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Joint Collaboration Agreements and the Bilateral Air Transport Agreement between Mexico and the U.S. - the AeroMexico and Delta case.

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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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Joint Collaboration Agreements and the Bilateral Air Transport Agreement between Mexico and the U.S. – the AeroMexico and Delta case

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In the ever-evolving landscape of international air travel, the bilateral agreements between nations play a pivotal role in shaping the dynamics of the aviation industry. One significant agreement is the Bilateral Air Transport Agreement between Mexico and the United States, signed on December 18, 2018, and published on August 19, 2016, in the Official Gazette of the Federation (the “Agreement”)¹. This Agreement, aimed at the liberalization and facilitation of air transport between the two neighboring countries, has far-reaching implications for airlines, passengers and the economic ties that bind these nations. In this article, we will delve into the intricacies of this bilateral pact and the recent challenges that have emerged, shedding light on the complex interplay between international agreements and the evolving aviation policies of both Mexico and the United States.

As mentioned, the primary objective of the Agreement is to promote the liberalization and simplification of air travel between Mexico and the US. The Mexican government aimed specifically to empower Mexican airlines by encouraging more active competition with a key focus on establishing an “antitrust immunity mechanism” to foster collaboration partnerships or joint collaborations among airlines of both countries. Antitrust immunity, in the context of the aviation industry, refers to an exemption granted by competition authorities that allows airlines to collaborate closely without violating antitrust laws and regulations. The mechanism aims to strike a balance between fostering cooperation for the benefit of consumers, while preventing anti-competitive practices. When airlines establish joint collaborations, they share sensitive information like pricing, schedules, and marketing strategies, and in a competitive environment, these actions could raise concerns about the creation of monopolistic practices. To address this concern, airlines can apply for antitrust immunity from the relevant competition authorities, and if granted, airlines are able to cooperate without facing legal consequences under anti-trust laws. However, airlines must adhere to specific conditions and the immunity is always subject to periodic reviews to ensure ongoing compliance with competition regulations.

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In this context, on May 5th, 2017, AeroMexico and Delta entered into a collaboration agreement, and received the approval from the Federal Antitrust Commission, and the United States Department of Transportation (DOT)². This approval granted them antitrust immunity, enabling the sharing of information such as routes, schedules, and fares, as well as the utilization of each other’s aircraft to operate an international traveler’s market between Delta and AeroMexico. The agreement became official on May 8, 2017, allowing them to operate as a single airline.

This collaboration has been running ever since. However, the DOT announced on January 26th, 2024, that it did not plan to renew the antitrust immunity between Delta and AeroMexico, given that the Mexican government has made some unilateral decisions allegedly resulting in a breach of the Agreement due to concerns about reduced market competition and increasingly tight control by the government on the nation’s largest airport.

1.- https://www.dof.gob.mx/nota_detalle.php?codigo=5448665&fecha=19/08/2016#gsc.tab=0

2.- <https://www.transportation.gov/briefing-room/dot-grants-antitrust-immunity-delta-aeromexico>

Article 11 of the Agreement³ emphasizes the principle of fair competition, stating that each party should provide fair and equal opportunities for airlines to compete in international air transport. Article 11(2) specifically states that “in agreement with this right, neither party will limit unilaterally the traffic volume, frequency, regularity of the service, of type of aircraft operated by the other airline, except when this is required for customs, technical, operative or environmental reasons in accordance with Article 15 of the Agreement”.

The Mexican government published on August 31, 2023 a resolution declaring the saturation of the Mexico City International Airport (AICM). Following this resolution, the government reduced operations at the AICM from 52 to 43 per hour, affecting only national airlines but with a special impact to AeroMexico due to its association with Delta. Furthermore, the closure of the AICM for cargo services decreed by the Mexican president and published in the Official Gazette of the Federation on February 2nd, 2023, is another unilateral decision adversely affecting the Agreement.

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It appears that the DOT views the Mexican government’s unilateral decisions as not only undervaluing the Agreement over administrative resolutions, but also violating the terms of an international Agreement which carries a higher hierarchical importance. Article 133 of the Mexican constitution establishes that the constitution, international treaties, along with the laws enacted by the congress of the union hold supreme authority throughout the country. However, the DOT concerns are not new or surprising. Back in 2021, Allegiant Air and Viva Aerobus, also requested a joint collaboration application and the DOT decided during summer of 2023 to suspend the review of such application citing outstanding questions about the implementation of the Agreement.

On January 29, 2024, Delta officially responded to the DOT addressing the tentative decision to not renew the antitrust immunity and terminate its approval of Delta and AeroMexico joint collaboration⁴. As stated by Delta: “this unprecedented regulatory overreach by the DOT will cause significant harm to consumers traveling between US and Mexico. Mexico is our country’s second largest trading partner and the Delta/ AeroMexico Joint Cooperation Agreement, which is responsible for the launch of 15 routes between the U.S. and Mexico, has been critical to connecting communities and businesses in both countries, while generating substantial economic benefits for U.S. businesses.” Both Delta and AeroMexico will officially respond to the DOT and requested an extension to address all of its concerns by March 8, 2024.

It is crucial not only for the airlines but also for the Mexican government to recognize the potential repercussions of the DOT’s decision to terminate joint collaboration between AeroMexico and Delta. This decision could adversely affect the competitiveness of the country. The government should recognize that its decisions affect the entire aviation industry, a vital component of the national economy, and should provide a regulatory framework that ensures stability within the sector. It is imperative for the government to actively engage with the DOT and address these specific concerns to resolve the situation.

3.- <http://www.ordenjuridico.gob.mx/TratInt/TratadosC/TIC5.pdf>

4.- <https://news.delta.com/delta-responds-us-dots-decision-terminate-long-standing-pro-competitive-partnership-between-delta>

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