BEFORE THE UNITED STATES DEPARTMENTS OF COMMERCE, TRANSPORTATION, AND STATE

WASHINGTON, DC

In the Matter of:	)	
	)	
	)	
Information Docket on Claims	)	Docket Nos. DOC-2015-0001;
Raised about State-Owned Airlines	)	DOS-2015-0016; and
In Qatar and the United Arab Emirates	)	DOT-OST-2015-0082
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ETIHAD AIRWAYS RESPONSE TO CLAIMS RAISED ABOUT STATE-OWNED AIRLINES IN QATAR AND THE UNITED ARAB EMIRATES

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May 31, 2015

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I. INTRODUCTION

In a paper dated January 28, 2015,[1] the three largest American airlines, and indeed the three largest airlines in the world by most measures,[2] American Airlines, Delta Air Lines, and United Airlines (hereinafter the "Big 3 Carriers") took the unprecedented step of seeking to roll back decades of United States "Open Skies" policy, which refers to the United States' efforts to liberalize air services between the U.S. and other countries. United States Open Skies Policy calls for bilateral air services governed by competition, consumer benefits, and reduced regulatory intervention, rather than artificial constraints, arbitrary limits on air services, and other barriers to competition. The United States has been relentless in its efforts to bring more

[1] "Restoring Open Skies: The Need to Address Subsidized Competition from State-Owned Airlines in Qatar and the UAE" ("Big 3 Carriers' Paper").

[2] By market capitalization, passengers carried, number of destinations, passenger-kilometers flown, and fleet size.

competition, better products, and enhanced services to consumers in the United States and around the world. To this end, the United States has successfully consummated over 100 Open Skies-type air transport agreements, including such agreements with the United Arab Emirates ("UAE") and Qatar. The Brookings Institute conservatively estimates that Open Skies agreements have generated at least $4 billion in annual gains to travelers, and that additional large gains are available through consummating more Opens Skies agreements.[3]

In the over 30-year history of United States Open Skies Policy, the United States has never revoked or placed post-execution restrictions on an Open Skies agreement, and has pressed countries around the world to recognize the benefits of competition in a manner similar to that of this country. U.S. consumers, and all consumers seeking to travel to or from the U.S., have been the direct beneficiaries of these Open Skies agreements, with hundreds of new destinations available to Americans, and making the U.S. more accessible to millions around the world. Unfortunately, the Big 3 Carriers seek to put their own narrow interests before public benefit, consumer welfare, and competitive markets.[4]

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[3] "Open Skies: Estimating Travelers' Benefits from Free Trade in Airline Services," C. Winston and J. Yan, May 13, 2015, American Economic Journal: Economic Policy 2015, 7(2); 370-414, available at http://www.brookings.edu/~/media/Research/Files/Articles/2015/05/13-open-skies-free-trade-airlines-winston/Open-Skies-Published.pdf?la=en. Their view is shared by leading aviation groups, including the Global Travel Association Coalition (GTAC), whose members include the Airports Council International, Cruise Line International Association, International Air Transport Association, International Civil Aviation Organization, Pacific Asia Travel Association, World Economic Forum, World Tourism Organization and World Travel & Tourism Council. The GTAC adopted the "Agenda for Growth and Development," in which it emphasized "the need for improved and expanded connectivity and capacity" and confirmed "that the continued liberalization of international air transport, both bilateral and multilateral, could provide opportunities for ensuring the free flow of travel and trade," *available at* http://www.wttc.org/-/media/upload/gs15/gtac%20document%20final.pdf.

[4] "Airlines are Making Record Profits, but Don't Expect a Cheaper Seat," Washington Post, April 30, 2015, *available at* http://www.washingtonpost.com/news/business/wp/2015/04/30/airlines-are-making-record-profits-but-dont-expect-a-cheaper-seat/. "American Airlines, which excels at not much of anything, just banked $1.2 billion in profit during its most profitable three months in history. The nation's other major airlines are also swimming in record profits[.]"

Etihad Airways is the national airline of the United Arab Emirates. We were established in November 2003 by the Abu Dhabi government. Like many carriers around the world, including many members of Star Alliance, oneworld, and SkyTeam, the three global mega-alliances founded by the Big 3 Carriers, Etihad is government-owned.[5] We have been since our inception, and we have been since our designation in the current United States-United Arab Emirates Air Transportation Agreement (the "US-UAE Air Services Agreement"), which has been in place since March 11, 2002.[6] Yet, despite no changes in our ownership model, and with the Big 3 Carriers benefiting from a post-bankruptcy, post-consolidation, and post-voluntary capacity reduction operating environment, the Big 3 Carriers have launched an attack on competition, targeting Etihad, Emirates, and Qatar Airways. They have also attacked other carriers that threaten their market hegemony and have sought to frustrate the efforts of other airlines that seek to compete in the United States.[7] Consistent with this approach of collectively seeking to eliminate competition, they now wish to suppress competition from Etihad, Emirates, and Qatar Airways.

There is a lot of bluster in the Big 3 Carriers' claims. Etihad and other Gulf carriers have been accused of receiving "subsidies and other unfair benefits," "captur[ing] U.S. airline market share," "shifting American aviation jobs overseas," "negatively impacting the U.S. economy,"

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5 Indeed, the French government recently announced it had acquired a further 2% of Air France-KLM, increasing their holding from 16% to 18%, "French Government Seeks Shareholder Power at Air France-KLM," The Wall Street Journal, May 8, 2015, *available at* http://www.wsj.com/articles/french-government-seeks-shareholder-power-at-air-france-klm-1431097199.

6 United States-United Arab Emirates Air Transportation Agreement as of March 11, 2002, *available at* http://www.state.gov/e/eb/rls/othr/ata/u/.

7 "EU says U.S. Delays on Norwegian Air License Breaches Aviation Deal," EurActive, December 3, 2014, *available at* http://www.euractiv.com/sections/transport/eu-says-us-delay-norwegian-air-licence-breaches-aviation-deal-310532. Delta, American and United actively oppose Norwegian Air's attempts to secure a U.S. license. *Id.*

and many other rhetorical flourishes and unsubstantiated claims.[8] For example, according U.S. aviation trade organization, Airlines 4 America, in each month of 2014 U.S. carriers added workers to their respective payrolls. The 2014 full time equivalent total of 384,600 employees represents an increase of approximately 6,300 employees from 2010.[9]

At times the rhetoric has been over the top, such as weaving the September 11 terrorist attacks into the narrative.[10] However, despite this costly anti-competitive, anti-consumer campaign, the Big 3 Carriers' complaints are bereft of any substance.

In their public papers, the Big 3 Carriers have not accused Etihad of being anticompetitive, charging "prices that are unreasonably high . . . or artificially low,"[11] or harming consumer welfare. Indeed, in the Big 3 Carriers' 55 page paper, consumer choice is mentioned only once, and even then only in a cursory manner.[12] Most significantly, nowhere in their paper do the Big 3 Carriers allege that they have been harmed, let alone offer any proof of harm. They also fail to argue, let alone demonstrate, how their proposed restrictive remedies would benefit consumers or competition. That is not by mistake—it is by design. While the Big 3 Carriers

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8 "Restoring Open Skies Executive Summary," *available at* http://www.openandfairskies.com/wp-content/themes/custom/media/Executive-Summary.pdf.

9 *See* "A4A Recaps Year of Progress as U.S. Airlines Report Improved Financial Reports in 2014 to the Benefit of Customers, Employees and Shareholders," March 11, 2015, *available at* http://airlines.org/news/2014-passenger-airline-results-and-2015-spring-air-travel/#.

10 *See* "U.S. Airlines To Take on State Owned Gulf Rivals," CNN Quest Means Business, February 16, 2015, *available at* http://www.cnn.com/videos/business/2015/02/16/qmb-delta-ceo-richard-anderson-intv.cnn. *See also* "Delta CEO Richard Anderson Links Gulf Airlines Like Emirates and Etihad to 9/11 Attacks," International Business Times, February 17, 2015, *available at* http://www.ibtimes.com/delta-ceo-richard-anderson-links-gulf-airlines-emirates-etihad-911-attacks-1819378. *See also* "Gulf Carriers Rebuke Delta Chief Executive Office Over 9/11 Comment," USA Today, February 19, 2015, *available at* http://www.usatoday.com/story/todayinthesky/2015/02/19/gulf-carriers-rebuke-delta-ceo-over-911-comment/23690695/.

11 As these terms are used in the US-UAE Air Services Agreement.

12 In contrast, the words "subsidy" and "subsidies" are mentioned 148 times. "Sheikh" is mentioned 23 times.

have rolled out their "parade of horribles," they have failed to identify *any* tangible harm to themselves, or to consumer welfare. Their only specific claim is that from 2008 to 2014, they have allegedly collectively lost five percentage points of their Indian Subcontinent market share.[13] However, what they neglected to mention is that during the same period their passenger numbers to the Indian Subcontinent actually grew by 18%.[14] So while their collective market share actually went down by a relatively insignificant 4.4 percentage points, their actual passenger volumes grew by over 18%, or 250,000 passengers.[15] This passenger growth clearly demonstrates the power and effects of Open Skies and liberalized traffic rights.[16]

On April 24, 2015, American Airlines CEO Doug Parker summed up the extent of the "harm" American, and presumably all the Big 3 Carriers, had sustained as a result of Gulf carriers' purported violations of the US-UAE Air Services Agreement:

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13 Big 3 Carriers' Paper, Figure 22, page 47.

14 Edgeworth Economics' "Empirical Investigation and Analysis of Economic Issues Raised In 'Restoring Open Skies: The Need to Address Subsidized Competition From State-Owned Airlines in Qatar and the U.A.E.,'" May 21, 2015, J. Johnson and M. Kheyfets ("Edgeworth Report"). Etihad retained Edgeworth to independently evaluate the economic claims made by the Big 3 Carriers and their proxies. *See* sec III, *infra*. Etihad submitted this report to the respective dockets on May 22, 2015.

15 Edgeworth Report, para 22. This includes the growth in both economy and premium passengers of the Big 3 Carriers during this period.

16 On May 15, 2015, the Big 3 Carriers released a report entitled "Assessing the Impact of Subsidized Gulf Carrier Expansion on U.S.–International Passenger Traffic," Compass Lexecon, May 13, 2015 ("Lexecon Report"). The Lexecon Report, which is based on undisclosed data, is flawed in many ways, including: (1) it assumes as fact and builds into its assumption that certain carriers are "subsidized;" (2) that there is a linear or other direct connection between global economic growth and implied demand for passenger traffic on specific routes; (3) that certain carriers (*i.e.* the Big 3 Carriers) are "entitled" to a certain share of traffic based upon factors such as "per capita income and population;" (4) their model does not appear to account for other carriers that compete in the relevant market, such as Turkish Airlines and Air India, among others; and (5) that any growth in excess of these self-styled factors constitutes "stolen" market share. None of these concepts are included in *any* modern air services agreement, let alone the US-UAE Air Services agreement.

> "We think the situation in the Middle East is serious and needs to be addressed and if it's not addressed it *could have* material consequences to our industry *over time*.
>
> . . . [B]ut the other European carriers have seen severe impact to their profitability because of the growth of these subsidized airlines and we don't care to see that happen in the United States."[17]

American's statement bears repeating: The Big 3 Carriers are seeking to rewrite decades of U.S. Open Skies Policy and potentially over 100 consummated Open Skies agreements because competition from Etihad, Qatar, and Emirates could, over time, have material consequences to the three biggest airlines in the world. In doing so, they seek to deprive consumers of one of the few remaining elements of competition in an increasingly concentrated and oligopolistic international aviation market.

We also note that the Big 3 Carriers are waging a proxy fight, seeking to use United States bilateral treaties to which European countries are not even a party to wage a fight on behalf of some of their immunized European global alliance "partners."[18] This critical element of the Big 3 Carriers' campaign is particularly ironic in that they claim to be "fighting" for American jobs. The Big 3 Carriers also fail to acknowledge the substantial positive economic impact of Etihad on the US economy, an impact that is meticulously documented by Oxford

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[17] First Quarter 2015 American Airlines Group Inc. Earnings Conference Call, *available at* http://edge.media-server.com/m/p/akdcucv6/lan/en. (emphasis provided).

[18] Lufthansa/Austrian/Swiss is United's European partner. Air France/KLM is Delta's European partner. Both European airlines are leading a similar anticompetitive campaign in Europe. British Airways, in contrast, support Open Skies, competition and innovation, and is not part of these efforts. Indeed British Airway's parent IAG stated, among other things, that "the benefits to U.S. consumers, businesses and employment are plain to see. The global competitiveness of the U.S. economy has been significantly enhanced by the aviation policies the DOT has pursued over the last 30 years. **Turning back the clock now would be folly**." IAG Public Comments submitted to the respective dockets on May 14, 2015 (DOT-OST-2015-0082-0063) (emphasis provided). We encourage the Agencies to review carefully IAG's thoughtful submission.

Economics in its May 2015 study.[19] This study has quantified the economic impact of Etihad on the USA in terms of both the core contribution stimulated by its activities and the wider economic benefits its services enable for others. With six unique routes linking the USA to the Middle East and beyond, in 2015 Etihad's economic footprint in the USA is expected to amount to a GDP contribution of $2.9 billion and some 24,000 US jobs. After twelve years of growth in its worldwide network, the air connectivity Etihad creates is estimated to boost the productivity of the US economy by $410 million.

The Big 3 Carriers affirmatively and voluntarily choose not to directly serve Etihad's key Middle East and Indian Subcontinent markets in a meaningful way.[20] Instead they are routing U.S. passengers through congested European hubs and on to their European alliance partners to serve certain destinations. Indeed, the Big 3 Carriers' campaign is little more than a regulatory attempt to further cement their oligopoly, particularly on transatlantic markets. In an article entitled "The Pathetic State of Airline Travel Today Was Predicted Long Ago," *Time Magazine* laments:

> "'The airline industry is increasingly looking like an uncompetitive oligopoly,' Andrew Ross Sorkin wrote in a recent New York Times analysis. Sorkin pointed to the insights of analyst Vinay Bhaskara, who in late 2014 wrote in Airway

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19 "The Economic Impact of Etihad Airways on the United States Economy," Oxford Economics, May 2015. Etihad submitted this report to the respective dockets on May 27, 2015.

20 As of March 2015, United has two flights to India. *See* "Why United Is the Only U.S. Airline That Flies to India," The Street, March 10, 2015, *available at* http://www.thestreet.com/story/13072290/1/why-united-is-the-only-us-airline-that-flies-to-india.html. According to aviation consultant Bob Mann, "U.S. carriers would continue to serve most markets in India through partnerships, with or without the Gulf airlines, although the increasing number of Boeing 787s in the U.S. fleet could open more markets. By contrast, Gulf carriers led by Etihad are heavily involved in India." *Id.*

> News, 'We are unquestionably living in an air travel oligopoly,' in which virtually all power in the industry lies in the hands of very few players."[21]

The fact that the Big 3 Carriers are waging this battle against competition in coordination with and on behalf of their European "competitors" should come as no surprise either. *Fortune Magazine's* Christopher Elliott recently observed:

> "On first glance, the transatlantic routes may look competitive. There are 172 air carriers servicing transatlantic routes, according to Hopper. And fares are down about 10% from last summer. But look closer: the 27 carriers belonging to the three main carrier alliances (SkyTeam, Star Alliance, and oneworld) operated over 85% of those flights.
>
> It gets worse. The average U.S.-Europe route is served by 7 carriers, but if you consider each alliance as a single carrier, the average number of carriers per route falls below 4. The average share for the largest carrier on these routes is 57%, but it rises to 79% when you combine alliance carriers."[22]

There is a simple solution to all the Big 3 Carriers' complaints: If the Big 3 Carriers sincerely wish to serve the Middle East and Indian Subcontinent, then they should simply serve the Middle East and Indian Subcontinent, and bypass their self-selected European midway points and European "partners." Instead, they have chosen not to serve these important regions themselves and yet seek to block others from doing so. What the Big 3 Carriers propose is the antithesis of both Open Skies and competition.

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21 "The Pathetic State of Airline Travel Today Was Predicted Long Ago," *Time Magazine*, April 24, 2015, *available at* http://time.com/money/3831903/airlines-high-prices-bad-service-mergers/.

22 "The Surprising Cause of High Summer Airfares: 'Legally-sanctioned price collusion,'" *Fortune Magazine*, April 30, 2015, *available at* http://fortune.com/2015/04/30/airlines-summer-europe-fares/.

In June 2014, over 6 months before the Big 3 Carriers' current anti-competitive campaign, Delta testified under oath to the House Financial Services Committee that their withdrawal from the India market was due to Air India's purchases of American-manufactured Boeing aircraft with financing from the United States Export-Import Bank:

> "'Only two years earlier Air India had used separate guarantees to secure below-market financing for the purchase of Boeing 777s and deploy them between JFK and Mumbai, in direct, head-to-head competition with Delta at significantly reduced ticket prices. Delta had no choice but to exit that market,' Mr. [Richard] Anderson's statement reads. 'I personally presented this problem to the bank following the bank's September 2011 deal, but my concerns fell on deaf ears.'"[23]

On March 6, 2015, Delta began to hedge its assertion. According to Delta spokesman Trebor Banstetter:

> "Delta Air Lines would be flying direct to India from Seattle were it not for government subsidies given to competitor Emirates Airlines. 'They (the Middle East airlines) don't have the same profit imperative we do,' he said. 'They can operate a flight that loses money to gain market share.' He added that this makes competition difficult, which is why Delta stopped offering service to India from Seattle."[24]

On May 15, 2015, the Big 3 Carriers went "all in" on the Gulf Carrier-India story. At the National Press Club Luncheon with Airline CEOs, Delta unequivocally asserted that its "exit"

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[23] "Why Can't You Fly Delta to India? CEO Blames Ex-Im Bank, Global Atlanta," Global Atlanta, June 27, 2014, *available at* http://www.globalatlanta.com/article/27000/why-cant-you-fly-delta-to-india-ceo-blames-ex-im-bank/.

[24] "Delta: We'd Fly Direct to India if it Weren't For Unfair Competition from Mideast Airlines," *Puget Sound Business Journal*, March 6, 2015, *available at* http://www.bizjournals.com/seattle/news/2015/03/06/delta-wed-fly-direct-to-india-if-it-werent-for.html?page=2. Etihad is unaware of *any time* in which Delta operated a direct service between Seattle and any city in India. Delta did suspend its Amsterdam-Mumbai service in 2015.

from the India market was due to the "Gulf Carriers."[25] While this new explanation provided an expedient and timely talking point for the current debate, it underscores the tenuous nature of the totality of the Big 3 Carriers' claims regarding their choice not to compete in India. The truth of the matter is that none of the Big 3 Carriers or their pre-consolidation predecessors ever served India in a meaningful way, irrespective of Air India, Etihad, other Gulf carriers, or the actions or inactions of any other airline. Indeed, to the limited extent the Big 3 Carriers ever served India, the scheduling changes to which they claim in 2015 were the result of Etihad's actions largely took place *before* Etihad even existed. Even by the Big 3 Carriers' fanciful standards, it defies logic to blame an airline that did not exist for actions the Big 3 Carriers took years ago. Travel writer Rohan Anard compiled the following service summary dating back to the 1960s:

[25] "National Press Club Luncheon with Airline CEOs, May 15, 2015," *available at* http://www.press.org/news-multimedia/videos/npc-luncheon-airline-ceos.

Airline	From	To	Routes	Aircraft	Notes
PAN AM	1960s	Unknown	Frankfurt - Delhi - Calcutta	Boeing 707	
	1970s	Unknown	New York JFK – London Heathrow – Frankfurt – Istanbul – Beirut – Karachi/Tehran – Delhi – Bangkok – Hong Kong – Tokyo – Honolulu – Los Angeles	Boeing 747	*alternated between Karachi/Tehran **PANAM 001/002 RTW
	1980s	1991	New York – London – Frankfurt – Tehran – Delhi – Hong Kong – Tokyo – Honolulu – Los Angeles	Boeing 747	
TWA	1970s	Unknown	Mumbai - Frankfurt	Boeing 747	
	1970s	Unknown	Mumbai - Karachi	Boeing 747	
	1970s	Unknown	Frankfurt - Bombay - Calcutta	Boeing 747	
	1985	1986	New York JFK – Cairo – Kuwait – Mumbai	Boeing 747	
	1986	1988	New York JFK – Frankfurt – Kuwait – Mumbai	Boeing 747	
DELTA (premerger)	1991	1995	Frankfurt - Delhi	Boeing 767	
	1991	1997	Frankfurt - Mumbai	Boeing 767	
	1997	2006	Paris - Mumbai	Boeing 767	
	2005	2006	New York - Paris - Chennai	Boeing 767	*transferred to Air France
	2006	2006	Frankfurt - Mumbai	Boeing 767	*came back sesasonal
	2006	2008	New York JFK - Mumbai	Boeing 777-200ER	*moved to ATL
	2008	2009	Atlanta - Mumbai	Boeing 777-200ER	*supposed to be moved to JFK, used AMS
NORTHWEST (premerger)	1997	2001	Amsterdam - Delhi	DC-10/747	Part of KLM and Northwest JV
	1997	2009	Minneapolis - Amsterdam - Mumbai	DC-10/747/A330	Transferred to Delta
	2005	2005	Seattle - Amsterdam - Bangalore	Airbus A330	Did not materialize
DELTA (post merger)	2009	2015	Amsterdam - Mumbai	A330/767	
UNITED (pre-merger)	1998	1998	Los Angeles - New York JFK - London Heathrow - Delhi - Hong Kong - Los Angeles	767 (LAX - JFK-LHR-DEL-HKG) 747 (HKG-LAX)	UA 1/2 rtw
	2000	2001	Los Angeles - Washington Dulles - London Heathrow - Delhi - Hong Kong - Los Angeles	Boeing 747-400	UA 1/2 rtw
	2001	2001	Chicago - Delhi	Boeing 747-400	was intended to replace RTW, never started
Continental (pre-merger)	2005	2012	Newark - Delhi	Boeing 777-200ER	given to UA
	2005	2012	Newark - Mumbai	Boeing 777-200ER	given to UA
UNITED (post-merger)	2012	present	Newark - Delhi	Boeing 777-200ER	
	2012	present	Newark - Mumbai	Boeing 777-200ER	
AmericanAirlines	2005	2012	Chicago - Delhi	Boeing 777-200ER	

[26]

While the Big 3 Carriers attempt to paint carriers in the Middle East as a monolith, there are more than 30 airlines based in the Middle East region. The three largest are Emirates, based in Dubai, UAE; Qatar Airways, based in Doha, Qatar; and Etihad Airways, based in Abu Dhabi, UAE. While the Big 3 Carriers label us "the Gulf carriers," we have no relationship with each other. We do not work together or lobby together—we compete vigorously. We are of different

[26] "Delta Uses India Withdrawal to Underscore 'Unfair' Practices of Gulf Carriers, Rohan Anard," Upgrd, *available at* http://upgrd.com/aerospace/the-challenges-of-the-us-india-nonstop-market-its-time-for-facts-and-figures2.html. "One of the biggest ironies of the airline industry is that global carriers will never hesitate to resort to trash talking and finger pointing, irrespective of the overall financial health of the passenger air travel market. The reality is that Delta has the capability to launch nonstop flights from Seattle to India any day if it wishes, but is not willing to admit that it could not even viably support 1-stop service to Mumbai, one of the largest U.S.–India O&D markets, from its Amsterdam hub despite enormous feed from Delta and KLM across the Atlantic." *Id.*

sizes, and have different hubs, growth strategies, and owners. Indeed, unlike the Big 3 Carriers who have teamed up to take full advantage of the *Noerr-Pennington* Doctrine exception to the application of the Sherman Act and related United States antitrust laws, we are filing this paper on behalf of Etihad and Etihad alone.[27]

Although there has been great temptation to respond to the Big 3 Carriers' baseless allegations in real time, Etihad has chosen to follow the thoughtful process proposed by the three United States agencies reviewing this issue: the Departments of Commerce, State, and Transportation (the "Agencies"). We have chosen not to respond directly to an inflammatory advertising campaign (including television, radio, print, web, and social media, among others), and selective disclosures (the contents of which we do not know) to certain government agencies.[28] Instead, over the past two weeks, we have filed a series of studies, expert reports, and this response.

In this submission, we outline the relevant legal, policy, and economic framework that govern the US-UAE Air Services Agreement, and explain how Etihad's actions are not only fully consistent with the treaty, but also with applicable law. We will also explain how Etihad services benefit American consumers. In doing so, it will be necessary to point out where the Big 3 Carriers have been hypocritical in their allegations, particularly as they relate to purported subsidies. We will also show that the Big 3 Carriers have chosen to apply a legal standard that is

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[27] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965).

[28] Indeed, Etihad has had to file requests pursuant to the Freedom of Information Act ("FOIA") to attempt to get access to materials the Big 3 Carriers have purportedly provided to the United States government. It is a fundamental tenet of United States law and jurisprudence that there should be a right to face one's accuser and have access to all relevant evidence. That the Big 3 Carriers are forcing Etihad to use FOIA and other discovery tools, rather than being transparent with their allegations and the data on which they rely, is further indication of the lack of veracity of their allegations and their true intentions.

wholly inapposite to this case. We will demonstrate empirically that our key United States markets have grown over the relevant period, resulting in more passengers for Etihad and also the Big 3 Carriers. Moreover, Etihad is actually feeding passengers onto US domestic carriers, including Delta, United and American. In 2014, Etihad delivered 182,000 connecting passengers onto U.S. airlines and this is forecast to grow to approximately 300,000 in 2015.

These points will lead to the inescapable conclusion that: (1) Etihad is not subsidized: (2) the Big 3 Carriers cannot explain how to account for the over $70 billion in government benefits they have received since 2000; (3) Etihad's conduct and that of the UAE is fully consistent with the applicable air services agreement, U.S. law, and international treaty; (4) the WTO rules cited by the Big 3 Carriers are not relevant in this case; (5) the relevant US markets in which Etihad and other carriers compete have grown over time, resulting in more passengers and more revenue for all carriers, all while maintaining high load factors and demand; (6) the Big 3 Carriers cannot demonstrate that they have suffered any actionable harm; and (7) government-to-government consultations are inappropriate under the circumstances.

II. THE US-UAE AIR SERVICES AGREEMENT, ALLEGED STATE SUBSIDIES, AND THE APPLICABLE LEGAL STANDARD

Introduction

Even though subsidies are not prohibited under the US-UAE Air Services Agreement, Etihad categorically rejects the Big 3 Carriers' claims that it receives subsidies. The Big 3 Carriers assert that Etihad has received over $17 billion in subsidies since 2004.[29] They arrive at this amount by aggregating equity that our shareholder has taken in the airline, shareholder

[29] Big 3 Carriers' Paper at p.12.

loans,[30] and amounts that they characterize as grants, essentially concluding that any element of state ownership is prohibited. They also claim that all Etihad contracts with related parties should be considered subsidies. They cite excerpts from partial financial summaries filed by Etihad in certain countries for licensing purposes and media stories.[31] Their assertions are without merit.

Etihad's Ownership and Equity

The Abu Dhabi government is the sole shareholder of Etihad. Through resolutions of the Abu Dhabi Executive Council, the Abu Dhabi government has approved $14.3 billion of capital (equity and loans) since 2003. Of this amount, $9.1 billion reflects our shareholder's equity in Etihad, and $5.2 billion are shareholder loans made to Etihad. The approved equity came in several tranches: $2.3 billion between 2004 and 2009, $2.9 billion between 2010 and 2012, and $3.9 billion between 2013 and March 2015. While our shareholder's equity grew through these investments, so did Etihad's value. In 2005, Etihad had 10 aircraft and served 18 destinations. In 2014, Etihad operated a fleet of 110 aircraft and served 103 destinations. Moreover, during this same period, Etihad evolved from a traditional airline to a sophisticated aviation services group, with interests in related businesses such as ground handling, cargo and maintenance operations at Abu Dhabi International Airport, travel management and distribution capabilities, and airline loyalty programs.[32]

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30 The Big 3 Carriers place our shareholder loans in quotation marks ("loans") in the apparent hope that the Agencies will respond favorably to sarcasm.

31 The Big 3 Carriers do not reveal how they obtained these documents, and the extent to which they may have had to make misrepresentations to sovereign regulatory bodies to obtain these materials.

32 These transactions included acquisitions of stakes in certain frequent flyer programs, including: topbonus (2012), Jet Privilege (2014) and MilleMiglia (2014). In July 2013, Etihad acquired three subsidiaries of the Abu Dhabi Airports Company (ADAC) – Abu Dhabi Cargo Company (ADCC), Abu Dhabi In-Flight

During this time, Etihad also acquired minority equity stakes in other airlines, including Air Berlin, Jet Airways, and Alitalia. This allowed Etihad to accelerate its growth, though we are still dwarfed by competing airlines from the United States and Europe, all of which have consummated mega-mergers during the same period. Etihad pursued a strategy similar to that of other airlines that have become more vertically integrated. For example, in 2012, only 5 years after emerging from bankruptcy protection, Delta purchased an oil refinery in Pennsylvania.[33] In 2013, Delta purchased Endeavor Air and also acquired a 49% stake in Virgin Atlantic.[34] Lufthansa and Singapore Airlines, among others, have also acquired or developed a number of ancillary businesses as part of their extensive aviation-related portfolios.

In other words, as our shareholder's equity stake increased, so did the value of its investment. To put our capitalization in context, Delta's current market capitalization is over $38 billion.[35] American Airlines has a market capitalization of almost $34 billion, and United's market capitalization is over $20 billion. That is almost $100 billion dollars of current combined market capitalization, which of course excludes billions of dollars of debts and other obligations disclaimed during multiple bankruptcy proceedings, and billions of dollars of employee pension obligations assumed by the U.S. government-operated Pension Benefit Guarantee Corporation.[36]

Catering (ADIFC) and the ground handling business Abu Dhabi Airport Services (ADAS). In July 2014, Etihad acquired the aircraft maintenance services provider Abu Dhabi Aircraft Technologies (ADAT).

33 "How Delta Bought A Refinery And Wound Up Saving Its Rivals A Ton Of Cash," Business Insider, September 2, 2014, *available at* http://www.businessinsider.com/delta-airlines-fuel-prices-2014-8.

34 Delta Air Lines 2014 United States Securities and Exchange Commission (SEC) Form 10K, *available at* http://d1lge852tjjqow.cloudfront.net/CIK-0000027904/57b007ce-7d42-4818-a9d6-cdce500d3f52.pdf.

35 Yahoo! Finance Summaries as of May 28, 2015, *available at* http://finance.yahoo.com/q?s=DAL; http://finance.yahoo.com/q?s=AAL; and http://finance.yahoo.com/q?s=UAL.

36 *See* "Financial & Other Governmental Benefits Provided to American Airlines, Delta Air Lines and United Airlines," The Risk Advisory Group, May 14, 2015 ("Risk Advisory Benefits Report"). The Risk Advisory Group identified over $71 billion of quantifiable governmental benefits to the Big 3 Carriers, more than

Unlike the Big 3 Carriers, who have shown an uncanny ability to regularly disclaim debts and other liabilities through seemingly regularly scheduled bankruptcy filings, Etihad and other commercial carriers that do not have the U.S. Bankruptcy Code as a financing tool must carry and service their debt.

In 2013 Etihad divested 50% of its frequent flyer program ("FFP"). This allowed Etihad to both recognize its individual value and better position the business for future growth. Etihad is not the first airline to sell its FFP business. For example, in 2008 Air Canada sold its remaining interest in its Aeroplan FFP.[37] According to CAPA Chief Financial Analyst Jonathan Wober, "[t]he visibility you get from establishing it [FFP] as a separate unit and the additional focus that it then has in terms of becoming profitable in its own right pushes it to generate revenue from sources other than the core FFP."[38] The accounting treatment and the recognition of the gain on the sale of Etihad's FFP program were fully compliant with International Financial Reporting Standards.[39] Moreover, the valuation of the transaction, which was at 16.7 times EBITDA, was fully comparable to similar FFP transactions.

$70 billion of which inured to the benefit of the Big 3 Carriers since 2000. Etihad submitted this report to the respective dockets on May 15, 2015.

37 "ACE Sells Remaining Stakes in Aeroplan, Jazz Air, Reuters," May 28, 2008, *available at* http://www.reuters.com/article/2008/05/28/us-aceaviation-sales-idUSWNA287920080528.

38 "Airlines are Unlocking New Value in Their Frequent Flyer Programs," Business Insider, August 11, 2014, *available at* http://www.businessinsider.com/r-frequent-flyer-schemes-revamped-to-drive-profits-in-tough-times-for-airlines-2014-11.

39 Indeed, all Etihad financial statements are prepared in accordance with International Financial Reporting Standards ("IFRS") and audited by global accounting firm KPMG. The IFRS standards are available at http://www.ifrs.com/index.html.

Shareholder Loans and Other Financing

In addition to the aforementioned equity infusions, our shareholder provided loans to Etihad in several tranches: $3.0 billion between 2004 and 2009, $600 million between 2010 and 2012, and $1.6 billion between 2013 and March 2015. In addition to these loans, Etihad secures funding in the global markets through channels similar to those of other airlines. As of May 2015, Etihad has raised more than $11 billion from the global aviation, finance, banking, and leasing markets, including markets based in the U.S. Clearly these institutions consider Etihad to be a good investment, confirming that the Abu Dhabi government has acted as a rational investor.

It is important to note that there is nothing in United States aviation law, the US-UAE Air Services Agreement, or international aviation conventions that prohibit shareholder loans or set the terms or interest rates on which such loans must be made. While our shareholder would have been fully justified in taking additional equity in Etihad, given Etihad's growth and additional value, our shareholder chose instead to make loans with the express requirement that such loans be repaid by Etihad. Indeed, even the Big 3 Carriers concede as much by deceptively citing World Trade Organization ("WTO") standards and the "Department of Commerce's subsidy methodology."[40] As we explain later in this response, these standards and methodologies do not apply in relation to aviation traffic rights.[41]

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[40] *See* Big 3 Carriers' Paper at p. 16.

[41] "The Department of Commerce's Enforcement and Compliance (formerly Import Administration) is responsible for coordinating multilateral subsidies enforcement efforts. **The primary mission is to assist the private sector by monitoring foreign subsidies and identifying subsidies that can be remedied under the Subsidies Agreement of the World Trade Organization of which the United States is a member,**" *available at* http://esel.trade.gov/esel/groups/public/documents/web_resources/esel_home.hcsp (emphasis provided). Of course, it is uncontroverted that air traffic rights and areas directly related to

Miscellaneous Big 3 Carrier Subsidy Claims

In addition to the aforementioned equity and loans, the Big 3 Carriers also claim that Etihad received $750 million in miscellaneous cash grants from the Abu Dhabi government. These allegations, which of course pale in comparison to the over $70 billion in governmental benefits received by Big 3 Carriers and verified by The Risk Advisory Group, are false.[42] The Big 3 Carriers characterize the Abu Dhabi Tourism Authority's ("ADTA") payment of $111 million for the "Abu Dhabi to the World" campaign as a subsidy. They cite no authority for this proposition other than their own mischaracterization; this is a common theme. In 2008, the ABTA paid Etihad $111 million as promotional consideration, which included placing their "Abu Dhabi to the World" slogan on Etihad's livery. Etihad recognized this ABTA payment as "other income" in its 2008 annual financial statement, which was reviewed and approved by KPMG.

The assertion that the Abu Dhabi government paid for Etihad's sponsorship of English Premier League football club Manchester City is equally false. In 2011, Etihad and Manchester City entered into a 10 year sponsorship agreement, which included naming rights for Manchester City's stadium. Etihad funded this sponsorship from its own liquidity. It is not uncommon for airlines to have sponsorships with sports teams and their venues. Indeed, the Big 3 Carriers each

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traffic rights are not part of the WTO. The WTO applies to certain ancillary services, such as aircraft repair and maintenance, computer reservation systems.

42 Risk Advisory Benefits Report, *Id.*

have, or in the case of Delta recently had, similar sponsorship arrangements.[43] Sports sponsorships play an important role in Etihad's global marketing strategy.[44]

The Big 3 Carriers also claim that the fact that UAE airports do not impose passenger service charges on transit passengers results in a $501 million subsidy.[45] This allegation is so nonsensical it scarcely merits a response. UAE airports apply their charges to all carriers on an equal and nondiscriminatory basis. This is very similar to the United Kingdom, which imposes an air passenger duty on departing passengers but exempts transiting passengers.[46] Under the US-UAE Air Services Agreement, U.S. airlines are free to transit passengers through Abu Dhabi. So both the passenger service charge exemption and the ability to transit passengers through Abu Dhabi are equally available to all carriers that serve the UAE pursuant to the US-UAE Air Services Agreement, including the Big 3 Carriers.

The Big 3 Carriers also take issue with certain UAE regulations and laws, perhaps believing an air services agreement also gives them standing to rewrite UAE law. Of course, they do not have such standing. Moreover, the purported advantages: (1) UAE labor laws and the absence of unions; (2) the use of a UAE-registered general sales agent; (3) lack of UAE competition law; and (4) the competence of the UAE General Civil Aviation Authority, are disingenuous and insult the sovereignty of the UAE.

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43 American Airlines sponsors stadiums in Miami, Florida and Dallas, Texas (http://www.aaarena.com/ and http://www.americanairlinescenter.com/). The Chicago Bulls and Blackhawks play their home games in the United Center (http://www.unitedcenter.com/). Salt Lake City's EnergySolutions Arena was formerly the Delta Center.

44 *See* "Our Sponsorships," *available at* http://www.etihad.com/en-us/about-us/our-sponsorships/.

45 Big 3 Carriers' Paper at 17.

46 "HM Revenue & Customs Excise Notice 550: Air Passenger Duty, Updated 27 February 2015," *available at* https://www.gov.uk/government/publications/excise-notice-550-air-passenger-duty/excise-notice-550-air-passenger-duty.

Etihad acknowledges that the UAE's labor laws differ from those of the United States. Indeed, even within the U.S., there are varied laws regarding union membership, with some states having "Right to Work" laws that make collective labor organization more challenging.[47] Other states make union organization easier to accomplish. Etihad wonders whether Illinois-based United considers its "Right to Work" competitors American and Delta to benefit from "unreasonable conduct" because they are based in Texas and Georgia, as they have alleged against the Gulf carriers at page 36 of their paper.[48] In any event, Etihad's overall cost base is similar to that of its competitors, including the cost bases of the Big 3 Carriers.

Regarding the Big 3 Carriers' and their proxies' attempts to place employment terms into the debate, Etihad finds this to be an odd issue to be injected into a dispute over an air services agreement. We treat our employees, who come from over 140 countries including the United States, fairly and with respect. Etihad recruits globally and has over 24,000 staff employed worldwide. Etihad pays its employees competitive salaries, provides them and their families with health insurance and other generous benefits including, for our expatriate staff and their families, housing, schooling, and annual home leave air tickets. In 2014 Etihad was named a LinkedIn's Top 100 Most In-Demand Employer and the Employer of the Year at the Middle East

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[47] Texas and Georgia are considered "Right to Work" states, meaning union organization is more difficult. Illinois does not currently have a "Right to Work" law. *See generally* "AFL-CIO, America's Unions, Right to Work," *available at* http://www.aflcio.org/Legislation-and-Politics/State-Legislative-Battles/Ongoing-State-Legislative-Attacks/Right-to-Work.

[48] Etihad also notes that the United States Department of Justice, apparently at Delta's request, is investigating the International Association of Machinists and Aerospace Workers' attempt to unionize Delta's flight attendants. Delta CEO Richard Anderson supports the investigation "so our people can know the full truth." *See* "Fraud Challenge Raised in Delta Flight Attendants' Union Drive," *available at* http://skift.com/2015/04/12/fraud-challenge-raised-in-delta-flight-attendants-union-drive/. Only 18% of Delta employees are represented by a union, less than one-fourth the percentage at the other three leading U.S. airlines, according to regulatory filings by the companies. *Id.*

Human Resources Awards.[49] We are not aware of the Big 3 Carriers receiving any similar awards. Likewise, while Etihad has consistently fulfilled all financial obligations to its workforce, the Big 3 Carriers cannot say the same. Indeed, at the May 15, 2015 National Press Club Airline CEO luncheon, Delta CEO Richard Anderson asked the "airline employees in this room who lost their pensions in bankruptcy or had their pensions frozen to stand up." [50] Unfortunately for those employees, much of the room stood up.

The Big 3 Carriers' other regulatory complaints – local registration requirements, lack of competition law, and competence of the UAE Civil Aviation Authority – reflect a quasi-colonial attitude and take a very condescending view of non-U.S. law. Etihad, as a foreign airline and corporation that is pleased to do business in the United States, takes no issue with complying with U.S. law; that is our obligation. We do not complain about the laws of the United States, many of which differ considerably from those of the UAE. As for the Big 3 Carriers' complaints about a lack of antitrust law in the UAE, they are simply wrong. The UAE competition law is set forth in Federal Law No. 4 of 2012.[51] Entities operating within the oil and gas, electricity and

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49 "The World's 100 Most in Demand Employers: 2014, The Most Sought After Employers in the World Based On Billions of Interactions from LinkedIn's 300,000,000 plus members," LinkedIn, *available at* https://www.linkedin.com/indemand/global/2014. None of the Big 3 Carriers appeared on this list. Many of their former employees had their pensions involuntarily reduced or terminated by their management. *See* Risk Advisory Benefits Report.

50 "National Press Club Luncheon with Airline CEOs, May 15, 2015," *Id, available at* http://www.press.org/news-multimedia/videos/npc-luncheon-airline-ceos (Mr. Anderson's request starts at 34 minutes). *See also* "Conflicts Abound at American Airlines' Pension and 401(k) Plans," Forbes, November 14, 2012, *available at* http://www.forbes.com/sites/edwardsiedle/2012/11/14/conflicts-abound-at-american-airlines-pension-and-401k-plans/ ("On February 1, 2012, American Airlines announced it would seek to terminate all four of its pension plans. According to the Pension Benefit Guaranty Corp., 'America's [sic] four defined benefit plans have assets of $8.3 billion and liabilities of $18.5 billion, and officials at the agency, which sits on the airline's creditors committee, pressed American to avoid terminating the plans.' Under pressure from the PBGC, American relented and On March 7, 2012, AMR announced it would freeze, not terminate, the pensions of its non-pilot employees.").

51 UAE Federal Law No. 4 of 2012 on the Regulation of Competition (English version), *available at* http://www.economy.gov.ae/English/Publications/Federal%20Law%20No.%204%20of%202012%20on%20the%20Regulation%20of%20Competition.pdf.

water, financial services, pharmaceuticals, transportation, telecommunications, and waste management sectors are exempt.[52] Notwithstanding the UAE sector exemptions, as the Big 3 Carriers are aware, most antitrust and competition laws are applied extraterritorially, and thus Etihad's activities are captured by global merger control and substantive antitrust laws, including those of the European Union, United States, and Australia, among others.[53]

With respect to the competence of the UAE General Civil Aviation Authority ("GCAA"), the Big 3 Carriers would apparently have the U.S. adopt a rule mandating that countries cannot regulate airlines that have government ownership. There is of course no authority for this brazen and silly proposal, which would of course eliminate the competence of regulators in scores of jurisdictions, including Hong Kong, Singapore, New Zealand, China, and Turkey, among others. The GCAA regulates all aviation in the UAE, including Etihad's activities.[54] In 2015 the International Civil Aviation Organization ("ICAO") awarded the GCAA its top ranking in the world after conducting an intensive audit of the country's safety records, procedures and equipment. The UAE scored a success rate of 98.86%, placing it ahead of South Korea and Singapore, which placed second and third, respectively.[55] The GCAA is a world class regulator. The Big 3 Carriers' insinuations to the contrary merit no consideration.

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52 *Id.*

53 For example, the Australian Competition and Consumer Commission instituted proceedings against UAE-based Emirates for conduct that allegedly took place outside Australia. *See* "ACCC Takes Acton Against Emirates for Alleged Freight Price Fixing," August 18, 2009, available at https://www.accc.gov.au/media-release/accc-takes-action-against-emirates-for-alleged-air-freight-price-fixing. See also *New Zealand Commerce Commission v. Emirates* (NZ$1.5 million fine), *available at* http://www.comcom.govt.nz/the-commission/media-centre/media-releases/detail/2012/two-more-airlines-settle-with-commerce-commission-in-air-cargo-case-penalties-top-21-million.

54 The UAE General Civil Aviation Authority was created in 1996 by Federal Cabinet Decree (Law 4) to Regulate Civil Aviation, *available at* https://www.gcaa.gov.ae/en/aboutgcaa/Pages/aboutus.aspx.

55 *See* "AJWAA, The Guide to UAE Aviation," March 2, 2015, *available at* http://edition.pagesuite-professional.co.uk//launch.aspx?eid=6b3f9e8d-dcb7-44d0-9ec0-bbeb277169e3 ("The UAE is ranked

To the extent that Etihad transacts business with government-related entities, Etihad does so at arm's length. For example, Abu Dhabi Airport charges ground handling costs of $2,286 per turnaround for a Boeing 777-300ER aircraft. These terms are available to all carriers, and are consistent with the costs charged at other airports in the Middle East and Southeast Asia. For example, Kuala Lumpur charges $2,240 per turnaround and Bahrain charges $2,443. Likewise, Abu Dhabi International Airport's airport charge of $7,770 per turn, which is applied to all carriers, is consistent with its regional competitors, including Kuala Lumpur's $6,427 charge and Mumbai's charge of $8,074. Under the US-UAE Air Services Agreement, the respective countries are required to make such services available on an equal and non-discriminatory basis, something to which the UAE strictly adheres.

Finally, Etihad does not receive special tax breaks or exemptions from the UAE government. The UAE is a tax free country, and all companies (including domestic and foreign airlines) that conduct business in the UAE receive equal tax treatment. Certain states in the United States do not have income or corporate taxes. The Big 3 Carriers have substantial operations in those states. Etihad has its U.S. headquarters in New York, which is considered a high tax state. Etihad does not argue that American benefits from a subsidy since its headquarters is in Texas, which is considered a low tax state.

The US-UAE Air Services Agreement

Having dispensed with the subsidy myths, we now turn to the US-UAE Air Services Agreement, which has been in force since 2002 and forms the legal basis for Etihad's service to

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number 1 in the world in aviation safety standard compliance and is considered to be one of the safest aviation industries in the world after scoring the highest ever ranking in safety standard compliance history by ICAO.")

the United States. The Big 3 Carriers have studiously avoided its terms in their anticompetitive campaign. That is because this treaty provides no legal basis for the claims the Big 3 Carriers make or the relief that they seek. Instead, in a leap unrestrained by law or treaty, the Big 3 Carriers introduce WTO standards and more general trade principles that are not, by their terms, applicable to air transport services.[56] In particular, the Big 3 carriers seek to introduce terms such as "equity worthiness" and a methodology used by the Department of Commerce in antidumping cases, into the analysis. However, these are WTO and antidumping and countervailing duties terms.[57] The United States government has consistently resisted efforts to incorporate air transportation and traffic rights into the WTO:

"[The United States] delegation continued to believe that the almost total exclusion of air transport services from the scope of coverage under the GATS had been farsighted and had contributed to the ongoing liberalization of air transport agreements through air services-specific agreements and the facilitating activities of ICAO and numerous regional fora. This was equally true for traffic rights and ancillary air services in support of traffic rights."[58]

Despite the Big 3 Carriers' copious reliance on WTO law and standards, they do not appear to advocate bringing all their commercial aviation and air traffic rights into the WTO. They simply appear to be co-opting these irrelevant standards for the limited purpose of their current campaign.

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56 *See* WTO Uruguay Round Agreement, Annex 1B: General Agreement on Trade in Services, Annex on Air Transport Services ("This Agreement, including its dispute settlement procedures, shall not apply to measures affecting: (a) traffic rights, however granted; or (b) services directly related to the exercise of traffic rights"), *available at* https://www.wto.org/english/tratop_e/serv_e/9-anats_e.htm.

57 *See* 19 CFR Part 351 *et seq*., and specifically 19 CFR §351.507.

58 *See, e.g*., World Trade Organization Council for Trade In Services, Report of the First Session of the Review Mandate Under Paragraph 5 of the Annex on Air Transport Services Held on 12 September 2006, Note by the Secretariat (September 27, 2006), 06-4615. (S/C/M84, p. 5, para 25).

The US-UAE Air Services Agreement was drafted by the United States, using a U.S. template that has been offered to (and accepted by) more than 100 other countries and jurisdictions. It does not define the term "subsidy." Instead, Article 12.1 of the US-UAE Air Services Agreement provides:

> Each Party shall allow prices for air transportation to be established by each designated airline based upon commercial considerations in the marketplace. Intervention by the Parties shall be limited to:
>
> a. prevention of unreasonably discriminatory prices or practices;
>
> b. protection of consumers from prices that are unreasonably high or restrictive due to the abuse of a dominant position; and
>
> c. protection of airlines from prices that are artificially low due to direct or indirect governmental subsidy or support.[59]

Given the clear and unambiguous nature of this language as well as the entire treaty, this should end attempts to seek to "interpret" this language using extrinsic or parol evidence. However, if the Agencies are to accept the Big 3 Carriers' invitation to refer to sources outside the US-UAE Air Services Agreement, one can turn to the current U.S. "Model Open Skies Agreement" (adopted in 2012). It was drafted solely by the United States government, presumably with input from U.S. airlines and other U.S. stakeholders. The current model does not even mention the term "subsidy," let alone define it.[60]

If the Agencies are to further indulge the Big 3 Carriers' requests to "interpret" the treaty, the voluminous legislative history and testimony also points to the fact that "subsidy" as used in modern air services agreements is to be analyzed <u>only in connection with pricing</u>. In the

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59 US-UAE Air Services Agreement, Art. 12(1).

60 Current Model Open Skies Agreement Text as of January 12, 2012, United States Department of State, *available at* http://www.state.gov/e/eb/rls/othr/ata/114866.htm.

International Air Transportation Competition Act of 1979 ("IATCA"), Congress mandated the Secretaries of State and Transportation to develop an air transportation agreement negotiating policy that emphasized "the greatest degree of competition compatible with a well-functioning international air transportation system."[61] Congress further mandated that the policy ought to eliminate discriminatory and unfair competition practices that impair United States airlines in foreign air transportation, including "excessive landing and user fees," "unreasonable ground handling requirements," "unreasonable restrictions on operations," "prohibitions against change of gauge," and "similar restrictive practices."[62] These issues, which relate to pricing and discriminatory practices, are expressly reflected in the US-UAE Air Services Agreement. The IACTA mandate did not address subsidies. 49 U.S.C. § 40101 makes no mention of the term "subsidy," despite the fact that Congress was very aware of the issue. There is no basis for a formal complaint relating to the IATCA factors, as incorporated into the US-UAE Air Services Agreement.

As early as 1977, in Senate testimony that formed part of the basis for IATCA, Civil Aeronautics Board ("CAB") Chairman A. E. Kahn testified "[w]e are not in the business of protecting carriers or conferring monopoly markets on them. We are in the business of serving consumers."[63] Chairman Kahn then listed the following objectives that ought to be pursued when negotiating open skies agreements with third countries:

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61 49 U.S.C. § 40101(e).

62 49 U.S.C. § 40101(e)(9).

63 *International Aviation: Hearings Before the Subcomm. on Aviation of the S. Comm on Commerce, Science, and Transportation*, 95th Cong. 7 (1977) (statement of Alfred E. Kahn, Chairman, Civil Aeronautics Board).

- One, the elimination of anticompetitive restrictions on charters and supplemental carriers;
- two, expanded opportunities for new low priced-scheduled service;
- three, maximum access to markets by expansion, and not contraction, of nonstop U.S. gateways;
- four, adequate multiple carrier designations;
- five, avoidance of capacity or frequency restrictions; and
- six, maximum flexibility for air carriers to operate to points beyond, or on the way to, the country with whom the agreement negotiated.[64]

Again, there is no mention of "subsidies."

According to President Jimmy Carter's letter, submitted into the record at the same hearing: "We should seek international aviation agreements that permit low-fare innovations in scheduled service, expanded and liberalized charter operations, non-stop international service, and competition among multiple U.S. carriers in markets of sufficient size. We should also avoid government restrictions on airline capacity. While keeping in mind the importance of a healthy U.S. flag carrier industry, we should be bold in granting liberal and expanded access to foreign carriers in the United States in exchange for equally valuable benefits we receive from those countries. Our policy should be to trade opportunities rather than restrictions." Thus, even from the progeny of Open Skies, the U.S. did not include subsidies as a consideration for including in newly deregulated air services agreements.

During the 1979 House Hearing, then Congressman Norman Mineta, (who later became DOT Secretary), asked then CAB Chairman Cohen to address foreign governments that subsidize their carriers. After discussing the effects of *supra*-competitive fares set by foreign

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[64] *Id.*

governments, Mr. Cohen turned to *infra*-competitive subsidized fares. "If we were dealing with an **artificially low fare, and it was low because the other country is subsidizing we would have to seriously address, and we have provisions in all our bilaterals to address that**."[65] This testimony addresses subsidies specifically in the context of fares, and appears to be the genesis of the subsidy/pricing language that appears in Article 12.1 of the US-UAE Air Services Agreement. Again the testimony and congressional record is fully consistent with the US-UAE Air Services Agreement.

In 1995, DOT published its International Air Transportation Policy (the "Policy"), which stated in pertinent part:

> "[W]e have designed our international aviation strategy to meet the following objectives: […] Ensure that competition is fair and the playing field is level by eliminating marketplace distortions, such as government subsidies, restrictions on carriers' ability to conduct their own operations and ground-handling, and unequal access to infrastructure, facilities, or marketing channels."[66]

This is the first official manifestation of the term "subsidies" outside the context of fares or pricing. When making this reference, DOT had ample opportunity to: (1) define what DOT meant by the term "government subsidies;" (2) incorporate the Policy language into current or future air services agreements; and/or (3) do both. However, it chose to not to define "subsidies" <u>and</u> chose not to incorporate the Policy language into United States air services agreements. Indeed, the Agencies went in the <u>opposite direction</u> by removing any reference to subsidies from

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65 *International Air Transportation Competition Act of 1979: Hearings on H.R. 5481 Before the Subcomm. on Aviation of the H. Comm. on Public Works and Transportation*, 96th Cong. 144-145 (1979) (statement of Marvin S. Cohen, Chairman, Civil Aeronautics Board) (emphasis provided).

66 60 FR 21844.

the current model agreement.[67] While we do not think it is necessary to refer to extrinsic sources to interpret the plain meaning of the US-UAE Air Service Agreement, if one were to indulge the Big 3 Carriers' invitation, clearly the intent is not to define subsidies and not to have subsidies form any part of the Open Skies agreement, except in the pre-2012 limited context of fares. This alone should end the Big 3 Carriers' campaign.

Both the pertinent record and Article 12.1 of the US-UAE Air Services Agreement demonstrate the intent to limit interventions regarding "subsidies" in situations involving artificially low fares and the implementation of that limitation in the plain language of the Treaty. While neither defines what "subsidy" means, it is apparent from these sources what subsidy does not mean. At the time the United States and UAE negotiated and entered into the US-UAE Air Services Agreement (using the then current U.S. template), Emirates was the sole UAE designated carrier. When the U.S. government executed the US-UAE Air Services Agreement, with the support of the Big 3 Carriers, Emirates was government-owned; it still is. Had government ownership or equity been inconsistent with the requirements of the US-UAE Air Services Agreement, the United States would not have signed the treaty.

In terms of other types of government involvement with the designated carriers, the US-UAE Air Services Agreement and related applicable law are silent. There is no prohibition against equity or loans made by a government or having a government as an airline's shareholder. Moreover, the US-UAE Air Services Agreement is equally silent on direct government benefits, such as a government-supplied employee pension insurance at below

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[67] *Id., available at* http://www.state.gov/e/eb/rls/othr/ata/114866.htm.

market rates from a government insurer that carries a $60 billion-plus deficit,[68] due largely to Big 3 Carrier pensions that it had to assume during the Big 3 Carriers various forays into bankruptcy court.[69] It is equally silent on whether benefits like the Essential Air Services Program falls within the meaning of the term "subsidy."[70] It is also unclear if the United States governments' Fly America Act Program, which discriminates in favor of U.S. airlines and provides the Big 3 Carriers a robust windfall, is a subsidy for purposes of the air services agreement.[71] Moreover, it is uncontroverted that the Big 3 Carriers receive subsidized federal and state tax breaks, subsidies that the Big 3 Carriers must concede fall within their self-styled definition of subsidy.[72] Likewise, it is uncontroverted that U.S. bankruptcy law is only available in the U.S., and that the Big 3 Carriers have been able to eliminate billions of dollars in employee, supplier, and other contractual obligations.[73] This favorable policy allows the Big 3 Carriers to shed debts with impunity and enter into new contracts with the comfort of knowing that if their business turns down again, they can simply make a new bankruptcy filing. Indeed, the Big 3 Carriers seem to have built U.S. bankruptcy protection into their business model.[74] These ambiguities underscore

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68 "PBCG Deficit Hits Record $61.7B in 2014," Business Insurance, November 17, 2014, *available at* http://www.businessinsurance.com/article/20141117/NEWS03/141119849.

69 Risk Advisory Benefits Report page 7.

70 "Is Essential Air Service Wasting Taxpayer Money," *CBS News*, February 24, 2015, *available at* http://www.cbsnews.com/news/government-subsidized-essential-air-service-waste-of-taxpayer-money-some-say/ ("The cost to taxpayers for subsidizing those journeys has quadrupled in the last decade to a whopping $261 million, which has some lawmakers convinced the program is anything but essential, reports CBS News' Kris Van Cleave.")

71 US government travelers are required by 49 U.S.C. 40118, commonly referred to as the "Fly America Act," to use United States air carrier service for all air travel and cargo transportation services funded by the United States Government.

72 Risk Advisory Benefits Report at pages 8 and 9.

73 *Id.,* at pages 6 at 7.

74 "Is Bankruptcy 'Business As Usual' For Airlines?" *National Public Radio*, November 29, 2011, *available at* http://www.npr.org/2011/11/29/142909836/is-bankruptcy-business-as-usual-for-airlines. According to aviation consultant Robert Mann, "[a]s the industry consolidated, and particularly with the stress that

the perils of unilaterally attempting to label equity and loans as "subsidies" while arguing that direct government benefits are not subsidies. The Big 3 Carriers' arguments and characterizations are replete with such hypocritical reasoning.

The governing language of the US-UAE Air Services Agreement provides that if a Party believes that prices in the market are "inconsistent with the considerations set forth in paragraph (1) of this Article," then the remedy for that unfair pricing is to seek consultations about such prices. There is no basis for the Big 3 Carriers to object to the fares offered by Etihad under Article 12,[75] nor have they at any stage complained about the pricing behavior of any UAE carrier. There is likewise no basis for any complaint of U.S. carriers being subject to differential treatment in terms of landing fees, airport access, or other factors set forth in the air services agreement. In fact, aside from an unsupported supposition that "basic economics suggest that prices will be driven down"[76] sometime in the future, the Big 3 Carriers' paper notably does not raise the argument that the (alleged) government subsidies have created "artificially low" prices. That is because there is no evidence of any below market pricing.

In fact, the Big 3 Carriers have no basis for objecting to fares offered by Etihad, or sought consultations about pricing in the market, as permitted by Article 12 because they choose not to directly compete against Etihad in any non-stop market, and have only limited competitive

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emerged after 2001, it became a definite competitive strategy." [internal attribution omitted.] "Which is to say, if you haven't done it, you haven't wrung out all the costs that you could." Pete Garcia, who retired as a vice president for Continental Airlines in 2007 and now runs his own consultancy, agrees. "Bankruptcy, for the airline industry in particular, is just a way to refinance the business," he said. "**It is a financial move to keep you in business and give you some time to renegotiate with your lenders**." (emphasis provided).

75 US-UAE Air Services Agreement, Art. 12(1)(c).

76 Big 3 Carriers' Paper at 46.

exposure to Etihad in one-stop markets.[77] Instead, they choose to focus their efforts on the lucrative North Atlantic market, where they enjoy oligopolistic pricing and hegemonic market segmentation.[78] Moreover, conspicuously absent in the voluminous materials prepared by the Big 3 Carriers is any contention that fares offered by Etihad in one-stop markets are unreasonably low. Indeed, the public contentions being made by the Big 3 Carriers that Etihad is somehow "violating" the US-UAE Air Services Agreement are especially ironic, given that they fail to cite a single provision that is allegedly violated.

U.S. carriers have complained that Etihad and other Gulf carriers offer "excessive capacity" from their hubs to the United States. That term does not appear in the US-UAE Air Services Agreement, applicable law, or related aviation policy. It is a concept that the Big 3 Carriers simply made up. Setting aside the fallacy of this statement (Etihad offers a single daily service from Abu Dhabi to each of its U.S. gateways, with the exception of New York, where we offer two daily flights to the approximately 20 million people who live in the New York metropolitan area[79]), the US-UAE Air Services Agreement simply does not authorize parties to reject or block services proposed or operated by carriers of the other Party. In fact, under Article 11 ("Fair Competition") of the US-UAE Air Services Agreement, each party must allow the other party's airlines to determine the frequency and capacity they offer "based upon commercial considerations in the marketplace." The parties simply cannot unilaterally limit the

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77 See section III of this paper, *infra*.

78 According to Professor George Hoffer, University of Richmond, "An oligopoly is a market structure where you have relatively few players in the market, and since there are so few participants they have quite a bit of pricing power. **In this case, the players are Delta, U.S. Airways, United and American Airlines. They are making money on international routes by filling up planes, and they have no reason to offer discounts this year**." "Europe May Be On Sale, But The Ticket To Get There Isn't," NPR News, April 28, 2015, *available at* http://www.npr.org/2015/04/28/401468613/europe-may-be-on-sale-but-the-ticket-to-get-there-isn-t (emphasis provided).

79 U.S. Census Bureau New York QuickFacts, *available at* http://quickfacts.census.gov/qfd/states/36000.html.

volume of traffic, frequency, regularity of service, or the aircraft type operated by airlines of the other party.[80] Again, this is the US-UAE Air Services Agreement that was signed by the United States at the request of the Big 3 Carriers, and the document that is based upon a template developed solely by the United States government, almost certainly with significant input from the Big 3 Carriers. Notwithstanding the clear and uncontroverted provisions of the US-UAE Air Services Agreement to the contrary, the Big 3 Carriers propose that the U.S. government do just that—limit frequencies, freeze, or otherwise define the "appropriate" level of flights for the Gulf carriers.[81] Indeed, the Big 3 Carriers would seek to take U.S. aviation back to pre-1978 standards, and perhaps invite the now defunct Civil Aeronautics Board to provide its input.[82]

While the Big 3 Carriers lament the fact that Etihad and two other Gulf-based carriers have expanded their presence in the market in the past several years, it also is clear that the U.S.-drafted US-UAE Air Services Agreement (again, based upon the U.S. drafted template) places capacity decisions solely within the purview of the air carriers serving the market and does not provide any procedure for post-hoc review or rejection of such services.

> "2. Each Party shall allow each designated airline to determine the frequency and capacity of the 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 type or types operated by the designated airlines of the other Party, except as may be required for customs, technical, operational, or

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80 US-UAE Air Services Agreement, Art. 11(2).

81 In its April 17, 2015 filing with the Departments of Commerce, State, and Transportation, the Big 3 Carriers requested that DOT ask Qatar and the UAE to "direct their state-owned airlines to freeze any additional flights or capacity increases" contrary to the clear language of Article 11(2).

82 The National Archives maintains official CAB records at http://www.archives.gov/research/guide-fed-records/groups/197.html.

environmental reasons under uniform conditions consistent with Article 15 of the Convention."[83]

Words and treaties have meaning. If U.S. government negotiators had intended to include a mechanism to object to "excess capacity" or other factors believed to be affected by government subsidies, then such language would have been included in the US-UAE Air Services Agreement.[84] By referring to subsidies only in relation to price, the U.S. intended to limit interference in the market; noticeably absent is a remedy meant to limit capacity. The Agreement by its plain language provides a limited basis for intervention in pricing under Article 12, but provides for no similar intervention under Article 11.

It has long been recognized under U.S. canons of statutory construction that "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[85] This canon is equally applicable to international agreements. If the U.S. negotiators had intended to allow interference of the parties to remedy excess capacity or other potential effects of government support, they would have included in Article 11 the same remedy presented in Article 12. This U.S. canon of statutory construction is fully consistent with international law. The Vienna Convention on the Law of Treaties contains the fundamental rule on interpretation of treaty language: "A treaty shall be interpreted in good faith

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83 US-UAE Air Services Agreement, Article 11.

84 Even if the Agencies intended "excess capacity" to form a part of the air services agreement, and even if the Big 3 Carriers made a cogent argument that Etihad has deployed "excess capacity" (neither of which are true), the Edgeworth Reports shows conclusively that when Etihad increased its number of seats, its load factor increase. Thus, the Big 3 Carriers' "excess capacity" argument is without merit. *See* Edgeworth Report, para 63 and ex. 14.

85 *United States v. Lawrence*, 727 F.3d 386, 392-393 (2013), citing *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc*., 554 U.S. 33, 42 (2008).

in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose."[86] The Big 3 Carriers are not only requesting the U.S. government read into the US-UAE Air Services Agreement prohibitions and remedies that do not exist, they are seeking to have the U.S. government essentially rewrite it. The Big 3 Carriers' claim that they are only seeking "consultations" to have a discussion is disingenuous—they cannot ignore that there is no basis whatsoever for such consultation and their true objective is to eviscerate the US-UAE Air Services Agreement to suit their current anticompetitive objectives.

Given that U.S. carriers are not in a position to complain about specific commercial behaviors, such as pricing, they instead pivot and demand that the U.S. government create a remedy based on a determination that U.S. carriers are somehow being denied a "fair and equal opportunity" to compete in the marketplace, due in part to the fact that the UAE has adopted policies that better facilitate the development of the aviation sector in the UAE. The "fair and equal opportunity" clause[87] is not meant to be a leveling mechanism for government policies or even for air carrier ownership structures. This clause is intended to prevent one party from discriminating against the other by applying differential treatment to carriers of the other party.

The Big 3 Carriers have not raised any meaningful claims that the UAE has discriminated against them or treated them differently than its domestic carriers. Indeed, the UAE has actively invited the Big 3 Carriers to operate in and beyond the country, allowing the Big 3 Carriers coveted "Fifth Freedom" rights to fly passengers beyond the UAE. Cargo carriers such as FedEx

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86 1155 U.N.T.S. 331, T.S. No. 58 (1980). While the U.S. is not a signatory to the Vienna Convention on the Law of Treaties, it has long recognized these principles as customary international law.

87 US-UAE Air Services Agreement, Art. 11(1).

have taken advantage of this liberalized market, having established a hub in Dubai over 25 years ago and using its Fifth Freedom rights to operate flights to destinations around the world.[88] The Big 3 Carriers' fanciful interpretation of the "fair and equal opportunity" clause is also at odds with the negotiating history of the U.S. and UAE. Although Etihad was created after the Agreement entered into force, Emirates, a government-owned airline, was already in existence at that time. At no time did the U.S. government express concern about entering into an air services agreement with a country that designated a government-owned carrier under the treaty[89] or object to concluding an agreement with a nation that had a small home market.[90] If the Big 3 Carriers are now considering having the U.S. government implement this new and unprecedented standard, multiple air services agreements will be subject to unilateral termination. Moreover, this would provide the basis for other countries to unilaterally amend or terminate air services agreements *sua sponte*.

The fact that the Big 3 Carriers have encountered competitors that have harnessed new aircraft technology, implemented innovative business models, and offer important nonstop and connecting services to the UAE (and points behind) should be neither surprising nor problematic. The fact that the UAE actively promotes its air transport sector by offering state-of-the-art

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88 "FedEx Express Opens New Facility in Dubai to Meet Increased Shipping Demand," November 6, 2012, *available at* http://about.van.fedex.com/newsroom/meisa-english/fedex-express-opens-new-facility-in-dubai-to-meet-increased-shipping-demand/. "FedEx has been operating directly in Dubai for more than 23 years, establishing our regional hub here, with flights linking the Middle East to the rest of the world. The investment in the Garhoud facility is in line with FedEx' strategy to continue offering outstanding services that fit our customers' needs," said Gerald P. Leary. "Dubai has, and continues to be at the center of our regional operations, as a result of its access to large regional and global markets, its open trade and investment policies, as well as its strong macroeconomic environment."

89 Indeed, the U.S. has concluded Open Skies agreements with many nations that own their flag carriers, such as Turkey and Saudi Arabia.

90 The U.S. has concluded Open Skies agreements with the Netherlands and Singapore, which are both countries with small (or nonexistent) home markets, and strong home carriers. However, since KLM and Singapore Airlines are members of the Big 3 Carriers' mega-alliances (SkyTeam and Star Alliance, respectively), they have escaped attack by the Big 3 Carriers.

infrastructure does not constitute the denial of a fair and equal opportunity to competitors. Indeed, the Big 3 Carriers have not asserted that they are being charged different fees at UAE airports, because they are not. The reality is that the UAE and other countries in the region are ideally situated to connect traffic between the United States and the Indian Subcontinent and other emerging markets to the east. This geographic reality was known at the time the US-UAE Air Services Agreement was signed and in no way constitutes a denial of a "fair and equal opportunity" to compete in the US-UAE market. The Big 3 Carriers have failed to make, let alone substantiate, any claim that Etihad or UAE carriers are acting in violation of the US-UAE Air Services Agreement. Instead, they attempt to argue that Etihad has received "subsidies" and that its operations somehow violate broader and irrelevant inchoate trade principles.

Setting aside the fact that there is an agreement in force that expressly governs air transport services between the U.S. and UAE, efforts to base remedies on a regime that governs trade in goods are entirely misplaced. Moreover, the very remedies available under a trade regime (a challenge to fares that are "artificially low due to direct or indirect governmental subsidy or support") are available and are going unused under the US-UAE Air Services Agreement.

The Big 3 Carriers Cannot Justify Remedies Under Any Relevant Legal Standard

Even if the Big 3 Carriers could prove the existence of subsidies, the inquiry does not end there. While the Report alleges that Gulf carriers have received subsidies as defined under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)[91] and the U.S.

[91] 1869 U.N.T.S. 14 (1994).

countervailing duties statute,[92] the Big 3 Carriers' Paper fails to acknowledge that in order for a subsidy to be prohibited or actionable under either of these irrelevant legal regimes, the complaining party must prove that the subsidies caused competitive harm. The Big 3 Carriers fail woefully in this regard also.

SCM Agreement

Under the SCM Agreement, which the Big 3 Carriers correctly acknowledge is not applicable to air transport,[93] a subsidy is defined in simple terms as a financial contribution by a government that confers a benefit on its recipient.[94] However, that does not end the inquiry. In order for such a subsidy to be prohibited or actionable under the Agreement, there must be a determination that the subsidy is "specific,"[95] which must be "clearly substantiated on the basis of positive evidence."[96] A specific subsidy is prohibited under the Agreement only if the subsidy is contingent upon export performance or is contingent upon the use of domestic over imported goods. Clearly, this is not analogous to air transport services. Even if it were, since U.S. carriers largely do not directly compete in the same market, it would not apply.

A specific subsidy is actionable under the Agreement if the complaining country demonstrates that the subsidy causes adverse effect to the interests of the complaining country. Adverse effects consist of:

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92 19 U.S.C. § 1671.

93 Big 3 Carriers' Paper at 12, fn. 44.

94 SCM Agreement § 1.1.

95 SCM Agreement § 1.2.

96 SCM Agreement § 2.4.

1. Injury to the domestic industry of another member;

2. Nullification or impairment of benefits accruing directly or indirectly to other members under GATT 1994; or

3. Serious prejudice to the interests of another member.[97]

For a complaining country to take action under WTO countervailing measures rules, it must have "sufficient evidence" that (1) a subsidy exists and, if possible, its amount; (2) injury;[98] and (3) a causal link between the subsidized imports and the alleged injury.[99] "Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient" to meet these requirements.[100]

As noted in WTO's Overview of the SCM Agreement, "the complaining country has to show that the subsidy has an adverse effect on its interests. Otherwise the subsidy is permitted."[101] The WTO Appellate Body has found that in order to satisfy the causation requirement, it must be shown that there is a "genuine and substantial relationship of cause and effect" between the subsidies and the alleged market effect, and the complaining party must ensure that the effects of other factors are not improperly attributed to the challenged

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97 SCM Agreement, Art. 5.

98 As defined by GATT 1994 Article VI and interpreted by the SCM Agreement.

99 SCM Agreement, § 11.2.

100 *Id.*

101 World Trade Organization Overview on the SCM Agreement, *available at* https://www.wto.org/english/tratop_e/scm_e/subs_e.htm.

subsidies.[102] The burden is on the complainant "to furnish factual evidence affirmatively demonstrating the causal link alleged."[103]

U.S. Countervailing and Anti-Dumping Law

Under U.S. countervailable subsidy law, the definition of subsidy contains the same basic elements as the SCM Agreement definition—a financial contribution by a government that confers a benefit on its recipient.[104] In order to be actionable, the subsidy must be specific[105] and the subsidized ***goods*** must cause material injury to an industry in the U.S., the threat of material injury to an industry in the U.S., or material retardation of the establishment of an industry in the U.S.[106] There is no similar provision for services. The International Trade Commission (ITC) issues an affirmative material injury determination only if it finds "present material injury or a threat thereof" and makes a "finding of causation."[107]

With respect to causation, the U.S. Court of International Trade has found that "the ITC 'has the discretion—indeed an obligation—to consider and weigh a number of other pertinent economic and factual criteria, and consider all the facts and circumstances, including the health

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102 Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Aircraft*, WT/DS316/AB/R (May 18, 2011).

103 Panel Report, *Korea — Commercial Vessels*, ¶ 7.560, WT/DS273/R (Mar. 7, 2005).

104 19 U.S.C. § 1677(5).

105 The requirements for specificity under U.S. law are found at 19 U.S.C. 1677 (5A).

106 19 U.S.C. § 1671(a) (emphasis provided).

107 *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1210, 431 F.Supp.2d 1302, 1306 (2006) (internal quotation and citation omitted).

of the domestic industry,'" when determining whether a subsidized import injured the domestic industry.[108]

The Big 3 Carriers Have Failed To Make Any Showing of Competitive Harm.

The Big 3 Carriers present no evidence of injury or material harm suffered by U.S. carriers—just an allegation that Gulf carrier services are "causing serious overcapacity in the world market," and that this overcapacity "will drive down yields for all carriers, including U.S. carriers."[109] The "evidence" of "overcapacity" consists of: (1) a map that purports to show Gulf carrier shares of long-haul bookings in various world regions; and (2) a breathtakingly incorrect assertion that there should be a direct correlation between capacity growth and global gross domestic product ("GDP").[110] This map shows enormous regional variations, which cuts directly against any claim of the existence of a "world market." In fact, this chart shows a very modest "Gulf Share" of international long-haul bookings in the United States. In terms of falling yield, the "evidence" proffered is a bare claim that this overcapacity "will drive down yields for all carriers, including U.S. carriers,"[111] without reference to an amount, a specific market or a specific time period, or any evidence that this has actually occurred, beyond the decrease in prices that would be expected in a normal competitive market. These claims of anticipated harm

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108 *See JMC Steel Group v. U.S.*, 24 F.Supp.3d 1290, 1310 (2014), citing *SCM Corp. v. United States*, 4 CIT 7, 13, 544 F.Supp. 194, 199 (1982); accord *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 23, 590 F.Supp. 1273, 1277 (1984) ("No factor, standing alone, triggers a per se rule of material injury.), aff'd 760 F.2d 249 (Fed.Cir.1985)).

109 Big 3 Carriers' Paper at 44-45.

110 Big 3 Carriers' Paper at page 41 ("And because the Gulf carriers are adding this new capacity at rates that substantially exceed global GDP growth – **which drives growth in demand for air transport services** – the only way to accomplish this feat is to continue taking passengers away from other countries' carriers.") (emphasis provided).

111 Big 3 Carriers' Paper at 45.

are speculative at best.[112] Moreover, prevailing conditions for U.S. carriers are flatly inconsistent with these claims of imminent doom. U.S. carriers are enjoying extremely high load factors and record profits in the markets they choose to serve. Quite simply, these carriers have failed to show any harm caused by any purported subsidies.

Claims about U.S. carriers losing ISC traffic are similarly illusory. While the relative U.S. carrier share of these markets has declined slightly in recent years, the U.S.–India traffic they carry has actually increased in absolute terms.[113] Moreover, to the extent that there have been any meaningful shifts in share, they have occurred due to the superiority and convenience of the services being offered by new entrants to the market, as well as the Big 3 Carriers' affirmative choices not to properly serve these markets but in general to force passengers to connect onto European carriers in their main European hubs.

Regarding the Big 3 Carriers' GDP/Capacity "corollary," the Big 3 Carriers' comparison of GDP to capacity growth is fatally flawed for a number of reasons."[114] As an initial matter, how global GDP bears any relationship to demand in particular relevant markets defies any rational explanation. Moreover, as Edgeworth Economics explains, the Big 3 Carriers' arguments ignore the economic concept of income elasticity of demand, which is the relationship between changes in income and changes in the quantity of demand of a particular good or

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112 It is uncertain (at best) whether parties can seek remedial action against anticipated harm. *See* SCM Agreement § 15.7, 1869 U.N.T.S. 14 (1994).

113 Edgeworth Report at paras 22 -24, exs. 5 and 6.

114 Edgeworth Report at paras 42-50. "This comparison is fatally flawed as a matter of economics for a number of reasons. First the worldwide measure of GDP provides little information about demand growth in areas where Gulf carrier's U.S.-based traffic actually goes. In fact, as discussed above, a substantial portion of Etihad's U.S. traffic currently goes to (or from) the ISC and Southeast Asia. As a result, it is expected growth of demand of these regions – as opposed to worldwide demand – that is relevant for such as analysis." *Id.,* at para 45.

service.[115] A recent IATA study estimated that long-haul demand passenger elasticity in developing countries was approximately 2.0, meaning air travel will increase by 2% for every 1% increase in national income.[116] This elasticity grows to 2.7 for "very long-haul" flights.[117] Etihad's service between Los Angeles and India, which includes sectors of approximately 17 and 4 hours, is a "very long-haul" flight. Indeed, all Etihad U.S. services meet this standard.

Even if the Big 3 Carriers were using the correct legal standard to address their concerns (which they are not), their efforts to demonstrate that they have suffered actionable harm have fallen flat. Even their attempts to cure this deficiency by aggregating the concerns of their European partners with those of their own (U.S. carriers do not even serve the points in the ISC for which they claim to have lost share)[118] have failed. To the extent European carriers can show that they have suffered any sort of competitive harm, the grievances of European carriers are not an issue for the U.S. government when considering the United States–UAE aviation relationship. Even if the European carriers had standing in this matter – which they do not – they too would have no colorable claim of harm. The Big 3 Carriers' failure to demonstrate any actionable harm should alone put an end to their campaign.

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115 *Id*.

116 "IATA, Air Travel Demand, IATA Economics Briefing No. 9," April 2008, Table 2, *available at* https://www.iata.org/whatwedo/Documents/economics/air_travel_demand.pdf.

117 *Id.*

118 *See* section III, *infra*.

III. THE BIG 3 CARRIERS' RHETORIC DOES NOT SURVIVE ECONOMIC SCRUTINY

Introduction

As discussed previously, to the extent that the US-UAE Air Services Agreement makes mention of government subsidy, it does so within Article 12, which states in pertinent part:

> Each party shall allow prices for air transportation services to be established by each designated airline based upon commercial considerations in the marketplace. Intervention by the Parties shall be limited to:
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> * * *
>
> c. protection of airlines from pricing that is artificially low due to direct or indirect government subsidy or support.[119]

Etihad does not receive government subsidies or support. Moreover, even if a designated carrier received government subsidies, which is not the case for Etihad, subsidies alone do not invoke the prohibitions under Article 12, as Article 12 clearly and unambiguously states that there must be subsidies <u>and</u> prices that are <u>artificially low</u>. While the US-UAE Air Services Agreement does not define the term "artificially low," we note that nowhere in the Big 3 Carriers' Paper do they accuse Etihad of charging below market fares. This is because Etihad's fares fell generally within the market range on the relevant city-pair markets.

Comparing Fares in the Key Markets

Earlier this year, Etihad retained Edgeworth Economics ("Edgeworth"), a leading American consultancy that provides objective economic and financial analyses for complex litigation, regulatory disputes, and public policy debates.[120] Specifically, Etihad asked

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119 *Id.*

120 http://www.edgewortheconomics.com/.

Edgeworth to evaluate various economic claims made by the Big 3 Carriers in their paper, and also asked Edgeworth to consider whether Etihad's fares in the relevant markets were "artificially low." Since over 65% of Etihad's United States traffic goes to countries in the Indian Subcontinent ("ISC"), which include India, Pakistan, Bangladesh and Sri Lanka, Edgeworth considered key city pairs between the U.S. and the ISC. In addressing Etihad's questions, Edgeworth performed detailed economic analyses of Etihad's published fares, as well as those of our competitors. In particular, Edgeworth compared Etihad's fares on key routes between the United States and the ISC,[121] and also considered published fares on a number of immunized routes between the United States and Europe. Edgeworth considered a two-year sampling (between April 2013 and March 2015) of published fares, which captured multiple IATA seasons and other variances.

Over this two-year period, Etihad's published fares fell generally within the range of the published fares[122] of our competitors, which include Delta (and its immunized partner, Air France/KLM), United (and its immunized partner, Lufthansa/Austrian/Swiss), American (and its immunized partner, British Airways/Iberia), Air India, Turkish Airways, Emirates and Qatar, among others.[123] These data are not our own—they come from the published fares databases maintained by ATPCO and global distribution systems, which are recognized as reputable independent repositories of historic aviation data.[124] While there is no legal requirement that a

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121 The analyzed routes were: JFK-DEL, SFO-DEL, JFK-BOM, SFO-BOM, JFK-ISB, IAD-ISB, JFK-DAC, IAD-DAC, JFK-CMB, LAX-CMB, ORD-HYD, and JFK-HYD.

122 Published fares are the fares that carriers market to customers. Published fares are organized by fare classes, and the extent to which carriers make specific fares available to consumers lies within the discretion of the respective carriers.

123 Edgeworth Report, paras 26–29.

124 ATPCO is Air Tariff and Publishing Company.

designated carrier keep its median published fares "within the range" of its American competitors, it is axiomatic that if its median fares are within such a range, they cannot be considered "artificially low" unless the fares of our American competitors are also "artificially" low, which they are not.

The Big 3 Carriers Prefer Immunized Fares and Allocated Markets

The question arises as to why the Big 3 Carriers do not have even more passengers or market share in the relevant market. It is a fact that the Big 3 Carriers collectively carry 34 times the number of passengers carried by Etihad worldwide, and that multiple excludes their equally large European partners. It is likely because the Big 3 Carriers choose to funnel their passengers through their immunized routes to European hubs. This practice creates two internal bottlenecks, or hurdles. First, there is proportionally much more "point-to-point" traffic between the United States and Europe, leaving less capacity for passengers that want to fly through to other destinations. Second, each of the Big 3 Carriers has an immunized cooperation agreement with a European partner that allows for, among other things, pricing coordination on those very routes for which there is proportionally greater point-to-point demand. Because of this, their fares between the United States and Europe are relatively higher, and they are able to generate higher return on the transatlantic sector, thus disincentivizing the Big 3 Carriers from taking connecting traffic, or traffic beyond the European hub. Finally, given the enormous breadth of the immunized carriers' destinations beyond their hubs, there is simply more internal competition among the various beyond points. As a result, only 2% of their U.S.-originating passengers

make it over these two "hurdles" and connect through their European hubs all the way to the ISC.[125]

To better understand this phenomenon, it is instructive to consider the respective passenger flows between the United States and the ISC. The Big 3 Carriers send their passengers through London, Amsterdam, Paris, and Frankfurt, for the most part. They are not required to do this—they choose to do this. Etihad's passengers connect over Abu Dhabi, not only because it is our home base, but because we are required to do so under the applicable air services agreements. The Big 3 Carriers each have average load factors in excess of 80% for their United States–Europe flights,[126] and the majority of passengers on these flights, as indicated below, travelled only to the European hub, and not seeking travel beyond those cities to another destination.

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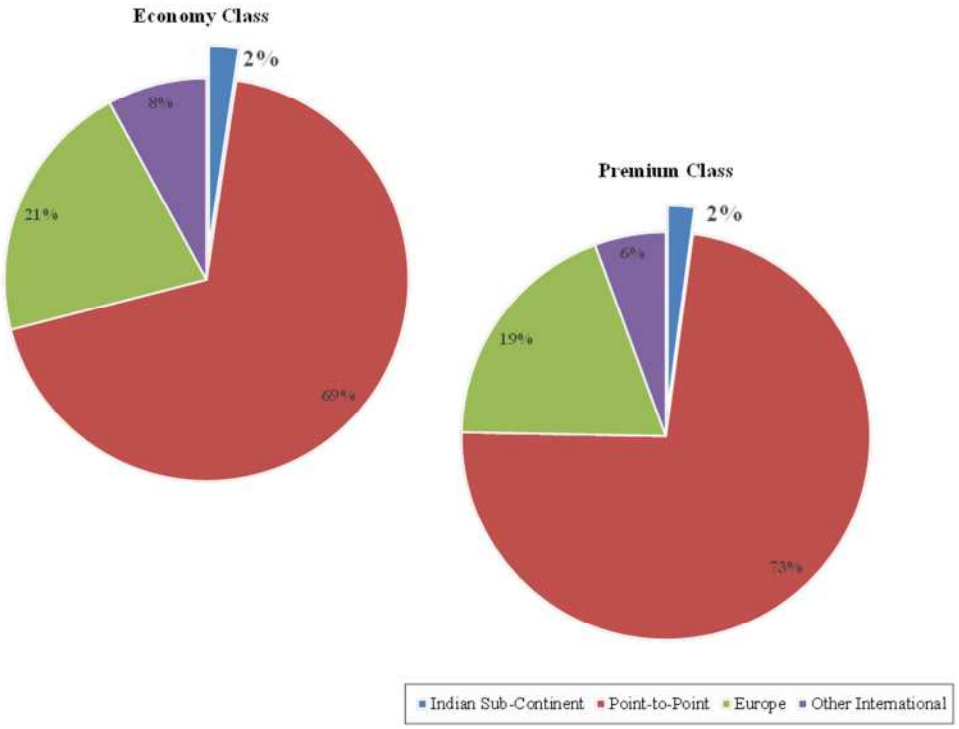
125 These connecting passengers are in addition to the passengers the Big 3 Carriers transport on the aforementioned two nonstop services by United.

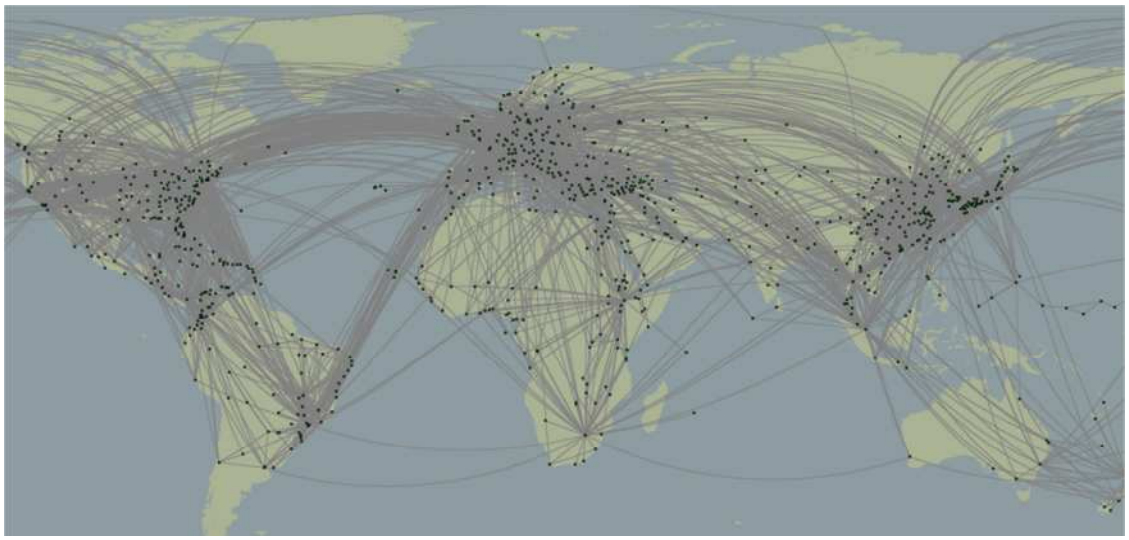
126 Edgeworth Report, para 37, ex 11.

DELTA, AMERICAN, AND UNITED AIRLINES CONNECTING VS. POINT-TO-POINT TRAFFIC ON FLIGHTS FROM THE UNITED STATES TO/THROUGH KEY EUROPEAN CITIES MARCH 2014 – February 2015[127]



127 Edgeworth Report at ex. 12. In contrast a majority of Etihad's U.S. traffic connects through our Abu Dhabi hub to other destinations, primarily in the ISC. Moreover, Etihad serves numerous "secondary" cities in India from our Abu Dhabi hub (not just Delhi and Mumbai), including Trivandrum, Cochin, Calicut, Chennai, Hyderabad, Bangalore, Ahmedabad, Jaipur and Kolkata. Etihad partner Jet Airways serves Mangalore, Goa, Pune and Lucknow from Abu Dhabi. Indeed, much of Etihad's ISC traffic involves these and other ISC secondary cities. To get to these destinations on a Big 3 Carrier generally requires: (1) a North Atlantic leg; (2) a Europe to India leg; and (3) a domestic Indian leg. Using one of Etihad's 6 U.S. gateways, all of these cities can be reached with two legs: (1) U.S. to Abu Dhabi; and (2) Abu Dhabi to India.

These American/European flights are all immunized from United States and European antitrust and competition laws. Edgeworth examined the median revenue per kilometer, or RPK, on the three key immunized routes over the North Atlantic:[128] JFK to London, Frankfurt and Paris.[129] None of these routes are served by Etihad, and each of these routes is dominated by an immunized Big 3 Carrier and its European partner. For JFK–London, the American Airlines/British Airways immunized service dominates. Delta/Air France has taken the JFK–Paris route, and United/Lufthansa has claimed the third piece of the North Atlantic market, JFK–Frankfurt. To fully appreciate the extent of this dominance, as well as the collective lack of interest in the Indian Subcontinent, one only need consider the mega-alliances' massive networks:



Star Alliance, The Way the Earth Connects.[130]

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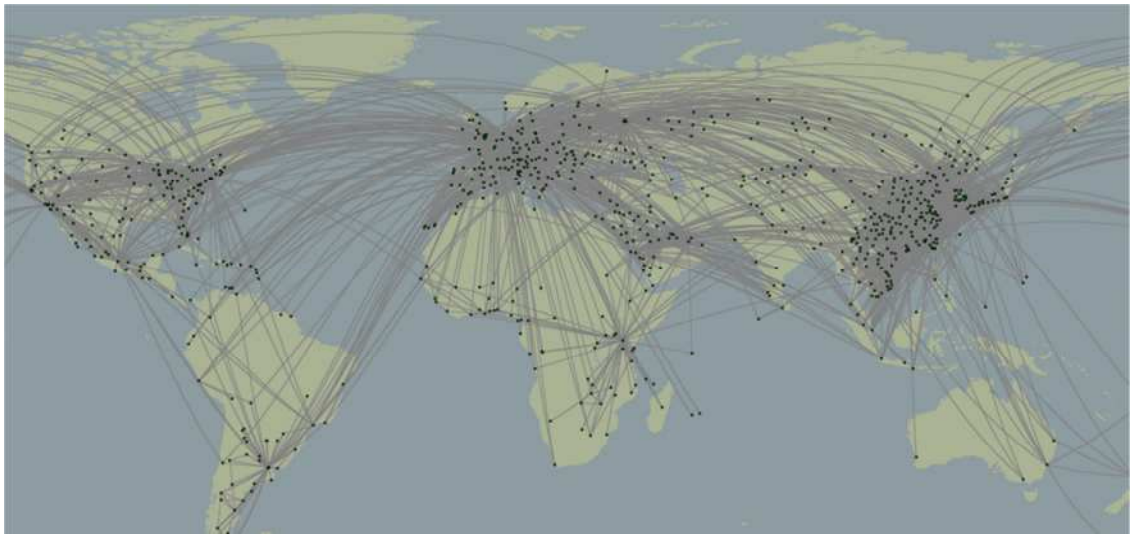
128 Edgeworth Report at paras 32 *et seq*.

129 To determine RPK, one divides the total fare by the number of kilometers. So a flight that is 1,000 kilometers and $100 results in RPK of $0.10.

130 http://www.staralliance.com/en/.

oneworld, An Alliance of the World's Leading Airlines Working as One.[131]



SkyTeam, An Extensive Global Network with 1,052 Destinations.[132]

Edgeworth compared the RPK generated by the Big 3 Carriers on these routes to Etihad's RPK on its Indian Subcontinent routes.[133] Edgeworth found that the Big 3 Carriers enjoy an average median RPK advantage ranging from between approximately 70% to 120% for these

131 http://www.oneworld.com/news-information/oneworld-fact-sheets/introduction-to-oneworld.

132 http://www.skyteam.com/en/About-us/.

133 Edgeworth Report at paras 32-33.

local passengers, and they are able to sell many seats on their North Atlantic flights with passengers that pay these high fares.[134] We suspect that this dramatic RPK differential would not surprise American and European consumers, who have endured rising fares, a thicket of ancillary fees, and other "enhancements," all against a backdrop of lower fuel prices. Indeed, the Big 3 Carriers' oligopolistic pricing practices caused Senator Chuck Schumer to observe that "[a]t a time when the cost of fuel is plummeting and profits are rising, it is curious and confounding that ticket prices are sky-high and defying economic gravity."[135] Given the extremely favorable RPK return on the immunized routes, the Big 3 Carriers are much more incentivized to serve the "local" passengers, or those passengers traveling between the United States and Europe (depicted in blue, below).[136]

134 Edgeworth Report at para 34 *et seq*.

135 Statement of United States Senator Chuck Schumer (D. NY) regarding falling fuel prices and high airfares, December 14, 2014, *available at* http://www.schumer.senate.gov/newsroom/press-releases/schumer-as-fuel-costs-plummet-airfares-for-nyers-this-holiday-season-remain-extremely-high_calls-for-federal-investigation-into-why-dramatically-lower-fuel-costs-and-record-airline-profits-are-not-being-passed-on-to-consumers-through-lower-fares.

136 Please note this map depicts passenger flows rather than actual routes. Both Etihad's and the Immunized Carriers' respective route networks are larger than what is depicted in our schematic.

So the combination of a greater number and proportion of "point-to-point" passengers coupled with very attractive immunized RPK generated for those passengers leaves fewer seats available for passengers seeking to travel to India. Moreover, since the Big 3 Carriers' European partners offer more "beyond" destinations (depicted for illustrative purposes only in green for European carriers and yellow for Etihad, above), there is more internal competition (competition internal to a particular airline or immunized alliance) among these various additional legs to secure a seat on the initial transatlantic leg. Therefore, the standard revenue management algorithms used by most major network carriers would prefer not to release a seat for a United States–ISC journey connecting through a European hub unless it can generate an overall better return than either: (1) the transatlantic sector, plus an entirely separate ISC sector flown on a different ticket; or (2) the transatlantic sector, plus the connecting sector to any other destination.

These robust returns that the Big 3 Carriers achieve on their North Atlantic routes not only help explain their record profits, but also help explain why the Big 3 Carriers have affirmatively chosen not to serve the ISC. The Big 3 Carriers have made ostensibly independent decisions to serve the ISC through European hubs. This is their choice. Under the applicable air services agreements, the Big 3 Carriers can serve India, Bangladesh, Pakistan, Sri Lanka (indeed almost any country in the world), directly and without transiting through intermediate hubs. Moreover, under the US-UAE Air Transportation Agreement, with full fifth and sixth freedom rights, the Big 3 Carriers can even use Abu Dhabi and Dubai as hubs to serve markets beyond the UAE, such as India and other countries. They affirmatively choose to do neither. Instead,

they affirmatively choose to force their customers to connect through congested European hub airports.[137]

Given the Big 3 Carriers' collective surge in profits, high load factors and the favorable cost environment in which carriers currently operate, one might ask when they are going to increase capacity to respond to improving economies in the United States and Europe as well as increased consumer demand globally. In April 2015, Delta answered that question emphatically. On April 15, 2015, Delta signaled its future capacity reductions to its U.S. competitors—something that both the financial press and Wall Street analysts characterized as an attempt to spur their U.S. "rivals" to follow:

> Delta Air Lines' move to cut seats on international routes later this year may herald similar moves by American Airlines and United, **helping the U.S. carriers pare costs and maintain pricing power.**
>
> The reduction announced Wednesday amounts to 3 percent of overseas capacity for Delta's winter schedule. Delta is paring service from Japan and to Brazil, Africa, India and the Middle East. It's also suspending flights to Moscow, meaning no U.S. passenger carrier will fly there during that period.
>
> * * *
>
> **"The cuts are deeper than we had anticipated and the announcement a little earlier," said Savanthi Syth, a Raymond James Financial Inc. analyst. "This is what we would expect to see with capacity discipline. We would expect adjustments to international capacity by the other legacy carriers" in the fall and winter months.**
>
> * * *
>
> Delta's capacity shift "**is likely to be greeted enthusiastically (including by us) and will likely be joined by similar efforts at competing carriers as earnings**

[137] American Airlines does have a codeshare agreement with Etihad, which includes points within the ISC American and Qatar are members of the oneworld global alliance.

> **season moves on,**" said Jamie Baker, an analyst at JPMorgan Chase & Co. in a note. United and American will report results next week.[138]

Simply stated, Delta announced to its two U.S. rivals that it will withdraw 3 percent of its capacity and from where Delta will withdraw it. Delta is not alone in maintaining its strong capacity discipline.[139] This practice of signaling to competitors hearkens back to the days of *United States v. Airline Tariff Publishing Company, et. al.,*[140] when the Big 3 Carriers and their legacy carriers executed a consent decree with the United States Department of Justice in which the carriers agreed to curtail their signaling activities. However, the ATPCO consent decree has expired.

Thus, at a time when the Big 3 Carriers are actually cutting capacity in international markets, and mostly in markets where they do not even compete with the Gulf carriers, it is extremely ironic that they are trying to block competitors who are expanding and taking advantage of the considerable growth in demand for air traffic services to and from the United States. This is the antithesis of Open Skies and competition.

The Market Share Fallacy

Etihad does not dispute the fact that over the past 10 years Etihad has increased its market share between the United States and the ISC; we embrace it. The Big 3 Carriers claim that

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138 "Delta Air's Pullback Abroad Seen Spurring Rivals to Follow," Bloomberg Business April 15, 2015, *available at* http://www.bloomberg.com/news/articles/2015-04-15/delta-air-plans-cut-in-overseas-seats-as-dollar-oil-damp-travel.

139 "Almost all of our capacity growth domestically is about putting more seats on airplanes," American Airlines President Scott Kirby explained in a recent investment conference. "We will absolutely not lose our capacity discipline," or the practice of limiting expansion in order to keep airfares high, United CEO Jeff Sismek said earlier this year, while announcing the company had nearly doubled profits in 2014." "The Pathetic State of Airline Travel Today," *Time Magazine, Id., available at* http://time.com/money/3831903/airlines-high-prices-bad-service-mergers/.

140 *United States v. Airline Tariff Publishing Co*., 836 F.Supp. 9 (D.D.C. 1993).

Etihad has "taken passengers," giving the impression that passengers are some type of chattel to which legacy carriers are entitled. We think differently. We consider our passengers to be our guests, and we work very hard to earn their patronage. Neither Etihad, the Big 3 Carriers, nor any other airline are "entitled" to any passenger, and any airline that argues to the contrary perhaps exposes a more obvious reason for their loss of passenger market share: a sense of entitlement and a complete disconnect between what they offer and what customers want.

Of course, Etihad just started operations 11 years ago, so if Etihad had not increased its market share in this time, it would be unexpected. Moreover, we have increased our market share in an ever growing market—something that inures to the benefit of all carriers that compete. So while the Big 3 Carriers bemoan their collective five percentage point loss of market share (actually, a 4.4 percentage point change from 40.7% to 36.3%), during the same period of time, the Edgeworth Report shows that the overall United States–ISC market grew significantly. When translated to actual passenger numbers, during the same period of time, the Big 3 Carriers and their immunized partners actually carried over 223,000 more economy class passengers between the United States and Europe in 2014 than they did in 2009—that represents 18% more passengers.[141] The Big 3 Carriers experienced similar growth for their premium passenger traffic, gaining 33,000 more passengers.[142]

Despite direct and unassailable evidence of this growth, the Big 3 Carriers have gone to considerable lengths to argue that they are legally and empirically entitled to more market share. Not satisfied with 18% *more* passengers, the Big 3 Carriers commissioned Compass Lexecon to design a regression analysis to infer causality between alleged subsidies (which they accept as

[141] Edgeworth Report at para 22, ex 6.

[142] Edgeworth Report at para 27, ex. 7.

fact) and "taken passengers" (a concept not recognized in antitrust or aviation law). Unfortunately, causation cannot be inferred by data analysis alone.[143] Moreover, Compass Lexecon's 2015 argument that increased competition is harmful not only contradicts fundamental tenets of antitrust law and economics, it also contradicts Compass Lexecon. In 2010, Compass Lexecon correctly posited that "*it is unusual, to say the least, for a government agency to worry about the deleterious effects of increasing competition*."[144] Compass Lexecon also noted that ". . . ***increasing competition generally enhances consumer welfare, even if it is rough for the competition involved*** . . ."[145]

The Compass Lexecon Report suffers from other fatal flaws, the most basic of which is the unusual and unorthodox notion that new entrants are only entitled to serve passengers that the Big 3 Carriers choose not to serve. This odd argument, which manifests itself through various iterations of their attempts to model "stimulated demand," has no basis in economics.[146] The Compass Lexecon Report fails to point to any economic or legal doctrine which indicates that an incumbent is *entitled* to the customers it serves and the only way for new entrants to compete "fairly" is to sell their products to customers *who would not otherwise purchase from the incumbent*.[147]

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143 Edgeworth Report at para 56, citing the *Federal Judicial Center Reference Manual on Scientific Evidence* (3rd ed.), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/$file/SciMan3D01.pdf.

144 Edgeworth Report at para 58, citing U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008), Chapter 1, Section III.D., *available at* http://www.justice.gov/atr/public/reports/236681_chapter1.pdf.

145 *Ibid*.

146 *See e.g.,* Compass Lexecon Report at page 2-4.

147 Edgeworth Report at paras 60 *et seq*.

Summary

What started as a simple request to benchmark Etihad's published fares to the Indian subcontinent against those of our competitors to determine if they were "artificially low" pursuant to Article 12 of the US-UAE Air Transportation Agreement revealed considerably more. According to the Edgeworth Report:

- Etihad's median published fares between the United States and the Indian Subcontinent were consistent with the fares charged by our competitors;
- For immunized flights between the United States and Europe, the Big 3 Carriers and their immunized partners generated RPK that exceeded the Indian Subcontinent fares by 70 to 120%;
- The Big 3 Carriers consistently achieve load factors in excess of 80% for their flights between the United States and Europe;
- A majority of passengers flying on flights between the United States and Europe are seeking only to go to Europe, meaning those flights have fewer seats available for passengers seeking to connect to other destinations, including the ISC (roughly only 2% actually end up connecting to the ISC); and
- The Big 3 Carriers' Compass Lexecon Report has a number of flaws, which make its conclusions regarding passenger demand patently unreliable. These flaws include: (1) making causal links absent any evidence of causation; (2) assumes allegations as fact and modeling a regression analysis based on these faulty assumptions; (3) failing to account for competition from other carriers; and (4) evaluating city pairs and markets where Etihad does not compete.

Given the foregoing, perhaps the better question for the Agencies to pose to the Big 3 Carriers is to find out how were they able to carry over 250,000 more passengers between the United States and ISC in 2014 than they were in 2009 given their extremely high immunized fares, their use of bottleneck hubs, their respective decisions to scale back capacity despite a growing U.S. and world economy, and their affirmative choice not to fly directly to the ISC.

IV. CONCLUSION

The Big 3 Carriers have reportedly spent two years and several millions of dollars "investigating" Etihad and "analyzing" documents seeking to prove that Etihad is subsidized by our owner and sole shareholder, the Abu Dhabi government. Their efforts were unnecessary. We are government-owned and have been since our founding. We are and have always been clear that we do not receive any subsidies from the Abu Dhabi government, and that we are financed through a combination of equity, shareholder and commercial loans. Our shareholder's equity and loans are not subsidies under any applicable definition; they are the means by which the Abu Dhabi government has sensibly invested in a successful business model.

The Big 3 Carriers' claims, allegations, and requests for relief are not supported by fact, logic, law, or treaty. They have tried to malign the reputation of Etihad, made a mockery out of antitrust law and competition policy, claimed to have ownership over passengers, disregarded the interests of consumers, relied on irrelevant laws and treaties and advanced the stunning proposition that new entrants are only permitted to carry traffic that they stimulate above and beyond natural growth expected in those markets, whatever "natural growth" means.

Our response is simple: (1) Etihad's conduct, and that of the UAE government, is fully consistent with the US–UAE Air Services Agreement, applicable United States law and the governments' respective treaty obligations; (2) government ownership is not an issue under the US–UAE Air Services Agreement or any other applicable law; (3) shareholder equity and loans are not subsidies under the US–UAE Air Services Agreement or any other applicable law; (4) while we compete aggressively for all passengers, we do not charge artificially low fares; (5) we have not caused any actionable harm to the Big 3 Carriers, and actually provide them with

significant commercial benefits in terms of connecting passengers onto their networks; (6) we have been successful in markets in which the Big 3 Carriers affirmatively choose not to compete, and we are in fact providing them with an avenue (through codeshare and interline agreements) to offer their passengers routes that they choose not to fly themselves; and (7) we treat our worldwide employees, who come from over 140 countries, including the United States, fairly and with respect.

For these reasons, we respectfully submit that the only remedy available under the US–UAE Air Services Agreement, government-to-government consultations, is neither called for nor appropriate. The very purpose of an Open Skies-type air services agreement is to take the regulators out of the fare and capacity control business. So while a request for consultations may sound benign, it cannot be made without a valid reason. We urge the Agencies to make the correct decision and not simply take the expedient course. We realize that the Big 3 Carriers have, through their own actions and those of their funded proxy groups, generated substantial pressure on the Agencies. However, we are confident that the Agencies will honor the clear provisions of the US-UAE Air Services Agreement and stay true to U.S. Open Skies policy, which benefits the United States in general and US carriers, US trade, and US employment in particular, as well as global aviation and consumers worldwide.

Accordingly, we respectfully request the Agencies close this matter following the termination of their respective dockets, notify all interested parties of their decision to not request government-to-government consultations, and take no further actions in this matter.