

THE RECENT COMPETITION AUTHORITIES DRIVE TO END OR REDUCE IATA'S IMMUNITY FROM COMPETITION LAWS

Joseph Monteiro*

I. Introduction

In a world where price fixing and market sharing have been unanimously denounced by nearly all countries, a few organizations continue to enjoy immunity from the antitrust laws for such activities. On July 5, 2006, the Department of Transport in the United States issued a show-cause order proposing to withdraw antitrust immunity from the tariff-coordination meetings held by the International Air Transport Association (IATA). This initiative was spearheaded by the European Union and Australian competition authorities.

This paper reviews these recent developments. It begins by providing a historical background to IATA and its growth from 1946 to date in Part II. Part III provides an overview of IATA's tariff coordination conferences and interlining. Part IV and Part V discusses the theory of interlining and the effect of tariff coordination on competition. Part VI reviews the recent drive to end IATA's immunity by the European Union, Australia and the U.S. together with Canada's position on immunity. The final section provides a few concluding remarks.

II. IATA

1) Historical Background

IATA was founded in Havana, Cuba, in April 1945, however its origin can be traced to its successor the International Air Traffic Association founded in Hague in 1919 - the year of the world's first international scheduled service. Initially, it had a European dimension until Pan American joined in 1939.

At its founding, IATA had 57 Members from 31 nations, mostly in Europe and North America. Its aims which are reflected in its 1945 Articles of Association are: to promote safe, regular and economical air transport for the benefit of the peoples of the world, to foster air commerce, and to study the problems connected therewith; to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service; and to cooperate with the newly created International Civil Aviation Organization (ICAO - the specialised UN agency for civil aviation) and other international organisations.

In the earliest days, the most important tasks of IATA were technical (i.e., tasks related to safety and reliability) and legal. It accomplished this in part by providing

** The views expressed here are those of the author and are not purported to be those of the Commissioner or the Competition Bureau, Industry Canada.*

airline input to ICAO and by helping mesh international conventions through them and by providing vital input to the development of conditions of carriage and airline liability for passenger injury and or death and cargo damage or loss.

It also had to deal with other issues: who can fly where; what prices should be in effect; how should interlining revenue be divided; and how should debt between airlines be settled. It attempted to resolve them at the 1944 Chicago Conference but was not successful on the first two. The Conference led to the Chicago Convention of Dec. 7, 1944 which adopted two freedoms of the air (the right to fly over another country without landing and the right of a plane to stop for fuel or repairs only).

In 1946, the Bermuda Agreement was reached between the US and Great Britain at Hamilton, Bermuda. The 3rd and 4th freedoms granted the right to collect passengers or cargo in an airline's home country for flight to another country and to discharge passengers or cargo at another country's airport. The 5th freedom concerned the right of an airline to collect passengers or cargo at a location outside its home country and to fly them to a point further on, also outside the airline's home country. The US also agreed that IATA would set fares, subject to the two governments' approval.

In the next year, at the first Traffic Conference in Rio de Janeiro, a number of matters - relating to fare construction rules for multi-sector trips, revenue allocation, pro-rating rules, baggage allowances, ticket and air waybill design and agency appointment procedures - were resolved. In the same year, the Clearing House was set up and debt settlements of US\$26 million between 17 airlines were cleared.

2) The Growth and Development of IATA

International air transport grew at double-digit rates from 1945 to the first oil crisis in 1973. Much of this impetus came from aviation innovation which resulted in improved service and increased real incomes. The increased demand led to increase IATA activity. Technical work evolved into seven broad areas: avionics and telecommunications; engineering and environment; airport terminal requirements; flight operations; medical monitored health standards for crew; facilitation to speed flow of people and goods; and security.

Its philosophy in a number of areas has been to save money for the airlines while enhancing services, a philosophy carried over to many activities in the 1950s and 1960s. For example the introduction and development of the Clearing House, Billing and Settlement Plans, Cargo Accounts Settlement Systems, Universal Federation of Travel Agents and Federation of Freight Forwarders' Association. In 1952, the pattern for airline-agent relations was set up with the introduction of the Standard Agency Agreement which led to nearly 81, 000 agents worldwide.

IATA plays a special role because of taxes, user charges imposed by different

countries, transfer back of currency earned by airlines abroad, etc. It has also developed technical specification for unit load devices, dangerous goods regulations and live animal regulations.

The increasing demand for the “public utility” view of the industry due to increased demand for air services fuelled by competition required modification of the old basis for conducting IATA Traffic Conferences. Eventually, in October 1979, IATA was re-organized on a two-tier basis: Trade Association and Tariff Coordination. Since 1979, IATA has put an increasing share of its resources into Trade Association activities and much of its revenues is obtained through the marketing of its products and services to Member airlines. In 1994, IATA re-defined its mission and goals to meet industry needs.

III. Overview of IATA’s Tariff Coordinating and Interlining

1) Tariff Coordination

Tariff Coordination Conferences: IATA Tariff Coordination Conferences (TCC) are forums in which any IATA member airline can participate for the development of passenger fares and/or cargo rates on international aviation routes of relevance to the participating airline. The decision to participate in Tariff Coordination is an individual decision for each airline. At present, 136 out of more than 270 IATA member airlines belong to the TCC.

The TCC is divided into Passenger Conferences and Cargo Conferences. There are 14 TCC in total (further subdivided into 57 regions), consisting of seven Passenger Conferences and seven Cargo conferences. These 7 groupings are arranged on the basis of routes within and between three defined geographical regions. Three cover routes ‘within’ each of the three IATA Areas and the other four cover routes ‘between’ those Areas. The two sets of coordinating conferences have their own Steering Group to review and make recommendations to the Conferences on policy. It has 19 members. The Resolution Advisory Panel can suggest changes to IATA Passenger Tariff Conference Resolutions and recommend changes.

The aims, objects and purposes of Tariff Conferences are those of IATA. In addition: each passenger / cargo TCC shall concern itself with the analysis of relevant operating costs and take action to develop passenger fares /cargo rates and related conditions in respect of the area of authority of such Conference; and each composite meeting of passenger / cargo TCC shall take action on those matters and practices relating to fare / rate construction and currency rules (excluding one PTC), conditions of service, baggage allowance and charges, remuneration levels of recognized passenger sales intermediaries, and such other matters as may be referred to it by any passenger TCC / remuneration levels of intermediaries engaged in the sale and/or processing of international air cargo and such other matters as may be referred to it by any passenger TCC.

All actions by the TCC are in the form of resolutions. TCC resolutions fall into two broad categories: composite resolutions which have world wide applications and fares and rates resolutions which apply in relation to a specified region. These resolutions must be passed unanimously by member airlines present at the meeting of the Conference. Each adopted resolution contains a filing period which has to be submitted to governments before the beginning of the filing period. The newly adopted or amended resolutions and fares and rates table are issued by IATA. It is the responsibility of each member to determine if government approval is necessary. At the end of the filing period, IATA collates the information it has received before declaring it effective.

It is worthwhile noting that the TCC do not set fares or rates which airlines must charge nor do they enforce or police compliance of these (IATA) fares or rates. Its members only make their own independent decisions on the fares and rates they will offer subject to government approval if required.

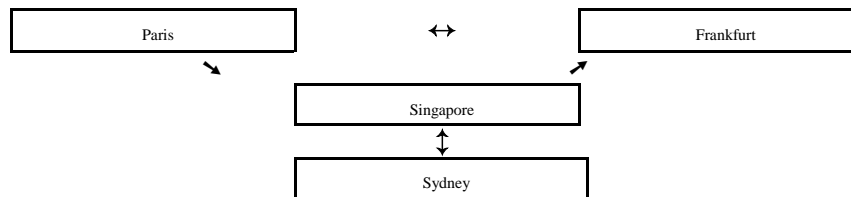
Benefits of tariff coordination - IATA's position: The key benefits of tariff coordination claimed by IATA are: 1) International obligations and comity benefits - Tariff coordination is often mandated by international agreements. The Air Services Agreements of many countries that belong to IATA require tariffs to be determined through the 'rate-fixing machinery' of IATA. Complying with its international obligations fosters international comity which is considered to be in the public interest. This also has indirect benefits such as playing a moderating role in establishing tariffs which have an effect on feeder traffic, preventing the balance of competing national airline interests being upset, and excluding smaller airlines which could act as a competitive pressure if tariff coordination were possible; 2) Through fares and rates - TCCs are the mechanism by which 'through' fares and rates are established. If the TCC forum were not available it is likely that an airline would offer a through rate only on its own services. Through fares and rates are of significant public benefit. It offers savings on the route compared to a sum of fares on individual segments of the routes. Further, if the airline were only able to offer a through fare or rate on a route where the airline was authorized under the Air Services Agreement it would likely severely limit choice and affect the economics of the airline (i.e., feeder traffic). Furthermore, without a through fare or rate, changes to an itinerary are time consuming and potentially costly; 3) A natural cap on prices - Fares and rates established through the IATA Tariff Coordinating Conferences are a natural cap on competitive market fares and rates. This is because IATA products are considered to be superior products since it provides for interlining. By establishing the fare or rate for a superior or premium product (i.e., fully interlineable ticket or waybill), a natural cap is placed on fares and rates generally, as it is unlikely that consumers will pay more for an inferior product; and 4) Other benefits - The TCC of IATA provide a neutral venue in which all potential interline partners serving a geographic region can work out

simultaneously acceptable origin-destination interline financial arrangements and various route combinations that can be sold. This thereby avoids complex and time consuming negotiations which lowers the cost of the product.

2) Interlining

Interlining: Interlining is a system by which passengers may travel on multiple airlines under a single contract on a single ticket, bought in a single transaction, using a single currency. Similarly, cargoes may be shipped on multiple airlines, under a single contract using one air waybill bought in a single transaction, using a single currency. The IATA Interlining System rests on four main pillars: 1) the multilateral interlining traffic agreement (MITA); 2) the IATA clearing House; 3) the IATA proration system; and 4) the IATA passenger tariff conferences.[1]

An illustration and description of interlining routes is shown hereafter. A passenger wishing to travel to Paris from Sydney could travel direct from



Sydney on Qantas with a stop in Singapore. With an interline ticket, the passenger has several options. He could travel by Qantas or Emirates to Singapore, change to Lufthansa or Singapore Airline for travel to Frankfurt and change to Air France for the final journey to Paris. On the return journey he could fly direct from Paris to Singapore and then to Sydney or go to Frankfurt on Lufthansa and travel to Singapore and then to Sydney on Singapore Airlines. Though interlining seems simple, the underpinning arrangements are quite complex involving the IATA: Passenger Agency System, Passenger Services arrangements, Scheduling System, Clearing House, Prorate System and Tariff Coordination.

How the prorate system works is briefly described. In its simplest form, it is shared on the basis of mileage (i.e., a 'straight rate prorate'). For example, suppose a passenger uses three airlines (A, B and C) for each of the segments from: Toronto-LA (3000 miles); LA-Sydney (7, 500 miles); and Sydney-Canberra (350 miles) for a total fare of \$2000. Then calculation of the fare for the last segment for airline C is: $\$2000 \times (350/10,850) = \64.52 . In its more complex form, it could involve consideration of regional cost factors (i.e., operation in high cost environments) and consideration of distance which are part of the multilateral prorate agreement. Interlining provides the rationale for airlines, to produce common standards and systems for reservations, tickets, waybills, passenger handling, baggage handling, cargo handling and data transfer that make interlining possible and efficient. It rests

on a number of commitments made by participants: acceptance of bookings for passengers and freight without questions; acceptance of tickets held by passengers and freight without question; acceptance of air waybills when freight needs to be transhipped between airlines; coordination of booking information and baggage handling; and commitment by the ticketing airline to pay booking costs and to reimburse airlines that actually carry the passenger or freight.

Benefits of interlining - IATA's position: The interlining system is a facilitative system which enhances consumer choice and gives airlines an efficient method of accessing a worldwide route network. The key benefits claimed by IATA are: 1) access to 'through' fares and rates - the 'through' fares provide consumers or shippers with a lower price than the sum of sector fares or cargo rates via any routing for the same journey in nearly all cases; 2) access to connecting services - the connecting services may or may not be online and may provide consumers with services that are more synchronized to meet their needs such as better frequency, lack of service, time sensitivity of cargo, etc.; 3) flexibility for time-sensitive passengers - the provision for ticket changes, cancellation, open returns, airlines changes, route changes and addition or deletion of points which provides passengers with choice; 4) flexibility for time sensitive cargo - the connection to world markets, choice of airlines and routes and smooth transfer of cargo provides shippers with choice; 5) lower transaction costs - the multilateral system results in lower costs than would result in a bilateral system. This together with the opportunity to consolidate cargo translates to lower costs and lower prices to passengers and shippers; 6) opportunity for smaller airlines to compete - the access to the IATA network allows smaller airlines to compete or remove any competitive disadvantage by allowing them greater scope in the origin/destination pairs they serve and greater density in the routes they serve from feed network traffic; 7) expanded route networks - the possibility of interlining allows all airlines small and big to expand their networks greatly expanding choice and consumer welfare; 8) universality - the IATA interlining system is universal providing access to a worldwide network which no single airline or group dominates; and 9) efficient use of assets - the interlining system enables airlines to achieve greater utilization of their aircraft and airport infrastructure, as a result, less aircraft are needed, less fuel is consumed and the impact on the environment is reduced.

IV. Interlining - Theory

The theoretical reason underpinning the effect of airline cooperation on fares is briefly described. Suppose airline 1 provides service between markets A and B and airline 2 provides service between markets B and C and together they provide interlining service between markets A and C. Assume that the segments AB and BC are of the same length and there are constant returns to scale with the cost per passenger on each segment equal to a constant c for both airlines. Further, let q_{AC} denote total traffic in market AC and let p_{AC} denote the interline fare for service in

this market, so that $q_{AC}=D(p_{AC})$, where $D(\cdot)$ is the travel demand function. Two types of fare setting behaviour are possible here: non-cooperative and cooperative.

In the *non-cooperative market*, the two airlines charge their own fares p_{AB} and p_{BC} independently for the market segments AB and BC with the total fare for the market segment AC equal to $p_{AC}=p_{AB} + p_{BC}$. The optimal fares for the two market segments are less than the fares for the market segments AB and BC which are set independently. If this were not true, the passenger would be better off purchasing separate AB and BC tickets to travel between A and C.[2] Airline 1's profit in this non-cooperative case is given by

$$(p_{AB} - c) D(p_{AB} + p_{BC}) \quad (1)$$

The airline chooses p_{AB} to maximize equation (1), viewing p_{BC} as parametric in Nash fashion, and the first order condition can be written as

$$D/(\delta q_{AC}/\delta p_{AC}) + p_{AB} = c \quad (2)$$

Since the fares in each segment are equal in Nash equilibrium, each segment fare is equal to $p_{AC}/2$, this can be re-written as

$$\begin{aligned} D(\delta p_{AC}/\delta q_{AC}) + p_{AC}/2 &= c \text{ or} \\ 2q_{AC}(\delta p_{AC}/\delta q_{AC}) + p_{AC} &= 2c \end{aligned} \quad (3)$$

i.e., multiplying by 2 and substituting q_{AC} for D .

In the *cooperative market*, the two airlines set their fares cooperatively, setting the overall fare in the market to maximize their total profit. Because the carriers split the interline fare their combined profit equals

$$2(p_{AC}/2 - c)D(p_{AC}) \quad (4)$$

Maximization of (4) results in

$$q_{AC}(\delta p_{AC}/\delta q_{AC}) + p_{AC} = 2c \quad (5)$$

In other words, marginal revenue from an additional passenger in market AC should equal marginal cost, which is the cost of carrying a passenger on 2 route segments.

Since $\delta p_{AC}/\delta q_{AC} < 0$, a comparison of the equations (3) and (5) indicates that p_{AC} will have to be higher in (3) than (5) since it is multiplied by 2 in (3). **In other words, the interline fare is higher in the non-cooperative case than in the cooperative case providing the rationale for cooperative interlining.** "The intuitive reason is that, with non-cooperative behaviour, each airline ignores the negative effect on the other airline's profit from an increase in its own subfare. This effect arises because a higher subfare raises the overall fare, depressing traffic in the market. Because of the resulting externality, each subfare is set too high, leading to an overall fare that is excessive. Cooperative behaviour, however, internalizes the externalities, so that a lower fare is chosen. Because an interline trip is joint product of the two airlines, the inefficiency of non-cooperative pricing echoes standard results for such a market setting."[3]

V. The Effect of Tariff Coordination on Competition

Any contract, arrangement or understanding between competitors, including international airlines, has a potential to adversely affect competition. IATA

acknowledges this, but claims that this is not the relevant test and the factors that need to be considered in assessing competitive effects are: the structure of the market; the competitors and potential competitors; the behaviour in the market (i.e., vigorous competitors); and the effect of the conduct. These factors are examined.

The structure of the market: The structure of the market provides a clue whether the market is likely to be competitive or constrained. IATA submits indicators of competition such as a reasonable number of airlines, a range of competing services, a range of competing prices and a brand name promotion or active marketing should be considered. These indicators, however, do not necessarily provide an indication of competition as they are not necessarily objective as pointed out by the Australian Competition and Consumer Commission (ACCC). For instance, the number of airlines do not provide an indication of competition if these airlines operate on different routes, similarly a range of services generally is not indicative of services on particular routes. Further, a comparison or review of fares at a 'point in time' fails to capture the changes of fares 'over time' and the extent to which IATA fares are used as benchmarks in determining market or non-IATA fares which result in lessening competition.

The competitors and potential competitors: The number of competitors and potential competitors is significantly restricted by the nature of the international regulatory regime (i.e., bilateral agreements determine the number of airlines on a particular route) to begin with. Further, the need of these same airlines to be both competitors on some routes and to cooperate on others adds to the complexity of assessing competitive effects. Nevertheless, the potential to compete is enhanced by interlining and tariff coordination according to IATA, however, it should be noted that other means to enhance competition in varying degrees also exist such as alliances and code sharing.

The behaviour in the market (i.e., vigorous competitors): The sharing of information and knowledge on costs and other factors at TCC meetings could be conducive to coordinated conduct in relation to market fares and this would not be in the interest of competitive air markets. The ACCC in its discussion paper indicated that this was a matter of concern and could result in a lessening of competition. The agreed fares could be used as a benchmark for market fares, a basis for discounting and a basis for the setting of fares for code sharing. Further, it has the undesirable effect of not promoting efficiency, since the prices agreed upon would cover the costs of the least efficient carrier. Furthermore, it could extend beyond the agreement on fares to fixing surcharges and ancillary costs such as fuel surcharges, excess baggage charges, etc.

In its comments to the European Commission (EC) on the Restrictive Effects of the IATA Tariff Conference System, Charles River Associates (CRA) concludes that information exchange between carriers within the IATA conferences is unlikely to

facilitate tacit coordination between the airlines, notwithstanding that both business class travel and cargo are not conducive to such coordination in the first place. The EC indicates that there is no disagreement on the well accepted theoretical framework of the market conditions that would facilitate collusion set out by the CRA. But how it is applied is troubling. 1) It does not discuss that IATA fare could serve as a focal point for price determination. 2) It assumes that the industry mostly offers differentiated products. The number and quantity of products offered should not be overblown. 3) The punishment mechanism is not fully analyzed.

The effect of the conduct (i.e. is competition retarded or enhanced): The effect of conduct can be found according to IATA by correlating IATA fares with non-IATA fares. The evidence put forth by IATA finds no correlation. Based on this finding (determined from a single point in time comparison) they conclude that airlines are offering competitive fares. The ACCC believes that any correlation between changes in IATA fares and market fares would only be evident in a longitudinal analysis (i.e., an analysis of movements over time). Their analysis indicates that IATA Tariff Coordination leads to a lessening of competition between airlines when setting their own non-IATA fares for travel on point to point routes, especially for travellers purchasing first class tickets, business class tickets and economy class tickets in higher fare categories.[4]

CRA states that as a matter of theory [on product differentiation], it is probable that there will be some interaction between IATA and carrier fares, but it is not necessarily the case that it will result in increased prices and even if it does it cannot be assumed that it is anticompetitive (demand interaction is pro-competitive).[5] While the EC acknowledges that the CRA exposition on theory appears to be correct, it is unclear how the theories exposed in the paper apply to the facts. Further, it does not substantiate important assumptions (eg. perfect competition) underlying the theory or tackle important elements of the IATA conference system. Furthermore, it should have been more cautious in drawing too many inferences from limited data.

VI. Competition Authorities Drive to End IATA's Immunity

Antitrust immunity to IATA tariffs was a by-product of the Air Service Agreement signed between the United Kingdom and the United States in 1946, when as a concession to the United Kingdom, United States agreed to approve tariffs determined by IATA. This privilege was enjoyed unchallenged for more than three decades until 1978. Events leading to the challenge in the 1970s, the initial attempt by USA to end the immunity in 1978, Australia's challenge to the immunity, EU's challenge to the immunity, followed by the removal of the exemption in the USA, Australia and the EU, will be briefly described. Thereafter, the Competition Bureau's position on IATA agreements will be indicated.

1) Events leading to the challenge

By the mid 1970's, the United States was faced with increasing pressure to reconsider its position on North Atlantic routes. IATA fares were significantly higher than other fares and the failure of IATA to agree to lower its prices led to a great deal of criticism of IATA. "In 1963, a total of 2.88 million passengers were carried on North Atlantic routes, of which only 16 percent were charter passengers. Non-IATA charter operators -- such as Wardair -- held 2 percent of the total market. By 1971, 10.75 million passengers were carried on North Atlantic routes, with 30 percent of the total being charter passengers. Non-IATA charter operators accounted for 20 percent of the total market." [5] Further, "as a result of these competitive pressures, it was becoming increasingly difficult to enforce IATA tariffs and conditions of service. Some IATA members were themselves forced to break the rules. The public, the press and consumer groups in particular increasingly attacked the restrictive nature of bilateralism which prevented lower-cost airlines entering new markets and which appeared to protect high-cost airlines and the high fares they imposed." [6] United States was also in the midst of liberalizing international air transport. In early 1978, it issued a statement entitled 'Policy for the Conduct of International Air Transportation'. The latter proclaimed that America will endeavour to "trade competitive opportunities, rather than restrictions ... and pursue our interests in expanded air transportation and reduced prices." [7] Its DOT officials made it clear that the new policy signaled the denunciation of Bermuda II. [8]

2) The initial and latter attempts by the USA to end the antitrust immunity in 1978 Under its pro-competitive international air transport policy approach, US authorities questioned whether international airline activities and in particular certain IATA tariff coordination and agency arrangements should be exempted from anti-trust prosecution. This resulted in a 'Show Cause Order' directing IATA to show why the CAB should not rule that its international tariff agreements are no longer in the public interest and therefore should be disapproved. In other words, why anti-trust immunity should not be removed from IATA's Tariff Coordination activities.

IATA's immediate reaction was to accuse the United States that it was forcing American anti-trust laws on to the rest of the world. Eventually, it agreed to restructure and did so on October 1979. IATA activities were then regrouped on a two tier basis under: trade association covering technical, legal, baggage, clearing house and ticketing functions; and tariff co-ordination covering passenger fares, cargo rates and related conditions and charges. The outcome mainly affected North Atlantic passenger fares which, for some years, were subject to special rules under an inter-governmental MOU between the US and the ECAC states.

All Tariff Coordination activities continued to be protected. However, as a condition of approval and continued antitrust immunity for the provisions of the conduct of the IATA Conferences, the US Department of Transportation required that all Traffic Conference resolutions be submitted to it for prior approval and

grant of anti-trust immunity, regardless of whether those decisions have any direct connection, or impact on US commerce.[9] In 1979 the US *International Air Transportation Act* was passed [10]. Nearly 25 years later in July 2006, the US DOT issued a show-cause order proposing to withdraw the anti-trust immunity.

3) Australia's challenge to the immunity

Beginning in November 2002, the Australian Competition and Consumer Commission (ACCC) started re-assessing the immunity (which was granted in 1985 for all its activities outside travel agents) following lodgment by IATA of an application for review. The ACCC produced a series of discussion papers each examining specific components of IATA's conduct.

The *Discussion Paper IATA Tariff Coordination: Passengers* examined the public benefits and the anti-competitive detriment associated with IATA Passenger Tariff Coordination. It indicated that there are two key issues relevant to the assessment of public benefits: the need for interline fares; and the incidence of sale and utilization of IATA interline fares.

Regarding the former, greater destination access has occurred as a result of the combination of the liberalisation of air services agreements, expanded individual airline networks, airline alliances and code sharing, marketing alliances, special prorate agreements, and low cost carriers. For these reason, the ACCC considers that since the authorization of IATA's Tariff Coordination activities in 1985 there has been a substantial reduction in the number of offline destinations that can be reached by travellers using IATA interline fares. It also believes that there has been a significant reduction in the need for travellers to seek flexibility through purchasing IATA interline fares.[11] Regarding the latter, the data provided by IATA indicates that 18% of the full Economy Y Class fares are interlineable tickets, however, these estimates are not consistent with submissions and comments made which indicate that the sales of such tickets are far below it. Further, for price sensitive leisure travellers, the price of interline fare is simply uncompetitive relative to the discount market fares. For these reasons, the ACCC believes that very few interline fares are sold for economy class travel for the purpose of either undertaking travel to offline destinations for gaining travel flexibility. It also acknowledges that interline fares are rarely purchased by leisure passengers.[12]

On June 30, 2005, the ACCC issued a *News Release* on the Discussion Paper. "The discussion paper identifies areas of competition concern in relation to IATA's coordination activities." [13] In particular, concerns about: sharing market knowledge at the TCC, agreeing on fares by competing airlines, and agreeing on fare conditions were raised. It also raised concern about: the lack of regard for air services arrangements; the extent of multilateral interlining today; the increase in the purchase of non-IATA fares; and the increase of destination access. In light of this, the release questions the extent of public benefits claimed by IATA.

4) European Union's challenge to the immunity

IATA enjoyed explicit antitrust immunity in the EU since the 1993 block exemption was granted under Article 81(3) of the Treaty allowing airlines within the EU to consult on scheduled interlining passenger tariffs (Commission Regulation (EEC) No 1617/93). The challenge to the immunity first began with a narrowing of the scope of the regulation [14].

In February 2001, *DG-Competition Consultation Paper IATA Passenger Tariff Conferences* was released describing the IATA passenger tariff conferences together with their perceived effects. It presented an assessment of the various policy options. These options are: (1) to refuse an exemption and to oblige IATA to end the tariff conferences; (2) to grant an exemption for the conferences either in their current form or subject to certain modifications; and (3) to impose an obligation to interline by Regulation. On June 25, 2002, the Commission renewed the block exemption for the IATA passenger tariff conferences until June 30, 2005 (EC No. 1105/2002) with a data collection obligation on the actual use of agreed tariffs. The reason for the adoption was benefits to consumers.[15]

On June 24, 2004, *DG-Competition First Consultation Paper Concerning Commission Regulation 1617/93* was released in light of the forthcoming expiry of Regulation 1617/93 on June 30, 2005. Its purpose was: to identify the main issues that are pertinent for the revision, possible prorogation and extension in scope of the Regulation; and to consult and gather information from interested parties with a view to conduct the competition assessment of the issues identified. The paper analyzed the IATA tariff conferences in terms of their restrictive effects and the potential benefits from passenger and cargo to pass onto the networks of different airlines in the context of the IATA multilateral system. The DG Competition took the preliminary view that the TCC actually restricts competition. The reasons for their views were: the effect of IATA agreed fares on non-IATA fares; and the exchange of cost and other information which facilitates tacit coordination reinforcing the restrictive effect flowing from the previous consideration. The paper elicited a mixed response.[16]

A few months later, *DG-Competition Consultation Paper Concerning Commission Regulation 1617/93* was released in March 2005 in response to submissions of the earlier paper. It discusses: the available data, the evidence regarding IATA passenger tariff conferences; and the views of the submissions. On November 16, 2005, the Commission proposed to revise the block exemption for IATA passenger tariff conferences. The draft regulation would discontinue the exemption for passenger tariff conferences for routes **within** the EU as of January 1, 2007 with a transitional period to the end of 2006. For routes between the EU and non-EU countries, the draft regulation proposed an exemption until June 30, 2008 on the condition that the participating airlines provide the Commission with data. The

basic reason for the proposal was lack of sufficient assurances of benefit to interlining passengers.[17]

5) The end of the exemption in USA, Australia and the EU

The foregoing developments led to the end of the antitrust exemption in USA, Australia and the EU. The first to withdraw the exemption was the EU followed by Australia and then the USA.[18]. In sum, the reason for an end to the withdrawal of immunity was because it was no longer in the public interest due to changes in international aviation services. The growth of international airline alliances enabled airlines to establish interline fares without IATA conferences, making the pricing conferences unnecessary. More importantly, was the possibility of enhancing competition and providing lower fares.

6) The Competition Bureau's position on IATA agreements

IATA agreements and the industry agency programme conducted under the auspices of IATA or the TCC are not exempt from the application of the provisions of the *Competition Act*. There appears to be some documentation why this is so.

IATA made a submission to the House of Commons Committee on Finance, Trade and Economic Affairs, Canadian Competition Reform on Bill C-42 (when the Act was being amended). The submission stated "*Prima facie*, the IATA agreements on which individual tariff filings are based are likely to constitute offences in relation to competition under the *Combines Investigation Act* as it now stands. Clause 5, Section 4.5 of Bill C-42 attempts to rectify this. However, in IATA's submission the exemption clause is deficient." [19]

The Competition Bureau's overall view was that "Another class of exemptions would be service activities covered by regulatory laws. Services such as ... would continue to be immune from the legislation to the extent that their activities were regulated or expressly authorized by law. This immunity is not stated in the Bill, but stems from judicial interpretation." [20] In the words of Mr. De Melto of the Competition Bureau before the House Committee on Finance, Trade and Economic Affairs "What we are saying is that these agreements should be exempted if there is a proper regulatory authority reviewing them and making sure that they are in the public interest, ... if the regulatory board is looking at these ... then we have no problem and the act would not apply." [21]

However, IATA's position was that there was very little case law on the matter and it was doubtful whether the agreements reached within IATA would be immune. Given that the CTC merely passed on tariffs submitted by individual carriers. Further, even if the CTC did have jurisdiction to require or authorize such agreements, IATA agreements might still be challenged" [22]

It therefore urged the House of Commons Committee 1) to recommend that the proposed amendments to the competition law should clearly exempt agreements

affecting air transportation from the application of the *Competition Act*; and 2) to recommend that such an exemption be in the terms of that approved by the Standing Senate Committee on Banking, Trade and Commerce in 1975.

The 1976 and later amendments to the *Competition Act* did not provide for any explicit exemption to these IATA agreements. The reasons for this are: the *Competition Act* is a law of general application; the IATA agreements include matters beyond air fares and tariffs; the IATA agreements are only required to be filed and the regulatory agency does not regulate them; the Bureau does not want to extend the scope of the exemption to other industries (eg. travel industry etc.).

Unlike the other jurisdictions, Canada has never granted IATA agreements an explicit exemption from its competition laws, though IATA requested one.

VII. Concluding Remarks

IATA was founded in Havana, Cuba in 1945. When it was formed it was the prime vehicle for inter-airline cooperation in promoting safe, reliable, secure and economic air services for the benefit of air travelers. Its philosophy in a number of areas has been to save money for the airlines while enhancing services.

The two activities of IATA that have attracted the most attention are tariff coordination and interlining. The first formed the basis for setting fares in bilateral agreements that were subject to the approval of the regulatory agency of each country, at least initially. IATA claims that tariff coordination results in a number of benefits such as: international obligations and comity; through fares and rates; price capping; etc. The second formed the basis of seamless travel, on a single ticket, bought in a single transaction and currency. Interlining rests on four pillars: the multilateral interlining traffic agreement, the IATA clearing House, the IATA proration system and the IATA passenger tariff conferences. IATA claims that interlining provides numerous benefits such as: through fares and rates; access to connecting services; flexibility of service; expanded route service; etc.

After IATA was founded, its tariff coordination activities were granted an explicit exemption or immunity from the competition laws by the major jurisdictions in the US, EU and Australia based on the belief that it was in the public interest. Interestingly, Canada never granted IATA agreements an explicit exemption from the competition laws. Exemption, if any, could arise from a judicial interpretation of the regulated conduct defence. However, it is this author's opinion that currently this exemption would not be granted, though it is ultimately the Court's decision. Thirty-five years later, this exemption began to be continually challenged based on an increasing demand for a 'public utility' view of the industry fueled by competition concerns. The recent initiative to end IATA's exemption is based on the belief that the benefits obtained through tariff coordination could be secured by less restrictive means. As a result, competition authorities of the major jurisdictions have tentatively determined to end or reduce IATA conferences' immunity from

their own competition laws for certain areas. This is hardly surprising, given that price fixing and market sharing have been unanimously denounced by most countries in nearly all industries.

In the final analysis, such an exemption like the liner shipping conference exemption no longer makes sense, especially at a time when countries all over the world are turning to competition as the best hope for economic prosperity.

Bibliography/Endnotes

1. Multilateral Interlining Traffic Agreement binds signatory airlines to issue and accept each others tickets on a reciprocal basis according to the fares and conditions set by the carrying airline. The Clearing House is meant to settle world airline's interline billings. The Proration system provides a scheme for dividing interlining revenues generated by an interline ticket for carriage.
- TCC are conferences in which non-binding prices for international journeys involving interlining all over the world are agreed. See DG Competition Consultation Paper, Concerning the revision and possible of Commission Regulation 1617/93, June 2004.
2. Brueckner, Jan K., International Airfares in the Age of Alliances: the Effects of Codesharing and Antitrust Immunity, *Review of Economics and Statistics*, February 2003, Vol. 85, No. 1, p. 107.
3. Id.
4. *IATA Tariff Coordination: Passengers*, Discussion Paper, A908553, p. 44.
5. Bonsor, Norman., *Transportation Economics, Theory and Canadian Policy*, Butterworths, 1984, p. 63.
6. Doganis, Rigas, *The airline business in the twenty-first century*, Routledge, 2001, p. 23.
7. Hearings before the Subcommittee on Aviation of the Committee on Commerce, Science and Transportation, United States Senate (95th Congress Second Session 1978 on S. 3363) pp. 19-20.
8. Bermuda I and II are the air services agreement signed between UK and the US. Bermuda I granted each party five freedoms of the Air. Bermuda II signed in 1977 was a result of breakdown of Bermuda I A few months later US adopted the *Airline Deregulation Act* deregulating domestic air transportation.
9. *IATA Tariff Coordinating Conferences & Interlining, Submission in Support of Application for Re-Authorization, to the ACCC*, p. 49. Anti-trust immunity was withdrawn from IATA's agency programmes, and though airline tariff coordination on the North Atlantic, which was formerly given anti-trust immunity was now subject to a continued existence of an understanding between the US and Member States of the ECAC.
10. To obtain anti-trust exemption, agreements have also to be approved under section 414 of the *International Air Transport Act of 1979*. It promulgated three categories of goals: multiple carrier designation with permissive route authority without capacity and frequency restrictions; fare flexibility; and elimination of discrimination and unfair competitive practices against American carriers.
11. *IATA Tariff Coordination: Passengers*, Discussion Paper, A908553, p. 66 and p. 68
12. Id., p. 72 and p. 74.
13. ACCC raises concerns at agreement of international interline fares between airlines, ACCC, Release # MR 166/05, June 30, 2005.
14. The regulation was amended in 1996, '99, '01, and '03 resulting in a narrowing of the scope of the exemption.
15. Those consulted "held the view that the IATA passenger tariff conferences secures an important benefit for consumers and that the benefit is, at the present stage, unlikely to be replicated by any alternative, less restrictive system." *Commission renews block exemption for the IATA passenger tariff conference*, IP/02/2002, June 25, 2002. It is worthwhile noting that in contrast to the decision on passenger tariff consultation, the Commission took the preliminary view that IATA cargo tariff consultations infringe competition rules on May 15, 2001 and on October 19, 2001 IATA agreed to end the joint setting of cargo rates within the EEA. See IP/01/694 and IP/01/1433.
16. "While airlines favour a prolongation of existing exemptions, corporate customers and travel agents do not." Competition: Commission consults on future of IATA passenger tariff conferences, Press Release, IP/05/289, March 14, 2005.
17. Competition Commission proposes to revise Block Exemption for IATA passenger tariff conferences, IP/05/1432, Nov. 16, 2005.
18. In the EU, the Commission adopted a Block Exemption Regulation on October 2, 2006. For routes within the EU, and between the EU and the US or Australia, tariff conferences will no longer be exempted as of January 1, 2007, and June 30, 2007, respectively. The exemption on routes between EU and other non-EU countries will also end on October 31, 2007. The ACCC then issued its determination on November 9, 2006 providing "for the phased removal of the current immunity covering most of IATA's program within the next twenty months." On March 30, 2007, the DOT issued its final order and revoked antitrust immunity from meetings held by IATA for US-Europe and US-Australia flights as of June 30, 2007 following a show-cause order issued on July 5, 2006.
19. Brief Submitted by International Air Transport Association to HOC Standing Committee on Finance, Trade and Economic Affairs, Canadian Competition Reform, Bill C-42, Issue 54A:9, 9-6-1977.
20. Proposals for a new Competition Policy of Canada - Bill C227, pp. 26-27.
21. Minutes of Proceedings and Evidence of the 4th Standing Committee on Finance, Trade and Economic Affairs, House of Commons, Issue No. 54, June 9, 1977, pp. 29-39.
22. See footnote 18.