

coelum.

Monthly Digital Publication by Abogados Sierra

December 15, 2017
year 12 | No. 08

Mexico: The thin line
between Liberalization
and Protectionism.

by Juan Manuel Estrada

NOVEMBER 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

Mexico: The thin line between Liberalization and Protectionism.

by Juan Manuel Estrada.

Historically, only very few concepts have ingrained themselves within an industry as deeply and as vividly as that enshrined within Article 1 of Convention on International Civil Aviation of 1944 ('Chicago Convention');¹ in the aviation industry. This fundamental principle upon which international civil aviation has been founded enshrines the recognition of complete and exclusive sovereignty of each state over the airspace above their territory.² Consequently, and due to the historical context in which it was regulated, States have actively taken part in regulating all market aspects of international civil aviation through the implementation and adoption of bilateral and multilateral treaties and their materialization within national regulations and laws.

As stated in our previous paragraph, States have traditionally opted for the conclusion of bilateral or multilateral air service agreements as the principal diplomatic and political vehicle used to both parcel out the access to their national airspace and to set forth their aeropolitical policies with third parties.³ Through these agreements, States are able to engage in exchange of traffic rights;⁴ as well as to set forth operative restrictions imposed upon such rights, specifically pertaining designations, tariffs and flight frequencies. This architecture has led States to negotiate traffic rights on a case-by-case basis, ultimately generating a patchwork of differing market access requirements and rules for airlines.⁵

"The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."

Accordingly, bilateralism can be identified as the first stage through which States materialize their political views on aviation. Pursuant to the enactment of bilateral agreements, States have the option of adopting or including the policies therein agreed within the adoption of national laws and regulations. Which, when consistent with the nature of agreements entered by States, serve the purpose of providing further legal certainty to stakeholders.

In this context, it is valuable to recognize that today's global aviation landscape is facing rapid changes, as higher demand for air services and seemingly flights (from anywhere to everywhere), particularly in emerging economies has become a constant within the industry.⁶ As a consequence of this, the air transport industry is increasingly operating within a context of liberal markets. While governmental controls over fares, market entry, and capacity, continue to be the national policy of some States, many have opted for a gradual shift to more liberal policies.⁷

1.-The Chicago Convention is silent with regards to the instrument through which States would materialize the rights set forth in Articles 1, 2 and 6 of the Chicago Convention. Bilateralism emerged as the popular mechanism implemented by States in oppose to unilateral, plurilateral or multilateral schemes. B.F. Havel, 'Beyond Open Skies a new regime for International Aviation' Kluwer Law International (2009).

2.- D. Verschoor, *An Introduction to Air Law*, Wolters Kluwer (9th ed.) pag. 3.

3.- B.F. Havel, 'Beyond Open Skies a new regime for International Aviation' Kluwer Law International (2009), pag. 3 and 109.

4.- The actual principle adopted by the fifty-four delegations to the Conference on International Civil Aviation held in Chicago on 1944 provides that all commercial international air passenger transport services are forbidden except to the extent they are permitted. (see, B.F. Havel (n 4) 1043.

5.- European Commission, 'Internal Aviation: an opportunity for growth and jobs in the EU aviation sector'.

6.- Supra Note 1.

7.- K. Button, 'The Impacts of Globalization on International Air Transport Activity', *Global Forum on Transport and Environment in a Globalizing World*

Such is the case of Mexico. In line with this new approach, in the past few years Mexico has taken concrete steps to improve the competitiveness of its internal market within a global-orientated industry.⁸ In doing so, Mexico has adopted a more liberal approach when negotiating bilateral air services agreements. A clear example of this liberal approach adopted by Mexico can be perceived in the concessions granted to the European Union ('EU'), through accepting their Community Clause. Moreover, and recent years Mexico's new liberal policy can be appreciated in its relationship with the U.S., particularly through the subscription of a 'modern' and 'liberal' air service agreement, model which is intended to be replicated in the foreseeable future with other aviation partners such as Canada, Spain and Switzerland.⁹

"In order to appreciate the effects and benefits of the Rail Protocol, one must first understand the Cape Town Convention, its context and objectives."

In such line of thought, Mexico has tried to modernize its national framework to comply with this new aeropolitical policy. For instance,¹⁰ through the amendment to the threshold for foreign investment in national airlines which recently increased from 25% to 49%.¹¹ Additionally, cross-border mergers, acquisitions and alliances such as the that between Aeromexico and Delta are being fostered.

Despite this progressive approach, when put under scrutiny, it is evident that Mexico's aeropolitical policy focused on a new liberal line and the enactment of national laws to embody such policies are, substantially inconsistent, to say the least. For instance, while Mexico is in the mists of implementing a new slot allocation regulation, it has unfortunately reached a crossroad, as the newly adopted allocation mechanism has been classified as strictly administrative.¹² This means that the slot allocation mechanism does not follow market-base trends, but rather administrative discretion. This, amongst other issues, have led to substantial opposition from national and international stakeholders,¹³ as well as by the Federal Competition Commission ('COFECE'), which intends to challenge said amendments before our Supreme Court of Justice, based on the alleged existence of substantial barriers to competition and limitations on the access to essential inputs derived from the approved amendments on slot allocation.¹⁴

8.- PROMEXICO, 'National Flight Plan Mexico's Aerospace Industry Road Map 2015' (2015) found in <http://www.promexico.gob.mx/documentos/mapas-de-ruta/Roadmap-Aerospace-2015.pdf> (Last visited on 15 November 2017).

9.- José Antonio Cervantes Acosta, 'Air service agreements executed by Mexico with Canada, Spain and Switzerland will be modernized', (2017) found in <https://joseantoniocervantes.com/2017/11/16/air-services-agreements-executed-by-mexico-with-canada-spain-and-switzerland-will-be-modernized/>

10.- At this moment, foreign entities can own 49% of a national air service provider. This legal structure has been implemented by Aeromexico and Delta Airlines, who has recently increased its participation in the capital shares of the latter. <http://www.americaeconomia.com/negocios-industrias/aerolineas-en-mexico-solicitan-ampliar-al-49-las-inversiones-extranjeras-en-el-s>

11.- Article 7 subsection II, 'Foreign Investment Law', Mexico.

12.- It is administrative based as the allocation mechanisms relays on grandfather rights and administrative discretion. See Takatoshi Ito and Anne O. Krueger, "Deregulation and Interdependence in the Asia-Pacific Region", (2000) The University of Chicago Press, 218.

13.- COFECE, 'Autoridad Investigadora plantea consideraciones al anteproyecto de ley', (2017) <https://www.cofece.mx/cofece/index.php/prensa/historico-de-noticias/autoridad-investigadora-plantea-consideraciones-a-anteproyecto-de-reforma-a-regulacion-de-horarios-de-despegue-y-aterrizaje-en-aeropuertos-saturados> accessed 22 November 2017.

14.- OFECE, 'Autoridad Investigadora plantea consideraciones al anteproyecto de ley', (2017) <https://www.cofece.mx/cofece/index.php/prensa/historico-de-noticias/autoridad-investigadora-plantea-consideraciones-a-anteproyecto-de-reforma-a-regulacion-de-horarios-de-despegue-y-aterrizaje-en-aeropuertos-saturados> accessed 22 November 2017.

Similarly, the widely discussed amendments to the Civil Aviation Law ('LAC') and the Federal Consumer Protection Law ('LFPC') on the inclusion of certain passenger protection rights (i.e. denied boarding, flight delays and cancellations),¹⁵ have generated extensive debate. The lack of judicial precedents, along with the clashing positions between the Civil Aviation Authority ('DGAC') and the Consumer Protection Agency ('PROFECO') with regards to the preemptive effects of the Warsaw¹⁶ and Montreal¹⁷ Conventions within Mexico's legal regime, as well as by the lack of clarity with regards to the scope and applicability of such amendments to international carriage, considering the existence of the Bilateral/Multilateral Air Service Agreements entered by Mexico.

"...the Rail Protocol has clear economic implications in developing countries..."

As evidenced, whilst cases such as the of Mexico demonstrate how a progressive approach to the liberalization of international aviation may lead to the development of national industry. The latent inconsistencies in our aeropolitical policy, (i.e. bilateral agreements vs national law) may well hampered the benefits of market liberalization and lead to no other result other than uncertainty for prospective and current stakeholders.

The objective of the present analysis is not to praise the benefits of liberalization, as each State has the right to adopt and develop their own policies based on their internationally recognized sobering right, but rather to highlight the importance of having a coherence between the international agreements adopted and national law. As stated, in stead of fostering the benefits of he newly adopted policy, the unstructured and inconsistent national laws adopted by Mexico have in turn deter development and growth of the industry. In such regard, securing certainty for stakeholders through a coherent adoption of international agreements and national laws is of the essence for States to thrive in this new aeropolitical context. Many changes should be adopted in Mexico if it intends to have its industry thrive in a highly competitive market.

15- "Elevan a rango de ley los derechos de pasajeros del transporte aéreo", (2017) http://www.canaldelcongreso.gob.mx/noticias/9963/Elevan_a_rango_de_ley_los_derec

[hos_de_pasajeros_del_transporte_aereo](#) accessed 22 November 2017.

16- Convention for the Unification of Certain Rules for International Carriage by Air, signed at Warsaw of 12 October 1929.

17- Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal of 28 May 1999.

Response to air emergencies in Mexico: the challenge.

In order to strengthen the air safety culture in Mexico, the Mexican Aviator Pilots Association (CPAM) held the XI Air Safety Meeting, which on this occasion focused on emergency response actions. Celebrated in Mexico City, this forum brought together more than 150 attendees - including professionals from the national aviation industry, aviation companies, air traffic controllers, specialized technical personnel and members of the country's armed forces - to discuss the priority issues of safety in the national aviation sector. <http://a21.com.mx/organismos/2017/11/30/respuesta-emergencias-aereas-en-mexico-el-desafio> November 01, 2017.

Chronic diseases, main cause of errors in air accidents.

In a conference at the International Congress of Air Safety Daniel Danczyk, expert of the Medical Aerospace Association (ASMA) explained that in countries like Mexico, which declared the existence of a national epidemiological emergency because of the prevalence of overweight in its population, obesity and diabetes, prospective issues in the aviation field might arise. Particularly in the case of pilots, the issue is urgent, since chronic diseases are the main contributor to human errors and, consequently increased the risk of incident or accident. <http://a21.com.mx/aerolineas/2017/11/15/enfermedades-cronicas-principal-causa-de-errores-en-accidentes-aereos> November 01, 2017.

Demand for international freight grows 5.9% in October.

Freight transportation by air increased 5.9% percent (measured in tones-kilometers of freight transported) worldwide during October 2017 compared to the same month last year. As stated by the International Association of Air transport (IATA), annual air freight growth continues to maintain a 3.2% percent boom over the past ten years. <http://a21.com.mx/organismos/2017/12/01/demanda-de-carga-internacional-crece-59-en-octubre> November 01, 2017.

Homebuilt accidents drop to historic lows.

Fatal accidents in experimental category aircraft, particularly amateur-built aircraft, continued their decline during the FAA's 2017 fiscal year, reaching to historic lows. For the 12-month period from Oct. 1, 2016, to Sept. 30, 2017, the total number of fatal accidents in amateur-built aircraft were down to just 27%, compared with 33% during the 2016 fiscal year. <https://generalaviationnews.com/2017/11/20/homebuilt-accidents-drop-to-historic-lows/> November 20, 2017.

Mexico will be a leading economy in air connections with the new airport: IATA.

IATA suggested that the beginning of operations of the New Mexico City Airport should be postponed, as it is planned to start operations, before the entire terminal is finished. However, IATA recommendations suggest to have the building completely finalized, in order to be considered one of the best, not only in the region, but also in the world. <http://www.20minutos.com.mx/noticia/299912/0/mexico-sera-potencia-en-conexiones-aereas-con-nuevo-aeropuerto-iata/> November 20, 2017.

New immigration checkpoint procedures are implemented at the airports of CDMX, Los Cabos and Cancun.

As of December 1, 2017, new immigration checkpoint procedures have been implemented in the airports of Mexico City, Los Cabos and Cancún. The objective is to speed up the current process, thus allowing a better flow of international tourists in the such terminals by reducing waiting periods in at least 40%. <http://www.excelsior.com.mx/nacional/2017/11/23/1203228> November 23, 2017.

Progress in the development of the New Mexico City International Airport. It is expected estimated to be at 85% by the end of the current administration.

With non-stop 24-7 shifts, more than 40 thousand people continue to work on the New Mexico City International Airport. With these long shifts, it is expected that by the end of President Enrique Peña Nieto's administration (December 2018) the construction will reach at least 85% of its completion. <http://canaero.org.mx/obras-del-nuevo-aicm-al-85-a-final-del-sexenio/> November 29, 2017.

Air passengers add up to 100 million.

The Mexican Chamber of Commercial Airlines (CANAERO) informed that the estimated final number of transported passengers by the end of 2017, will reach 90 million. Therefore, according to said projections, it is expected by 2018 the number will exceed 95 million. <http://www.eluniversal.com.mx/cartera/negocios/pasajeros-transportados-aerea-suman-casi-100-millones> November 30, 2017.

Airbus investment will bring a third simulator to its Training Center in Mexico.

In September 2016, European manufacturer Airbus Group announced a major investment in the development of Training Facilities in Mexico. It has been confirmed that the prospective investment will be of 15 million dollars. This investment comes a year after Airbus and the authorities of the Ministry of Communications and Transportation (SCT) inaugurated the Airbus Mexico Training Center facilities with two A320 simulators. <http://enelaire.mx/airbus-traera-un-tercer-simulador-a-su-centro-de-entrenamiento-en-mexico/> November 30, 2017.

Global air passenger traffic demand to the rise.

Global demand for air travel climbed 7.2% in October, rebounding after September was disrupted by hurricanes, the International Air Transport Association (IATA) said on Monday. It said airline capacity rose 6.2 percent and load factor - a measure of how full planes are - increased by 0.8 percentage points to 80.8 percent. <https://www.reuters.com/article/us-airlines-iata-passenger/global-air-passenger-traffic-demand-up-7-2-percent-in-october-iata-idUSKBN1DY13V?feedType=RSS&> December 04, 2017.

coelum.

Monthly Digital Publication by Abogados Sierra

JUAN MANUEL ESTRADA

Attorney at Law: Admitted to practice law in 2011. Mr. Juan Manuel Estrada Sánchez of Mexican nationality obtained his law degree at the Universidad Panamericana, Guadalajara, he has post-graduate studies in Commercial Law by Universidad Panamericana, Mexico City, and he currently attends master degree studies in Government and Public Policies, by Universidad Panamericana, Mexico City. He attended studies in History and Political Science in University of Notre Dame, in South Bend Indiana and is currently Assistant Professor of the "Aviation Law Seminar" imparted by Universidad Panamericana, Mexico City.

Languages: Spanish, English and French

Practice Areas: Aviation Law, Aircraft Contract Law, Industrial Property and Corporate Law.

e-mail: jestrada@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 / 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.