

Emirates' response
to claims raised
about state-owned airlines
in Qatar and
the United Arab Emirates

Executive Summary

Emirates welcomes this opportunity to respond to the claims presented by Delta Air Lines, United Airlines, and American Airlines (“Legacy Carriers”) in their “White Paper.” This submission rebuts, point-by-point, each of the Legacy Carriers’ allegations. It proves false the claim that Emirates benefits from UAE government subsidies in violation of the U.S.-UAE Open Skies Agreement (“Open Skies Agreement”).

Emirates is one of the world’s leading airlines precisely because Emirates does *not* depend on government subsidies, bail-outs, and bankruptcy laws, but operates as a consumer-focused, profit-driven, commercial enterprise. Emirates has earned a profit for twenty-seven straight years, because Emirates (1) is committed to world-class customer service, (2) is well-managed, and (3) has pioneered an innovative aviation model: long-haul to long-haul service that reduces costs and travel times and provides unrivaled global connectivity for international travelers, particularly in the heavily populated but underserved countries in the Indian Subcontinent and Africa.

Emirates is a financially transparent business with nothing to hide. It is owned by a shareholder that seeks to derive value from its portfolio of assets. Over the course of the last 20 years, Emirates has returned more than \$3.3 billion to its shareholder in dividends—far outweighing its modest capital base of \$218 million—and has also paid out close to \$1 billion to its employees in profit sharing payments, all of which is clearly spelled out in its publicly available, independently audited financial statements. Emirates has financed its growth from its own financial resources, reinvesting in its own business continuously and utilizing a wide range of external financing options available in the market. Each stage of Emirates’ organic growth story can be understood from the audited financial statements that Emirates’ has maintained from the date of its inception. There is no room in any of this for subsidy or unfair government benefits.

Throughout its history, Emirates has always needed to be managed and run in a profitable and self-sustaining manner, even during and after the global financial crisis in 2007 and 2008, a period during which a number of allegations contained in the White Paper are alleged to have taken place. The White Paper conveniently omits to mention that this was a time when governments right across the globe were finding themselves in extremely difficult financial situations, including the Dubai Government which was, very publicly, working through its own financial priorities and challenges. Emirates continued to grow throughout this period, a feat which would have been impossible if it was reliant on Dubai Government funds. On the contrary, Emirates achieved this by continuing to focus on the key drivers behind its commercial success and the fundamentals underpinning its business model.

The Legacy Carriers claim to have spent two years preparing their White Paper by conducting in-depth research across the globe. As this submission establishes, the White Paper in fact consists of a series of demonstrably inaccurate assertions, outright distortions, and legal misinterpretations of the Open Skies Agreement.

I. Emirates is not subsidized. In their White Paper, the Legacy Carriers allege that Emirates has received over \$6 billion in subsidies from the Dubai Government. This claim is patently false. All of the individual allegations are briefly summarized here:

Fuel Hedging Allegation: *The Legacy Carriers claim that the Dubai Government, through Emirates' parent company, Investment Corporation of Dubai (ICD), shielded Emirates from "massive losses" on fuel hedging contracts after a sharp decline in global oil prices in 2008–2009.¹ This allegation is drawn from a report by Mr. Charles Anderson of Capital Trade Inc. ("Anderson Report"), which bases its conclusion not on actual facts, but on mere assumptions that are not true.*

¹ White Paper at 27.

Fact: When fuel prices plunged in 2008, Emirates and ICD agreed that fuel hedging contracts would be transferred to ICD, so that non-realized, paper losses for fuel hedging contracts under “mark to market” accounting did not present a misleading portrayal of Emirates’ operations. Notwithstanding this transfer, all actual payments on the contracts at maturity were ultimately paid using Emirates’ own cash resources. Letters of credit to meet collateral calls were issued against Emirates’ credit, *not* ICD’s, the direct opposite of what the Anderson Report asserts. Neither ICD nor the Dubai Government absorbed any losses, and when the transactions were completed, ICD actually made a profit, which would otherwise have gone to Emirates. As a result, the transfer cost Emirates money, the precise opposite of the alleged “subsidy.”

Related-Party Transactions: *The Legacy Carriers allege that Emirates benefits from various below-market terms for goods and services purchased from “related-party” suppliers.² This allegation is based on no actual facts, and is proven false by the unqualified audit opinion of Emirates’ auditors on the March 31, 2015 financial statements.*

Fact: The Legacy Carriers’ claim rests completely on inference: the White Paper asserts that since Emirates has not declared in its financial statements that its related-party transactions are at arm’s length, it is reasonable to infer that the transactions are not at arm’s length.³ That is the best of the “evidence” that the White Paper has, and it is wrong. International accounting standards do not require, or even suggest, that such a declaration be issued. Auditing standards merely provide that if a company does make a declaration, then the declaration must be audited. Given this controversy, Emirates has included a declaration in its most recent financial statements that its related-party transactions were

² White Paper at 31–34.

³ White Paper at 32.

conducted at arm's length for the fiscal year ended March 31, 2015 (and also for the prior fiscal year ended March 31, 2014, which is also included in the financial statements for comparison purposes as required under international accounting standards). PricewaterhouseCoopers ("PwC") has issued an unqualified audit opinion in respect of these financial statements. This clearly shows that all such related-party transactions were conducted at arm's length.

This paper shows that Emirates pays ENOC, a related fuel supplier, substantially the same prices as it pays to suppliers like BP, Shell, Chevron, and Emojet; that Emirates leases aircraft from DAE, a related company, on substantially comparable terms as aircraft leased from Allco, an unrelated party; and that dnata, a related supplier of ground services at Dubai International, actually earns a higher profit on its services for Emirates than it does on services to other airlines.

Airport Infrastructure and User Fee Allegations: *The Legacy Carriers assert that the Dubai International airport user charges fail to recover the full cost of infrastructure, and that this disproportionately benefits Emirates in its hub operations.⁴ They also assert that the collection of a passenger fee on departing, but not connecting, passengers is a subsidy to Emirates.⁵ Both of these allegations are grounded in a highly flawed study by Compass Lexecon, which ignores that the Open Skies Agreement imposes a ceiling on airport charges, not a floor, and fails to mention that airports worldwide follow the same practices, including U.S. airports used as hubs by the Legacy Carriers.*

Fact: The Open Skies Agreement requires that user fees "shall not exceed . . . the full cost . . . of providing the appropriate . . . facilities." The law prevents the Parties from charging *more* than full costs (to prevent airports from gouging foreign airlines). It does not set a floor on charges,

⁴ White Paper at 29.

⁵ White Paper at 29–31.

or require airports to cover their costs. Compass Lexecon ignores this and finds a “subsidy” on the assertion that airport fees are too low. Airports worldwide do not charge to recover their full costs, including Legacy Carrier hubs such as Detroit, Atlanta, Newark and Dallas/Fort Worth, nor does the U.S. Department of Transportation or the Federal Aviation Administration require them to do so. The Legacy Carriers’ interpretation would put this U.S. policy in violation of Open Skies. Compass Lexecon also finds a “subsidy” based on the absence of a user fee on connecting passengers. They simply ignore that there is no legal obligation to collect fees on connecting passengers. Major Asian hubs such as Bangkok and Kuala Lumpur exempt transfer passengers from passenger service charges. Passengers transferring at airports in the United Kingdom, Hong Kong, and Taipei are exempted from airport or air passenger taxes.⁶ The exemption at London Heathrow is particularly telling. Under the Legacy Carriers’ baseless legal theory, Virgin Atlantic, forty-nine percent owned by Delta, impermissibly receives a subsidy, and Delta passengers who connect to Virgin Atlantic at Heathrow unjustly benefit.

Labor Rights Allegation: *The Legacy Carriers allege that Dubai provides an artificial cost advantage to Emirates through the structure of its labor law.⁷ Neither the United States nor the UAE has ever agreed that labor laws can confer a “subsidy.”*

Fact: There is no precedent under the Open Skies Agreement or under any international trade agreement for treating differences in national labor practices as a “subsidy.” The United States has always strongly objected to such efforts, since U.S. labor laws depart from the International Labor Organization conventions in numerous respects, including with regard to

⁶ International Air Transport Association, *Airport, ATC and Fuel Charges Monitor* (2014–15 ed. 2015), available at <http://www.iata.org/publications/Pages/aeronautics-charges-monitor.aspx>.

⁷ White Paper at 36–38.

the ILO's "right of association." The Legacy Carriers have asked the United States to adopt a legal position for which there is no international authority, and which if applied would require Congress and state legislatures to revise a host of U.S. laws, including those dealing with striker replacement and right-to-work, limits on union organizing and the right to strike, restrictions on primary and secondary boycotts, and restrictions on public employee unions.

II. The Legacy Carriers misstate the governing law, and then urge the United States to violate it. Much of the Legacy Carriers' case rests on a single legal premise—that the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") either applies to international aviation or is somehow implicitly incorporated in the United States' Open Skies agreements. This is a profound misstatement of both Open Skies and the WTO SCM Agreement. The SCM Agreement, by its own terms, does not apply to services, which are covered by an entirely separate WTO Agreement, the General Agreement on Trade in Services ("GATS"). GATS, in turn, explicitly excludes air transport services, and does not include rules on unfair subsidies, as these were left to further negotiations after WTO Members could not reach agreement in the Uruguay Round. Such rules have never materialized.

The Legacy Carriers compound this error by misinterpreting the Open Skies Agreement. According to the Legacy Carriers, government subsidies violate Article 11 of the Open Skies Agreement, which addresses "fair and equal opportunity" for carriers of each Party. However, they are citing the *wrong* article. Subsidies are expressly addressed in Article 12, which sets out specific procedures for dealing with artificially low prices "due to direct or indirect governmental subsidy or support." Under customary rules of international treaty interpretation, Article 12 represents the exclusive remedy for subsidy concerns. Article 11 contains no reference to subsidies and is legally inapplicable.

The Legacy Carriers' call for the United States to freeze additional landing rights under the Open Skies Agreement would be a flagrant violation of U.S.

international obligations. Unilateral actions of this type are strictly prohibited, and Article 12 explicitly provides that subsidy-related restrictions on prices require “mutual agreement.” Unilateral U.S. action that so stridently violates an Open Skies agreement would jeopardize Open Skies relationships with 113 other countries, putting at risk all of the significant public and competition benefits that the Open Skies program has generated.

III. The Legacy Carriers have failed to show that the objectives of Open Skies have been harmed by alleged subsidies. The Legacy Carriers have framed their complaint in terms of their narrow commercial interests, but they are asking the United States to undertake a massive departure from Open Skies policy. Open Skies policy embraces goals such as greater competition, increased flight frequency, more consumer choice, promotion of business travel and tourism, improved service, and innovation. The Legacy Carriers have not even tried to argue that these goals of Open Skies have been harmed.

Even with respect to harm to their narrow corporate interests, the Legacy Carriers have failed to make a persuasive case. In no instance have they shown that they have suffered any adverse effect from any alleged subsidies, and they also have failed to show that they have been harmed by competition from Emirates. This is because they cannot make such a showing: the Legacy Carriers are earning record profits, and Delta is returning \$7 billion to its shareholders. They claim that they have lost traffic to competition, but in fact on every route that Emirates has established to the United States, overall traffic has *grown* significantly after Emirates’ entry. Fundamentally, the Legacy Carriers fail to recognize that Emirates has grown in large part by focusing on markets like the Indian Subcontinent that have grown rapidly and yet have been neglected by the Legacy Carriers and their joint venture partners.

IV. The Legacy Carriers benefit from massive federal, state, and local government support of their own. The Legacy Carriers come to this debate with unclean hands. They have received billions of dollars of government support, including U.S. Government assumption of airline pension obligations,

airline stabilization grants, loan guarantees, grandfathering of airport slots, bankruptcy relief from debt and other obligations, direct grants and tax exemptions to support airport development, grants of antitrust immunity to form market-dominant alliances, protection of the U.S. market from foreign competition, and the prohibition against majority foreign ownership. As demonstrated below, the Legacy Carriers have received more than \$100 billion in government support since 2002 and, with other U.S. carriers, receive annual benefits potentially exceeding \$24 billion. Their suggestion that Open Skies agreements authorize a government unilaterally to freeze landing rights because of alleged subsidization would put the Legacy Carriers (but not Emirates) at serious risk.

V. The Legacy Carriers' real goal is protection from competition and an end to Open Skies. While the White Paper is couched in the usual, tired, and self-serving rhetoric about “fair trade,” “level playing field,” and “saving jobs,” it is not about trade, subsidies, fairness, or jobs. Rather, what the Legacy Carriers really seek is even more government support, this time in the form of protection from international competition. Such protection would come at the expense of other U.S. stakeholders—U.S. aircraft and engine manufacturers, competing low-cost U.S. carriers, non-Legacy Carrier hub U.S. cities and airports, U.S. tourism, U.S. air cargo carriers, U.S. jobs, and most of all, U.S. consumers, who have benefited enormously from Open Skies and an end to government-mandated oligopolies on international travel. That is why U.S. stakeholders like JetBlue, Federal Express, Alaska Airlines, Airports Council International – North America, Atlas Air, the Cargo Airline Association, the Greater Orlando Aviation Authority, Las Vegas McCarran International Airport, the U.S. Travel Association, and the Business Travel Coalition, among many others, have publicly voiced their strong opposition to the Legacy Carriers' call for a roll-back of Open Skies or unilateral freezing of Open Skies traffic rights.

The Legacy Carriers want to overturn a quarter-century of market-based Open Skies policy pioneered by the United States, and revert to the highly regulated,

post-war aviation regimes of *Bermuda I*⁸ and *Bermuda II*,⁹ in which governments tightly managed carriers' landing rights, flight frequencies, and fares. By broadly deregulating international air travel and minimizing government regulation, Open Skies has led to massive growth in international air travel and huge benefits for businesses and travelers worldwide. It has lowered fares and transportation costs; sharply increased competition and choice; fostered the entry of new low-cost carriers; encouraged innovative air transport services; and vastly expanded access to international travel for U.S. households. The Legacy Carriers simply want protection: they want the United States to cast aside the benefits of Open Skies, so that they can continue to reduce flights, provide indifferent customer service and increase fees and fares, all without fear of competition in the marketplace.

Conclusion

Despite their oft-repeated claims to have presented an “overwhelming” case, the Legacy Carriers' allegations against Emirates collapse under closer analysis. Their argument is nothing more than a mess of legal distortions and factual errors. Unlike the Legacy Carriers, Emirates is *not* subsidized. It has been consistently profitable for more than a quarter-century. What the Legacy Carriers want is protection from competition. Such protection would do irreparable harm to U.S. cities and airports, America's world-leading aerospace industry, U.S. exports and jobs, U.S. air cargo carriers, and most of all, U.S. consumers, including passengers and shippers. It would also undermine America's leadership in international aviation—leadership that has made Open Skies the global template for air services.

⁸ Agreement Between the Government of the United Kingdom and the Government of the United States of America Relating to Air Services Between Their Respective Territories [*Bermuda I*], Feb. 11, 1946, reprinted in [Apr. 2008] 3 Av.L.Rep. (CCH) ¶ 26,540a, at 23,219.

⁹ Consolidated Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland [*Bermuda II*], July 23, 1977, reprinted in [Mar. 1999] 3 Av.L.Rep. (CCH) ¶ 26,540c, at 22,234.

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Glossary

ACL	Airport Coordination Limited
AOC	Airport Operators Committee
ASEAN	Association of Southeast Asian Nations
CAPA	CAPA Centre for Aviation
DOT	U.S. Department of Transportation
ENOC	Emirates National Oil Company
ExIm Bank	Export-Import Bank of the United States
FAA	U.S. Federal Aviation Administration
GAAP	generally accepted accounting principles
GATS	WTO General Agreement on Trade in Services
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICD	Investment Corporation of Dubai
ILO	International Labor Organization
JV	joint venture
O&D	origin and destination
OECD	Organization for Economic Cooperation and Development
Open Skies Agreement	U.S.-UAE Open Skies Agreement
PwC	PricewaterhouseCoopers
SCM Agreement	WTO Agreement on Subsidies and Countervailing Measures
WTO	World Trade Organization

IATA Airport Codes Referenced

Airport Code	Airport Name	City
AMD	Sardar Vallabhbhai Patel International Airport	Ahmedabad
ATL	Hartsfield–Jackson Atlanta International Airport	Atlanta
BLR	Bengaluru International Airport	Bengaluru
BOM	Chhatrapati Shivaji International Airport	Mumbai
BOS	Logan International Airport	Boston
CCJ	Calicut International Airport	Kozhikode
CCU	Netaji Subhas Chandra Bose International Airport	Kolkata
CLT	Charlotte Douglas International Airport	Charlotte
CMB	Bandaranaike International Airport	Colombo
COK	Cochin International Airport	Kochi
DAC	Shahjalal International Airport	Dhaka
DCA	Ronald Reagan Washington National Airport	Washington
DEL	Indira Gandhi International Airport	Delhi
DEN	Denver International Airport	Denver
DFW	Dallas/Fort Worth International Airport	Dallas/Fort Worth
DTW	Detroit Metropolitan Wayne County Airport	Detroit
DXB	Dubai International Airport	Dubai
EWR	Newark Liberty International Airport	New York
HNL	Honolulu International Airport	Honolulu
HYD	Rajiv Gandhi International Airport	Hyderabad
IAD	Washington Dulles International Airport	Washington
IAH	George Bush Intercontinental Airport	Houston
ISB	Benazir Bhutto International Airport	Islamabad
JFK	John F. Kennedy International Airport	New York
KHI	Jinnah International Airport	Karachi
LAX	Los Angeles International Airport	Los Angeles
LGA	LaGuardia Airport	New York
LHE	Allama Iqbal International Airport	Lahore
MAA	Chennai International Airport	Chennai
MCO	Orlando International Airport	Orlando
MIA	Miami International Airport	Miami
MLE	Ibrahim Nasir International Airport	Male
MSP	Minneapolis–Saint Paul International Airport	Minneapolis/St Paul
ORD	O'Hare International Airport	Chicago
PEW	Bacha Khan International Airport	Peshawar
PHX	Phoenix Sky Harbor International Airport	Phoenix
SEA	Seattle–Tacoma International Airport	Seattle
SFO	San Francisco International Airport	San Francisco
SKT	Sialkot International Airport	Sialkot
SLC	Salt Lake City International Airport	Salt Lake City
TRV	Trivandrum International Airport	Thiruvananthapuram

I. Emirates is not subsidized.

This section demonstrates the errors, misstatements, and legal distortions made by the Legacy Carriers in their effort to create a subsidy case by repudiating existing U.S. international commitments and then aggressively reinterpreting the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”)¹ and Open Skies agreements. The Legacy Carriers have no case against Emirates, but have sought to contrive one to secure government protection. The result is a mix of factual and legal distortions, and the regrettable use by the Legacy Carriers of some clear falsehoods, that are discussed below.

The analysis is divided into six parts, and is immediately followed by a detailed discussion of the applicable legal standards from the U.S.-UAE Open Skies Agreement (“Open Skies Agreement”).² The first part offers background and explains why Emirates’ success is due to superior commercial performance, not subsidies.

The second part analyzes the allegation that Emirates received government assistance to meet its obligations on certain fuel hedging contracts during the financial crisis.³ This analysis shows that the Legacy Carriers’ allegation rests on a series of wrong assumptions by its consultants: in fact, all actual payments on the contracts at maturity were ultimately paid using Emirates’ own cash resources.

The third part assesses allegations that Emirates has been subsidized through dealings with related parties that also have government ownership.

¹ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

² Air Transport Agreement Between the Government of the United States of America and the Government of the United Arab Emirates, U.S.-UAE, Mar. 11, 2002 [hereinafter U.S.-UAE Open Skies Agreement].

³ White Paper at 27–29.

Here, the White Paper asserts that these transactions cannot be at arm's length on the ground that Emirates, while correctly reporting related-party transactions in its financial statements, had not declared whether the transactions are conducted at arm's length.⁴ This section analyzes each of the transactions in detail and demonstrates that each was conducted at arm's length. But the allegation can be dismissed even more simply. As a non-publicly held company, Emirates in the past never had any reason to make any declaration on related-party transactions. However, in light of the White Paper's spurious allegations, Emirates has included, in its most recent financial statements, a declaration that its related-party transactions were conducted at arm's length for the fiscal year ended March 31, 2015 (and also for the prior fiscal year ended March 31, 2014, which is also included in the financial statements for comparison purposes as required under international accounting standards). PwC has issued an unqualified audit opinion in respect of these financial statements.⁵ This clearly shows that all such related-party transactions were conducted at arm's length.

The fourth part reviews the allegation that Emirates has received improper advantages from investment by the Government of Dubai in Dubai International airport. Here the White Paper asserts, without any concrete evidence, that Dubai International must not be recovering its costs, and then concludes that this practice "unfairly" benefits Emirates as a heavy airport user.⁶ The assertion is wrong: Dubai International operates on a profitable basis. Moreover, in making this allegation, the White Paper ignores the only relevant legal standard for airport charges that applies here, Article 10 of the Open Skies Agreement, which is that fees not exceed the airport's "full cost" of providing services, and that the fees be "just, reasonable, not unjustly

⁴ White Paper at 31–34.

⁵ Paul Suddaby, PricewaterhouseCoopers, *Independent Auditor's Report to the Owner of Emirates, in Emirates Group Annual Report 2014–15*, at 65, available at <http://www.theemiratesgroup.com/system.aspx/download.aspx?id=tcm:409-2358317> (attached as **Exhibit 2**).

⁶ White Paper at 29–31.

discriminatory, and equitably apportioned among categories of users.”⁷ Both of these conditions are met: the airport’s user charges do not exceed its full cost of providing services to users, and Emirates pays the same fees as all other users, in full compliance with the Open Skies Agreement.

The fifth part deals with the allegation that Emirates is somehow subsidized by the UAE labor laws.⁸ The allegation falls of its own weight: the Open Skies Agreement does not deal with labor practices at all, nor do the inapplicable WTO subsidy or services rules.⁹ Indeed, the United States has never been willing to argue that differences in comparative labor structures can give rise to a subsidy, in considerable part because U.S. labor law departs from International Labor Organization (“ILO”) standards in numerous respects, and as a result any such legal commitment would require far-reaching changes in U.S. state and federal labor laws in order to bring the U.S. into compliance. In any event, the emptiness of the White Paper’s argument is revealed fully in the convoluted attempt to quantify a “benefit,” exposed below, and in the fact that Emirates has been independently recognized as one of the most desirable employers in the world.

The sixth and final part dismisses a number of other issues touched on briefly by the White Paper, ranging from the incredible suggestion that the UAE’s General Civil Aviation Authority—which has received the highest assessment by the International Civil Aviation Organization—fails to exert proper oversight over Emirates, to the ridiculous proposition that Emirates is subsidized by a general law requiring foreign businesses to be represented in Dubai by a general sales agent.

⁷ U.S.-UAE Open Skies Agreement arts. 10.1, 10.2. “Full cost,” as defined in Article 1, “means the cost of providing service plus a reasonable charge for administrative overhead.” *Id.* art. 1.6 (internal quotation marks omitted).

⁸ White Paper at 36–38.

⁹ On the inapplicability of WTO rules, see Section II.A.

A. Emirates' success is due to superior commercial performance, not subsidies.

Emirates was launched in 1985 with flights to Karachi and Mumbai. From small beginnings it has grown rapidly, providing premium service across all travel classes to its expanding network. Throughout its history, Emirates has constantly striven to provide innovative products and service, such as being the first airline to install seat back video systems in all classes throughout its fleet in 1992. The airline was started with minimal capital, and the total capital invested by the Government of Dubai is U.S. \$218 million. This amount—miniscule for a business that earned \$23.6 billion in revenue last year—has been repaid many times over through dividends. Emirates has consistently reinvested its earnings, supporting its own growth from its own resources. Emirates is a prime example of a dynamic, innovative, commercially run, well-managed, profitable, and self-sustaining business.

The Emirates model—long-haul flights to a single hub based in a geographically advantageous position—brings tremendous operating efficiencies. As shown in Figure I-1, Dubai International airport is within eight hours of two-thirds of the world's population, and therefore has a five-billion population catchment area.

Geocentric Location of Dubai International



Source: Emirates Analysis

- Over 2/3 of the world's population lives within 8 hours flight from Dubai
- 1/3 lives within 4 hours

Figure I-1

In fact, Dubai is perfectly positioned near the fastest growing countries in the world, with populations that are rapidly growing and currently under-served by airlines. Figure I-2 shows Dubai centrally located among the world's fastest-growing economies, colored in orange. As the center of international travel has shifted away from the transatlantic axis to a multi-polar model, Emirates has been well situated to lead.

Dubai's Proximity to the World's Most Rapidly Growing Countries

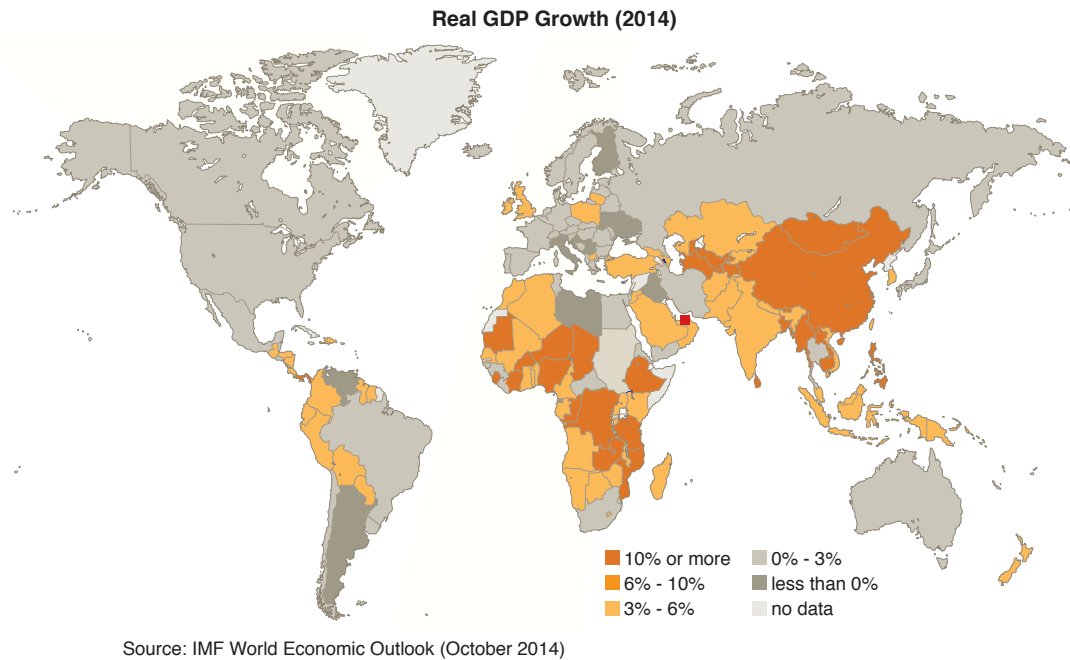


Figure I-2

The Emirates model is not simply about hub location. Emirates has low unit costs due to a new fleet (providing economies such as lower fuel and maintenance costs per hour flown), higher aircraft utilization, longer average stage length,¹⁰ and higher productivity. Emirates' all-widebody fleet also reduces its unit cost while providing a spacious cabin for better passenger comfort.

Emirates' business model is particularly focused on bringing better air service to rapidly growing countries. The Indian Subcontinent and African markets have long been ignored by the Legacy Carriers and their European counterparts, who largely left such services, with the exception of certain of the largest cities, to local national airlines whose flights were scheduled for the convenience of European-originating travelers. These grossly underserved

¹⁰ Emirates analysis based on Emirates annual reports.

markets in the Indian Subcontinent and Africa¹¹ have been vital to Emirates' success. As described later in this submission, Emirates' operating efficiencies and superior service have substantially stimulated traffic in these previously neglected markets.¹²

Emirates' success is not based on raising baggage fees, unbundling amenities, or cutting costs through inferior service. Rather, Emirates aims to provide a consistently best-in-class travel experience for all of its customers. Emirates has transformed global flying from ordeal to delight for many modern air travelers, including businesspeople who demand the highest standards of comfort, service, and timeliness.

Neither is Emirates' success based on subsidies. Emirates has grown because it pioneered a new model—high-quality long-haul service to and through a more efficient, state-of-art and consumer-friendly hub. Emirates has also grown because it is a well-managed and profitable airline, with well-trained, high-quality employees from around the world, that has invested its earnings in new aircraft and in innovative products, and in providing its passengers with world-class service. The Dubai Government has long recognized the importance of a vibrant airline sector, but it has fostered aviation not through government subsidies, but rather by providing world-leading safety oversight, a superb aviation infrastructure, and an insistence that its airlines operate on a commercial basis. As Jeff Smisek, the CEO of United Airlines, rightly acknowledged, the UAE “has done a terrific job recognizing the value of transportation. They're quite supportive. And by support, I don't mean subsidies. I mean understanding the value and the jobs this industry drives.”¹³

¹¹ For example, no U.S. or European carrier flies to Bangladesh, Nepal, Pakistan, or Sri Lanka, with a combined population of over 387 million. See Population, Total, *World Bank*, <http://data.worldbank.org/indicator/SP.POP.TOTL> (last visited June 7, 2015) (2013 population).

¹² See *infra* Part III.

¹³ Charlie Rose, *Charlie Rose Talks to United Airlines CEO Jeff Smisek*, Bloomberg Business (Aug. 8, 2013), <http://www.bloomberg.com/bw/articles/2013-08-08/charlie-rose-talks-to-united-airlines-ceo-jeff->

The Legacy Carriers had great difficulty in formulating allegations against Emirates. Emirates is the largest of the Gulf Carriers, and the most formidable competitor, and so could not be ignored. Indeed, the Legacy Carriers' strategy of eliminating competition will not work if Emirates remains free to compete on the merits of its service. But the fact is that Emirates is not subsidized.

B. The Legacy Carriers' fuel hedging allegation is false.

The Legacy Carriers have misinterpreted Emirates' financial reporting of its fuel hedging activity, mischaracterized the facts of the fuel hedging contracts, and misunderstood the terms of Emirates' 2009 transaction with its parent company, Investment Corporation of Dubai ("ICD"). In brief, the Government of Dubai did not provide a subsidy to Emirates either directly or through ICD. After the hedging contracts were assumed by ICD, Emirates voluntarily declared specific dividend amounts to ICD, matching the amount of all the losses imposed by the hedging contracts at maturity. These dividends were paid by Emirates either by making payments on behalf of ICD or directly to ICD. Neither the Dubai Government nor ICD absorbed any hedging losses. To the contrary, when the transactions were completed, ICD made a profit, receiving net fuel hedging gains in excess of \$100 million, gains that would have accrued to Emirates but for the novation.

1. Factual Background

In the latter part of 2008 and early 2009, there was a dramatic fall in worldwide economic activity following the collapse of the U.S. mortgage-backed securities market, the failure of Lehman Brothers, and the near failure of the U.S. banking system. Oil and jet fuel prices, which had been expected to increase in 2008 and 2009, instead declined, temporarily but significantly. International accounting standards, which govern Emirates' accounts, required that losses on fuel hedging contracts be recognized, even on the unrealized present value of

smisek; see also Andrew Parker, *United Backs US Airline Consolidation*, Financial Times (June 26, 2012, 9:26 PM), <http://www.ft.com/intl/cms/s/0/9893fbf4-bf90-11e1-a476-00144feabdc0.html?siteedition=intl#axzz3TDRbHIVw>.

hedging contracts with multiyear terms to maturity that ultimately might not result in any cash losses. That is, even when a hedging contract would not mature in the current reporting period, accounting standards required that the potential liability be valued at current fuel prices, and that the liability be recognized by recording a loss in Emirates' financial statements.¹⁴ The result of this treatment would have been the reporting of large paper losses in 2009, followed by large paper profits to revalue the contracts after fuel prices reversed in 2010 and beyond.

These gains and losses on open hedging contracts did not involve cash, but merely the restatement of the amount of potential liability under the contracts in the future based on the current price of fuel at that time. Emirates concluded that these paper losses and gains were so large that if they were recognized alongside the normal operating results of the company, they would greatly distort Emirates' actual operating position. Delta Air Lines was of the same opinion. In its earnings announcement to investors for the 2009 fiscal year, Delta stated that in reporting non-generally accepted accounting principles ("non-GAAP") financial measures of performance it "excludes non-cash mark-to-market adjustments related to fuel hedges settling in future periods in order to represent financial results related to operations in the period shown."¹⁵ In its non-GAAP financial measures, Delta even excluded approximately \$1.4 billion in fuel hedging losses *actually incurred* in 2009 because "management believes the exclusion of these items is helpful to investors to evaluate the company's recurring operational performance."¹⁶

¹⁴ IAS 39, like its U.S. GAAP counterparts SFAS 131 and 161, requires that effective cash flow hedging contracts in force at the reporting date be marked-to-market with any resulting gain or loss reported as a component of other comprehensive income, an equity reserve. Gains or losses incurred on cash flow hedging contracts that mature during the reporting period are reported as a component of periodic income.

¹⁵ Press Release, Delta Air Lines, Delta Air Lines Reports 2009 Financial Results (Jan. 26, 2010), *available at* <http://news.delta.com/index.php?s=20295&item=123230> (attached as **Exhibit 3**).

¹⁶ *Id.* (Ex. 3, at 13).

The concern that mark-to-market of the fuel hedging contracts would distort actual results proved to be well founded. When oil prices recovered dramatically in the second half of 2009, the mark-to-market paper losses that would have been reported in the Emirates financial statements for the year ended March 31, 2009 reversed. This reversal would have resulted in a large, offsetting, and equally distortive, gain at March 31, 2010.

As a non-publicly held entity, Emirates had the option to pursue a different approach, one that made it unnecessary to report large paper losses and gains. Specifically, Emirates reached an agreement with its parent company, ICD, whereby ICD stepped into the shoes of Emirates by assuming the fuel hedging contracts, a process known as “novation.” This agreement reflected the judgment of ICD and Emirates that novation was appropriate to provide a more meaningful reporting of Emirates’ operating results. This novation agreement is clearly disclosed in Emirates’ financial statements for the fiscal year ending March 31, 2009.¹⁷

While the fuel hedging contracts had been legally transferred to ICD, Emirates wanted to ensure that ICD was not ultimately out-of-pocket on any losses incurred under those contracts. Emirates chose to track the required payments and, while not legally required to do so, Emirates declared specific dividends to ICD matching the amount of all losses imposed by the hedging contracts at maturity. These dividends were paid by Emirates either by making payments on behalf of ICD or directly to ICD. The net result was that the loss settlements under the contracts were ultimately paid using Emirates’ own cash. But all subsequent gains on the contracts accrued to ICD, not Emirates.

In addition, with the single exception noted below, Emirates secured the counterparty’s demands for collateral with letters of credit drawn on Emirates’

¹⁷ Emirates Group, *Consolidated Financial Statements for the Year Ended 31 March 2009, in Annual Report 2008–09*, at 103 n.32, 105 n.34, available at <http://www.theemiratesgroup.com/system/asp/download.aspx?id=tcm:409-462957>.

own credit, *not* the credit of ICD or the Government of Dubai. Over the course of the novation period, ICD, as the shareholder, provided temporary assistance in a singular respect: posting a portion of the collateral for a limited period of time. From January 14, 2009 to November 4, 2009, ICD posted a peak value of \$750 million in cash as collateral against a decline in the value of jet fuel covered by hedge contracts. The entire remaining portion of collateral was posted by Emirates in the form of letters of credit, issued by a group of banks including both international and domestic banks.

ICD wished to post a portion of the collateral itself because it had the cash available from a recent borrowing but had no immediate use for the cash in the post-economic crash environment, and because it was offered attractive deposit rates from Morgan Stanley. Morgan Stanley was the intermediary securing collateral and was willing to offer attractive rates for deposits in an environment where banking sector liquidity was challenged. While ICD elected to make this deposit itself, throughout the time that the money was on deposit Emirates had sufficient cash and credit to fund *all* the required collateral with its own resources, even at the peak collateral exposure. If ICD had chosen not to avail of the deposit rates offered by Morgan Stanley, and instead had required Emirates to post the collateral, Emirates would have been fully capable of doing so from its available cash and available credit facilities.¹⁸

As noted above, Emirates declared specific dividends to ICD matching the amount of any losses incurred at the close of each of the hedge contracts. These dividends were paid by Emirates either by making payments on behalf of ICD or directly to ICD, so all hedge contracts losses during this period were ultimately paid with Emirates' own cash. Indeed, throughout this period, Emirates had sufficient cash not only to meet the contract obligations, but also to

¹⁸ At year-end in March 2009, Emirates had "cash and bank balances" of AED 7,168,360,000, or \$1.95 billion. Of this balance, AED 771,225,000 was pledged. Thus the majority of Emirates' cash in March 2009 was "available." See Emirates Group, *Annual Report 2008–09*, at 102 n.30, *available at* <http://www.theemiratesgroup.com/english/facts-figures/archive/2008-2009.aspx>.

make substantial additional dividend payments to ICD over and above those matching the contract settlements.¹⁹

2. The Legacy Carriers' allegation of fuel hedging subsidy is groundless.

The Legacy Carriers base their allegation of a fuel hedging subsidy on a report prepared by Charles Anderson of Capital Trade Inc. ("Anderson Report").²⁰ But the Anderson Report is based on errors and unsupported assertions. It demonstrates a profound misunderstanding of financial reporting and even common commercial practice. That can be demonstrated by examining a single sentence in Mr. Anderson's report, which encapsulates the overall sloppiness of his analysis, compounded by repeated assertions devoid of evidentiary support:

At the time, Emirates did not have \$4 Billion in cash [to fund hedging contract margin calls] and would have had to declare bankruptcy or restructure, as it would have been in violation of its debt covenants.²¹

In this one sentence Mr. Anderson demonstrates his lack of understanding of Emirates' actual cash position,²² and assumes, in contradiction

¹⁹ See Emirates Group, *Annual Report 2012–13*, at 74, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2012-2013.aspx>; Emirates Group, *Annual Report 2011–12*, at 60, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2011-2012.aspx>; Emirates Group, *Annual Report 2010–11*, at 56, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2010-2011.aspx>; Emirates Group, *Annual Report 2009–10*, at 52, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2009-2010.aspx>; Emirates Group, *Annual Report 2008–09*, at 74, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2008-2009.aspx>.

²⁰ Charles L. Anderson, Capital Trade Inc., *Evidence of Actionable Government Subsidies Received by Etihad Airways, Qatar Airways, and Emirates Airline* (2015) [hereinafter Anderson Report].

²¹ Anderson Report at 76.

²² Anderson Report at 76 n.148. The Anderson Report understates Emirates' actual cash position by over a third by excluding deposits over three months of AED 1,847,696,000 and margins placed of AED 771,225,000. The distinction between short- and long-term deposits is an accounting disclosure requirement; it does not mean that Emirates could not use long-term deposits if it needed to—which it did not. Emirates' actual cash and bank balance was AED 7,168,360,000, equal to \$1.95 billion. See Emirates

of common commercial practice, that cash on hand is the only possible means to collateralize a hedging contract margin call. In this same sentence, he compounds those errors by asserting the existence of debt covenants that in fact did not exist, and errs yet again by concluding that the fictional loan covenants—had they actually existed—would invariably have led to bankruptcy or restructuring.

These are surprising errors from the individual the Legacy Carriers have asked the U.S. Government to accept as an industry expert. Even a cursory reading of the Anderson Report by a relatively junior financial manager at Delta, American, or United should have raised red flags. Evidently no such review took place, because the Legacy Carriers have fully endorsed the report as evidence supporting their allegations. Indeed, in their White Paper, the Legacy Carriers repeat the errors and baseless assumptions. At page 27 of the White Paper, for example, the Legacy Carriers contend that Emirates was subjected to “a massive margin call” that “Emirates was unable to meet.” *This is false.* At all times during the existence of the fuel hedging contracts, Emirates had sufficient cash and credit to meet collateral calls and pay cash settlements, and even to make additional dividend payments to ICD.²³

Second, relying again on Mr. Anderson’s flawed reasoning that the violation of non-existent loan covenants would have forced Emirates into bankruptcy or restructuring, the White Paper, at pages 28 and 29, alleges that the mark-to-market paper losses incurred on the hedging contracts would have

Group, *Annual Report 2008–09*, at 102 n.30, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2008-2009.aspx>.

²³ See Emirates Group, *Annual Report 2012–13*, at 74, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2012-2013.aspx>; Emirates Group, *Annual Report 2011–12*, at 60, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2011-2012.aspx>; Emirates Group, *Annual Report 2010–11*, at 56, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2010-2011.aspx>; Emirates Group, *Annual Report 2009–10*, at 52, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2009-2010.aspx>; Emirates Group, *Annual Report 2008–09*, at 74, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2008-2009.aspx>.

threatened Emirates' ability to continue as a going concern. This allegation is also false.

Not surprisingly, neither the Legacy Carriers nor Mr. Anderson offers evidence to support the allegation of a threat to Emirates' status as a going concern. In fact, the very existence of debt covenants is asserted solely on the strength of Mr. Anderson's statement, buried in a footnote to his report, that "Emirates' substantial leasing and other commercial bank borrowing *undoubtedly included covenants* requiring the company to have positive levels of cash on hand."²⁴ This is not evidence; it is pure surmise. In fact, no such covenants existed. Emirates has consistently enjoyed strong credit, even in the post-2008 period when economic conditions were the most unstable since the Great Depression, and maintained sufficient bargaining leverage with its lenders that it never had to enter into such covenants. This position is also reflected in Emirates' public market borrowing documentation which does not have any such covenants.

The disconcerting absence of precision of Mr. Anderson's analysis is further illustrated by the reality that, had the non-existent covenants actually existed, his assertion that creditors would have forced a borrower in this situation into bankruptcy or restructuring is at best naive, especially in an environment where the borrower in question did not have the significant advantage of U.S. Chapter 11 bankruptcy protection to fall back on. Given that the losses on the hedging contracts were largely paper losses, and given Emirates' financial ability to fund the calls for collateral, settle the cash losses, and still service its debt, creditors would have been foolish to demand bankruptcy or restructuring. Prudent financial practice would have been to waive any covenants (had they existed) for the reporting period in question, rather than force an action that could threaten the ongoing debt service.

²⁴ Anderson Report at 76 n.148 (emphasis added).

Third, the Legacy Carriers, again relying on the Anderson Report, mistakenly assert that ICD issued letters of credit in the amount of \$1.6 billion as collateral to counterparties to its hedging contracts.²⁵ This is not true. As plainly and publicly reported in Emirates' financial statements,²⁶ letters of credit were obtained *by Emirates* from banks on its own credit, and were provided by Emirates to ICD to meet collateral calls on the novated hedge contracts. These letters constitute reliance on Emirates' own financial resources, not ICD's. Emirates thus fulfilled its role in the novation as a credit support provider to ICD, not the other way around.

The key premises underlying Mr. Anderson's and the Legacy Carriers' allegation of subsidy regarding the hedging contracts simply are not true. This is the principal (and by far the largest) allegation that the Legacy Carriers have made against Emirates, and it rests on complete falsehood.

3. The proper legal framework to assess any fuel hedging allegation is the Open Skies Agreement, but even under WTO rules, there would be no subsidy.

The Anderson analysis glosses over the fact that the subsidy standards in the WTO SCM Agreement are legally inapplicable to any form of services, and that, at the urging of the Legacy Carriers, the United States has repeatedly and successfully opposed efforts by other WTO Members to bring air transport services into GATS. This matter is governed only by the Open Skies Agreement, as will be explained next in Part II.

²⁵ White Paper at 28; Anderson Report at 77. The White Paper specifically claims:

The financial statements also disclose that the ICD provided \$1.6 billion in letters of credit to Emirates during the fiscal year. Although the financial statements fail to explain the purpose of the letters of credit, it is likely that the ICD provided them to satisfy some portion of the \$4 billion margin call discussed above. Given its limited cash on hand, Emirates could not have made the payment itself without calling into question its ability to continue as a going concern.

White Paper at 28.

²⁶ *Annual Reports*, Emirates, <http://www.emirates.com/ae/english/about/annual-reports.aspx> (last visited June 7, 2015).

But even if this matter were considered under the SCM Agreement, there would be no finding of subsidy. A WTO subsidy violation can be established only if there is a benefit to the alleged subsidy recipient under Article 1.1(b) of the SCM Agreement.²⁷

That did not happen here. The preceding analysis demonstrates that (1) except for one short-term deposit by ICD that could have been provided by Emirates, the novation did not lead to a reduction in Emirates' collateral obligation, (2) all settled losses under the contracts were covered by Emirates' own resources, and (3) neither ICD nor the government absorbed any actual losses on the contracts. And of course, there can be no benefit conferred by avoiding the application of loan covenants that never existed.

To the contrary, it was ultimately ICD that received a benefit. Emirates pledged considerable financial resources to meet the collateral calls, and made payments equal to all cash losses on the contracts. Then, as the bulk of the hedging contracts matured in the second half of 2009 and beyond, oil prices recovered. The loss positions reverted to gains, and those gains accrued to ICD. Rather than confer a benefit, the novation deprived Emirates of over \$100 million that accrued instead to its parent ICD.

In short, the Legacy Carriers' claims rest on a misconception that the SCM Agreement applies to air transport services when the only governing law is the Open Skies Agreement. Moreover, even if the SCM Agreement applied to air transport services or represented context for the Open Skies Agreement under the Vienna Convention on the Law of Treaties—which it does not—the hedging contracts did not result in a “subsidy.”

²⁷ SCM Agreement art. 1.1(b).

C. The Legacy Carriers' related-party transactions allegations are false.

The Legacy Carriers allege in their White Paper that unless Emirates publicly declares that all its transactions are at arm's length, then they must not be at arm's length, and, moreover, that the alleged non-arm's-length transactions must constitute a subsidy. This is ludicrous on its face, and the Legacy Carriers have provided no evidence at all to support their allegation that Emirates' related-party transactions were not on arm's-length terms or that they constitute a subsidy.²⁸ While the Legacy Carriers have been willing to base wild allegations on distorted statements and dramatic extrapolations, here the Legacy Carriers are forced to admit that they do not have actual facts to support the proof or quantification of a related-party subsidy.²⁹ But the failings of this specific allegation against Emirates go far beyond the Legacy Carriers' inability to quantify it. As shown in this section, the fundamental premise—that Emirates cannot show to its auditors' satisfaction that its related-party transactions are conducted at arm's length³⁰—is false and reflects Mr. Anderson's apparent lack of familiarity with international accounting standards. This section also reviews in detail the major specific related-party allegations in the White Paper involving ENOC, DAE, and dnata.

²⁸ The Legacy Carriers, not content with grossly mischaracterizing Emirates' arm's-length commercial relationships in the White Paper, further ramped up their rhetoric in their April 17, 2015 letter to the Departments of State, Transportation and Commerce. Letter from Doug Parker, CEO, American Airlines, et al. to John F. Kerry, Secretary, U.S. Department of State, et al. (Apr. 17, 2015). They demanded, inappropriately and without any justifiable authority, that the U.S. Government request contemporaneously audited financial statements from the government-owned entities that provide goods and services to Emirates and the other two Gulf carriers. *Id.* This demand is clearly improper and well outside the scope of the Open Skies Agreement.

²⁹ This is admitted on the slide about Emirates in the "Deck is Stacked" presentation; and in the White Paper at pages 31–34. The Anderson Report at page 89 admits quantification is not possible, but then proceeds to make an estimate anyway. This may have been too much even for the Legacy Carriers: that estimate is not used in the other documents.

³⁰ White Paper at 32–33.

1. Emirates' financial statements for the year ended March 31, 2015 contained a clear statement that related-party transactions are at arm's length and Emirates' auditors have issued an unqualified audit opinion.

The Anderson Report allegation regarding related-party transactions boils down to the argument that unless Emirates publicly declares in every instance that its transactions are at arm's length, then they must not be at arm's length. This is an absurd claim, unsupported by any legal, accounting, or reporting standard. The operative international accounting standard requires only that related-party transactions be disclosed.³¹ It does not require or even suggest that transactions between related parties be tested to determine whether they are at arm's length, or that a declaration must be issued for each transaction attesting that it was (or was not) at arm's length, or that absent the declaration the related-party transactions are not at arm's length.

International auditing standards do specify, however, that if an entity *wishes* to represent that transactions between related parties are at arm's-length prices, *then* the entity must substantiate the claim.³² This is not a process lightly undertaken. Substantiation of arm's-length dealing requires substantial data gathering, not least to provide to the entity's auditors as part of the annual audit to support their additional testing procedures. Unless there is good cause to make an arm's-length declaration—for example, to reassure shareholders regarding transactions with a related entity that holds a significant minority equity interest—there is no purpose served by incurring the additional administrative and cost burden.

That is the reality, and in light of this, it is clear, contrary to the assertion by the Legacy Carriers and Mr. Anderson,³³ that one cannot infer that, in the

³¹ International Accounting Standards Board, *International Accounting Standard 24—Related Party Disclosures* (IAS 24).

³² *Id.*; International Federation of Accountants, *International Standard on Auditing 550—Related Parties* (ISA 550).

³³ White Paper at 32; Anderson Report at 88.

absence of an affirmative declaration, dealings with related entities are therefore not at arm's length. It is perfectly reasonable not to invest the time, effort, and expense needed to support a declaration of this kind, especially as it does not relate to any reporting or legal obligation.

Although the inference is unreasonable, the false conclusion has been promoted loudly and repeatedly by the Legacy Carriers. Emirates therefore has included a declaration in its most recent financial statements that its related-party transactions were conducted at arm's length for the fiscal year ended March 31, 2015 (and for the prior fiscal year ended March 31, 2014, which is also included in the financial statements for comparison purposes as required under international accounting standards).³⁴ As a result, Emirates' auditor, PwC, was required to perform additional audit procedures during their annual audit of these financial statements. PwC has issued an unqualified audit opinion in respect of these financial statements. A copy of the signed PwC audit report is attached as Exhibit 2. This clearly shows all such related-party transactions were conducted at arm's length.

Like the other subsidy allegations, the Legacy Carriers again ignore that this issue is governed by the Open Skies Agreement. The agreement imposes *no* obligation to avoid transacting with related parties, and *no* obligation regarding the terms of the transactions, other than the user charge requirements, discussed below. That is why the Legacy Carriers seek to frame their allegations in WTO terms, even though the WTO standards are inapplicable, as will be demonstrated below in Part II of this submission.

But as with the rest of the White Paper, even if the WTO standards suddenly applied to air transport services, there would be no subsidy. The

³⁴ In determining whether Emirates conducted transactions at arm's length, Emirates disclosed transactions that international accounting standards require under the accounting definition of a related party, including government-controlled utilities. PwC issued an unqualified audit opinion on the Emirates financial statements for the year ended March 31, 2015. Emirates Group, *Annual Report 2014–15*, at 102, available at <http://www.theemiratesgroup.com/english/facts-figures/annual-report.aspx>.

Government of Dubai does not provide goods or services to Emirates for less than adequate remuneration, and the Legacy Carriers' allegation to the contrary is based solely on an unsubstantiated assertion by their purported expert. The unqualified audit opinion issued by PwC on the Emirates financial statements for the year ended March 31, 2015 is sufficient to rebut this poorly developed allegation, but Emirates nonetheless has prepared even more specific demonstrations on the key accusations, set forth in this section.

2. Emirates purchases jet fuel from its affiliated supplier ENOC at market prices.

The Emirates National Oil Company ("ENOC") is owned by ICD, Emirates' parent company. ENOC is a supplier of jet fuel to Emirates and other airlines at Dubai International airport, where it competes with several other suppliers. ENOC and other suppliers at Dubai International offer jet fuel on similar terms: buyer and seller agree that the price will be determined for a specified time period based on a standard industry price series. The contracts generally establish prices based on Platt's Arabian Gulf jet fuel price, which is the major component of the purchase price, plus a margin that is negotiated between buyer and seller.

The Legacy Carriers allege that Emirates obtains fuel from ENOC on less than arm's-length terms. The allegation is based on no facts whatsoever. The Legacy Carriers contend that it is appropriate to infer that less than arm's-length prices are being charged since Emirates does not mention ENOC in its financial statements, and does not assert that its transactions with ENOC are at arm's length.³⁵

The allegation has no basis in reality, as even a cursory examination of the relevant facts demonstrates. The chart below sets forth in detail the specific findings from an analysis of the prices paid by Emirates to ENOC for jet fuel for

³⁵ White Paper at 33.

the three-, six-, and twelve-month time period ended February 28, 2015. As a matter of good corporate and risk-management policy, Emirates divides its purchases among several suppliers, including BP, Chevron, Emojet, ENOC, and Shell.³⁶ Consequently, no single supplier provides Emirates with a majority of its fuel at Dubai International. As the chart demonstrates, rather than somehow subsidizing Emirates, ENOC is actually the most expensive supplier in several comparisons.

U.S.\$ per US gallon	ENOC	SUPPLIER B	SUPPLIER C	SUPPLIER D	SUPPLIER E
3-month daily average	\$1.9782	\$1.8531	\$1.9779	\$1.9713	\$1.9738
6-month daily average	\$2.3391	\$2.2364	\$2.3388	\$2.3322	\$2.3347
12-month daily average	\$2.6462	\$2.5871	\$2.6460	\$2.6394	\$2.6419

During the recent three-month period ending February 28, 2015, Emirates purchased 35.1 percent of its fuel requirements at Dubai International from ENOC, and 64.9 percent from its four other suppliers. The averages of daily prices reported in the chart demonstrate that prices paid to ENOC are completely in line with—in fact, higher than—prices from unrelated suppliers for the three-, six-, and twelve-month period ended February 28, 2015. In sum, contrary to the false allegation of the Legacy Carriers, Emirates purchases fuel from ENOC on an arm’s-length basis.

It should be noted that the prices Emirates pays to ENOC and the other fuel suppliers at Dubai International are comparable to, and often higher than, fuel prices paid by Emirates for the same time periods at the nine U.S. airports it

³⁶ Data for each of these five suppliers are presented in the chart summarizing purchase prices.

serves. It is clear that Emirates does not receive jet fuel at below market prices from ENOC. The Legacy Carriers' allegation of preferential fuel prices is groundless.

3. Emirates' sale of purchase rights to DAE and the sale and leaseback transaction with DAE were conducted at arm's length.

The Legacy Carriers' allegation of government subsidies to Emirates through its transactions with DAE rests solely on inference from the fact that Emirates does not assert that two sets of transactions with DAE were at arm's length: (1) sale and leaseback of eight A330-200 aircraft, and (2) the sale of purchase rights in respect of certain freighter aircraft.³⁷ That is the full extent of the supposed evidence of subsidy. Based on nothing more than this, Mr. Anderson computed a purported subsidy value that is greater than Emirates' reported income.³⁸

Allegation in respect of aircraft sales and leaseback with DAE: Aircraft sale and leaseback agreements are a common form of financing in the airline industry. In the very DAE webpage cited by the Anderson Report,³⁹ DAE lists multiple sale and leaseback agreements with Azul Brazilian Airlines, Garuda Indonesia, and Kingfisher, along with the transaction with Emirates. It is equally common practice for leasing companies to purchase aircraft directly from Boeing and Airbus.

On no other evidence than DAE's mention on its website of a contemporaneous sale and leaseback with Emirates, Mr. Anderson concluded that a gain of AED 553.8 million (U.S.\$ 150.8 million) arising from aircraft sales

³⁷ White Paper at 33–34; Anderson Report at 89–90.

³⁸ See Anderson Report at 90; Emirates Group, *Consolidated Income Statement for the Year Ended 31 March 2008*, in *Annual Report 2007–08*, at 72, 84 n.5, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2007-2008.aspx>.

³⁹ Anderson Report at 90 n.189.

reported in Emirates' 2008 year-end financial statements⁴⁰ was a subsidy in its entirety. That statement is groundless.

Emirates recognized the gain as the result of the sale and (operating) leaseback of thirteen Airbus A330-200 aircraft. These were aircraft operated by Emirates that had previously been financed under various arrangements. The previous financing transactions were unwound with Emirates assuming full ownership of the aircraft. Simultaneously, a separate sale and leaseback agreement was entered into with two parties: Australia-based Allco Finance Group and DAE. Allco, which is not affiliated with Emirates, purchased and leased back five of the aircraft and DAE, eight aircraft. The following chart summarizes the transactions.

U.S.\$ (thousands)	ALLCO	DAE	TOTAL
Sale price	378,500	525,000	903,500
Carrying-value	319,432	439,449	758,881
Profit	59,068	85,551	144,619
Units	5	8	13
Average	11,814	10,694	11,125
Fair value (AVACS)	388,679	555,245	943,924

Importantly, the sale price to both Allco and DAE is below the AVACS appraised value of the aircraft.⁴¹ Emirates' sale price to Allco is approximately 97 percent of the appraised value while the sale price to DAE is 95 percent, and

⁴⁰ Emirates Group, *Consolidated Income Statement for the Year Ended 31 March 2008, in Annual Report 2007-08*, at 84 n.5, available at <http://www.theemiratesgroup.com/english/facts-figures/archive/2007-2008.aspx>.

⁴¹ Aircraft value ratings, first developed by The Aircraft Value Analysis Company (AVAC), are an industry standard valuation source.

the percent markup over carrying value is approximately the same for the sale to Allco and DAE. Thus, as the terms of the sale to DAE are comparable to those of Allco, the sale to DAE was at arm's length on market terms with no hint of a subsidy.

Allegation in respect of the sale of purchase rights to DAE: The sale of purchase rights of previously ordered aircraft to DAE was at arm's length and did not confer a subsidy. In fact, DAE was able to receive the aircraft sooner by acquiring the manufacturing and delivery slots from Emirates, and it could do so at approximately the same aggregate pricing than it could have obtained from the manufacturer due to Emirates' position as a large purchaser of Boeing aircraft.

The summary in Exhibit 4 demonstrates that the transaction was clearly in both parties' interest. It makes clear that Emirates had negotiated certain strong market pricing with Boeing and that the transaction price between Emirates and DAE was at arm's length. In effect, Emirates was able to benefit from the prices it had negotiated with Boeing and at the same time offer a commercially attractive deal to DAE, based on pricing and timing of deliveries. As the summary of the transaction demonstrates, Emirates was not willing to provide DAE with uncompensated value and sought to receive market-based pricing on the transaction.

Further, Emirates leased back from DAE thirteen of the eighteen aircraft for which it had sold its purchase rights to DAE. In this leaseback transaction, Emirates agreed to a lease cost based on the full price paid by DAE, including for the purchase rights, at market rates. Emirates accordingly agreed to make lease payments based on the transaction price with DAE, thereby further confirming the legitimate arm's-length price paid by DAE for the aircraft and the purchase rights.

4. Emirates does not receive services from dnata at less than market rates.

The White Paper's allegation regarding dnata is both unsubstantiated and false. The Legacy Carriers' claims are based solely on distorting a statement made by Emirates related to the arm's-length price it pays dnata and unnamed, undocumented "confidential sources in Dubai" who claim that Emirates receives a fifteen percent discount.⁴² The Legacy Carriers offer no additional evidence other than once again contending that if Emirates does not affirmatively assert that its dealings with related parties are at arm's length, then there are sufficient grounds to conclude they are not at arm's length. The White Paper has nothing further to offer—no attempt at quantification, no documents, nothing—just innuendo.

The inference from Emirates' financial statements is not valid, and does not survive the inclusion in Emirates' financial statements for the financial year ended March 31, 2015 of the declaration that Emirates' transactions with related parties, including dnata, are at arm's length, and the issuance of an unqualified audit opinion from PwC in respect of those financial statements, as explained above.

Rates vary among airlines largely because airlines request different packages of service. Emirates operates a hub at Dubai International airport, and therefore needs a more intensive package of high-quality services—such as more aircraft towing and in-depth cleaning services—that are not needed by airlines that treat Dubai International airport as an outstation and simply need to turn an aircraft around. The comparison of rates to Emirates and other airlines—despite the fact that this was the comparison suggested by the White Paper—is not apples-to-apples.

⁴² White Paper at 33.

dnata is a profitable, independently managed, and professionally run ground handling company that provides no subsidy to Emirates. To address the false allegations of subsidization by a key supplier, while maintaining customer confidentiality, at Emirates' request dnata agreed to disclose its detailed confidential financial information to an independent certified public accountant who presents a public summary of his analysis and specific findings at Exhibit 4.⁴³

Having received confirmation from an independent accounting firm asked to analyze both public and confidential financial data, Emirates has demonstrated that the allegation of subsidy to Emirates from dnata is false. In short, as reported in Exhibit 4, dnata earns a higher rate of profit on its services to Emirates than it does to other airlines operating at Dubai International.

D. The Legacy Carriers' airport infrastructure and fees allegations are false.

The Legacy Carriers argue that Emirates has received subsidies from Dubai International airport (DXB). The argument consists of three paragraphs at pages 29 to 31 of the White Paper. The shortcomings of the argument are immediately apparent: those three paragraphs (1) set out a legal standard that is wrong, (2) alter a quotation from an academic report to change the point being made,⁴⁴ and (3) set forth a comparison of airport fees that selectively omits data that undercut the Legacy Carriers' argument.⁴⁵

⁴³ Marks Paneth LLP, Statement and Analysis of John Miller, CPA ¶ 6 (attached as **Exhibit 4**).

⁴⁴ The White Paper purports to quote from an academic study by J.F. O'Connell to support the allegation that control relationships and close coordination among Emirates, Dubai International, and government authorities led to favoritism for Emirates. The White Paper quoted the study as saying: "This multifaceted management role . . . can press the airport to act in the best interests of the country's flag carrier." White Paper at 30. In fact, the words "best interests of the country's flag carrier" do not appear in the article. They are invented out of whole cloth. The actual statement is "pressures airports to act *in the best interests of airlines*" (emphasis added). The White Paper's grossly inaccurate alteration completely changes the sense of the quotation, which in its authentic version does not support the White Paper's point. Mr. O'Connell has protested this false quotation in a response. Frankie O'Connell, *U.S. White Paper on Gulf Carriers Distorts My Academic Report*, Air Transport World (Apr. 26, 2015), <http://atwonline.com/open->

The Legacy Carriers' argument is unsuccessful, because they fail to make any case at all under the controlling law. The allegation involves the appropriate level of airport user fees, a subject on which the United States and the UAE have reached express agreement in Article 10 of the Open Skies Agreement. That is the governing international obligation, but the Legacy Carriers ignore it altogether. They do not even allege that the Dubai International airport user charges violate the express rules for user charges set forth in the Open Skies Agreement. For international law purposes, Article 10 is *lex specialis*—a highly specific provision that represents the sole and exclusive legal obligation with respect to user fees under the Open Skies Agreement. As such, the Legacy Carriers are not free to render it *inutile* by inventing extraneous, one-sided, and unilateral user fee obligations that do not exist in reality, that were never contemplated by the parties, and that would represent a major departure from the actual language of the agreement. The analysis need go no further: the applicable law is the specific provision of the Open Skies Agreement, and the Legacy Carriers have not even attempted to make a case under that law. It is not surprising that the Legacy Carriers have simply ignored the only applicable law. The reason is simple: they have no case to make. The practices at Dubai International comply fully with the user fee standards specifically set forth under the Agreement, and indeed are no different from those at airports worldwide, including practices at U.S. hubs for the Legacy Carriers.

Unable to make a case under the governing legal standard, the Legacy Carriers again manufacture their own: they seek to apply WTO subsidy rules for

skies/commentary-us-white-paper-gulf-carriers-distorts-my-academic-report (attached as **Exhibit 5**). As a result, the Legacy Carriers were forced to expressly acknowledge this allegedly mistaken alteration of text in a subsequent letter.

⁴⁵ As described fully *infra* Section I.D.2, the White Paper attempts to demonstrate that landing fees are low at Gulf Airports when compared to other airports, particularly in the United States. White Paper at 30 fig.14. In fact, the comparison demonstrates nothing. Landing fees are only one source of revenue, and examining them in isolation distorts the comparison. Concessions income, for example, is an important source of airport income in the Middle East, far more important than in the United States, but it is completely omitted from the analysis. A more comprehensive study by Oxford Economics concluded that Dubai International's overall charge levels are about average among the worlds' top 100 airports. Oxford Economics, *Explaining Dubai's Aviation Model* 6, 43 (2011).

goods trade, arguing that government support for the airport constitutes a subsidy. This diversion does not succeed. Not only is the SCM Agreement completely inapplicable (as explained in more legal detail in Part II below), but SCM Agreement rules expressly provide in Article 1.1(a)(1)(iii) that a government's provision of "general infrastructure"—like airports—is not a subsidy, any more than the government provision of seaport facilities, roads and highways, or water distribution.⁴⁶

1. Open Skies Agreement Article 10 (User Charges) is the only law applicable to airport user charges, and the Legacy Carriers fail to make a case under the governing law.

The Legacy Carriers' two allegations regarding Dubai International airport both involve airport user charges: that the charges assessed for Emirates' use of the airport are too low, and it is improper for Dubai International to impose a passenger fee only on departing passengers and not on connecting passengers.⁴⁷

The United States and the UAE have reached an express agreement on the rules to govern airport user charges. That agreement is set forth with specificity at Article 10 of the Open Skies Agreement, which is entitled "User Charges." Such user charges must be "just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users," and user charges must be assessed on the other country's airlines on terms not less favorable than the most favorable terms available to any other airline at the time the charges are assessed.⁴⁸ In addition, user charges "may reflect, but shall not exceed, the full costs to the competent charging authorities or bodies of providing the appropriate . . . facilities and services at the airport."⁴⁹

⁴⁶ SCM Agreement art. 1.1(a)(1)(iii).

⁴⁷ White Paper at 30–31.

⁴⁸ U.S.-UAE Open Skies Agreement art. 10.1.

⁴⁹ *Id.* art. 10.2.

The Open Skies Agreement directly addresses the subject matter of airport user charges. It occupies the field and is controlling. The Legacy Carriers are not free to ignore U.S. international obligations by resorting to other agreements that have nothing to do with air transport or by inventing fictitious and unilateral legal standards that were never agreed to by the Parties in the context of the Open Skies Agreement. As will be discussed in the next section of this submission, the SCM Agreement does not apply to services in any event, and while services are covered by the General Agreement on Trade in Services (GATS), GATS specifically excludes air transport services and does not contain any rules on subsidies, since the WTO Members were unable to agree on such rules in the Uruguay Round. As a result, the Legacy Carriers' legal theory collapses on closer analysis, as the SCM Agreement is wholly irrelevant to the interpretation of U.S. and UAE obligations on airport user charges, the subject matter at hand.

This is in fact the end of the analysis. The exclusive governing law is set forth at Article 10 of the Open Skies Agreement, and the Legacy Carriers have failed to mount an argument under that law. Their allegations are irrelevant, and should be dismissed.

2. The Legacy Carriers could not demonstrate that Dubai International airport user charges violate the Open Skies Agreement, even if they tried.

While the Legacy Carriers' user fee allegations apply an incorrect legal standard, the political and public relations noise they have manufactured to accompany their legally inadequate argument makes it worthwhile to probe just how weak their case is. A quick examination makes clear why they have not framed their allegations under the applicable law: they would lose.

Failure of an airport to recover costs—even if it could be shown—is not a violation of Article 10. The primary obstacle faced by the Legacy Carriers under governing law is that low user fees do not violate the Open Skies Agreement. To the contrary, the restriction on user fees is that they not be too

high: full cost recovery is a *cap* on user charges, not a floor. Article 10.2 of the Open Skies Agreement makes this clear:

User charges imposed on the airlines of the other Party *may reflect, but shall not exceed, the full cost* to the competent charging authorities or bodies of providing the appropriate airport, airport environmental, air navigation, and aviation security facilities and services at the airport or within the airport system. Such charges *may* include a reasonable return on assets, after depreciation. Facilities and services for which charges are made shall be provided on an efficient and economic basis.⁵⁰

This is the law of the case. Airports are *permitted* to recover full costs, but are not *required* to do so. The amounts recovered “*may* include a reasonable return on assets,”⁵¹ but no airport is *required* to earn a return on assets. It is clear why the Legacy Carriers did not attempt to make their case under the actual governing law: that law does not forbid airports to charge fees that fail to recover costs.

This fact should not be a surprise to anyone involved in U.S. aviation policy. Federal Aviation Administration (“FAA”) and Department of Transportation (“DOT”) policy on airport user charges is the same as that reflected in the Open Skies agreements: full cost acts as a cap on user charges, not a floor. Likewise, FAA/DOT policy provides that for U.S. airports that have accepted FAA Airport Improvement Program grants, unless otherwise agreed by airport users, rates and charges for airfield facilities “may not exceed” costs to the airport proprietor for providing services.⁵² Indeed, U.S. Government policy

⁵⁰ *Id.* (emphases added).

⁵¹ *Id.* (emphasis added).

⁵² Policy Regarding Airport Rates and Charges, 78 Fed. Reg. 55,334 (Federal Aviation Administration Sept. 10, 2013); *see also id.* § 2.2 (“Revenues from fees imposed for use of the airfield . . . *may not exceed the costs* to the airport proprietor of providing airfield services and airfield assets currently in aeronautical use, unless otherwise agreed to by the affected aeronautical users”); *id.* § 2.3 (“The ‘rate base’ is the total

permits U.S. airports to temporarily waive landing fees and offer other fee discounts to airlines for new services⁵³—this permits not only low charges, but discrimination between airlines, which is not even alleged against Dubai International airport.

There are many examples of airline incentive programs in the United States, where airports grant special financial privileges to attract flights to their facility:

- *Baltimore/Washington International Airport (BWI)—Profit Guarantee for British Airways.* With respect to the Baltimore/Washington International to London Heathrow route, the State of Maryland provided remuneration to compensate British Airways for the difference between the target profit margin and the actual profit margin. British Airways was eligible for several million dollars in remuneration per year for three years from the State of Maryland. British Airways has a metal neutrality understanding with American Airlines through the oneworld joint business agreement, which means that American Airlines also received benefits from this arrangement.⁵⁴
- *Portland International Airport (PDX)—Retention Incentive for Tokyo Narita International Airport.* In 2009, the Port of Portland, Oregon, operator of Portland International Airport, made a one-time cash payment of \$3.5 million to Delta to maintain the city's only direct link to

of all costs of providing airfield facilities and services to aeronautical users . . . that *may be recovered* from fees charged for providing airfield aeronautical services and facilities”; *id.* § 2.4.4 (“The airport proprietor *may include* in the rate base amounts needed to fund debt service and other reserves and to meet cash flow requirements as specified in financial agreements or covenants...”); *id.* § 2.4.5(a) (“Costs of airfield facilities and services directly used by the aeronautical users *may be fully included in the rate base* For example, the capital cost of a runway *may be included* in the rate base used to establish landing fees.”); *id.* § 2.6.1 (“Reasonable methodologies may include, but are not limited to, historic cost valuation, direct negotiation with aeronautical users, or objective determinations of fair market value.”) (emphases added).

⁵³ See Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696 (Fed. Aviation Admin. Feb. 16, 1999); Federal Aviation Administration, *Air Carrier Incentive Program Guidebook: A Reference for Airport Sponsors* (2010).

⁵⁴ American Airlines, Inc. & British Airways, PLC, Dkt. Nos. DOT-OST-2002-13861, DOT-OST-2008-0252, Order 2010-7-8 (U.S. Department of Transportation July 20, 2010); see also Jack Lambert, *BWI Looks to Spend Up to \$16.5M to Extend British Airways Contract*, Baltimore Business Journal (Sept. 17, 2012, 12:26 PM), <http://www.bizjournals.com/baltimore/news/2012/09/17/bwi-british-airways-subsidy-contract.html>.

Asia, a daily non-stop flight to Tokyo that the carrier had planned to terminate in September of that year.⁵⁵

- *Pittsburgh International Airport (PIT)—Revenue Guarantee to Delta.* In 2009, Delta received a revenue guarantee from the Pittsburgh and Allegheny County community in order to re-establish non-stop service to Europe, which was lost when US Airways de-hubbed the market. The state and the Allegheny Conference on Community Development pledged up to \$9 million in potential subsidies to Delta over two years if the Paris service falls short of the agreed-to revenue levels. In addition, the State and Conference agreed to provide up to \$2.5 million each after the first year of service provided, and up to \$2 million each after the second year if revenues did not meet an agreed-upon level. The airport authority also waived landing fees for the flights for the first two years and \$300,000 in marketing funds to Delta. The local economic-development group provided revenue guarantees. The flight still operates as summer seasonal, and in the upcoming summer 2015 period, it will operate five times weekly for the first time since it began.⁵⁶
- *Dallas/Fort Worth (DFW) Service Incentive Program*—In 2005, Dallas/Fort Worth International Airport announced the implementation of a major incentive package to U.S. air carriers. In general, the Program was “a multi-million dollar incentive and stimulus package that will be offered to all major U.S. air carriers which initiate or expand service at the airport. The plan includes free rent in Terminal E for one year and up to \$22M in other financial aid.”⁵⁷

⁵⁵ See Richard Read, *Port's Gamble on Delta Pays Off*, Oregonian, June 11, 2010, available at http://www.oregonlive.com/business/index.ssf/2010/06/ports_gamble_on_delta_pays_off.html.

⁵⁶ *Nonstop Pittsburgh to Paris*, FlyPittsburgh.com, <http://www.flypittsburgh.com/europe> (last visited June 7, 2015); see also Mark Belko, *Airport to Hype Paris Flights with \$600,000 in Ads*, Pittsburgh Post-Gazette, Dec. 13, 2008, available at <http://www.post-gazette.com/business/businessnews/2008/12/13/Airport-to-hype-Paris-flights-with-600-000-in-ads/stories/200812130143>; Mark Belko, *Delta to Offer Nonstop Service to Paris in June*, Pittsburgh Post-Gazette, Jan. 7, 2015, available at <http://www.post-gazette.com/business/development/2015/01/07/Delta-to-offer-non-stop-service-to-Paris-in-June/stories/201501070065>; Brett Snyder, *Pittsburgh Pours Money into Delta's Paris Flight and It Might Work*, CBS MoneyWatch (Dec. 18, 2008, 10:40 AM), <http://www.cbsnews.com/news/pittsburgh-pours-money-into-deltas-paris-flight-and-it-might-work/>; Benét J. Wilson, *Incentives Are Key in Fight for Air Services*, Airways News (Jan. 20, 2015), <http://airwaysnews.com/blog/2015/01/20/incentives-are-key-in-fight-for-air-service/>.

⁵⁷ Press Release, DFW International Airport, DFW International Airport Announces Major Incentive Package to Attract New Air Service and Expand Travel Choices for Customers: Offer Includes Free Rent and Marketing Dollars for Terminal E Gates (Jan. 6, 2005), available at https://www.dfwearport.com/pressroom/Announces_Major_Incentive_Package_Attract_New_Air_Service_Expand_Travel_Choices_Customers.pdf.

- *San Francisco International Airport (SFO) Landing Fee Waiver*—San Francisco International Airport offers a 100 percent discount on landing fees for up to twenty-four months to any airline that initiates a non-stop international route that is not currently served from the airport.⁵⁸

Many U.S. airports promote their airline service incentive programs actively, posting promotional materials on their websites. Miami International Airport (MIA), an American Airlines hub, is one of these, boasting of incentives like a 100 percent abatement of landing fees.⁵⁹ Other U.S. airports run their airline incentive programs less formally. For instance, in 2014, Denver International Airport (DIA) extended incentives to United to ward off the possibility that United might cease its hub operations at the airport in the wake of the Continental merger. Denver International Airport restructured its debt to save about \$45 million, and then renegotiated its lease with United to pass on \$35 million of the savings to the airline.⁶⁰

Dubai International airport aeronautical fees are low, in part due to Dubai International's policy to maximize revenues from non-aeronautical users (for example, concessionaires, food and beverage, news/gifts/retail, etc.), which enables the airport to reduce fees to airline users, a benefit enjoyed by all airlines serving Dubai International, including United and Delta. In fact, non-aeronautical revenue grew by fifteen percent in 2014, and represented fifty-three percent of operating revenue.⁶¹ This growth in non-aeronautical revenue reflects Dubai International's "long-term corporate objective of reducing sole dependency on aeronautical revenue sources, or other funding, to finance [] expansion [,] *while keeping aeronautical charges among the most competitive when*

⁵⁸ San Francisco Airport Commission Meeting Minutes 3–4 (Aug. 19, 2014), *available at* <http://media.flysfo.com/media/sfo/about-sfo/commission/minutes/m081914.pdf>.

⁵⁹ See Miami International Airport, *ASIP4, Air Service Incentive Program*, *available at* <http://www.miami-airport.com/pdfdoc/MIA-ASIP-brochure.pdf> (a three-year program effective November 2012).

⁶⁰ Cathy Proctor, *United Airlines Commits to DIA Through 2035*, *Denver Business Journal* (Aug. 19, 2014, 2:48 PM), http://www.bizjournals.com/denver/blog/earth_to_power/2014/08/united.html.

⁶¹ *Profitability*, Dubai Airports, <http://dubaiairportsreview.com/profitability/> (last visited June 10, 2015).

*compared to similar global hubs.*⁶² In fact, DOT/FAA rates and charges policy allows U.S. airports to employ such an approach: “Aeronautical users may receive a cross-credit of non-aeronautical revenues only if the airport proprietor agrees.”⁶³

There simply is no law or practice under the Open Skies Agreement to support the Legacy Carriers’ case that low airport fees are a violation of the Open Skies Agreement or any other law. The Legacy Carriers have not mounted a case under the correct legal standard because they have no case.

Article 10 requires that airport fees be “not unjustly discriminatory,” and fees at Dubai International airport fully meet this standard. The Legacy Carriers also cannot make a case that Dubai International airport user charges are unjustly discriminatory—the standard that Article 10 actually does impose—because there is no such discrimination.

Dubai International airport imposes three types of charges on aircraft: landing charges, aircraft parking fees, and aerobridge fees.⁶⁴ All of these are imposed non-discriminatorily based on objective criteria:

- Landing charges are based on the maximum take-off weight of the aircraft as submitted by the airline/operator, rounded to the nearest tonne. There are three weight categories with a different rate charge for each category.
- Aircraft parking charges are based on the total number of hours (or part thereof) that an aircraft is parked in a designated parking area, with different rates for narrowbody and widebody aircraft.
- Aerobridge occupancy charges are calculated based on the hours an aerobridge is occupied.

⁶² *Dubai Airports Yearbook* 28, 30 (2014) (emphasis added), available at <http://dubaiairportsreview.com>.

⁶³ Policy Regarding Airport Rates and Charges, 78 Fed. Reg. 55,334 (Federal Aviation Administration Sept. 10, 2013).

⁶⁴ See Dubai Airports, Dubai International Airport Charges (Commercial) (IATA Summer Season 2015); Dubai Airports, Conditions of Use (including Airport Charges) (effective 29 March 2015).

Not only are these charges non-discriminatory, airports around the world, including in the United States, impose similar charges on similar bases. For example, Newark Liberty International Airport (EWR), where United has a hub, and New York's JFK International Airport, where Delta has a hub, impose public landing area charges, public ramp/apron area charges, and public aircraft parking and storage area charges, among others.⁶⁵

Dubai International airport does not impose separate lease rental charges for use of terminals, whether Terminal 1, 2, or 3, except that rent is charged for exclusive-use spaces at the airport, including lounges, check-in counters, offices, and storage. Dubai International airport has confirmed that all airlines currently pay the same lounge rental rate per square foot.⁶⁶

Dubai International airport also imposes passenger service charges (per departing passenger) and passenger security and safety fees (per departing passenger).⁶⁷ These are imposed on passengers of all airlines on a non-discriminatory basis. Dubai International airport's charges are structured in a similar fashion to per-passenger charges imposed at airports around the world, including in the United States, where passenger facilities charges, September 11 security fees, and per-passenger general terminal charges are imposed.⁶⁸

Dubai International not only imposes airport charges on a non-discriminatory basis, it also establishes them through a transparent tariff setting process. Dubai International airport management coordinates with airline users

⁶⁵ See Schedules of Charges for Air Terminals for EWR and TEB and for JFK (revised December 2014), issued by the Port Authority of New York and New Jersey.

⁶⁶ Emirates understands that the rent rate will be different in Concourse D, which is expected to be delivered during Q4 2015 and will be used only by other airlines. The rent rate is different as it is based on a bidding process, and therefore each lounge operator would have a different rate based on its own bidding.

⁶⁷ See Dubai Airports, Dubai International Airport Charges (Commercial) (IATA Summer Season 2015); Dubai Airports, Conditions of Use (including Airport Charges) (effective March 29, 2015).

⁶⁸ The White Paper alleges that the collection of passenger service fees from departing passengers but not on connecting passengers confers a "subsidy." White Paper at 31. That issue is dealt with below. There is no allegation that the passenger fees are unjustly discriminatory under the Open Skies Agreement.

on tariffs and other issues through the airline-established Airport Operators Committee (“AOC”). This committee of airline users is similar to airline committees established at airports throughout the world, including at virtually every U.S. airport, to interface with the airport operator. The most recent chair of the AOC was a representative from Virgin Atlantic, forty-nine percent of which is owned by Delta Air Lines. Changes in airport tariffs are subject to a six-month notice period during which the concerns of the airlines are considered.

One set of Conditions of Use applies to all airlines. All carriers, including Emirates, are subject to these same conditions, which are published and openly available.⁶⁹ Like its charges, Dubai International’s rules are non-discriminatory.⁷⁰

These facts again make clear why the Legacy Carriers have avoided trying to make their case under the actual governing law: they have no case to make.

3. WTO principles are not applicable, and the Legacy Carriers fail to make a persuasive case even under those principles.

Unable to make a case for their allegations under the Open Skies Agreement, the Legacy Carriers seek to cast their argument in terms of WTO principles regarding subsidies in goods trade. These principles are inapplicable, for the reasons set forth in Section II of this submission.⁷¹ But even under

⁶⁹ See Dubai Airports, Conditions of Use (including Airport Charges) (effective March 29, 2015), *available at* <http://www.dubaiairports.ae/docs/default-source/CoU-DXB/dubai-international-conditions-of-use-iata-summer-season-march-2015.pdf?sfvrsn=2>.

⁷⁰ Although Dubai International is slot-controlled, slots at Dubai International are allocated using the IATA Worldwide Scheduling Procedures, which is an internationally accepted, non-discriminatory, and transparent process, used by most slot-controlled airports throughout the world. The slot coordinator for Dubai International is Airport Coordination Limited (“ACL”), the same company that coordinates slots at London Heathrow Airport and Auckland International Airport, among others. ACL is an independent and impartial slot coordinator, and ACL meets with airlines regularly each year on slot allocation. The Scheduling Coordination Committee is comprised of all operating carriers at Dubai International and Al Maktoum International, and Emirates has no influence on the decision-making process for slot allocation/coordination at Dubai International.

⁷¹ See *infra* Section II.A.

hypothetical application of WTO principles, the Legacy Carriers' case collapses under close examination.

Under Article 1.1(a)(1)(iii) of the SCM Agreement, a government is deemed to have provided a benefit (one of the necessary elements of a subsidy) if “a government provides goods or services *other than general infrastructure*.”⁷² The emphasized language is critical. In short, the very provision of the SCM Agreement cited by the Legacy Carriers excludes government provision of general infrastructure.

Airports are general infrastructure. Like seaports, water and electricity distribution facilities, and general purpose roads and highways, they are available to all who are qualified to use them. The provision of general infrastructure is expressly excluded from the definition of subsidy under the WTO SCM Agreement.⁷³

The Legacy Carriers' consultants try to avoid the WTO's exclusion of general infrastructure by redefining the good provided. They contend that the

⁷² SCM Agreement art. 1.1(a)(1)(iii) (emphasis added).

⁷³ Mr. Anderson attempts to justify his strained general infrastructure argument by citing the U.S. Department of Commerce's Softwood Lumber Subsidies Report. He contends that this report shows that payments to reimburse the cost of roadbuilding can be considered an actionable subsidy. This is inapposite for two reasons. First, the U.S. Department of Commerce referenced U.S. countervailing duty law, which is a domestic U.S. law that governs goods trade and is not the same as the WTO SCM Agreement. Second, the programs involved government payments to companies to reimburse them for *their* road building expenses in the construction of roads to support *their* forestry operations, as well as tax credits for such construction expenses. U.S. Department of Commerce, *Softwood Lumber Subsidies Report to the Congress* 13–14 (2014), available at <http://enforcement.trade.gov/sla2008/reports/Softwood-Lumber-Subsidies-Report-2014-06-16.pdf>. This is quite different from government construction of an asset for general use.

A far more relevant authority would be the European Communities' complaint against the United States alleging that road improvement projects expanding Interstate 5 and State Route 527 in Washington State, only in the vicinity of a Boeing facility, constituted a subsidy provided for the advantage of Boeing. Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* ¶ 7.428, WT/DS353/R (Mar. 31, 2011). The Panel concluded that the European Communities did not demonstrate that the expansion projects were anything but general infrastructure under the SCM Agreement. *Id.* ¶ 7.456.

good provided is not the airport, but specifically Terminal 3 and Concourse A,⁷⁴ which is used mostly by Emirates, with some use by Qantas Airways.⁷⁵ In doing this, their consultants engage in circular logic: they assume their own conclusion. Having defined the “good provided” as that portion of the airport that is mostly used by Emirates, they not surprisingly find that most of the “good provided” is used by Emirates. This is the sole basis for their argument that the good is not general infrastructure.

Dubai International is a complete airport, not just a terminal. Like most modern international hub airports, it consists of several passenger terminals, baggage handling facilities, ground handling facilities, cargo facilities, fuel storage and distribution facilities, various other facilities, and air traffic control and runways. It is an integrated operation directed to provide services to all airlines landing at the airport. Terminal 1 is used by many international carriers, Delta and United included; Terminal 2 by the low cost carrier Fly Dubai with some use by other carriers; and Terminal 3 principally by Emirates but also by Qantas Airways, as noted.

The Dubai Government has provided all airport infrastructure, including Terminals 1, 2, and 3 and all supporting facilities and runways, by applying government resources from general funds (raised from fees and other government revenue sources, or by accessing the capital markets). There is nothing unique about Terminal 3 that could not be said of all the airport facilities, including Terminal 1 housing Legacy Carriers Delta and United. Since Terminals 1, 2, and 3 are components of an integrated airport operation, whatever benefit the government provides, it provides to all users of the airport’s facilities. The fact that Emirates, as the operator of a hub and the largest presence at Dubai International, occupies the large majority of one of the

⁷⁴ Anderson Report at 81–82; Daniel F. Kasper, *Gulf Airport Subsidies 20 et seq.* [hereinafter Kasper Report].

⁷⁵ See *Dubai International Airport*, Qantas, <http://www.qantas.com.au/travel/airlines/airport-guide-dubai/global/en> (last visited June 7, 2015).

terminals and uses other supporting airport facilities the most intensely does not mean the airport is not general infrastructure. The airport is available to all airlines who seek to use it. Any benefit provided by the manner in which the Government of Dubai provides airport infrastructure is shared among all users of the airport, including Delta, United, the Legacy Carriers' joint venture⁷⁶ and alliance partners, and the approximately 100 other carriers operating at Dubai International.⁷⁷

Dubai International airport is an open market, as a comparison with the Legacy Carriers' fortress hubs makes clear. Figure I-3 shows that Dubai International is one of the most open airports. Figure I-4 shows the extent to which the Legacy Carriers and their joint venture partners dominate their hub flight frequencies.

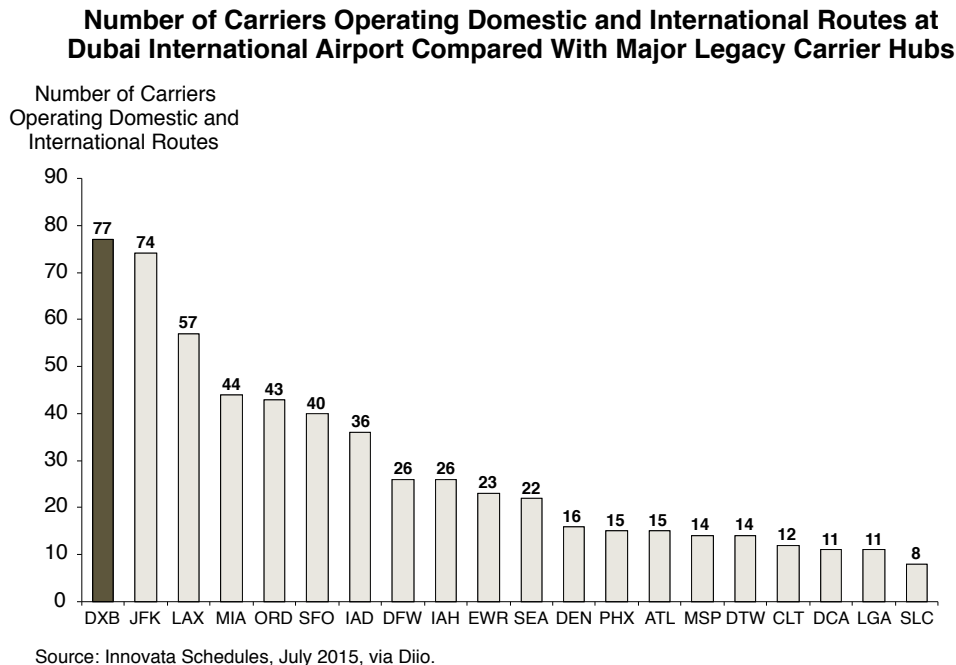
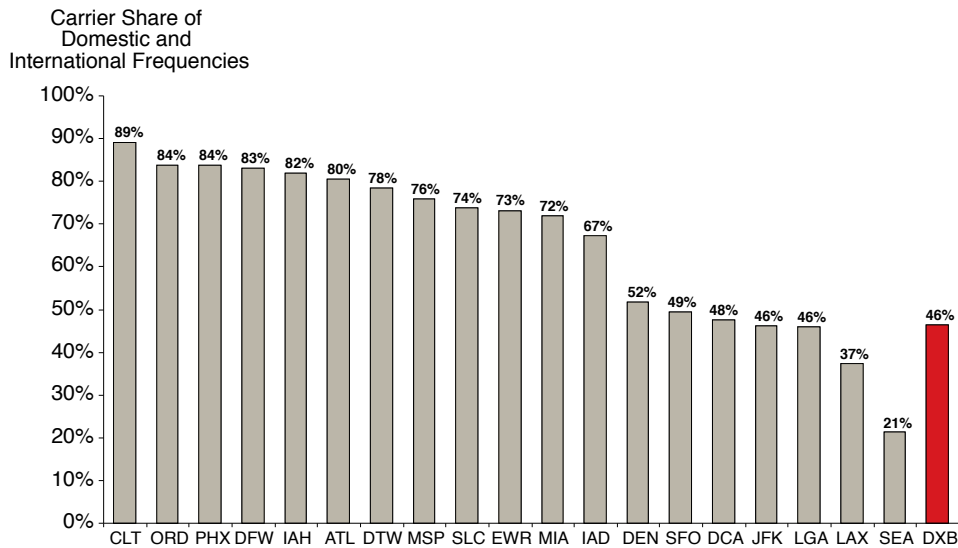


Figure I-3

⁷⁶ Unless defined otherwise, this paper uses the White Paper's definition of joint venture partners. White Paper at 46 n.196 ("JV partners include: Delta (Air France/KLM, V-Australia, Alitalia, Virgin Atlantic), American (British Airways/Iberia, Qantas, JAL), United (Lufthansa, Swiss, Brussels, Austrian, Air Canada, ANA).").

⁷⁷ Figure I-3 shows only scheduled airlines. At any given time, there are charter carriers, which are included in the estimate of 100.

Frequency Share of Legacy Carriers and Their JV Partners Operating Domestic and International Routes at Their Hub Markets Compared to Emirates' Share at Dubai International



Source: Innovata Schedules, July 2015, via Diio.

Figure I-4

It should be noted that the construction of a terminal for exclusive or principal use by a hub airline is a common and well-accepted practice in aviation. Airports and communities see the value in hosting a hub in their community, and are often involved in financing it. The practice is common in the United States. For example,

- Detroit's Edward H. McNamara Terminal World Gateway opened in 2002. It was built to house Northwest Airlines' Detroit hub, and is now the home of Delta's Detroit hub. \$751 million of the \$1.2 billion cost of the new terminal was covered by tax-exempt municipal bonds the county issued in 1998 to be repaid by passenger facility charges (PFC). Another \$299 million came directly from PFC revenues while another \$164 million came from federal and state grants.⁷⁸
- Continental Airlines opened its Global Gateway at Newark Liberty International Airport in 2001. Of the total cost of \$1.4 billion, \$730 million was linked to tax-exempt bonds issued for Continental through

⁷⁸ Paul Egan, *Detroit Metro Midfield Terminal: Taxpayers Won't Foot \$1.2 Billion Bill for Facility*, Detroit News, Feb. 17, 2002.

the New Jersey Economic Development Authority, which Continental is paying over 30 years.⁷⁹

- The Maynard Jackson International Terminal at Delta's hub in Atlanta was built at a cost of \$1.4 billion, \$1 billion of which was funded through municipal bonds, with the rest funded by the airlines. The FAA provided a small amount of money for apron work, and the U.S. Transportation Security Administration (TSA) provided some grant money. The new terminal's primary tenant is Delta Air Lines and its SkyTeam partners.⁸⁰ This is particularly interesting because the Legacy Carriers' own consultant presents data showing that the proportion of connecting traffic to origin and destination ("O&D") traffic at Atlanta is greater than the proportion at Dubai International.⁸¹
- Terminal D in Dallas/Fort Worth opened in 2005 and currently houses American's international arrivals (and other carriers) coming into the Metroplex. The terminal was built at a cost of \$1.2 billion through Dallas/Fort Worth International Airport's discretionary funds.⁸² The Legacy Carriers' consultant also presents data showing that the proportion of connecting traffic to O&D traffic at Dallas/Fort Worth is greater than the proportion at Dubai International.⁸³

It also is well established in the United States that it is not unfair to recoup the costs of a terminal built primarily for one airline through charges that are collected from all airlines. In 1997, for example, DOT rejected a complaint by various carriers that the rates and charges at Miami International Airport were not fair and reasonable because they included the cost of the then-new A/D Concourse, which was for the exclusive use of Miami's hub carrier, American Airlines. DOT ruled that the cost of new facilities built for a hub airline—facilities that are not available for use by others—can still be reflected in fees charged to

⁷⁹ Port Authority of New York and New Jersey, *Newark Liberty International Airport Airline Competition Plan Update* (2011), available at <http://www.panynj.gov/airports/pdf/ewr-competition-plan-update-march-2011.pdf>.

⁸⁰ Kelly Yamanouchi, *The New International Terminal: What You Need to Know*, Atlanta Journal-Constitution (June 14, 2012, 10:22 PM), <http://www.ajc.com/news/travel/the-new-international-terminal-what-you-need-to-know/nQTjm/>.

⁸¹ Kasper Study at 17 ex.8.

⁸² Press Release, DFW International Airport, DFW International Airport to Open International Terminal D on July 23 (July 18, 2005), available at https://www.dfwairport.com/pressroom/Open_Terminal_D_July_23.pdf.

⁸³ Kasper Study at 17 ex.8.

others who do not use the new terminal.⁸⁴ Dedicated terminals for hub carriers and consolidated facilities among partner carriers are a common industry-wide practice. Global alliance carriers, particularly Star Alliance, actively engaged with airport operators to have their dedicated and exclusive terminal facilities across the world.⁸⁵

The Legacy Carriers also make the ridiculous suggestion that it is somehow improper and unfair for airports (like Dubai International) to invest funds to expand capacity in excess of what is needed to serve the local population. There is no such prohibition on airport investment in the Open Skies Agreement. In fact, many hub airports invest and develop infrastructure to handle more passengers than the local population would otherwise justify. Delta's hub at Atlanta is a prime example. Atlanta Hartsfield International is far larger than the local population warrants. Similarly, Amsterdam's massive and highly efficient Schiphol Airport far exceeds the needs of the Dutch population, let alone that of Amsterdam.

Aside from the general infrastructure question, there is a second, equally fatal flaw in the Anderson/Kasper analysis: the manner in which Compass Lexecon estimated the alleged shortfall of airport revenue compared to expenses. Compass Lexecon's own analysis starts with the recovery of operating expenses as demonstrated by Exhibit 4.⁸⁶ Compass Lexecon did not identify an alleged shortfall; Mr. Kasper created it. He added a hypothetical interest cost to the airport's operating cost. In fact, Dubai International never incurred the interest expense estimated by Compass Lexecon.

⁸⁴ Miami International Airport Rates Proceeding, Dkt. No. OST-96-1965, Order 97-3-26 (Department of Transportation Mar. 19, 1997).

⁸⁵ See *Connect and Transfer*, Star Alliance (last visited June 7, 2015), <http://www.staralliance.com/en/benefits/global-network/connect-and-transfer/>; see also Press Release, Star Alliance, Star Alliance Outlines Next Stage of "Move Under One Roof" at London Heathrow Airport (Apr. 6, 2009).

⁸⁶ Kasper Report at 25 ex.12.

Hypothetical costs do not show a subsidy, or even a shortfall. Consistent with principles in the SCM Agreement, the Government of Dubai and its agencies are free to provide infrastructure using any financial structure they choose.⁸⁷ Indeed, the folly of Mr. Kasper's imputations of interest is placed in high relief by the fact that U.S. airports have received tens of billions of dollars in FAA grants for airport infrastructure development, much of which is of benefit to the Legacy Carriers, and no interest is paid or imputed. U.S. airports also have received hundreds of millions of dollars in passenger facility charge authorizations on which no interest is paid or imputed.

The Government of Dubai has provided funding to its airport to develop the Dubai economy and promote Dubai as a center of travel, commerce, and investment, with all the spin-off benefits of economic growth, including an employment multiplier and a growing revenue-collection base. All users of the airport, including Legacy Carriers Delta and United, benefit from the airport infrastructure. It is general infrastructure, and would not be actionable even if the WTO SCM Agreement applied in this case.

The final WTO issue is the allegation that the imposition of a passenger fee on departing passengers, but not on connecting passengers, is a subsidy to Emirates, whose passengers comprise the largest proportion of all connecting passengers at the airport. There is no subsidy to Emirates. The program is not specific to Emirates, a necessary condition of establishing a subsidy under WTO principles.⁸⁸

All airlines are treated the same under the passenger fee policy: departing passengers on all airlines pay an identical passenger fee. Connecting

⁸⁷ Even if it were possible to attribute a subsidy to general infrastructure in the manner attempted—it is not—all airlines using the airport facility would benefit from it. Mr. Anderson and Mr. Kasper, focused exclusively on Terminal 3 and Concourse A, are silent concerning the same hypothetical interest costs incurred on Terminal 1 and the myriad other airport facilities that benefit all other airlines exercising landing rights at Dubai International.

⁸⁸ SCM Agreement art. 1.2.

passengers, regardless of airline, do not pay. The Legacy Carriers argue that this program is “specific” to Emirates. They base this conclusion on the fact that a very large proportion of connecting passengers at Dubai International are Emirates passengers. This, of course, simply reflects the fact that Emirates operates a hub at the airport, while other airlines do not.

The Legacy Carriers ignore that a similar pattern prevails at many other airports. Major Asian hubs such as Bangkok and Kuala Lumpur exempt transfer passengers from passenger service charges. Passengers transferring at airports in the United Kingdom, Hong Kong, and Taipei are exempted from airport or air passenger taxes.⁸⁹ The exemption at London Heathrow is particularly telling. Under the Legacy Carriers’ baseless legal theory, Virgin Atlantic, forty-nine percent owned by Delta, impermissibly receives a subsidy, and Delta passengers who connect to Virgin Atlantic at Heathrow unjustly benefit.

The Legacy Carriers’ argument would require hub airports to impose passenger fees on connecting passengers. To do otherwise would always grant a subsidy to a hub operator, under the Legacy Carriers’ logic—simple mathematics shows that the hub operator will have the largest proportion of connecting flights. That is the necessary consequence of hub operations. This would be an absurd result, at variance with the practice of airports worldwide, and demonstrates the contortions of the Legacy Carriers’ logic.

The Legacy Carriers seek to demonstrate a subsidy by arguing under the wrong law, ignore the consistent, non-discriminatory application of Dubai International airport user fee policy to all airlines, and then advance an interpretation of a standard provision of U.S. Open Skies agreements that (1) is inconsistent with common global user fee practice, (2) would, if applied, lead to a subsidy finding whenever a hub airport does not charge passenger fees on

⁸⁹ International Air Transport Association, *Airport, ATC and Fuel Charges Monitor* (2014–15 ed. 2015), available at <http://www.iata.org/publications/Pages/aeronautics-charges-monitor.aspx>.

connecting passengers, and (3) implies that the United States is in violation of its own international obligations. They have failed to make the case.

E. The Legacy Carriers' labor law "subsidy" allegation is false.

In their White Paper, the Legacy Carriers allege that Emirates derives an artificial cost advantage from various labor laws and policies.⁹⁰ It is unclear whether the Legacy Carriers view such practices as a "subsidy," or as part of a separate, unspecified category of other unfair practices; the White Paper's discussion at this point is muddled. Regardless, the allegation collapses upon inspection. The Legacy Carriers fail to advance a coherent legal theory to support the claim, fail to offer any defensible means to quantify the supposed subsidy, and ignore the fact that Emirates has been independently recognized as one of the leading employers in the world.⁹¹ Raymond Benjamin, the Secretary General of the International Civil Aviation Organization, recently observed that the Legacy Carriers' labor subsidy claim is wholly without merit because "[y]ou cannot force an airline to have a union in other countries."⁹²

1. The Legacy Carriers fail to advance a coherent legal basis to support their allegation.

The Open Skies Agreement does not deal with labor practices, nor does the WTO.⁹³ Such issues are the province of the International Labor Organization

⁹⁰ White Paper at 37.

⁹¹ For example, LinkedIn's 2014 list of the 100 "most sought-after employers in the World based on billions of interactions from LinkedIn's 300M+ members" ranked Emirates 52nd. *The World's 100 Most InDemand Employers: 2014*, LinkedIn (2014), <https://www.linkedin.com/indemand/global/2014>.

⁹² Gulf News, *Airline Subsidy Spat Won't Be Diplomatic Issue, Says Minister of Economy*, Yahoo Maktoob News, May 12, 2015, available at <https://en-maktoob.news.yahoo.com/airline-subsidy-spat-won-t-diplomatic-issue-says-045535293--finance.html>.

⁹³ While Article 17 *bis* of the U.S.-EU Open Skies Agreement contains an additional provision recognizing "the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards," this provision is unique to the agreement with the EU and has not been included in any other Open Skies agreement, including the agreement with the UAE. Whatever the meaning of Article 17 *bis*, the absence of any labor language in the U.S.-UAE Open Skies Agreement must be given meaning. See, e.g., Appellate Body Report, *Japan – Taxes on Alcoholic Beverages [Japan – Alcoholic Beverages II]* 18, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

(“ILO”), which has promulgated various international conventions. Moreover, as discussed in Section II.A, the WTO agreement on services—the GATS—does not even apply to air transport services and, in any event, does not include a single provision on labor rights. And the WTO SCM Agreement, on which the Legacy Carriers erroneously rely as a source of applicable subsidy definitions and rules, neither applies to services trade nor even contemplates “subsidy” claims based on labor cost advantages.⁹⁴ As WTO Members have long recognized, treating labor practices as “subsidies” is a bottomless and standardless pit.

In its quest for legal support, the White Paper casts Section 301 of the U.S. Trade Act of 1974 as a basis for interpreting the Open Skies Agreement.⁹⁵ Section 301 is a statement of unilateral U.S. policy that is not binding on any foreign country, reliance on which in this context would itself violate the Open Skies Agreement and the (non-applicable) rules of the WTO.⁹⁶

The Open Skies Agreement offers no textual or contextual basis for seeking to apply Section 301. Under Article 31 of the Vienna Convention, self-serving unilateral statements by one Party do not provide a contextual basis for interpretation of a treaty. As the International Law Commission stated, “[T]he principle on which [Article 31(2) of the Vienna Convention] is based is that a

⁹⁴ Differences in national labor law practices do not involve a government financial contribution under SCM Agreement Article 1, and as long as such laws are nation-wide in scope, would not be specific to an industry or group of industries as required by SCM Agreement Article 2. The Legacy Carriers appear to be confusing any government measure that may confer an alleged benefit with a “subsidy,” but as the WTO Appellate Body made clear in *US – Softwood Lumber IV*, “not all government measures capable to conferring benefits would necessarily fall within Article 1.1(a). If that were the case, there would be no need for Article 1.1(a), because all government measures conferring benefits, per se, would be subsidies.” Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* ¶ 52 n.35, WT/DS257/AB/R (Jan. 19, 2004).

⁹⁵ White Paper at 36 n.159. The cite to the U.S. Code by the White Paper is to one of a series of provisions collectively known as Section 301.

⁹⁶ A WTO Panel has determined that unilateral U.S. Section 301 actions that have no basis in international law or the WTO Agreements are specifically prohibited by the WTO Dispute Settlement Understanding. See Panel Report, *United States – Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

unilateral document cannot be regarded as forming part of the context . . . unless not only was it made in connexion with the conclusion of the treaty, but its relation to the treaty was accepted in the same manner by the other parties . . .”⁹⁷ The Legacy Carriers have yet to produce any evidence that the UAE authorities accepted Section 301 as part of Open Skies, and cannot do so, because no such evidence exists.

Invoking internationally recognized labor rights would be, at best, a double-edged sword for the United States, which has signed only a handful of the 200-plus ILO Conventions and whose labor laws deviate from ILO standards in numerous respects. While 140-plus countries have ratified all eight of the core ILO conventions, the United States has ratified only two.⁹⁸ The U.S. refusal to ratify ILO conventions is not an accident. Key aspects of U.S. federal and state labor practices diverge from ILO rules, particularly regarding the right of association, such as striker replacement and right-to-work laws; limits on union organizing; the exclusion of supervisors, public employees and independent contractors from National Labor Relations Act (NLRA) protections; the ability of U.S. employers to actively oppose union organizing campaigns; U.S. limits on the right to strike, including restrictions on primary and secondary boycotts; restrictions on public employee unions; the prohibition of “hot cargo” agreements (the right of workers to refuse to handle goods from a struck plant); restrictions on the use of union funds for political purposes; failure to ensure equal remuneration for equal work under the ILO’s “comparable worth” standard; and the Landrum-Griffin Act’s detailed regulation of union election procedures.

In short, the Legacy Carriers’ call for a new U.S. policy of lashing out under Section 301 to impose trade restrictions on U.S. trading partners or to restrict aviation agreements in response to alleged deviations from international

⁹⁷ *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, [1966] 67 Yearbook of the International Law Commission 221 ¶ 13, U.N. Doc A/CN.4/SER/A/1966/Add.1.

⁹⁸ The UAE has ratified six.

labor standards, asks either that Congress make fundamental changes in U.S. labor laws to comply with ILO standards, or that the United States expose its exporters to protectionist restrictions on U.S. goods, services, and farm exports by foreign countries who will follow the U.S. precedent they seek.⁹⁹ This would be a sharp departure from the past. The United States has never agreed that differences in comparative labor law structures can give rise to a “subsidy” under international law, in part because this would expose U.S. exporters to countervailing duties as a consequence of U.S. refusal to adopt a more rigid European-style labor regime.¹⁰⁰

2. The Legacy Carriers are unable to quantify any alleged labor advantage.

The White Paper makes a sophomoric attempt to quantify the alleged economic benefit derived from a labor “subsidy.” The Legacy Carriers did not even bother to conduct a detailed study of the labor issues about which they make allegations—instead the White Paper simply pastes together anecdotes and asserts figures drawn from unrelated analyses. The centerpiece of this is the White Paper’s reliance on a study by Stephen Jarrell and T.D. Stanley, cited as demonstrating that the gap between union and non-union wages is 11 percent.¹⁰¹ The White Paper applies this figure to the annual labor costs of the Gulf Carriers, and claims that an 11 percent reduction in wage costs is a conservative measure of a supposed government-conferred advantage.¹⁰²

⁹⁹ For this reason, Congress included worker rights violations in Section 301(b), where action by the United States Trade Representative is “discretionary,” rather than in Section 301(a), where action is mandatory. Some level of judgment is plainly required in order to determine whether to launch a trade war over worker rights, and particularly when the United States is clearly vulnerable to reciprocal actions by its trading partners. These concerns were raised in a 1987 Senate Finance Committee hearing on Worker Rights and Trade Adjustment Assistance Programs. In response, Representative Don Pease (D-Ohio), the lead House sponsor of the provision, testified that it gave the President discretion, but not a duty, to raise Section 301 claims.

¹⁰⁰ The ILO Conventions were heavily influenced by European governments and unions as part of the ILO’s tripartite drafting process.

¹⁰¹ White Paper at 36.

¹⁰² *Id.*

Given the Legacy Carriers' unquestioning adoption of these figures, one would expect the Jarrell and Stanley paper to be an in-depth, current study of aviation wage rates and the effect of unions. It is not. In fact, this paper is a 25-year-old study of industrial wages solely in the United States for the time period 1967–1979. It has no bearing on aviation, on services industries, or on the Middle East, and contains *no* data that are even within two decades of the current century. The Jarrell and Stanley paper provided the Legacy Carriers with nothing more than a convenient number to use in a slipshod analysis, and they used it.

The White Paper's comparison of the proportion of total cost accounted for by labor costs among different airlines does not support its "subsidy" argument. This crude comparison is driven by many factors that have nothing to do with collective bargaining, including superior labor productivity, differences in aircraft leasing costs, adoption of advanced technologies, and more. The White Paper made no attempt to sort these factors out.

Completely missing from the White Paper analysis is any attempt to draw comparisons to the labor posture of the U.S. airlines. This is no surprise: some of the most successful U.S. airlines are non-union. Indeed, Delta has bragged to investors that its successful anti-union campaign was the main reason its workforce was eight-seven percent non-union in 2011.¹⁰³ Because of these efforts by management, apart from pilots and flight dispatchers, Delta's workforce is largely non-union.¹⁰⁴ After the Delta-Northwest Airlines merger, Delta CEO Richard Anderson emphasized that he "was determined to keep most

¹⁰³ See Mike Esterl, *Labor Board Broadens Delta Probe*, Wall Street Journal, June 6, 2011, available at <http://www.wsj.com/articles/SB10001424052702304474804576369762641111264>; *Delta Air Lines Form 10-K Annual Report* (filed with U.S. Sec. & Exch. Comm'n Feb. 11, 2015), available at EDGAROnline. See also the abysmal treatment of United Airlines' contractor personnel in New York as reported in Michael Powell, *Hauling Bags and Cleaning Planes for Little Pay and No Vacations of Their Own*, New York Times, Jan. 15, 2014, at A21, available at http://www.nytimes.com/2014/01/16/nyregion/hauling-bags-and-cleaning-planes-for-little-pay-and-no-vacations-of-their-own.html?_r=0.

¹⁰⁴ Jim Zarroli, *Delta Employees to Vote on Unionizing*, National Public Radio (Nov. 2, 2010, 4:00 AM), <http://www.npr.org/2010/11/02/130993670/delta-employees-to-vote-on-unionizing>.

of Delta non-union to maintain the direct relationship with employees.”¹⁰⁵ As a result, 17,000 Northwest Airlines employees *lost* their union representation.¹⁰⁶

3. Emirates is an employer with exemplary employee benefits.

While the White Paper relies on vague, pejorative allegations about labor practices in the UAE, it fails to focus on what one would assume is the critical issue in a serious analysis: the actual employers at issue. Emirates was ranked 52nd on LinkedIn’s 2014 list of the World’s 100 Most InDemand Employers. Not one of the Legacy Carriers was even ranked. Emirates complies rigorously with applicable labor laws, and has no restrictions on union membership for employees in the countries to which it operates from Dubai. To this point, Emirates negotiates with unions in seventeen countries.¹⁰⁷ Emirates’ employees’ salary, treatment, and perks are extremely competitive within the airline industry and in line with the customer service excellence that Emirates strives to provide.

Emirates provides benefits for staff, both in air and on the ground, which meet or exceed industry norms. Unlike the Legacy Carriers’ pension plans for their employees, which were cast off in Chapter 11 restructurings, Emirates has not walked away from its benefits obligations nor abandoned its retirees. For all UAE-based employees, Emirates operates a fully funded provident fund scheme for pilots, engineers, and management and has fully accrued for statutory end-of-service benefits for all other employees. In stark contrast, according to the 2012 Pension Benefit Guaranty Corporation (PBGC) Databook—the most recent

¹⁰⁵ Shawn Tully, *Delta Takes Off*, *Fortune* (Feb. 27, 2014, 11:29 AM), <http://fortune.com/2014/02/27/delta-takes-off/>.

¹⁰⁶ *Fly the Union-Friendly Skies, if You Can Find Them*, Northwest Labor Press (Oct. 29, 2012), <http://nwlaborpress.org/2012/10/fly-the-union-friendly-skies/>.

¹⁰⁷ Argentina, Australia, Austria, Brazil, Cote d’Ivoire, Denmark, France, Greece, Italy, Japan, Kenya, New Zealand, Nigeria, Norway, Portugal, Sweden, and Uganda.

available—the U.S. air transportation industry accounted for fully thirty percent of all pension claims on the PBGC from 1975 to 2012.¹⁰⁸

Emirates provides competitive salaries in the aviation industry, which allows it to attract and retain staff from across the world. Since inception, Emirates has distributed close to one billion dollars in profits to employees, both those based in the UAE and internationally, as part of its employee profit share program. Figure I-5 shows the amount of Emirates' profits shared with employees since 1997, the year the employee profit sharing plan was implemented.

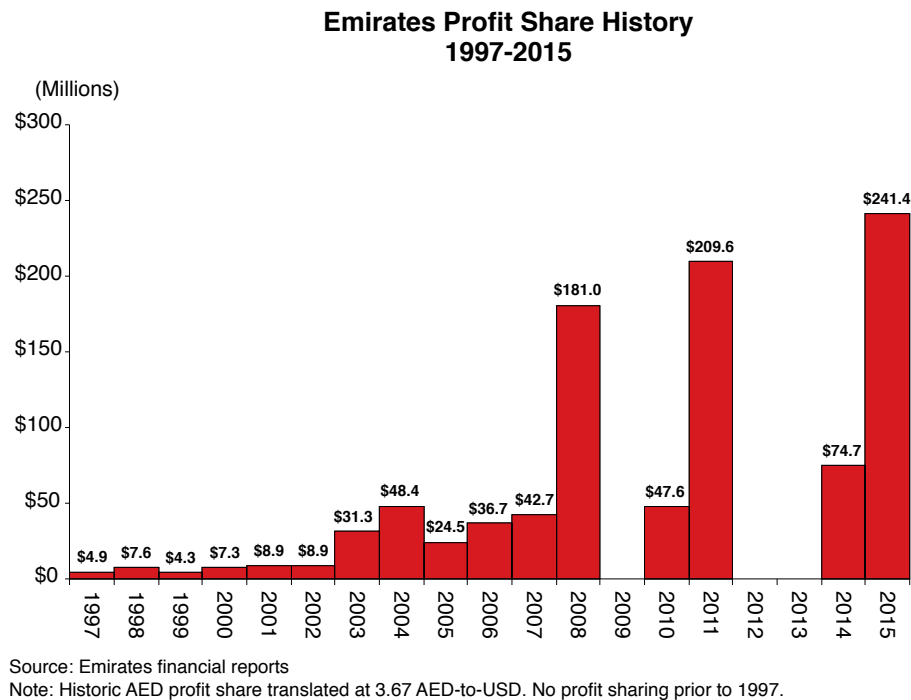


Figure I-5

At least 41,000 Emirates staff shared in the profit share plan for the financial year ending March 31, 2015. Emirates' attrition rate is low—indeed,

¹⁰⁸ Pension Benefit Guaranty Corporation, 2012 Pension Insurance Data Tables tbl. S-19 (2012), <http://www.pbpc.gov/documents/2012-Data-Book-Tables.pdf>.

Emirates is honored that many of its employees make the airline their careers. Over one-fifth of the Emirates team has worked for Emirates for ten years or more. On average, the Emirates Group receives about 850 job applications for each opening, regardless of position. In 2013–14 alone, more than 430,000 people from around the world applied to work for Emirates.

The White Paper’s allegations grapple with none of these facts. In sum, the allegation that Emirates somehow enjoys a labor subsidy under Open Skies lacks both legal and factual support.

F. The Legacy Carriers’ additional allegations regarding Emirates are false and indicative of the sloppiness that characterizes their research.

In several parts of their White Paper, the Legacy Carriers allege that broader government industrial policies in the Gulf have granted Emirates and others “artificial cost advantages and other benefits.” The Legacy Carriers appear to have spent little effort in developing these allegations, appear to have relied on poor research, and evidently do not advance them seriously. In each instance, the blanket allegations can quickly be demonstrated to be false, premised on a legal theory that is contradicted by the actual law, or based on a fundamental misunderstanding of the facts and sloppy research. Each of the remaining allegations is addressed below to make clear that not one survives examination.

Independent Regulatory Oversight: The Legacy Carriers claim that Gulf Carriers receive “other significant, artificial cost advantages” because “the Gulf Carriers are not subject to independent regulatory oversight.”¹⁰⁹ This claim is false and outrageous on its face. It is simply unacceptable to imply there has been any compromise of safety standards by Emirates or any of the aviation authorities in the UAE. It is tantamount to saying that all state-owned airlines are unfairly cost-advantaged or unsafe because the civil aviation regulator and the

¹⁰⁹ White Paper at 36, 39.

airline are “the same” and, carrying this illogic further, collude nefariously to cut corners on safety in order to enhance profits. Indeed, such logic would necessarily and falsely smear many of the Legacy Carriers’ airline partners which have significant or controlling government ownership, such as Air New Zealand, Air China, China Eastern, China Southern, and South African Airways. Moreover, the position advanced by the Legacy Carriers contradicts the standards for safety oversight adopted by the International Civil Aviation Organization (“ICAO”) and the formal determination by the Federal Aviation Administration (FAA) placing the UAE in “Category 1” of its “International Aviation Safety Assessment” (IASA) program, a determination that means “the country’s civil aviation authority licenses and oversees air carriers in accordance with ICAO aviation safety standards.”¹¹⁰

The UAE General Civil Aviation Authority (GCAA) is an autonomous, federal body, established to oversee and regulate civil aviation in the UAE. It was created in 1996 by Federal Cabinet Decree (Law 4) to regulate civil aviation and provide designated aviation services with emphasis on safety and security and to strengthen the aviation industry within the UAE and its upper airspace. It serves the same role as the FAA in the United States, the European Aviation Safety Agency (EASA) in the EU, and numerous Civil Aviation Authorities throughout the world. The GCAA has promulgated comprehensive Civil Aviation Regulations (CARs) which are largely based on the European civil aviation regulations and the U.S. federal aviation regulations.¹¹¹ The CARs contain comprehensive requirements involving every facet of civil aviation operation, maintenance, training, and qualifications. The GCAA also issues Civil Aviation Advisory Publications (CAAPs), which provide information and guidance

¹¹⁰ Clarification Concerning Examination of Foreign Air Carriers’ Request for Expanded Economic Authority, 60 Fed. Reg. 55408 (Department of Transportation Oct. 31, 1995); see also Federal Aviation Administration, *International Aviation Safety Assessment (IASA) Program*, available at http://www.faa.gov/about/initiatives/iasa/media/FAA_Initiatives_IASA.pdf.

¹¹¹ The CARs are available at *Civil Aviation Regulations*, UAE General Civil Aviation Authority, <https://www.gcaa.gov.ae/en/ePublication/Pages/CARs.aspx?CertID=CARs> (last visited June 7, 2015).

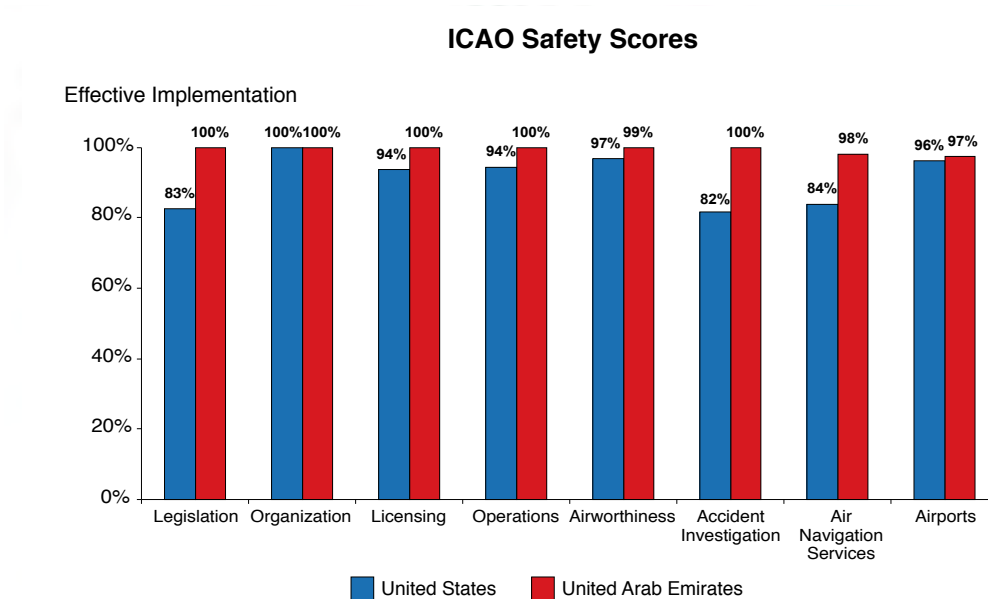
material, as well as GCAA requirements, to operators of UAE registered aircraft and interested organizations and individuals.¹¹² Among many other publications and information, the GCAA also has a system for airworthiness notices and information bulletins, similar to those processes used by the FAA and EASA. The GCAA is as independent, sophisticated, and safety-focused as any other Civil Aviation Authority, and UAE airlines are as carefully regulated by the GCAA as any of the world's airlines are regulated by their home regulatory bodies.¹¹³

The FAA has determined that the UAE is a Category 1 country (meets ICAO standards) under FAA's IASA Program. ICAO confirms as much. Neither ICAO nor the FAA deems state ownership of an airline a disqualifying factor in judging a foreign country's compliance with safety oversight standards. Moreover, in ICAO's most recent audit of the GCAA, the GCAA achieved an impressive score of approximately 99% in terms of implementation across all eight categories (legislation, organization, licensing, operations, airworthiness, accident investigation, air navigation services, aerodromes), *ranking the GCAA number one in the world among all civil aviation oversight authorities*.¹¹⁴ In fact, comparing the UAE's implementation of ICAO standards (2015 ICAO safety audit) against the United States' implementation (2007 ICAO audit, most recently posted on the ICAO website), the UAE achieved a greater level of implementation in seven of the eight categories and tied the U.S. in the eighth category (the U.S. and UAE both achieved 100% regarding "organization"), as shown in Figure I-6.

¹¹² The CAAPs are available at *Civil Aviation Advisory Publication (CAAP)*, UAE General Civil Aviation Authority, <https://www.gcaa.gov.ae/en/ePublication/Pages/CAAP.aspx> (last visited June 7, 2015). See generally UAE General Civil Aviation Authority, <https://www.gcaa.gov.ae/en/pages/default.aspx> (last visited June 7, 2015).

¹¹³ In addition to the federal GCAA, the State of Dubai has a Civil Aviation Authority (DCAA) which engages in various regulatory and policy activities, including oversight of the Dubai airports.

¹¹⁴ See *UAE Ranks Number 1 in the World in Compliance*, UAE General Civil Aviation Authority (Feb. 18, 2015), <https://www.gcaa.gov.ae/En/Pages/NewsDetails.aspx?NewsID=397>.



Source: ICAO Flight Safety Information Exchange (FSIX), 2007 audit period, UAE progress validation period, 2015.

Figure I-6

When the U.S. Department of Transportation granted the joint request of JetBlue and Emirates for a statement of authorization, DOT noted “that JetBlue has conducted a code-share safety audit of Emirates under the Department’s Code-Share Safety Audit Program, and the Federal Aviation Administration has advised the Department that [it] has reviewed the relevant audit report and found it to be acceptable.”¹¹⁵ The allegation that Emirates benefits from lax safety regulation by a related party is false, offensive, slanderous, and defamatory.

General Sales Agents in the UAE: The Legacy Carriers assert that because national laws in the Gulf States require foreign airlines to appoint General Sales Agents (“GSAs”) to carry out commercial activities,¹¹⁶ this is a

¹¹⁵ Action on Application, Dkt. No. DOT-OST-2013-0103, at 1 n.3 (Department of Transportation July 24, 2013).

¹¹⁶ The Legacy Carriers state that the GSA requirement “increases ticket costs by at least three percent.” White Paper at 38. This statement is easily shown to be false, as the Legacy Carriers do not appear to have conducted even basic research into GSAs in Dubai. Contrary to their assertion, there are several competing companies providing services, they can charge different rates (three percent is not a requirement), and they can provide different services.

discriminatory denial of national treatment.¹¹⁷ However, the Open Skies Agreement—the applicable accord governing what is permissible—does not provide any requirement for national treatment in this context. In fact, Article 8.2 of the Open Skies Agreement states that airlines shall be entitled to operate in the other Party’s territory, “in accordance with the laws and regulations of the other Party.” National treatment obligations, when they are imposed on services, are imposed by an affirmative commitment made by a country in the context of the GATS. However, as described more fully in Section II.A of this submission, the GATS specifically does not apply to most aviation services,¹¹⁸ and the Legacy Carriers have not even attempted to claim that a general requirement for General Sales Agents somehow constitutes a subsidy.

More fundamentally, it is ironic that the Legacy Carriers would even suggest an allegation premised on a supposed violation of the national treatment principle. Delta, American, and United benefit directly from what is typically considered one of the largest and most profitable departures from national treatment in aviation: the U.S. cabotage rules. If national treatment were actually a requirement, its denial in the context of the cabotage rules in the United States would be a blatant violation of the principle, a fact the Legacy Carriers selectively ignore.

Finally, GSA requirements are common throughout the world and are simply a standard way of doing business in certain regions. The Legacy Carriers conveniently neglect to mention that there are no aviation specific laws applicable to airline companies in Dubai. The GSA requirement is a *general* requirement of doing business in Dubai. Under the corporate establishment laws foreign companies have two choices in setting up a presence in Dubai: (1)

¹¹⁷ White Paper at 38.

¹¹⁸ See *infra* Section III.A; GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Annex on Air Transport Services, 1869 U.N.T.S. 183 [hereinafter GATS Annex on Air Transport Services].

set up a company which requires a local partner and a trade license,¹¹⁹ or (2) choose to offer its services for sale in the country through an agent.¹²⁰ Emirates abides by similar rules in other places where it does business. For example, Emirates has appointed a GSA in order to sell tickets in Abu Dhabi. It is also a requirement to appoint a GSA in countries such as Afghanistan, Bahrain, Kuwait, Oman, Qatar, and Saudi Arabia.

Alleged Income Tax “Exemption”: The Legacy Carriers allege that tax exemptions provide an unfair advantage to the Gulf Carriers relative to U.S. carriers.¹²¹ First, not a single requirement under an Open Skies agreement that the United States has negotiated specifies that competitors to the Legacy Carriers must be subject to a minimum corporate income tax or other tax regimes. As with any sovereign government, including the U.S., the UAE is free to set tax policy as it wishes, consistent with its domestic laws and the international commitments it has made to other nations. The Legacy Carriers do not allege that there is any different obligation, legal or otherwise.

The White Paper characterizes the UAE tax regime for domestic company earnings as a government “decision not to enforce the law with respect to Emirates,”¹²² but in fact Emirates’ tax-free status in Dubai is granted on a non-discriminatory basis. Taxes are currently imposed by the Dubai Government only on oil- and gas-producing companies and on branches of foreign banks.¹²³ At the UAE Federal Government-level, no corporate income taxes whatsoever are imposed on any business sector. This application of corporate taxation is not a special benefit to Emirates, as it is the approach taken to all businesses in Dubai, except as detailed above. The implication that Emirates is somehow

¹¹⁹ Federal Law No. (2) of 2015 (Commercial Companies Law) (UAE).

¹²⁰ Federal Law No. (18) of 1981 (Commercial Agencies Law) (UAE).

¹²¹ White Paper at 39.

¹²² *Id.* at 39.

¹²³ *Id.*

gaming the system through its tax-exempt status is absurd, as the UAE has every right to choose its own tax policy and apply different approaches to different business sectors. Delta, United, and their respective joint venture partners enjoy the same tax-free benefits as Emirates and other enterprises for their operations in the UAE.

Based on the erroneous premise that Emirates is specially exempted from tax law enforcement, the White Paper calculates a supposedly unfair benefit of \$523 million in a single fiscal year, using the tax rates set forth in Exhibit 20 of the Anderson Report.¹²⁴ However, the calculated “benefit” on Exhibit 20 is a *complete fiction*. The reality is that Dubai does not impose corporate taxes on businesses in the UAE, except for the specific sectors mentioned above. Therefore, the true tax calculation rate would be zero percent, for Emirates, for Delta and United, and for all other businesses outside of the two specific exceptions as detailed above.

Alleged Exemption from Competition Laws: The Legacy Carriers allege that the Gulf countries specially exempt government-owned entities and the transportation sector from domestic competition laws, amounting to “unfair” advantages to the Gulf Carriers. The Legacy Carriers are well aware, however, that there is no provision in the Open Skies Agreement that a specific domestic competition law or policy is required of either sovereign government as a precondition or obligation of the Agreement. Competition policy takes many different shapes and forms across the world, and the United States has not challenged the prerogative of foreign governments to formulate their own competition policies.¹²⁵ The transportation sector is commonly exempted from

¹²⁴ See Anderson Report ex.20.

¹²⁵ For example, even when the United States agreed with the European Union to foster cooperation between their respective competition authorities, the relevant Annex to the U.S.-EU Air Transport Agreement provides that the Annex itself “and all activities undertaken by a Participant pursuant to it, are . . . intended to be implemented *only to the extent consistent with all laws, regulations, and practices applicable to that Participant.*” Air Transport Agreement Between the U.S. and the European Community

competition laws.¹²⁶ For example, Canada's competition law framework permits the Minister of Transport to approve transportation transactions found to be in the public interest even if they raise competition law concerns,¹²⁷ and China retains sector-specific regulation of transport so the Civil Aviation Administration effectively trumps competition law.¹²⁸ As with its tax policy, it is well-recognized as a matter of international law that the UAE's competition law policy is a matter for the UAE Government to decide as a sovereign State. That said, Emirates operates many flights to the European Union, the United States, and other countries that apply their competition laws to activities outside of their borders that affect competition in those markets.

Equally important, and a source of no little irony, the Legacy Carriers omit any mention of the fact that they have been granted highly preferential antitrust immunity under U.S. law for their alliances.¹²⁹ If there was a requirement in the Open Skies Agreement for domestic competition law and policy to apply normally to air transport, the Legacy Carriers' antitrust immunity, granted by DOT (not the Department of Justice or Federal Trade Commission), would constitute a major violation of such an obligation.

Miscellaneous Allegations and Passing Criticisms: The Legacy Carriers' White Paper makes additional spurious allegations in passing, addressed below:

Allegation that several of Emirates' financial statements are unpublished: The White Paper asserts that Emirates did not release public

and its Member States annex 2, art. 6.2, Apr. 25 & 30, 2007, *as amended* by the Protocol Between the U.S. and the European Community and its Member States, Mar. 25, 2010 (emphasis added).

¹²⁶ R. Shyam Khemani, *Application of Competition Law: Exemptions and Exceptions* 11 (U.N. Conference on Trade & Dev. 2002).

¹²⁷ See Canada Transportation Act, R.S.C. 1996, c. 10 §§ 53.1–2.

¹²⁸ See, e.g., Xueguo Wen, *Market Dominance by China's Public Utility Enterprises*, 75 *Antitrust Law Journal* 151 (2008).

¹²⁹ See *infra* Section IV.C.

financial statements for the first sixteen years of its operation.¹³⁰ This claim is patently false. Emirates' financial statements are, and have been, public for years. The inability of the Legacy Carriers' consultants to carry out the needed work to retrieve them does not make them "unpublished." Emirates has now made available on its website each of its previously published financial statements dating back to the twelve-month period commencing April 1, 1993,¹³¹ (well before Emirates commenced service to the United States in 2004 and also before the United States and the UAE negotiated the Open Skies Agreement). Emirates has publicly released its financial statements, voluntarily, since the financial year commencing on April 1, 1993. This first public financial report contained audited financial information for both that financial year as well as the financial year commencing on April 1, 1992, in accordance with applicable accounting standards. It also included summaries of key financial and operational information, including details of shareholder's funds, revenue, operating income and net income, for each of the financial years dating back to April 1, 1989. Prior to 1993, Emirates maintained audited financial accounts in accordance with applicable accounting standards. Emirates voluntarily decided in 1994 to disclose publicly its audited financial statements in the interests of full financial transparency and in order to assist with it accessing global financing markets for the continuing growth of its business.

Allegation that Emirates misstates the facts and misstates the amount of capital injections it has received: The White Paper implies that Emirates has lied about the capital injections it has received over the years and that Emirates has attempted to hide the Dubai Government's supply of capital.¹³² The reality demonstrates precisely the opposite. Emirates has been fully transparent about its capital injections, with the amount of capital received over

¹³⁰ White Paper at 35.

¹³¹ *Annual Reports*, Emirates, <http://www.emirates.com/ae/english/about/annual-reports.aspx> (last visited June 7, 2015).

¹³² White Paper at 35, 36.

the years clearly and accurately set forth in each of its published audited financial accounts since March 31, 1994.¹³³ Some of these capital injections were received prior to the publication of the first financial report in 1994, but all capital, regardless of when it was received, has been recorded accurately and fully at all times prior to and after that date and have been publically available since 1994. The total of \$218 million that Emirates has received from the Dubai Government in capital injections is miniscule compared to the size of its business and is significantly smaller than the capital amounts commanded by each of the Legacy Carriers. It is also dwarfed by the dividends paid out to Emirates' shareholders over the same years. Up to and including its financial year ended March 31, 2015, Emirates has paid out US\$3.363 billion in dividends to the Government of Dubai (or to ICD after 2008).¹³⁴ A comparison of total dividends and capital injections is shown in Figure I-7. In fact, in some years when capital was provided, a dividend was paid that was multiple times the capital injection received.¹³⁵

¹³³ Based on review of Emirates' annual reports from 1993–94 to present. Emirates' annual reports are available at *Annual Report*, Emirates Group, <http://www.theemiratesgroup.com/english/facts-figures/annual-report.aspx>.

¹³⁴ *Id.*

¹³⁵ *Id.*

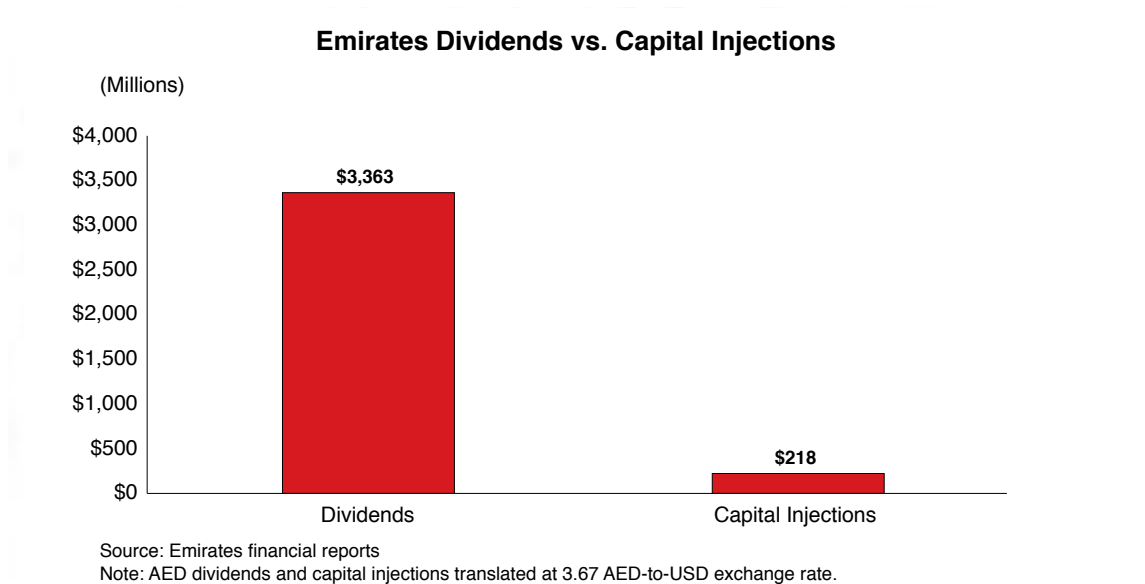


Figure I-7

Allegation of Emirates' status as a GRE: The Legacy Carriers argue that because the Government of Dubai allegedly classifies Emirates as a government-related entity (GRE), the government *may* have provided significant support to ensure Emirates' ability to continue as a going concern.¹³⁶ This allegation is pure speculation, with the Legacy Carriers conceding that "it is not clear whether the government has provided such support to Emirates."¹³⁷ Simply put, as detailed elsewhere in this response, no such support has been provided.

To the degree that Emirates is considered a GRE, it is by virtue of the fact that it is wholly owned by ICD, which in turn is wholly owned by the Government of Dubai. Emirates' publicly available, audited financial statements have confirmed Emirates' relationship with its shareholder in a transparent manner. And, Emirates' arm's-length financial dealings with its shareholder—whether in relation to the provision of equity, the payment of dividends, or any other

¹³⁶ White Paper at 34.

¹³⁷ White Paper at 34.

commercial transactions—have been addressed and explained elsewhere in this response. This allegation, which even the Legacy Carriers concede is speculative, is therefore baseless and without merit. It *is* demonstrably clear (as detailed in this paper) that Emirates has not received any such support, which would otherwise have been reflected in Emirates' financial statements.

Indeed, the statement from the Government of Dubai's Euro Medium Term Note Programme, quoted in the White Paper,¹³⁸ makes it clear that there is no blanket guarantee for GREs. What the Government of Dubai has stated is that any support provided as a shareholder to a GRE would be considered on a case-by-case basis only, as would presumably be the case for any other shareholder who owns a commercial enterprise. Notably, the Government of Dubai bond prospectus that the Legacy Carriers rely on as the basis for their speculation and insinuation specifically discloses the GREs to which support has been provided, and Emirates is not named among these.¹³⁹

The White Paper's false speculation about Emirates possibly having received support from the Government of Dubai is contradicted by Emirates' success in the marketplace and the financial markets. Emirates has a public and successful track record as an independent borrower, both with financial institutions and in public debt markets, without guarantees from its shareholder. As explained in Emirates' recent bond prospectus, dated February 1, 2013:

Emirates has raised a total of USD \$30.2 billion over a period covering approximately 16 years up to 30 September 2012 for financing aircraft and corporate finance requirements. This amount includes funds raised through traditional aircraft financing sources such as operating leases, European Union and United States

¹³⁸ White Paper at 34 & n.146.

¹³⁹ Government of Dubai, US\$5,000,000,000 Euro Medium Term Note Programme, Base Prospectus, Jan. 21, 2013, at 105 ("Dubai Financial Support Fund").

export credit agencies, and commercial asset-backed debt, as well as through other sources such as Islamic funding and equity from Japanese and German investors as part of cross-border leveraged leases. The diversity of Emirates' funding sources during the approximately 16-year period up to 30 September 2012, underscores Emirates' independent strength and perception in the financial markets: 42 per cent. from operating leases, 19 per cent. from commercial bank lending, 12 per cent. from European export credit agencies, 11 per cent. from debt capital market issuances, 11 per cent. from US Export-Import Bank guaranteed transactions and five per cent. from Islamic funding.¹⁴⁰

In sum, the depth and breadth of global investors willing to lend to Emirates in the absence of any guarantees from Emirates' shareholder or the Government of Dubai reflects the strength of Emirates' historical financial performance and the support of the investor community for Emirates' business plan and strategy.

Allegation that Emirates receives subsidies through customs duties tax exemption: The Legacy Carriers assert that Emirates' founding decree exempts it from payment of customs duties on imports of "planes, equipment spare parts, and other materials that are necessary for its operations or to be sold on its planes or distributed for the sake of advertisement."¹⁴¹ Emirates' founding decree does contain such a provision. But subsequent legislative developments, the specific text of the Open Skies Agreement, the Chicago Convention on International Civil Aviation, and real-world practice establish that the allegation that the exemption from customs duties is a "subsidy" is patently false. This allegation reflects a fundamental lack of understanding of Open Skies and international aviation policy by the Legacy Carriers' purported expert.

¹⁴⁰ Emirates US\$750,000,000 4.50 per cent. Notes due 2015, Prospectus, Feb. 1, 2013, at 79–80.

¹⁴¹ White Paper at 34.

The Dubai Government enacted Law No. (31) in 2008, which cancelled all tax and duty exemptions—including customs duties—granted in favor of public institutions subordinate to the Government of Dubai or private entities under any previous legislation, decision, or order.¹⁴² Emirates pays customs duties on all items that come landside from the airport into Dubai and the UAE, but not on items that remain airside at the airport and thus do not pass through customs into the Dubai and UAE economy (for instance, aircraft, engines, spare parts, food for on-board catering, duty free items). The exemption from duty on these “airside” items applies equally for all operators at the airport, including U.S. airlines. This exemption is consistent with the explicit exemption from customs duties and taxes in Article 9 of the Open Skies Agreement.¹⁴³ Moreover, similar exemptions apply at virtually all international airports, consistent with the exemption from “customs duty, inspection fees or similar national or local duties and charges” on “aircraft, fuel, lubricating oils, spare parts, regular equipment and aircraft stores” provided in Article 24 of the Chicago Convention on International Civil Aviation. In their zeal to allege subsidies, the Legacy Carriers overlook both international law and international practice that exempt from customs duties aircraft engaged in international aviation and other standard items that remain “airside” at airports.

¹⁴² Dubai Law No. (31) of 2008, art. 1.

¹⁴³ U.S.-UAE Open Skies Agreement art. 9.1 (“On arriving in the territory of one Party, aircraft operated in international air transportation by the designated airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts (including engines), aircraft stores . . . and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all . . . customs duties, excise fees, and similar fees and charges . . . provided that such equipment and supplies remain on board the aircraft.”).

II. The Legacy Carriers' case rests on the wrong legal standard for air transport services.

A. The WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") does *not* apply to services, much less air transport services.

The Legacy Carriers' entire White Paper rests on a fundamental and fatal legal error. Throughout the White Paper, the Legacy Carriers cite the WTO SCM Agreement as the operative set of rules for airline subsidy issues, "as it has been multilaterally agreed by all 100 WTO Members, including Qatar and the UAE."¹⁴⁴ However, the Legacy Carriers neglect to mention that the WTO SCM Agreement applies solely to *goods*, not *services*.¹⁴⁵ Because air transport is plainly a service, and *not* a good, the SCM Agreement is irrelevant and has no bearing on the interpretation or application of the Open Skies Agreement.¹⁴⁶ In short, the White Paper's protracted discussion of the SCM Agreement's alleged application to alleged Gulf Carrier subsidy programs is a long detour to nowhere and the CEO of Delta Air Lines has admitted as much.¹⁴⁷

In the WTO, services are governed by an entirely separate agreement, the General Agreement on Trade in Services (GATS), which expressly *excludes* air transport services. The GATS Annex on Air Transport Services specifically states that the agreement "shall not reduce or affect a Member's obligations under bilateral or multilateral [aviation] agreements."¹⁴⁸ It goes on to state that "[t]he Agreement . . . shall *not* apply to measures affecting: (a) traffic rights, however granted, or (b) services directly related to the exercise of traffic

¹⁴⁴ White Paper at 12.

¹⁴⁵ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14. The Annex lists the SCM Agreement under the category of "Multilateral Agreements on Trade in Goods."

¹⁴⁶ GATS Annex on Air Transport Services.

¹⁴⁷ Richard Anderson, CEO, Delta Air Lines, Delta Earnings Call (Dec. 11, 2013) ("If this was any other industry, we would have filed a WTO complaint."). Of course, were it another *service* industry, a WTO complaint under the SCM Agreement would be dismissed for the reasons discussed in this section.

¹⁴⁸ GATS Annex on Air Transport Services ¶ 1.

rights.”¹⁴⁹ As Professor Havel notes in his treatise, *Beyond Open Skies*, most countries have broadly interpreted these exclusions such that “almost all air service activity is excluded.”¹⁵⁰ Among these countries is the United States, which, at the urging of the Legacy Carriers, has strongly opposed the inclusion of air transport services in the WTO,¹⁵¹ free trade agreements, and other trade agreements.¹⁵² As a result, the GATS only applies to a very limited category of airline services, including repair and maintenance, selling and marketing, and computer reservation systems. The transportation of passengers and cargo is excluded from GATS rules and market access commitments.

Moreover, even if GATS applied to air transport services—which it does not—GATS does not include *any* rules on services subsidies, since these rules have yet to be negotiated. At the end of the Uruguay Round, the WTO Members, having failed to reach any consensus on services subsidy disciplines, deferred the issue to a new round of multilateral negotiations. In GATS Article XV, the WTO Members agreed “to enter into negotiations with a view of developing the multilateral disciplines to avoid such trade distortive effects [of subsidies].” Article XV resulted in no meaningful progress, and these future hopes have never come to fruition, as the WTO Members still have not agreed on subsidy rules for services. The chances of such WTO rules remain remote, since the Doha Round, which represented the logical venue for negotiating new multilateral rules, remains on life support and has been pronounced largely dead by most participants and observers.

¹⁴⁹ *Id.* ¶ 2 (emphasis added).

¹⁵⁰ Brian F. Havel, *Beyond Open Skies: A New Regime for International Aviation* 537 n.35 (2009).

¹⁵¹ Juan A. Marchetti & Petros C. Mavroidis, *The Genesis of the General Agreement on Trade in Services*, 22 *European Journal of International Law* 689, 713–19 (2011).

¹⁵² *Hearing on Whether International Airline Services Should Be Included in the General Agreement on Tariffs and Trade (GATT): Hearing Before the Subcommittee on Aviation of the House Committee on Public Works & Transportation*, 101st Cong. 24 (1989) (statement of Richard B. Self, former Deputy Assistant U.S. Trade Rep. and lead U.S. services negotiator) (“Industry officials have made themselves clear that they do not want trade rules to extend to this industry. . . . [Y]our committee should be aware that many countries, including some of our major trading partners, believe that civil aviation should be included in some form in the services understanding.”).

Despite their current attempts to cast air transport as simply another WTO-related trade dispute, the Legacy Carriers have always opposed bringing air transport services into GATS. To do so would require the United States to repeal (or defend in a WTO dispute settlement proceeding) longstanding and highly discriminatory U.S. restrictions on domestic air service¹⁵³ and airline ownership, the maintenance of which would represent clear-cut violations of GATS Article XVII. Similarly, a prohibition on “subsidies” in Open Skies agreements would require the United States to eliminate a host of federal and state subsidy programs and wean the Legacy Carriers off their longstanding dependence on extensive government benefits and bail-outs, as will be discussed in Section IV of this submission.

In short, the Legacy Carriers’ case is based on a series of legal fictions regarding (1) a WTO SCM Agreement that does not apply to any services, (2) a WTO GATS agreement that specifically excludes such airline services, and (3) the inability of the GATS negotiators to agree to rules on subsidies, so that such rules remain non-existent. Applying purported WTO industrial goods subsidy rules on a selective and unilateral basis to air transport services provided by the Gulf Carriers would be the height of legal and diplomatic hypocrisy—such actions would directly violate the diplomatic and international law commitments already made by the United States for a series of new aviation subsidy rules that were never agreed to by the United States and the UAE and that exist only in the imagination of the Legacy Carriers.

¹⁵³ If air services were covered by GATS, the national treatment principle would apply, meaning the United States could no longer ban cabotage. In addition, GATS’s most-favored nation (“MFN”) clause would create a major free-rider problem: U.S. inclusion of air services in its GATS schedule would require the grant to other GATS signatories of access to the U.S. aviation market without their having to make comparable concessions.

B. Air services between the United States and the UAE are governed by the Open Skies Agreement, which specifically prohibits unilateral freezes on the landing rights of either party's airlines, whether because of alleged subsidization or any other reason unrelated to aviation safety and security.

The U.S.-UAE Open Skies Agreement—like all U.S. Open Skies agreements—specifically prohibits either party from imposing a unilateral freeze on the exercise of additional landing rights based on any economic or commercial considerations. This prohibition is contained in Article 11 of the U.S.-UAE Open Skies Agreement. In a May 11 *Washington Post* article, a senior Obama Administration official confirmed what is widely known by all parties: such a freeze would constitute a “major breach” of the Open Skies Agreement.¹⁵⁴

From the beginning of the Open Skies era, it was recognized that government subsidies and support to the aviation sector were pervasive, both abroad and in the United States. U.S. negotiators also recognized that they would put the Legacy Carriers at serious risk if their landing rights could be revoked or frozen by foreign governments based on U.S. Government support. More broadly, unilateral economic restrictions, in the absence of a material breach of the agreement by a party, are simply an anathema under Open Skies, which seeks to get governments out of the business of protecting national carriers by limiting air travel, competition, aircraft choice, routes, and flight frequencies.

Accordingly, the only use of the term “subsidy” in the Open Skies Agreement is in Article 12 (Pricing), which refers to “direct or indirect governmental subsidy or support.”¹⁵⁵ While the parties recognized that subsidies might lead to artificially low prices, they established a specific

¹⁵⁴ Ashley Halsey III, *U.S. Airlines Seek Federal Help in Dogfight with Persian Gulf Carriers*, *Washington Post*, May 11, 2015, available at http://www.washingtonpost.com/local/trafficandcommuting/us-airlines-in-dogfight-with-persian-gulf-carriers/2015/05/11/26dda076-e1ea-11e4-905f-cc896d379a32_story.html.

¹⁵⁵ U.S.-UAE Open Skies Agreement art. 12.1(c).

procedure, in Article 12 itself, to handle such concerns through formal notification and consultations, with unilateral actions strictly prohibited. Consistent with the U.S. definition of Open Skies adopted by the Department of Transportation (“DOT”) in 1992,¹⁵⁶ Article 12 establishes a “double-disapproval” pricing regime. Airlines are authorized to establish prices “based on commercial considerations in the marketplace.”¹⁵⁷ The “inauguration or continuation of a price” may be prevented *only if* both parties “reach agreement” to do so following the notification and consultations process specifically established under Article 12.¹⁵⁸ Without “mutual agreement,” prices established by an airline “shall go into effect or continue in effect.” This process under Article 12 is expressly excluded from the dispute settlement provisions of Article 14.¹⁵⁹

Like the pricing articles in other early U.S. Open Skies agreements, Article 12 limits the parties to three grounds on which they may request consultations. The third of these, in paragraph 1(a), allows a party to request consultations for the “protection of airlines from prices that are artificially low due to direct or indirect governmental subsidy or support.”¹⁶⁰ This language merits several observations. First, “government subsidy or support” is not itself prohibited; indeed, the language in paragraph 1(a) is premised on the reality that governments do indeed, directly and indirectly, provide various forms of subsidy and support to air carriers. This includes the United States. Second, such “government subsidy or support” constitutes an “issue” only if it results in prices that are “artificially low” and both Parties agree that it gives rise to a legitimate need for protection. Third, and most important, the language allowing an issue of “subsidy or support” to be addressed in consultations under Article 12 does

¹⁵⁶ Defining “Open Skies,” Dkt. No. 48,130, Order 92-8-13 (Department of Transportation Aug. 12, 1992) (final order).

¹⁵⁷ U.S.-UAE Open Skies Agreement art. 12.1.

¹⁵⁸ *Id.* art. 12.3.

¹⁵⁹ *Id.* art. 14.1 (“Any dispute arising under this Agreement, *except those that may arise under paragraph 3 of Article 12 (Pricing) ...*) (emphasis added).

¹⁶⁰ *Id.* art. 12.1(c).

not authorize unilateral action. To the contrary, paragraph 3 explicitly states that “[n]either Party shall take unilateral action” with respect to any price offered by an airline of the other Party.¹⁶¹

The prohibition against unilateral action with respect to prices is the essential core of “double-disapproval pricing” and it mirrors the broader prohibition on unilateral government action in Article 11 (Fair Competition), paragraph 2:

Each Party shall allow each designated airline to determine the frequency and capacity of international air transportation it offers based upon commercial considerations in the marketplace. *Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft types or types operated by the designated airlines of the other Party, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Convention.*¹⁶²

The exceptions to the Agreement’s prohibition on unilateral action—permitting restrictions only “as may be required for customs, technical, operational, or environmental reasons”¹⁶³—contain no reference, mention, or hint that unilateral action is permitted for “subsidies” or for other economic or commercial reasons.

Thus, the notification and consultation process under Article 12 is the appropriate and exclusive means under the Open Skies Agreement for addressing any concerns of either party regarding “government subsidy or support.” The Legacy Carriers completely ignore Article 12 and instead base

¹⁶¹ *Id.* art. 12.3.

¹⁶² *Id.* art. 11.2 (emphasis added).

¹⁶³ *Id.*

their attack on sweeping and inaccurate assertions about the “foundational concepts” of Open Skies, on selective and misleading quotations from the 1995 policy statement, and on the patently false assertion that “the underlying assumption of U.S. Open Skies policy [is] that carriers compete on a level playing field without the distorting effect of government actions.”¹⁶⁴ Indeed, it is not clear that the Legacy Carriers are actually asserting a violation of the Open Skies Agreement as opposed to laying out, at great length but with no little confusion, their desire for a fundamental and distinctly anti-consumer change in U.S. aviation policy. Their vision of the future of aviation would limit competition and consumer choice in those bilateral markets where the three Legacy Carriers and their European antitrust-immunized joint venture partners fear their fortress market position is challenged. Despite the Legacy Carriers’ self-serving statements that they have concerns at this time with only Qatar and the UAE, the core of their argument would require terminating, renegotiating, or rewriting scores of U.S. Open Skies Agreements, and dialing back U.S. aviation policy to the protectionism and government hyper-regulation of *Bermuda I*¹⁶⁵ and *Bermuda II*.¹⁶⁶

C. The Legacy Carriers’ interpretation of the Open Skies Agreement ignores customary international law.

To the extent that the Legacy Carriers are asserting a violation of the Agreement—presumably of the “fair and equal opportunity to compete” provision in Article 11—they seriously misstate the applicable legal standards and apply this standard in a way that violates basic international law principles.

¹⁶⁴ White Paper at 52.

¹⁶⁵ Agreement Between the Government of the United Kingdom and the Government of the United States of America Relating to Air Services Between Their Respective Territories [*Bermuda I*], Feb. 11, 1946, reprinted in [Apr. 2008] 3 Av.L.Rep. (CCH) ¶ 26,540a, at 23,219.

¹⁶⁶ Consolidated Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland [*Bermuda II*], July 23, 1977, reprinted in [Mar. 1999] 3 Av.L.Rep. (CCH) ¶ 26,540c, at 22,234.

The interpretation of the Open Skies Agreement is governed by customary rules of international law. These rules are part of the “context” of the agreement under Article 31 of the Vienna Convention on the Law of Treaties.¹⁶⁷ Under the international law principle of *lex specialis*, whenever two provisions of a treaty can both be interpreted to deal with the same subject matter, priority should be given to the norm which is more specific.¹⁶⁸ Because Article 12 is the only provision that specifically refers to and deals with “government subsidy or support,” it represents the applicable provision of the agreement under *lex specialis*. As a result, the Legacy Carriers are not free to ignore Article 12 and rely on Article 11 instead.

Moreover, under the “principle of effectiveness” (*ut magis valeat quam pereat*), meaning and effect must be given to *all* terms of a treaty. An interpreter is not permitted to adopt a reading which would reduce whole clauses or provisions to redundancy or inutility. The Legacy Carriers depart from this basic principle by cherry-picking from the agreement and resting their legal case on Article 11. Its interpretation would render the procedural safeguards set out in Article 12 wholly *inutile*; a party could ignore them and simply resort to the “fair and equal opportunity” provisions of Article 11 instead. This approach, if adopted by the U.S. Government, would turn the specific rules and consultation procedure of Article 12.3 into a nullity, contrary to the principle of effectiveness. It would circumvent the specific procedures laid out in Article 12 for resolving

¹⁶⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Although the United States has not ratified the VCLT, the State Department considers it to reflect customary international law. See State Department, Vienna Convention on the Law of Treaties, <http://www.state.gov/s/l/treaty/faqs/70139.htm>; S. Exec. Doc. 65-118, at 1 (1971) (Secretary of State Rogers emphasizing that the VCLT “is already generally recognized as the authoritative guide to current treaty law and practice”); see also Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* [*Japan – Alcoholic Beverages II*], p. 10, WT/DS8/AB/R (Oct. 4, 1996).

¹⁶⁸ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* [*U.S. – Gasoline*], p. 23, WT/DS2/AB/R (Apr. 29, 1996); *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 24 (Apr. 9); *Case Concerning Territorial Dispute (Libya/Chad)*, 1994 I.C.J. 6, 23 (Feb. 3); 1 *Oppenheim’s International Law* 1280–90 (Robert Jennings & Arthur Watts eds., 9th ed. 2009).

subsidies pricing disputes, which require “mutual agreement.”¹⁶⁹ And in practical terms, it would open U.S. carriers to the risk of mirror or retaliatory actions by the trading partners of the United States under the corresponding provisions of their Open Skies agreements, and launch a new beggar-thy-neighbor era in international aviation.

It makes sense that the Open Skies Agreement addresses “government subsidy or support” in the pricing article.¹⁷⁰ For how else would subsidies or other support normally evince themselves in an anti-competitive manner if not through “prices that are artificially low” for the services provided? Could a “government subsidy or support” that does not result in artificially low prices nevertheless result in the denial to other carriers of a “fair and equal opportunity to compete”? As discussed below, the Legacy Carriers fail to demonstrate any harm resulting from the air services offered by the Gulf Carriers and much less any harm from “artificially low prices” that merit the extreme “protection” of a freeze of all new service.

In sum, the interpretation of the Open Skies Agreement urged by the Legacy Carriers ignores the customary international law of treaty interpretation, and proposes unilateral actions that would put the United States in direct violation of its international obligations.

D. The Legacy Carriers distort Article 11’s reference to “fair and equal opportunity.”

Even as the Legacy Carriers strive to build a legal case around Article 11, they misstate the meaning and long-established U.S. approach to this standard provision in all Open Skies and most other U.S. air services agreements.

The Legacy Carriers appear to claim that Article 11 of the U.S.-UAE Open Skies Agreement prohibits government subsidies. This is legally incorrect, as

¹⁶⁹ U.S.-UAE Open Skies Agreement art. 12.3.

¹⁷⁰ *Id.* art. 12.1(c).

noted above in connection with the pricing article and as discussed in detail below. It is also somewhat ironic, since Delta, United, and American have been serial recipients of billions of dollars in federal, state, and local government support. These same Legacy Carriers daily earn profits from antitrust-immunized joint ventures with foreign airline partners, many of which have received substantial government support. As a result, the United States has never been in any position to agree to a blanket prohibition on government subsidies or demand a “level playing field,” despite the Legacy Carriers’ repeated invocations of such mantras and sound bites in their White Paper.

More important, the Legacy Carriers fundamentally distort the meaning of “fair and equal opportunity” in Article 11. First, Article 11 makes no mention of subsidies or government support, which *are* dealt with in a separate article. Second, the entire article, not just its first paragraph, deals with “Fair Competition.” Article 11 prohibits unilateral or discriminatory restrictions on *access* to each party’s market for air services.¹⁷¹ As paragraph 2 makes clear, it allows each party’s airlines “to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace.”¹⁷² This is the heart of Open Skies, which sought to get governments out of the business of managing airline routes, seating capacities, ticket prices, and flight frequencies. As noted earlier, Article 11.2 specifically prohibits unilateral freezes on landing rights: “Consistent with this right [under Article 11], *neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated airlines of the other Party, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the [Chicago] Convention.*”¹⁷³ In short, Article 11 prohibits exactly the type of unilateral freeze urged by the Legacy Carriers, who tellingly omit any

¹⁷¹ *Id.* art. 11.2.

¹⁷² *Id.*

¹⁷³ *Id.* (emphasis added).

mention in their White Paper or public pronouncements that complying with their demand would put the United States in direct violation of its obligations under the Open Skies Agreement.

This interpretation was underscored by the extensive discussion of state aid in the negotiation of the U.S.-EU Open Skies Agreement, which contained some changes to the standard U.S. Open Skies text embodied in the U.S.-UAE Open Skies Agreement. Article 14 of the U.S.-EU Open Skies Agreement explicitly states that “government subsidies and support may adversely affect the fair and equal opportunity of airlines to compete in providing the international air transportation governed by this Agreement.”¹⁷⁴ Notably, this language does not appear in the U.S.-UAE Open Skies Agreement, which instead deals with subsidies in a more focused fashion in Article 12. Significantly, even Article 14 of the U.S.-EU Open Skies Agreement does not prohibit “government subsidies and support,” nor does it authorize unilateral action based on a finding of “subsidy.” Instead, Article 14 is premised on the existence of “government subsidies and support,” some of which “may” affect fair and equal opportunity. Finally, Article 14 contains no reference whatsoever to the definition of “subsidy” under the SCM Agreement, GATS, or any other law relevant to trade in non-aviation sectors, nor is there any such reference in the long, highly detailed Memorandum of Consultations¹⁷⁵ that accompanied the 2007 U.S.-EU Open Skies Agreement.¹⁷⁶

Since the United States, and more specifically Delta, United, and American, does not have clean hands on government support,¹⁷⁷ for Congress

¹⁷⁴ Air Transport Agreement, U.S.-EU, art. 14.1, Apr. 30, 2007 [hereinafter U.S.-EU Open Skies Agreement].

¹⁷⁵ Memorandum of Consultations Regarding the U.S.-EU Air Transport Agreement, Mar. 2, 2007, *available at* <http://www.state.gov/documents/organization/114892.pdf>.

¹⁷⁶ Had the United States deemed trade law subsidy principles relevant to air transport, surely the arduous, multi-year negotiation of the EU Agreement would have contained some suggestion to this effect. The reality, however, is that nowhere is to be found any such reference, hint, or even faint whiff to this effect.

¹⁷⁷ See *infra* Part IV.

or the Administration to launch a new era of subsidy-based unilateral government restrictions on landing rights would have dire ramifications for U.S. consumers, U.S. companies, U.S. communities, international travelers, and airports around the world. It would (1) effectively end Open Skies, (2) return international aviation to a mercantilist regime where governments regulate air travel and promote the businesses of national champions, (3) backfire on the Legacy Carriers by handing foreign governments and foreign competitors a new weapon to use against them whenever they start to make gains against a national carrier on an international route, (4) damage the Legacy Carriers' alliances as many of their partner airlines would similarly be at risk of losing landing rights, and (5) greatly harm U.S. airline consumers who will pay higher fares for worse service and fewer international flights.

E. The Legacy Carriers seek to rewrite Open Skies.

In an effort to rewrite aviation history, the Legacy Carriers have provided a deeply flawed description of U.S. Open Skies policy.

The fundamentals of Open Skies were established in 1992 following an in-depth Department of Transportation (DOT) proceeding. The Legacy Carriers conveniently ignore the 1992 proceeding, in which DOT explicitly rejected arguments by Open Skies opponents as to whether Open Skies agreements should require matching benefits for U.S. airlines, so that the benefits for U.S. and foreign carriers would be of equal economic value. Instead, DOT flatly rejected the reciprocal "horse-trading" of routes, seats, and national carriers that was at the heart of antiquated agreements such as *Bermuda I* and *Bermuda II*, and opted for de-regulation and competition in order to benefit consumers. DOT's final order states:

Various commenters, while supporting a procompetitive aviation environment, question whether open-skies agreements will necessarily produce benefits for U.S. interests of economic value equal to those accruing to our bilateral partners. We carefully

weighed this question before we announced our initiative, and decided that it does *not* provide a basis for failing to go forward with open skies. . . *We are frankly and firmly committed to free trade in civil aviation services, and our commitment is grounded, in large part, on our experience with both the market-oriented and the restrictive approaches that govern many of our current bilateral aviation relationships. We have seen much larger dividends in those markets which allow greater scope for airline price and service initiatives. Indeed, if we were to embark on negotiation initiatives only where we could anticipate precisely equal economic benefits we would have been deterred from some of the most successful agreements we have achieved in the last decade.*¹⁷⁸

In short, DOT rejected government matching of routes, carriers, pricing, and service frequencies to ensure “equivalent benefits” for each side and left these matters to carriers to determine on the basis of commercial considerations in a broadly deregulated international aviation marketplace.¹⁷⁹

The text of the model Open Skies agreement adopted in 1992 and only slightly modified in the succeeding two decades is the ultimate and most concrete expression of U.S. policy. It does not refer to a “level playing field,” nor does it seek to prohibit subsidies or tie Open Skies to a fairyland “market undistorted by government actions that advantage foreign (or U.S.) carriers,” as the Legacy Carriers claim in the White Paper. Instead, DOT found that “those

¹⁷⁸ Defining “Open Skies,” Dkt. No. 48,130, Order 92-8-13, at 2 (Department of Transportation Aug. 12, 1992) (final order) (emphasis added).

¹⁷⁹ Open Skies mirrored the de-regulation of U.S. domestic air services by the Carter Administration in the Airline Deregulation Act of 1978. The Act removed most of the government restrictions on fares and market entry for interstate air transportation in the United States. Prior to the Act, the Civil Aeronautics Board (CAB) licensed each route, generally limiting service provision to one carrier, and regulated fares so as to ensure a “reasonable rate of return” to U.S. airlines. The Act abolished the CAB and de-regulated routes and fares, triggering the entry of new low-cost carriers and a massive increase in air travel for American households.

types of specifics are better left to the negotiation phase of open skies.”¹⁸⁰ Likewise, in its 1995 Statement of United States International Air Transportation Policy, the Clinton Administration recognized that state ownership, government interventions, and financial aid continued to “underlie many of the disputes we face in international negotiations today,” but adopted a pragmatic strategy of seeking to “advance the liberalization of air services regimes as far as our partners are willing to go.”¹⁸¹

In short, Open Skies agreements were negotiated and signed by the United States in full recognition of widespread government ownership, intervention, and support for airlines and facilities—in the United States and elsewhere—and the pervasive use of various forms of government support, including from U.S. federal, state, and local authorities. That was the reality in 1992; it remains true in 2015. Approximately 85 percent of Open Skies agreements were with countries that had government-owned carriers or were providing extensive government support at the time of agreements. The U.S. Government was fully aware of government support of these airlines—and also fully cognizant of the many ways in which U.S. carriers have received government support over the years—and for this reason the agreements did not¹⁸² address the issue. This deliberate omission was not charity on the U.S. part, but pragmatism—the United States has massively subsidized and supported the U.S. aviation sector for decades and including such requirements or prohibitions would have invited mirror restrictions on the Legacy Carriers, cutting them off from the benefits of Open Skies.¹⁸³ The adoption of enforceable

¹⁸⁰ Defining “Open Skies,” Order 92-8-13, at 6.

¹⁸¹ Statement of United States International Air Transportation Policy, 60 Fed. Reg. 21,844 (Department of Transportation May 3, 1995).

¹⁸² Cf. U.S.-EU Open Skies Agreement art. 14. For the pricing articles in early bilateral Open Skies agreements, see, for example, U.S.-UAE Open Skies Agreement art. 12; *infra* note 183.

¹⁸³ Indeed, during the 2003–2006 negotiation of the comprehensive U.S.-EU Open Skies Agreement, the European Union pressed the United States for strict disciplines on state aid akin to those that apply within the European Common Aviation Area: “Where either Party nevertheless deems it essential to grant Governmental subsidies or other forms of public support to a carrier or group of carriers operating in the

WTO or Open Skies rules on government subsidies would put the Legacy Carriers in serious jeopardy, given their lack of clean hands and repeated dependence on U.S. Government bail-outs.

The reality is that most countries, including the United States, treat aviation as a critical sector where there is a need for government support to promote the development of airline services, infrastructure, and technology and to protect these in times of crisis—which explains why the air transport sector was excluded from WTO rules, why U.S. Open Skies agreements do not contain rules that would foreclose future U.S. Government support, and why government bail-outs of major national carriers remain commonplace.

Today, many carriers remain under government ownership or have received large subsidies, including airlines in immunized joint ventures with the Legacy Carriers. For example, Japan Airlines, a joint venture partner of American, has received over \$4 billion in government subsidies¹⁸⁴ and Air

Open Aviation Area, public interventions shall be specific, proportionate, transparent and shall not materially distort competition in the Open Aviation Area.” The United States—at the time very much on the defensive because of the cash payments, loan guarantees, and other extraordinary measures propping up U.S. carriers after September 11 as well as the competitive advantages secured under Chapter 11—pushed back vigorously. The resulting compromise, Article 14, is a much diluted provision that does not prohibit government subsidies or support, lacks a clear definition of what the phrase means, and provides simply that one Party “may submit observations” to the other Party about government subsidy or support and request that the Joint Committee established by the Air Transport Agreement “consider the issue and develop appropriate responses to concerns found to be legitimate.” The concerns of EU airlines about U.S. Government support for its carriers, including the availability of Chapter 11 protection from creditors under U.S. bankruptcy law, were tellingly stated in Air France KLM’s 2005–06 annual report under the heading “Unfair competition risks between EU and US airlines”:

Following the events of September 11, 2001, the US airlines have been receiving substantial subsidies from the US federal authorities, whether in terms of insurance, security or pension fund liabilities. Moreover, four of the largest companies filed for Chapter 11 protection, which allows them to restructure without calling into question their capacity development plans. Thus the US air carriers benefit from a significant competitive advantage over their European competitors operating on North Atlantic routes.

Air France KLM, *2005–06 Reference Document 103* (2006), *available at* http://www.airfranceklm.com/sites/default/files/publications/reference-document_2005-06_en.pdf.

¹⁸⁴ See, e.g., *Government Panel to Launch Review of JAL Bailout*, Japan Times (Aug. 20, 2014), <http://www.japantimes.co.jp/news/2014/08/20/business/corporate-business/government-panel-launch-review-jal-bailout/> (“The DPJ government also injected ¥350 billion of public money into the failed airline, arranged debt waivers totaling ¥520 billion and exempted JAL from corporate taxes.”); see also Notice of Decision to Provide Support to Japan Airlines, Enterprise Turnaround Initiative Corporation of Japan, Jan.

France, Delta's partner, continues to be partially owned by the Government of France.¹⁸⁵ In launching Open Skies, the United States and other governments made a fundamental policy calculation that the benefits of deregulation, competition, and increased international travel far outweighed any advantages of continuing the traditional zero-sum policy of focusing primarily on airline profits and trading "airline benefits for airline benefits" on a strictly reciprocal, one-for-one basis for designated national carriers. For instance, the United States agreed to Open Skies with Ethiopia even though no U.S. carriers directly fly there.

In contrast, pre-deregulation U.S. aviation policy largely ignored the broader interests of U.S. consumers and cities in access to affordable international travel and instead placed a primary emphasis on ensuring equivalent benefits for favored national carriers, such as Pan Am and TWA.¹⁸⁶ Through Open Skies, the United States sought to create new opportunities for all airlines, U.S. travelers, U.S. businesses, U.S. shippers, and U.S. communities. Under the new policy, the United States expressly endorsed the view that the benefits of Open Skies far outweighed the risks of continued government subsidization and ownership of airlines.¹⁸⁷ This decision has been vindicated by massive increases in international travel, the rise of new low-cost airlines to compete with long-established national airlines, unprecedented innovations in

19, 2010, *available at*

<http://press.jal.co.jp/en/uploads/Notice%20of%20Decision%20to%20Provide%20Support%20to%20Japan%20Airlines.pdf>.

¹⁸⁵ In fact, the Government of France recently raised its ownership stake another 1.7 percent to 17.6 percent to increase its influence over Air France by ensuring the applicability of a new law granting double voting rights to long-term shareholders. Anne-Sylvanie Chassany, *State Lifts Air France Stake to Win Vote*, Financial Times, May 8, 2015, *available at* <http://www.ft.com/cms/s/0/f47f47ec-f56c-11e4-8c83-00144feab7de.html#axzz3bNX461sO>. .

¹⁸⁶ For example, the Nixon Administration proclaimed that the exchange of rights in air services agreements was expected "to assure [U.S.] air carriers the opportunity to achieve no less than" the rights available to foreign air carriers. Office of the White House Press Secretary, Statement of International Air Transportation Policy, Jun. 22, 1970, *reprinted in* 36 *Journal of Air Law & Commerce* 651, 654 (1970).

¹⁸⁷ Statement of United States International Air Transportation Policy, 60 Fed. Reg. 21,844 (Department of Transportation May 3, 1995); Defining "Open Skies," Dkt. No. 48,130, Order 92-8-13, at 2 (Department of Transportation Aug. 12, 1992) (final order).

airline service (for example, express delivery carriers and the long-haul to long-haul international travel pioneered by Emirates), and dramatic reductions in international airfares to the benefit of passengers around the world. To this point, numerous groups and companies have indicated their emphatic support for the continuation of Open Skies because of the significant benefits it provides for various stakeholders and, at the same time, have urged the rejection of the Legacy Carriers' efforts to roll back that policy: Airports Council International—North America,¹⁸⁸ Federal Express,¹⁸⁹ JetBlue,¹⁹⁰ Alaska Airlines,¹⁹¹ Hawaiian Airlines,¹⁹² the Business Travel Coalition,¹⁹³ the U.S. Travel Association,¹⁹⁴ TravelersUnited,¹⁹⁵ and even American Airlines' principal joint venture partner, British Airways,¹⁹⁶ and oneworld members, Iberia and Air Berlin, among many others.

¹⁸⁸ Letter from Kevin M. Burke, President & CEO, Airports Council International—North America to John F. Kerry, Secretary, U.S. Department of State et al. (Feb. 10, 2015).

¹⁸⁹ Comments of Federal Express Corp., Information on Claims Raised About State Owned Airlines in Qatar and the UAE, Dkt. Nos. DOT-OST-2015-0082, DOC-2015-0001, DOS-2015-0016 (May 29, 2015); *see also* Letter from David J. Bronczek, President & CEO, FedEx Express, to John F. Kerry, Secretary, U.S. Department of State et al. (Feb. 18, 2015).

¹⁹⁰ Letter from Robin Hayes, CEO, JetBlue, to John F. Kerry, Secretary, U.S. Department of State et al. (Apr. 29, 2015).

¹⁹¹ Letter from Bradley D. Tilden, President & CEO, Alaska Airlines, to John Kerry, Secretary, U.S. Department of State, & Anthony Foxx, Secretary, U.S. Department of Transportation (Feb. 27, 2015).

¹⁹² Madhu Unnikrishnan & Joseph C. Anselmo, *Hawaiian: Lack of Awareness of Hawaii as Destination a 'Challenge' in China*, Aviation Daily, June 9, 2015, at 3 (“Hawaiian has been a vocal supporter of air services liberalization and is opposed to the stance taken by Delta Air Lines, United Airlines, and American Airlines on this issue. . . . [Hawaiian Airlines CEO Mark] Dunkerley considers any steps that would curtail open skies as dangerous. ‘The U.S. lives in a glass house, and picking up a stone has certain consequences.’”).

¹⁹³ Letter from Kevin Mitchell, Founder, OpenSkies.travel & Chairman, Business Travel Coalition, to John Kerry, Secretary, U.S. Department of State, et al. (Feb. 3, 2015).

¹⁹⁴ Letter from Roger J. Dow, President & CEO, U.S. Travel Association, to John Kerry, Secretary, U.S. Department of State et al. (Feb. 11, 2015).

¹⁹⁵ Charlie Leocha, *Geopolitical Changes and Open Skies Agreements*, Consumer Traveler (May 1, 2015), <http://consumertraveler.com/columns/policy-columns/geopolitical-changes-and-open-skies-agreements/>.

¹⁹⁶ International Airlines Group, *US Department of Transportation, Department of Commerce and Department of State Stakeholder Engagement on Gulf Carrier Subsidy Claims – IAG Comments*.

There have been various discussions before and since the inception of Open Skies of what constitutes a “level playing field.” All have come to naught because of the lack of any international consensus and, at least as important, a widespread realization that different countries and their airlines will compete—“arrive at the game,” to use the metaphor—with countless advantages and disadvantages and that the playing field has always been one with bumps, valleys, and tilts. Moreover, as a new Organization for Economic Co-operation and Development (“OECD”) study recognizes, “the allegory of the ‘level playing field’ can be misleading,” one that wrongly suggests “a zero-sum game” when the reality is that “[i]n aviation, gains by one airline can actually benefit another by stimulating the overall market, enabling other carriers to gain incremental traffic, if not market share.”¹⁹⁷

The truth is that most governments, including the United States, have engaged in extensive interventions in the aviation sector, so all have major defensive concerns. In 2013, the ICAO Secretariat concluded that “[i]t is unlikely that a comprehensive definition of [level playing field] can be achieved at this time, given the widely divergent circumstances of States and their aviation sectors, including such fundamental issues as State ownership, policies on maintenance of national air carriers and airport development, and widely divergent State policies on taxation, labour regulation, bankruptcy, and health insurance.”¹⁹⁸ Given their lack of clean hands on government subsidies and support, the Legacy Carriers’ efforts to invoke a spurious prohibition on government subsidies in Open Skies markets represent a cynical political ploy for protection—at the expense of U.S. consumers, cities, airports, tourism, and aircraft manufacturing exports and jobs.

¹⁹⁷ Mike Tretheway & Robert Andriulaitis, *What Do We Mean by a Level Playing Field in International Aviation* (International Transport Forum, OECD, Discussion Paper No. 2015-06, 2015), available at <http://www.internationaltransportforum.org/jtrc/DiscussionPapers/DP201506.pdf>.

¹⁹⁸ International Civil Aviation Organization, Fair Competition in International Air Transport 3 ¶ 4.5 (Mar. 18–22, 2013) (ICAO Working Paper for Worldwide Air Transport Conference 6th Meeting), available at http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp004_en.pdf.

III. The Legacy Carriers have not established that the objectives of the Open Skies agreements have been harmed by the alleged subsidies.

The Open Skies Agreement does not contemplate that subsidies to air carriers—even if they exist, which they do not in the case of Emirates—are a valid reason for governments to restrict trade in air services. This was made clear in Part II above. That demonstrated, it is equally true that the allegations are even more meaningless if it cannot be shown that the alleged subsidies have caused some sort of harm to the objectives of Open Skies. The Legacy Carriers should bear a rigorous burden in this respect, but they have failed utterly to make a case.

This section addresses three points. First, it explains that the U.S. Government should demand that allegations be accompanied by a convincing demonstration that the alleged subsidy has caused harm. Allegations of harm should be evaluated in light of the objectives of the Open Skies Agreement: not merely the narrow business interests of one group of carriers, but rather the broad governmental objectives of the promotion of air travel, competition, and the provision of quality, efficient service to passengers and shippers. Second, this section shows that the Legacy Carriers cannot make a demonstration even of harm to their own narrow interests: they are highly profitable, they are thriving on the few routes where Gulf Carrier competition might be relevant, and the facts demonstrate that the entry of Emirates into U.S. markets has stimulated additional traffic. Third, this section rebuts each of the specific allegations of harm that have been made in the Legacy Carriers' White Paper.

A. The U.S. Government should determine whether there has been harm to the objectives of Open Skies—not merely effects on specific competitors—and the Legacy Carriers should be held to a high standard of proof.

The Open Skies Agreement governs this dispute, despite the Legacy Carriers' attempt to misapply WTO standards for goods trade. And Part I of this submission already has shown that the Legacy Carriers have failed to show any subsidy to Emirates even under WTO standards. But setting aside this failure,

the Legacy Carriers have failed to demonstrate any harm in this matter under the Open Skies Agreement. They mount an argument that is inspired by WTO principles, but a WTO standard cannot simply be transferred to Open Skies. The WTO standards of injury or serious prejudice reflect a carefully negotiated agreement among WTO members that, in the case of goods trade, a showing of an actionable subsidy and a showing of harm can give rise to government intervention. Those standards are rigorous, but also narrowly focused on harm to competitors.¹⁹⁹

No such agreement has been reached in the context of Open Skies. To the contrary, the policy behind Open Skies is a major step away from a regime where the principal focus was the economic interests of air carriers, to a regime that embraces goals such as greater competition, increased flight frequency, more consumer choice, promotion of business travel and tourism, improved service, and innovation. Any harm alleged under the Open Skies Agreement should be evaluated in light of the objectives of that agreement. Harm to competitors is at most one element of a showing. Put differently, a mere WTO-style showing of injury should not be sufficient. The injury shown should be injury to the benefits that are sought by Open Skies policy, such as injury to increased competition and consumer choice.

It is useful, in considering harm, to recognize that even under the WTO, where narrow harm to competitors is relevant, allegations of harm are held to high evidentiary standards. A determination of injury to a competitor in its home market, for example, must be “based on positive evidence and involve an objective examination” of the volume of subsidized imports, the effect of subsidized imports on prices in the domestic market, and the consequent impact of these imports on domestic producers.²⁰⁰ Those domestic producers must be examined in careful detail, including an evaluation of their actual and potential

¹⁹⁹ See SCM Agreement art. 5.

²⁰⁰ See SCM Agreement art. 15.1.

decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, and the ability to raise capital or investments.²⁰¹ The standard for harm in other markets is “serious prejudice,” which requires the complainant to “furnish specific factual evidence” to demonstrate that subsidies have led to serious prejudice.²⁰² Demonstrating this link between subsidies and serious prejudice requires “extensive, case-specific evidence.”²⁰³ The evidentiary burden for showing harm is detailed and thorough.²⁰⁴ Any allegations of harm under the Open Skies Agreement should be at least subject to equivalent levels of scrutiny and evidentiary requirements.

²⁰¹ SCM Agreement art. 15.4.

²⁰² Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels* ¶ 7.560, WT/DS273/R (Mar. 7, 2005).

²⁰³ Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* ¶ 915, WT/DS353/AB/R (Mar. 12, 2012).

²⁰⁴ The WTO law on injury and serious prejudice also requires a clear demonstration of causation. Article 15.5 of the SCM Agreement requires that a claimant demonstrate that subsidized imports are causing injury through the subsidies received, based on an examination of “all relevant evidence before the authorities.” The language of the Article also contains a non-attribution requirement, which entails separating and distinguishing the injurious effects of other known factors that may impact the domestic industry. At the very least, this requires a “satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports.” Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea* ¶ 7.405, WT/DS299/R (June 17, 2005).

Serious prejudice likewise requires a rigorous causation analysis. To satisfy the causation requirement under Article 6.3, which defines serious prejudice, it must be shown that there is a “genuine and substantial relationship of cause and effect” between the alleged subsidies and adverse market phenomena affecting the claimant’s trade in a product. Appellate Body Report, *EC and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* ¶ 1232, WT/DS316/AB/R, (May 18, 2011). The language of Article 6.3 requires that any form of serious prejudice must be the “effect of the subsidy,” which requires that the effect be linked causally to the alleged subsidy. Appellate Body Report, *United States – Subsidies on Upland Cotton (Article 21.5 Proceeding - Brazil)* ¶ 372, WT/DS267/AB/RW, (June 8, 2008). WTO cases have required consideration of a counterfactual situation to analyze whether subsidies are a “but-for” cause of prejudicial effects – that is, a showing that without subsidies the complainant’s domestic firms would have made more sales, sold at higher prices, etc. Appellate Body Report, *United States – Upland Cotton* ¶ 370. In some cases a separate non-attribution analysis has also been considered necessary to properly account for other market factors. Appellate Body Report, *EC – Large Civil Aircraft* ¶¶ 1233–34.

The following sections demonstrate that the Legacy Carriers have utterly failed to make an adequate showing of harm. Just as they failed in their arguments about the relevant legal framework and failed in their factual assertions that Emirates has received subsidies, so have the Legacy Carriers failed to show anything approaching the sort of harm that should be demanded here.

B. The Legacy Carriers have not been adversely affected by Emirates.

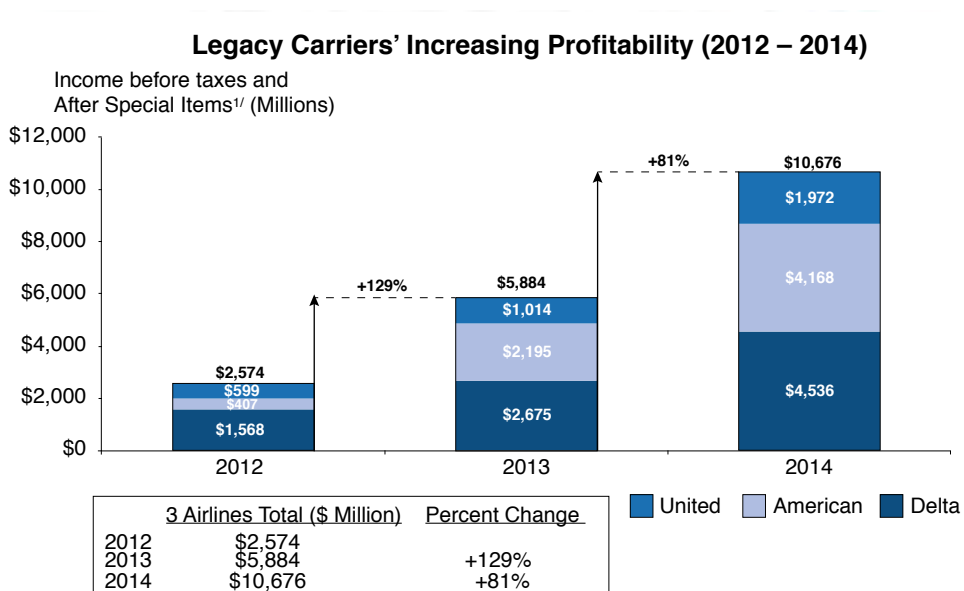
The Legacy Carriers cannot even meet the WTO standards for a showing of harm, much less show harm to the objectives of Open Skies. The Legacy Carriers are highly profitable, compete with Emirates only on a few routes, and enjoy high load factors²⁰⁵ on those routes. Further, the data demonstrate that where Emirates has entered U.S. markets, overall demand for air travel in those markets has increased, reducing or eliminating the effects on other carriers' traffic.

1. The Legacy Carriers are highly profitable.

In a WTO subsidy case on goods, an industry alleging injury from imports normally is facing financial challenges. Commonly, the leading companies are losing money. It is unheard of for the complaining industry to be earning record profits, but that is exactly the situation of the Legacy Carriers. Having walked away from their pension obligations in Chapter 11 restructurings (a large portion of which was picked up by the U.S. Government), and having shed massive debt obligations in the same proceedings, the Legacy Carriers are enjoying immense profits. Airline consolidation has reduced the number of large U.S. competitors, and the mega-carriers that remain have exercised remarkable "capacity discipline"—protected by U.S. cabotage restrictions—to limit available seats and drive up yields. A sharp reduction in fuel prices has grown profits further.

²⁰⁵ Load factor is defined as the ratio of passenger numbers carried to seat capacity deployed.

As shown in Figure III-1, the three Legacy Carriers earned a total of \$10.7 billion in 2014. This figure, which represents income before taxes and special items, is an eighty-one percent increase from the \$5.9 billion earned in 2013, which was itself a 129 percent increase from the \$2.6 billion earned in 2012. The color coding on the chart shows that each of the three Legacy Carriers shared in the positive trend. Three straight years of profitability that is rapidly increasing to record heights would be a highly unusual basis for a finding of harm in a trade dispute.



^{1/} Net income after adjusting for special items and before income tax.
 Source: Delta Air Lines, Delta: Delivering Growing Value, J.P. Morgan Aviation, Transportation and Industrials Conference, March 3, 2015, page 25; Delta Air Lines, Investor Day 2013, December 11, 2014, page 46; United Airlines Announces Full-Year and Fourth Quarter 2014 Profit, January 22, 2015, United Announces Full Year and Fourth Quarter 2013 Profit, January 23, 2014; American Airlines Group Reports Record Fourth Quarter and Full Year Profit, January 27, 2015, American Airlines Group Reports Fourth Quarter and Full Year 2013 Financial Results, January 28, 2014. American Airlines Group reports fourth quarter and full year 2013 financial results, January 28, 2014.

Figure III-1

The Legacy Carriers' profitability has continued its rapid ascent into 2015. American Airlines reported a record first quarter net profit of \$1.2 billion, excluding special charges, tripling its net profit from first quarter 2014.²⁰⁶ United

²⁰⁶ Press Release, American Airlines, American Airlines Group Reported Record First Quarter 2015 Profit (Apr. 24, 2015), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=117098&p=irol-newsArticle&ID=2039822>. Note also that American Airlines CEO Doug Parker recently decided to take his full compensation in company stock—hardly a personal decision reflecting fear of American Airlines'

Airlines announced a record first quarter profit of \$585 million excluding special items, an increase of \$1 billion from first quarter 2014.²⁰⁷ United CEO Jeff Smisek has stated recently that the U.S. airlines are a “solidly profitable industry.”²⁰⁸ Delta Air Lines had the “best March quarter, both operationally and financially, in Delta’s history,” according to Delta CEO Richard Anderson, reporting a pre-tax income for the first quarter of 2015 of \$594 million, up \$150 million from March 2014.²⁰⁹

The record profits of the first quarter of 2015 are seen on Figure III-2, which compares the Legacy Carriers’ combined total income before taxes and after special items in first quarter 2014 to the same figure for first quarter 2015. The increase over the first quarter of 2014 was 562 percent.²¹⁰

competitive prospects. Justin Bachmann, *American’s CEO Explains Why He Wants to be Paid Only in Stock*, Bloomberg Business (Apr. 24, 2015, 2:47 PM), <http://www.bloomberg.com/news/articles/2015-04-24/american-s-ceo-explains-why-he-wants-to-be-paid-only-in-stock> (“I’m not suggesting there is not still risk in airline stocks, but we’re really bullish on what the outlook is for years to come.”).

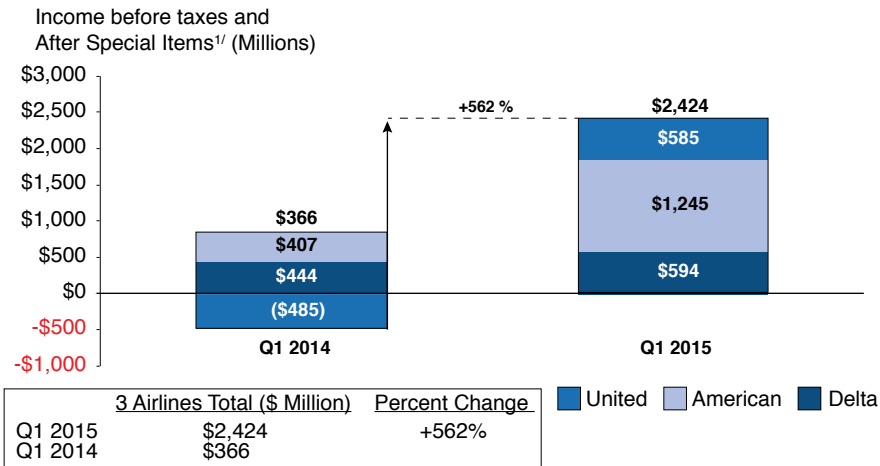
²⁰⁷ Press Release, United Airlines, United Announces Record First-Quarter Profit (Apr. 23, 2015), *available at* <http://www.prnewswire.com/news-releases/united-announces-record-first-quarter-profit-300070958.html>.

²⁰⁸ Archived Video: NPC Luncheon with Airline CEOs, held by the National Press Club (May 15, 2015), <http://www.press.org/news-multimedia/videos/npc-luncheon-airline-ceos>.

²⁰⁹ Press Release, Delta Air Lines, Delta Air Lines Announces March Quarter Profit, (Apr. 15, 2015), *available at* <http://news.delta.com/2015-04-15-Delta-Air-Lines-Announces-March-Quarter-Profit>.

²¹⁰ Christopher Jasper, *Airline Industry to Lift Annual Profit 80% on U.S. Surge*, Bloomberg (June 8, 2015, 9:33 AM), <http://www.bloomberg.com/news/articles/2015-06-08/airline-industry-to-lift-annual-profit-80-on-u-s-surge> (“U.S. airlines are benefiting most given the fall in dollar-denominated fuel prices, a strong economy and restructure that’s seen mergers including the formation of American Airlines Group Inc., [IATA] said.”); *see also* American Airlines Press Release (Apr. 24, 2015); United Airlines Press Release (Apr. 23, 2015); Delta Air Lines Press Release (Apr. 15, 2015).

**Legacy Carriers' Increasing Profitability
(1st Quarter 2015 vs. 1st Quarter 2014)**



1/ Net income after adjusting for special items and before income tax.
 Source: Delta Air Lines, Delta Air Lines Announces March Quarter Profit, April 15, 2015;
 United Airlines, United Airlines Announces Record First Quarter Profit, April 23, 2015;
 American Airlines Group Reports Record First Quarter Profit, April 24, 2015.

Figure III-2

Delta's record financial results are of particular interest. Delta is petitioning the U.S. Government for protection from competition in this matter at a time when it is in the midst of returning *\$7 billion of cash* to its shareholders. Next month, Delta will complete a \$2 billion share-buyback program, a year and a half ahead of schedule.²¹¹ The company recently announced that it will boost its dividend by fifty percent starting in September 2015, and will undertake a new \$5 billion share-buyback program that it plans to complete by December 2017.²¹²

Aside from the question of adverse effects, Delta's oversupply of cash raises a second issue: the company that operates what is by far the oldest fleet of any airline involved in this matter,²¹³ and which has taken a leadership role in seeking protection, has immensely more cash on hand than it apparently wants

²¹¹ Chelsea Dulaney, *Delta to Return \$6 Billion to Shareholders by 2017*, Market Watch (May 13, 2015, 8:41 AM), <http://www.marketwatch.com/story/delta-to-return-6-billion-to-shareholders-by-2017-2015-05-13>.

²¹² *Id.*

²¹³ See Section V.D.

to invest in its business. Just to put this in perspective, even at list price of \$330 million per aircraft²¹⁴—which a company like Delta would not expect to pay—that \$7 billion would buy twenty-one brand new Boeing 777-300ERs, which would dramatically refresh Delta’s antiquated fleet, allow it to offer non-stop service to distant markets from its hubs in Atlanta, New York, and elsewhere, greatly improve its service to passengers, and take a major step toward increasing its proportion of wide body aircraft. But Delta’s decision—to reap very high profits by controlling capacity, rather than by investing in new, customer-friendly equipment and technologies for expanded international service—follows a classic pattern of behavior for companies that enjoy market power and protection from competition.

The Legacy Carriers’ strong profits are driven by strong operating margins. This is shown by Figure III-3, which plots the operating profit of each airline as a percent of operating revenue over time. This chart, data for which run through 2014, shows that all of the Legacy Carriers are posting healthy operating margins. Over the last five years, from 2010 through 2014, margins have been positive, very strongly so in the last two years.²¹⁵ Indeed, seven U.S. carriers were among the world’s fifteen most profitable airlines in 2014, including Delta and American.²¹⁶

²¹⁴ *About Boeing Commercial Airplanes*, Boeing, <http://www.boeing.com/company/about-bca/> (last visited June 16, 2015).

²¹⁵ The only aberration was American’s negative margins in 2011, the year it filed for protection under Chapter 11. Even American rebounded to a positive operating margin in 2012, enjoyed an increase to over five percent in 2013 and posted a margin over eight percent in 2014.

²¹⁶ See Terry Maxon, *Seven U.S. Carriers Among the World’s Most Profitable Airlines*, Dallas Morning News Airline Biz Blog (Sept. 22, 2014, 12:07 PM), <http://aviationblog.dallasnews.com/2014/09/sevem-u-s-carriers-among-the-worlds-most-profitable-airlines.html/>.

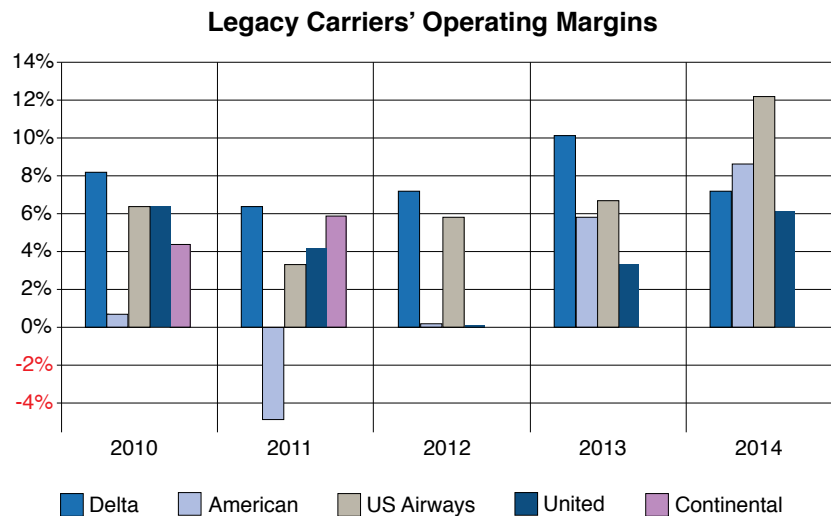
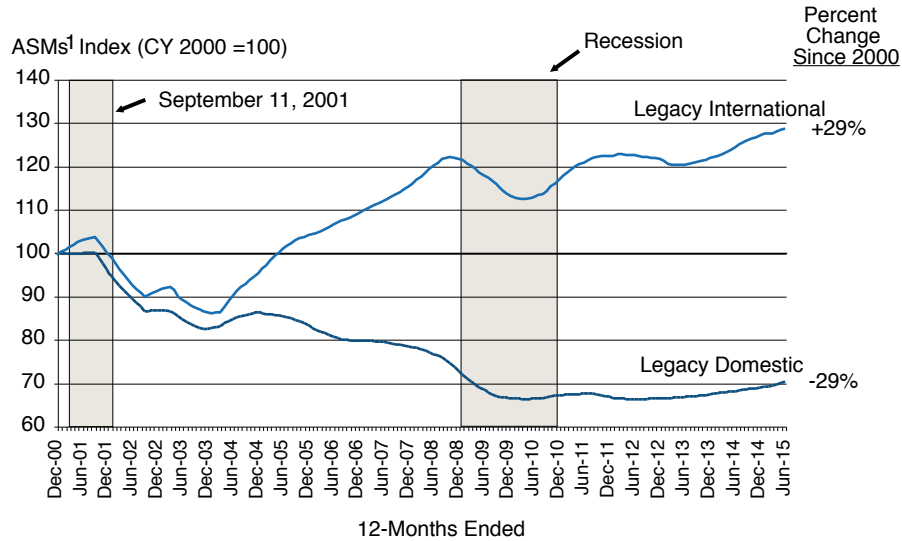


Figure III-3

2. The Legacy Carriers' transatlantic operations are growing traffic, operate at impressive load factors, and are highly profitable—in precisely the market where they are most likely to face Emirates competition.

The Legacy Carriers' overall performance on international routes certainly does not suggest that they are encountering competitive difficulty. To the contrary, the Legacy Carriers have transformed themselves in the last fifteen years, reducing capacity in the domestic market and expanding it on international routes. Figure III-4 shows the extent of this transformation. The industry reduced capacity generally in the aftermath of the September 11, 2001 attacks. But starting in 2004 the trend changed dramatically. Capacity reductions continued in the protected domestic market, where the Legacy Carriers could earn strong profits from commoditized services. But the Legacy Carriers that year began to grow capacity on international routes, a strong trend only briefly interrupted by the 2008–09 financial crisis.

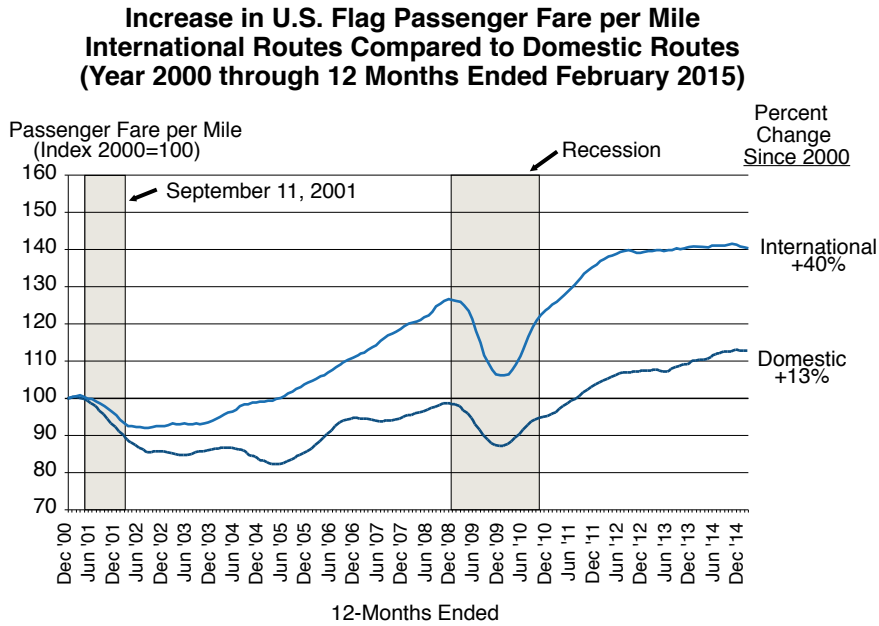
Growth in the Legacy Carriers' International Capacity While Reducing Domestic Capacity



1/ ASM = Available Seat Mile.
 Source: Innovata schedules, via Diio.
 Excludes commuter affiliates.

Figure III-4

The growth in international capacity has been accompanied by increasing U.S. flag “passenger fare per mile” on international routes over the same time period. Figure III-5 shows that while both domestic and international passenger fares per mile increased, the increase for international routes was much greater: forty percent since 2000, whereas domestic fares per mile went up thirteen percent. The overall picture is hardly consistent with the contention that the Legacy Carriers are suffering from international competition. Rather than hunker down at home, they are sustaining margins in their protected domestic market by reducing capacity deployed there (with the inevitable decline in service to passengers) and *adding* capacity to those international routes where they can earn even more money.



Source: All A4A reporting carriers from the Airlines for America, *Monthly Passenger Yield Report*, March 2015.

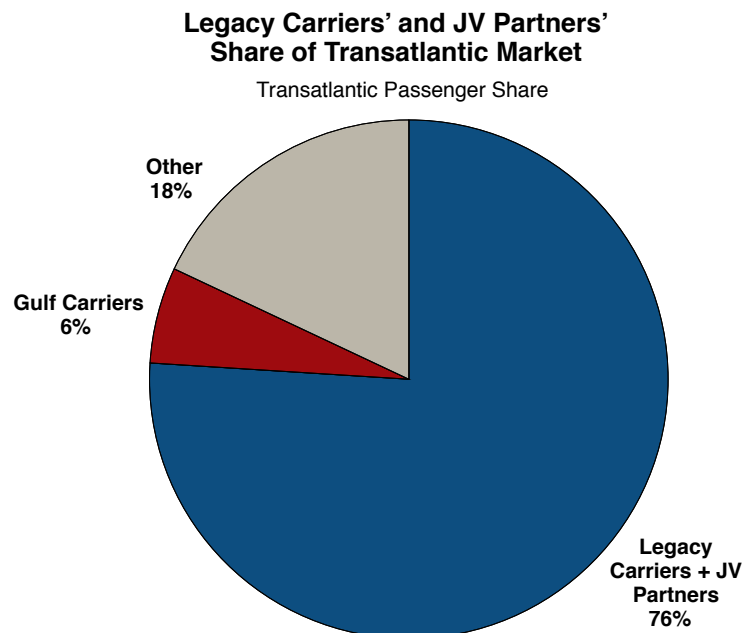
Figure III-5

Where competition exists between Emirates and the Legacy Carriers, it is largely over North Atlantic routes. Emirates’ key destinations beyond Dubai—the Indian Subcontinent, Africa, and some ASEAN routes—are served by the Legacy Carriers for the most part through their alliance partners’ operating hubs in Europe.²¹⁷ For many, Emirates’ hub in Dubai is more attractive than the European hubs for most of those beyond destinations, providing seamless connections and reducing overall travel time in many cases. To the extent that adverse competitive effects would be seen on the Legacy Carriers’ operations, those effects should be most visible on transatlantic routes. Yet adverse effects are nowhere to be found. By all measures—traffic growth, load factors, and

²¹⁷ In a moment of candor before the launch of the campaign against the Gulf Carriers, Delta indicated to investors that Delta is not exposed to harm from Gulf Carrier competition, since the Gulf Carriers serve different traffic streams. In an investor relations call in December 2013, Delta’s Chief Revenue Officer Glen Hauenstein explained that Delta has “never been a big player” in the U.S. and European routes to the Indian Subcontinent and Asia, and that Middle Eastern carriers operate in traffic flows where Delta does not really participate. As Mr. Hauenstein pointed out, Emirates and the other Gulf Carriers are “halfway around the world” from the Legacy Carriers’ bases. Glen Hauenstein, Remarks in Delta Air Lines Investor Day 2013 Presentation (Dec. 11, 2013) (transcript available at http://ir.delta.com/files/doc_presentations/2013/DAL%20Investor%20Day%20Transcript%2020131211.pdf.)

profitability—the Legacy Carriers and their joint venture partners are doing very well indeed on transatlantic routes.

As an initial matter, it is important to recognize that the Legacy Carriers and their joint venture partners dominate the transatlantic market²¹⁸ carrying more than seventy-five percent of all passengers compared to six percent for the three Gulf Carriers (combined), as shown in Figure III-6.



Source: U.S. DOT, T-100 sector data, YE Q3 2014, via Diio.

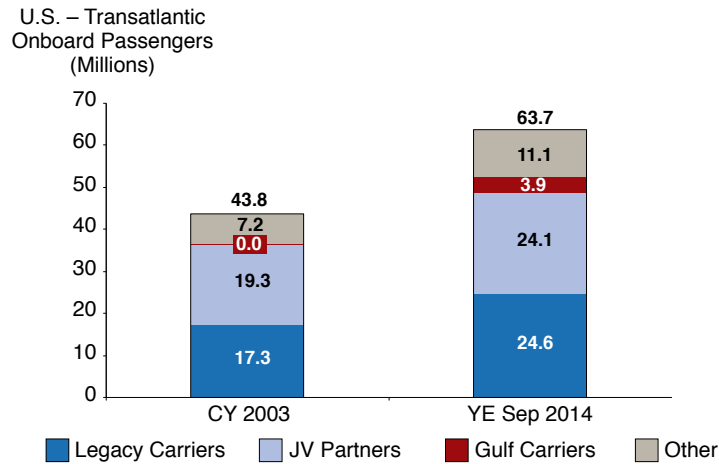
Figure III-6

Figure III-7 shows the growth in the total transatlantic passenger market since 2003, the year immediately before Emirates, the first of the Gulf Carriers to serve the United States, entered the market. It shows that over ten years the Legacy Carriers have enjoyed a forty-two percent growth in traffic, consistent with the forty-five percent growth of the entire market over the same period. For

²¹⁸ For purposes of this analysis, the transatlantic market is considered to consist of routes between the United States, on the one hand, and points in Europe, Africa, the Middle East, and the Indian Subcontinent, on the other hand.

the twelve months ended September 30, 2014, the Gulf Carriers' share of transatlantic onboard passengers reached 3.9 million, or just six percent of the total market.

Number of Transatlantic Passengers by Carrier, 2003 and 2014

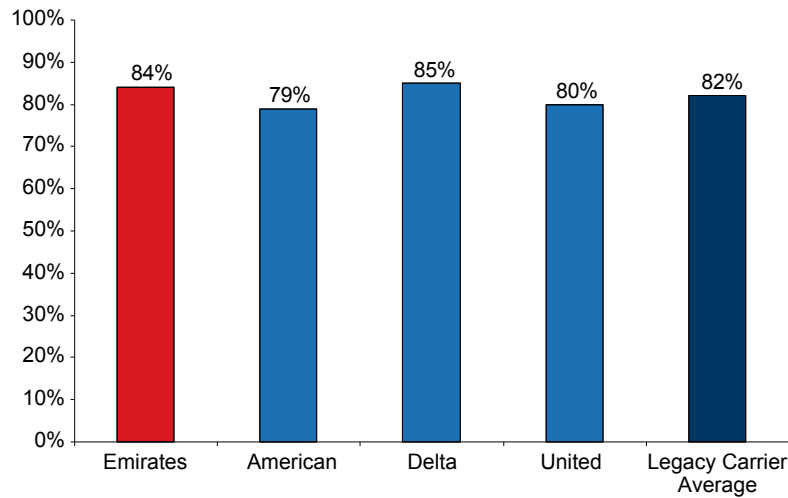


Note: Legacy carriers includes all carriers they merged with.
Source: U.S. DOT, T-100 sector data, YE Q3 2014, via Diio.

Changes Since 2003	
Legacy Carriers	= + 7.3 Million (42%)
JV Partners	= + 4.8 Million (25%)
Legacy Carriers+JV Partners	= +12.1 Million (33%)
Gulf Carriers	= + 3.9 Million
Other Carriers	= + 3.9 Million (55%)
Total Transatlantic	= +19.9 Million (45%)

Figure III-7

Both Emirates and the Legacy Carriers are enjoying high load factors on their transatlantic routes. Figure III-8 plots the transatlantic load factors of the airlines, and shows that Emirates' eighty-four percent is on a par with the Legacy Carriers' eighty-two percent average. All of the airlines' passenger load factors suggest good operational performance on these routes.

**Load Factors on Transatlantic Routes:
Emirates vs U.S. Legacy Carriers**Transatlantic Load Factor
to/from U.S. (YE Q3 2014)

Source: U.S. DOT, T-100 data, for the year ended September 30, 2014, via Diio.

Figure III-8

The absence of any effect of Gulf Carrier entry on Legacy Carrier load factors is made clear by Figure III-9. The chart shows the average load factors for 2003 and for the most recent year for which data are available, the year ended the third quarter of 2014. Those years are compared for the Legacy Carriers, the Legacy Carriers combined with the joint venture partners, and for all transatlantic flights. In every instance, load factors are highest in the year ended in 2014, a decade *after* Emirates' entry.

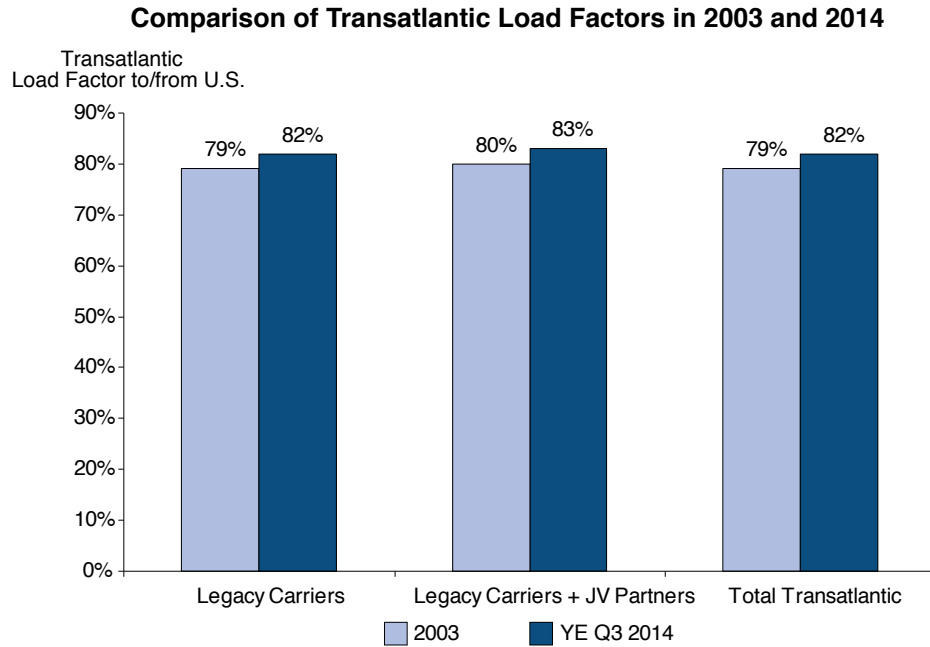
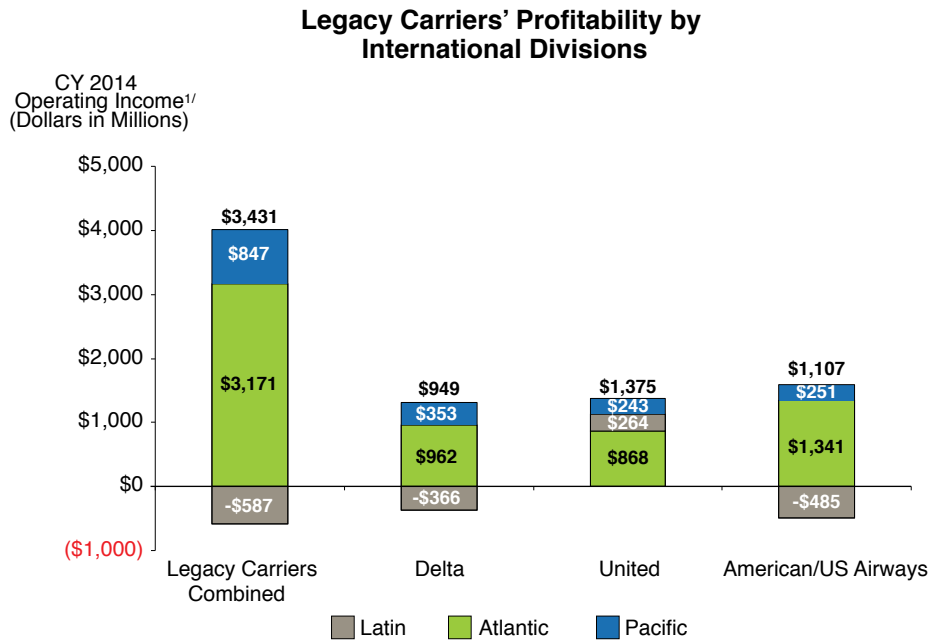


Figure III-9

The Legacy Carriers' transatlantic operations are highly profitable and in recent years have become their strongest international routes. As shown in Figure III-10 through Figure III-12, the Atlantic Divisions of the Legacy Carriers have posted strong profitability and continued to grow. Atlantic division profits are the strongest of the Legacy Carriers' international routes, dwarfing the profits from the Latin and Pacific international divisions for the three Legacy Carriers collectively. In Figure III-10 the Atlantic division profits, depicted by the green portion of each bar, are much larger than the Latin and Pacific divisions, accounting for \$3.2 billion of the total \$3.4 billion of combined international profits.



^{1/} Operating income is operating revenue less operating expenses. Excludes items such as taxes, interest income and expenses and capital gains and losses.
Source: U.S. DOT, Form 41 reports, P12-Profit and Loss Statements, via Diio.

Figure III-10

Atlantic division profits for the Legacy Carriers are second only to profits from the protected U.S. home market. In fact, examination of the bar for United Airlines in Figure III-11 shows that the Atlantic division's profits (green) are almost equal to the Domestic division's profits (orange).

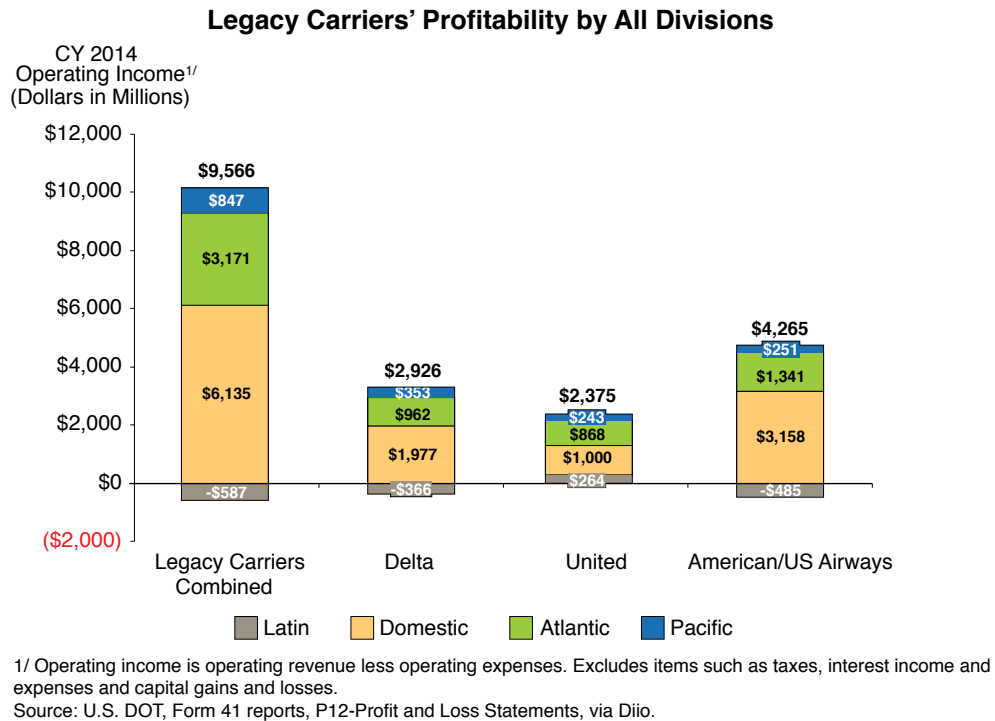
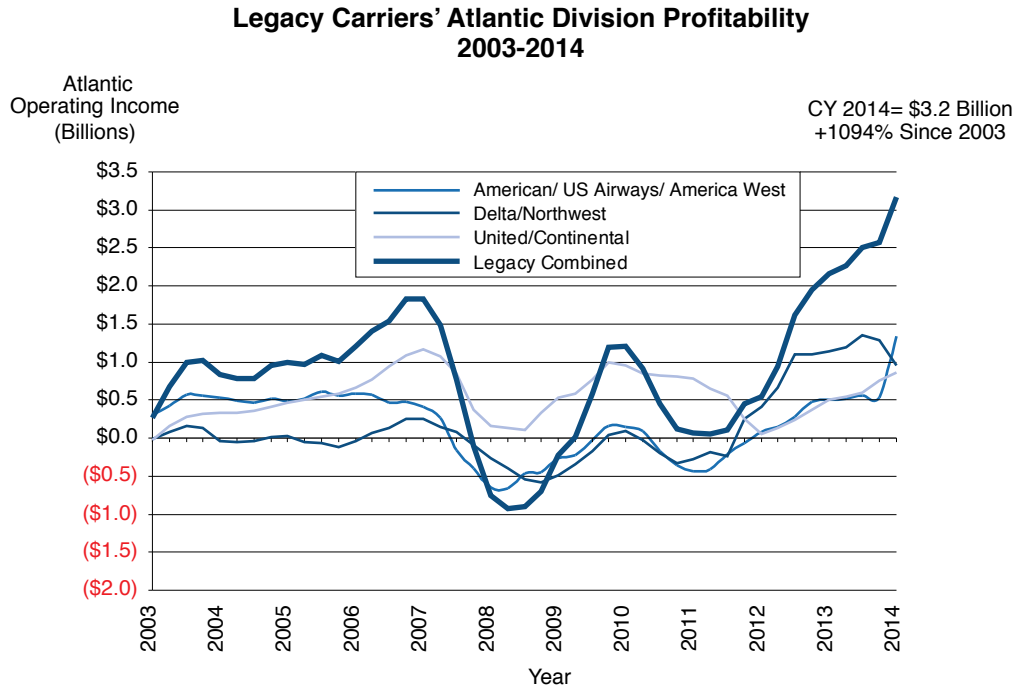


Figure III-11

Figure III-12 traces the Legacy Carriers' collective Atlantic operating income since 2003. It shows that their operating income in the transatlantic division grew by more than 1000 percent during the time that the Gulf Carriers were in the market. The chart shows a particularly dramatic increase in operating income in the most recent time periods, from the end of 2012 through 2014.²¹⁹ Operating income exceeded \$3 billion for 2014.

²¹⁹ The dip in operating income in 2008–09 reflects the combined effect of a spike in jet fuel prices and the financial crisis. The dip in 2011 reflects, in significant part, the strong increase in fuel prices in that year. See Slide Deck (attached as **Exhibit 1**) at 19, which depicts jet fuel prices over this time period.

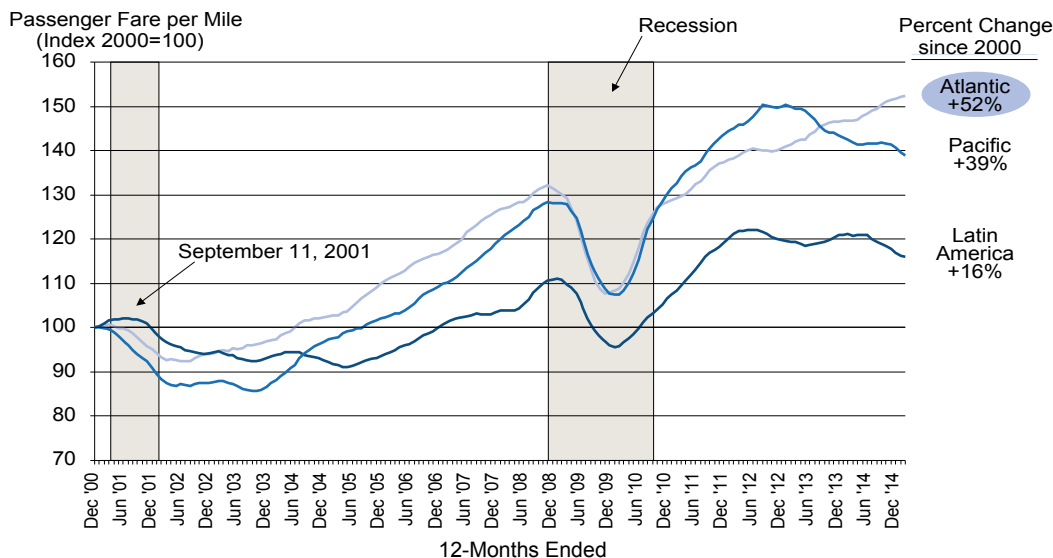


Source: U.S. DOT, Form 41 reports, P12-Profit and Loss Statements, via Diio.

Figure III-12

Figure III-13 shows that the Legacy Carriers have enjoyed growth in unit revenue in all international divisions, both in the recovery from the post-September 11 crisis and in the recovery from the 2008–09 recession. The exhibit plots the growth in passenger fares per mile (yield) for the Legacy Carriers' Atlantic, Pacific, and Latin American divisions. While all routes have seen unit revenue growth, transatlantic routes have seen the greatest increase, fifty-two percent since 2000. The Atlantic divisions have been the most successful of all: since 2012, while Legacy Carrier average yields in the Pacific and Latin American divisions have trended downward, Atlantic division average yields have continued to soar.

**U.S. Flag Passenger Fare per Mile (Yield) by International Division
(Year 2000 through 12 Months Ended February 2015)**



Note: Atlantic region includes Indian Subcontinent routes.
Source: All A4A reporting carriers from the Airlines for America, Monthly Yield Report – March 2015.

Figure III-13

3. U.S. markets have seen significant traffic growth after Emirates' entry.

One of the core arguments advanced in the White Paper is that the Gulf Carriers are taking bookings away from the Legacy Carriers on their international routes.²²⁰ As a preliminary matter, even if this were true, it would fall far short of an adequate showing of harm. To the contrary, a fundamental purpose of Open Skies Agreements is to promote competition and consumer choice. If a new competitor enters a market with a superior service, and passengers decide to fly with the new competitor, the new competitor is *fulfilling* the goal of Open Skies. The Legacy Carriers' argument is premised on the disturbing assumption that existing carriers are entitled to their existing traffic as well as a share of market growth: in other words, to be insulated from competition. That is not U.S. policy, it is not the goal of Open Skies, and is not the standard by which the Legacy Carriers' arguments should be judged.

²²⁰ White Paper at 39–45.

The preceding sections have shown that the Legacy Carriers have continued to grow their international traffic despite the entry of Emirates into the U.S. market, have prospered in the transatlantic market where one would most expect “harm” to arise, and have enjoyed high profits, load factors, and unit revenues. This lack of harm to the Legacy Carriers stems in part from the fact that they do not compete very directly with Emirates, but also because Emirates’ entry has not resulted in a significant loss of business. Rather, Emirates’ entry has grown the pie: enhanced levels of service have attracted new travelers to routes, allowing Emirates to grow without significantly diverting passengers from the Legacy Carriers.

Emirates offers more convenient routings to many markets than have ever existed before. Americans can now fly with only one stop to cities such as Islamabad, Pakistan and Colombo, Sri Lanka, options that simply did not exist previously. That has attracted new travelers into the marketplace. This growth is enhanced by the fact that Emirates’ key markets—the Indian Subcontinent, the ASEAN countries, and Africa—consist of rapidly growing economies that were under-served before the Gulf Carriers entered those markets.

The Legacy Carriers deny this traffic stimulation and have released a consultants’ report that they claim shows that Gulf Carrier growth has been achieved by diverting passengers away from the Legacy Carriers.²²¹ The shortcomings of that report are demonstrated in Section III.C.3 below. This section sets forth affirmative evidence, and in fact the only evidence, that directly addresses the issue: traffic levels on specific routes before and after Emirates’ entry.

Massive, worldwide econometric analysis is a poor tool to resolve questions of stimulation. Because Emirates serves only a small number of U.S. markets, the data can be examined directly. The methodology is simple:

²²¹ Darin Lee & Eric Amel, Compass Lexecon, *Assessing the Impact of Subsidized Gulf Carrier Expansion on U.S.-International Passenger Traffic* (2015).

passenger bookings are examined twelve months prior to Emirates' launch into a new U.S. city, and are examined for all of the routes: from the U.S. city to Dubai as a final destination; from the U.S. city through Dubai to the Indian Subcontinent; from the U.S. city through Dubai to ASEAN countries; and from the U.S. city through Dubai to Africa.²²² The pre-entry bookings are compared to bookings for the twelve months after Emirates' launch. Both sides of the comparison include bookings on all airlines flying between the originating city and the destination city, regardless of routing. Booking data are available back to 2008, and comparisons are made for Emirates' entry into every city for which that time limitation permits compilation of both pre-entry and post-entry data.²²³ Those cities are Boston, Dallas-Fort Worth, Seattle, and Washington, DC. (For other U.S. cities, Emirates commenced service in or prior to 2008 and therefore comparison data are not available.)

The results are compelling: for every route, from every city, bookings increased after Emirates' entry. Moreover, the calculation considers only the O&D traffic for the U.S. airports served by Emirates (gateway airports); feeder traffic to Emirates' offline network beyond gateway airports would show even greater growth. In some cases, the growth was massive, indicating very significant stimulation of additional travel. The *smallest* growth from Boston was seventeen percent, on routes to Africa, as shown in Figure III-14, which

²²² The two exceptions to this analysis are Seattle and Dallas/Fort Worth to ASEAN. There is no significant traffic on Emirates on those routes, because Dubai is not well located to handle traffic from the western United States to ASEAN countries. Therefore, those two markets are not relevant to and not included in the analysis. But see Figure V-3 for an illustration of Emirates' feeder traffic to destinations across the United States.

²²³ Marketing Information Data Tapes (MIDT) provide detailed reservation data on all air bookings made by various GDSs (Global Distribution Systems). Emirates' MIDT data subscription includes nine GDSs (Abacus, Amadeus, Apollo, Galileo, Infiniti, Sabre, Topas, Travelsky, and Worldspan). MIDT data does not include direct bookings made at airlines' own booking engines through their websites, and thus tends to underestimate market size compared to actual flown traffic data. In identifying origin and destination of a trip, Emirates does not apply a stopover rule. Thus, if a passenger flies from Chicago to Kolkata, connecting in Dubai, this is viewed as a Chicago to Kolkata O&D passenger even if the passenger stops in Dubai for more than twenty-four hours. This differs from the stopover convention frequently used by aviation analysts assessing traffic in the United States. Emirates has adopted this rule for its route planning, however, because it accurately reflects the nature of traffic that is drawn to Emirates' long-haul, single-stop business model. The rule has been applied here regardless of carrier flown.

compares bookings from March 2013 to February 2014 with bookings from March 2014 (when Emirates entered) to February 2015. Boston to the Indian Subcontinent grew fifty-three percent, Boston to ASEAN grew twenty-eight percent, and Boston to Dubai as a destination grew 134 percent.

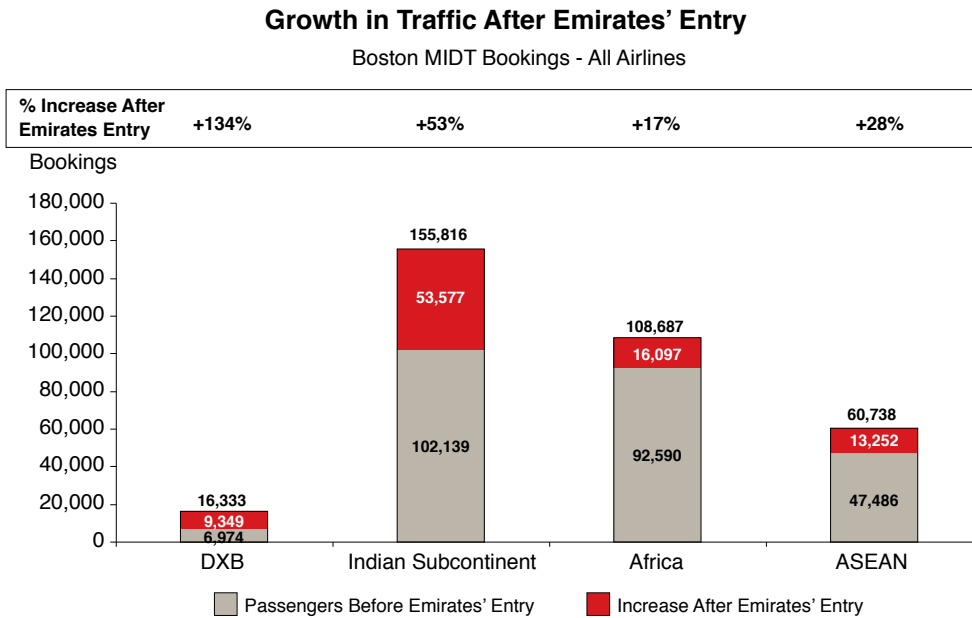
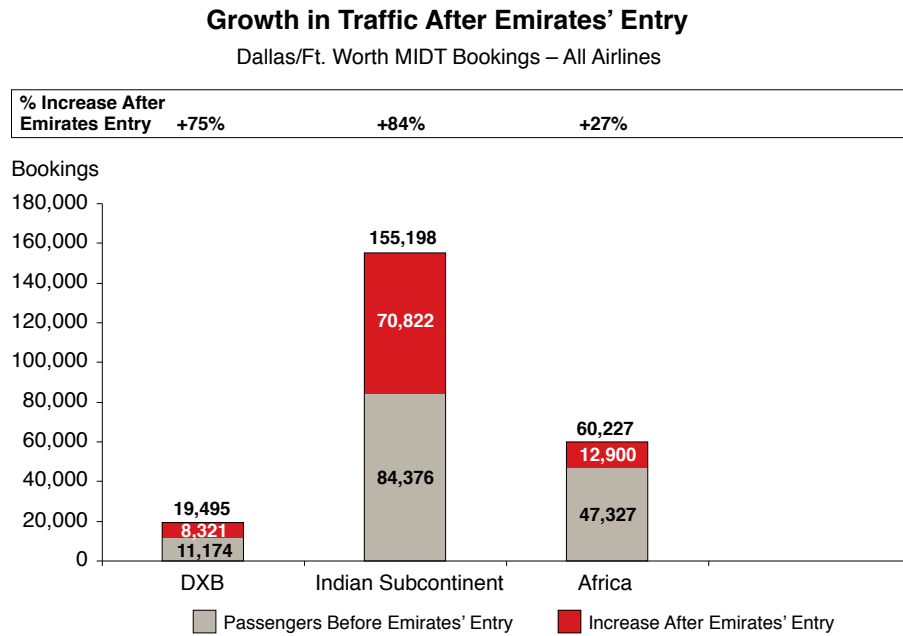


Figure III-14

Figure III-15, which compares bookings from February 2011 to January 2012 with bookings from February 2012 (when Emirates entered) to January 2013, demonstrates that Dallas-Fort Worth ranged from twenty-seven percent growth (Africa) to eighty-four percent growth (Indian Subcontinent).



Source: MIDT bookings analysis from Emirates.

Figure III-15

Seattle ranged from twenty-four percent growth (Africa) to 163 percent growth (Dubai), as shown in Figure III-16, which compares bookings from March 2011 to February 2012 with bookings from March 2012 (when Emirates entered) to February 2013.

Growth in Traffic After Emirates' Entry Seattle MIDT Bookings – All Airlines

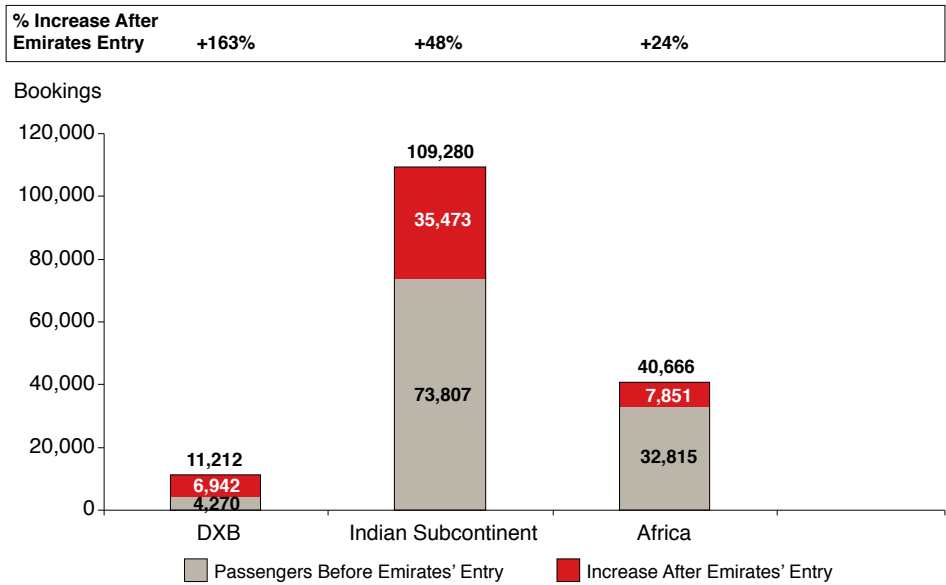
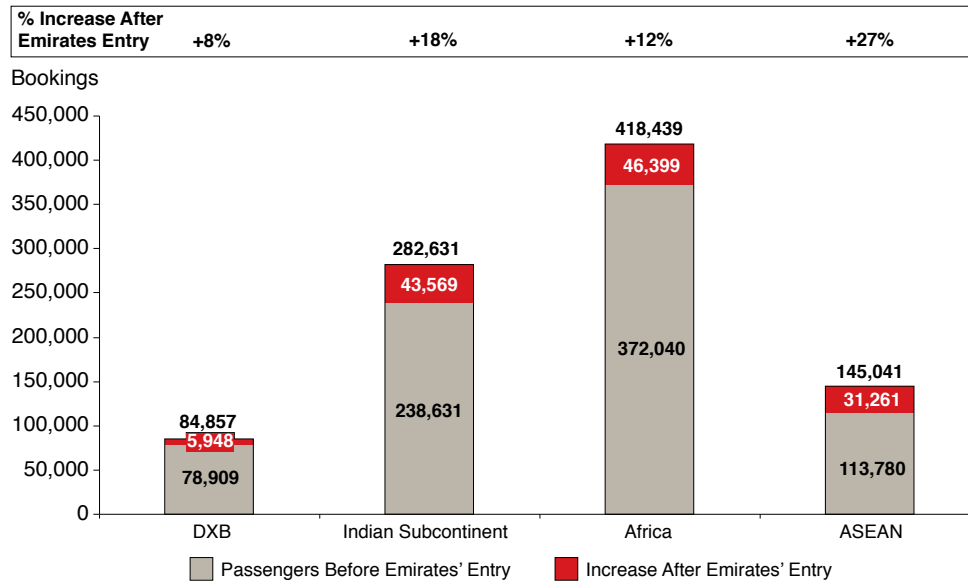


Figure III-16

Only one route in the entire analysis experienced less than double digit growth: Washington-Dubai, which grew eight percent. This is depicted on Figure III-17, which compares bookings from September 2011 to August 2012 with bookings from September 2012 (when Emirates entered) to August 2013 and also shows the more heavily travelled Washington-Indian Subcontinent and Washington-ASEAN routes grew eighteen percent, and twenty-seven percent, respectively.

Growth in Traffic After Emirates' Entry

Washington Dulles MIDT Bookings – All Airlines



Source: MIDT bookings analysis from Emirates.

Figure III-17

Since Washington-Dubai shows the least growth of the fourteen comparisons made, Emirates examined the data in more detail. Figure III-18 charts monthly traffic for both Emirates and United, which operates non-stop service from Washington to Dubai, both before and after Emirates' entry. It shows that traffic on United's non-stop service proceeded unaffected by Emirates' entry. If traffic was lost on other flights after Emirates' entry, those flights featured one-stop or multiple-stop connections. Emirates' provision of additional non-stop capacity provided better service options for passengers, fulfilling a key goal of Open Skies policy.

Washington Dulles to Dubai International Flight Leg

United Airlines Traffic and Emirates Traffic

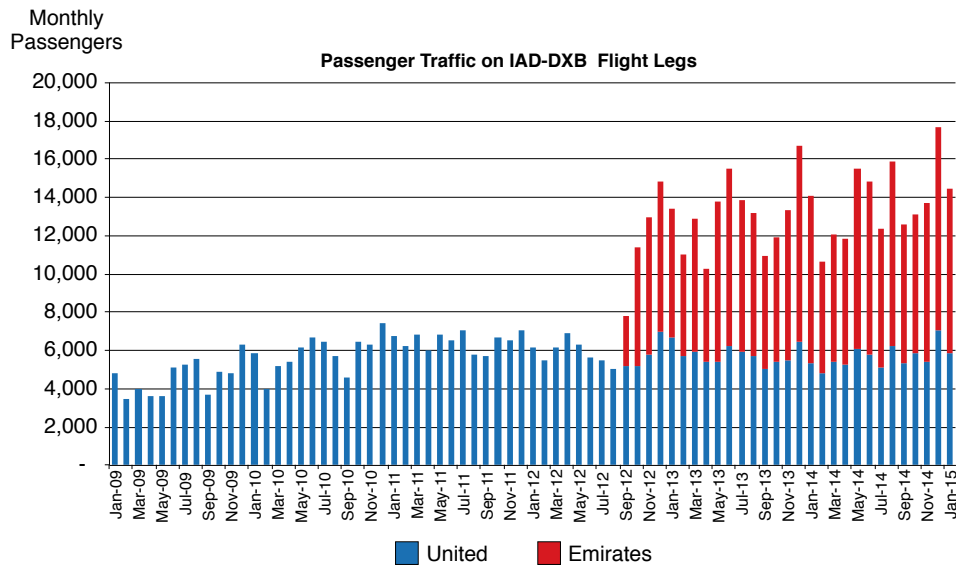


Figure III-18

The evidence is clear: Emirates' entry into U.S. markets has been followed by a growth in bookings in every instance. In virtually all cases the increases are of such magnitude as to demonstrate significant stimulation of demand, and in many cases the increases are stunning. When it enters a market, Emirates offers passengers single-stop, single airline service with well-timed connections that rarely existed before. The convenience of this service attracts new passengers. This is exactly what Open Skies is supposed to achieve, and travelers are demonstrating its success by flying these routes in large numbers.

C. The Legacy Carriers' specific arguments that they are adversely affected by Gulf Carrier competition are not persuasive.

The Legacy Carriers toss a variety of arguments on the table in an attempt to show that they are harmed by the Gulf Carriers. The arguments are anything but a coherent whole, falling largely into three categories: (1) the

alleged loss of market share in three regional markets,²²⁴ (2) a variety of assertions that mostly involve capacity expansion,²²⁵ and (3) a regression analysis that is claimed to show that Gulf Carriers divert traffic, rather than stimulate it. None of these arguments succeeds. This section rebuts each.

1. Arguments on market share are both insufficient and misleading.

Market share figures alone cannot demonstrate harm, and for good reason: an airline can be highly profitable and growing its traffic in a rapidly growing market, but if it does not commit sufficient capacity to the routes in question, it will lose share. In other words, a decline in market share can reflect no harm at all, but merely a business decision to take a smaller slice of a growing pie.

This is the case in the markets at issue. In each instance—the Indian Subcontinent, Southeast Asia, and Africa (a market that the Legacy Carriers ignored in their arguments, but which has been very important in the growth of Emirates and the other Gulf Carriers)—a clear pattern is seen:

- The markets are growing rapidly
- The Legacy Carriers have failed to commit their own capacity to the market in order to share in the growth, but instead continue to operate their existing capacity levels and rely on joint venture arrangements
- Gulf Carriers and others have stepped in and grown the markets
- U.S. carriers have maintained stable or growing bookings

This is not a picture of adverse effects. It is rather the normal, “harm”-less result of business decisions by the Legacy Carriers: their failure to commit additional capacity to growing markets necessarily means, as a matter of arithmetic, that their share of those growing markets will decline. Their market

²²⁴ White Paper at 46–52; Compass Lexecon Report at 4–12.

²²⁵ White Paper at 39–45.

share is reduced, but they are maintaining high load factors and profits. The Legacy Carriers have no claim on markets they have ignored, and they certainly should not be rewarded for their indifference.

The Legacy Carriers are not “entitled” to maintain their historical market shares, nor are they entitled to stipulate that a market should not grow in order to maintain high prices and outsized yields. Like other market participants, they must compete for and earn their share. Even under the precedents of the old Civil Aeronautics Board, it was well established that an existing carrier was not automatically entitled to maintain its market share on an existing route. Under this “growth offsets” principle, other carriers could be added, even if their addition diluted the market share of the existing carrier.²²⁶ Under Open Skies, there is no justification whatsoever for a claim that a reduction in share in a growing market is an unacceptable result. The core idea of Open Skies is to permit competitive forces to act and to grow markets. Incumbent carriers bear the responsibility to meet competitive challenges.²²⁷

A closer look at the data shows that, despite their allegations, the Legacy Carriers and their joint venture partners continue to increase the absolute number of passengers transported in what, for them, are minor markets. The Legacy Carriers suffer no loss at all— they are actually growing their business. While the Legacy Carriers continue to grow in these markets, they are doing so alongside even more rapid growth enabled by Emirates’ business model. Far from harming the Legacy Carriers, in a large number of cases Emirates has helped stimulate these emerging markets to the benefit of the Legacy Carriers, the industry as a whole, and, most importantly, to the benefit of the passengers, businesses, hotels, tour operators, and other airline-dependent interests who now enjoy more robust service on the route.

²²⁶ See *Frontier Airlines v. Civil Aeronautics Bd.*, 439 F.2d 634 (D.C. Cir. 1971).

²²⁷ Statement of United States International Air Transportation Policy, 60 Fed. Reg. 21,841 (U.S. Department of Transportation May 3, 1995); Defining “Open Skies,” Dkt. No. 48130, Order 92-8-13 (U.S. Department of Transportation Aug. 12, 1992).

a. Indian Subcontinent

The Indian Subcontinent provides an excellent example of the value that Emirates has brought to international aviation, with the business model of long-haul transatlantic flights efficiently connecting online at Dubai to a large number of cities in the Subcontinent. This is a natural market for Emirates: over 2.6 million Indians reside in the UAE, representing the largest single national group in the UAE expatriate community, and comprising thirty percent of the UAE population.²²⁸ The two regions have deep historic ties, arising out of Indian Ocean trade routes that have flourished for centuries. For much of the twentieth century the Indian Rupee was accepted as currency in the states that became the UAE. These strong links alone are sufficient to support robust air service from Dubai to many cities in the Indian Subcontinent, totally aside from the opportunity to connect to third countries through a Dubai hub.

With these natural advantages, Emirates was exceptionally well-placed to expand air service to the Indian Subcontinent as the Subcontinent economy has grown rapidly over the past decade. Contrary to the Legacy Carriers' allegations of traffic diversion, the real story is very different and very simple: Emirates and the other Gulf Carriers have invested greatly in Indian Subcontinent routes, and have massively grown that market. The Legacy Carriers and their European joint venture partners have not made the investment needed to participate in that growth. They are free under Open Skies to make that choice, but they have no basis under Open Skies to complain when other airlines choose differently.

Figure III-19 puts this in clear perspective. It plots weekly seat capacity to the Indian Subcontinent against the rapid growth in Subcontinent GDP. From 2004 to 2014 Indian Subcontinent GDP (the black line) grew from less than \$1 trillion to over \$2.5 trillion. The Legacy Carriers (the dark blue line) operated at an extremely low level throughout this time period, never making a major

²²⁸ *UAE Indian Community*, Embassy of India, <https://www.uaeindians.org/profile.aspx> (last visited June 10, 2015).

investment of their own capacity. The Legacy Carriers relied on their joint venture partners (the light blue line), but those partners were content to keep capacity largely level, not making a serious effort to expand with the growth of the market. Emirates (the red line) stepped in and grew the market, leveraging the geographic advantage of the Dubai hub and the historical legacy of flights from Dubai to many Indian Subcontinent cities.

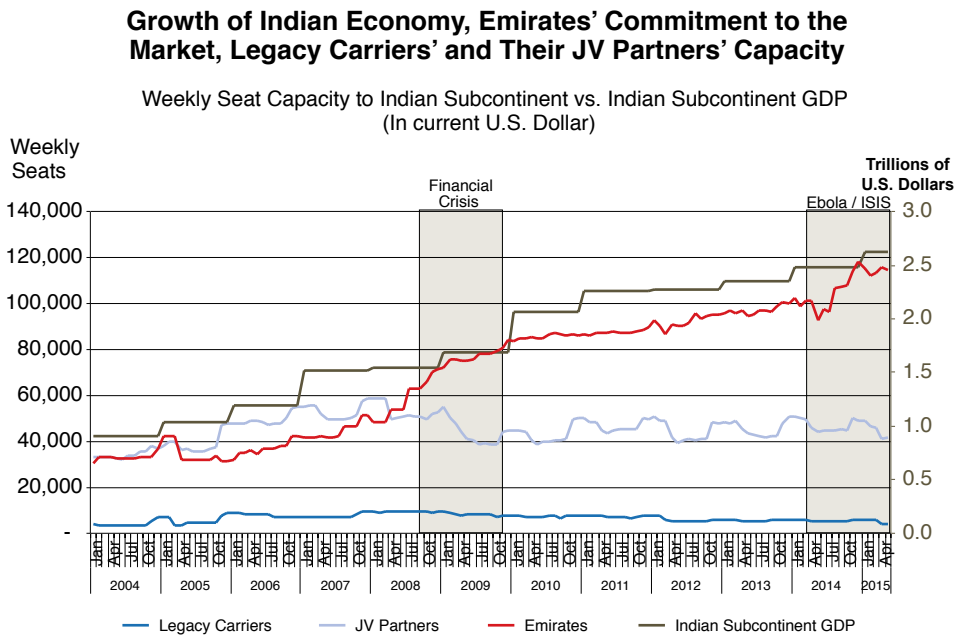


Figure III-19

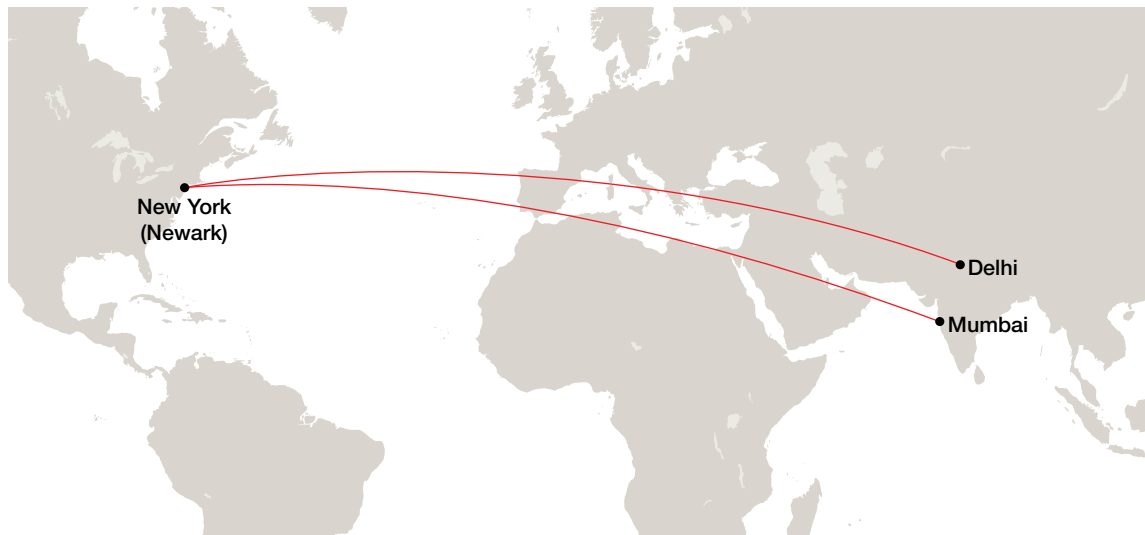
Figure III-19 exposes just how misleading the Legacy Carriers' case is. It is not about lost traffic. Rather, the Legacy Carriers and their joint venture partners simply made a business decision not to commit their capacity. As a consequence of this choice, they lost market share as other airlines seized the opportunity to expand service to a rapidly growing region.

The facts are these: there is relatively little competition in the Indian Subcontinent between the Legacy Carriers and Emirates and the other Gulf Carriers; despite their decision to forgo significant investments, the Legacy

Carriers and their joint venture partners have enjoyed *growth*, not decline, in U.S.-Indian Subcontinent bookings; and the Legacy Carriers' allegations that competition by the Gulf Carriers forced them to drop non-stop flights—which the Gulf Carriers do not even offer—are completely unsupported. Finally, the comparison of Indian Subcontinent growth to that of China and South Korea, argued in the Compass Lexecon Report, is simply absurd. The following paragraphs explain each of these points.

There is little competition between the Gulf Carriers and the Legacy Carriers. As shown on Figure III-20, the Legacy Carriers serve only two U.S.-Indian Subcontinent city pairs with their own aircraft: Newark-Delhi and Newark-Mumbai.

**'Online' U.S.-Indian Subcontinent City-Pairs
Operated by Legacy Carriers**



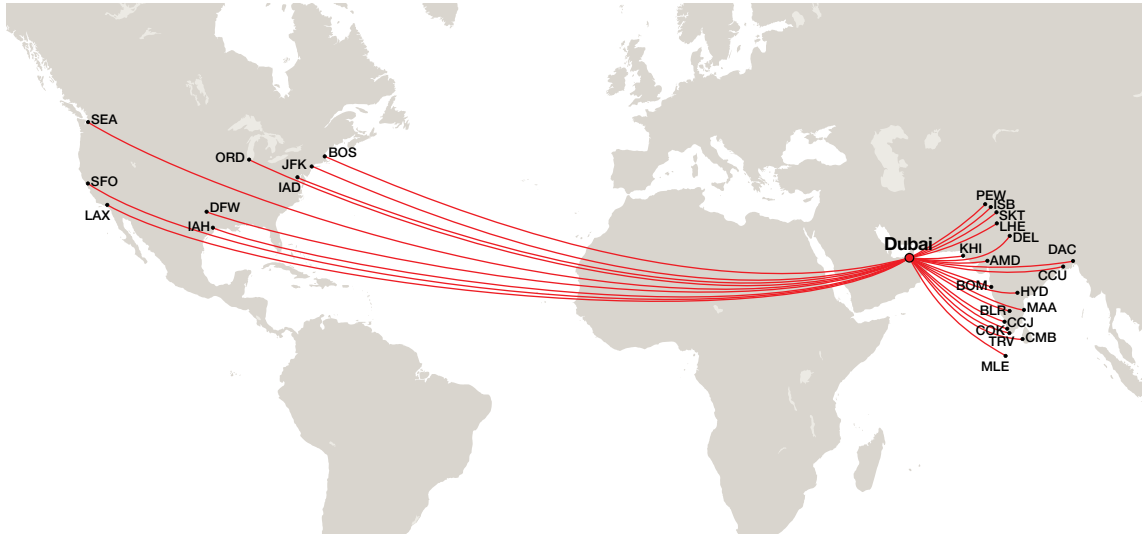
Source: Innovata Schedules data, via Diio (April 2015)

Figure III-20

Emirates, by contrast, serves 162 U.S.-Indian Subcontinent city pairs with its own aircraft. The comparable Emirates route map is in Figure III-21. Emirates offers travelers from nine cities in the United States one-stop itineraries

to ten cities in India, five cities in Pakistan, and the capital cities of Bangladesh, Maldives, and Sri Lanka—eighteen cities in total.

**‘Online’ U.S.-Indian Subcontinent City-Pairs
Operated by Emirates**

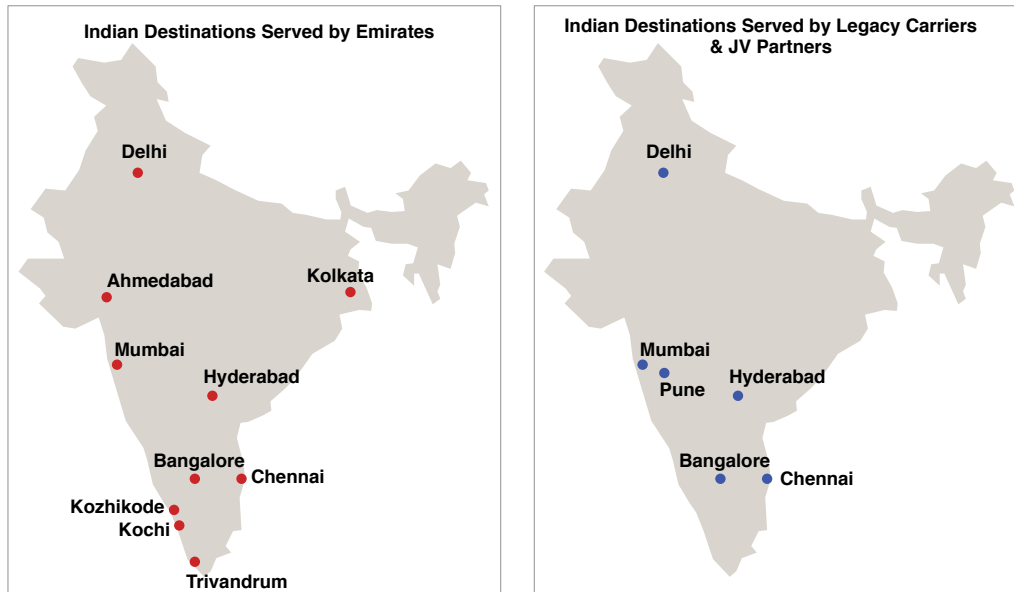


Source: Innovata Schedules data, via Diio (April 2015)

Figure III-21

Even when service by the Legacy Carriers’ joint venture partners is included, they serve only six cities in India, and no cities in Pakistan, Bangladesh, or Sri Lanka. The destinations served are compared on Figure III-22. Legacy Carrier and joint venture partner passengers to those unserved countries on the Indian Subcontinent, or to unserved Indian cities, are simply expected to make a second connection after they arrive in the Indian Subcontinent. Needless to say, two-stop interline connections to those cities are not an attractive service to passengers, and do not constitute a serious effort to compete.

**Comparison of Indian Destinations Served by Emirates
to Destinations Served by Legacy Carriers & JV Partners Combined**

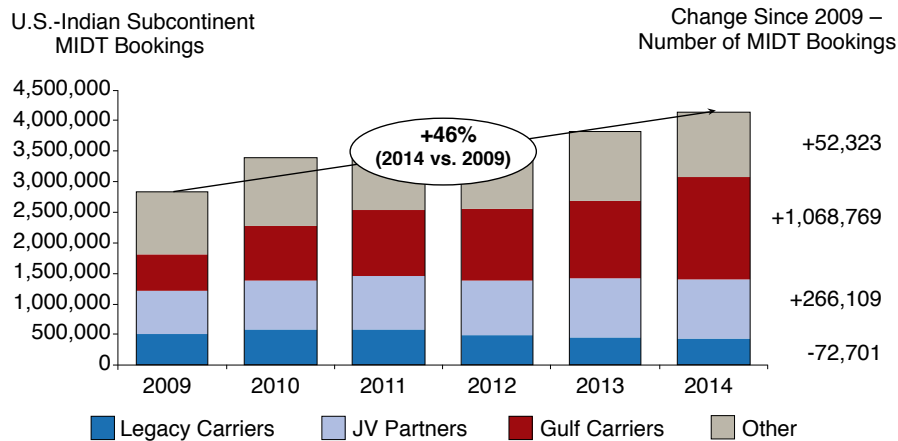


Source: Innovata Schedules Data, via Diio (Typical week of May 2015)

Figure III-22

The Legacy Carriers and their joint venture partners have still enjoyed growth on Indian Subcontinent routes, but the Legacy Carriers have shifted much of their traffic to their joint venture partners. Despite the fact that the Legacy Carriers have declined to commit capacity to this expanding market, they and their joint venture partners together have enjoyed growth on Indian Subcontinent routes. The market dynamics are depicted by Figure III-23.

Total U.S.-Indian Subcontinent Market, Bookings by Carrier Group 2009 to 2014



Source: MIDT bookings analysis from Emirates.

Note: Indian Subcontinent region includes India, Pakistan, Bangladesh, Nepal, Sri Lanka and Maldives.

Figure III-23

As the chart makes clear, the market as a whole—bookings on all carriers—grew forty-six percent from 2009 to 2014. The Legacy Carriers, shown in dark blue, and their joint venture partners, shown in light blue, together experienced a sixteen percent *increase* in bookings during that time. But the real dynamic at work is that the Legacy Carriers have shifted a considerable number of their passengers to their joint venture partners. Legacy Carrier bookings declined by about 73,000 over the six years, but the joint venture partner bookings increased over 266,000. These are the facts of the matter. The Legacy Carriers’ allegation that they have lost Indian Subcontinent bookings to the Gulf Carriers is simply not true.

The Legacy Carriers falsely assert that Gulf Carrier competition caused Delta and American to cancel non-stop flights to India. The Legacy Carriers’ Compass Lexecon Report asserts—with no explanation or documentation—that “two of the three U.S. carriers *were forced to* discontinue their non-stop services between the United States and India” as a result of the

growth of Gulf Carrier bookings to the region.²²⁹ It is odd that such a strong conclusion of cause and effect is advanced with no support whatsoever. It is particularly odd in light of the fact that the supposed competition for the Legacy Carriers' discontinued *non-stop* flights consisted of the Gulf Carriers' *one-stop* flights. A closer look at the fact casts grave doubt on the assertion that these cancellations were caused by competition from the Gulf Carriers.

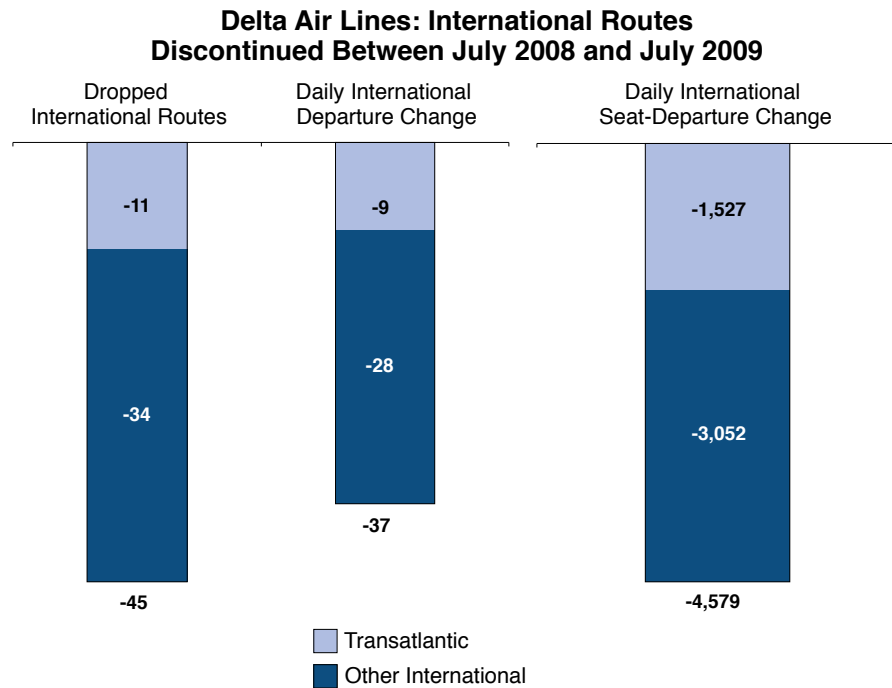
Delta cancelled its New York-Mumbai non-stop service in July 2009. The press at the time quoted Delta as attributing the cancellation to "lower projected passenger demand."²³⁰ There was no mention of intensified competition from the Gulf Carriers or other airlines. Later, in the course of its litigation against the U.S. Export Import Bank ("ExIm Bank"), Delta changed its story and blamed competition from Air India, which it asserted had an unfair advantage because of ExIm Bank financing.²³¹ At the time it made these allegations about Air India, Delta again made no claim that Gulf Carrier competition caused the cancellation of its Mumbai route. Alleging Gulf Carrier competition now, Delta evidently is happy to reinvent the alleged cause of the flight cancellation to suit whatever argument it may be making at a given time.

The truth is almost certainly more prosaic. July 2009 was near the lowest point of the global financial crisis. Delta cancelled forty-five international flights between July 2008 and July 2009, with a particular focus on routes other than transatlantic routes, as shown on Figure III-24. Cancellation as part of a company-wide retrenchment is a more believable story. Delta has offered no reason to believe this decision was taken because of Gulf Carrier competition.

²²⁹ Compass Lexecon Report at 9 (emphasis added).

²³⁰ David Beasley, *Delta Ends Nonstop Flights to India*, Global Atlanta (July 9, 2009) <http://www.globalatlanta.com/article/17442/delta-ends-nonstop-flights-to-india/>.

²³¹ *US Airlines Sue EximBank for Giving Loan Guarantee to AirIndia*, Economic Times (Feb. 12, 2012, 4:16 AM), http://articles.economicstimes.indiatimes.com/2012-02-21/news/31080163_1_foreign-carriers-loan-guarantee-foreign-airlines.



Source: Innovata Schedules via Diio, July 2008 and July 2009.

Figure III-24

American Airlines announced the cancellation of its Chicago-Delhi non-stop service in January 2012, six weeks after it filed for bankruptcy protection on November 29, 2011.²³² Press coverage suggested that the cancellation was part of the bankruptcy-driven rationalization of its network,²³³ although American denied that at the time.²³⁴ Instead, American claimed that the cancellation was due to “historical financial performance of the route and its future outlook given

²³² *Now, American Airlines to End Services on Delhi-Chicago Route; 150 to Lose Jobs*, Economic Times (Jan. 15, 2012, 10:14 PM), http://articles.economictimes.indiatimes.com/2012-01-15/news/30629792_1_american-airlines-new-delhi-chicago-kingfisher-airlines_.

²³³ *Non-stop US-India Market Continues to Shrink with American Airlines Ending Chicago-Delhi Service*, CAPA Leading Edge (Jan. 11, 2012), <http://centreforaviation.com/blogs/aviation-blog/non-stop-us-india-market-continues-to-shrink-with-american-airlines-ending-chicago-delhi-service-65956>.

²³⁴ Gregory Karp, *American Airlines cuts service between Chicago and New Delhi*, Chicago Tribune, Jan. 9, 2012, available at http://articles.chicagotribune.com/2012-01-09/business/chi-american-airlines-cuts-service-between-chicago-and-new-delhi-20120109_1_american-airlines-chicago-s-o-hare-international-airport-job-cuts.

the global economic climate and high oil prices.”²³⁵ Again, there was no suggestion at all that the route was cancelled due to competition from the Gulf Carriers. Indeed, Qatar Airways and Emirates did not even begin service to Chicago until 2013 and 2014, respectively.²³⁶

The comparison to China and South Korea growth is meaningless.

Compass Lexecon advances a sophomoric argument that the Gulf Carriers have not stimulated growth on Indian Subcontinent routes. Compass Lexecon contends that if stimulation were taking place, the growth in bookings on U.S.-Indian Subcontinent routes would grow faster than bookings on U.S.-China and U.S.-Korea routes, where the Gulf Carriers have a much smaller geographic advantage. Finding that U.S.-China and U.S.-Korea routes have grown more rapidly, Compass Lexecon concludes that stimulation on the U.S.-Indian Subcontinent routes is “unlikely.”²³⁷

The principal challenge in rebutting this argument is deciding where to start. Compass Lexecon has ignored virtually every factor that might affect such a crude comparison. To name just a few, they ignored possible differences in capacity devoted to the routes, differences in the presence and behavior of other carriers, differences in fare levels and changes in fares, differences in U.S. travel visa policies, differences in population growth and income trends, and differences in overall economic growth. It is amazing to see a well-known consultancy advance an argument which blithely ignores the fact that China and

²³⁵ *Non-stop US-India Market Continues to Shrink with American Airlines Ending Chicago-Delhi Service*, CAPA Leading Edge (Jan. 11, 2002), <http://centreforaviation.com/blogs/aviation-blog/non-stop-us-india-market-continues-to-shrink-with-american-airlines-ending-chicago-delhi-service-65956>.

²³⁶ Press Release, PR Newswire, Qatar Airways First Passenger Flight to Chicago Touches Down (Apr. 10, 2013), <http://www.prnewswire.com/news-releases/qatar-airways-first-passenger-flight-to-chicago-touches-down-202418971.html>; Press Release, Emirates, Emirates Says Hello Chicago (Feb. 24, 2014), http://www.emirates.com/us/english/about/news/news_detail.aspx?article=1566874.

²³⁷ Compass Lexecon Report at 10. On November 17, 2008, the Republic of Korea joined the U.S. visa waiver program which significantly increased visitor arrivals from South Korea to the United States. This is one of many potential explanations for the difference in growth rates.

India might be rather different places. Emirates has demonstrated traffic growth on Indian Subcontinent routes with hard facts. This argument does not begin to operate at that level.

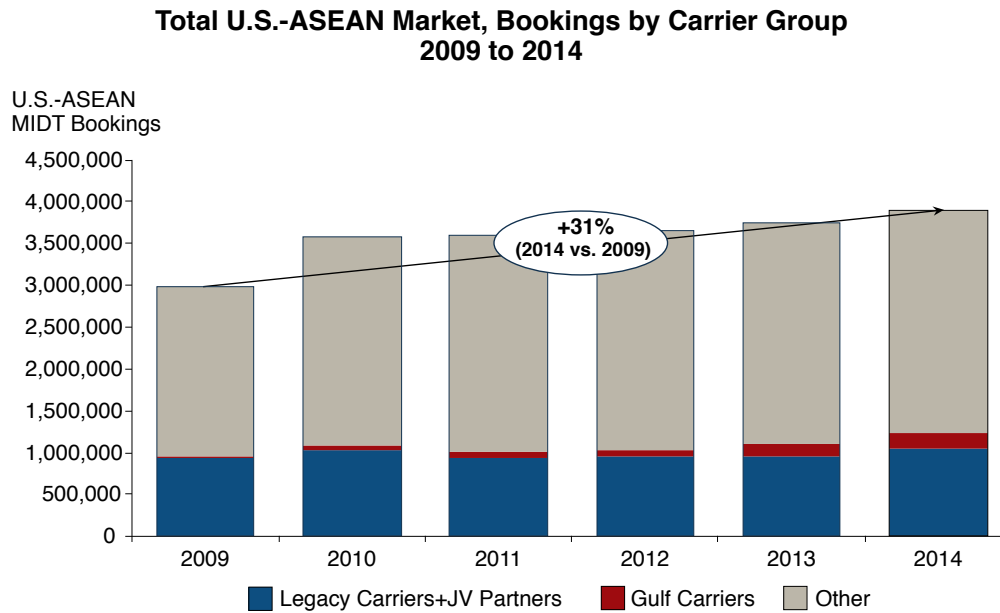
b. Southeast Asia

The principal argument advanced by the Legacy Carriers is that they have lost market share on U.S.-Southeast Asia routes from 2008 to 2014, while the Gulf Carriers gained share.²³⁸ That is, in fact, the only argument that they make. In doing so, the Legacy Carriers ignore the facts that defeat their case: (1) the overall market is growing rapidly, so a reduced share does not mean reduced bookings; (2) market share has been captured principally by Asian carriers, which the argument ignores completely—the Gulf Carriers are minor players; and (3) the Legacy Carriers and their joint venture partners have enjoyed growth in bookings.

The U.S.-Southeast Asia market is growing rapidly. As pointed out above, a loss of market share does not equal harm. In a growing market a carrier can both grow traffic and lose market share at the same time. The loss of share can in fact be good business practice: it can permit a carrier to continue growing but without having to commit the capacity necessary to capture a large share of a rapidly-expanding market. Southeast Asia is an example of this. Figure III-25 shows the bookings growth in routes between the United States and the ASEAN countries: the market grew substantially from 2009 to 2014, with U.S.-ASEAN²³⁹ MIDT industry-wide bookings up thirty-one percent.

²³⁸ White Paper at 47–48.

²³⁹ ASEAN countries include the Southeast Asian countries Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.



Source: MIDT bookings analysis from Emirates.
 Note: ASEAN countries include Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

Figure III-25

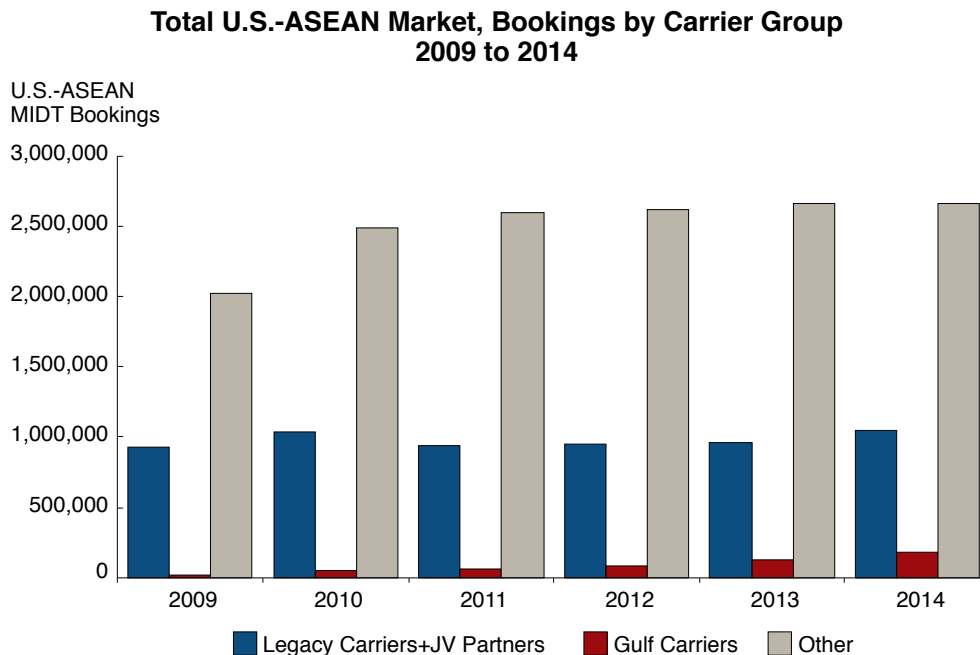
The Legacy Carriers completely ignore the most important carriers in the market. Reading the White Paper, one might conclude that competition in the U.S.-Southeast Asia market consists of a pitched battle between the Legacy Carriers and the Gulf Carriers. But a quick inspection of the White Paper’s market share chart shows that something is missing.²⁴⁰ The two lines on the chart trace only the market shares of the Legacy Carriers (with their joint venture partners) and the Gulf Carriers, but when added together those two do not sum to even half of the market. Other carriers, who command the majority of the market, are omitted completely.

Figure III-25 graphs bookings in the market, providing the complete picture. The shares on which the Legacy Carriers have asked the U.S. Government to focus are the blue and red bars at the bottom of the chart. But the real story is at the top. The gray bars, dwarfing the others, plot the bookings

²⁴⁰ White Paper at 48 fig.24.

of all other carriers in the market. It is the Asian Carriers, not the Gulf Carriers, that dominate competition in this market. The Gulf Carriers, depicted by the red bars in the middle, account for only a sliver of U.S.-ASEAN bookings.

The Legacy Carriers and their joint venture partners have enjoyed growth in bookings. The other key fact omitted from the Legacy Carriers' presentation is that the combined bookings of the Legacy Carriers and their joint venture partners in the U.S.-Southeast Asian market have actually grown. Figure III-26 shows bookings data in a different format, demonstrating that the Legacy Carriers' and their joint venture partners' U.S.-ASEAN MIDT bookings increased by thirteen percent from 2009 to 2014. In 2014, they received over one million bookings for these routes. This figure also shows that the most important growth was enjoyed by the other carriers that the Legacy Carriers' arguments ignore. The Gulf Carriers' traffic, while growing, is dwarfed by both the Legacy Carriers and the other carriers.



Source: MIDT bookings analysis from Emirates.

Note: ASEAN countries include Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

Figure III-26

The Legacy Carriers have fallen far short of a demonstration that they have been harmed by the Gulf Carriers in their Southeast Asia routes.

c. Africa

The Legacy Carriers do not allege that they have been harmed on U.S.-Africa routes. This omission is not surprising, given that the Legacy Carriers have little presence in Africa. But the Legacy Carriers do assert that the Gulf Carriers' overall capacity growth is threatening to them, allegations that are rebutted below. The failure to consider the deployment of that capacity to markets like Africa where the Legacy Carriers have a minimal presence demonstrates that those sweeping assertions are deeply misleading.

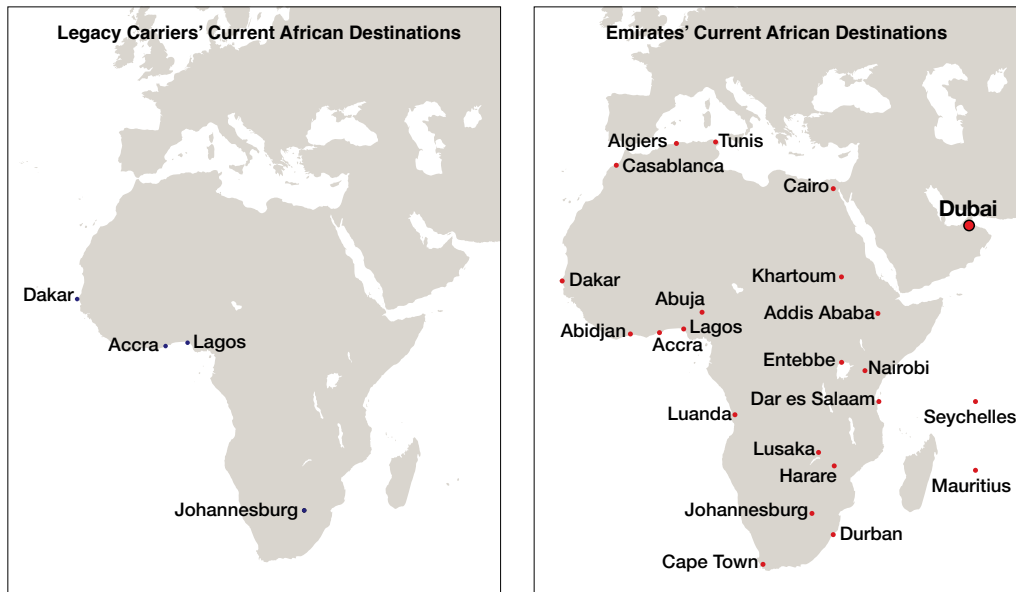
Africa is a market of 1.1 billion people, and is growing rapidly.²⁴¹ A significant number of African countries are experiencing real GDP growth of ten percent per year or more.²⁴² Dubai's geographical location naturally positions Emirates to focus on the high-growth markets in Africa, particularly East Africa.²⁴³ As shown on Figure III-27, Emirates flies to twenty-two cities in Africa, twenty on the mainland plus Mauritius and the Seychelles.

²⁴¹ Mike Pflanz, *Africa's Population to Double to 2.4 Billion by 2050*, Telegraph, Sept. 12, 2013, available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/10305000/Africas-population-to-double-to-2.4-billion-by-2050.html>.

²⁴² World Economic Outlook (International Monetary Fund), Oct. 2014; see Figure I-2.

²⁴³ See John Arlidge, *The New Scramble for Africa Starts in Dubai*, Sunday Times, May 24, 2015, available at <http://www.thesundaytimes.co.uk/sto/business/Economy/article1559673.ece>.

Comparison of African Destinations Served by Emirates to Destinations Served by Legacy Carriers

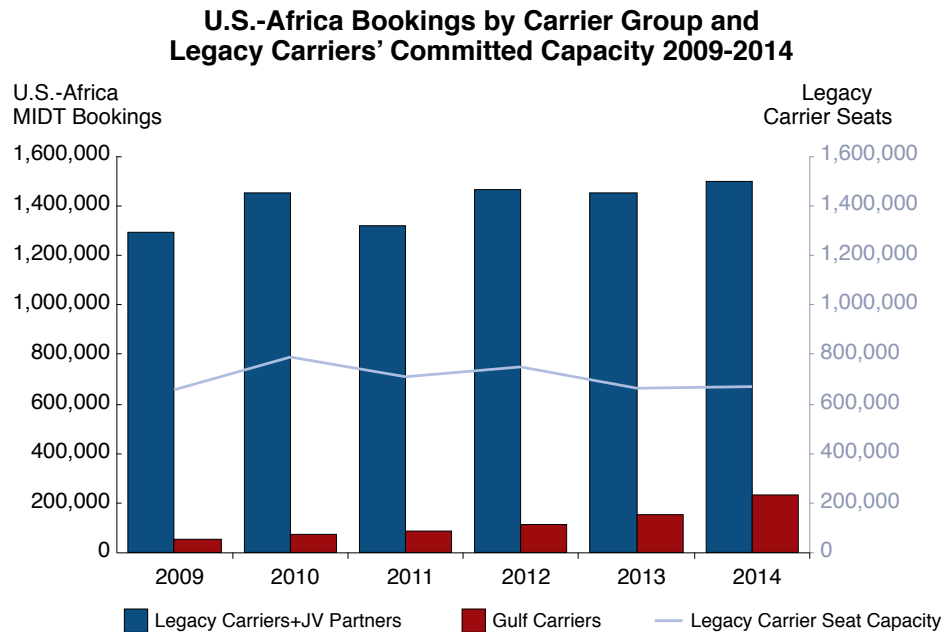


Source: Innovata Schedules Data, via Diio (Typical week of May 2015)

Figure III-27

By contrast, American provides no direct flights to Africa, United provides direct flights only to one destination in Africa, and Delta provides direct flights only to four destinations in Africa. These are also depicted on Figure III-27, which shows that three of those four destinations are in West Africa.

Despite the fact that Legacy Carriers have refrained from committing their own capacity to Africa, relying instead on their European joint venture partners (who in some cases offer less convenient service), they have still seen considerable growth in U.S.-Africa traffic. Figure III-28 shows a reduction since 2011 in Legacy Carrier capacity in the African market (shown by the light blue line). Yet, the Legacy Carriers and their joint venture partners, taken together, have seen increased bookings for these routes since that time, as illustrated by the dark blue bars. The chart also displays the Gulf Carriers in much shorter red bars—the Gulf Carriers' share of U.S.-Africa bookings represents only nine percent of the market.



Source: MIDT Bookings analysis from Emirates, and Innovata Schedules via Diio, nonstop seats only.

Figure III-28

Like the Indian Subcontinent and ASEAN countries, the Legacy Carriers' approach to Africa fits the same pattern. They have reduced their own capacity to Africa, and instead rely on their joint venture partners. They have enjoyed some growth in bookings, but have not invested the effort or capacity needed to participate fully in a rapidly growing market.

d. Milan

The discussion above demonstrated that the Gulf Carriers are not harming the Legacy Carriers on connecting routes to the Indian Subcontinent, Southeast Asia, and Africa. In the case of the U.S.-Europe market, the White Paper focuses on the one and only route on which there is direct competition: New York-Milan.²⁴⁴ This argument is strained: no alleged commercial harm on a

²⁴⁴ White Paper at 49–50.

single city-pair would justify the broad action sought by the Legacy Carriers.²⁴⁵ Further, the White Paper's arguments do not even succeed in showing harm on this single route.

At the express request of Milan-Malpensa Airport and Italian aviation authorities, Emirates commenced non-stop fifth freedom service between Milan and New York JFK in October 2013.²⁴⁶ At that time, this important market was poorly served by Alitalia, Delta, United (to Newark), and American.²⁴⁷ Some of this service was seasonal,²⁴⁸ older aircraft were used (e.g., Boeing 767s),²⁴⁹ and not one of the four incumbent airlines offered a first-class cabin.²⁵⁰ Capacity on the route had dipped since 2009,²⁵¹ lagging behind service in roughly comparable markets such as Zurich-New York. After careful analysis of the route's economic potential, Emirates commenced daily three-cabin service with

²⁴⁵ It also is highly hypocritical. The Legacy Carriers decry Emirates' use of fifth-freedom traffic rights on the Milan-New York route that are available under the U.S.-UAE Open Skies Agreement, while ignoring their own massive use of fifth-freedom rights throughout the world, such as the Delta and United hubs at Narita, Japan. The Legacy Carriers also conveniently do not mention operations between the U.S. and Europe by their non-European carrier partners (e.g., Air New Zealand (Los Angeles to London Heathrow), Jet Airways (Newark Liberty to Brussels), Singapore Airlines (JFK to Frankfurt)), from which they benefit in the North Atlantic.

²⁴⁶ Adrien Glover, *Emirates Debuts First Transatlantic Flight*, Travel + Leisure (Oct. 1, 2013), <http://www.travelandleisure.com/blogs/emirates-debuts-first-transatlantic-flight>.

²⁴⁷ Justin Bachman, *Emirates Adds Non-Dubai Flight and Enters Trans-Atlantic Fray*, Bloomberg Business (Aug 28, 2013), <http://www.bloomberg.com/bw/articles/2013-08-28/emirates-adds-non-dubai-flight-and-enters-trans-atlantic-fray>; *US Airlines Take Aim at Gulf Carriers when Perhaps They Would Be Better Woo-ing Them*, CAPA Aviation Analysis (Dec. 19, 2014), <http://centreforaviation.com/analysis/us-airlines-take-aim-at-the-gulf-carriers-when-perhaps-they-would-be-better-woo-ing-them-192141> ("Mr Hauenstein . . . effectively admitted incumbents had left themselves exposed with poor service quality. Capacity on the route dipped after 2009, in line with Alitalia's reduction . . . Delta and American privately acknowledge they were letting their products stagnate, especially in the premium cabins.")

²⁴⁸ *Id.* ("Further, it was not just the annual picture that showed some slack. On a month-by-month basis, carriers were curtailing off-season capacity.")

²⁴⁹ Ben Mutzbaugh, *Emirates to Add New York JFK-Milan Nonstop*, USA Today (Apr. 8, 2013, 4:14 PM), <http://www.usatoday.com/story/todayinthesky/2013/04/08/emirates-airline-adds-first-route-between-usa-and-europe/2064113/>.

²⁵⁰ *Id.*

²⁵¹ *US Airlines Take Aim at Gulf Carriers when Perhaps They Would Be Better Woo-ing Them*, CAPA Aviation Analysis (Dec. 19, 2014), <http://centreforaviation.com/analysis/us-airlines-take-aim-at-the-gulf-carriers-when-perhaps-they-would-be-better-woo-ing-them-192141>

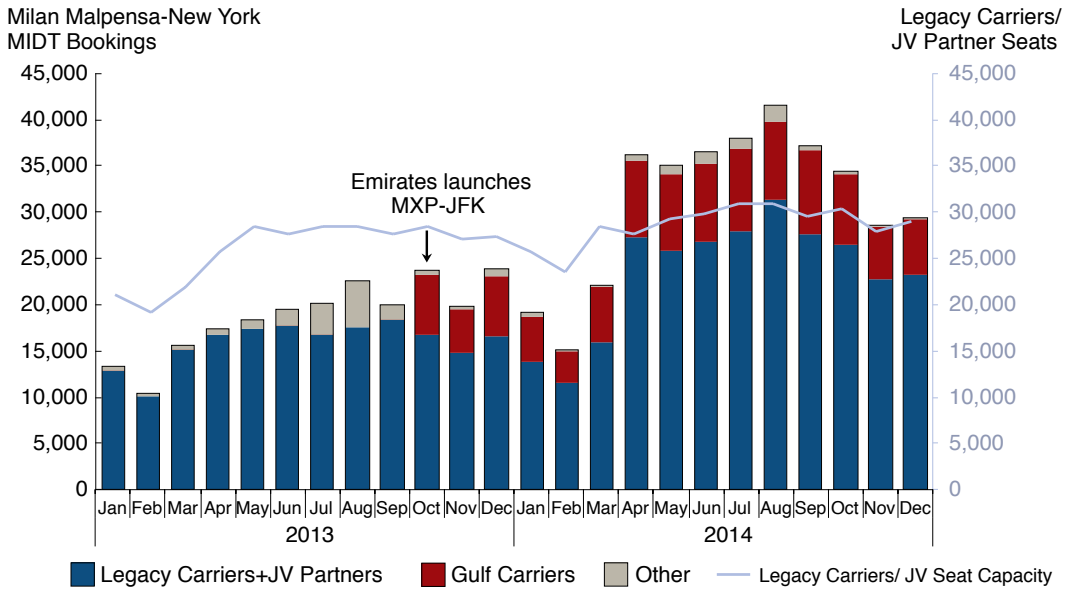
Boeing 777s,²⁵² and has achieved extraordinary success. This success is not harm: it validates the wisdom of U.S. Open Skies policy, which insists upon unlimited fifth-freedom rights as an essential element and, as demonstrated here, a critical discipline on third- and fourth-freedom airlines that fail to meet market demand and customer expectations.

The key argument in the White Paper is that “U.S. carriers have lost 13 points of market share directly to Emirates.”²⁵³ Once again, the Legacy Carriers have framed a misleading argument in terms of market share, rather than revealing the actual bookings data. Indeed, the Legacy Carriers appear to presume their audience is unfamiliar with basic arithmetic: market share is only meaningful when considered in the context of overall growth or shrinkage of the market. In fact, market share figures are highly misleading here, because Emirates’ entrance into the New York-Milan market has stimulated overall demand for the market. Since Emirates’ launch in October 2013, total bookings for New York to Milan routes increased by nearly eighty percent. Figure III-29 and Figure III-30, showing bookings from 2013 through 2014, demonstrate this significant increase in bookings not just for Gulf Carriers but also for the Legacy Carriers and their joint venture partners. Figure III-29 also displays the Legacy Carrier and joint venture partner seat capacity over this period (shown by a light blue line), demonstrating how the launch of Emirates’ New York-Milan service increased Legacy Carrier and joint venture partner capacity by over 2,000 seats per month. This capacity was filled by the pent-up passenger demand for non-stop service.

²⁵² Adrien Glover, *Emirates Debuts First Transatlantic Flight*, Travel + Leisure (Oct. 1, 2013), <http://www.travelandleisure.com/blogs/emirates-debuts-first-transatlantic-flight>.

²⁵³ White Paper at 49.

**Monthly Bookings by Carrier Group and Legacy Carriers' Capacity
Milan-New York 2013-2014**



* New York (NYC) market includes JFK, EWR and LGA.
Source: MIDT Bookings analysis from Emirates and Innovata Schedules via Diiio, nonstop seats only.

Figure III-29

Emirates' stimulation of the market benefited passengers, and it also led to significant growth in bookings for the Legacy Carriers. Lurking behind their market share argument is the fact that Legacy Carriers and their joint venture partners experienced a forty-six percent growth in New York-Milan bookings after the Emirates service launch, as shown on Figure III-30. This traffic growth reflects an expansion of the market and the increased demand since the Emirates launch.

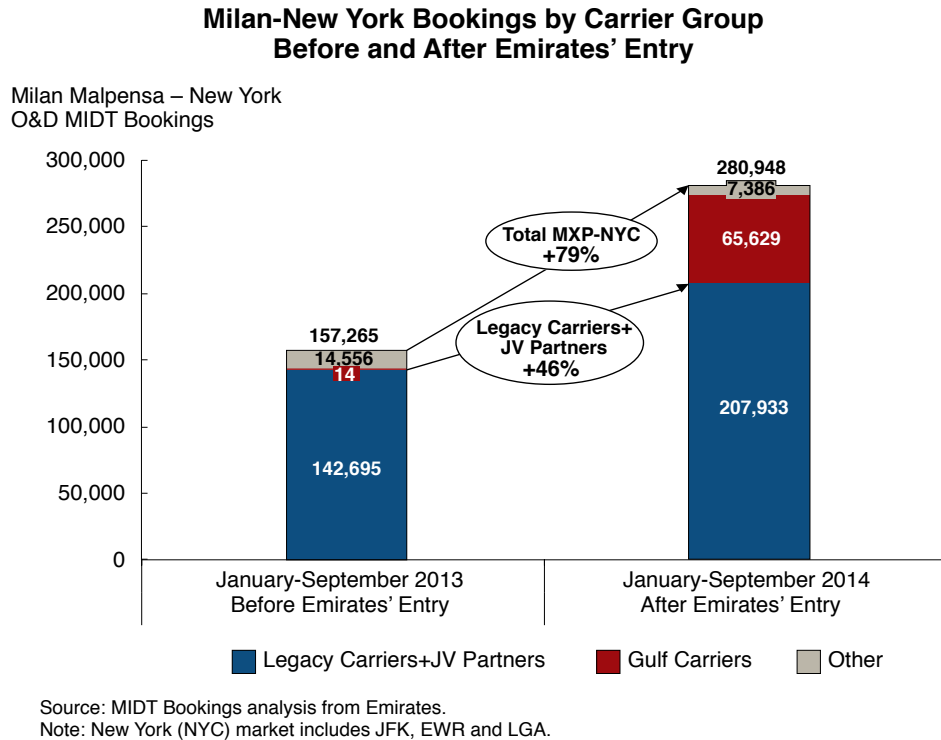


Figure III-30

These data show yet again that the market share arguments advanced by the Legacy Carriers are misleading and wholly insufficient to demonstrate harm.

2. Capacity expansion arguments do not make even the most basic showing that added Gulf Carrier capacity will cause harm.

The Legacy Carriers' second type of argument describes the growth of Gulf Carrier capacity, and speculates on the implications of added capacity for the Legacy Carriers. In trade disputes, arguments of this kind are held to a rigorous standard. Projections of future harm must be "based on positive evidence" and must show a "high degree of likelihood that projected occurrences will occur."²⁵⁴ The circumstances that could lead to harm must be "clearly

²⁵⁴ Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada (Article 21.5 Proceeding)* ¶ 98, WT/DS277/AB/RW (April 13, 2006).

foreseen and imminent.”²⁵⁵ This requires a logical, fact-driven analysis that demonstrates with a high degree of likelihood that harm will happen in the near future, and a thoughtful analysis of why alternative scenarios are not likely.²⁵⁶

The Legacy Carriers’ allegations are to be considered under the Open Skies Agreement, which, unlike trade agreements, does not even contemplate allegations of this kind. And unlike trade agreements, under Open Skies there is no agreed understanding that harm merely to the commercial interests of a competitor is sufficient to justify government intervention in the marketplace. The Legacy Carriers should be required to demonstrate much more than harm to their narrow interests. They should show harm to the goals of enhanced competition, increased flight frequency, consumer choice, promotion of business travel and tourism, improved service, innovation, and the encouragement of overall economic growth—the policies behind the Open Skies Agreement.

The Legacy Carriers’ arguments fail miserably to carry this burden or any other legal standard one might reasonably hypothecate. Their arguments commit fundamental errors of logic, rely on long-obsolete analyses, and do not grapple at all with projections of future demand and growth.

a. The Legacy Carriers’ argument regarding capacity added on U.S.-Middle East hub routes is misleading and fails to demonstrate its point.

The shortcomings of the Legacy Carriers’ arguments are seen from the start. The very first argument of the Compass Lexecon Report relies on a highly misleading comparison, and is bereft of the fact-driven logic that would be required to support its conclusion. Compass Lexecon contends that the Gulf Carriers have added capacity between the United States and their Middle East hubs of about 11,000 seats per day from 2008 to 2014, but that origin and

²⁵⁵ Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* ¶ 7.57, WT/DS277/R (Mar. 22, 2004).

²⁵⁶ Appellate Body Report, *United States – Softwood Lumber* ¶ 98.

destination bookings between the United States and those hubs has increased only by 240.²⁵⁷ They even produce a chart that compares these two numbers.²⁵⁸

The obvious fallacy here is that the vast majority of the 11,000 seats are not occupied by travelers whose destinations are the Middle East hubs. They are occupied by travelers who will pass through the hubs en route to Africa, the Indian Subcontinent, Southeast Asia, and other destinations. The Compass Lexecon chart thus compares apples to oranges: it compares total seats added—seats which carry both local passengers and passengers to destinations beyond the hub—to the growth in local traffic alone.

Compass Lexecon does not actually say that the 11,000 seats should be filled by local passengers. They instead frame their argument by contending that “new international non-stop routes are typically expected to stimulate significant amounts of local passenger demand.”²⁵⁹ But if this is the goal of their argument, then they must explain what that “significant amount” of demand should be, whether this expectation is applicable to the Gulf Carrier model where the hubs are designed to connect new, rapidly growing, and underserved destinations in places like India and Africa, and examine the before-and-after effects of market entry route by route rather than rely on macro figures. Compass Lexecon does none of this: all they offer is a crude comparison of total seats to local traffic.

The failure of this macro-level—and misleading—argument is clear when compared to the route-by-route traffic growth analysis presented by Emirates, above. That analysis shows very significant growth of local traffic to the Dubai hub in the twelve months after entry in every instance, in some cases as much as seventy-five percent or even 163 percent.²⁶⁰

²⁵⁷ Compass Lexecon Report at 5–8.

²⁵⁸ Compass Lexecon Report at 8.

²⁵⁹ Compass Lexecon Report at 5.

²⁶⁰ See *supra* Section III.B.3.

b. The Legacy Carriers' arguments about overall capacity growth fail to demonstrate that harm will ensue.

The Legacy Carriers' principal argument is that Gulf Carrier capacity is increasing so significantly that it will cause overcapacity and drive down yields for other carriers.²⁶¹ They parade a number of statistics and graphics depicting data like the absolute numbers of seat miles that have been added by the Gulf Carriers, and the number of aircraft on order for future purchase. To make credible arguments just on the issue of harm to their narrow commercial interests, however, the Legacy Carriers would have to offer (1) convincing evidence that reasonably expected capacity growth (not just broad extrapolations from orders and options that may not be exercised) will greatly exceed reasonably expected traffic growth, and (2) a credible demonstration that overcapacity will have an adverse effect on the Legacy Carriers in directly competitive markets, in light of the limited competition between the Gulf Carriers and the Legacy Carriers, and that the circumstances that will create this effect are imminent. The Legacy Carriers' case fails on both points.

Capacity growth and traffic growth. The White Paper indulges in inflated rhetoric about the growth of the Gulf Carrier fleets. Much of the discussion focuses on growth in the past,²⁶² but past growth is irrelevant: the Legacy Carriers, earning record profits, are not suffering current harm from that growth. Future growth could be relevant, but the estimates of future growth are shallow, simply assuming, for example, retirement schedules for existing aircraft, assuming that all options will be exercised, including aircraft that are not going to be delivered until after 2020, and assuming that large amounts of the capacity will be deployed on directly competitive routes, when in fact this may not occur.

²⁶¹ See, e.g., White Paper at 39–45.

²⁶² White Paper at 39–40.

(It is relevant that a WTO dispute panel has specifically found that aircraft orders and delivery information are poor predicting factors.²⁶³)

Equally important, the Legacy Carriers fail to plot their allegations of capacity growth against realistic estimates of traffic growth, so as to evaluate whether there is a real risk of overcapacity. One example makes this clear: the White Paper places great emphasis on the growth in widebody aircraft fleets, and recites a study finding that the Gulf Carriers' widebody fleet, currently estimated at 363 aircraft, "is expected to increase by at least another 130 aircraft by 2020."²⁶⁴ Setting aside the question of whether expectations regarding a time five years in the future can be considered "imminent," that number bears examination. If accurate, it reflects a thirty-six percent growth in the size of the widebody fleet. Boeing currently projects five percent annual growth in passenger traffic in the future, for the entire world.²⁶⁵ That of course is an average, reflecting both slow-growing mature markets like North America and the much more rapidly growing markets being developed by the Gulf Carriers. Current traffic, growing at a five percent annual rate, will increase by thirty-four percent over six years. Even by this crude calculation, then, traffic will grow to match the alleged fleet growth by late 2021. Of course, if one applies a higher growth factor to reflect the Gulf Carriers' rapidly growing markets, traffic will increase much faster, and the alleged fleet increase looks not only reasonable, but potentially constraining.

The Legacy Carriers fail to make a convincing demonstration of any future overcapacity, much less imminent overcapacity, and rely instead on

²⁶³ Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* ¶¶ 7.2177–.2178, WT/DS316/R (June 30, 2010) ("We note that there are certain constraints in considering order information with respect to likely trends in future imports...these types of concerns make this information a less than reliable basis on which to draw conclusions concerning an imminent increase in subsidized imports.")

²⁶⁴ White Paper at 40.

²⁶⁵ Boeing, Long-Term Market Current Market Outlook 2014–2015, <http://www.boeing.com/commercial/market/long-term-market/>.

meaningless comparisons. The Legacy Carriers complain, for example, that the Gulf Carrier widebody fleet will exceed the U.S. widebody fleet by 2020.²⁶⁶ That possibility may injure the pride of Legacy Carrier executives, but it offers no guidance on whether the Gulf Carriers' capacity will exceed the traffic they will carry at that time. The Legacy Carriers express concern that the Gulf Carrier fleet will be far too large to be based in countries that have only four percent of the population of the United States.²⁶⁷ That speaks volumes about the geographical advantages of Middle East hubs, but says nothing about whether that capacity will exceed the traffic it carries. And the Legacy Carriers argue that Gulf Carrier capacity growth will exceed the growth of global GDP.²⁶⁸ At best, that comparison ignores that traffic growth in the markets served by Emirates and the other Gulf Carriers exceeds global GDP growth. At worst, it betrays the Legacy Carriers' protectionist preconceptions: they seek a world where all competitors accept permanently their current shares, and grow slowly at a pace that does not exceed the growth of the overall economy in a mature world market. This sort of entitlement thinking would permit the Legacy Carriers to continue to constrain capacity and diminish customer service in order to grow profits and executive bonuses, while protecting them from any need to confront transformations in the competitive marketplace. Had such a policy of GDP-constrained expansion applied in the U.S. domestic market, Southwest would still be flying only in Texas and JetBlue would probably not exist.

Effects of alleged overcapacity in the imminent future. Even if the Legacy Carriers could show a serious, credible likelihood of excess capacity, that would not be sufficient even to show harm to their narrow commercial interests under WTO principles. They also would have to show that clearly foreseen, imminent circumstances threaten competitive harm: positive evidence that a reduction in key indicators of performance—load factors, yields, and

²⁶⁶ White Paper at 40.

²⁶⁷ White Paper at 40.

²⁶⁸ White Paper at 41.

prices—will happen. The White Paper provides no evidence of this at all. It relies on conclusions by two secondary sources, one of which is badly out of date and the other of which does not support the Legacy Carriers' excess capacity claim.

The first source is a 2009 publication (amazingly described in the White Paper as “recent”) by Mr. Mark Haneke, which attempted to project industry effects in 2012, which at the time was three years in the future.²⁶⁹ This was a foggy crystal ball even at the time of its publication six years ago in the midst of the Great Recession. The article predicted an “airplane capacity glut” owing to the excess capacity of the Gulf Carriers, based on “industry aircraft delivery projections as of 2007.”²⁷⁰ (Note that those projections were from a time prior to the onset of the recession.) All of the article’s predictions regarding market conditions and growth were based on aircraft order data from 2007, and it forecast an overcapacity continuing “at least until 2014.”²⁷¹

The time period of the prediction has come and gone. Mr. Haneke’s predicted capacity “glut” and its effects never occurred. To the contrary, 2012 was a year of great profitability for the Legacy Carriers, showing no injury from depressed yields or prices.²⁷² The Legacy Carriers’ profits increased over 300 percent from 2012 to 2014, completely disproving the prediction of an injurious global overcapacity for this period.²⁷³ Yet this paper is offered by the White Paper as evidence to support its claim that there will be effects *in the future*.

²⁶⁹ White Paper at 45 n.193.

²⁷⁰ Mark Haneke, *Will There Be an Airplane Capacity Glut by 2012*, 15 *Journal of Air Transportation Management* 134, 134 (2009).

²⁷¹ Haneke, *Will There Be an Airplane Capacity Glut by 2012*, at 136.

²⁷² Figure III-1.

²⁷³ See Figure III-1.

The second source is a 2013 publication by the CAPA Centre for Aviation (“CAPA”).²⁷⁴ The White Paper relies on the CAPA article for a single quote that it has taken out of context.²⁷⁵ Examination of the entire CAPA report reveals that it *negates* the White Paper’s contentions about overcapacity. The article places Emirates’ fleet expansion in the context of traffic growth on Emirates’ routes,²⁷⁶ and makes statements like the following:

At first when Emirates began serving non-capital “regional” cities such as Manchester and Birmingham in the UK, or even Dublin (with its population of just over a million), there were cries of “capacity dumping.” *The market response has generally given the lie to that*, as new global one-stop travel opportunities opened up. Today, Greater Manchester, with a population of around 2.5 million . . . is host to seven widebody services each day from the three Gulf carriers . . . well over 2,000 seats daily.²⁷⁷

The Legacy Carriers simply have not set forth a credible case either that overcapacity will emerge, or that alleged overcapacity will cause harm.

3. The Compass Lexecon regression analysis does not demonstrate adverse effects.

Several of the arguments in the May 13, 2015 Compass Lexecon report have already been rebutted. As shown earlier in this section, those arguments rest on fundamental flaws: the failure to distinguish between traffic bound to a hub as a destination and traffic that will travel beyond the hub, for example, and the crude comparison of traffic growth to India and China without considering any of the differences between the markets.

²⁷⁴ White Paper at 45.

²⁷⁵ White Paper at 45.

²⁷⁶ CAPA Centre for Aviation, *Why Emirates and Friends Will Soon Reshape American Aviation* 4 (2013) (Emirates encourages “massive flows” through Dubai).

²⁷⁷ *Id.* at 10.

After that inauspicious beginning, Compass Lexecon asks the reader to accept the results of a regression analysis that it claims shows that Gulf Carrier traffic gains have come at the expense of other carriers, and that the Gulf Carriers have not stimulated additional traffic.²⁷⁸ As a preliminary matter, Emirates has presented in this document specific data on bookings before and after its entry into U.S. markets that show very large growth in traffic after Emirates' entry into a market, data that are far more detailed and closely related to the matter at hand than the global approach taken by Compass Lexecon's model.

A scan of the Compass Lexecon report further reveals a number of flaws. There is reason to believe, for example, that the model builds in the assumption that incumbent carriers will share proportionately in traffic growth. If so, this would cause the model to assume its own conclusion: to the extent that a new carrier stimulates traffic and carries that traffic, this would show in the model as share taken from the incumbent carriers. If present, this is the same flaw that afflicts all of the Legacy Carriers' market share arguments. It is a failure to recognize that a decline of market share in a growing market may simply be the result of a decision not to invest in carrying that growth, or not to sell competitive services, and may not actually show lost traffic. It is significant, in this regard, that Compass Lexecon has not actually quantified any allegedly lost traffic or revenue, nor has it shown on what routes traffic allegedly was lost.

There is also reason to believe that the model fails to distinguish effects of Gulf Carrier competition from that of other carriers. The model operates at a simplistic level: it does not distinguish among geographic regions, and it lumps together U.S. and other carriers into one group, thus ignoring competitive relationships among them that may be far more important than the role played

²⁷⁸ Compass Lexecon Report at 13. Emirates has already shown that there is no basis under the Open Skies Agreement to conclude that mere impact on a competitor's narrow commercial interests is sufficient to justify government intervention in the marketplace. To the contrary, the promotion of competition to secure the broad benefits of competition is the key policy behind Open Skies.

by the Gulf Carriers. Emirates has already shown how the Legacy Carriers' arguments regarding ASEAN traffic simply ignored the most important competitive challenge, Asian carriers. The analysis instead concentrated solely on the Gulf Carriers, despite the fact that they are by far the smallest players on those routes.

The Compass Lexecon model may make the same error. It calculates one set of global coefficients that are supposed to be equally applicable to traffic from the United States to the Indian Subcontinent, where the Gulf Carriers are a major presence, and to traffic from the United States to Europe, where they are very small indeed. At the same time it fails to distinguish the effects of dominant carriers in regions like Europe and Asia from those of minor players like the Gulf Carriers.

Other flaws are evident on the face of the report. For example, the first two models in Exhibit 2 of the Compass Lexecon report (page 16, columns 1 and 2) show results that indicate that Gulf Carrier competition supposedly has the same effect on U.S. carriers in markets behind international gateways as it does on traffic to the gateway market itself. It is simply not credible that Gulf Carriers have the same alleged competitive impact on traffic from Mumbai to Kansas City, which a passenger can reach only by connecting on a U.S. flag carrier, as on traffic from Mumbai to Boston, where Gulf Carriers fly directly. All of these signs indicate a crudely wrought analysis that offers no real guidance on the question at hand.

4. The Legacy Carriers' job loss estimates are based on faulty analysis. Emirates' entry into the United States has supported thousands of U.S. jobs.

The Legacy Carriers claim that if a daily widebody flight by a Legacy Carriers is lost to a foreign carrier, then 800 U.S. jobs would be lost.²⁷⁹ This figure does not withstand scrutiny. Four significant flaws in the analysis—

²⁷⁹ White Paper at 51.

including the fact that the Legacy Carriers have not actually shown any such displacement—render the conclusion meaningless. Like the spurious allegations of subsidies to Emirates, the jobs impact estimate appears to be slapped together to support a public relations campaign, not a serious attempt to assess the jobs effect of Gulf Carriers flights to the United States. In fact, Emirates supports substantial U.S. employment.

Emirates supports nearly 4,000 U.S. jobs per daily round trip service.

The aviation experts Campbell-Hill Aviation Group have analyzed the U.S. jobs effect of Emirates' flights to the United States. That analysis, set forth in Exhibit 6 to this paper, demonstrates that Emirates supports 3,975 U.S. jobs per with each of its U.S. daily flights.²⁸⁰ The employees holding these 3,975 jobs earn \$161 million per year.²⁸¹ (U.S. jobs associated with Emirates operations are also touched on in the analysis of Emirates' contribution to the U.S. economy, in Section V.B, below.)

No Legacy Carrier flights have been displaced. The fundamental assumption of the White Paper jobs analysis is that Emirates (and other Gulf Carrier) flights have displaced flights by the Legacy Carriers. The Legacy Carriers offer no evidence to substantiate this,²⁸² and it is not true. The Legacy Carriers offer very few flights that compete on routes flown by Emirates, and have not provided any credible evidence that any of those flights have been displaced. To the contrary, when flying to the vast majority of destinations served by Emirates, a passenger seeking to book with a Legacy Carrier would be routed through an alliance partner—a foreign airline—not a Legacy Carrier flight. This is very important: the Legacy Carriers have *already* transferred their U.S. jobs to foreign airlines. They have done so by ceding the traffic to their

²⁸⁰ See *also* Section V.B; Figure V-5.

²⁸¹ Campbell-Hill Aviation Group, Analysis of the Legacy Carriers' Job Loss Estimate Due to Emirates' Service 5–6 (June 22, 2015) (attached as **Exhibit 6**).

²⁸² The many shortcomings of the Compass Lexecon report, including its failure to present *any* credible evidence of displacement of Legacy Carrier flights, were detailed in the immediately preceding sections.

foreign alliance partners. The White Paper does not even mention this issue, much less account for it in the analysis. The White Paper simply assumes that a wholly Legacy Carrier flight will be replaced by a Gulf Carrier flight, without offering any credible evidence that this has occurred.

The White Paper’s job loss estimates completely ignore jobs outside of airline services. The White Paper’s analysis, even if it is taken on its own terms, erroneously looks only at jobs held at airlines. The calculation starts with airline jobs figures, and those figures are increased by “multipliers” (factors used to estimate indirect effects) that also do not contemplate jobs beyond airline-related jobs.²⁸³ This is far too narrow a view. The Germany study cited by the Legacy Carriers indicates that direct airline jobs represent only seven percent of all jobs generated by aviation activities.²⁸⁴ Further, Emirates has demonstrated in Section III.B.3 of this paper that traffic has grown significantly in the U.S. markets it has entered. That increased traffic leads to increased visitor spending, increased business activity, and other economic benefits of international travel. Any objective calculation of the job impact effects of Emirates air service must take these considerations into account, but the White Paper has failed to do so.

The Legacy Carriers’ own studies show that Emirates supports thousands of jobs per daily flight. The White Paper’s analysis relies heavily on two studies, which examined the effect of Emirates’ entry into the German and Austrian markets.²⁸⁵ This is remarkable, because those studies document very positive job effects associated with Emirates’ entry, effects that are simply ignored by the White Paper. Campbell-Hill Aviation Group reviewed those studies, and found that Emirates supported 2,400 jobs in Germany per daily

²⁸³ White Paper at 51; Oxford Economics, *Economic Benefits from Air Transport in the U.S.* (2015).

²⁸⁴ Campbell-Hill Aviation Group, *Analysis of the Legacy Carriers’ Job Loss Estimate Due to Emirates’ Service*, Ex. 6, at 2 & n.2.

²⁸⁵ White Paper at 51 fig.26.

round trip, and 3,300 jobs in Austria per daily round trip.²⁸⁶ These studies, relied upon by the Legacy Carriers, actually contradict their arguments.

²⁸⁶ Campbell-Hill Aviation Group, Analysis of the Legacy Carriers' Job Loss Estimate Due to Emirates' Service, Ex. 6, at 3–5.

IV. The Legacy Carriers come to this debate with unclean hands: they benefit from massive federal, state, and local government support in the United States.

A. The legal fictions by which the Legacy Carriers claim subsidies would find massive subsidies if applied to the United States.

The central premise of the Legacy Carriers' subsidy allegations is that WTO subsidy principles, found in the SCM Agreement, apply to aviation services under Open Skies agreements. This is a fundamental misstatement of the law, as demonstrated above. It is a legal fiction.

The Legacy Carriers' legal fiction also involves a breathtaking leap. International legal rules are not a one-way street. If the principles that they now advance—erroneously—were applied to the United States, they would demonstrate that the Legacy Carriers themselves are subsidized by massive federal, state, and local government support. The benefits provided to Delta, United, and American would dwarf these carriers' allegations regarding other airlines. This section shows that the Legacy Carriers, by their own logic, have received one-time benefits in excess of \$100 billion since 2002. This section also demonstrates that each year U.S. carriers as a whole receive additional benefits that potentially exceed \$24 billion. Finally, this section shows the folly of the Legacy Carriers' attempt to apply the WTO "national treatment" principle to aviation services. The United States has never agreed to national treatment obligations in aviation. Application of the principle would raise questions about core elements of U.S. aviation policy such as cabotage restrictions and the U.S. restrictions on foreign ownership.

B. By their own standards, Delta, United, and American have received benefits exceeding \$100 billion.

Figure IV-1 shows the subsidy amounts that would be found against the Legacy Carriers, if SCM Agreement rules applied to air transport services as the Legacy Carriers assert. The total amount exceeds \$100 billion. The text that follows explains each element of that amount.

Legacy Carriers' One Time Benefits From the U.S. Government Since 2002

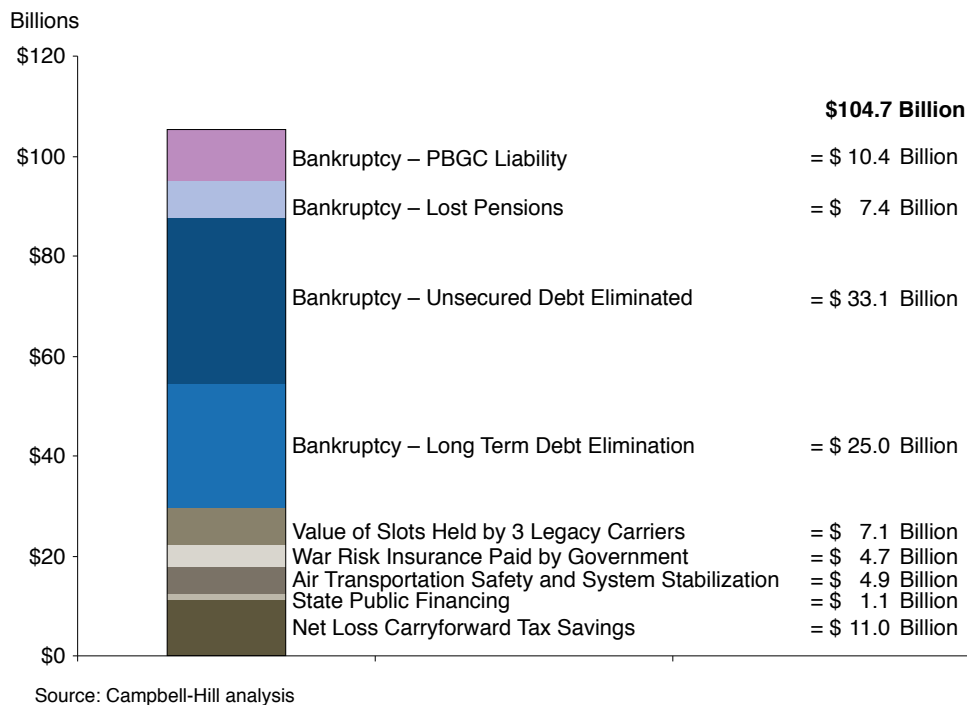


Figure IV-1

\$18 BILLION: U.S. Government Assumption of Airline Pension

Obligations: As part of a series of bankruptcies, Delta, United, and American dumped their massively underfunded pension plans—and tens of thousands of their retirees—on the United States Pension Benefit Guaranty Corporation (PBGC).²⁸⁷ From 1975 to 2012, air transportation retirees made \$14.4 billion in claims on the PBGC, thirty percent of all claims paid out.²⁸⁸ In an attempt to justify their actions, the Legacy Carriers claim that they have made some payments into the PBGC. But as Figure IV-2 demonstrates, the carriers in fact had badly underfunded their pensions—in the amount of nearly \$18 billion—by

²⁸⁷ The PBGC would represent a “public body” under SCM Agreement Article 1.1(a)(1), since it was created and operated on the basis of a public statute and has been entrusted with the administration of pension obligations of bankrupt U.S. firms. See, e.g., Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China* ¶¶ 3.17–.18, WT/DS449/AB/R (July 7, 2014) (“In some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body may be a straightforward exercise.”)

²⁸⁸ Pension Benefit Guaranty Corporation, 2012 Pension Insurance Data Tables tbl. S-19 (2012), <http://www.pbgc.gov/documents/2012-Data-Book-Tables.pdf>.

the time the PBGC took them over. The U.S. Government takeover cost the government in excess of \$10 billion.²⁸⁹

**Pension Liability Assumed by
U.S. and Employee Pension Value Lost**

Company Participants	Date PBGC Took Over Trusteeship	Pension Assets (in millions)	Benefit Liabilities (in millions)	Underfunded Amount (in millions)	Estimated PBGC Liability (in millions)	Employee Pensions Lost (in millions)
Delta ^{1/}	12/31/2006	\$1,700	\$4,700	\$3,000	\$920	\$2,080
United ^{1/}	10/26/2005	\$2,800	\$5,700	\$2,900	\$1,400	\$1,500
United ^{6/}	6/30/2005	\$1,500	\$3,800	\$2,300	\$1,733 ^{7/}	\$567
United ^{3/}	6/30/2005	\$1,400	\$3,300	\$1,900	\$1,432 ^{7/}	\$468
United ^{5/}	5/23/2005	\$1,300	\$4,000	\$2,700	\$2,035 ^{7/}	\$665
US Airways ^{2/3/4/}	2/1/2005	\$1,700	\$4,200	\$2,500	\$2,300	\$200
US Airways ^{1/}	3/31/2003	\$1,200	\$3,700	\$2,500	\$600	\$1,900
Total				\$17,800	\$10,420	\$7,380

1/ Pilots Plan

2/ Employees Plan

3/ Flight Attendants Plan

4/ IAM Plan

5/ Ground Employees Plan

6/ Management, Administrative and Public Contact Defined Plan

7/ PBGC estimated liability for United Ground Employees, Flight Attendants and Management Groups was \$5.2 billion. Liability prorated across groups based on proportion of underfunding.

Note: Northwest Airlines and American Airlines emerged from bankruptcy keeping their pension plans.

Source: Pension Benefit Guaranty Corporation press release Delta Pilots, January 5, 2007, press release of United Airlines Pilots, December 30, 2004, press release of other United Airlines groups, April 22, 2005, press release of US Airways Pilots, April 1, 2003, press release on other US Airways groups, February 2, 2005.

Figure IV-2

If the SCM Agreement applied, the U.S. Government assumption of this liability would represent a financial contribution under SCM Article 1.1(a)(1).²⁹⁰ It conferred a benefit upon the Legacy Carriers, since it relieved them of huge obligations that they owed to their former workers. The Legacy Carriers' defaulted pensions now represent a disproportionate share of the PBGC's \$62 billion in unfunded liabilities. Under the Legacy Carriers' own logic, a

²⁸⁹ Bradley D. Belt, Executive Director, Pension Benefit Guaranty Corporation, Testimony Before the Senate Committee on Finance (June 7, 2005) (transcript available at <http://www.pbgc.gov/news/testimony/page/tm060705.html>).

²⁹⁰ The PBGC is funded in part by the pension assets of bankrupt firms, insurance premiums, and investments. The U.S. Government's financial contribution took the form of a direct transfer of funds through PBGC's assumption of the Legacy Carriers' pension obligations. See, e.g., Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* ¶¶ 250–52, WT/DS336/AB/R (Nov. 28, 2007).

disproportionate benefit to a single sector makes that benefit specific within the meaning of SCM Agreement Article 2. The PBGC program would satisfy this standard, and it therefore would be a subsidy.

Government support through assumption of airline pension obligations is also trade-distorting. Absent the PBGC’s assumption of their massively underfunded pension liabilities, the Legacy Carriers would no longer be profitable and in no position to engage in international expansion—in fact, they might not even exist. One of the main goals of their bankruptcy proceedings was to shift their underfunded pension obligations away from themselves and onto the U.S. Government.

\$58 BILLION: Chapter 11 Relief from Legacy Carriers’ Lease, Debt, and Other Obligations: The Legacy Carriers have relied on Chapter 11 bankruptcies as a means to reorganize—and to shed any obligations otherwise weighing them down. As Figure IV-3 shows, U.S. bankruptcy proceedings allowed the Legacy Carriers to eliminate over \$33 billion in unsecured debt:

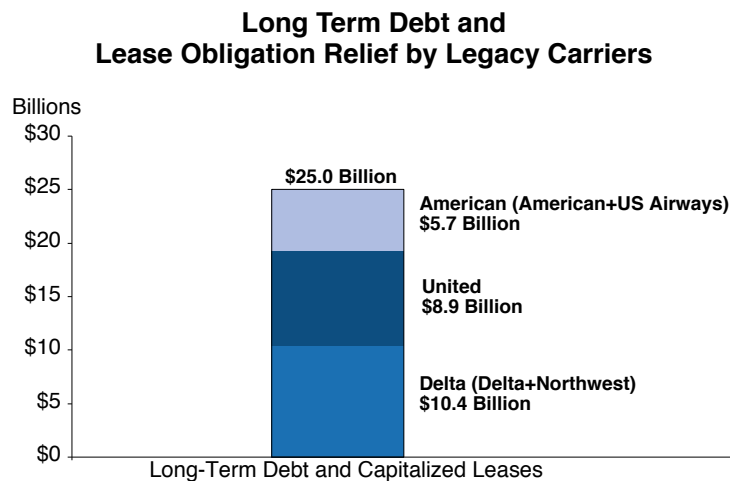
Legacy Carriers’ Unsecured Debt Relief in Chapter 11 Reorganization	
	<u>Unsecured Debt Not Recovered</u>
Delta (Delta+Northwest)	\$6.6
United	\$26.5
American (American+US Airways)	*
Total	\$33.1

*No non-recovered amounts found in disclosure statements.

Source: UAL Corporation, Disclosure Statement, US Bankruptcy Court for the Northern District of Illinois, September 7, 2005, page 74; Delta Air Lines, Disclosure Statement, U.S. Bankruptcy Court for the Southern District of New York, February 7, 2007, p. 146; Northwest Airlines Corporation, U.S. Bankruptcy Court Disclosure Statement for the Southern District of New York, March 30, 2007.

Figure IV-3

Figure IV-4 shows that even a cursory examination of only those Legacy Carrier bankruptcies since 2000 demonstrates that they collectively eliminated nearly \$25 billion in debt and lease obligations, separate from their pension write-offs to the PBGC—\$5.7 billion in debt and lease obligations for American, \$8.9 billion for United, and \$10.4 billion for Delta—as a result of Chapter 11 reorganizations.²⁹¹



Note: Includes only bankruptcies since 2000 and current portion of long-term debt. Does not include other claims in the bankruptcy proceeding or pension liability write-downs.

Source: US Airways Group, Inc SEC Form 10-Q, March 31, 2003, US Airways Group, Inc SEC Form 10-Q, June 30, 2002, US Airways Group, Inc SEC Form 10-Q, September 30, 2005, UAL Corporation, SEC Form 10-Q, March 31, 2006, UAL Corporation, SEC Form 10-Q, September 30, 2002, Northwest Airlines Corporation, SEC Form 10-Q, June 30, 2007, Northwest Airlines Corporation, SEC Form 10-Q, June 30, 2005, Delta Air Lines, Inc SEC Form 10-Q, June 30, 2007, Delta Air Lines, Inc, SEC Form 10-Q, June 30, 2005.

Figure IV-4

These Chapter 11 reorganizations resulted in the forgiveness of debt, which represents a financial contribution for SCM Agreement purposes.²⁹² They conferred “benefits” on the Legacy Carriers, and disproportionately benefited the

²⁹¹ SEC quarterly and annual reports. These figures include US Airways with American and Northwest Airlines with Delta.

²⁹² Appellate Body Report, *Japan – DRAMS (Korea)* ¶¶ 250–52 (“Debt forgiveness, which extinguishes the claims of a creditor, is a form of performance by which the borrower is taken to have repaid the loan. . . In all of these cases, financial position of the borrower is improved and therefore there is a direct transfer of funds within the meaning of Article 1.1(a)(1)(i).”).

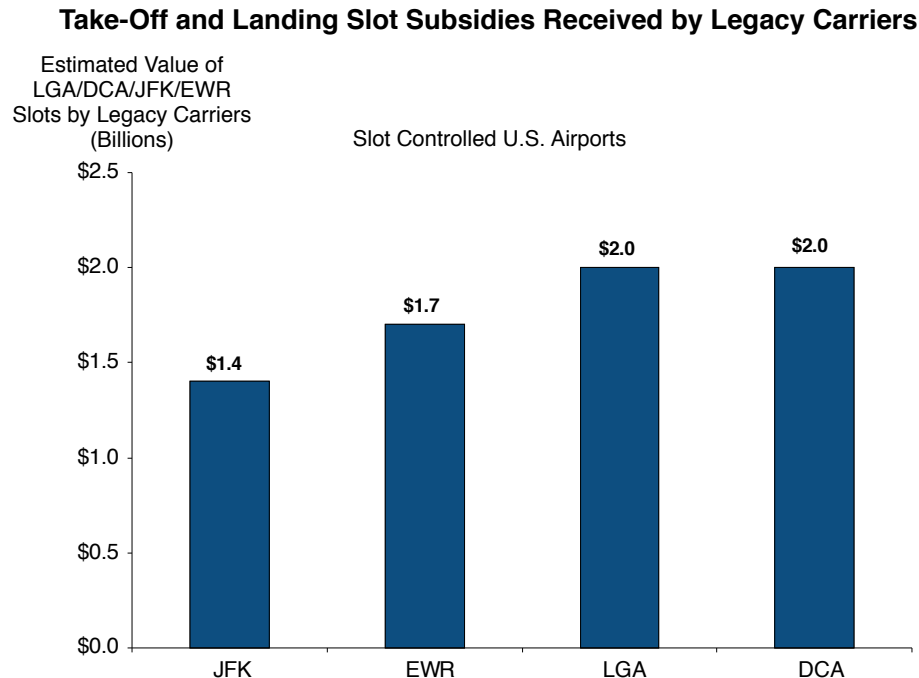
air transportation industry, which is one of the leading users of Chapter 11. Delta's now-President, then-CFO Edward Bastian said it well in 2007 as Delta emerged from one of the bankruptcies: "Delta used the Chapter 11 process to completely transform every aspect of our business. This will enable us to weather future volatility in the airline industry." Without Chapter 11 benefits, the Legacy Carriers likely would not have achieved the record profits they enjoy today.

The Legacy Carriers would argue that Chapter 11 benefits are not specific. Whether that is so, particularly in light of the Legacy Carriers' expansive disproportionate use standard, would be a sharply contested factual question in a world where SCM Agreement rules applied to aviation services. What is certain is that the Chapter 11 benefits the Legacy Carriers received are of historic proportions. The following table lists the aviation industry bankruptcies where more than \$1 billion in assets were involved. As the table demonstrates, the Legacy Carriers' Chapter 11 proceedings were the largest in U.S. aviation history.²⁹³

²⁹³ See *History of U.S. Airline Bankruptcies*, Fox Business (Nov. 29, 2011), <http://www.foxbusiness.com/travel/2011/11/29/history-us-airline-bankruptcies/>

COMPANY	START	ASSETS
UAL Corp.'s United Air Lines	12/09/02	\$ 22,800,000,000
Delta Air Lines	9/14/05	\$ 21,561,000,000
Northwest Airlines	9/14/05	\$ 14,352,000,000
US Airways, Inc.	9/12/04	\$ 8,600,458,000
US Airways, Inc.	8/11/02	\$ 8,025,000,000
Continental Airlines Holdings	12/3/90	\$ 7,656,140,000
Eastern Air Lines, Inc.	3/9/89	\$ 4,037,000,000
Trans World Airlines, Inc.	1/31/92	\$ 2,864,530,000
Trans World Airlines, Inc.	6/30/95	\$ 2,495,210,000
Pan Am Corp.	1/8/91	\$ 2,440,830,000
Trans World Airlines, Inc.	1/10/01	\$ 2,137,180,000
America West Airlines	6/27/91	\$ 1,165,260,000
Resorts International	11/12/89	\$ 1,034,580,000

\$7 BILLION: FAA Grandfathering of Airport Slots: The U.S. Government originally allocated slots at certain high density airports to airlines for free. (Slots are operating authorizations for take-off and landing during certain windows of time.) The government later allowed airlines to buy and sell their slots, so that airlines that had received allocations without charge could monetize their slots, capturing the scarcity benefit for themselves. As shown in Figure IV-5, the estimated value of slots at major U.S. airports ranges from \$1.4 billion at JFK to \$2.0 billion at Ronald Reagan Washington National Airport and LaGuardia Airport.



Source: Campbell-Hill analysis of recent slot transactions and FAA, Slot Holdings Reports for EWR, LGA, DCA, and JFK, November 14, 2014. Values per slot calculated using current market data from the recent divestiture of slots from AA/US (See U.S. DOJ, Proposed Final Judgment in the American/US Airways Merger, Case 1:13-cv-01236-CKK, Document 159, Filed 03/10/14, pages 1,6 and 7).

Figure IV-5

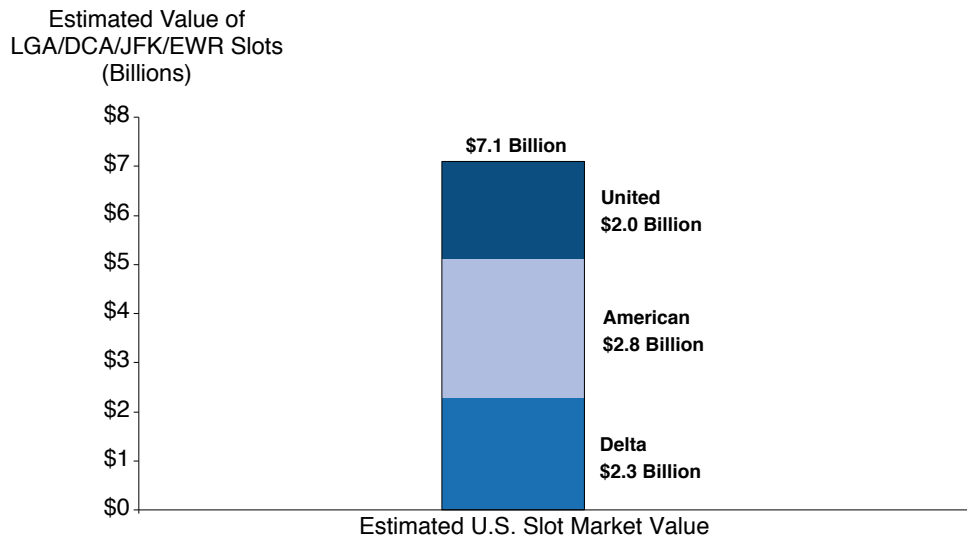
The system of unrestricted transferability for value still exists at Reagan National Airport.²⁹⁴ At other airports, under certain restrictions, airlines can lease slots on various financial terms.²⁹⁵ In addition, because slots now have value and transferability, airlines can use slots as security and collateral for credit. The monetization of U.S. slots has led to more than a \$7 billion windfall for the Legacy Carriers—\$2.0 billion for United, \$2.8 billion for American, and \$2.3 billion for Delta—based on recent slot transactions and FAA slot holdings reports,²⁹⁶ as illustrated in Figure IV-6.

²⁹⁴ 14 C.F.R. § 93.221 (2014).

²⁹⁵ See, e.g., Operating Limitations at John F. Kennedy International Airport, 79 Fed. Reg. 16,854, 16,856 (Fed. Aviation Admin. Mar. 26, 2014).

²⁹⁶ Values calculated are the total value of current slots held by the three carriers. Values per slot calculated based on recent slot transactions. Recently American/US Airways received \$425 million for 138 slots at New York LaGuardia airport and Washington Reagan National Airport. See Proposed Final

Take-Off and Landing Slot Subsidies Received by Airline



Source: Campbell-Hill analysis of recent slot transactions and FAA, Slot Holdings Reports for EWR, LGA, DCA, and JFK, November 14, 2014. Values per slot calculated using current market data from the recent divestiture of slots from AA/US (See U.S. DOJ, Proposed Final Judgment in the American/US Airways Merger, Case 1:13-cv-01236-CKK, Document 159, Filed 03/10/14, pages 1,6 and 7).

Figure IV-6

The creation of a government program to permit slot monetization, combined with the grandfathering of slots to the Legacy Carriers, represents a financial contribution for SCM Agreement purposes.²⁹⁷ Given their financial value, the slots conferred significant financial benefits on the Legacy Carriers, which received the lion's share of slots at slot-controlled airports. Since the slots went only to a very limited group of enterprises—those carriers that had established landing rights at the slot-controlled airports—the program would be held to be specific under the SCM Agreement.

Judgment in the American/US Airways Merger, Case 1:13-cv-01236-CKK, at 1, 6, 7 (U.S. Department of Justice March 10, 2014).

²⁹⁷ See, e.g., Appellate Body Report, *US – Softwood Lumber IV* ¶ 75 (“Accordingly, like the Panel, we believe that, by granting a right to harvest standing timber, governments provide that standing timber to timber harvesters. We therefore agree with the Panel that, through stumpage arrangements, the provincial governments ‘provide’ such goods, within the meaning of Article 1.2(a)(1)(1)(iii) of the SCM Agreement.”)

\$4.9 BILLION: U.S. Government Airline Stabilization Act Grants and Loan Guarantees: Days after the September 11 terrorist attacks, the U.S. Congress passed the Air Transportation Safety and System Stabilization Act (“Act”) to address the financial hardship faced by the air transportation industry. As shown in Figures IV-7 and IV-8, U.S. carriers received \$5 billion in grants and \$1.65 billion in loan guarantees under the Act.²⁹⁸ Of this the greatest portion—\$3.6 billion in grants and \$1.3 billion in loan guarantees, in rounded amounts—went to the Legacy Carriers.

Subsidies Received Under The Air Transportation Safety and System Stabilization Act			
<u>Act Components Post 9/11</u>	<u>Legacy Carriers (in millions)</u>	<u>Other Carriers (in millions)</u>	<u>Total (in millions)</u>
Immediate Cash Grants	\$3,589	\$1,411	\$5,000
Loan Guarantees	\$1,280	\$370	\$1,650
Total	\$4,869	\$1,781	\$6,650

Source: Congressional Record, Air Transportation Safety and System Stabilization Act; US Airways Group, Inc SEC Form 10-K, 2002, UAL Corporation, SEC Form 10-K, 2002, Northwest Airlines Corporation, SEC Form 10-K, 2002, Delta Air Lines, Inc. Annual Report, 2002, Continental Airlines, SEC Form 10-K, 2002. AMR Corp, SEC Form 10-K 2002; America West, Inc, SEC Form 10-K, 2002.

Figure IV-7

While the Act has been defended as paying for lost revenues from grounding flights after September 11, the driving rationale for the assistance was the weak financial condition of the carriers, which had been deteriorating for some time beginning with the bursting of the dot.com bubble in 2001.

²⁹⁸ Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230.

U.S. Government Loan Guarantees Received by Airline

Airlines	Dollar Amount (in millions)	
US Airways	\$900	} \$1,280
America West Airlines	\$380	
American Trans Air	\$149	
Evergreen International Airlines	\$90	
Frontier Airlines	\$63	
Aloha Airlines	\$41	
World Airways	\$27	
Total	\$1,650	

Source: Air Transportation Stabilization Board press release US Airways , Inc. February 11, 2003, America West Airlines, December 28, 2001, American Trans Air, Inc. September 26, 2002, Evergreen International Airlines, Inc. December 20, 2002, Frontier Airlines, Inc. November 5, 2002, Aloha Airlines, Inc. November 5, 2002, World Airways, Inc. April 23, 2003.

Figure IV-8

Such grants and loan guarantees are “financial contributions” that conferred “benefits” on the Legacy Carriers. Since under the Act these benefits were specifically targeted at a single industry—commercial airlines—they were specific under Article 2 of the SCM Agreement, and would represent an actionable subsidy if the SCM Agreement applied.

The Legacy Carriers will undoubtedly defend this program as necessary in the context of the overall tragedy of the September 11 attacks. Granting full respect to the horror of those days, it is important to separate necessity from subsidy. Emirates has also faced major challenges posed by wars and international instability. It has coped with the effects of three Gulf Wars on its hub, which is located in one of the most volatile regions of the world. These wars have resulted in significant additional costs for Emirates, including fuel-inefficient flight paths, additional insurance costs, and a negative impact on the

tourism industry in Emirates’ home market. At no point, however, did Emirates receive government support to weather these adversities.

\$4.7 BILLION: Subsidized Insurance: After the September 11 attacks, private insurers would not sell insurance to airlines to provide coverage against future attacks. Accordingly, Congress expanded the FAA War Risk Insurance Program, requiring the FAA to offer war risk insurance at the cost that domestic airlines were paying *before* the World Trade Center attacks. This directly subsidized insurance coverage for the Legacy Carriers. Such insurance provided a specific service to the Legacy Carriers at subsidized rates, and would represent a “subsidy” under the SCM Agreement if that Agreement actually applied. Figure IV-9 shows that the estimated cost of such insurance at market rates would have been \$748 million in 2002 alone, and that the cumulative benefit from 2002–2014 was \$4.7 billion.

Value of Subsidies Related to War Risk Insurance in Calendar Year 2002

	Estimated 2002
Continental Airlines 2002 anticipated additional insurance cost ^{1/}	\$85 million
Continental Airlines share of Major U.S. Airlines System ASMs ^{2/}	11.36%
Estimated 2002 additional cost for Major U.S. Airlines ^{3/}	\$748 million

Based on the assumption that the premium for additional war risk insurance (per ASM) declined at a constant rate until the program expired in 2014, the cumulative benefit of government subsidized insurance was \$4.7 billion.^{4/}

^{1/} Continental Airlines, Inc. SEC Form 10-K, December 31, 2001.

^{2/} Form 41 data for FY 2002, Major U.S. Airlines include American, Continental, Delta, Northwest, United and US Airways

^{3/} \$85 million divided by 11.36%

^{4/} Declining rate applied to U.S. Legacy Carriers’ systemwide ASMs from U.S. DOT Form 41 data.

Figure IV-9

\$1.1 BILLION: State Public Financing: The Legacy Carriers regularly seek government support for specific investments or projects. Support is frequently offered in terms of special tax exemptions and other benefits. Many

governments have development offices that were created expressly to participate in bidding wars to determine which locality will offer the greatest subsidies to secure a corporate investment.

This state and local government support, by conferring specific benefits on the Legacy Carriers, would also represent a “subsidy” if SCM Agreement principles were to be applied. Tax incentives are a financial contribution by the government, in terms of revenue foregone; they confer a benefit on the recipient because they relieve the recipient of a tax obligation; and they are specific because they are awarded to a specific enterprise.

State Public Financing for Legacy Carriers

Action	Year	Dollar Amount (in millions)
Minnesota public financing package for Northwest	1992	\$761
Indiana, City of Indianapolis tax breaks for United	1991	\$320
Pennsylvania Trainer Refinery Complex for Delta	2012	\$30
City of Phoenix incentives for building in Phoenix for America West/US Airways	1998	\$15
City of Fort Worth tax incentive for operations center for American	2014	\$7
Pennsylvania revenue guarantee for Delta PIT-CDG nonstop flight	2009	\$5
Total		\$1,138

Sources: Minnesota Legislative Reference Library, “Northwest Airlines and The State of Minnesota: A Chronology”, New York Times, “States Pay for Jobs, but It Doesn’t Always Pay Off”, November 10, 2003, Delta Air Lines press release, “Delta Subsidiary to Acquire Trainer Refinery Complex”, April 30, 2012, Suburban Phoenix East Valley Tribune, “AmWest behind on tax-funded land deal”, October 7, 2011, Fort Worth Star-Telegram, “Council approves \$6.5 million tax incentive for American Airlines”, June 10, 2014, Pittsburgh Post-Gazette, “Delta’s flight to Paris not taking off financially”, March 13, 2010.

Figure IV-10

Figure IV-10 tabulates a number of examples of state and local government subsidies conferred upon the Legacy Carriers.

\$11 BILLION: Net Operating Loss Carryforward Tax Savings: The same losses that led to Chapter 11 proceedings, and which permitted the Legacy Carriers to offload their pension obligations and cancel their debts, also permitted them to avoid paying federal corporate income taxes on the profit that they could earn on their new, reduced-liability operations. The Chapter 11

proceedings allowed them to carry forward past operating losses, incurred before the bankruptcies, to reduce their taxable incomes after the bankruptcies.

Delta has specifically highlighted the value of these operating loss carry forwards in investor presentations, stating, “Active management of our net operating loss carryforwards will defer the payment of cash taxes for several years.”²⁹⁹ Overall, this reduction of federal income taxes yields a capitalized benefit of over \$11 billion—\$4.2 billion for American, \$4.4 billion for Delta, and \$2.9 billion for United.³⁰⁰ Net operating loss tax savings have placed the Legacy Carriers in the extremely advantageous position of receiving relief from liabilities through bankruptcy, while at the same time not being required to pay taxes on their rejuvenated earnings.

The net operating loss carryforwards are a financial contribution by the government in the form of revenue foregone, and they confer a benefit on the recipients, as Delta has glowingly informed its investors. The Legacy Carriers undoubtedly would argue that the carryforwards are not specific, but like the use of Chapter 11, that would be a hotly-contested factual issue in a real dispute, with opponents of the United States asserting the Legacy Carriers’ own disproportionate use standard as the measure.

C. By the Legacy Carriers’ own standards, U.S. carriers receive annual benefits potentially exceeding \$24 billion.

In subsidy law analysis, a distinction is drawn between one-time subsidies, which are given in a lump sum but can distort trade for many years thereafter, and recurring subsidies, where the government provides fresh benefits every year. The preceding section set forth the one-time benefits

²⁹⁹ Delta Air Lines, Investor Day 2014 Presentation 2 (Dec. 11, 2014).

³⁰⁰ American Airlines Group Inc. SEC Form 10-K, December 31, 2013, US Airways Group, Inc. SEC Form 10-K, December 31, 2005, Delta Air Lines Inc. SEC Form 10-Q, June 30, 2007, Northwest Airlines Corporation SEC Form 10-Q, June 30, 2007, UAL Corporation SEC Form 10-Q, March 31, 2006. For US Airways, no carryover figures were available in 10-Q for Q3 2005, and so 10-K for 2005 is used.

received by the Legacy Carriers. The Legacy Carriers are also very substantial recipients of recurring benefits that would be subsidies under SCM Agreement principles. Those benefits are described in this section.

Figure IV-11 shows the annual benefits potentially received by U.S. carriers as a whole. (Available data do not permit, in every instance, isolation of the amounts received just by the Legacy Carriers.) The following paragraphs explain each item.

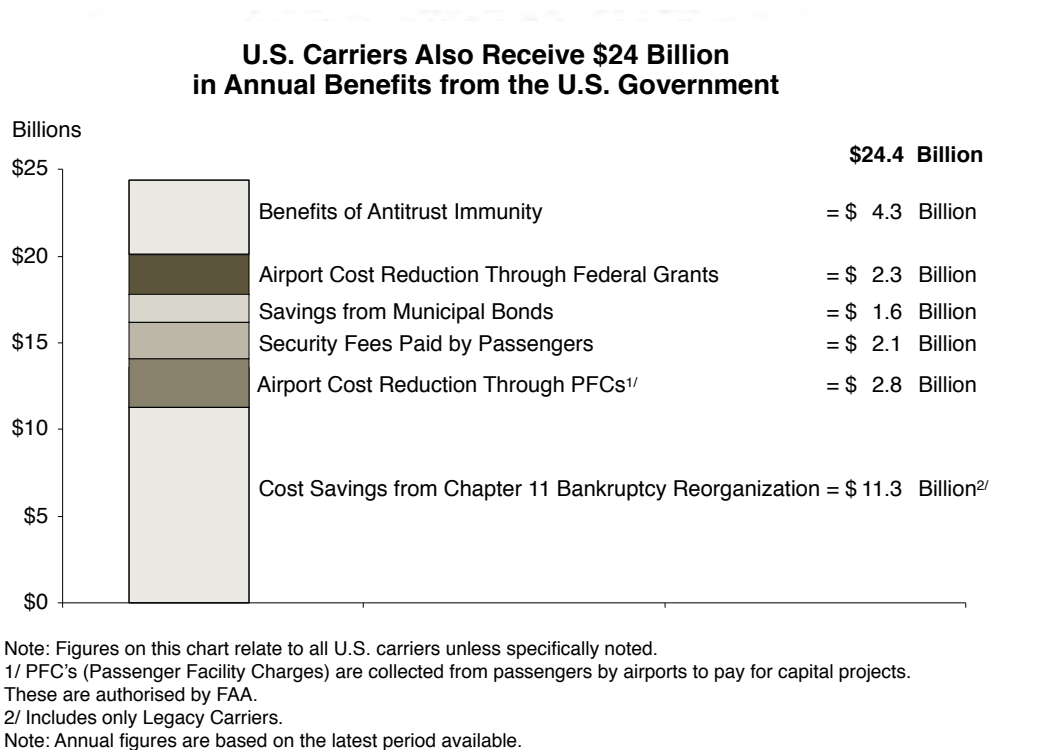


Figure IV-11

U.S. Antitrust Immunity for Legacy Carriers: The White Paper claims that exemptions from competition laws also represent “significant artificial cost advantages” to Emirates and other Gulf Carriers.³⁰¹ This is a rather surprising claim, given that the Legacy Carriers eagerly seek antitrust immunity for their relationships. Immunity can be granted, by statute, by the U.S. Department of

³⁰¹ White Paper at 39.

Transportation. Figure IV-12 lists the Legacy Carrier alliances that enjoy antitrust immunity.

**Antitrust Immunity for Legacy Carriers'
International Alliances with Foreign Carriers**

Delta

- Air France-KLM, Alitalia, Czech and Korean
- Virgin Atlantic, Air France-KLM, and Alitalia
- Virgin Australia

United

- Air Canada, Brussels, Lufthansa, Swiss, Austrian, SAS, and LOT
- Air New Zealand
- Asiana
- All Nippon Airways
- COPA

American

- British Airways, Iberia, Finnair and Royal Jordanian
- LanAirlines and Lan Peru
- Japan Air Lines

Source: U.S. DOT, [Airline Alliances Operating with Antitrust Immunity](#) (updated 7/14/14).

Figure IV-12

The White Paper complains about competition law treatment of Emirates, contending that it confers an unfair “cost advantage”, but does not actually allege that the treatment constitutes a subsidy.³⁰² Should exemptions from competition law be considered a subsidy, the Legacy Carriers would without question be the recipients of major subsidies. Figure IV-13 estimates that antitrust immunity boosts the revenues of U.S. airlines by \$4.3 billion annually.

³⁰² White Paper at 39. This restraint is remarkable, given the Legacy Carriers’ willingness to cite wholly inapplicable laws when it suits them.

Revenue Created for U.S. Carriers by Antitrust Immunity

Dollar Figures in Millions of 2014 Dollars

	Average Annual Revenue Value to U.S. Carriers of One Lost Competitor ^{1/}	Number of Lost Competitors Due to ATI	Total U.S. Carriers Annual Revenue Benefits from ATI
Atlantic	\$177	9	\$1,593
Pacific	\$343	6	\$2,058
Latin America	\$327	2	\$654
			\$4,305

Actual Year Ended 3rd Quarter 2014	
Scheduled Passenger Revenue (Millions):	\$37,138
ATI Benefit (Share of Revenue)	12%

Note: Legacy Carriers account for 96% of all U.S. flag revenue in the Atlantic, Pacific and Latin America divisions. Therefore, it is estimated that \$4.1 billion of annual ATI revenue benefit is enjoyed by Legacy Carriers.

1/ Determined by regression models

Transatlantic Competitors Lost through ATI include: KLM, Lufthansa, SAS, Air France, Alitalia, Swiss, British Airways, Iberia and Virgin Atlantic

Transpacific Competitors Lost through ATI include: JAL, Qantas, Air New Zealand, Asiana, ANA, and Korean Latin America

Competitors Lost through ATI include: LAN and Copa.

Note: The value in the Transatlantic is similar to British Airways' forecast synergy value of approximately \$235 million per year (See article below)

<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aG0HuOu3PaBQ>

Source: U.S. DOT, Form 41 and T-100 data.

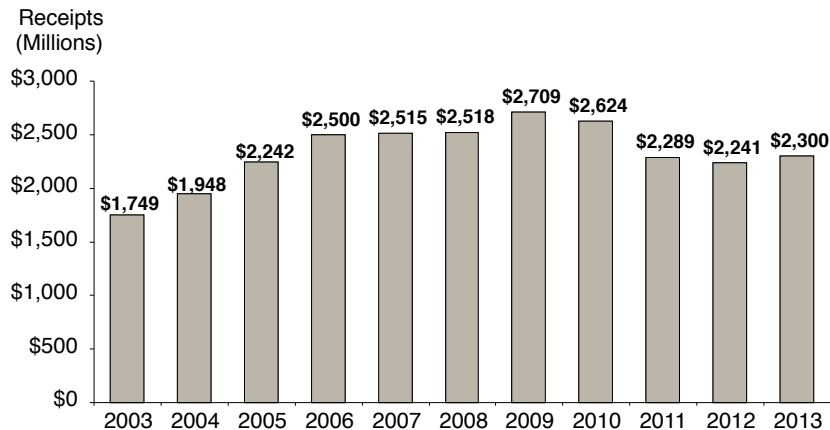
Figure IV-13

U.S. Federal, State, and Local Government Support (Including Tax Exemptions) for U.S. Airport Development: Aviation infrastructure programs, like airport construction and FAA programs, do not constitute subsidies because they relate to general infrastructure. Government support for general infrastructure is expressly excluded from the definition of subsidy under the SCM Agreement.³⁰³ That fact did not prevent the Legacy Carriers from misstating the SCM Agreement standard, even as they misapplied it to aviation services. The Legacy Carriers' willingness to knock down one legal standard after another in their eagerness to show subsidies raises the question of the extent to which the United States provides similar support.

³⁰³ SCM Agreement art. 1.1(a)(1)(iii).

Figure IV-14 shows that the U.S. Government has provided significant annual grants for airport construction since 2003. In the most recent year for which data are fully available, the grant amount was \$2.3 billion.

U.S. Government Grant Funding Received by Airports^{1/} Since 2003



1/ Excluding the portion of AIP funding paid directly by airlines.
Source: U.S. Department of Transportation, Federal Aviation Administration, Office of Airports (ARP), Certification Activity Tracking System (CATS), Form 127.

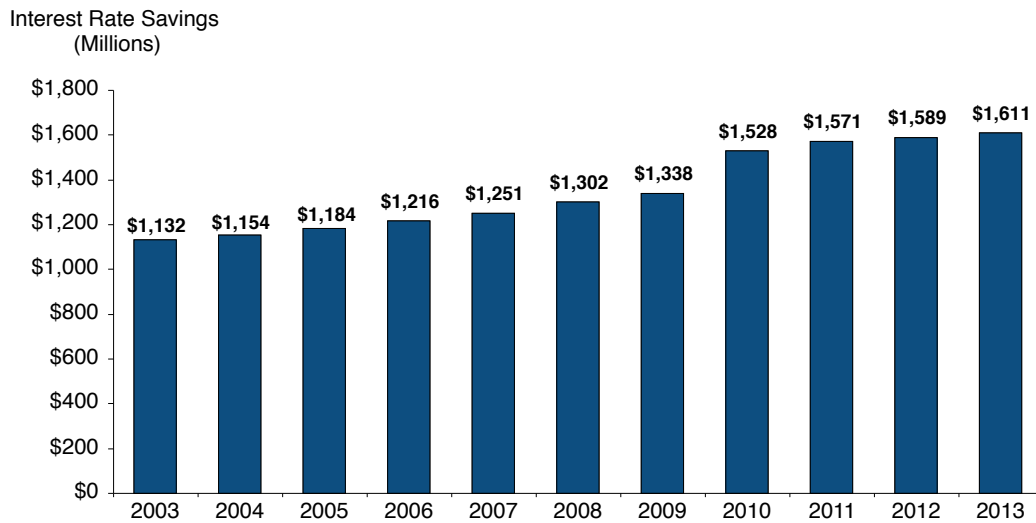
Figure IV-14

In addition to annual grants for airport construction, several other federal, state, and local government programs create annual benefits for the Legacy Carriers. For example, many airport infrastructure projects are financed by municipal bonds, the interest of which is exempt from federal income tax. Figure IV-15 shows that the estimated savings on airport debt issued as tax-free or secured municipal bonds totaled \$1.6 billion in 2013.³⁰⁴ This could become a subsidy under the Legacy Carriers' construct.³⁰⁵

³⁰⁴ See U.S. Department of Transportation, Federal Aviation Administration, Office of Airports (ARP), Certification Activity Tracking System (CATS), Form 127. The estimated savings is calculated by multiplying the outstanding debt on airport bonds by 2%. It is assumed that the average yield spread between tax free municipal bonds and comparable taxable bonds averaged 200 basis points over the 2003-2013 period.

³⁰⁵ Another way of looking at airport support is to consider the airport financial losses absorbed by state and local government agencies across the United States. By the Legacy Carriers' logic, the Legacy Carriers benefit from this to the extent of their "disproportionate" usage at their hubs—such as Delta at

Estimated Savings on Airport Debt Issued as Tax Free and/or Secured Municipal Bonds Since 2003



Note: Calculated by multiplying the outstanding debt on airport bonds by 2%. It is assumed that the average yield spread between tax free municipal bonds and comparable taxable bonds averaged 200 basis points over the 2003-2013 period. Source: U.S. Department of Transportation, Federal Aviation Administration, Office of Airports (ARP), Certification Activity Tracking System (CATS), Form 127.

Figure IV-15

Air passengers in the United States are required to pay a passenger security fee, which is used, at least in part, to support security screening costs at airports. Under the Legacy Carriers' approach to subsidy, the extent to which that revenue conferred a benefit on the carriers who use the airport would be open to factual argument. Figure IV-16 shows that passengers paid \$2.1 billion in passenger security fees in 2014.³⁰⁶

Atlanta and Minneapolis-St. Paul, American at Dallas/Fort Worth, and United at Houston Intercontinental and Chicago O'Hare—making any federal, state, or local government spending on these facilities specific to Delta, American, or United. Slide Deck, Ex. 1, at 55 shows that, from 2003 to 2012, state and local governments absorbed \$39 billion in airport losses, which redounded largely to the benefit of the Legacy Carriers.

³⁰⁶ Transportation Security Administration, available at <http://www.tsa.gov/stakeholders/historical-fee-collection-data>.

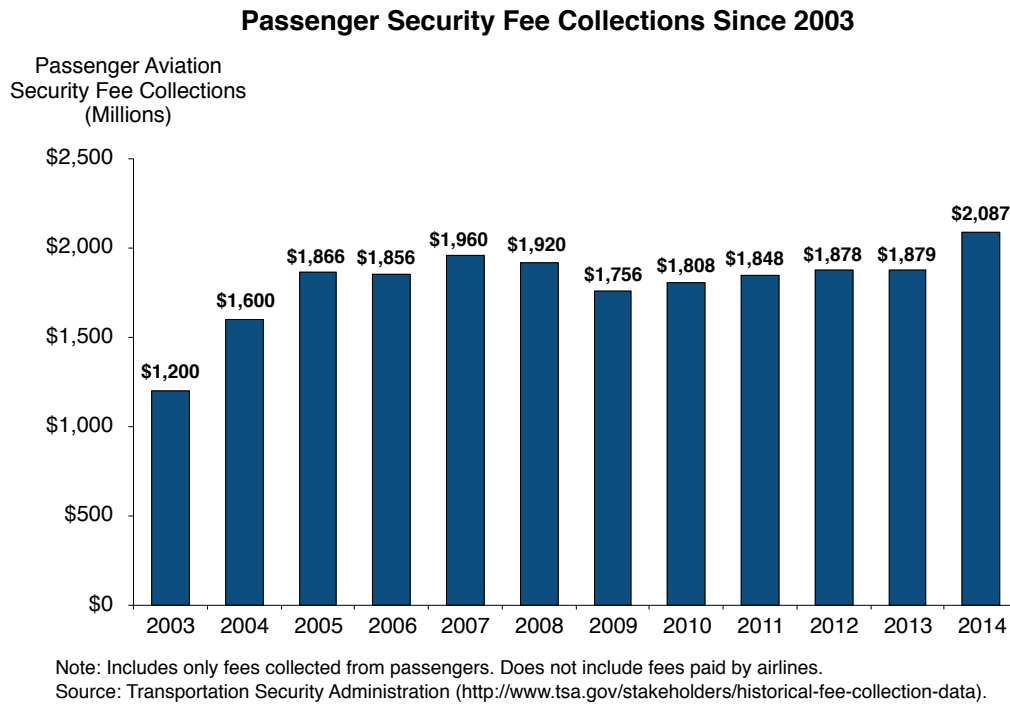


Figure IV-16

U.S. airports collect separate passenger facility charges from passengers to pay for capital projects, which in turn benefit the airlines which use the improved infrastructure. Figure IV-17 shows that airports collected \$2.8 billion in passenger facility charges in 2013.³⁰⁷

³⁰⁷ See U.S. Department of Transportation, Federal Aviation Administration, Office of Airports (ARP), Certification Activity Tracking System (CATS), Form 127.

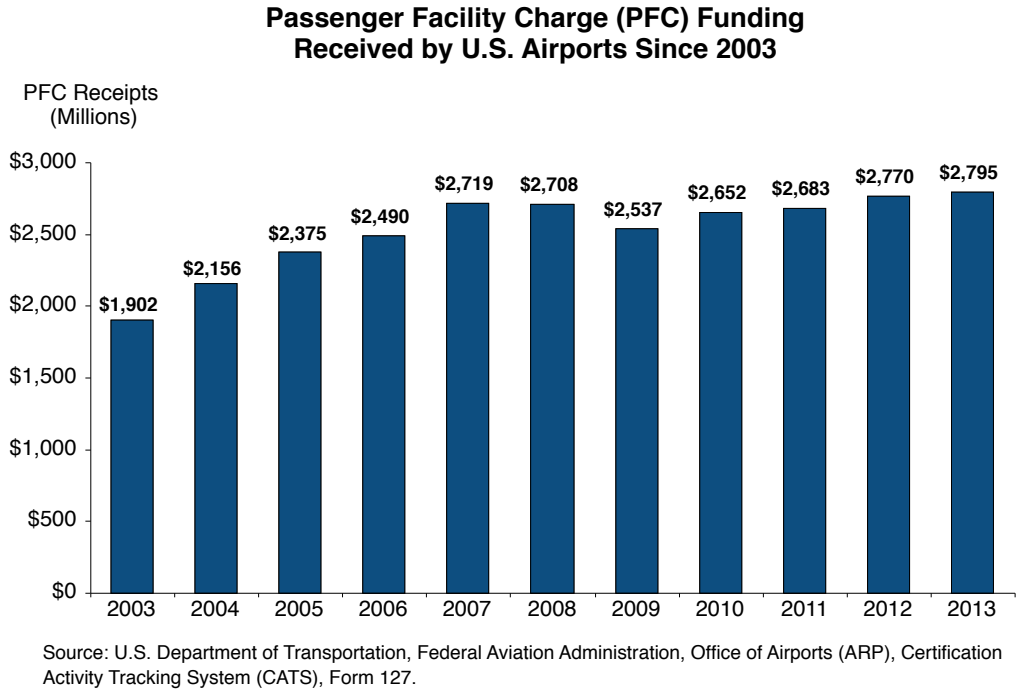
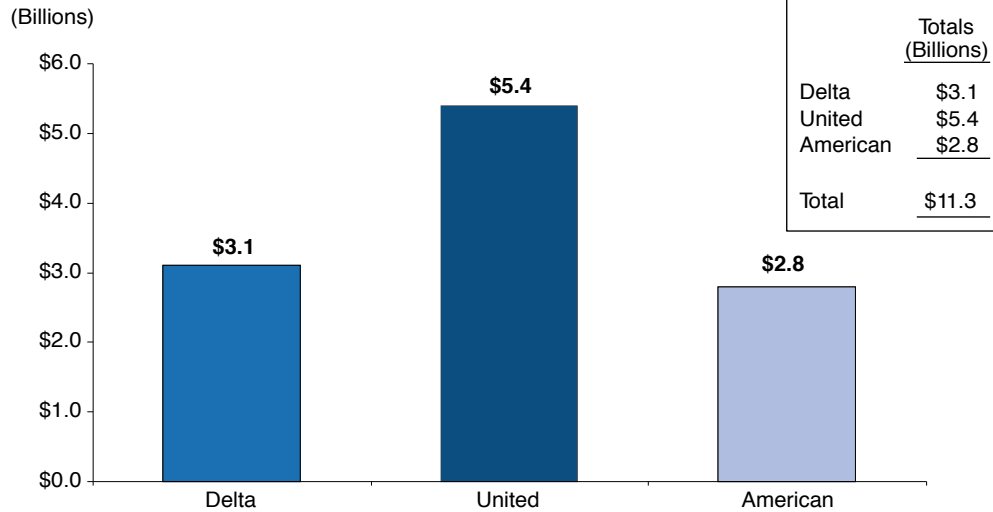


Figure IV-17

Annual Cost Savings from Chapter 11 Bankruptcy Reorganization: In addition to the one-time benefits from bankruptcy organization described above, the Legacy Carriers now save over \$11 billion per year due to benefits from reorganization—\$2.8 billion for American, \$5.4 billion for United, and \$3.1 billion for Delta³⁰⁸—as shown in Figure IV-18.

³⁰⁸ Analysis of Form 41 reports; Turnaround Management Association, *The American Airlines Bankruptcy* (2013).

The Legacy Carriers' Annual Savings Due to Chapter 11 Reorganization Benefits



Note: Delta Air Lines Exits Bankruptcy, Reuters, 4/30/2007 (Edward Bastian was CFO at the time). Delta and United are estimated using cost per ASM changes in salaries/benefits, rentals and depreciation from the full year before bankruptcy to the full year after emerging from bankruptcy multiplied by YE Q3 2014 ASMs. Since the AA bankruptcy is so recent, this analysis includes management projections of savings and Form 41 data. In addition, US Airways' latest bankruptcy is included in the American number using the method described for DL/UA above.

Source: Campbell-Hill analysis of Form 41 reports and Turnaround Management Association, The American Airlines Bankruptcy, 12/12/13.

Figure IV-18

D. The Legacy Carriers' argument to apply "national treatment" rules to aviation services would expose important elements of U.S. aviation policy to challenge under trade rules, including cabotage restrictions, the CRAF program, foreign ownership restrictions, and the Fly America program.

The preceding analysis showed the possible implications of the Legacy Carriers' unsupportable argument that SCM Agreement subsidy rules should apply to aviation services. That is not the only WTO principle that the Legacy Carriers seek to apply. They also argue that various aspects of doing business in the UAE, ranging from airport fees to sales agency requirements, deny "national treatment" to U.S. carriers.³⁰⁹ In the context of goods trade, national

³⁰⁹ White Paper at 17, 31 n.133, and 38.

treatment is a fundamental rule. It requires that a government offer the same legal treatment to goods of a foreign country that is offered to domestic goods.³¹⁰

The United States has never agreed that a national treatment standard should be applied to aviation services, a position that is not surprising. Application of the standard to aviation services would have profound implications for U.S. programs. Were the U.S. Government actually to entertain arguments based on the national treatment standard, it would expose some of the pillars of U.S. aviation regulation to attack under the same logic, including cabotage restrictions, the CRAF program, foreign ownership restrictions and the Fly America program.

Exclusive Rights to Domestic U.S. Traffic Under U.S. Law: By law, the United States prohibits “cabotage,” preventing international carriers like Emirates from transporting passengers who originate travel at one point in the United States to another U.S. point.³¹¹ Through the cabotage prohibition, the U.S. Government transfers the exclusive right to provide a valuable service—transporting passengers wholly within U.S. territory—solely to U.S. carriers. This is an open denial of national treatment to foreign carriers, and is permissible only because the United States has not agreed that national treatment applies to aviation services. The unavoidable conclusion of the Legacy Carriers’ national treatment arguments is that the U.S. prohibition on cabotage would violate Open Skies agreements.

Figure IV-19 shows that key protected domestic markets have an annual value of nearly \$7 billion for the Legacy Carriers.

³¹⁰ General Agreement on Tariffs and Trade, Art. III.

³¹¹ 49 U.S.C. § 41703 (2012); 19 C.F.R. § 122.165 (2014).

Value of Cabotage Protection to Legacy Carriers

Markets	CY 2014 Passenger Revenue (Millions)
1. East Coast ^{1/} Midwest ^{2/} to from West Coast ^{3/}	\$5,966
2. East Coast ^{1/} Midwest ^{2/} to from Hawaii ^{4/}	\$457
3. West Coast ^{3/} to from Hawaii ^{4/}	\$533
Total	\$6,956

1/ Includes ATL, BOS, EWR, IAD, JFK, MCO and MIA

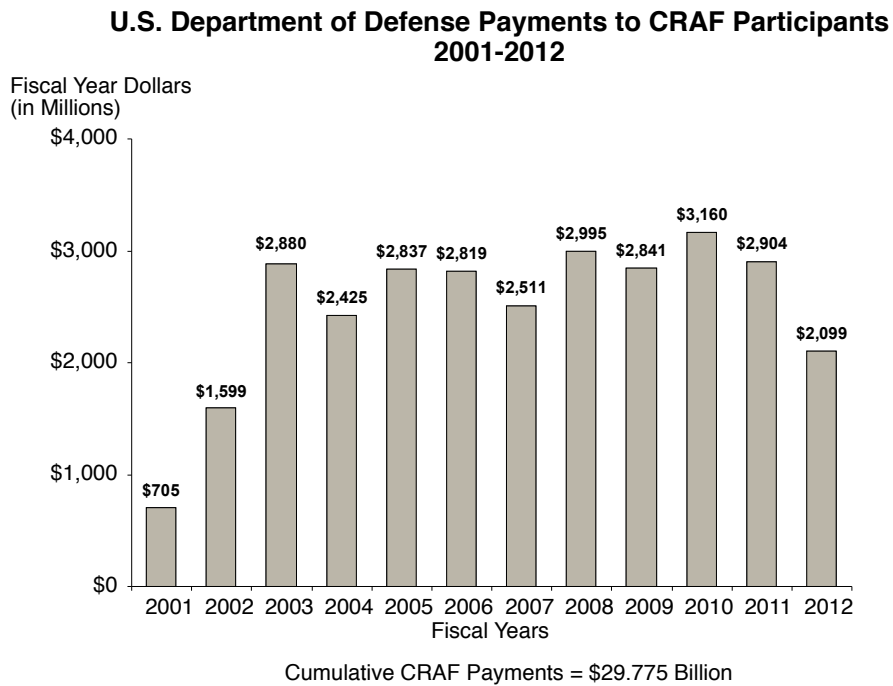
2/ Includes DFW, IAH and ORD

3/ Includes LAX, SEA and SFO

4/ Includes HNL

Figure IV-19

Defense Department CRAF Payments: As Figure IV-20 shows, from 2001 to 2012, the U.S. Department of Defense provided almost \$30 billion in payments to the Legacy Carriers and other U.S. carriers for participation in the Civil Reserve Air Fleet (CRAF).



Source: June 2013 GAO Report to Congressional Committees, GAO-13-564.

Figure IV-20

CRAF carriers must be U.S. flag carriers, and the Defense Transportation Regulations set forth a binding preference for use of CRAF carriers (and other U.S. flag carriers) over foreign carriers.³¹² Foreign carriers are denied the opportunity to compete for this business. This both provides a benefit to U.S. carriers and discriminates against foreign carriers. The Department of Defense acts lawfully in supporting an important U.S. program in part because WTO and GATS rules in fact do not apply.

U.S. Government Prohibition of Foreign Ownership of U.S. Carriers: U.S. law prohibits foreign ownership of more than twenty-five percent of the voting interest of any U.S. airline, including each of the Legacy Carriers. The Legacy Carriers have repeatedly engaged in merger activity, mergers that have permitted them to boost prices and limit competition. Mergers between U.S. and foreign airlines that would give control to a foreign carrier are prohibited under U.S. law, so the Legacy Carriers have not had to face foreign competition that might offer competing bids. Applying the Legacy Carriers' logic, this too is a denial of national treatment that confers a "significant artificial cost advantage".

Fly America: Under the "Fly America" program, the U.S. General Services Administration (GSA) requires the use of U.S. flag carriers for air travel funded by the federal government, with certain very limited exceptions. This program too denies national treatment to foreign carriers. As Figure IV-21 shows, the estimated annual value of the subsidized purchase of air transport services by GSA is over \$550 million annually.

³¹² See Defense Transportation Regulation Chapter 103, Air Movement.

**Annual Value of International Markets in the
GSA Fly America Program**

<u>Fiscal Year</u>	<u>Estimated Dollar Amount (in millions)</u>
2014	\$559
2015	\$563
Total	\$1,122

Note: Assumes 40% of passengers fly on the YCA fare and 60% on the capacity controlled contract fare in markets where both fares are offered. Assumes no traffic on Business Class fares.

Source: Analysis of contract data from the GSA City Pair Program website.

Figure IV-21

In sum, the Legacy Carriers are in no position to complain about foreign subsidies or to invoke the notion of a “level playing field” in international aviation. If the SCM Agreement applied to aviation services, which it does not, the Legacy Carriers would be found to have been massively subsidized by the U.S. Government under WTO rules. To the extent that the playing field in international aviation is not level, it is decidedly tilted in the Legacy Carriers’ favor, not in favor of foreign airlines. This is one of many reasons that help explain why U.S. negotiators sensibly did not prohibit “subsidies” in Open Skies agreements, and have refused to apply national treatment or other goods trade concepts to aviation services.

V. The Legacy Carriers' true motive is to bring down the foundations of Open Skies and obtain protection from competition.

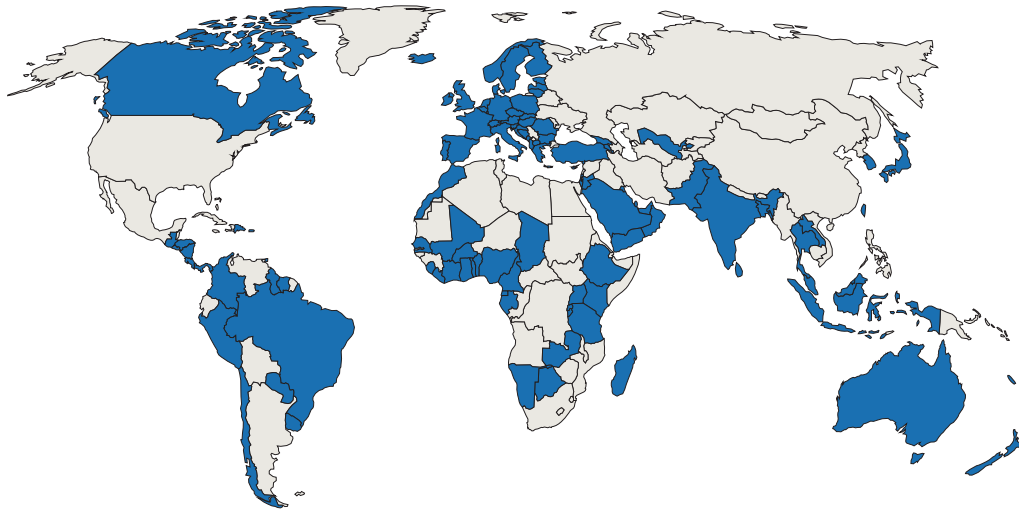
A. U.S. Open Skies policy has transformed international aviation and brought tremendous benefits to all aviation stakeholders

U.S. aviation policy extends far beyond the narrow commercial interests of its Legacy Carriers. The U.S. Government's Open Skies program is a proven pro-consumer, pro-competition U.S. aviation policy that represents a fundamental shift from the highly-regulated aviation regimes in the decades following World War II.³¹³ Since the adoption of Open Skies by the Department of Transportation in 1992, it has been aggressively pursued by every President from George H.W. Bush to Barack Obama.³¹⁴ As depicted in Figure V-1, Open Skies agreements with the United States now govern air transportation to 115 countries.

³¹³ Despite U.S. efforts at the 1944 Chicago Convention to build support for a liberal exchange of traffic rights, the 1946 Bermuda I agreement with the United Kingdom established a template for restrictions on airline routes, capacity, and pricing, a template made even less liberal in the notorious Bermuda II agreement. In general, U.S. aviation policy prior to the Carter Administration was focused almost exclusively on the interests of U.S. flag carriers and sought to secure a "balance of benefits" in each bilateral air services agreement. See, for example, the "Statement of International Air Transportation Policy" issued early in the Nixon Administration, which proclaimed that the exchange of rights in air services agreements was expected "to assure [U.S.] air carriers the opportunity to achieve no less than" the rights available to foreign air carriers. Office of the White House Press Secretary, Statement of International Air Transportation Policy, June 22, 1970, *reprinted in* 36 *Journal of Air Law & Commerce* 651, 654 (1970).

³¹⁴ See, e.g., Hillary Rodham Clinton, Secretary, U.S. Department of State, Ceremony Celebrating the Negotiation of Agreements Between the United States and 100 Open Skies Partners (Mar. 30, 2011), *available at* <http://iipdigital.usembassy.gov/st/english/texttrans/2011/03/20110331123522su0.3473126.html> (Obama Administration); Mary E. Peters, Secretary, U.S. Department of Transportation, Statement by Secretary Peters on the U.S. - EU Open Skies Agreement (Mar. 22, 2007), *available at* <http://2001-2009.state.gov/e/eeb/rls/rm/2007/82143.htm> (George W. Bush Administration); Statement of United States International Air Transportation Policy, 60 Fed. Reg. 21,841 (Department of Transportation May 3, 1995) (Clinton Administration); Defining "Open Skies," Dkt. No. 48,130, Order 92-8-13 (Department of Transportation Aug. 12, 1992) (final order) (George H.W. Bush Administration).

U.S. Open Skies Partners
(As of June 2015)



Source: U.S. Bureau of Economic and Business Affairs

Figure V-1

Open Skies has increased the service options available to U.S. consumers. Consumers now enjoy seamless travel, greater competition and choice of airlines, lower fares, increased flight frequency, and greater variety of types of aircraft (leading to more products and levels of service). The realization of Open Skies by the United States and its trading partners has enhanced U.S. cities' access to the international air transportation system: more U.S. cities have direct international routes, which boosts travel and tourism.³¹⁵ Open Skies agreements have created tremendous opportunities for U.S. air carriers: as

³¹⁵ For example, an important DOT analysis of the 1995 Canada-United States open trans-border agreement found that within only three years of signature, total U.S.-Canada passenger traffic had increased 37.2 percent, versus only 4.3 percent in the three years prior to the agreement. Moreover, whereas in 1994 there were only fifty-four non-stop markets with annual traffic of more than 50,000 passengers, in 1997, the number of markets with that level of traffic had increased to seventy-seven. Office of Aviation & International Economics, U.S. Department of Transportation, *The Impact of the New US-Canada Aviation Agreement at Its Third Anniversary* (1998), available at <http://permanent.access.gpo.gov/lps21200/canada2.pdf> ; see also U.S. Liberalization Experiences (Int'l Civil Aviation Org. Mar. 2003), available at http://www.icao.int/sustainability/CaseStudies/StatesReplies/US_En.pdf .

shown in Figure V-2, the Legacy Carriers and their joint venture partners control seventy-two percent of all flights, and sixty-seven percent of the seat capacity, between the United States and the sixty-three countries with Open Skies agreements and direct or one-stop service to the United States, listed on the chart.

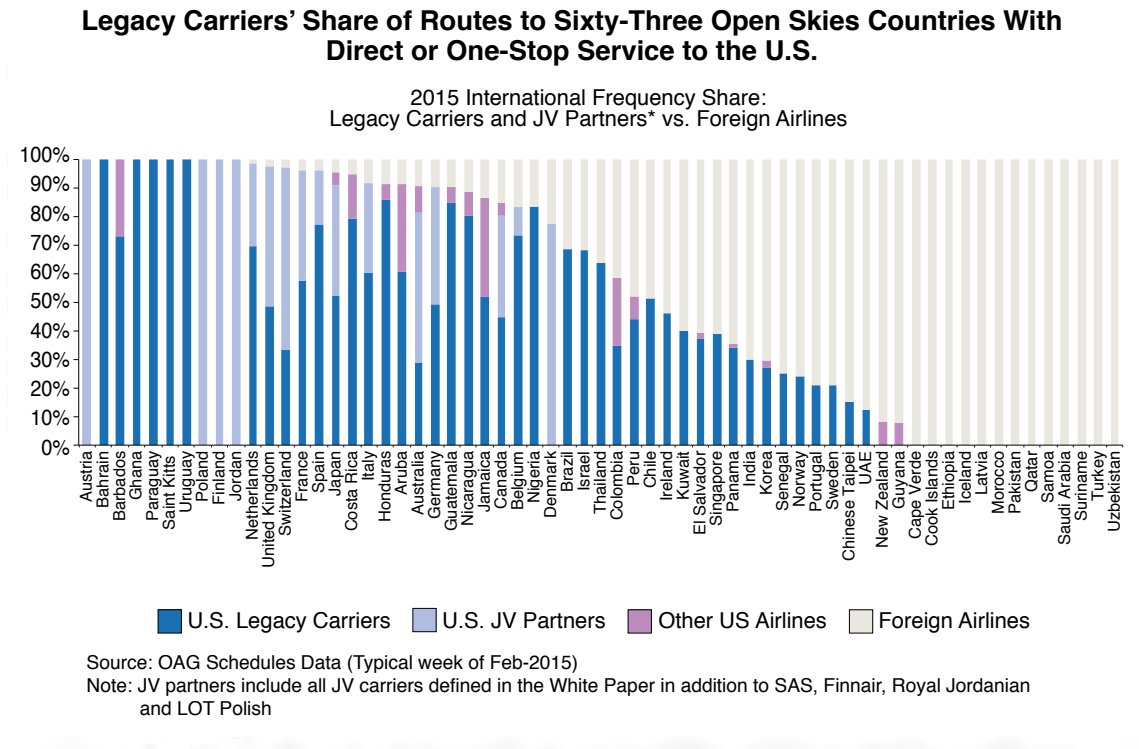


Figure V-2

Open Skies has spurred innovation, creating unrestricted opportunities for carriers to develop new types of service and networks based on their assessment of marketplace demand. The result has been a vast increase in international travel; more efficient business travel; more access to international travel by middle-class American families; greatly increased foreign inbound tourism for U.S. cities, vacation spots, and travel destinations; and innovative new transportation services like international express delivery and long-haul to long-haul international flights.

B. Emirates is a leading example of the benefits that Open Skies has brought to the United States.

Emirates' innovations in expanded long-haul service have greatly facilitated access to emerging economies by U.S. citizens and products. More routes to underserved markets generate more travel, tourism, and exports—growing the pie. Travel has increased in both directions, bringing African tourists to the United States, while allowing Americans to visit tourist destinations in South Africa, the Serengeti, and Victoria Falls. Such tourism—not to mention the work of non-profit organizations like USAID and UN agencies, which have difficulty traveling to and from these countries—boosts African economies while allowing Americans to experience Africa's diverse cultures and heritage and extraordinary wildlife. Likewise, expanded two-way access to air travel has allowed Asian-American families to visit relatives in the Indian Subcontinent, as well as bringing tourists, businesspeople, investors, and students from India, Pakistan, and Bangladesh to the United States.

More passengers to the United States, who otherwise might not have convenient access to travel, brings the United States closer to President Obama's U.S. tourism goal of having 100 million foreign visitors by the end of 2021.³¹⁶ In President Obama's words,

[T]ourism translates into jobs and it translates into economic growth [W]e're spending a lot of time and focus trying to make it easier for folks from around the world to come see America and spend money here No country on Earth earns more money from international tourism than we do. And the growth of international tourism created about 175,000 new jobs over the last

³¹⁶ Ken Salazar, *National Travel and Tourism Strategy Sets Goal to Draw 100 Million International Visitors to the U.S.*, White House Blog (May 10, 2012, 6:12 PM), <https://www.whitehouse.gov/blog/2012/05/10/national-travel-and-tourism-strategy-sets-goal-draw-100-million-international-visito>.

five years, and helped drive American exports to an all-time high.³¹⁷

Emirates' service has directly promoted U.S. exports. During Emirates' financial reporting period from April 1, 2014 to March 31, 2015, Emirates carried 120,320 tonnes of cargo from the United States to different parts of the world, and has already transported more than 27,900 tonnes of cargo during the current financial year as of May 2015. American export goods carried by Emirates are listed in the following table.

³¹⁷ President Barack Obama, Remarks by the President on Creating Jobs Through Tourism (May 22, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/05/22/remarks-president-creating-jobs-through-tourism>.

List of Export Commodities Carried by Emirates from its U.S. Gateways	
New York (JFK)	Cars/Trucks, Aircraft Parts, Pharmaceuticals, Vaccines, Perfumes & Colognes, Machine Parts, Unfinished Textiles, Frozen/Chilled Meats, Foodstuffs, Computer Laptops, Chemicals, Printed Matter, Restaurant Supplies, Live Animals, Chocolate Candy, Personal Effects, Helicopters
Boston (BOS)	Medical/Surgical Supplies, Lobsters/Seafood, Diagnostic/Lab equipment, Diagnostic Reagents, Electronic Parts, Aircraft Parts, Electrical Machinery, Sporting Equipment, Computers
Washington D.C. (IAD)	Diplomatic Mail, Printed Matter, Culture Media, Air Conditioner Parts, OTC Drugs, Uniforms, Construction Material, Perishables, Liquor, Personal Effects
Atlanta (ATL)	Live Grass, Carpet Rolls/Tiles, Floor Coverings, Medical Supplies, Perishables, Pharmaceuticals, Electrical Supplies, Machine Parts, Cement, Machine Parts, Baby Chicks, Hatching Eggs, Finished/Unfinished Textiles
Houston (IAH)	Oil Field Equipment and Parts, Cell Phones, Explosives, Drilling Mud, Air Conditioner Parts, Steel Pipes, Helicopter Blades, Chemicals
Dallas (DFW)	Foodstuffs, Aircraft Parts, Consumer Commodities, Paint, Spare Parts, Fresh/Frozen Meat, Electronics
Los Angeles (LAX)	Fresh Produce/Fruits, Nuts, Serums, Diagnostic Reagents, Integrated Circuits, Medical Supplies, Machinery Parts, Cars, Electronic Parts
San Francisco (SFO)	Fresh Produce/Fruits, Pharmaceuticals, Machine Parts, Electronic Parts, Foodstuffs
Seattle (SEA)	Aircraft Parts, Auto Parts, Fresh Fish, Cherries, Apples, Ultrasound Equipment, Electronic Parts, Foodstuffs, Humanitarian Supplies
Chicago (ORD)	Auto Parts, Textiles, Machine Parts, Medical Instruments/Equipment, Cars, Frozen/Chilled Meat, Diagnostic Reagents, Aircraft Parts, Electronics, Consumer Commodities, Chemicals

Increased travel stimulated by the efficiency of the Emirates model is also a boon to the U.S. airline industry.³¹⁸ Passengers arriving to the United States on Emirates flights travel on to over 200 airports in small and medium-sized communities in the United States, as shown by Figure V-3.

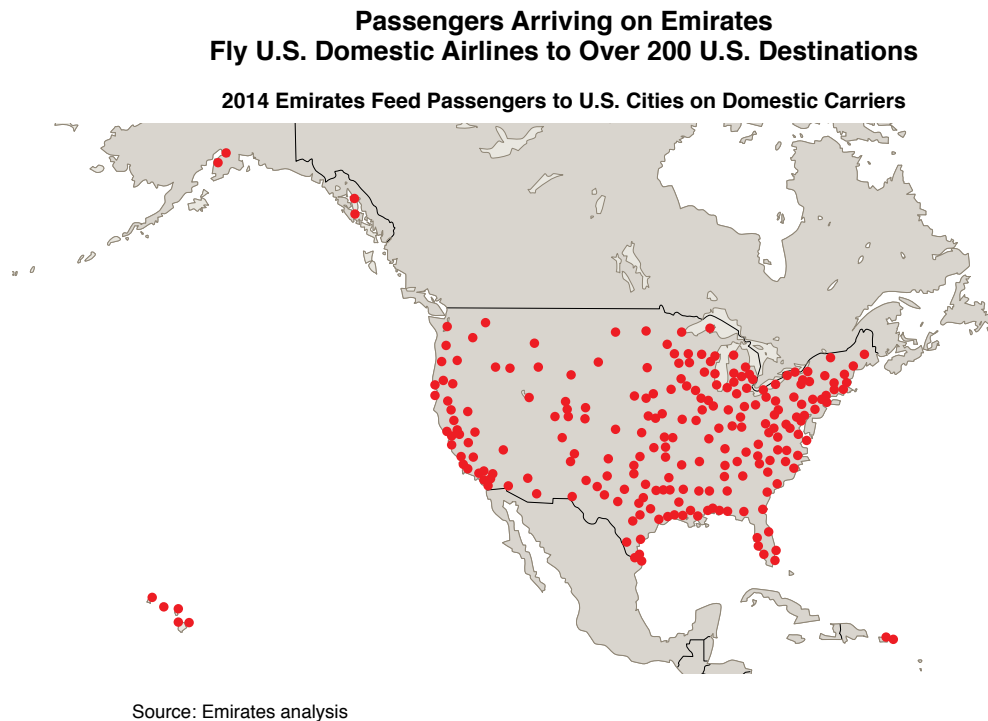


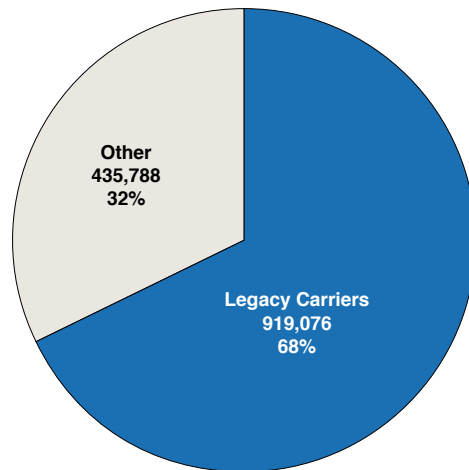
Figure V-3

Many of these travelers board U.S. airlines to get to their final U.S. destinations, most often on a Legacy Carrier. The Legacy Carriers enjoy the greatest share of Emirates' feeder traffic to the U.S. airline industry, scooping up

³¹⁸ JetBlue CEO Robin Hayes credited partnerships with airlines like Emirates with increasing JetBlue traffic flow, creating jobs, and enabling launch of new JetBlue routes. Etihad placed 180,000 passengers onto U.S. carrier networks in 2014 and Qatar calculates a revenue benefit of over \$60 million to its U.S. carrier partners in 2014. *Gulf-US Airline Partnerships: Idiosyncratic but the Way Forward*, CAPA Aviation Analysis (May 25, 2015), <http://centreforaviation.com/analysis/gulf-us-airline-partnerships-idiosyncratic-but-the-way-forward-american-airlines-to-abu-dhabi-223254>.

sixty-eight percent of this traffic, depicted by Figure V-4. Over the past five years, Emirates has carried over 1.35 million feeder passengers to U.S. and European gateways who have then travelled onwards to U.S. destinations using other carriers, resulting in a revenue benefit of \$145.5 million to the Legacy Carriers and their joint venture partners.

**Emirates' Feeder Traffic Share to U.S. Markets
(2010-2014)**



Source: Interline and departure control system data sourced from Emirates.
Note: Includes separately ticketed passengers who availed the through check-in facility to their respective final destination.

Figure V-4

Cities around the world want the benefits of enhanced air service and more visitors. In the past few years, many U.S. airports have urged Emirates to commence operations, including Phoenix, Buffalo, Pittsburgh, Denver, Detroit, Atlanta, San Jose, Baltimore, Cleveland, Minneapolis-St. Paul, Philadelphia, Las Vegas, and Miami. Air service is viewed as so important to economic growth that many U.S. airports offer incentives, such as reduced or waived landing fees or marketing assistance, for new air service.

Emirates' business model also supports innovations in aircraft technology. Emirates deploys ultra-long range aircraft capable of flying non-stop sixteen

hours, such as the Boeing 777-200LR and 777-300ER. Emirates' and other Gulf Carriers' willingness to commit to bulk purchases of new aircraft models gave Boeing the market certainty it needed to make these world-shrinking technological advances. Emirates placed the largest launch order in history from Boeing,³¹⁹ as well as the largest commercial jet engine award to GE.³²⁰ These orders generate hundreds of billions of dollars of benefits (including hundreds of thousands of U.S. jobs) for the U.S. and world economies. The Department of Commerce estimates that 5,359 U.S. jobs are generated for every one billion dollars in value of export goods from the U.S. On this basis, Emirates' order from Boeing of the new B777X would alone account for over 400,000 new American jobs.³²¹ The Legacy Carriers' demands to stifle Emirates' growth would logically put potential future orders to suppliers at risk.

Figure V-5 sets forth a traditional air service economic impact analysis. It shows that Emirates' current level of non-stop service to the Middle East creates \$4.7 billion in annual economic benefit (output) in the U.S. economy.

³¹⁹ Press Release, Boeing, Emirates Finalize Order for 150 777Xs (July 9, 2014), *available at* <http://boeing.mediaroom.com/2014-07-09-Boeing-Emirates-Finalize-Order-for-150-777Xs>; *see also* Press Release, Emirates, Emirates' \$76 Billion Boeing Aircraft Order a Boost to U.S. Aviation Industry (Nov. 18, 2013), *available at* <http://www.emirates.com/us/english/about/news/order-boeing.aspx> (quoting Commerce Secretary Pritzker: "This agreement represents the largest aircraft purchase in history and it will further strengthen the US aerospace industry and support tens of thousands of American jobs. It is also a win-win for our economy and our workers, and clearly demonstrates the confidence in American-made products throughout the world".)

³²⁰ Press Release, GE Aviation, Emirates Signs \$13 Billion GE9X Services Agreement, GE Aviation (July 14, 2014), *available at* http://www.geaviation.com/press/ge90/ge90_20140714.html.

³²¹ Chris Rasmussen & Martin Johnson, Int'l Trade Admin., *Jobs Supported by Exports, 1993–2011*, at 12 (2012), *available at* http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003978.pdf.

The Economic Impact of Emirates Flights to the United States

Emirates U.S. Route ¹	Annual Spending by Visitors to the U.S. (Millions)	Annual Total U.S. Economic Output/Sales ² (Millions)	U.S. Jobs	Annual U.S. Employee Earnings (Millions)
	(1)	(2)	(3)	(4)
Boston	\$187	\$469	4,004	\$162
Chicago	\$153	\$383	3,262	\$132
Dallas/Ft. Worth	\$124	\$310	2,639	\$107
Houston	\$143	\$358	3,062	\$124
Los Angeles	\$270	\$677	5,774	\$234
New York	\$463	\$1,161	9,916	\$401
San Francisco	\$222	\$557	4,740	\$192
Seattle	\$167	\$419	3,567	\$145
Washington D.C.	\$130	\$326	2,787	\$113
Total	\$1,859	\$4,660	39,751	\$1,610
Total per Daily Roundtrip Flight³	\$186 Million	\$466 Million	3,975	\$161 Million

1/ Includes the impact of all onboard passengers (includes passengers connecting within the U.S. to/from all Emirates Dubai flights).

2/ Includes multiplier effects for final demand output in the United States.

3/ Based on 10 daily roundtrip flights in current schedule (excludes Milan).

Note: Includes data for flights operated for the 12 months ended September 2014.

Figure V-5

This translates to \$466 million per year on average for each of Emirates' ten round trip services (flights). The analysis also shows that Emirates' current Middle East service supports 40,000 jobs throughout the U.S. economy, specifically focused on the regional economies benefiting from its flights. The estimated worker earnings from these jobs total \$1.6 billion per year. Four thousand U.S. jobs and \$161 million in annual payroll are supported by each round trip service.

Air traffic promotes foreign investment: business executives are more comfortable investing money in locations where good air service facilitates on-the-ground management. Emirates' expansion of direct online services between the United States on the one hand, and the Middle East, the Indian Subcontinent, the ASEAN countries, and Africa on the other, is very important in this regard. As shown in Figure V-6, foreign direct investment in the United

States from those regions has increased by sixty-six percent between 2007 and 2013.

**Foreign Direct Investment in the United States from Regions Served
by Emirates (Millions of U.S. Dollars)**

	2007	2008	2009	2010	2011	2012	2013	Total	Growth
United Arab Emirates	\$1,039	\$2,136	\$2,253	\$747	\$1,451	\$2,514	\$1,804	\$11,944	74%
Other Middle East	\$13,989	\$14,097	\$15,924	\$16,061	\$18,012	\$17,667	\$19,362	\$115,112	38%
Middle East	\$15,028	\$16,233	\$18,177	\$16,808	\$19,463	\$20,181	\$21,166	\$127,056	41%
Africa	\$1,034	\$1,817	\$1,225	\$2,265	\$3,295	\$3,810	\$1,968	\$15,414	90%
India	\$1,671	\$2,820	\$2,555	\$4,102	\$5,323	\$6,365	\$7,118	\$29,954	326%
Pakistan	\$52	\$57	\$60	\$76	\$79	\$70	\$97	\$491	87%
Sri Lanka	\$8	\$14	\$9	\$10	\$15	\$17	\$44	\$117	450%
South Asia (major)	\$1,731	\$2,891	\$2,624	\$4,188	\$5,417	\$6,452	\$7,259	\$30,562	319%
Malaysia	\$464	\$450	\$439	\$338	\$911	\$679	\$635	\$3,916	37%
Singapore	\$12,151	\$25,801	\$20,757	\$21,517	\$16,819	\$18,310	\$19,760	\$135,115	63%
Thailand	\$334	\$187	\$199	\$158	\$123	\$366	\$439	\$1,806	31%
Vietnam	\$5	\$14	\$19	\$59	\$17	\$40	-\$276	-\$122	-5620%
Philippines	\$125	\$60	\$131	\$103	\$115	\$266	\$268	\$1,068	114%
Southeast Asia (major)	\$13,079	\$26,512	\$21,545	\$22,175	\$17,985	\$19,661	\$20,826	\$141,783	59%
Combined - All Areas	\$30,872	\$47,453	\$43,571	\$45,436	\$46,160	\$50,104	\$51,219	\$314,815	66%

Source: U.S. Department of Commerce, Bureau of Economic Analysis.

Figure V-6

UAE investment in the United States grew by seventy-four percent while investment from India and Singapore grew by 326 percent and sixty-three percent respectively.

Emirates is a tangible example of the benefits of Open Skies policy for the U.S. economy and American jobs. Emirates has pioneered a new approach to global air travel. Its growth has created substantial additional demand for U.S.-made aircraft and engines and benefited millions of American travelers. Generating U.S. jobs in tourism and manufacturing, strengthening American prosperity, and offering convenient service to new destinations to U.S. citizens at reasonable prices—this is the virtuous circle that the Legacy Carriers now seek to unwind. The Boeing 777X aircraft and GE9X engine programs are successful in significant part because they have been enabled by demand from the Gulf Carriers, led by Emirates' record-setting order. Open Skies and liberalized agreements worldwide translate into greatly increased air service, more

consumer traffic, and more air cargo shipments, each of which increases the demand for aircraft. Open Skies created the framework in which successful business models, like Emirates', can prosper, as other countries have followed the leadership of the United States in opening their markets and adopting a pro-competition, pro-consumer approach to international aviation. This model is vastly different from that which the Legacy Carriers seek to reintroduce. It is telling that the Legacy Carriers' White Paper contains only one reference to consumers in its entire fifty-five pages³²²—their approach to airline services assigns a low priority to the quality of a passenger's travel experience and possibilities for improving that experience.

C. This complaint is not about fair competition or U.S. trade policy. It is the Legacy Carriers' attempt to stifle competition and return to pre-Open Skies protectionism.

While the Legacy Carriers disingenuously claim that they only have concerns with two of the countries that are governed by Open Skies Agreements,³²³ in fact they are seeking action that would destroy the very foundation of Open Skies policy. They seek protection from competition by urging the United States to abandon Open Skies, initially with two countries, and turn the clock back to government-enforced limits on routes and capacity, coupled with mercantilist allocation of international landing rights—the old regime when governments negotiated detailed schedules of rights, frequencies, fares, and aircraft-type, and vied to protect their national champions.³²⁴

³²² See White Paper at 1.

³²³ See, e.g., Jeff Smisek, CEO, United Airlines, National Press Club Holds Newsmaker Luncheon on Restoring Fair Competition to the Skies (May 15, 2015).

³²⁴ Richard Anderson, the CEO of Delta Airlines, has openly opposed a foundational element of Open Skies policy. Fifth Freedom rights—the ability to carry revenue traffic between two foreign countries as a part of services connecting an airline's own country—are a bedrock element of Open Skies, and are actively used by the Legacy Carriers in their Pacific traffic, particularly the Tokyo hubs operated by Delta and United. Yet in a 2014 interview with the Wall Street Journal, Mr. Anderson complained about Emirates' exercise of Fifth Freedom rights in flying Dubai-Milan-New York: "Well, the Fifth Freedoms under the Chicago Convention way back in the 1940s, were never intended to be used the way that they were used in those circumstances. And so, we're optimistic that the Italian -- the decision of the Italian court will be a

Such a reversal of Open Skies would be a grave threat to competition. The Legacy Carriers' existing antitrust immunity for intra-alliance price setting and capacity coordination is premised on the broader climate of competition that has been created by Open Skies. Replacing Open Skies with protection would stifle competition and hand even more market power to the Legacy Carriers and their European antitrust-immunized joint venture partners. Behind their standard trade rhetoric of "unfair subsidies" and "level playing field," the Legacy Carriers' real goal is to shut out independent carriers like Emirates, JetBlue, and Alaska Airlines, who make pricing and capacity decisions based on market forces, not on antitrust-immunized joint venture dictates, and who threaten their cherished oligopoly.

In effect, the Legacy Carriers are bidding to become the primary, if not sole, twenty-first century version of the U.S. flag carriers such as Pan Am and TWA, arrogantly and with a sense of entitlement demanding U.S. Government intervention to cut off competition in their markets and to shield their profits from competitive pressures to innovate and improve. Such protection will hurt U.S. consumers by eliminating competitive choice, reduce service options, sharply reduce business and tourist travel to the United States, perpetuate the Legacy Carriers' poor service, raise fares, and stifle customer-friendly innovation—reversing the significant achievements of Open Skies. A coalition of the travel, hospitality, and cargo industries, including Alaska Airlines, Atlas Air, FedEx Express, Hawaiian Airlines, Hilton, InterContinental, Caesars, Hyatt, JetBlue, Marriott, MGM, and Wyndham,

precedent that will be followed in other venues. Because it was never the intention, the Fifth Freedoms were originally intended to take into account the range of aircraft to be able to fly nonstop. And it wasn't intended to, in essence, set up operations between two countries, neither of which you are a citizen of—as standalone operations." Thomson Reuters Streetevents, *Delta Air Lines Earnings Conference Call* (Apr. 23, 2014), available at http://ir.delta.com/files/doc_financials/quarterly/DALTranscript%2020140423_v001_j69j5t.pdf.

In fact Fifth Freedoms are a core element of U.S. Open Skies policy, exercised extensively both by the Legacy Carriers and by their alliance partners. They play a critical role in providing passengers with more competitive options and better service, a fact exemplified by Emirates' success on that Dubai-Milan-New York route.

support this policy of Open Skies that has brought tremendous increases in international air service, reductions in fares and millions of new international visitors to our shores. Open Skies not only benefits the entire travel and hospitality industry, it supports other economic sectors that fuel and facilitate global trade. That includes air cargo, which represents more than 30 percent of the total value of global international trade. In short, Open Skies agreements are essential to the U.S. economy and the 21st century global economy.³²⁵

Efficient lower-cost U.S. air carriers understand the Legacy Carriers' real motives, and are not joining this effort. Unlike the Legacy Carriers, they see their future in open, competitive markets. JetBlue's CEO, Robin Hayes, has said that the Legacy Carriers "do not represent the views of the entire US aviation industry. . . . Each of these new international flights not only adds direct aviation sector jobs in [JetBlue focus city] Boston and indirect travel and tourism benefits in the region, but also strengthens JetBlue's ability to launch new competitive domestic routes such as Boston-Detroit based on the large flow of arriving international connecting customers."³²⁶ Alaska Airlines CEO Bradley Tilden has added, "Alaska Airlines has benefited from Open Skies in the form of new access for both U.S. and foreign carriers to serve numerous international markets."³²⁷

According to U.S. all-cargo carrier Atlas Air's CEO, William Flynn, "Atlas and Polar are able to sustain efficient and financially profitable operations . . . made possible by the strong U.S. commitment to Open Skies, which has

³²⁵ Letter from Roger J. Dow, President & CEO, U.S. Travel Association, et al. to Anthony R. Foxx, Secretary, U.S. Department of Transportation, et al. (June 11, 2015).

³²⁶ Letter from Robin Hayes, CEO, JetBlue, to John F. Kerry, Secretary, U.S. Department of State et al. (Apr. 29, 2015).

³²⁷ Letter from Bradley D. Tilden, President & CEO, Alaska Airlines, to John Kerry, Secretary, U.S. Department of State, & Anthony Foxx, Secretary, U.S. Department of Transportation (Feb. 27, 2015).

enabled Atlas and Polar to use ‘5th freedom’ rights to carry freight from one foreign country to another.”³²⁸ Likewise, FedEx Express’s CEO, David Bronczek, has noted, “Retrenchment in any way from Open Skies by the U.S. would jeopardize the economic growth benefits that air cargo provides.”³²⁹ As the Cargo Airline Association explained, ending Open Skies would threaten the U.S. cargo carriers’ business model: “Because our networks depend upon the ‘beyond rights’ granted by these foreign countries, our entire worldwide network would be placed in jeopardy if those rights were scaled back resulting in significant negative economic impact.”³³⁰

In effect, the Legacy Carriers want the U.S. Government to put their interests and record-breaking profits ahead of other U.S. passenger airlines, U.S. cargo and express delivery airlines, U.S. aircraft and engine manufacturers, U.S. exports, U.S. airports, U.S. travel and tourism, and U.S. consumers. This explains the outcry from their representatives and associations:

- Alaska Airlines has pointed to “aircraft orders from other carriers (both U.S. based and foreign) whose own growth is at least partially driven by Open Skies,” noting that “it is easy to see the significant positive impact this policy has had on well paid, middle-class jobs like those at Boeing and Alaska.”³³¹
- The Airports Council International-North America cites a recent peer-reviewed study showing that Open Skies Agreements generate at least \$4 billion in annual gains to travelers,³³² and urges the

³²⁸ Letter from William J. Flynn, President & CEO, Atlas Air, to John F. Kerry, Secretary, U.S. Department of State et al. (Feb. 17, 2015).

³²⁹ Letter from David J. Bronczek, President & CEO, FedEx Express, to John F. Kerry, Secretary, U.S. Department of State et al. (Feb. 18, 2015).

³³⁰ Letter from Joseph C. Hete, CEO, ABX Air, Inc. et al. to John F. Kerry, Secretary, U.S. Department of State et al. (Feb. 20, 2015).

³³¹ Letter from Bradley D. Tilden, President & CEO, Alaska Airlines, to John Kerry, Secretary, U.S. Department of State, and Anthony Foxx, Secretary, U.S. Department of Transportation (Feb. 27, 2015).

³³² Clifford Winston & Jia Yan, *Open Skies: Estimating Travelers’ Benefits from Free Trade in Airline Services*, 7 American Economic Journal: Economic Policy 370 (2015).

Administration not to pander to the “criticisms . . . being levelled against U.S. Open Skies policy by a few U.S. interests.”³³³

- At Dallas/Fort Worth International Airport (American Airlines’ hub), the airport’s executive vice president, John Ackerman, emphasizes that the Gulf Carriers’ flights generate “hundreds of millions of dollars” in annual economic benefits for the Dallas-Fort Worth region, with Emirates being singled out as the single largest contributor with \$300 million in annual economic benefit.³³⁴
- The Greater Orlando Aviation Authority, operator of Orlando International Airport, notes, “Neither the US economy nor our economy in Central Florida can afford the Open Skies policy departure that is being urged in this matter. The Orlando area certainly cannot afford to lose the more than \$100 million in new annual economic activity Emirates’ new Orlando-Dubai non-stop flight will generate, and the nearly 1,500 jobs it will support.”³³⁵
- FedEx Express urges, “The U.S. should not capitulate to the interests of a few carriers who stand ready to put their narrow, protectionist interests ahead of the economic benefits that Open Skies provides to the people of the United States.”³³⁶
- The Clark County Department of Aviation, operator of Las Vegas McCarran International Airport, adds, “International service has provided significant economic benefits to Las Vegas and the continuation of Open Skies, without the uncompetitive interference from the domestic carriers, is fundamental to our national goal of attracting 100 million visitors by 2021 New entrants into the American market, including airlines like Emirates . . . will increase

³³³ Letter from Kevin M. Burke, President & CEO, Airports Council International—North America to John F. Kerry, Secretary, U.S. Department of State et al. (Feb. 10, 2015). (“If the United States were to weaken its Open Skies policy generally or with respect to targeted countries, ACI-NA believes that many of the benefits enjoyed today could be decreased. We also expect that the leadership role of the U.S. Government in the international aviation community would be seriously damaged, thus undercutting U.S. efforts to liberalize aviation regimes with other countries, and raising the risks that current Open Skies agreements could be undermined as other countries may try to limit U.S. airlines, citing U.S. airline advantages as unfair competition.”)

³³⁴ Shereen El Gazzar, *Dallas-Fort Worth Executive Says Gulf Carriers Support His Region*, The National, May 7, 2015, available at <http://m.thenational.ae/business/aviation/dallas-fort-worth-executive-says-gulf-carriers-support-his-region>.

³³⁵ Letter from Phillip N. Brown, Executive Director & Frank Kruppenbacher, Chairman, Greater Orlando Aviation Auth., to John F. Kerry, Secretary, U.S. Department of State et al. (May 21, 2015).

³³⁶ Letter from David J. Bronczek, President & CEO, FedEx Express, to John Kerry, Secretary, U.S. Department of State et al. (Feb. 18, 2015).

international travel to the United States and grow the economies of the communities they serve, as well as our national economy.”³³⁷

- The U.S. Travel Association notes, “The policy of deregulating international aviation through Open Skies has been tremendously successful for American consumers, who have found it easier and cheaper to travel abroad, our domestic airports, that have reaped the benefits of expanded lucrative inbound international travel, and our domestic airlines, which have grown and profited from the opening on a global scale of markets that previously were restricted.”³³⁸
- General Electric (GE) vice chairman John Rice recently stated, “We are, at our heart, kind of free traders, and we believe that Open Skies exists for a reason, and we don’t think that reason has changed We like to see free flow of trade, people, air travel, if you will, and that’s what we advocate.”³³⁹

These passenger airlines, cargo carriers, manufacturers, airports, and consumer groups agree: the U.S. Government should reject the Legacy Carriers’ protectionist attempt to weaken U.S. Open Skies policy and turn back the clock to the highly-regulated aviation marketplace of the 1950s and 1960s.

D. This effort is intended to increase the Legacy Carriers’ market power, created by mergers, Chapter 11 restructuring, and grants of antitrust immunity, which has enabled them to reduce capacity and service and increase prices in their protected markets while earning record profits.

While Emirates grows and wins passengers by offering an innovative and consumer-oriented business model, the Legacy Carriers cling to an outdated approach of protecting market power with a sense of entitlement to customers. The Legacy Carriers are not suffering because of Open Skies Agreements with Qatar and the UAE. In fact, they have never been more profitable. Each of the three Legacy Carriers reported record earnings in the first quarter of 2015: Delta

³³⁷ Letter from Rosemary Vasiliadis, Director of Aviation, Clark County Department of Aviation, to Anthony Foxx, Secretary, U.S. Department of Transportation et al. (May 20, 2015).

³³⁸ Letter from Roger J. Dow, President & CEO, U.S. Travel Association, to John Kerry, Secretary, U.S. Department of State et al. (Feb. 11, 2015).

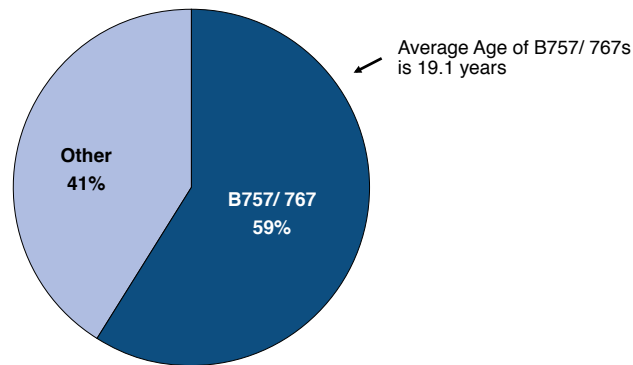
³³⁹ Ed Attwood, *Open Skies ‘Exists for a Reason,’ Says GE Boss*, ArabianBusiness.com (May 24, 2015, 2:30 PM), <http://www.arabianbusiness.com/open-skies-exists-for-reason-says-ge-boss-593787.html>.

tripled its profit to \$594 million and is distributing \$6 billion to its shareholders,³⁴⁰ American Airlines Group posted a record \$1.2 billion profit,³⁴¹ and United posted a record \$582 million profit.³⁴²

Those record profits, unfortunately, have been generated in part by underinvestment in customer service. To give one important example, almost sixty percent of the Legacy Carriers' total frequencies on transatlantic routes are operated by old B757 and B767 aircraft as shown on Figure V-7.³⁴³

Almost 60% of Legacy Carriers' Total Frequencies on Transatlantic Routes is Operated by Old B757/767s

Legacy Carriers' Transatlantic Frequency Share by Aircraft Type



Source: Innovata Schedule Data, via Diio, April 2015; Flightglobal / Ascend fleet data, via Diio, as of April 2015.

Figure V-7

³⁴⁰ Press Release, Delta Air Lines, Delta Air Lines Announces March Quarter Profit (Apr. 15, 2015), available at <http://news.delta.com/2015-04-15-Delta-Air-Lines-Announces-March-Quarter-Profit>; see also Jack Nicas, *Delta, Southwest Unveil Buybacks, Added Dividends*, Wall Street Journal, May 13, 2015 (reporting Delta's announcement of \$6 billion in new stock buybacks and added dividends through 2017).

³⁴¹ Press Release, American Airlines, American Airlines Group Reported Record First Quarter 2015 Profit (Apr. 24, 2015), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=117098&p=irol-newsArticle&ID=2039822>.

³⁴² Press Release, United Airlines, United Announces Record First-Quarter Profit (Apr. 23, 2015), <http://www.prnewswire.com/news-releases/united-announces-record-first-quarter-profit-300070958.html>.

³⁴³ Innovata Schedule Data via Diio Mi (as of 2015).

These aircraft entered service in the 1980s, and are *not* preferred by customers. Figure V-8 maps the routes on which the Legacy Carriers fly these old 757s and 767s.

**Legacy Carriers' Transatlantic Routes
Operated by B757 and B767 Aircraft As of April 2015**



Source: Innovata Schedule Data, via Diio, April 2015.

Figure V-8

In fact, the Legacy Carriers continue to actively operate almost 400 B757 aircraft and more than 200 B767 aircraft with an average age of nineteen years on both international and domestic routes.³⁴⁴ In 2012, Delta purchased a thirteen-year-old MD-90 from China Southern Airlines, along with 48 other MD-90s purchased from other airlines around the world.³⁴⁵ Just weeks ago, United announced that it would be leasing twenty-five ten-year-old A319s.³⁴⁶ While

³⁴⁴ Diio Mi Fleet Data (as of Apr. 26, 2015).

³⁴⁵ Susan Carey, *Delta Flies New Route to Profits: Older Jets*, Wall Street Journal, Nov. 15, 2012, available at <http://www.wsj.com/articles/SB10001424052970203406404578072960852910072>.

³⁴⁶ Press Release, AerCap Holdings N.V., AerCap to Lease up to 25 Used A319 Aircraft to United Airlines (May 15, 2015), available at <http://hugin.info/149317/R/1921942/688874.pdf>. Average age of United's A319

Emirates' average fleet age is just 6.5 years, American's is 12.9 years, United's is 13.6 years, and Delta's is 17.1 years.³⁴⁷ The age of Delta's fleet, together with its continued acquisition of obsolete and uncomfortable aircraft, is astonishing in light of the strong profitability of the airline.³⁴⁸ It is a sign that the company is harvesting profits from its protected market position and not seriously investing in better service for its customers.

Continued operation of older aircraft may reduce acquisition costs and enhance profits, but it comes at the expense of customer service, reliability, and service and maintenance expenses. The ultra-long range operation is more capital-intensive, but significantly enhances passenger convenience and experience. Compared to the long-haul aircraft investments of Emirates, the Legacy Carriers have invested far less in this aspect of service. Not surprisingly, customers—particularly business travelers and visitors who are informed about the choices available—prefer competitors who offer better, modern, wide-body aircraft and world-class service. Under Open Skies, the Legacy Carriers are free to operate older fleets, but they do not deserve to be protected from the consequences of that choice if customers choose competitors who offer better service, with newer, more dependable aircraft. Consumer choice is precisely what competition is designed to achieve.

Aside from the age of their aircraft, the Legacy Carriers have dramatically reduced capacity, shrinking the number of flights and cities they serve. When Delta announced that its profits tripled compared to first quarter 2014, it also

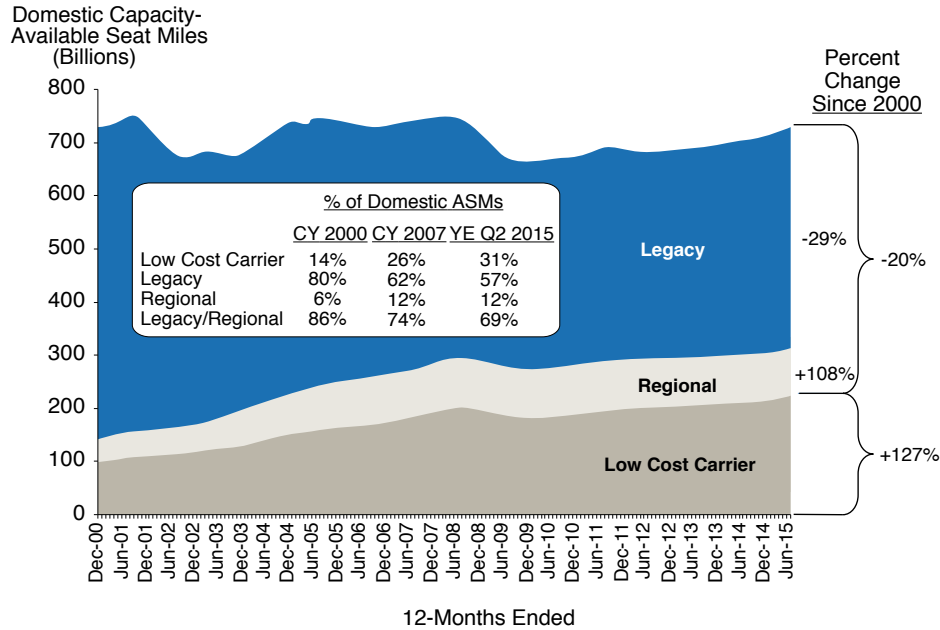
fleet is based on average age of all A319 fleet owned by AerCap, as of May 24, 2015, source from Diio Mi Fleet Data.

³⁴⁷ Skytrax/Centre for Aviation Fleet Data (as of Feb. 10, 2015).

³⁴⁸ Carey, *Delta Flies New Route to Profits: Older Jets*, *supra* note 345 ("It's just math," said Nat Pieper, Delta's vice president of fleet strategy and a veteran of Northwest. "Our fleet strategy is one of opportunism.") (internal quotation marks omitted).

announced it would cut overseas capacity by three percent this winter.³⁴⁹ As shown in Figure V-9, Legacy and regional carrier domestic capacity has decreased by twenty percent since December 2000, even as the total market has not declined.³⁵⁰

Legacy and Regional Carrier Domestic ASM Capacity Has Decreased by 20% Since December 2000 While the Total Market Has Remained Frozen



Source: Innovata schedules.

Figure V-9

Reducing capacity and service may lower costs, increase fares and therefore increase profits, but the result is increased crowding on aircraft and distinctly inferior service. As a result of the Legacy Carriers' decision to prioritize profits over customer service, passengers flying from Detroit to Atlanta enjoy far less comfort than, for example, an Emirates passenger flying from Entebbe, Uganda, to Dubai.

³⁴⁹ Susan Carey & Angela Chen, *Delta Says Profits Triple, Plans Capacity Cuts to Overseas Flights*, Wall Street Journal, Apr. 15, 2015, available at <http://www.wsj.com/articles/delta-says-profits-triple-plans-capacity-cuts-to-overseas-flights-1429100056>.

³⁵⁰ Innovata Schedule Data.

The strategy of reducing capacity and service to consumers explains why the Legacy Carriers are now among the most profitable—and among the most disliked—businesses in America.³⁵¹ The Legacy Carriers can and do post solid operating margins;³⁵² Delta and American rank among the world's fifteen most profitable airlines.³⁵³ But these profits have been achieved by sacrificing customer service and shorting air travelers with cancelled flights, lost luggage, additional fees, and shrunken frequent-flyer programs. The Legacy Carriers rank very low in terms of overall services by comparison with other airlines—with Delta 45th in the world, United at 60th, and American at 79th—according to the Skytrax World Airline Rankings 2015, which was based on the votes of millions of travelers from around the world.³⁵⁴ To put this in perspective, Aeroflot is ranked 46th.³⁵⁵ Meanwhile, Emirates ranks at the top of quality and service rankings. The same Skytrax World Airline Rankings ranked Emirates #1 in 2013 and #5 in 2015. Condé Nast's Best Airlines for Business Travelers ranked Emirates #1 in 2014.³⁵⁶ Travel and Leisure ranked Emirates #2 for best airlines in 2014.³⁵⁷ Business Insider ranked Emirates #6 for best airlines in the world in 2014.³⁵⁸ AirlineRatings.com ranked Emirates #5 for its top ten airlines for

³⁵¹ Dina Spector et al, *The 15 Most Disliked Companies in America*, Business Insider (June 22, 2012, 1:41 PM), <http://www.businessinsider.com/the-most-hated-companies-in-america-2012-6#> (ranking United 5th, American 8th, US Airways 9th, and Delta 10th); see also Akane Otani, *America's Most Loved and Most Hated Companies*, Bloomberg (Feb. 5, 2015, 2:48 PM), <http://www.bloomberg.com/news/articles/2015-02-05/america-s-most-loved-and-most-hated-companies> (ranking United 5th).

³⁵² See *supra* Figure III-3.

³⁵³ Terry Maxon, *Seven U.S. Carriers Among the World's Most Profitable Airlines*, Dallas Morning News (Sept. 22, 2014, 12:07 PM), <http://aviationblog.dallasnews.com/2014/09/sevem-u-s-carriers-among-the-worlds-most-profitable-airlines.html/>.

³⁵⁴ *The World's Top 100 Airlines in 2015*, Skytrax (last visited June 17, 2015), http://www.worldairlineawards.com/Awards/world_airline_rating.html.

³⁵⁵ *Id.*

³⁵⁶ Barbara Peterson, *World's Best Airlines for Business Travelers: Reader's Choice Awards 2014*, Condé Nast Traveler (Feb. 3, 2015), <http://www.cntraveler.com/galleries/2015-02-03/worlds-best-airlines-business-travel-readers-choice-awards-2014>.

³⁵⁷ *Top International Airlines for In-Flight Service for Business Travelers*, Travel + Leisure, (Aug. 28, 2014), <http://www.travelandleisure.com/articles/top-international-airlines-for-in-flight-service-for-business-travelers>.

³⁵⁸ Benjamin Zhang & Sara Bower, *The 20 Best Airlines in the World*, Business Insider (June 15, 2014, 10:53 AM), <http://www.businessinsider.com/best-airlines-in-the-world-2014-6>.

2015.³⁵⁹ Delta, American, and United failed to make any of these lists. And Emirates earned these accolades by investing in products and services—without any government subsidies. The Legacy Carriers are on a mission to eliminate competitive choice and thereby force consumers to accept substandard service by default.

The Legacy Carriers' profitable complacency extends to their strategy of handing off international flights to their foreign joint venture partners, such as Air France/KLM and Lufthansa. This business model routes passengers to Africa and the Indian Subcontinent through less efficient European hubs, often requiring multiple stops and longer elapsed travel times, and avoids the development of efficient, more convenient, and direct non-stop or one-stop service to rapidly growing markets in those regions. From a service perspective, this has resulted in an inter-alliance race to the bottom to offer the lowest common denominator service.

VI. Conclusion

Emirates has taken the opportunity offered by Open Skies to innovate and improve air travel with a new business model. In contrast, the Legacy Carriers do not want to make the effort necessary to compete. Despite their protestations, the Legacy Carriers are seeking no competition, not fair competition. What they want is to defeat the fundamental principles of Open Skies and block competitors who may disrupt their entrenched market positions. What they want is to continue a business strategy that brings them profit while ignoring consumers, quality of service, and new emerging markets.

Emirates is not subsidized. It has produced a consistent profit for more than a quarter-century. Emirates' expansion has been funded from its own revenues, and it does not depend on government subsidies, bail-outs,

³⁵⁹ *AirlineRatings Announces Its Top Ten Airlines for 2015*, AirlineRatings.com, (Dec. 2, 2014), <http://www.airlineratings.com/news/402/worlds-top-ten-airlines->.

bankruptcy laws, cabotage, or casting aside tens of thousands of its retirees. What the Legacy Carriers want is even more protection from competition. Such protection would come at the expense of other U.S. stakeholders—U.S. aircraft and engine manufacturers, U.S. exports and jobs, both agricultural and industrial, non-hub U.S. cities and airports, U.S. air cargo carriers, and most of all, U.S. consumers, including passengers and shippers. The primary beneficiaries would not be the Legacy Carriers, but their European alliance partners, since the Legacy Carriers have offloaded most of their international flights to Africa, the Middle East, and the Indian Subcontinent to their European antitrust-immunized joint venture partners. From the standpoint of international law, the Legacy Carriers' demands for a freeze on Emirates and the other Gulf Carriers would represent a clear-cut violation of the Open Skies Agreement, which expressly prohibits such "unilateral actions."

In sum, there is no factual or legal justification for U.S. unilateral action against Emirates. Such a step by the United States would seriously disadvantage other U.S. stakeholders, sound the death knell for Open Skies, and send a very negative signal about the value of U.S. trade, diplomatic, and security commitments. For these reasons, the Legacy Carriers' demands for protection should be firmly rejected.

Document Appendix

- Exhibit 1: Campbell-Hill Aviation Group, LLC, Slide Deck
- Exhibit 2: Paul Suddaby, PricewaterhouseCoopers, Independent Auditor's Report to the Owner of Emirates, in Emirates Group Annual Report 2014–15
- Exhibit 3: Excerpt from Press Release, Delta Air Lines, Delta Air Lines Reports 2009 Financial Results
- Exhibit 4: Marks Paneth LLP, Statement and Analysis of John Miller, CPA
- Exhibit 5: Frankie O'Connell, U.S. White Paper on Gulf Carriers Distorts My Academic Report, Air Transport World
- Exhibit 6: Campbell-Hill Aviation Group, LLC, Analysis of the Legacy Carriers' Job Loss Estimate Due to Emirates' Service
- Exhibit 7: Supporters of Open Skies

Legal Appendix

- Exhibit 8: Air Transport Agreement Between the Government of the United States of America and the Government of the United Arab Emirates [U.S.-UAE Open Skies Agreement]
- Exhibit 9: GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Annex on Air Transport Services, 1869 U.N.T.S. 183 [Annex on Air Transport Services]