

COELUM.

**Subsidies in the light
of Mexico's legal framework:
*the Aeromexico v. Emirates
dispute.***

by Juan Manuel Estrada



**AUGUST 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 25

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Abogados Sierra 25th Anniversary



celebrating twenty-five years of paramount legal services in Mexico

Abogados Sierra is very proud to share with all of our clients and friends our pride and joy to have reached the young age of 25 years during this month of September. Throughout these years we have proudly built the most respected, consolidated and recognized aviation practice in Mexico and are proud to be one of the most recognized aviation boutique firms in the world.

We hope to continue strengthening our abilities and always finding ways to improve our service and professionalism for the benefit of our clients and of the Mexican aviation industry. We look forward to continuing servicing your needs for the next 25 years and for many more to come.

On behalf of every member of our team we reiterate our appreciation for the continuing favor, support and confidence of each and every one of our clients.

THANK YOU!

A handwritten signature in black ink, appearing to be "Jen", written in a cursive style.

Construyendo México



For a second consecutive year our firm and its members proudly engaged in our now traditional homebuilding project for families living in underdeveloped and impoverished communities in Mexico. Through the unmeasurable economic, physical and moral support of our friends, relatives and the Abogados Sierra family, we were able to help yet another family build a dignified place to live. As mentioned in our September 2018 edition, the goal of our project is to provide families with a place they can call “home”, and for “home” we do not only mean a set of walls but rather a new start, a place which provides stable foundations and security to restore the dignity and hope for the future to the families we work with.

This year’s project took us back to the community of Mexicapa, in the State of Mexico where our team had the opportunity to work side by side with the Mendoza family in the construction of their new house. It is important to mention that this homebuilding model promotes self-sufficiency principles as the construction requires the close collaboration of the benefited family and the surrounding community.

Abogados Sierra would like to thank Constuyendo for their leadership in this venture and again extend an invitation to all members of society, both in Mexico and abroad that wish to contribute in any way, to please contact Radina de la Peña at rdelapena@asyv.com should wish to come on-board this project.

Subsidies in the light of Mexico's legal framework: *the Aeromexico v. Emirates* dispute.

by Juan Manuel Estrada.

The advent of new entrants into Mexico's aviation market during 2019 has raised substantial public expectation and excitement amongst aviation enthusiasts and eager consumers; all of which are now savoring the possibility of enjoying enhanced passenger experience, seamless travel and higher connectivity to more destinations than ever before. The wave of new airlines that have entered our national market comes as the result of the adoption of a more liberal aero political policy by Mexico's Government which began with the amendment to the Bilateral Air Service Agreement enacted with the United States of America in 2016¹. Unfortunately, change has come not without substantial opposition and considerable legal challenges, all of which can be personified by the current three-way dispute held between the Middle Eastern airline Emirates, Aeromexico and Mexico's Federal Government.

The purpose of this article is to provide a preliminary summary of the facts that give way to the aforementioned *Aeromexico v. Emirates* dispute, which will be then analyzed in the light of the applicable legal national and international legal framework in Mexico. In doing so, we will try to elucidate the prospective outcome to this old dispute from a national standpoint.

I. General Background

It is likely that most readers are acquainted with the endemic and seemingly never-ending dispute arising from the alleged existence of state aid or public subsidies within the aviation industry². This Conflict has now found in Mexico a new arena to extend its historical showdown in the form of the *Aeromexico v. Emirates* dispute. The facts of the case are as follows:

On July 16, 2019, Emirates announced with considerable fanfare, its plan to launch a new daily service from Dubai ("DXB") to Mexico City International Airport ("MEX"), via the Spanish city of Barcelona ("BCN"), starting on 9 December 2019³.

In response to such announcement, Aeromexico urged the Federal Government to roll back on any prospective rights granted to Emirates claiming that the "gulf carrier" has been systematically subsidized by the Government of the United Arab Emirates ("UAE")⁴ and therefore should not be allowed to fully exercise the traffic rights provided for in the Bilateral Air Service Agreement enacted between Mexico and the UAE⁵.

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On August 07, 2019, Aeromexico filed an amparo claim (which is a constitutional remedy) against the Ministry of Communication and Transport ("*Secretaría de Comunicaciones y Transportes*" or "SCT") for the granting of a schedule operating permit, tariff approval and for the slot allocations in MEX in favor of Emirates, alleging that effective competition cannot be ensured

1.-Bilateral Air Service Agreement Between the United Mexican States and the United States of America, available at: <https://aplicaciones.sre.gob.mx/tratados/ARCHIVOS/euatransportearo.pdf>

2.- Brian F. Havel & Gabriel S. Sanchez, "The International Law Regime for Trade in Air Services", Cambridge University Press, pag. 119.

3.- Emirates to launch services to Mexico City via Barcelona, available at: <https://www.emirates.com/media-centre/emirates-to-launch-services-to-mexico-city-via-barcelona>

4.- Milenio, "Aeroméxico se ampara para impedir llegada de Emirates Airlines", <https://www.milenio.com/negocios/aeromexico-se-ampara-para-impedir-llegada-de-emirates>

5.- It is important to mention that Aeromexico had previously challenged the enactment of Bilateral Air Service Agreement enacted between Mexico and the UAE on June 2018. See: https://www.reforma.com/se-ampara-aeromexico-para-bloquear-a-emirates/ar1740609?flow_type=paywall

and that this violated provisions of the Civil Aviation Law (“Ley de Aviación Civil”) which require the prior notification and consent of the Federal Competition Commission (“COFECE”) when competition is prospectively at stake⁶.

In response to Aeromexicos allegations, the SCT issued a statement whereby it informed that the granting of the requested schedule operating permit, tariff approval and slot allocations in MEX in favor of Emirates where yet to be approved, despite the fact that the Secretary of Tourism, Miguel Torruco announced on July 16 the intention of the SCT to fully support Emirates. This positioning was confirmed by District Court for Administrative Matters overseeing the case, who denied Aeromexico’s claim by stating the impossibility to rule on the merits as no administrative acts had effectively taken place to the moment.

“Although not expressly mentioned, the LFCE does not in itself prohibit subsidies...”

Despite the fact that the case was overruled by the aforementioned District Court, the merits of the case are yet to be analyzed as they will undoubtedly be challenged again once the SCT issues the prospective authorizations requested by Emirates.

After summarizing the general facts, we will now address the applicable legal framework in Mexico.

II. Competition under the Convention on International Civil Aviation

The Convention on International Civil Aviation, signed at Chicago on December 7, 1944 (“Chicago Convention or the Convention”) was drafted with the objective to ‘create and preserve friendship and understanding among

the nations’ and that ‘international air transport services may be established on the basis of equality of opportunity and operated soundly and economically’⁷.

From a practical standpoint, the Chicago Convention does not forbid States from granting subsidies to airlines. However, the convention does mandate the Council of the International Civil Aviation organization (“ICAO”) to “request, collect, examine and publish information [...] about the costs of operation and particular subsidies paid to airlines from public funds”⁸ and provides, as part of the overarching mandate of ICAO, to develop ‘to foster the planning and development of international air transport’ so as to ‘prevent economic waste caused by unreasonable competition’⁹.

Regardless of this, ICAO has issued several working documents where it has addressed the issue of subsidies. In line with the abovementioned, ICAO’s work has been limited to highlighting the importance of regulating state subsidies in order to deter prospective distortive effects which could adversely affect the market while also recognizing its importance of them when granted in a transparent and non-distortive manner¹⁰.

III. Fair Competition Clause in the Bilateral Air Service Agreement Between Mexico and UAE (“BASA”)

The BASA between Mexico and the UAE provides for the “fair competition” clause under Article 5. Unlike traditional and restrictive air service agreements (Bermuda-II type agreements) which usually contained the ‘fair and equal opportunity to operate’ principle, the BASA has adopted the more commercially orientated wording of ‘fair and equal opportunity to compete’, which allows airlines to conduct their operations in accordance to ‘commercial considerations in the marketplace’¹¹.

6.- The basis of this claim is Article 43 of the Civil Aviation Law which grants to the SCT the discretionary authority to request the input of COFECE in any case in which competition concerns arise. This Article further allows prospectively affected third parties to instruct the SCT to request the input of COFECE.

7.- Preamble, Chicago Convention.

8.- Article 54 (i), Chicago Convention.

9.- Article 44, Chicago Convention.

10.- See ICAO working documents: ATConf/5, ATconf/6, ATRP/12 ATRP/13 and IATS 2016.

11.- As stated by professor Henri Wassenbergh: ‘fair and equal opportunity to compete simply means a “level playing field” (unequal is not unfair under equal circumstances!). Henri Wassenbergh, ‘The international airline industry: The Straightjacket of Competition Law’, 29 Annals of Air and Space Law (2004), pg.198.

Furthermore, Article 5 subsection 2 of the BASA requires each Contracting State to implement all measures “to suppress any form of discrimination, anti-competitive and predatory practices”.

IV. Competition Law Framework in Mexico

The Federal Competition Law (“*Ley Federal de Competencia Económica*” or “*LFCE*”) was enacted to regulate the provisions set forth under Article 28 of the Political Constitution of the United Mexican States (“*Constitución Política de los Estados Unidos Mexicanos*”). Its overall objective is to promote, protect and guarantee free market access and economic competition, as well as to prevent, investigate, combat, efficiently prosecute, severely punish and eradicate monopolies, monopolistic practices, unlawful concentrations, barriers to entry and to economic competition, as well as other restrictions to the efficient operation of markets.¹²

As part of its scope the LFCE prohibits, under Article 52, anticompetitive practices which, in terms of this Law, hinder, harm, impede or condition any form of free market access or economic competition.

In order to prevent any such actions COFECE is vested with the authority to perform the required actions to prevent and eliminate barriers to free market access and economic competition, to the extent needed to eliminate anticompetitive effects, through the procedures established in this Law.

Although not expressly mentioned, the LFCE does not in itself prohibit subsidies, and on the contrary the Regulation to the LFCE states within its article 7 subsection VII that subsidies will only be considered as a barrier to entry when such are granted in a discriminatory fashion to one or more service providers. This in itself further contributes to evidences the complex coexistence between subsidies and open markets.

12.- Article 2, LFCE.

13.- The non-applicability of the WTO GATT Agreement on Subsidies and Countervailing Measures (SCM), which expressly excludes air traffic rights from its coverage, which furthermore does not define nor prohibit, subsidy.

V. Preliminary Considerations

Conclusive considerations and final remarks are somewhat complicated due to the nature of the issue and in light of the fact that the merits of the case are yet to be assessed by the relevant courts in Mexico, however, I would like to enumerate certain relevant matters that should be taken into consideration by Mexican authorities when assessing this case:

a) The nature of subsidies should be analyzed in-depth. The fact that subsidies are not strictly prohibited in the relevant international and national legal framework applicable in Mexico provides for relevant discussion points. This is particularly important as subsidies *per se* are not and should not be deemed as a barrier to entry or a market distorting externality. In other words, Aeromexico should evidence that as a consequence of such subsidies Emirates is receiving and unlawful benefit which results in “artificially low prices” or negative market externalities which ultimately affect fair competition¹³; and

b) Mexican authorities should analyze the case in the interest of consumers and should not be held subject to the interests of any particular stakeholder.

The Future of Biometrics at the Airport and Beyond.

Creating a seamless travel journey is the goal for future passenger travelers, therefore several in the aviation industry are expecting biometrics to create this experience. Biometrics at the airport enables passengers to use a single token to authenticate their identity when traveling through an airport, from check-in, to bag drop, through security, to boarding a flight and beyond. The experience not only improves the passenger experience, but also improves airport's operations and challenges that arise with the increase of travelers. <https://connect-edaviationtoday.com/the-future-of-biometrics-at-the-airport-and-beyond/#.XVGwOugzaUk> August 08, 2019.

International Amnesty prevents travelers from flying to the U.S.A.

The International Amnesty issued a travel warning to tourists considering visiting the United States, in a notice released days after the mass shootings in El Paso, Texas and Dayton, Ohio, which left 31 people dead. Thus, the statement urges travelers to maintain caution in relation to the lack of adequate protection by the US country, it also suggests avoiding areas where too many people gather, including shopping centers, schools and places of worship. <https://a21.com.mx/aeronautica/2019/08/09/amnistia-internacional-previene-viajeros-que-van-eua> August 09, 2019.

Aborted Landings Jump in Mexico City as Airport Crowding Worsens.

Shortly before taking office last year, Mexican President Andres Manuel Lopez Obrador cancelled the construction of a \$13 billion airport for the nation's capital. The modernist project was riddled with corruption, AMLO stated, and congestion could be eased more cheaply with a plan that included improvements for the existing center. But now, just nine months later, the full extent of the risks to that plan are emerging. Mexico City's airport has recorded a 52% increase in aborted landings in the first five months of the year; Landings dissatisfied specifically because other aircraft were still on the runway at the overcrowded airport climbed even faster by 84%. <https://www.bloomberg.com/news/articles/2019-08-12/aborted-landings-jump-in-mexico-city-as-airport-crowding-worsens> August 12, 2019.

'Inexperienced' pilots will test the new 737 Max software.

US regulators are turning to relatively inexperienced pilots of Boeing 737 to test the renewed flight control software, which aims to return the landed plane to commercial service, according to people familiar with the matter. The Federal Aviation Administration (FAA) wants to determine how aviators with less than one year of experience in 737 and at least one flight in Max react to software updates, said the people, who asked not to be identified because the deliberations are private. The flight simulator test was supposed to start the first week of September, but one week was delayed, one of the people said. The FAA's request reached the three American operators of the Max, American Airlines Group, Southwest Airlines and United Airlines Holdings, according to Reuters, who reported on the test initiative above. <https://www.elfinanciero.com.mx/empresas/pilotos-inexper-tos-probaran-el-nuevo-software-de-737-max-por-esta-razon> August 22, 2019.

ALTA urges to reduce rates to boost industry.

The Air Transport Association of Latin America and the Caribbean (ALTA) published a video in which it requests collaboration between the industry and governments for the implementation of measures that aid reduce taxes and fees in the regional industry, as these influence in the development of the sector. According to the group, operating costs are the major challenges facing the airline industry in the region, and among these, fuel is the main one with about 30% of the total. "Fees and taxes increase costs and discourage, to some extent, the ability to increase the competitiveness of destinations". <https://a21.com.mx/organismos/2019/08/29/exhorta-alta-reducir-tasas-para-impulsar-industria> August 29, 2019.

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Environmentalists will fly drones in Heathrow as protest.

Heathrow Pause, a group of environmental activists, announced that on September 13, drones will fly in the restricted area of Heathrow International Airport, London, seeking to suspend flights in the second most important air terminal in the world. The group said the measure is an attempt to pressure the government to reduce the emission of greenhouse gases. <https://a21.com.mx/aeropuertos/2019/08/30/ambientalistas-volaran-drones-en-heathrow-como-protesta> August 30, 2019.

Bertrand Piccard leads initiative against climate crisis.

Bertrand Piccard, pilot and founder of Solar Impulse, was selected by the French government to lead a delegation of civil representatives in the G7 that seeks to call for the creation of policies to counteract climate change. During his participation in the G7, Piccard presented the work of the One Planet Lab initiative, focusing on clean mobility by reducing carbon emissions in the transport sector. Piccard directs since the beginning of 2019 a working group focused on ecological mobility that seeks to reduce emissions from the transport sector in general. <https://a21.com.mx/organismos/2019/08/31/bertrand-piccard-encabeza-iniciativa-contra-la-crisis-climatica> August 31, 2019.

Shield aerospace industry.

With a 15% increase in the last 10 years, the Mexican aerospace industry has grown above any other sector. The Mexican Federation of the Aerospace Industry (FEMIA) has identified 330 economic units within this area where they include manufacturing, maintenance and repair and engineering (MRO) activities. The growth forecast for the air fleet in the following years will generate a boost to MRO services and it is estimated that this will also double, going from a market value of 60 billion dollars in 2016, to more than 120 one billion dollars per year by 2036. <http://a21.com.mx/aeroespacial/2019/09/01/blindan-industria-aeroespacial> September 01, 2019.

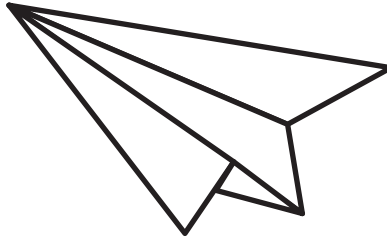
Prepares IATA Extended Reality Fair in Switzerland.

The International Air Transport Association (IATA) will hold the XR Aviation Week, an event that follows the realization of the Virtual Aviation and Augmented Reality Summit (AVARS) and the Aviation Hackathon XR, an event that aims to explore of the applications that allow airlines and partners, greater efficiency, better experiences and new revenue opportunities. Thus, from September 7 to 9, in Crans Montana, Switzerland, the association plans to meet specialized personnel who are changing the way the industry works and expanding the Proofs-of-Concept (PoC) for its implementation. <http://a21.com.mx/aeronautica/2019/09/01/prepara-iata-feria-de-realidad-extendida-en-suiza> September 01, 2019.

Aerospace clusters plan airlift.

The aerospace industry installed in Chihuahua, Nuevo León and Querétaro plans to generate an air bridge that speeds up the exchange of parts between companies. With this initiative it is expected to support the constant mobilization of components that the aerospace industry exchanges between the three zones, for which it is analyzed to work hand in hand with airlines that provide the service, explained the director of the Querétaro Aeroclúster, Antonio Velázquez Solís. The proposal arises from the interinstitutional linkage that the Aerospace Cluster of Chihuahua and the air clusters of Monterrey and Querétaro have begun to work. Therefore, it is planned to generate an alternative to aerospace companies to mobilize their merchandise on a commercial cargo flight, which would result in reducing transfer costs, which would also result in facilitating small and medium-sized enterprises (SMEs) with efficient logistics services. The conformation of an air cargo bridge is managed together with an airline and with the Intercontinental Airport of Querétaro. <https://www.economista.com.mx/estados/Clusteres-aeroespaciales-planean-puente-aereo-20190902-0004.html> September 02, 2019.

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