

# coelum.

Monthly Digital Publication by Abogados Sierra

July 15, 2018  
year 13 | No. 02



The Fifth Freedom of the Air:  
the door to multilateralism  
in air transport.  
by Miguel Ruelas

JUNE NEWS on  
Mexican Aviation

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.

sierra

# The Fifth Freedom of the Air: the door to multilateralism in air transport.

by Miguel Ruelas.

## Aviation politics and regulatory context

The politics of aviation has always struggled with bi-lateral state relations in air transport, particularly with the authorizations of the freedoms of the air established by the Chicago Convention in 1947. In an over conservative global panorama, where protectionist movements in politics and economics has begun to shape this decade's most influential countries' public policies, assessing the protectionist and pro-liberalization waves in the market may well define the future of the air industry for years to come.

*“When analyzing the economic benefits and facts derived from authorizations of the 5th freedom of the air, the analysis must be divided into two categories: first demonstrating that authorizing third party rights actually increase i) passenger traffic and ii) air cargo; and secondly, demonstrating the effect this has in the employment figures of the nation authorizing it.”*

The first step to illustrate the main characteristics of the air industry is to contextualize the regulations on air traffic established by the Chicago Convention. The Chicago Convention establishes nine<sup>1</sup> freedoms of the air<sup>2</sup> sustained in the overarching principle that each nation has “complete and exclusive sovereignty over the airspace above its territory”.<sup>3</sup> Whilst the Chicago Convention set out the framework for international routes, the industry's common practice has been defined by bilateral agreements on the matter. Therefore, it is up to each country's domestic regulations to determine how “opened” or “closed” their freedoms of the air policy truly is.

## The fifth freedom of the air

Particular to this analysis is the fifth freedom of the air relating to “an airline ha[ving] the right to carry traffic between two countries outside its own country of registry so long as the flight originates or terminates in its own country of registry”<sup>4</sup> In other words, the fifth freedom consists of: the right granted to an airline to take passengers or cargo from its home country ( Country A), deposit them at the destination (Country B) and then, collect passengers on to a different international destination (Country C).

The fifth freedom of the air is often a controversial privilege in a considerable protectionist industry. In Mexico, recent developments have given rise to the legal and economic arguments both in favor and against the specific granting of fifth freedoms to particular airlines and in particular bilateral agreements. The main arguments sustained by pro-protectionists are based on the fact that this produces unfair competition amongst national air carriers and third country air carriers, eroding employment and economic benefits to national air carriers.

1.- All “freedoms” beyond the Fifth freedom are often referred to as “so-called” because only the first five “freedoms” have been officially recognized as such by the Chicago Convention.

2.- An official description of the nine freedoms of the air can be found at the International Civil Aviation Organization's official website at: <https://www.icao.int/Pages/freedomsAir.aspx>. The purpose of this article is not to describe them thoroughly but rather focus on the 5th freedom of the air and the economic myths behind air traffic protectionism.

3.- Convention on International Civil Aviation, Dec. 7, 1944, art. 1, 61 Stat 1180, 1180, 15 U.N.T.S. 295, 296 [Chicago Convention]; Convention for the Regulation of Aerial Navigation, Oct. 13, 1919, art. 1, 11 L.N.T.S. 173, 190 [Paris Convention];

4.- Air Traffic Rights, Dr. Paul Stephen Dempsey, McGill University, 2008.

## The traditional objections to the fifth freedom of the air

In order to assess the veracity of such often-cited arguments against the granting of fifth freedom by one state to another it is necessary to first: i) clarify the policy the Mexican Civil Aviation Authority has taken on granting fifth freedom liberties, and ii) address these arguments against economic facts on the liberalization of the of skies.

Currently more than half of the 48 bilateral agreements in force between Mexico and third countries, foresee the possibility of seeking authorization of a fifth freedom of the air for cargo and/ or passenger traffic.<sup>5</sup> Nevertheless, requesting a fifth freedom of the air, must be subject to: i) the route not being operated by a national carrier. As the previous Director General of Civil Aviation mentioned: "5th freedoms shall only be allowed on routes that are currently not being operated".<sup>6</sup>

Clarifying the fact that these freedoms of the air are permissible and a possibility in Mexico's airspace, the policy that has ruled these authorizations and decisions has always been anchored by two principles:

- Reciprocity and fair competition; and
- Preference to Mexican air carriers to operate the routes were a possible fifth freedom is requested.<sup>7</sup>

These principles grant in first instance fair play for the aviation industry when it comes to granting the fifth freedom, nevertheless the most-cited argument against the permission of these operations lays in a more economic argument. The argument often cited refers to the impact that granting a third country airline with a fifth freedom has over the domestic economy, which falsely claims, reduces competitiveness, employment and shrinks the domestic market.

Multiple studies have been made to quantify in hard numbers the true impact that the liberalization -emphasizing the authorization of 5th freedom liberties being granted- of air routes has in the industry. When analyzing the economic benefits and facts derived from authorizations of the 5th freedom of the air, the analysis must be divided into two categories: first demonstrating that authorizing third party rights actually increase i) passenger traffic and ii) air cargo; and secondly, demonstrating the effect this has in the employment figures of the nation authorizing it.

*"...econometric findings of traffic benefits of liberalization with a minimum of 5th freedom were found to increase traffic up to 75%."*

## The economics behind liberalization

### On passenger and air traffic

Limited examples can be economically analyzed given the limited bi-lateral agreements that allow 5th freedoms, however between 2005 and 2012, carriers in the US, Japan, Australia and New Zeland, allowing 5th freedom liberties proved to increase the overall number of total departures by 60%. Translating into opening new markets, and total passenger traffic to rebound to the highest levels in history.<sup>8</sup>

### On Cargo

The Air Transport Agreement between the U.S. and Europe signed in 2007 openly authorized 5th freedom operating routes within or beyond the EU. As a result, U.S. cargo operators were allowed to develop hub operations in Europe and even the Middle East. This enabled cargo operators from the European Union, United States and Middle East to make major investments in foreign airports that not only serve the U.S. to European market, but also provided an ample connectivity that the globalized industry requires to survive. In 2014, UPS estimated the value of its investment at

5- <https://www.eleconomista.com.mx/empresas/Quinta-libertad-solo-donde-no-haya-conectividad-DGAC-20140721-0072.html>

6- Ibidem

7- Ibidem

8- [http://www.intervistas.com/wp-content/uploads/2015/07/The\\_Economic\\_Impacts\\_of\\_Air\\_Liberalization\\_2015.pdf](http://www.intervistas.com/wp-content/uploads/2015/07/The_Economic_Impacts_of_Air_Liberalization_2015.pdf)

Cologne-Bonn to be \$200 million (USD).<sup>9</sup> The US-EU agreement for example also allowed FedEx to operate service between London Stanstead and Paris. At its Paris facility, as far back as 2009, FedEx reported that it was operating 300 flights per week.<sup>10</sup> A market that required such investment, as it was not sufficed by the current domestic operating market.

## Benefits to the ultimate consumer

Most impressive, the benefits are not solely limited to the connectivity of the cargo and air transport market solely; An OECD study<sup>11</sup> analyzed the effect of liberalization on OECD countries. The study Economic Impacts of Air Service Liberalization –found that on liberalized routes, those allowing the 5th freedom of the air, business fares were between 20% and 40% lower than the OECD average. Where routes were restricted by other existing air service agreements fares were more than 20% higher on some Atlantic and Europe-Asia routes than their predicted level.<sup>12</sup>

## The benefits to employment and GDP

If the abovementioned facts do not suffice; econometric findings of traffic benefits of liberalization with a minimum of 5th freedom were found to increase traffic up to 75%.<sup>13</sup> The Air Transport Action Group (ATAG) predictions result in a staggering number that “if all markets were liberalized, global air traffic could have increased by roughly a half billion passengers.” Employments directly related per this study estimate that in a 20 year-period, approximately 30 million person can be added solely to the aviation workforce. Employment benefits are not confined only to airline workers. ATAG also reported that 58 million people are employed in aviation and in aviation-dependent tourism. Based on an increase of 16% in traffic from liberalization, another 9 million jobs in aviation and aviation dependent tourism might have been generated.<sup>14</sup>

## Conclusion of analysis

The numbers and facts that demonstrate the economic, employment and general benefits of granting a 5th freedom, proves wrong all arguments that claim an undermined economy, loss of national jobs and unfair competition, often set forth in bias nationalistic communications by national carriers. These numbers reflect the aging common practice of bilateralism in the air transport world, demonstrating the imperative need to soften bilateralism and open the door to legal mechanisms that allow to effectively cover the demands of the air transport market.

Therefore, taking into account that current Mexican bilateral agreements do not strictly forbid 5th freedom rights but rather allow their authorization subject to an approval process; so long the following preconditions are met, these suffice to equal the playing field to all industry participants:

1. Preference is given to national operators in routed where a fifth freedom has been requested is met, and;
2. A reciprocity has been granted amongst participating jurisdictions.
3. The operation or the route is clearly needed in the market.

With these conditions, and the beforementioned economic facts, the denying of fifth freedoms of the air based on mere protectionist arguments, is even more dangerous than granting them; truncating the general growth and well-being of the multibillion dollar market. There is an undeniable link between increased air traffic and growth in employment and Gross Domestic Product (GDP), according to IATA’s study titled Impact of International Air Service Liberalization<sup>15</sup> an estimate of each 10% increase in international air services led to a 0.07% increase in GDP, which can translate into millions (or even billions) of dollars of incremental GDP for a single country.

9- [http://www.intervistas.com/wp-content/uploads/2015/07/The\\_Economic\\_Impacts\\_of\\_Air\\_Liberalization\\_2015.pdf](http://www.intervistas.com/wp-content/uploads/2015/07/The_Economic_Impacts_of_Air_Liberalization_2015.pdf)

10- [http://www.intervistas.com/wp-content/uploads/2015/07/The\\_Economic\\_Impacts\\_of\\_Air\\_Liberalization\\_2015.pdf](http://www.intervistas.com/wp-content/uploads/2015/07/The_Economic_Impacts_of_Air_Liberalization_2015.pdf)

11- Gönenç, R. and G. Nicoletti (2000), “Regulation, Market Structure and Performance in Air Passenger Transportation”, OECD Economics Department Working Papers, No. 254, OECD Publishing, Paris

12- Economic Impacts of Air Service Liberalization, intervistas Study

13- Ibidem.

14- Idem

15- <https://www.iata.org/publications/economics/Reports/chile-report.pdf>, 2009, Quantifying the benefits provided to the Chilean economy after its full-liberalization policy.

## Airlines need to be ready for CORSIA.

By virtue of the first stage of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), which is due to come into effect early next year, the Air Transport Action Group (ATAG) has reinforced to carriers the importance of meeting obligations under the green scheme with monitoring of all CO2 emissions set to start on 1 January 2019. <http://airlines.iata.org/news/atag-airlines-need-to-be-ready-for-corsia> June 05, 2018.

## The Mexican government must make binding security audits on all its airlines: IATA.

IOSA is the Operational Safety Audit program that all airlines affiliated with IATA are required to register to maintain their membership. In Mexico, only four companies follow the standards of the organization. More than a requirement to be a member of IATA, it is a measure to operate under global security standards. <https://a21.com.mx/organismos/2018/06/06/gobierno-mexicano-debe-hacer-obligatorias-auditorias-de-seguridad-en-todas> June 06, 2018.

## Governments Urged to Address Airline Blocked Funds.

The International Air Transport Association (IATA) called on governments to abide by international agreements and treaty obligations to enable airlines to repatriate revenues from ticket sales and other activities. <https://aviationvoice.com/governments-urged-to-address-airline-blocked-funds-2-201806071143/> June 07, 2018.

## Mexican elected Presidente vows to consult public about airport's future.

Lopez Obrador initially vowed to scrap construction of the airport and instead add runways at a smaller facility to handle Mexico's increasing air travel demands, setting business leaders' nerves on edge. AMLO said that if he wins the July 1 election, he will aim to hold a public vote before taking office on whether to finish building a \$13 billion airport outside Mexico City. <https://www.reuters.com/article/us-mexico-election/mexican-presidential-front-runner-vows-to-consult-public-about-airports-future-idUSKBN1JD11W> June 17, 2018.

## Necessary independent agency of airport fees: ACI and IATA.

To solve disputes between airlines and aerodromes over excessive airport charges, governments should implement an independent agency for airport charges as proposed by Angela Gittens and Alexandre de Juniac, general managers of the World Airports Council (ACI World) and the Transport Association International Air (IATA), respectively. This position was expressed by the leaders of both organizations during the closing event of the General Assembly of ACI Europe and ACI World, held in Brussels, Belgium. <https://a21.com.mx/aeropuertos/2018/06/21/necesaria-agencia-independiente-de-cargos-aeroportuarios-aci-y-iata> June 21, 2018.

## Mexican Airline Pledges to Reunite Immigrant Families Separated by Trump Policy for Free.

A Mexican airline says it will reunite migrant families separated by the "zero tolerance" prosecution of any adult crossing the southern border illegally, resulted in the separation of hundreds of migrant families since being implemented by Attorney General Jeff Sessions last month. <http://thehill.com/blogs/blog-briefing-room/news/393723-mexican-airline-pledges-to-reunite-immigrant-families-separated> June 22, 2018.

## **The Liberation of Mexico's Aviation Fuels Market.**

ASA has lost its exclusivity to sell aviation fuel in Mexico, after being the only authorized company allowed by law to store, distribute and supply carriers with jet fuel. This as a part of the Energy Reform of 2013 which, among other points, proposed to implement and allow private companies to take part in the aviation fuels market, whith the intend to reduce prices of jet fuel and flight tickets. <http://www.aerospacemx.com/the-week-in-aviation-the-liberation-of-mexicos-aviation-fuels-market/> June 22, 2018.

## **10 Consortiums go through NAIM external networks.**

The Airport Group of Mexico City received 10 proposals for the construction of the Foreign Service Distribution Networks of the New Mexico International Airport. The offers range is from 2 thousand 863 million pesos to 4 thousand 756 million. The construction of service networks includes facilities such as natural gas, electricity, water, telecommunications, security and general services such as fire protection systems, which connect to the maintenance area, as well as the civil works of electromechanical and special installations. <http://www.milenio.com/negocios/van-10-consorcios-por-redes-exteriores-del-naim> June 22, 2018.

## **ICAO Council reaches landmark decision on aviation emissions offsetting.**

The ICAO Council made important headway today on the key international standards supporting the planned timeline for the UN aviation agency's Carbon Offsetting and Reduction Scheme for International Aviation, or 'CORSIA', during its 214th Session. Future Council work on CORSIA will focus on the timely realization of the remaining CORSIA Implementation Elements, including the evaluation of carbon market programmes against a set of robust criteria, the determination of its Eligible Emissions Units, and which aviation fuels will meet the CORSIA Sustainability Criteria. The adoption of CORSIA SARPs complements other elements in the basket of measures including the enhancement of air navigation efficiency, the adopted aircraft CO2 certification standard and the long-term vision on the use of sustainable aviation fuels. <https://centreforaviation.com/members/direct-news/icao-council-reaches-landmark-decision-on-aviation-emissions-offsetting-425153> June 27, 2018.

## **SCT approves ASUR investment plans.**

As part of the strategy of expansion of capacity in the airports that it manages in national territory, Grupo Aeroportuario del Sureste (ASUR) will invest close to 10 thousand 896 million pesos (mdp) in the next five years. Cancun Airport will receive 54% of the investment, follow by Mérida and Oaxaca. <https://a21.com.mx/aeropuertos/2018/06/28/aprueba-sct-planes-de-inversion-de-asur> June 28, 2018.

# coelum.

*Monthly Digital Publication by Abogados Sierra*

## MIGUEL RUELAS

Attorney at Law: Mr. Miguel Ruelas Rosas of Mexican nationality obtained his law degree at the Instituto Tecnológico Autónomo de México. Miguel has participated in the legal structuring and counseling of transactional, financing and leasing of aircraft and mobile assets in Mexico. Mr. Ruelas has actively assisted international and private entities in the understanding and application of the Cape Town Convention in Mexico, through the careful assessment of applicable law. He has participated in the development of various academic projects for the Cape Town Convention and other publications on this matter. Mr. Ruelas has been admitted in an internship program of the Aviation Working Group and is currently in secondment to the organization. He attended several business and law courses at Oxford University.

Languages: English, Spanish, French and Portuguese

Practice Areas: Aviation Law, Aircraft Finance, Private International Law.

e-mail: [mruelas@asyv.com](mailto:mruelas@asyv.com)

## sierra

Prol. Reforma No. 1190 25th Floor,  
Santa Fe México D.F. 05349  
t. (52.55) 52.92.78.14  
f. (52.55) 52.92.78.06  
[www.asyv.com](http://www.asyv.com) / [www.asyv.aero](http://www.asyv.aero)

The articles appearing on this and on all other issues of Terrum reflect the views and knowledge only of the individuals that have written the same and do not constitute or should be construed to contain legal advice given by such writers, by this firm or by any of its members or employees. The articles and contents of this newsletter are not intended to be relied upon as legal opinions. The editors of this newsletter and the partners and members of Abogados Sierra SC shall not be liable for any comments made, errors incurred, insufficiencies or inaccuracies related to any of the contents of this free newsletter, which should be regarded only as an informational courtesy to all recipients of the same.