

# COELUM

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The Air Services Agreement between the European Union and Mexico: A Coup de Grace to the Mexican International Operators?

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COELUM Pronunciation: 'che-l&m, is Latin for airspace or sky. The Romans began questioning the rights they had in the space above the land they owned and to how high above did that right extended to. Ad coelum et ad inferos, they discussed, meaning that their right of property would extend as high up to the heavens and down to hell.

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# The Air Services Agreement between the European Union and Mexico: A Coup de Grace to the Mexican International Operators?

by *Misael Arellano*.

Perhaps it is not required that this author refers to the several hits given to the Mexican international operators recently, but there are some events that definitively have shocked, jeopardized and affected Mexican international aviation. Hits like the FAA's downgrading to Category 2 because the failure to be in compliance with the international safety standards set by the International Civil Aviation Organization (ICAO) following an assessment of the Mexican Civil Aviation Authority (DGAC); the swine flu pandemic that scared away international passengers for several months in 2009; and the closure of Mexicana de Aviación that produced an increase of sales to foreign operators instead Mexican carriers because the passengers' fear of being affected by a suspension or flights cancellations of Mexican airlines based on the Mexicana experience. Now however there is one more issue that probably will affect Mexican carriers flying to countries in the European Union (EU): The agreement on certain aspects of air services between the European Union and the United Mexican States (the Agreement), done at Brussels on December 15, 2010.

## **The Agreement.**

“...the Agreement will modify certain provisions of the thirteen existing bilateral air services agreements, without affecting existing traffic rights..”

The Agreement, published in the Official Journal of the European Union on February 12, 2011, had regard and affect to the provisions of the twelve working bilateral air service agreements and one that have not yet entered into force at the date of its signature; and consist in 8 Articles and 3 Annexes. The Agreement will enter into force thirty days after the date of the last exchanged diplomatic note with the Parties providing written notification, via diplomatic channels, that their respective internal procedures necessary for that effect have been concluded. In Mexico this has not yet occurred.

Article 1 refers to nationals and carriers from a member states of the EU; and states that the Agreement will modify certain provisions of the thirteen existing bilateral air services agreements, without affecting existing traffic rights.

The main clauses are in Articles 2 and 3, which will supersede the provisions stated in the thirteen executed agreements. Article 2 - in respect to the designation of an air carrier by a

member state of the EU, authorizations and permissions granted by Mexico, and the refusal, revocation, suspension or limitation of the authorizations or permissions of the air carriers and Article 3 - Safety issues applicable when a member state of the EU has designated an operator whose regulatory control is exercised and maintained by another member state of the EU.

The Agreement also includes competition rules declared on Article 4 which states that any provisions contained in the thirteen bilateral agreements that are incompatible with the competition rules shall not apply; Article 5 refers to the Annexes to the Agreement, which shall form an integral part thereof; Article 6 declares the applicable rules for revisions and amendments; Article 7 describes the procedure to be followed to become the Agreement or revisions/amendments duly enforceable between the Parties; and finally, Article 8 states that in the event of the termination of any of the bilateral agreements involved, all provisions of this Agreement relating to the referred agreement shall terminate simultaneously, and in the event of the termination of the thirteen involved agreements, the Agreement shall terminate as the same time as the last of those agreements.

### **The Lethal Weapon.**

“...the Agreement will open the door to fulfill and designate as many European carriers as possible to operate to and from Mexico all routes and frequencies as the thirteen bilateral agreements allow...”

The principal reason for the Agreement is to establish the criteria to designate an air carrier as an EU air carrier so as to be able to be designated by any member state of the EU and grant in its favor the applicable traffic rights stated on the specific bilateral agreement executed with Mexico.

Article 2 of the Agreement states that the DGAC, upon receipt of a designation by a member state of the EU, shall grant the relevant authorizations, permissions and required confirmation of notified designation, for the applicability of one of the thirteen involved bilateral agreements without discrimination if:

- I. The air carrier is established in the territory of the designating member state of the EU under the Treaty on the European Union and the Treaty on the Functioning of the European Union and has a valid operating license in accordance with the law of the European Union; and

II. Effective regulatory control of the air carrier is exercised and maintained by the member state of the European Union responsible for issuing its Air Operator Certificate and the relevant aviation authority is clearly identified in the designation; and

III. The air carrier is owned, directly or through majority ownership, and is effectively controlled by member states of the EU or nationals of such countries or by nationals of The Republic of Iceland, The Principality of Liechtenstein, The Kingdom of Norway (under the agreement on the European economic area), or The Swiss Confederation (under the agreement between the European community and the Swiss Confederation of Air Transport), or nationals of those other countries.

With the aforementioned, the Agreement will open the door to fulfill and designate as many European carriers as possible to operate to and from Mexico all routes and frequencies as the thirteen bilateral agreements allow; which obviously means that in the very near future Mexico will be connected with twelve member states of the EU, but unfortunately not by Mexican carriers.

### **The Concerns.**

“Is sadly evident that negotiations on the Agreement were performed without taking into account the real requirements and the current situation of Mexican international aviation.”

Based on the agreed aspects of the Agreement, it is a fact that 30 days after the date of the last note with which Mexico provide the written notification, via diplomatic channel, informing the EU that its respective internal procedures have been concluded; which by this date the only unsolved procedures are the promulgation decree and its publication in the Mexican Official Gazette; all carriers from the twelve countries involved in the Agreement, will be fully able to be designated by any other state member of the EU and obtain the traffic rights agreed on the specific bilateral agreement executed with Mexico.

The aforesaid involves several issues that must concern the Mexican intercontinental carriers, and the Mexican Aviation Authority. If we focus our analysis just on the passenger services we will observe some relevant aspects that have to be studied before the Agreement is enforced.

Based on the information published by the General Directorate of Civil Aviation (DGAC) about the operational statistical reports between Mexico and other countries , there are fifteen air

1.- [http://www.sct.gob.mx/uploads/media/Stats\\_by\\_country\\_eng\\_Apr\\_2011.pdf](http://www.sct.gob.mx/uploads/media/Stats_by_country_eng_Apr_2011.pdf)

carriers transporting passengers between twelve cities in seven of the twelve member states of the EU which are related to the thirteen bilateral agreements affected by the Agreement; and just one Mexican carrier transporting passengers to just three cities in France and Spain. This begs the following questions:

1. How just one Mexican air carrier could compete with the potential number of air carriers that could be designated, taking into account that all member states of the EU will be able to grant the traffic rights stated in its specific bilateral air service agreement to any other member state of the EU?
2. How the DGAC, with its poor performance and inefficient procedures will survey the applicability of the Agreement regarding Safety where a member state of the EU has designated an air carrier whose regulatory control is exercised and maintained by another member state of the EU?
3. The Agreement states that its rights under the safety provisions of the agreement between the member state of the EU that has designated the air carrier shall apply equally in respect of the adoption, exercise and maintenance of safety standards by the other member state of the EU and in respect of the operating authorization for that air carrier; so that means that it is probable that the DGAC will be required to survey, for the application of one bilateral agreement, the safety provisions and requirements stated on two or more bilateral agreements.
4. In respect with the provision stated in Article 4; how will the DGAC determine when a bilateral agreement executed with a member state of the EU is favoring the adoption of agreements between undertakings, decisions by associations of undertakings or concerted practices that prevent or restrict competition?

Is sadly evident that negotiations on the Agreement were performed without taking into account the real requirements and the current situation of Mexican international aviation. All bilateral agreements are supposed to be for the benefit, the growth and promotion of all parties, not just to one of them. After analysis of above clauses, this author did not see any regulation that would be of assistance to Mexican international aviation.

# United States Registration of Aircraft under Ownership Trust Agreements.

by *Samantha Garnica, Vera García and Jessi Saba*

There are several forms accepted by the Federal Aviation Administration (“FAA”) through which aircraft may be registered, especially when it comes to the registration of foreign ownership interests in the U.S., according to Title 49 of the United States Code, section 44103, which establishes the following:

*“An aircraft may be registered when the aircraft is:*

*a) Not registered under the laws of foreign country and is owned by:*

*i) A citizen of the United States;*

*ii) An individual citizen of a foreign country lawfully admitted for permanent residence in the United States.” (“Resident Alien”).*

Non-citizens must comply with other acceptable methods of registering aircraft in the U.S. by meeting U.S. Citizenship requirements. The same disposition mentioned previously, defines a Citizen of the U.S. in three different manners:

*a) An individual who is a citizen of the United States; or*

*b) A partnership each of whose partners is an individual who is a citizen of the United States; or*

*c) A corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.*

*“Non-citizens must comply with other acceptable methods of registering aircraft in the U.S. by meeting U.S. Citizenship requirements.”*

There are three different methods accepted by the FAA:

1. Through a foreign corporation: When at least 60% of the total flown hours of the aircraft are within the United States.

2. Through a voting trust: Described previously in section c) with reference to Title 49 of the U.S. Code, section 44103.
3. Ownership Trusts: This figure consists basically on transferring the title to a U.S. Citizen to hold the trust for the sole benefit of the Non-Citizen. The Non-Citizen beneficiary will maintain operational control of the registered aircraft. As for the trustee, it can be either an individual or a corporation, as long as it meets the Citizenship requirements. The FAA recognized this instrument as a legitimate way of satisfying the requirements for Citizenship.

For the purpose of this article we will focus specifically on the “ownership trust”, a figure that has been very controversial for the past couple of months.

The FAA, which has a long history of registering aircraft under ownership trusts, imposes some additional requirements and limitations with respect to the power of the beneficiaries to limit the trustee’s authority or to direct or remove a trustee. More specifically, under this kind of agreement, where there can be either one or more non-citizen beneficiaries, the FAA requires that they cannot own more than 25% of the aggregate or voting power to direct or remove the trustee, but they can own more than 25% of the beneficial interest. In order to prove this, an affidavit must be submitted.<sup>1</sup>

This very controversial figure has caused the FAA to issue several interpretations of its regulations in order to avoid possible “citizenship simulation” that can be presumed from the ownership trust agreements. For this reason, in May 2010, the FAA imposed a brief moratorium on the issuance of the opinions regarding aircraft registration under trusts with non-citizen beneficiaries. But, after a joint industry response, on May 13, 2010, FAA Chief Counsel David Grizzle, announced that the moratorium had been lifted. However, he also announced that the FAA will continue to review this issue very carefully in order to ensure the compliance with the law.

The FAA issued various interpretations of its regulations regarding the relationship and interaction between a trustee and a non-citizen beneficiary, all confirming that “*there can be no other relationship between the trustee and the beneficiary other than that created by the trust*”.<sup>2</sup> Also in order to clarify the interpretation and application of the FAA regulations, the FAA is seeking a public discussion to solicit some recommendations from interested members of the public regarding the use of ownership trust agreements with non-citizen beneficiaries.

1.- Federal Aviation Regulations (FAR), pt. 47,, 47.7 (c)(2)(iii) and 47.7 (c)(3).

2.- Federal Register/Vol.76, No. 80/Tuesday, April 26, 2011/Notices

...“there can be no other relationship between the trustee and the beneficiary other than that created by the trust”.

The public meeting will be held on June 1, and after consideration of the comments received from the public, the FAA will advise what action will take regarding the above matter. Some of the questions which they hope to resolve are the following:<sup>3</sup>

- What are the appropriate obligations to impose to the trustees under the trust agreement?
- Which rights and actions must be prohibited to the foreign beneficiaries?
- What are the forms needed to ensure possession, use or operation control of an aircraft by the trustee?
- How can a beneficiary participate in the decision to remove a trustee?
- What information should be required by the FAA regarding the trustee or beneficiary?

As of today, at least 10,000 aircraft are currently registered by the FAA under ownership trust agreements. According to the Association of Aircraft Title Lawyers (AATL), the FAA should analyze very closely any ruling that could be interpreted to apply retroactively to those registrations, possibly invalidating them, because that would be devastating for the industry as a whole.

Although, it is very possible that the resolutions adopted in such meeting will only be applicable to future registrations, not acting retroactively and affecting the registrations already made, yet this scenario could still have a great impact on the industry.

To make sure that no harm is caused, any new resolution should be revised very carefully with regard to the consequences it may bring to the industry.

*Important notice: By the time that this article is published, the mentioned meeting will have already taken place. We will keep you posted on the resolutions adopted and actions taken by the FAA.*

3.- Federal Register/Vol.76, No. 80/Tuesday, April 26, 2011/Notices.

### Seizure of the “Mexicana” brand.

The Federal Board of Conciliation and Arbitration accepted a lawsuit brought by twenty-six workers of the airline, for a provisional embargo against the use of the brand and trade name of Mexicana. The lawsuit was filed on October 25, 2010, by Alejandro Javier Rangel Martinez and twenty-five other workers, as part of the labor dispute with the airline, with the aim of ensuring their compensation.

*Reforma* . 09/May/11.

### Airport traffic rises.

A total of four-million two hundred and sixty eight thousand passengers were served in April by the three private airport groups in Mexico (ASUR, OMA and GAP), which together manage 34 major terminals throughout the country, a figure 2.4% higher than during the same period last year, a reflection of the reactivation of tourism. *EL Universal* . 12/May/11.

### SCT promotes reduction in aircraft loan costs.

With high interest rates to rent equipment, domestic firms continue to maintain aircraft in operation for more than 20 years. The Ministry of Communications and Transport of Mexico (SCT) and the International Civil Aviation Organization (ICAO) are working together so that the airlines may buy new airplanes with more competitive interest rates than today. *El Universal*. 16/May/11.

### The sale of Mexicana’s aircraft in favor of Bancomext is denied.

The Eleventh District Civil Court handling the insolvency proceeding of Mexicana de Aviación notified the conciliator Gerardo Badín that it is not possible for Bancomext to sell any of the nine aircraft seized the company, as it is undertaking an investigation process for aircraft that were part of the trust that operated Nacional Financiera. *El Economista*. 18/May/11.

### Lozano is summoned to appear due to the crisis in Mexicana.

The Third Commission of the Permanent Commission of the Federal Congress, approved the appearance of Secretary of Labor, Javier Lozano, for June 7 to explain the Mexicana de Aviación situation. Also cited for the same case were the Director of the DGAC, the Director of Profeco, and the Director of Bancomext. *Excelsior*. 19/May/11.

In this month extract was prepared by Juan Antonio Tiscareño.

### Anticipated bankruptcy scenario for Mexicana.

If the conciliator in the insolvency proceeding of Mexicana de Aviación does not issue a decision related to the group of investors in a position to rescue the airline by next week, bankruptcy will be imminent, said Javier Lozano, Secretary of Labor and Social Welfare. In an interview, after a meeting with the Secretary of Communications and Transport (SCT), Dionisio Perez-Jacome, Lozano said that in the coming days the conciliator of insolvency, Gerardo Badin, must submit a project of investment that is more viable, and then deliver it to the authorities of the SCT in order to analyze the technical, operational, legal and administrative capacity of the investment group. *Milenio. 20/May/11.*

### SCT declares an end to the public bidding for the Riviera Maya Airport.

The public bid for the construction, operation, management and operation of a new airport in the Riviera Maya in Tulum was declared forfeited after none of the bidders met the requirements for the project, said the Ministry of Communications and Transport (SCT). *La Crónica. 23/May/11.*

### GAP and ASUR, interested in bidding for the terminals in Brazil.

While in Mexico airport projects fail to come together, controlling groups of airport terminals in this country are studying bids for airports in Brazil. Grupo Aeroportuario del Sureste (ASUR) is analyzing the bidding for the international airport of São Gonçalo de Amarante, located in the capital of Natal, Brazil. Grupo Aeroportuario del Pacifico (GAP) is also interested in airports in Brazil, particularly for São Gonçalo de Amarante. *Milenio. 24/May/11.*

### ASPA asks the Mexican government to rescue Mexicana.

The Union of Aviation Pilots (ASPA in Spanish), directed by Fernando Perfecto, prepared a report which shows that the rescues that the federal government has done in favor of different productive sectors have yielded positive numbers. For that reason, the Union proposes that the Government grant a credit of three-thousand-million pesos to restructure Mexicana *El Universal. 26/May/11.*

### Air traffic occupation, increases.

In addition to conducting more operations, domestic airlines have increased their occupation factors in the first four months of 2011 to reach 75.6 percent. Data from the DGAC indicate that from January to April, aircraft have transported more passengers in a constant way, while in February of last year there was a decline to 68.9%. *El Semanario. 01/June/11.*

In this month extract was prepared by Juan Antonio Tiscareño.

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