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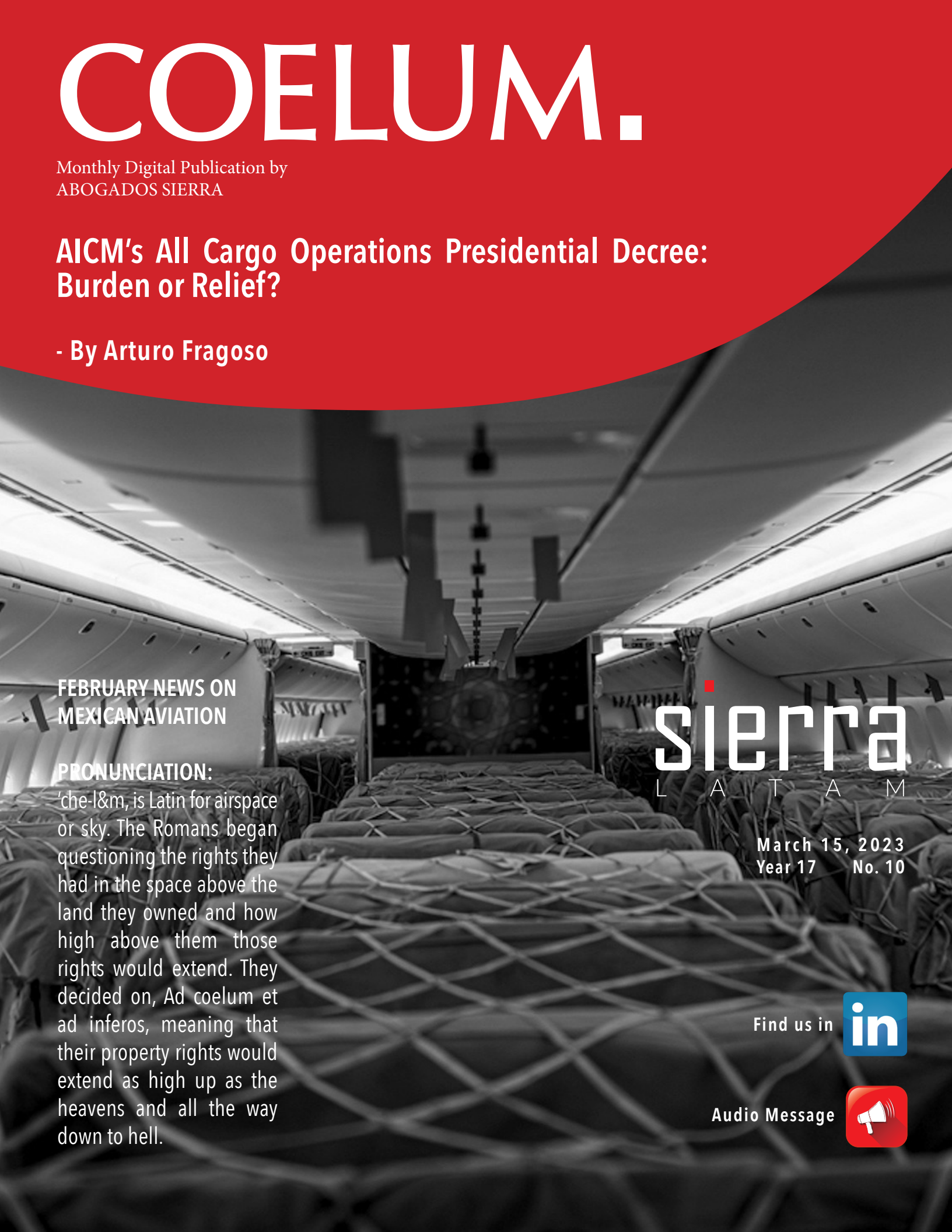
- By Arturo Fragoso



FEBRUARY NEWS ON MEXICAN AVIATION

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 how high above them those rights would extend. They decided on, Ad coelum et ad inferos, meaning that their property rights would extend as high up as the heavens and all the way down to hell.

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AICM's All Cargo Operations Presidential Decree: Burden or Relief?

by Arturo Fragoso.

One of the most affected businesses by the SARS-CoV-2 virus (COVID-19) pandemic is certainly the air industry. Due to restrictive measures on tourism and international air transport, several airlines across the world had great lags and financial losses that have not been easy to settle despite it being three years since the pandemic began. Whilst most of them are pursuing commercial strategies and sustainable actions aimed to recover cash flow in their businesses, all cargo operators at Mexico City International Airport ("AICM" and/or "MEX", indistinctly) are facing an additional challenge: to migrate their operations out of the AICM by July 7, 2023.

In this spirit, the following operational aspects and legal considerations will be addressed to provide our reader with a broad and objective panorama of the Decree that establishes the closure of the AICM for all cargo operations: first, a summary of the considerations that motivated its issuance will be exposed; second, a legal analysis of the unconstitutionality of its effects will be assessed; and finally, a couple of consequences and operational implications will be addressed.

1. Decree's "Rationale"

After a lot of expectations and rumors within the air industry in Mexico, the Decree issued by the President of Mexico declaring the closure of MEX for all cargo operations, both scheduled and chartered, was officially published in the Federal Official Gazette *(Diario Oficial de la Federación,* "DOF"*)* on the 2nd February 2023[1]. Entering into force on the date after its publication, the Decree provides air carriers a migration term of 108 working days from its enactment. Thus, only operations transporting cargo within the aircraft bellies of a passenger flight will be allowed and exempted from its effects.

Arguments such as national security and airport saturation are listed in the recitals of the Decree, despite its true motivation can be found implicitly in a series of actions that the Ministry of Infrastructure, Communications and Transport *(Secretaría de Infraestructura, Comunicaciones y Transportes,* "SICT"*)*, together with the Mexico City Airport Group *(Grupo Aeroportuario de la Ciudad de México,* "GACM"*),* have undertaken to activate and assist operators in their migration process to one of the main projects of the current Mexican government: the Felipe Ángeles International Airport in Santa Lucía ("AIFA" and/or "NLU", indistinctly).

a. AICM's Saturation

On September 29, 2014, the Declaration of saturation in the AICM's air space, from 7:00 a.m. to 10:59 p.m., was published in the DOF[2]. Similarly, on March 3, 2022, the Resolution declaring the saturation of the AICM's terminal buildings, mostly, from 05:00 a.m. to 10:59 p.m. was also published[3].

Despite recent operational reductions of 15% of the scheduled flights per hour in MEX, from 61 to 52 operations[4], and even most part of all cargo operations are performed during non-saturated schedules representing only 3.3.% of the total

1.- Diario Oficial de la Federación. (2023, February 02) DECRETO que establece el cierre del Aeropuerto Internacional de la Ciudad de México Benito Juárez, para las operaciones del servicio al público de transporte aéreo que se indica. Retrieved in February 24, 2023 from https://dof.gob.mx/nota_detalle.php?codigo=5678705&fecha=02/02/2023#gsc.tab=0

2.- Diario Oficial de la Federación. (2014, September 29) DECLARATORIA de saturación en el campo aéreo del Aeropuerto Internacional de la Ciudad de México Benito Juárez. Retrieved in February 24, 2023 from https://dof.gob.mx/nota_detalle.php?codigo=5361802&fecha=29/09/2014#gsc.tab=0

3.- Diario Oficial de la Federación. (2022, March 03) RESOLUCIÓN por la que se declara la saturación de los edificios terminales del Aeropuerto Internacional Benito Juárez de la Ciudad de México. Retrieved in February 24, 2023 from https://www.dof.gob.mx/nota_detalle.php?codigo=5644607&fecha=03/03/2022#gsc.tab=0

4.- Aeropuerto Internacional de la Ciudad de México. (2022, August 26) BOLETÍN INFORMATIVO Núm. 005/ 2022. Retrieved in February 24, 2023 from https://www.aicm.com.mx/aicm-y-aerolineas-acuerdan-disminuir-de-manera-provisional-operaciones-en-temporada-de-inviern/26-08-2022#:~:text=El%20Aeropuerto%20Internacional%20Benito%20Ju%C3%A1rez,octubre%2C%20con%20el%20prop%C3%B3sito%20de

operations in the airport[5], the decision that constitutes the Decree focuses on the alleged fact that "cargo operations affect the operating capacity of the terminal infrastructure, therefore, in order to safeguard the safety of air operations, and the integrity of the users who use the AICM, it is necessary to transfer the cargo to the airport network available in the country".

b. National Security

This excuse has certainly led the projects of our current government, and, in terms of aviation, National Security has been understood as the set of acts undertaken by the State to protect or maintain the proper operation of airspace and the essential infrastructure for the provision of public airports and air transport services, in a safe and efficient manner[6].

Based on the foregoing, as well as on article 5 section VI of the National Security Law, which classifies as threats to National Security any act that threatens aviation security, our President considered that the SICT, as an integral part of the National Security Committee, must ensure aviation security and contribute to the preservation of national security, in coordination with the other authorities that are members of said Committee. In this sense, the application of immediate and direct measures is allegedly essential to preserve the airport infrastructure, the safety of passengers, their possessions and goods, and service providers and employees of the air transport industry.

c. Operational Safety

Once the reasons above have been outlined throughout the recitals of the Decree, an elusive argument intended to establish the need to increase operational safety brings out again the saturation conditions of the terminal buildings of the AICM to finally resolve that " it is in the public interest to generate the conditions for the adequate and efficient operation of the airport, with optimal levels of service and thereby resolve the problems of saturated areas, as well as the facilities with the highest intensity of passenger traffic in the terminal buildings".

2. Legal Analysis and Remarks

Under a broad assessment of the violations deriving from the Decree's entry in force, unconstitutional foundation may be argued regarding the following considerations:

a. International and Bilateral Agreements

While an entire section of the industry with participation in passenger transport may continue transporting cargo to and from MEX to the detriment of other operators, various treaties and bilateral agreements that have been acceded to and ratified by the government of our country and other States to agree on the designation of air transport services on a reciprocal basis, as well as to guarantee safety and equality between operators regarding the provision of the public air transport service, as provided in the Convention on International Civil Aviation, may be clearly violated in respect to the rights of equality and operational safety conditions that the Mexican State must guarantee for the provision of air transport services throughout the country. This turns out to be discriminatory by ignoring a whole series of processes and regulatory provisions that must be considered before operators can legally operate at another airport.

Not considering the regulatory processes to which new authorizations and permits would have to be submitted to guarantee the continuity of the airline's operations would result in an affectation to the rights and obligations emanating from these instruments.

5.- Alejandro de la Rosa. (2023, January 19) Veto a carga en el AICM impactará apenas a 3.3% de sus operaciones. In El Economista. Retrieved in February 24, 2023 from https://www.eleconomista.com.mx/empresas/Veto-a-carga-en-el-AICM-impactara-apenas-a-3.3-de-sus-operaciones-20230118-0139.html

6.- Diario Oficial de la Federación. (2022, March 03) RESOLUCIÓN por la que se declara la saturación de los edificios terminales del Aeropuerto Internacional Benito Juárez de la Ciudad de México. Retrieved in February 24, 2023 from https://www.dof.gob.mx/nota_detalle.php?codigo=5644607&fecha=03/03/2022#gsc.tab=0

b. Economic Rights

Not only cargo operators will result affected but suppliers and related industries would also be negatively impacted as the Decree compromises their business model by not ensuring efficient, accurate, and operationally safe migrations.

The air cargo industry at MEX has strong and substantial participation due to the high supply and demand for the import and export of merchandise to Mexico City that engages the interest of clients and the connectivity currently available for these procedures. Therefore, to maintain high-security standards and quality in its operation, a detailed and deep analysis is necessary to guarantee the continuity of the operations. These processes would require reasonable time and market analyses that cannot be achieved in just five months.

In addition, there are several potential effects that, even though unquantifiable, will affect the source of employment and material resources that currently serve these players since business models vary and the government did not even conduct an exhaustive and objective analysis in this regard.

c. Due Process and Legal Certainty

The prohibition enacted by the Decree when ordering the closure of cargo operations in the AICM represents an affectation to the legal sphere of the operators without guaranteeing the latter's legal and operational certainty for the continuity of their operations. This measure not only constitutes major challenges to the cargo services operated in the region but implications to the customs procedures, distribution, delivery, and customs logistics, affecting hundreds of companies that rely on air cargo services for their highly sensible manufacturing and distribution facilities in the metropolitan area of Mexico City.

A lack of legal certainty may cause a direct violation of the rule of law and due process set for in Mexican legislation. Likewise, a lack of proportionality regarding the motivation and the measure that has been taken may be argued against the Decree, as it does not resolve or address the reason for its publication as stated in the first section of this article.

3. Operational Implications

Finally, and for a better understanding of the implications and effects of the Decree, it is important to distinguish all cargo operators from those that participate in combined cargo operations in the belly of passengers' aircraft, since all cargo services would not even represent a business for the former without the connectivity with passenger operations in which cargo finds fluidity and efficient processes for its transportation.

Operating both schemes would require infrastructure, personnel, and attention to independent cargo procedures in each station, increasing the costs not only for cargo services but other expenses inherent to its operation. The opportunity to meet the import and export needs of the clients in a satisfactory and optimal manner would be limited by the complexity of planning cargo operations and the simultaneous mixed passenger and cargo services at different airports.

In addition, there are operational and regulatory issues that involve modifying the permits and authorizations that have already been granted by the Civil Aviation Authority in Mexico for the operation at MEX, for which a series of certifications and inspections will be required to guarantee the safety of civil aviation, not only with respect to air transport but also with respect to the cargo handling.

Conclusion

Actions and strategies to achieve quality and safety on air transport are imperative. A process such as the one that addresses the reasoning of the Decree requires conservative measures and observance of the regulatory contents of the law to grant legal certainty at all times and levels. In this sense, both the operability and security in the continuity of the operations that would be affected must be considered. Regulating and enforcing the laws through administrative provisions may be necessary and urgent provided that effective and long-term policies are sought to ensure the proper functioning and safety of operations.

Santiago Creel rejects air cabotage reform; "Mexican skies are not for sale", he says.

The president of the Lower Chamber of the Federal Congress, Santiago Creel, offered his support to the Airline Pilots Union Association (ASPA) and the Mexican Association of Aviator Pilots against the presidential initiative to grant foreign airline cabotage permits in Mexican territory. In a press conference, accompanied by the General Secretary of ASPA, Humberto Gual, and the president of the Mexican Association of Aviator Pilots, Ángel Domínguez, the legislator argued the presidential initiative not only affects national aviation, but the territorial space. He opened the doors of the Palace of San Lázaro to provide a space for Mexico's aviator pilots to express their concerns, leading their move of rejection and opposition to cabotage with foreign aircrafts in the country. *www.milenio.com/politica/santiago-creel-rechaza-reforma-cabotaje-aereo* 01/02/2023.

Decree closes cargo operations at AICM for concession and permit holders.

An ordinance published in the Official Gazette of the Federation by the International Airport of Mexico City (AICM) Benito Juárez is closed for the operations of the concessionaires and permit holders that provide national and international scheduled and non-scheduled air transportation services to the public, exclusively for cargo. The Ministry of Infrastructure, Communications, and Transportation (SICT) was also instructed to carry out the necessary actions, in order to review and modify, as the case may be, the concessions for the service to the public of regular and non-scheduled domestic air transport of cargo. The concessionaires and permit holders that provide air transportation services, with the exception provided for in this ordinance, have a maximum term of 108 business days, to relocate their operations outside of the AICM. *www.enelaire.mx/decreto-cierra-operaciones-de-carga-a-concesionarios-y-permisionarios-en-el-aicm/* 02/02/2023.

New Mexicana de Aviación: legal changes that will give rise to the state-owned airline.

The bankruptcies of airlines led the federal government to outline the creation of a new airline to be operated by the Mexican Army, which will use the brand name of the extinct Mexicana de Aviación. In order for the Ministry of National Defense (SEDENA) to have majority control of the airline, an amendment must be made to the Airports Law, which in its Article 29 states that an airport group that has a concession for the operation of a terminal may not obtain participation in air transport services. The new amendment to the law proposes that the Ministry of Infrastructure, Communications and Transportation (SICT) "will have the authority to assign to the entities of the federal public administration to provide the public service of national air transportation, which will be for an indefinite period of time and will only be terminated when it is proven that there is no longer a cause of public utility, public interest, general interest, social interest or for reasons of national security that justify it", states the amendment. *www.forbes.com.mx/nueva-mexicana-de-aviacion-los-cambios-legales-que-daran-origen-a-la-linea-aerea-del-estado/* 09/02/2023.

Senate committees approve the airspace bill.

The Secretary of National Defense (SEDENA), on behalf of the President of Mexico, will be in charge of guaranteeing the security of Mexican airspace. After coordinating with various authorities in charge of different areas, it was decided that all would cooperate in the surveillance and protection of airspace. As a result, the United Commissions of Communications and Transportation and the Second Legislative Studies Commission of the Senate approved the issuance of the Mexican Airspace Protection Law. *www.com.mx/aereo/2023/02/22/comisiones-senado-aprueban-ley-espacio-aereo* 22/02/2023.

Passenger traffic to double by 2041: ACI World.

Expected air traffic through 2041 was revealed in the ACI World's annual airport traffic forecasts, expecting 19.3 billion passengers in 2041. Airports worldwide are expected to handle nearly 200 million tons of air cargo, the United States and China remaining the two largest markets, making up for 40% of global cargo. Luis Felipe de Oliveira, General Director of ACI World claims that the lift of travel restrictions will allow for an increase in travel, considering 86% of respondents of the Global Traveler Survey plan to travel by air. *www.a21.com.mx/index.php/aeropuertos/2023/02/23/se-duplicara-el-trafico-de-pasajeros-en-2041-aci-world* 23/02/2023.

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