

New Air Transport Agreement between the US and Mexico

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On December 18, 2015 the US and Mexico (the Parties) signed a new Air Transport Agreement that, once effective, will replace the current agreement which has been in effect since 1960. Although the new agreement does not include a full opening of the aviation sector, it is being referred to by the US and Mexican governments, as well as interested industry participants as an "open skies agreement" as it liberalizes certain air transport services between both countries, and includes other features typical of bilateral open skies agreements.

The new Agreement has not yet been approved by the Mexican Senate or its US counterpart. The Agreement will enter into force 30 days after such approvals are obtained and diplomatic notes have been exchanged.

Among the most significant changes to be found in the new Bilateral Air Transport Agreement are:

- **Regularly scheduled flights of passengers combination services:** designations are to be provided without restrictions for any number of airlines in any city pairs (currently, only two and in some cases three airlines per country are allowed for the designated city pairs). This will ultimately permit airlines to operate pursuant to fifth freedom rights (travel from any point in one country, via an intermediate country, to any point in the other country, and beyond) under certain circumstances. Cabotage (domestic flights operated by foreign airlines) is not contemplated by the new Agreement.

This Agreement includes a defined procedure for the granting of new fifth freedom rights to airlines for passenger and combination services.

- **Cargo only flights:** designations are to be provided without restrictions for any number of airlines in any city pairs (currently, only two and in some cases up to five airlines per country are allowed per designated city pair). Transport to a third country through the US or Mexico (as the case may be) and to either Mexico or the US, as the case may be, from an intermediate country will be permitted.

The Agreement includes a defined procedure for the granting of new fifth freedom rights for cargo services.

- **Intermodal transport operations:** International air transportation services under the Agreement may include surface transportation for cargo from or to any destination in either country to third countries. Airlines may elect to be directly responsible of such surface transportation or to provide the service through a third party (including other airlines and indirect providers of cargo transportation). This will allow surface transportation companies (e.g., a trucking company) used by an airline resident of one country, to provide intermodal services in the other country.

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- **Charter flights of persons and combination services:** designations shall be provided without any restrictions for any number of airlines in any city pairs. This will permit airlines to exercise new fifth freedom rights (travel from any point in one country, via an intermediate country, to any point in the other country, and beyond).
 - **Pricing:** Certain restrictions on pricing and related protections included in the existing Bilateral Agreement are removed, and airlines in each country will be able to freely establish their pricing models, pursuant to market principles.
 - **Commercial alliances:** Each country has agreed to view positively and promote and approve airline commercial alliances as long as there is also positive consideration given when fifth freedom rights are requested by an airline of the other country.
 - **Airport User Fees:** The new Agreement includes an obligation for each country to grant the airlines of the other country most favored nation treatment in terms of airport user fees. The Agreement does not require equivalent among all airlines for such benefit to be applicable.

As a basic principle, the Agreement provides that Airport User Fees shall not exceed amounts necessary to cover the full cost of facilities and services at the airport plus a reasonable return on assets, after depreciation.

As part of the new Agreement, the government of each country has expressed its intent to collaborate to ensure maximum flexibility for the airlines operating in their territory to provide services to and from any of the destinations set forth on the annexes to the Agreement, and to approve applications for commercial airline alliances between airlines from both countries.

There are no limitations specified in the Agreement on the number of airlines designated to provide international air transport services between the US and Mexico.

Scheduled Passenger and Combination flights

The following combination services shall be permitted (persons, cargo, and/or mail) in both directions:

- (a) from a destination in one country to any destination in the other country (*third and fourth freedom rights*);
- (b) from certain destinations in the US to certain destinations in Mexico and beyond to Panama or to any other destination in Central or South America (*fifth freedom right*);
- (c) from certain destinations in Mexico to certain destination in the US and beyond to Canada, Europe or other countries, as the case may be (*fifth freedom right*);
- (d) from any destination in one country, via any intermediate country, to any destination in the other country and beyond, as the Parties may agree from time to time (*new fifth freedom rights*); and
- (e) the ability of airlines in each country to enter into cooperative marketing agreements with one or more airlines of the other country or of third countries to provide services to intermediate destinations, behind or beyond Mexico or the US, as the case may be.

To comply with the above, a country receiving a designation application from an airline of the other country shall grant an operating license or permit with minimum procedural delay, as long as, among other conditions, the substantial ownership and effective control¹ of such airline is held by the other country, by nationals of the other country, or both.

¹ Since there is no authoritative definition on these concepts under public aviation law, they shall be interpreted in accordance with the terms and limitations of the internal law of each country (e.g., in the case of Mexico, the Foreign Investment Law).

Cargo-Only flights

The following cargo services will be permitted (cargo and/or mail) in both directions:

- (a) from any destination in one country, via any intermediate destination, to any destination in the other country and beyond (*third, fourth and fifth freedom rights*);
- (b) from any destination in one country to any destination in the other country or in a third country; and
- (c) the ability of airlines in each country to enter into cooperative marketing agreements with one or more airlines of the other country or of third countries to provide services to intermediate points, behind or beyond Mexico or the US, as the case may be.

Certain provisions that will promote greater operational flexibility for cargo services were also included in the Agreement. For example, cargo carriers will be permitted to operate a single cargo aircraft with multiple flight numbers, serve destinations in territories of each country in any combination, market such services to the public and make scheduled stops at any location inside or outside the territory of either country.

Commercial Cooperation Agreements

Commercial airlines in each country shall be permitted to, among other things: (i) establish offices for the marketing and sale of transportation services in the territory of the other country, and each country will allow administrative and operational staff necessary for the provision of such services to enter its territory, (ii) sell tickets for air transportation in the territory of the other country, and (iii) carry out services that are required during scheduled stops in the territory of the other country.

Likewise, any airline in either country shall be permitted to enter into commercial cooperation agreements, such as blocked spaces arrangements, code-sharing or leasing with one or more airlines of any of the other country or even third countries and with surface transportation providers of any country.

Fair Competition

The Agreement provides, among others, the following obligations of the Parties with respect to fair competition:

- (a) each country shall make available fair and equal opportunities to the airlines of both countries to permit them to compete in the international air travel markets;
- (b) each country shall permit the airlines of each country to determine the frequency and capacity of the international air transportation that they will offer (neither country shall unilaterally limit the volume of traffic, the frequency or regularity of service or the type or types of aircraft to be operated by the airlines of the other country, except for customs, technical, operational or environmental reasons); and
- (c) neither country shall impose on the airlines of the other country any first-refusal requirement, uplift ratio, no-objection fee, or any other requirement with respect to capacity, frequency, or traffic.

Commercial Alliances between Airlines

By means of communications prior to the execution of the Agreement, the US Department of Transportation (DOT) and the Mexican Ministry of Communications and Transportation (SCT) agreed to give definitive and formal consideration to any applications that involve international airline alliance agreements between airlines of each country, provided that, as of the effective date of the Agreement, both the DOT and the SCT provide positive consideration to any applications submitted by airlines of the other country to offer services to or from any of the following:

- (a) regular, scheduled combination services from any destination in one country, via any intermediate country, to any destination in the other country and beyond, as may be agreed from time to time (*new fifth freedom rights*); and

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- (b) charter flight of persons and combined services from any destination in country, via any intermediate country, to any destination in the other country and beyond (with or without changing aircraft) (*new fifth freedom rights*).

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