

**PRIVATIZATION OF INTERNATIONAL AIRPORTS:
THE CASE OF BOGOTA'S ELDORADO INTERNATIONAL AIRPORT**

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VM

ABSTRACT

Based on a new conception of airports, and recognizing the airport's preeminent role in strengthening a region's economy, this thesis centers on the positive and negative aspects of privatizing international airports. The core case study for the investigation is Eldorado International Airport, serving the city of Bogotá and port of entrance to the South American continent. It concludes that privatization of international airports has grown to be the best means by which large-scale aviation infrastructure projects are to be realized if airports are to not only attend rising traffic demand, but also as private enterprises that deliver users quality air transport services, and focal points of regional and national development facilitating a country's competition in world markets. In the case of Colombia, considerations and recommendations on specific matters that deserve special attention for the correct development of concession contracts are also indicated throughout the text.

RÉSUMÉ

Sur la base d'une nouvelle conception de l'aéroport, et tout en lui reconnaissant un rôle prépondérant dans l'économie de la région qu'il dessert, l'auteur examine les aspects positifs et négatifs de la privatisation des aéroports internationaux. L'étude de cas porte sur l'Aéroport international Eldorado qui dessert la ville de Bogotá et sert de port d'entrée du continent sud-américain. L'auteur conclut que la privatisation est le meilleur moyen de réaliser les projets d'infrastructure aéronautique à grande échelle. La privatisation permet aux aéroports de répondre aux exigences du trafic sans cesse croissant, d'offrir un service de qualité aux utilisateurs et de servir de point de mire dans les projets de développement régional et national conçus pour permettre aux pays de faire face à la concurrence mondiale. Dans le cas de la Colombie, l'auteur formule des recommandations spécifiques en vue de favoriser le bon développement des contrats de concession.

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1. INTRODUCTION

Globalization and liberalization are constantly changing economic, social and political realities. They have permitted a significant development in the air transport service industry, as the fastest means by which goods, services and passengers are interchanged. The continuity of the industry and the impact it has on the development of a nation's economy is mainly influenced and directly linked to the infrastructure available to carry out air transport operations.

Commercial aviation plays a leading role both in the economic and social growth of all nations as it smoothes the progress of international commerce between them. By providing an essential component to the transportation system, it promotes trade and tourism by facilitating the access of people and goods to domestic and international markets.¹ The economic benefits of aviation are undisputable. "The air travel industry contributes a high total linkage to an economy through employment and investment in the development of airports, hotels, retail outlets, tourist attractions and commerce generally. This linkage must be understood as the ability of the air industry to induce the establishment and growth of other industries."² To be able to compete in world markets, countries and cities must depend on an adequate transportation infrastructure that facilitates their participation.

International trade is demanding the aeronautic industry to provide planes that offer more capacity and that comply with all the necessary environmental requirements in order to preserve it. In so far as the regions grow and reach higher levels of competitiveness, airport infrastructure must also be modernized to provide the necessary logistics to attend the increasing demand in passenger and cargo traffic, as it ensures the safe operation of aircraft in any type of meteorological conditions.

¹ Donald H. Bunker, *International Aircraft Financing – Volume I General Principles*, 1st Ed. (Canada: International Air Transport Association, 2005) at 12. [Bunker].

² Bunker, *supra* note 1 at 12.

Airports constitute a major force in the local, regional and national economy of a country. They are a reflection of the communities they represent. Passenger and cargo movements constitute a way of determining the importance and impact airports have in a country. Passenger traffic reflects the level of economic development, demographics, business activity and tourism. On the other hand, cargo volumes serve also as an indication of the strength of a nation's economy.

Efficient, functional and easy to reach airports are key components for a city or country to attract and retain corporations with national and global ties. As Tulsi Kesharwani states it, "An increasingly fast-paced, economically networked world is changing the rules regarding industrial competition and their locations. The resultant thrust of digitization, globalization and time-bound deliveries is creating a new economic geography with international gateway airports driving and shaping business locations and urban development in the 21st century, much as highways did in the 20th century, railroads in the 19th century and seaports in the 18th century."³ Airports are gateways to the world and vital for business activity and leisure travel. A city's airport provides a first and last impression that can either be positive or negative in the people who use it. As globalization continues to take hold, the competitiveness of the industry is increasingly relying on airports and the aviation infrastructure.

Airports have traditionally been owned and managed by governments. Time has proven that government ownership of airports results in inefficiency leading to large financial deficits. When governments lack the provision of sufficient capital to invest, private sector participation/involvement is seen as the only viable way to finance and operate air transportation infrastructures. This growing trend that the world is facing allows productivity and efficiency to be maximized while greater market share and penetration is achieved. Privatization also offers the promise of better use and

³ Tulsi Kesharwani, *Privatisation of Aviation Infrastructure*, (New Delhi: Asian Institute of Transport Development, 2002) at 2. [Kesharwani].

allocation of resources, as well as better service provision and other benefits that accrue from competition and the discipline of the market.

Air transportation involves billions of dollars in the world market and has permitted the development of many cities such as Atlanta, where the economy revolves around its airport being the most important in the world. Hartsfield-Jackson Atlanta International airport registers more than eighty (80) million embarks and disembarks annually.⁴ In addition, the largest cargo airport, located in Memphis, transports more than 3.6 million tons of cargo per year.⁵ Combined, the largest airports in the United States of America register more than seventy (70) thousand monthly take-offs and landings.⁶ Hence, the USA is the country that has the highest level of air traffic in the world.

In Colombia, the airport with the highest movement is Eldorado International Airport in Bogotá, mobilizing more than twelve (12) million passengers and more than five hundred thousand tons of cargo per year.⁷ Since its creation, the Colombian Government has operated and managed the airport through an autonomous entity created by law for such purposes. The time has come to privatize this main airport, as it is the only source to obtain the capital needed for the construction of a new one in order to accommodate the current and future air traffic demand and improve its efficiency. The project will position it as one of the most modern airports in the region and the world, opening it to compete in world markets.

⁴ Airports Council International, "Statistics: Top 10 World Airports", Online: (2007) <http://www.aci.aero/aci/aci/file/Press%20Releases/2007_PRs/PR_180707_TOP10.pdf> [ACI Top 10].

⁵ ACI Top 10, *supra* note 4.

⁶ Comité Asesor Regional de Comercio Exterior de Bogotá y Cundinamarca (CARCE) y Cámara de Comercio de Bogotá, *El Aeropuerto Internacional Eldorado – Una Plataforma Estratégica para el Comercio Exterior de Bogotá y Cundinamarca*: Bogotá's Chamber of Commerce Forum on "Experiencias Internacionales en Concesiones Aeroportuarias." (Bogotá: Cámara de Comercio de Bogotá, 2004). [CARCE].

⁷ Unidad Administrativa Especial de la Aeronáutica Civil de Colombia, "Estadísticas", Online: (2008) <http://portal.aerocivil.gov.co/portal/page/portal/Aerocivil_Portal_Internet/estadisticas/transporte_aereo/Estad%EDsticas%20Operacionales>.

This thesis will summarize and analyze the major positive and negative impacts that private sector participation/involvement in airports has had on air transport activity in various countries, with specific attention to Colombia's experience on this matter, centering the discussion around Eldorado International Airport in Bogotá, Colombia, now recently given under concession. In essence, I will argue and sustain, on the basis of a new conception of airports and their impact in a country's economy, that private sector participation/involvement for the modernization and expansion, as well as for its operation and management, constitutes the most favorable and viable solution not only in adapting the airport to the new demands of the industry, but also enhancing its role in the growth of the Nation and achieving greater levels of efficiency.

To do so, Chapter 2 will offer a brief overview of how a series of countries have managed and operated airports, providing an explanation of the principal privatization models that exist, their economic benefits and risks, and the impact privatization has had in general. Additionally, an analysis of the positions adopted by the major international entities that form part of the industry in relation to privatization is also provided as they serve in indicating possible risks and specific issues that deserve special consideration. Chapter 3 will cover the air transport policy in Colombia to introduce how private sector participation/involvement has been carried out in previous experiences prior to Eldorado International Airport, in order to establish and understand how the contract for Bogotá's airport was elaborated, all of which is analyzed throughout Chapter 4. Chapter 5 will provide my conclusions taking into consideration general topics discussed throughout this thesis, emphasizing specific ones that deserve special attention.

2. PRIVATIZATION

Nowadays, airports are not merely airports. They have transformed themselves into focal points of employment and in business activity zones, as well as in vital centers of logistics and distribution. The airport industry is constantly undergoing periods of transformation that have increased the levels of competition in the market.

This part focuses on the various organizational formats under which airports may operate. The option chosen by the State depends on many factors (such as the experiences of other States, constitutional and administrative arrangements, infrastructure requirements, etc.) and it is strongly influenced by government policy. There are a lot of ownership and control models that States can adopt for the management and operation of airports, but they all basically can be regrouped into two main categories: (i) public ownership and control and, (ii) private sector participation/involvement.

In the following pages, both categories will be analyzed in detail, including a brief description of the various and most significant variations each of them can take. It is important to bear in mind that the difference between the private sector involvement models depends on the level and area of participation of the private sector and also from the percentage of ownership it holds jointly with the government.

2.1. Approaches

2.1.1. Public ownership and control - Traditional approach

Traditionally, airports have been managed and operated by governments as they constitute an essential component of the national aviation system and hence, are seen as a public utility for the community. Seeing it from this point of view, there are a series of activities that are considered more fundamental than others for the development of the airport business. Hence, operational and handling activities are regarded to be more significant than commercial ones. This is why public authorities

have always managed airport assets and property, while all other activities related to commercial aspects were outsourced or contracted to private parties.⁸

Public ownership of airports is still being utilized by a great number of airports around the world as governments are realizing that privatization is the way forward. This approach may take the following forms: (i) through direct control and management (for example through a civil aviation administration); (ii) through a different ministerial department; (iii) through regional or municipal levels of governments; (iv) through government bodies that have financial and operational autonomy⁹; (v) through an autonomous corporation established by a special statute¹⁰, or (vi) through a company established under company law¹¹. In general, in all of the previous cases the government retains the overall ownership and control of the airports.¹² In short, the parties involved in this model of airport activity are: the State, the airlines, and the providers of the services (fueling, handling, catering, etc.).

Among the advantages of establishing autonomous airport entities, the following can be pointed out: (i) it helps create a corporate culture inside the airport organization, where employees are motivated in order to generate additional revenue; (ii) airports operated under this model have lower expenses per traffic unit; (iii) the revenue obtained by these authorities can easily be deployed directly to the aviation sector and not into the country's general revenue as in the case of governmental ownership in its pure form; (iv) it helps reducing the financial burden of the government; (v) it

⁸ Paul Stephen Dempsey, *Airport Planning & Development Handbook – A Global Survey*, (United States of America: McGraw-Hill, 2000) at 189 – 192. [*Airport Planning & Development Handbook – A Global Survey*].

⁹ In this case, the autonomy is very limited and the government can easily opt-out from the grant of the degree of autonomy given. (See, *Kesharwani*, *supra* note 3 at 92, 93.)

¹⁰ In this case, the action of the government is much more limited than in the previous one. The powers here are set clearly and expressly in the statute that creates the authority and gives it its autonomy, and the government cannot automatically retract its granting without having to reform the statute. (*Ibid.*).

¹¹ The authority's functions and operations are defined and expressed in the By-laws of the company. This model provides greater flexibility for the private sector participation as compared to the previous two. (*Ibid.*).

¹² ICAO Document 9562 "Airports Economic Manual" Second Ed. 2006, at 2-1 - 2-6. Online: http://www.icao.int/icaonet/dcs/9562/9562_en.pdf [*ICAO Doc 9562*].

helps in the improvement of the quality of service offered to its users; and (vi) it leads to a clear distinction between the regulator of the activity and the provider of the services.¹³

This traditional view is directly linked with the notion of sovereignty that States have exercised continuously throughout time, and recognized expressly in Article 1 of the Chicago Convention of 1944¹⁴: “*The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.*” Airports were used and perceived as important elements for national defense. This approach led to airports being conceived as mere instruments for the use of airlines and not as a public service as they are. As has been noticed, most of the legal aeronautic literature never mentions airports as a service, but rather as an accessory element or instrument for the activity of airlines.¹⁵

2.1.2. Private participation/involvement in airport ownership and operations – New approach

Transportation is essential for the development and growth of nations and therefore, governments are under an obligation to provide such service in a continuous and effective way. Major investment projects are required to meet the expected growth in air travel demand (both passengers and cargo) around the world, specifically in regions such as Latin America and Asia. Despite the need for increasing airport capacity to satisfy the traffic demand, most governments and city airport authorities are unwilling to support these projects because of their major budgetary constraints.¹⁶

¹³ ICAO Doc 9562, *supra* note 12 at 2-5.

¹⁴ ICAO Doc. 7300.

¹⁵ Ernesto Gutiérrez Conte, Bogotá's Chamber of Commerce Forum on “*Experiencias Internacionales en Concesiones Aeroportuarias.*” (Bogotá: Cámara de Comercio de Bogotá, 2004). [Gutiérrez].

¹⁶ Frost & Sullivan Research on “Potential Economic Benefits of Airport Privatisation” Online: <<http://www.marketresearch.com/product/display.asp?productid=1286859&q=1>> [Potential Economic Benefits of Airport Privatisation].

Since the beginning of the 1980's, governments have begun to shift from the way they have traditionally perceived airports. Currently, most governments regard airports as "potential profit-making enterprises rather than merely considering them as part of the infrastructure suppliers,"¹⁷ or only as a public service. All over the world, governments in both developed and developing countries are showing interest in having the private sector develop and manage their airports.

To begin with, it is basic to note that privatization refers to the movement away from government ownership and management of facilities and services by involving the private sector and giving the private operator full or at least majority ownership over the airport's facilities and services.¹⁸ Therefore, the provision of an airport's component by a private entity, management contracts, leases, and minority participation in equity of airports and Air Navigation Services (ANS) should not be considered as privatization, but rather as private participation¹⁹ or private involvement²⁰ since the majority or totality of the ownership and control still remains with the government.²¹

¹⁷ *Potential Economic Benefits of Airport Privatisation*, *supra* note 16.

¹⁸ Examples of "pure" privatization include: (i) perpetual franchise – the private operator gets the ownership, financing and operation, while the government retains the faculty to regulate safety, prices and standards of service; (ii) Buy-Build-Operate (BBO) – the private operator buys the airport from the government and enlarges or improves it as its own facility. (See, *Kesharwani*, *supra* note 3 at 21-27).

¹⁹ Private participation (together with private involvement, understood as the situation where the private operator, after gaining control over the airport facility previously owned by the government which may be a runway, the cargo handling facilities or the terminal building, expands it assuming all costs). Private participation involves full participation of the private sector while the government retains majority or full ownership. It can be through a management contract, a lease or minority participation in the equity of the organization owning airports and ANS. It can also include transfer of a part of the airport, such as the passenger or freight terminal building or runway and associated facilities to a private entity on lease or ownership basis. An example would be a Build-Operate-Transfer (BOT), where the government retains the ownership and the facility reverts to the government at the end of the contracted period. (*Ibid.*).

²⁰ Private involvement involves full participation of the private sector but the government maintains majority or full ownership. It can be through a management contract, a lease or a minority participation in the equity of the organization owning airports and ANS. It can also include transfer of a part of the airport, such as the passenger or freight terminal building or runway and associated facilities to a private entity on lease or ownership basis. (*Ibid.*).

²¹ *ICAO Doc 9562*, *supra* note 12 at 2-6.

Certain international organizations such as the World Bank²² assist governments in reviewing all the possible alternatives to privatize their airports. In some countries more than one model or a combination of models have been adopted. Described below are the most common forms of private participation/involvement that can be used for airport management and operation, all of which are also included in ICAO Document 9562.

2.1.2.1. Management contracts

Through a management contract, the management of an entire airport system or part of it is transferred to a private operator for a certain period of time and who must pay a fee to the government in return. The fee to be paid can be calculated in several ways, including “a fixed professional fee, a percentage of the gross revenue or a percentage of profits, a proportion of the savings effected or additional revenue generated, or the actual costs of management plus a percentage to cover overheads and profit.”²³ It is important to note that the government still retains full ownership over the airport, and that the private manager does not undertake any improvements or development from its own funds. Airports that do not have a lot of development requirements but want to increase their operational and financial efficiency levels mostly use this model.²⁴

²² The World Bank is a specialized agency of the United Nations that plays an important role in the development of infrastructure for any kind of means of transportation. Regarding airports and air navigation services, the World Bank is in favor of having private sector participation in its operations and management. According to a report prepared on behalf of the World Bank, “publicly-owned airports, with a few exceptions, have not performed at the same level of efficiency as airports with private sector participation. Reasons contributing to the inefficiency of publicly-owned airports include: political interference in the appointment of management, uneven commercial structures, operational inefficiency resulting primarily from overstaffing and limited commercial orientation, inadequate maintenance, a fiscal drain on the national economy when funds should be diverted to more social problems, the lack of responsiveness to user needs, and inadequate economic and environmental regulations.” (See *Kesharwani, supra* note 3 at 118).

²³ *Ibid.* at 94, 95.

²⁴ ICAO Doc 9562, *supra* note 12 at 2-7.

2.1.2.2. Lease or concession contracts

This is one of the most common forms of private participation in the provision of airport services. Under this model, governments retain full ownership of the airport, while the operation, management, improvement, expansion and development functions are transferred to the private operator, who assumes the majority of the responsibilities under the conditions listed in the contract, and who is obliged to pay a lease rental or concession fee to the government. This fee may be paid upfront, annually or a combination of the previous two. The lessees or concessionaires are selected generally on the basis of open tenders from a list of pre-qualified bidders. Capital investments are made directly by the private operator to cope with additional traffic demand and improvement in quality of service.²⁵

The difference between these and a management contract basically resides on the term of the contract, where the lease or concession is always awarded for a greater period of time. At the expiry of the lease period, the lessee or concessionaire must return the airport to the lessor, without having the lessor to pay any compensation for the capital improvements undertaken by the lessee or concessionaire. During the execution of the contract, the private operator retains all revenues and profits.²⁶

Lastly, leases can take various types of forms. The most popular one is the Build-Operate-Transfer (BOT)²⁷, which derives itself into others including, but not limited to, Build-Own-Operate-Transfer (BOOT), Build-Transfer-Operate (BTO), Lease-Develop-Operate (LDO).²⁸ In the case of a Build-Own-Operate (BOO) or a Buy-

²⁵ *Ibid.*

²⁶ *Kesharwani, supra* note 3 at 96.

²⁷ ICAO Doc. 9562 defines the BOT scheme as “an ownership and management system under which a private entity obtains the right to finance, build and operate a certain facility, including land and/or buildings, over a long period of time, and on expiry of the right returns it to the owner.” (See, ICAO Doc 9562, *supra* note 12 at 2-7).

²⁸ Other variants resulting from the BOT scheme can be found in ICAO Circular 284 – *Privatization in the Provision of Airports and Air Navigation Services*.

Build-Operate (BBO) scheme, ownership of the airport is transferred to the private operator and therefore cannot be considered as a type of leasing.²⁹

2.1.2.3. Private sector minority participation in equity

This model compromises the transfer of ownership from the government to the private operator through a sale of less than fifty percent (50%) of the total equity shares. The sale can be done either through an outright sale³⁰ of shares to a strategic partner, or through an Initial Public Offer (IPO) on the stock exchange. In this case, the government will always retain the majority of the shares, and has the power to decide what proportion of ownership or equity it retains for itself and what proportion it will transfer to the private operator. One of the main advantages of this system is that the transfer of ownership can be done in different stages, depending upon local circumstances and needs, as will be seen in various cases of the European countries discussed later on.³¹

2.1.2.4. Private sector majority ownership and control

This model is very similar to the previous one, differing only that in this case there is a majority or full transfer of equity to the general public or the strategic partner chosen previously. The transfer of the majority of ownership can be effectuated in the same two ways discussed above. The private operator has the control over the management and operations of the airport. Once the transfer to the private operator is done, the only way the government can retract itself from the sale and regain its ownership over the airport is by buying back the shares if the private operator decides to sell them.³² There are only a few cases where this model has been adopted, one of them being the case of the British Airports Authority.

²⁹ *Kesharwani, supra* note 3 at 96, 97.

³⁰ Outright sale involves the sale of an airport to a private operator on the basis of public bids. The model requires the existence of a regulatory mechanism in order to protect the interests of the various users. It is believed that this method should only be used for smaller airports that represent little economic importance. (*Ibid.* at 98).

³¹ *ICAO Doc 9562, supra* note 12 at 2-7.

³² *Ibid.*

2.1.2.5. Privatization of part of airport services

This model allows only specific parts of an airport to be privatized, such as terminal buildings, runways, etc. Each State decides what part of the airport must be privatized depending on specific conditions such as traffic volume and growth potential, condition of the existing infrastructure, expansion and improvement requirements, etc. The operator's activities are regulated by a contract that is similar in some ways to a commercial concession agreement.³³

Presently, only two percent (2%) of the world's commercial airports are managed or owned by the private sector. Even though the percentage of participation of the private sector in the airport industry is low and has not changed significantly over the last twenty (20) years, the results achieved and gained by these airports have encouraged others to pursue the same approach. The following constitute some of the reasons that make the industry attractive for private investors, listed in order of relevance:

- i) During the past years, there has been a strong growth trend in air traffic. Additionally, the forecasted estimates are optimistic in predicting a continuing growth in traffic demand and aircraft production;
- ii) This growth of passenger traffic leads to improved profit margins that result from economies of scale³⁴ (the upward traffic forecast is also expected to have a positive impact);
- iii) There are a still a lot of strong commercial opportunities in the business to be exploited;

³³ *Ibid.*

³⁴ "Economies of scale are realized when increases in total production simultaneously decrease unit costs; long-run average cost decreases as output increases." (See Paul Stephen Dempsey and Laurence E. Gesell, *Airline Management Strategies for the 21st Century* 2nd Ed. (Chandler, Arizona: Coast Aire Publications, 2006) at 76. [*Airline Management Strategies for the 21st Century*]).

- iv) The industry is characterized by having significant barriers of entry³⁵ for newer companies, allowing the existing ones to improve their earnings, and
- v) “Reduced risk related to exchange rate fluctuations due to the fact that airports generate substantial revenues in hard currencies and both travel and tourism industries are dominated either by the Dollar or the Euro.”³⁶

One last important aspect to take into consideration regarding the aviation infrastructure are Air Navigation Services (ANS) as they constitute practically half of the airport infrastructure. In relation to ANS providers, these are slowly being considered to be privatized as well, especially in the Latin American region, but have not yet undergone such a process. States have always and still believe that the air space above their territory and its management constitute their national sovereignty and therefore do not desire to privatize these type of services.³⁷ Not only that, but ANS are also provided by a network of companies that have to strictly work in compliance and harmony with each other to ensure safety. The importance of ANS will be analyzed in the following paragraphs.

Lastly, it is important to bear in mind that both civil aviation and its infrastructure have special features that make them somewhat different than other transport sectors. If airports and ANS are privatized, special attention should be drawn to the special features each of these two have. This is because they require special treatment in certain aspects due to the differences in the objectives pursued when private operators or governments manage these services. These special features include:

³⁵ Barriers to entry have been defined as “any factor that prevents a new firm from competing on a equal footing with existing firms.” (See *Airline Management Strategies for the 21st Century*, *supra* note 34 at 95).

³⁶ *Potential Economic Benefits of Airport Privatisation*, *supra* note 16.

³⁷ Jaime Escobar – Corradine, “Privatización de Aeropuertos – El Efecto Económico sobre las Líneas Aéreas – Posición de IATA y AITAL”: ICAO Airport Privatization Seminar for the NAM/CAR/SAM Regions, Online: International Civil Aviation Organization <http://64.233.167.104/search?q=cache:R55Q3-b3RdMJ:www.icao.int/icao/en/ro/nacc/aps/07_pp_escobar_s.pdf+privatización+de+aeropuertos&hl=en&ct=clnk&cd=1&client=safari> [Escobar Corradine].

- i) *Airports are monopolies.* They constitute natural monopolies, where its users (airlines, passenger and shippers) are interdependent among each other. Airports provide essential transport links benefiting the economy of a country by bringing regions together. When airports are privatized, the price that the airport operator charges for the provision of aeronautical services is capped or limited to a specific amount to prevent abuse in overcharging its users.³⁸

As discussed earlier, ANS represent a much stronger monopoly compared to airports. This is because all aircraft depend on them while flying over the territory of a particular State. Basically, airports and ANS have different characteristics: (i) ANS services provided by a State extend over the whole territory of the State concerned and sometimes beyond, depending also on the systems from other States; (ii) The privatization of ANS implies much more far-reaching consequences; (iii) In the majority of States, ANS are not provided by a single entity but rather by a group of entities working together for the same purpose; (iv) ANS are said to be more sensitive than airports as they authorize aircraft prior to the over flight of a country or landing in one of its airports; (v) Services provided by private entities may not provide the same level of confidence as the services provided directly by the government or indirectly by a government owned corporation; (vi) ANS deal more with the safety of aircraft operation being directly related with a country's national defense system and security and external relations, or in other words, they are part of the sovereignty of the state as expressed before.³⁹

- ii) *Airports are capital intensive.* Airports demand large amounts of capital investment not only for the development of costly infrastructure, but also for its management and maintenance. In comparison with airlines, airport capacity can only be enhanced in lengthy stages, whereas in order to increase capacity in airlines, new aircraft must be acquired to fit the demand.

³⁸ Kesharwani, *supra* note 3 at 29, 30.

³⁹ *Ibid.* at 32, 33.

Additionally, establishing the location where a new airport is going to be built involves a great amount of study and planning, and it is a key factor to take into consideration because if traffic speculations do not materialize or it is located at an inappropriate site, the capacity cannot be transferred to a different location. This is not the case for airlines because aircraft acquired for a specific segment of the market can easily be used for another route, leased to another airline or simply sold.

Airports that have higher volumes of traffic are more likely to be financially stable and profitable than those with lesser volumes of traffic because of economies of scale.⁴⁰ This is probably why changes in the ownership and management structure of airports, and in some cases ANS, are currently taking place.

- iii) *Airport services are joint products from different agencies.* The service provider (airport operator) is not the only one in charge of providing airport services. Airlines are the principal users of these facilities and therefore airports must also ensure that other goods and services such as catering, ground facilities (gates, ticket counters, office space, baggage systems and maintenance)⁴¹, air traffic control, etc., are provided to the airlines. Various agencies in which the government has no administrative control, such as airline operators, regulatory bodies, security agencies and concessionaires provide these services to the passengers, shippers and other entities. Nevertheless, they must cooperate between each other in order to provide quality airport services. In airport partnerships, unlike other businesses, the operator has no opportunity in selecting its partners as they are previously determined either by international agreements or national legislation, or

⁴⁰ *Ibid.* at 30.

⁴¹ *Airline Management Strategies for the 21st Century*, *supra* note 34 at 378.

through administrative agreements. The only exception is the concessionaires, where the airport operator can choose its partner.⁴²

- iv) *Airports must comply with a series of international obligations in order to operate correctly.* Air transport activity has a large international dimension. States must comply with international standards and adopt recommended practices as they see fit in order to provide air transport services. Cooperation among the States is indispensable for the provision of secure and safe operations.⁴³

In short, with this new approach towards airports, the parties involved do not include only the traditional three mentioned before: the State (acting as the grantor of the concession, as regulator, as controller, and as the one in charge of modeling the commercial air policy), the airlines and the service providers, but it now includes the concessionaire (who acts as the CEO of the airport) and the user (which in this case refers to only passengers).⁴⁴

2.2. Airports in the Chicago Convention of 1944

Safe, secure, efficient and economical operations in international civil aviation can only be ensured by the cooperation of all the States involved in it. Thus, international conventions and agreements are a key component to accomplish these objectives.

The Convention on International Civil Aviation of 1944 (the Chicago Convention), to which 190 States are parties⁴⁵, constitutes the legal foundation for the regulation of world civil aviation, establishing a number of obligations for member States in order

⁴² Kesharwani, *supra* note 3 at 28, 29.

⁴³ *Ibid.* at 28.

⁴⁴ Gutiérrez, *supra* note 15.

⁴⁵ "Convention on International Civil Aviation Signed at Chicago on 7 December 1944," Online: International Civil Aviation Organization: <<http://www.icao.int/icao/en/leb/chicago.pdf>>. The Chicago Convention was approved in Colombia by Law 12 of 1947.

to accomplish its objectives. Signed in Chicago on December 7, 1944, it also established the International Civil Aviation Organization (ICAO), as “an international organization with wide quasi-legislative and executive powers in the technical regulatory field and with only consultative and advisory functions in the economic sphere.”⁴⁶ ICAO also holds a quasi-judicial authority to resolve aviation disputes between nations arising under the Chicago Convention.

The quasi-legislative power of ICAO translates in its ability to adopt standards and recommended practices (SARPs). The main difference between these two is that while the Standards are binding unless a member State declares its inability to comply, the Recommended Practices are viewed as desirable and States are not obliged to notify ICAO’s Council of their intent to comply.⁴⁷ Article 12 of the Chicago Convention expresses that it is each State’s responsibility to keep its own regulations uniform “to the greatest possible extent” with the SARPs. However, the execution of the Annexes depends upon the national laws and regulations promulgated by member States that implement and enforce them.⁴⁸

The ICAO Council is also responsible for adopting Annexes to the Chicago Convention in certain areas. There are three very important to this topic: Annex 11 on air traffic services, Annex 14 on the development and maintenance of aerodromes and Annex 17 on security. All Annexes are binding upon the States unless their differences are filed as provided under Article 38.

Among the principles, rights and obligations set forth in the Chicago Convention, there are a few articles that deal directly with private participation and privatization of airports and ANS, thus being the dominant legal framework applicable for the development of the airport activities.

⁴⁶ Michael Milde, “The Chicago Convention – After Forty Years,” *Annals of Air & Space Law* (Canada: 1984), at 119, 121.

⁴⁷ Paul Dempsey, “Coursepack: Public International Air Law” Vol. 1 (Faculty of Law, McGill University, 2007) at 23. [*Public International Air Law Coursepack*].

⁴⁸ *Public International Air Law Course Pack*, *supra* note 47 at 23, 24.

The most relevant article is Article 28, which places the responsibility of the provision of airport and ANS on each contracting State, whether the services are provided directly by the State or by a private operator. In the provision of such services, the State must act in accordance with the Chicago Convention and the SARPs dictated by ICAO.⁴⁹ States must provide such services on a non-discriminatory basis. This basic principle is one of ICAO's objectives⁵⁰, and also refers to the equal application of laws and regulations in aircraft engaged in international air transportation, in relation to the landing or take off from the territory of a State and also to the navigation of an aircraft within its territory stipulated in Article 11.⁵¹ Furthermore, Article 15 includes the basic policy on airport and ANS charges, reinforcing the concept of freedom of access and non-discrimination in the access and utilization of airport facilities and services. It basically states that airports should be as open under uniform conditions to aircrafts of other contracting States as they are for national aircraft.⁵²

⁴⁹ Chicago Convention 1944 – Art. 28: “Each contracting States undertakes, so far as it may find practicable, to: (a) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention; (b) Adopt and put into operation the appropriate standard systems of communications procedure, codes, markings, signals, lighting and other operational practices and rules which may be recommended or established from time to time, pursuant to this Convention; ...”

⁵⁰ Chicago Convention 1944 - Article 44(g).

⁵¹ Chicago Convention 1944 – Art. 11: “... the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.”

⁵² Chicago Convention 1944 – Art. 15: “Every airport in a contracting State which is open to public use by national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation. Any charges that may be imposed or permitted to be imported by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher, (a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international services. All such charges shall be published and communicated to the International Civil Aviation Organization: provided that, upon presentation by an interested contracting State, the charger, imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned. No fees, dues or other charges shall be imposed by

When States adopt international standards and procedures set forth by the ICAO, Article 37 demands uniformity in the regulations, norms and proceedings to facilitate and enhance air navigation operations.⁵³

When a State decides to privatize its airports and ANS, it should ensure that the private operator complies with its obligations under the Chicago Convention and the Annexes. This is mostly done by “legislative action, regulatory action or making appropriate provisions in the concession agreement.”⁵⁴ If the transfer of operations and management is done through a concession contract, it must clearly include the action taken by the State if the private operator does not comply with the requirements set forth in the Chicago Convention. The State shall make all necessary arrangements to oversee the activity carried out by the private operator providing the services.⁵⁵

2.3. Potential economic gains

Several potential economic gains result from privatization. To move away from a public management model to a private-for-profit business model implies a notable improvement in efficiency, as managers often tend to cut unnecessary costs and increase revenues as much as possible. Private operators are much more effective as this model allows the managers to take decisions in a more expeditious way. Managers regard their consumer as the most important and valuable element for the development of the airport business and therefore focus their management styles

any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.”

⁵³ Chicago Convention 1944 – Art. 37: “Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways, and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with: ... (b) Characteristics of airports and landing areas...” States are also obliged to send to the ICAO financial and statistical data according to articles 54 and 67 of the Chicago Convention.

⁵⁴ Kesharwani, *supra* note 3 at 38.

⁵⁵ *Ibid.*

and marketing skills towards them. Also, major capital investment decisions may be more easily carried out because there are practically no significant budgetary constraints in comparison to a public management model. In most cases, these decisions are taken on a consumer – oriented basis, leading to better quality provision of services and therefore increasing consumer satisfaction overall.⁵⁶

Sometimes, as will be seen later on with the examples provided by the case studies, the monopolistic status of airports has led managers to take investment decisions incorrectly. There have been situations where in order to reduce costs and prevent greater losses, managers have been inclined to invest less than what was projected or to reduce capacity to minimize costs. In order to prevent this from happening, a strict regulatory environment should be implemented to prevent the private operator from abusing its monopolistic position. The existence of a regulatory entity is a key factor for the efficient and safe operation of an airport by a private company. Such regulatory control must be oriented not only to satisfy high and secure standards in the operation but also to avoid the abuse of monopolistic power from the operator. The control must be flexible in order to guarantee efficiency and speed, consistent, transparent and responsible, based on an open communication scheme between the operator and the users (mostly the airlines), and between the operator and the regulatory agencies or others associated with the industry.⁵⁷

Nevertheless, history has also proven that the positive economic benefits derived from airport privatization surpass the negatives one, making it an attractive business for investors and at the same time, improving the quality of the services offered to passengers, airlines and shippers, and helping in the development of the areas that surround it.

⁵⁶ ICAO Doc 9562, *supra* note 12 at 2-8 – 2-9.

⁵⁷ Asociación del Transporte Aéreo en Colombia (ATAC), “Participación privada en infraestructura aeroportuaria – La experiencia colombiana” (Bogotá: 2004) at 31. [ATAC CONCESSIONS].

2.4. Risks

Privatization of airports also involves certain risks despite the positive potential economical benefits described above. One of the largest concerns in airport privatization is that the private operators will use monopoly pricing to abuse the public interest.⁵⁸

Before starting a privatization process, a government must contemplate several policy issues in order to safeguard the public interest.⁵⁹ Specifically, “the eventual externality, negative or positive effect imposed by airport users over non-users or other users, generated by the provision of airport services or strengthened market position gained by the airport operator after privatization should be carefully considered.”⁶⁰ In other words, a regulatory regime concerning areas such as charges, safety, quality of service and spatial planning must be designed and possibly adopted before the privatization process takes place and the regulatory role is assigned to an independent body.⁶¹

Once it has been determined that the airport activity will be delegated to the private sector, it is very important to also keep in mind that the legal relationships between the parties involved to carry out and develop the activity become much more complex. New parties also appear, where their rights and obligations must also be explicitly defined to avoid future conflicts. In addition, the commercial air policy must be carefully adapted to be at pace with developing air transport activities.⁶²

The following sections illustrate the point of views of the main international organizations and associations that are directly related to privatizing international

⁵⁸ William H. Payson and Steven A. Steckler, “Expanding Airport Capacity: Getting Privatization Off The Ground” *Reason Foundation Policy Insight*, Number 141 (Los Angeles: Reason Foundation, July 1992) at 11.

⁵⁹ “The monopolization of public resources is antithetical to the public interest.” (See, *Airline Management Strategies for the 21st Century*, *supra* note 34 at 870).

⁶⁰ *Potential Economic Benefits of Airport Privatisation*, *supra* note 16.

⁶¹ *Ibid.*

⁶² *Gutiérrez*, *supra* note 15.

airports. They generally agree on certain issues or aspects that should be easily taken care of when the decision to privatize is adopted, unanimously supporting private sector involvement/participation in the management and operation of airports. Their positions are based on how airports are conceived nowadays and the benefits that privatization brings when compared to a public operation and management model.

2.5. International Civil Aviation Organization (ICAO) position

The ICAO considers that the principal objective of airports consists in providing a secure, efficient and economic service to airlines, passengers and other users.⁶³ It recognizes that airports constitute a natural monopoly,⁶⁴ and thus recommends having a regulatory body that supervises the use of these monopolies as well as their productivity in order to ensure an equal benefit system. There are several ways of handling the ownership and operations of airports, and States shall choose the one that best fits its own characteristics, necessities and actual situation.⁶⁵

The ICAO states in the Airports Economic Manual (ICAO Document 9562) that privatization offers certain significant benefits independent from the form elected by the State. It believes that privatization could relieve states of the burden of capital investment and give managers more access to open markets for loans or other capital investments. It also states that independently from the option elected by a State, the government will always remain the responsible institution for the security, safety and economic oversight of the operations.⁶⁶ In other words, the Government

⁶³ In relation to airport certification processes, the ICAO suggests the application of the *Manual on Certification of Aerodromes* (ICAO Document 9774).

⁶⁴ Natural monopolies exist when “economies of scale available in the process of manufacturing a product are so large that the relevant market can be served at the least cost by a single firm.” (Ernest Gellhorn and Richard J. Pierce, *Regulated Industries*, 2nd Ed. (St. Paul, Minnesota: West Publishing Co., 1987) at 321).

⁶⁵ Zenón Cortés, “La Organización de Aviación Civil Internacional, OACI, y la privatización de los Servicios Aeroportuarios” (Paper presented to the Bogotá’s Chamber of Commerce Forum on “*Experiencias Internacionales en Concesiones Aeroportuarias*” (Bogotá: Cámara de Comercio de Bogotá, 2004). [Cortés].

⁶⁶ ICAO Doc 9562, *supra* note 12 at 2-6 – 2-9.

may delegate the administration of the airport, but under no circumstances may it delegate its responsibility to the international community and the ICAO.

Airport and ANS charges are also of great importance for the ICAO, as the ultimate goal is to avoid discriminatory charges among its users. Mainly, airport charges comprise aeronautical and non-aeronautical components that when combined result in the total revenue of an airport. The aeronautical charges include landing, parking and passenger service charges. The non-aeronautical include rentals, concession fees, etc.⁶⁷

Charges are determined in accordance with certain guidelines developed by the ICAO for such purposes, all based on the principles contained in the Chicago Convention. Regarding tariff regulations, the ICAO considers that there is no perfect formula to regulate pricing, but recommends the Policies on Charges for Airports and Air Navigation Services as contained in ICAO Document 9082⁶⁸ for such

⁶⁷ Kesharwani, *supra* note 3 at 42, 43.

⁶⁸ ICAO Document 9082 is not legally binding for States, but they internationally recognize not only because it was adopted unanimously by all States in an international conference, but also for the practical value of its principles in avoiding any type of discrimination or disputes. Some of these are mentioned as follows. To impede the proliferation of charges on air traffic, ICAO Document 9082, Article 8 recommends that States "... (i) permit the imposition of charges only for services and functions which are provided for, directly related to, or ultimately beneficial for, civil aviation operations; (ii) refrain from imposing charges which discriminate against international civil aviation in relation to other modes of international transport." Additionally, Article 22 declares "Aircraft operators and other airport users should not be charged for facilities and services they do not use... Any State or charging authority may recover less than its full costs in recognition of local, regional or national benefits received." Further on, Article 22 v), states that the Council should follow the following principles in determining the cost basis for airport charges, among them "The proportion of costs allocable to various categories of users, including State aircraft, should be determined on an equitable basis, so that no users shall be burdened with costs not properly allocable to them according to sound accounting principles." Additionally, Article 40 on Allocation of costs of air navigation services among aeronautical users states the following: "The Council recommends that the allocation of the costs of air navigation services among aeronautical users be carried out in a manner equitable to all users. The proportions of cost attributable to international civil aviation and other utilization of the facilities and services (including domestic civil aviation, State or other exempted aircraft, and non-aeronautical users) should be determined in such a way as to ensure that no users are burdened with costs not properly allocable to them according to sound accounting principles. The Council also recommends that States acquire basic utilization data in respect of air navigation services, including the number of flights by category of user (i.e. air transport, general aviation, and other) in both domestic and international operations, and other data such as the distance flown and aircraft type or weight, where such information is relevant to the allocation of costs and the cost recovery system."

purpose. The Document contains the ICAO's policy over airport and ANS charges, being that there must be equilibrium between airports, ANS and airlines. It also reminds States that they are the only ones responsible for safety and security and in general, the economic oversight of their operations because of the monopolistic status of airports and the provision of ANS. The ICAO emphasizes the role that the regulatory authorities must play in order to prevent monopoly abuse.⁶⁹

Additionally, through Document 9082, the ICAO for the first time recognized pre-funding projects, "not withstanding the principles of cost-relatedness for charges and of the protection of users from being charged for facilities that do not exist or are not provided after allowing for possible contribution from non-aeronautical revenue..." These type of projects, including for example, raising revenue to finance a future project, may be carried out when it is determined that they constitute the most appropriate means by which long-term, long-scale investment projects are to be financed. A strict safeguard policy must be put in place, including principally the following aspects:

- i) The existence of an "effective and transparent economic regulation of user charges and the related provision of services, including performance auditing and benchmarking, understood as the comparison of productivity criteria with other similar enterprises;
- ii) Comprehensive and transparent accounting with the assurance that all aviation user charges are, and will remain, earmarked for civil aviation services or projects;
- iii) Advance, transparent and substantive consultation by providers and, to the greatest extent possible, agreement with users regarding significant projects;
- iv) Application for a limited period of time with users benefiting from lower

⁶⁹ Cortés, *supra* note 65.

charges and from smoother transition in changes to charges than would otherwise have been the case once new facilities or infrastructure are in place.”⁷⁰

Through this document, the ICAO also encourages States to establish independent mechanisms to supervise the economical, commercial and financial activities of airports.⁷¹ These mechanisms would serve to assure the following: (i) that there will be no discrimination in the application of airport charges; (ii) that excessive tariffs are not established and anticompetitive practices are forbidden; (iii) the transparency and access to the required financial data in order to determine the applicable charges and taxes; (iv) the stimulation of efficiency and effectiveness of the operations; (v) the establishment of service quality control systems; (vi) the promotion of the necessary investments required to satisfy the demand, and (vii) that consultation processes with the users are taken.⁷² This economic oversight will also help promote the continuous development of civil aviation, the regional economic development, ensure the non-discriminatory access to all airport users, ensure that the ICAO cost recovery principles contained in this document are observed and also ensure that all the State’s obligations specified in the Chicago Convention of 1944 and its Annexes, including any other agreement to which a State is party, are strictly followed.⁷³

In brief, the ICAO holds the position that effects of privatization around the world have been positive. Even if in some cases airport charges have increased considerably as a result of the privatization process, they have been generally brought down in real terms and the services provided have improved.⁷⁴

⁷⁰ ICAO Document 9082, paragraph 42.

⁷¹ ICAO Document 9082, paragraph 15.

⁷² ICAO Document 9082 highlights the importance of consulting the airport and ANS users when setting up the respective charges for both, proposing a series of recommendations in Articles 31 and 49 to be adopted.

⁷³ ICAO Doc 9562, *supra* note 12 at 2-11.

⁷⁴ Cortés, *supra* note 65.

2.6. International Air Transport Association (IATA) position

The airline business would not exist if it were not for airports, and vice versa. Airports constitute a key partner for the IATA and its member airlines. This association believes that privatization should not be seen or used as a way for governments to obtain short-term revenues, but rather as an important step in a long-term vision of economic development of a country. Regarding which model of ownership structure government's implement, the IATA believes that the framework set to carry out the privatization process must be transparent⁷⁵ and beneficial for the industry and its users. The important issue for the IATA is that airports should deliver the appropriate cost and service levels that the airlines require.⁷⁶

The IATA promotes the establishment of autonomous entities to operate airports and ANS due to the fact that they believe the airport's facilities and its services could be operated along commercial lines and therefore in a more efficient way. In general, the IATA considers that government-owned airports have significant financing restrictions while having to compete with other sectors of the economy for resources, they have to face pressures that are not related to the business, they are generally inefficient in terms of provision of services, and also suffer from low cost recovery. On the other hand, it considers privatization to open up more financing options resulting in more efficiency.⁷⁷

⁷⁵ The IATA defines transparency as the "means of facilitating knowledge, assessment and opinion on what is happening within an organization and/or service." The IATA's position on transparency is that "airports and ANSPs need to ensure that airlines (as users) are provided with adequate information on major developments at airports/ANSPs, the rationale for any charges proposal, charge setting formula and the methods to establish the values used in the formula. Airport operators/ANSPs should provide airlines with key operational data to support benchmarking and discussions on continuous improvements in performance and cost efficiency. Also, regulators should be transparent to the users on the rationale for the selected regulatory formula and the methods of determining the values used in the formula. Similarly, third party arbitrators overseeing the consultation process need to be transparent in any ruling or decision." (IATA Position Papers on Aviation Charges – "Transparency", February, 2007 Online: http://www.iata.org/NR/rdonlyres/571270F7-B0D5-4D33-87F7-56CC2FED188D/0/Transparency_Feb07.pdf) [IATA Transparency].

⁷⁶ Brian Pearce, IATA Economics Briefing: Airport Privatisation, July 4, 2005 at 4. [IATA Airport Privatization].

⁷⁷ Kesharwani, *supra* note 3 at 114.

As with the ICAO, the IATA also emphasizes the need for efficient economic regulation by an independent and “neutral economic oversight” mechanism. It believes all airports and ANS providers (ANSP) must follow the ICAO principles in setting the user charges on a cost-based approach, through a transparent process that involves a consultation phase for all interested parties to participate. An effective transparent and independent regulatory framework not only reduces the investor risks and financing costs, but it also provides the stability to “attract longer-term investment finance into the industry, avoiding the potential volatility in infrastructure asset prices driven by short-term speculative finance.”⁷⁸

As the principal users of the infrastructure, airlines support privatization but with some restrictions. They mostly fear the unlimited raises in charges and tariffs that the private operator may impose, affecting their operational costs severely. It is very important for them to participate during a privatization process due to the financial impact it has on the airlines. The IATA, being the leading world airline association, plays an important role in the vigilance of these processes jointly with both the local associations that represent the airlines and other regional associations, not only to ensure the effective participation of the airlines during the process, but also to make sure the ICAO’s principles on consumer charges (relationship cost/charge), transparency in the presentation of information related to income and costs, and non-discrimination⁷⁹ for charges, are applied throughout and after the process.⁸⁰ It can be concluded then that the IATA is in favor of privatization of airports, with safeguards relating to charges.

⁷⁸ IATA Economics Briefing No. 06, “Economic Regulation”. Online: http://www.iata.org/NR/rdonlyres/D20E33A8-E16C-4DD6-8183-9D0DDBEE24C9/0/Economic_Regulation_Summary.pdf [IATA Economics Briefing No. 06].

⁷⁹ “In accordance with the ICAO policies, the regulatory structure should not distinguish between different types of users. The consultation process should be open to a range of stakeholders and the regulatory decisions should be applied on a non-discriminatory basis for users. Regulators should take into account the interests of existing users while safeguarding the rights for future potential users.” (IATA Economics Briefing No. 06, *supra* note 78).

⁸⁰ Escobar Corradine, *supra* note 37.

2.7. Airports Council International (ACI) position

The Airports Council International⁸¹ is the body that represents over 1660 airports worldwide. It gathers almost the totality of public and private airport operators in the world for the defense of all their common interests. It is organized by geographical regions and actively participates in global and regional committees (Facilitation, Safety, Security, Environment and Economy) along with the ICAO and other of the most important civil aviation organizations worldwide.

This international body believes that a private operating business model, which brings innovation and puts in practice various entrepreneurship tactics, enhances the way airports are managed as they serve the needs of the local community. It also liberates them from governmental bureaucracy allowing the operator to introduce new business models. This system allows both productivity and efficiency to increase as the consumer's needs are satisfied.⁸²

As in the ICAO's and the IATA's position, the ACI sees airport privatization to be positive. It does not favor any specific form of ownership, advocating for autonomy in the management and operation of airports.⁸³

The ACI's position does differ somewhat with the IATA's view on the monopolistic status of airports. The ACI considers this view as "simplistic", as its members, the majority of the airports worldwide, have shown that they have evolved by acting in a competitive way in the global marketplace and not as monopolies. A clear example is when the abrupt downturn in traffic was caused by the terrorist acts of September 11, 2001 and SARS, airports, instead of raising user charges to compensate for lost

⁸¹ ACI's *Airport's Legal Affair Committee* (CALA – Comité de Asuntos Legales Aeroportuarios), a committee that forms part of the Latin American and Caribbean Region of ACI (ACI/LAC), is one of the greatest promoters for the creation of a "new" legal airport regime. (*Gutiérrez, supra* note 15).

⁸² ACI Position Brief "A Global Industry", March, 2007 Online: Airports Council International <http://www.airports.org/aci/aci/file/ACI_Priorities/Business/position%20brief_LIBERALISATION.pdf>.

⁸³ *Kesharwani, supra* note 3 at 115.

revenues, decided to “ease the economic burden on cash-strapped carriers”⁸⁴ by cutting-off user charges. Therefore, the ACI does not recommend increased regulation of airports as it believes that it will “simply duplicate and complicate the already significant oversight structure that is in place today”⁸⁵, resulting in an increase in costs that at the end have to be passed and assumed by the airlines and passengers.⁸⁶ With these new ownership and management models, what airports are seeking is quality and efficiency in the provision of services to their airline customers.⁸⁷

Nevertheless, both the ACI’s and IATA’s view coincide in that they both advocate for constructive dialogue and healthy business relationships between airports and airlines. The ACI also believes that transparent consultation processes, specifically dealing with charges, shall be pursued based on “sound business principles and professional conduct.”⁸⁸

⁸⁴ Airports Council International (ACI), “*Understanding Airport Business*” (Geneva, Switzerland: ACI World Headquarters, July 6, 2006) at 10. Online: Airports Council International <http://www.aci-lac.aero/aci/ACI%20LAC/File/Downloads/Understanding_Airport_Business_final.pdf> [*ACI Airport Business*].

⁸⁵ *ACI Airport Business*, *supra* note 84 at 11.

⁸⁶ Director General of ACI, Robert J. Aaronson, called for a “light-handed regulation” in delivering a speech a few years ago while stating that “regulation that distorts market forces or creates expensive, time-consuming bureaucratic hurdles to airport development impedes airport operators from carrying out their core mission of serving the community and region in a cost-effective and efficient manner, providing gateways for economic development, trade and tourism.” (Airports Council International (ACI), “*Meeting the global challenge of sustainable airport infrastructure*”, speech delivered by Robert J. Aaronson, Director General of ACI on the World Civil Aviation Chief Executives Forum, Singapore Aviation Academy on December 11, 2006 Online: <http://www.aci.aero/aci/aci/file/Speeches/RJA_SIN%20speech_final.pdf>).

⁸⁷ ACI encourages its members to realize and participate in benchmarking studies to measure their business performance. In other words, benchmark tools are good to know if the organization is meeting its objectives or not. “In a globally competitive environment, benchmarking is a widely accepted means to analyze business performance against objectives and to evaluate achievements relative to peer performance. Airports worldwide have adopted financial and quality of service benchmarking as a management tool to enhance efficiency, improve service and drive down costs.” (Airports Council International (ACI), “*Airport Benchmarking to Maximise Efficiency*” (Geneva, Switzerland: ACI World Headquarters, July 6, 2006) at 3-6 Online: <http://www.aci.aero/aci/aci/file/Press%20Releases/Airport%20Benchmarking%20to%20Maximize%20Efficiency_final.pdf>).

⁸⁸ *ACI Airport Business*, *supra* note 84 at 2.

2.8. Worldwide privatization processes

Shortly after the United Kingdom privatized the British Airport Authority (BAA) in 1987, interest in privatizing other airports around the world began to increase. Today, more than twenty (20) countries around the world have completed the sale or lease of their airport facilities. These include, among others: Argentina, Australia⁸⁹, Austria⁹⁰, Belgium⁹¹, Bolivia, Canada, Chile, China, Colombia, Costa Rica, Denmark⁹², Dominican Republic, Egypt, France, Germany, Hungary, India⁹³, Italy,

⁸⁹ Privatization in Australia began in April 1994 when the government announced the decision to sell twenty-two airports that were owned and operated by the Federal Airports Corporation (FAC) publicly. (See, *Benefiting Consumers and the Economy through Airport Privatization*, *infra* note 100 at 20). The case of Australia is very similar to the U.S. Both use the lease model for management of domestic terminals. Under long-term leases, the airlines are the ones responsible for all the operational features at the terminal. It is only in this country where airports are leased through long periods of time, or what is also known as “trade sale”, where the lease is for an initial term of fifty (50) years with option to renew it for another forty nine (49) years. (See *Kesharwani*, *supra* note 3 at 83). In some airports such as the ones in Melbourne and Sydney, their responsibility extends to the provision and maintenance of terminal infrastructure while the airport operator only provides the land for the leased domestic terminals. (See, *Potential Economic Benefits of Airport Privatisation*, *supra* note 16). According to the airlines, the experience of privatizing Sydney International Airport (SYD) has been that “although service quality is judged good by passengers, airlines are less satisfied and charges are high. The problem is that formal price-cap economic regulation was abandoned in favour of “light-handed” price surveillance, after SYD appeared to “fattened” for sale with asset revaluations and a move to a dual till. Mandatory price monitoring by the ACCC does not provide sufficient incentive to improve efficiency or to reduce costs to the users.” (See, *IATA Airport Privatization*, *supra* note 76 at 7). SYD was privatized in 2002 where the government sold 100% of the operating and development rights to a private consortium, while it retained the ownership.

⁹⁰ The first phase of privatization transferred 50% of the shares to the private investors, where 34.8% was floated on the Vienna Stock Exchange, while the airport employee’s fund held 10% of the shares and the other 40% was held by the regional and local government. From the airline’s point of view, privatization of Vienna Airport (VIE) “has resulted in inadequate investment and high charges for customers... Very weak economic regulation has done little to change this providing no incentive to improve efficiency, provide adequate investment, or hold back monopoly profits.” (*Ibid.*).

⁹¹ Brussels Airport (BRU) was privatized in 2004 through a sale of 70% of its shares to a private consortium. Regarding the economic regulation structure put in place after privatization, the IATA says it “provides little reassurance for customers. In particular rate-of-return regulation and the potential to link charges to a reference group of airports provides little incentive for cost efficiency improvements to reduce airport charges. The regulation does however increase the level of transparency given to users...” (*Ibid.*).

⁹² Copenhagen Airport’s (CPH) first public floatation was done in 1994 where 25% of the shares were offered to the public, followed by another one in 1996 where 24% shares were offered. In general, and thanks to effective economic regulation put in place, privatization has been quite a success, where the aeronautical charges have been kept low and service quality has been enhanced. (*Ibid.* at 7, 13, 14).

⁹³ The four main international airports, located in the cities of Mumbai, Delhi, Calcutta and Chennai, were recently leased out to private parties for a period extending thirty (30) years. There are also future projects running to construct greenfield international airports with private participation in the share capital as well. (See, *Kesharwani*, *supra* note 3 at 83).

Japan, Malaysia, Mexico, Netherlands, New Zealand⁹⁴, Peru, Singapore, South Africa, Switzerland and the United Kingdom. A brief overview of how privatization has been carried out in many of these countries and how beneficial it has proven to be follows, highlighting case studies of the most important airports. Latin America will be discussed last, as it introduces the main case study of this thesis.

2.8.1. United Kingdom

Privatization of airports initiated when the British Airports Authority Act was promulgated in 1965.⁹⁵ Its objective was to create a non-profit corporation called the British Airports Authority Limited (formerly known as BAA plc) whose purpose was to manage and operate several airports in the United Kingdom. Until that year, the Ministry of Defense was in charge of airports in Great Britain. “As a statutory corporation, BAA had a degree of independence from Government, but it remained accountable to Government for its finances including borrowing and capital expenditures.”⁹⁶ The members of the Board of Directors were elected from a group of experienced professionals in air transport. The Act also authorized Secretary of State to appoint the Board of Directors as well as its Chairman. For reasons that would affect the national interest, the Government maintained the power to direct the

⁹⁴ The two main international airports located in Wellington and in Auckland were transferred to private parties. In the case of Auckland, the airport was privatized in 1998 when 51% of its shares were sold to the private operator through a share floatation, being the first one to be listed on stock exchange in the entire Asia-Pacific region. Later, the Auckland City Council sold half of its 25.6% stake to private investors. One of the main problems has been that the airport charges are unregulated, leaving the way free for the operator to set charges as it sees fit. Nonetheless, the Government retains the power to regulate these charges but has not done much about it. This “light-handed” regulation has proved costly to the users, especially the airlines. Privatization of Wellington, on the other hand, was done through inviting bids to a local agency. There are others that still remain in the public sector but have been corporatized, including Christchurch and Dunedin airports. (See, *Kesharwani, supra* note 3 at 84). From the IATA’s point of view, the privatization of Auckland International Airport (AIA) has “resulted in one of the most profitable airports in the world, but subject to ongoing airline criticism over excessive charging. The absence of effective economic regulation and an inflated asset base has allowed monopoly profits to persist. Of major concern is the Government’s decision to reject the Commerce Commission’s recommendation that airfield charges be subject to some form of control.” (See, *IATA Airport Privatization, supra* note 76 at 7).

⁹⁵ *Airports Authority Act* (U.K.), 1975, c.78.

⁹⁶ Richard L. Everitt, “The Pros and Cons of Airport Privatization in the EEC after 1992” *Air Law*, Vol. XV, No. 5/6 (Deventer: Kluwer Law and Taxation Publishers, 1990) at 327. [Everitt].

members of the Board of Directors. BAA was given the power to appoint them, including the Chairman.⁹⁷

The intention to move to complete privatization of the airports in the U.K. materialized when the government announced its intention to do so during the Queen's Throne Speech in 1983 when the Conservative party of Great Britain was re-elected.⁹⁸ Three years later, the Crown approved the Airports Act of 1986. In the following years, the totality of the ordinary shares of BAA plc was publicly offered for sale and traded on the London Stock Exchange. The privatization process concluded through a \$2.7 billion dollar-share floatation. In the rest of the European countries, sale of equity has also been the model for privatizing airports.

Nowadays, BAA Limited is the largest transport company in the world⁹⁹, owning and operating the following airports: Glasgow, Edinburgh, Aberdeen and Southampton Airports in Scotland, and Heathrow, Gatwick and Stanstead airports, three that are situated in and serve the city of London¹⁰⁰, moving over 70% of all airport passengers in the U.K.¹⁰¹ It also operates and has celebrated several retail contracts in other airports worldwide, including Naples in Italy, and Boston Logan International Airport, Baltimore-Washington International Airport and Pittsburgh International Airport in the United States, respectively. The remaining airports in the country are owned by the respective municipal governments and are being considered for future privatizations as well. The IATA believes that the BAA is a "good example of how to privatize an airport successfully and implement effective economic regulation of existing assets; however, less effective economic regulation

⁹⁷ *Airports Authority Act* (U.K.), 1975, c.78, s.1(2)(3)(4) and 2(7).

⁹⁸ John B. Heath, "Privatisation: The Case of BAA PLC" in V.V. Ramanadham, *Privatization in the U.K.* (London: Routledge, 1988) at 173.

⁹⁹ British Airports Authority. Online: <www.baa.com>.

¹⁰⁰ Carr, David and Lawrence Solomon. *Benefiting Consumers and the Economy through Airport Privatization*. Toronto: The Consumer Policy Institute, 1995, at 20. [*Benefiting Consumers and the Economy through Airport Privatization*].

¹⁰¹ Everitt, *supra* note 96 at 327.

of new investment has led to a recent sharp rise in airport charges, and potentially inefficient investment.”¹⁰²

2.8.2. United States of America

With regards to the United States of America, governmental policy towards airports is a little different than the rest of the countries. The commercial airports are basically owned and operated by local or regional authorities (sometimes referred to as “sub-governmental entities”)¹⁰³ and financed mainly through ticket and fuel taxes and bond issues, while the airlines own and operate their own terminals, thus increasing hub concentration. This model makes them independent from national control. Most of the private interests come from the airlines, which have enough power to decide major facets of airport management and development. With deregulation of the airline industry in 1978, each large U.S. air carrier now holds a dominant position over certain airports in the U.S. where they have established hubs¹⁰⁴ for their operations. The degree of participation of private interests in each of the airports differs broadly among states and cities. In general, most of the main U.S. commercial airports are operated through partnerships between the government, local interests and private firms.¹⁰⁵

The U.S. Congress has established the Federal Aviation Administration’s (FAA¹⁰⁶) Airport Privatization Pilot Program¹⁰⁷, which began in 1997, to “explore privatization

¹⁰² *IATA Airport Privatization*, *supra* note 76 at 13.

¹⁰³ L.E. Gesell, *Aviation and the Law* (Arizona: Coast Aire Publications, 1987) at 11-1.

¹⁰⁴ “Hubbing is a corporate strategy where large airlines dominate traffic at many airports by forming hub-and-spoke networks...” “Hubbing” is the result of airlines offering a large number of connecting flights to other cities from a few of their “hub” airports. Hubbing came about because the airlines found that hubs allowed them to take advantage of network and scale economies, while offering frequent service to a geometrically increasing array of city-pair markets...” “Though hubbing has revenue advantages, it is operationally inefficient. Hubbing sacrifices equipment and labor utilization and consumes more fuel than a linear route system in markets sufficiently dense to support non stop service...” “Airlines that control a greater percentage of their hubs’ gates obtain significant benefits in terms of scheduling flexibility and insulation from new competition.” (See, *Airline Management Strategies for the 21st Century*, *supra* note 34 at 305, 747, 891).

¹⁰⁵ *Potential Economic Benefits of Airport Privatisation*, *supra* note 16.

¹⁰⁶ The FAA administers the civil aviation system in the United States. Its mission is to “ensure safe and efficient use of the nation’s airspace; to foster civil aeronautics and air commerce in the country and also abroad; and to support the requirements of national defense.” It is also responsible for

as a means of generating access to various sources of private capital for airport improvement and development. Private companies may own, manage, lease and develop public airports. The Act authorized the FAA to permit up to five public airport sponsors to sell or lease an airport and to exempt the sponsor from certain federal requirements that could otherwise make privatization impractical. The airport owner or leaseholder would be exempt from repayment of federal grants, return of property acquired with federal assistance, and the use of proceeds from the airport's sale or lease to be used exclusively for airport purposes.”¹⁰⁸

In general, even though the United States supports private sector participation and promotes liberalization of economies worldwide, it is not a country that has pursued a strong and continuous policy of privatization of aviation infrastructure. The Government still provides the airports with large amounts of capital for them to invest in improving quality of service and infrastructure development.¹⁰⁹

2.8.3. Latin America

In Latin America, the majority of the privatization processes have been undertaken through concession contracts due to the lack of developed capital markets to subsidize these projects. It is important to note that the term “airport privatization” is not used correctly in Latin America, due to the fact that most of these airports will not end up being private enterprises. Rather, they are being “privatized” through long-term leases (approximately 20-30 years) or through concession contracts given to consortiums, which are the ones responsible for the administration and operation of airports, as well as for investing in the development of their infrastructure.¹¹⁰

regulation aviation security in the United States, and cooperates with other governments and international organizations in the development of worldwide security standards. (*Kesharwani, supra note 3 at 197*).

¹⁰⁷ Established by Section 149 “Pilot program on private ownership of airports” of the Federal Aviation Authorization Act of 1996. Online: <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ264.104.pdf>.

¹⁰⁸ “Airport Privatization Pilot Program, Online: Federal Aviation Administration <http://www.faa.gov/airports_airtraffic/airports/airport_obligations/privatization/>.

¹⁰⁹ *Kesharwani, supra note 3 at 82, 83.*

¹¹⁰ *Escobar Corradine, supra note 37.*

Concession contracts allow the private sector to carry out the investments required in each of them, while allowing the government of each country to retain complete ownership of all airport assets and services as well as the regulation and control of the activity.¹¹¹ Latin America is the region that has shown the highest rate of traffic increment in the world,¹¹² as well as the one that has the vastest experience in airport privatization processes.¹¹³

The first countries to allow private sector participation for the construction, maintenance and operation of their aeronautic infrastructure were Colombia, Mexico and Bolivia. Later came Argentina, Chile, Honduras, Peru, Costa Rica, Ecuador, Panama, and finally Uruguay.¹¹⁴ Therefore, it can be stated that the most important air terminals in Latin America have been awarded in concession to private operators. There are mainly two categories in which airports have been privatized in this region, depending on the necessities or the geographical or political organization of each country: i) individually considered airports, and ii) airport systems.¹¹⁵

An airport system is understood as the group formed by two or more airports for the provision of air transportation services whether to a city or an urban conglomeration, or to a specific country or region, depending on how it is considered. This “system” forms a unit characterized by its integrality, in which its components are linked and compatible between each other and at the same time are inseparable and indivisible parts.¹¹⁶

Countries that have followed the individually considered airports approach in Latin America include: Chile¹¹⁷, Colombia, Costa Rica¹¹⁸, Ecuador, Nicaragua, Peru, and

¹¹¹ *Gutiérrez, supra* note 15.

¹¹² *Escobar Corradine, supra* note 37.

¹¹³ *Gutiérrez, supra* note 15.

¹¹⁴ *ATAC CONCESSIONS, supra* note 57 at 2.

¹¹⁵ *Gutiérrez, supra* note 15.

¹¹⁶ *Ibid.*

¹¹⁷ Chile has given a total of nine (9) airports in concession for terms of twenty (20) years, most of them including all airport areas with the exception of ANS, airport security and those activities related to rescue and fire fighting. (*Sánchez, infra* note 126). Santiago de Chile's main air terminal, Arturo Merino Benítez, was awarded in concession to SLC Terminal Internacional Santiago. The contract

Uruguay¹¹⁹. On the other hand, countries that have adopted the airport system approach for privatization in Latin America include: Argentina, Bolivia, Honduras, Mexico, and the Dominican Republic. It is important to note that these have been privatized as a system without prejudice to privatizing smaller airports with less traffic in an individual way.¹²⁰

2.8.3.1. Argentina

In 1998, the concession contract for the administration and operation of a network of thirty-three (33) airports was awarded to the consortium Aeropuertos Argentina 2000 S.A. The contract contemplated an investment of US\$2.2 billion to be used in the development of airport infrastructure. Apart from having to pay the normal taxes a private company must pay, it offered to pay US\$171.2 million as consideration to the Government. This amount, as contemplated in the concession contract, is to be assigned to develop and operate the smallest airports in the country.¹²¹ Additionally, the Government created the *Organismo Regulador del Sistema Nacional de Aeropuertos* (ORSNA) for the purpose of supervising the financial and operational performance of the concessionaire, which included as well rate and tariff fixation, approval of development plans, and control of levels of services and productivity of the concessionaire.¹²²

encompassed the expansion of the terminal and the apron, improvement in the parking lot, building a new control tower and upgrading the electrical substation. Carriel Sur Airport, serving the city of Concepción, was also given in a fifteen (15) year concession for its modernization and expansion. (See, *Airport Planning & Development Handbook – A Global Survey*, *supra* note 8 at 84).

¹¹⁸ The privatization of Juan Santamaría International Airport (SJO) was done in 1999 where the Government sold a 20-year lease to an international consortium of investors and airport operators. The operator had to pay the government royalties of 40-45% of the total airport revenues, which limits the amounts required for the development of the airport. Additionally, an independent economic regulation on charges and service quality was not set up. (See, *IATA Airport Privatization*, *supra* note 76 at 7).

¹¹⁹ Montevideo's Carrasco International Airport is going through expansions through a two-phase BOT privatization scheme. The first phase includes rehabilitation of paved surfaces, a drainage system, a new passenger terminal with parking, a new cargo terminal, new airport rescue and fire fighting facilities and extension of the runway. The second phase will be concluded to handle traffic growth beyond the year 2010. All areas of the airport are under private operation except ANS. (See, *Airport Planning & Development Handbook – A Global Survey*, *supra* note 8 at 86).

¹²⁰ Gutiérrez, *supra* note 15.

¹²¹ Escobar Corradine, *supra* note 37.

¹²² *Ibid.*

The IATA has identified several problems that arose from the concessionaire, including lack of transparency during the concession process, crossed subsidies among profitable and non – profitable airports through the concept of airport network¹²³, and a substantial increase in the charges to airlines. There is also lack of information regarding the costs of the various services offered by the airport, impeding the IATA determine if the tariffs and charges are reasonable.¹²⁴

Another fault in the case of Argentina was the lack of criteria for selecting appropriately the concessionaire, as they ended up selecting a private operator that has not yet been able to comply with the investment chronogram and has not fulfilled its obligation of paying a pricy consideration to the Government in return.¹²⁵

2.8.3.2. Bolivia

The El Alto Airport in La Paz, Viru Viru Airport in Santa Cruz and Jorge Wilstermann Airport in Cochabamba were given in concession for a term of twenty-five (25) years to the U.S. consortium called Airport Group International (AGI). These three airports account for ninety percent (90%) of domestic and international air traffic in the country. The cost of the modernization projects exceeds \$200 million, and the AGI assures that it will bring those airports up to a B international rating under the IATA standards. The concession included all airport areas with the exception of ANS.¹²⁶

Bolivia's short planning period and lack of design for a project of this magnitude has resulted in a great setback for its airport. One of the major faults in Bolivia's case is

¹²³ For more information on cross subsidization refer to note 225.

¹²⁴ *Escobar Corradine, supra* note 37.

Privatization of Ezeiza International Airport (EZE) has been a bad deal for its users. "The structure of the lease sale has meant very high charges, under-investment and poor customer service quality. The absence of an independent economic regulator and the clear conflict of interest as apparent from extremely high royalty fees has lead to a very confrontational relationship between Government, airport operator and customers to the benefit of none." (See, *IATA Airport Privatization, supra* note 76 at 7, 19).

¹²⁵ *ATAC CONCESSIONS, supra* note 57 at 4.

¹²⁶ Sánchez, José Manuel, "Experiencia en Concesión Aeroportuaria – El Modelo Original Chileno" Paper presented to the Bogotá's Chamber of Commerce Forum on "Experiencias Internacionales en Concesiones Aeroportuarias" (Bogotá: Cámara de Comercio de Bogotá, 2004). [Sánchez]. See also Airport Planning & Development Handbook – A Global Survey, *supra* note 8 at 82.

that the Government did not have a master plan for the airport that would establish the investments that should be carried out by the concessionaire. This type of imprecision obstructs the correct development of the concession, producing a lack of transparency and a not so efficient operation overall.¹²⁷

2.8.3.3. Mexico

Mexico has a total of sixty (60) airports, where thirty-five (35) of them have been divided regionally and grouped in four major groups. A state-owned company was incorporated for each airport, while the Federal Government incorporated four holding companies, one for each airport group also as a state-owned company. The privatization process was basically handled in two phases: the first one involved choosing a strategic partner to provide technical and management expertise to the holding companies in order to improve their operations, and the second one included the sale of the equity from the holding companies by public tender offerings.¹²⁸ Three out of four groups have completed the sale of fifteen percent (15%) of the shares to private entities, most of them being consortiums formed by Copenhagen Airport, the Spanish Airport Operator (AENA) and Aeroports de Paris.¹²⁹

Mexico's legal system poses some insecurity in relation to the interpretation of the contracts due to its lack of clarity. In the case of Ciudad de Mexico's international airport concession contract, there are serious doubts concerning its legality because there have been partial cessions of rights over the public domain property under the Law of Airports, ignoring that there is another law of higher hierarchy that proscribes those cessions.¹³⁰

¹²⁷ ATAC CONCESSIONS, *supra* note 57 at 3.

¹²⁸ Kesharwani, *supra* note 3 at 208.

¹²⁹ *Ibid.* at 86.

¹³⁰ ATAC CONCESSIONS, *supra* note 57 at 4.

2.8.3.4. Peru

Jorge Chavez International Airport (LIM) in Lima was leased in 2001 to a consortium of international investors for a term of 30 years for its development and operation. The private operator has to pay the Government royalties of 46% of the total revenue, which makes it even higher in comparison to SJO in Costa Rica. No independent economic regulation of charges and service quality was set up, resulting in the users having to pay excessive charges that are set freely by the operator in order to not only recover its costs, but also to pay the Government the expensive royalties. There is no effective mechanism that allows the user's interests to be represented in decisions concerning charges and service levels. The lack of economic regulation has also resulted in low investments in new capacity leading to inefficient operations. Another important aspect to note is that there is absolutely no competition among the service providers (catering, ground-handling, etc.) at the airport, resulting also in inefficiency and high charges.¹³¹

2.8.3.5. Concluding remarks for the LATAM experience

Ten years after these processes have started, the results have not been very positive in various aspects. Just to mention the most relevant, there have been excessive increments in the airport tariffs that violate the applicable legal criteria to impose them, the low quality of the services do not reflect the high prices users must pay, the concessionaires have not completed the infrastructure works in time nor entirely, and the States have played a deficient role in striving for the correct and full development of the concession contracts.¹³²

In either case, and having mentioned some examples in the Latin American region, an important aspect shall be taken into consideration: the legal mechanism through which a State transfers the operation and administration of one or more of its airports must always be decided within a wide and general commercial air policy in

¹³¹ *IATA Airport Privatization*, *supra* note 76 at 12.

¹³² *ATAC CONCESSIONS*, *supra* note 57 at 3.

order for all the aspects that are related to the industry (such as the air transport properly stated, the infrastructure, the land assistance services, the ANS, etc.) to be taken into account and reconciled. Stated differently, the main framework from which all privatization processes are to be carried out must be adapted to the variables that each of the country's legal regimes imposes.¹³³

In the Latin American case, for example, and compared to Europe, each country's public law regime has determined that the best way to develop and improve airport infrastructure is through concession contracts, where the administration and operation of the activity is transferred to the private operator. This implies that the government, under the concession contract, retains for itself the rights to which it is entitled as owner of the activity, delegates the administration and operation to the private party, and regulates and controls the activity.¹³⁴ Through this method, the government is responsible for determining the object and purpose of the concession, as well as the aids or political and legal tools it could give the private operator to carry out the activity.¹³⁵

¹³³ *Gutiérrez, supra* note 15.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

2.8.4. Summary

Table No. 1 “Ownership and Management Models”, best summarizes all of the above by outlining the principal models privatization can adopt along with their possible variants, including where they have been implemented worldwide.

Table No. 1 OWNERSHIP AND MANAGEMENT MODELS¹³⁶		
Model	Variants	Countries
Government ownership and management	<ul style="list-style-type: none"> Ownership by federal, provincial or local government. It can also be a combination of the above. 	In Africa, smaller countries in the Asia-Pacific and the Middle East. Also smaller airports in developed countries, such as USA, Canada, UK and Australia.
Ownership by government/ Management by autonomous entities	<ul style="list-style-type: none"> Management can be exercised through autonomous statutory corporations or limited liability companies. 	All continents but they are more popular in Europe and the Asia-Pacific
Management contract	<ul style="list-style-type: none"> Entire airport. Part of the airport, such as passenger terminal building. Scope of management depends upon the contract. 	Used primarily in the USA. In the Asia-Pacific, Macau airport has a management contract.
Participation by private entity in equity	<ul style="list-style-type: none"> Minority/majority participation or full ownership by private entities in equity. Ownership of part of the airport, such as terminal building. Greenfield airports may be developed by private entity or jointly by several stakeholders or by government and private sector. 	Widespread in Europe, the Asia-Pacific and to a limited extent in Africa and South America.
Lease or concession	<ul style="list-style-type: none"> Conditions of lease vary. No two leases have the same terms, but generally all leases have some control over aeronautical charges. The facilities revert to the owner after the lease period without any compensation. 	Most popular in South America. In the Asia-Pacific, Australia is the lead country.

¹³⁶ Kesharwani, *supra* note 3 at 89.

3. AIRPORT POLICY AND PRIVATIZATION IN COLOMBIA

3.1. Introduction

Colombia's regional economic growth depends mainly on its airport as a logistic platform to handle exportations and attract investments. Eldorado International Airport is a key factor for the commercial integration processes of the country. It constitutes a strategic platform for foreign trade and the growth of competitiveness of the city and region. The airport constitutes the most important actor in the air transportation system as the element of integration for a country that is fractured geographically by the Andes mountain range. It is the main port of entrance to Bogotá and the rest of the country.

The governments of developing countries such as Colombia are reluctant and often incapable of introducing and financing with public resources expansion or modernization projects of airport infrastructure and its services, as they are also required to assign funds to other sectors such as education, health, justice, social security and housing. The economic resources that could have been provided by Colombia's civil aviation authority, in charge of the airport's operation prior to the concession, would not have been enough to cover the required amount needed for the execution of the project. The airport itself needs to be upgraded and expanded to keep pace with traffic demand and globalization.

Before a detailed overview of how private sector participation has been undertaken in Colombia with emphasis on Eldorado's case, it is essential to provide an initial review on the civil aviation authority in the country, the AEROCIVIL, as well as the comprehensive legal aviation framework applicable in Colombia.

3.2. Unidad Administrativa Especial de la Aeronáutica Civil de Colombia (AEROCIVIL)

The AEROCIVIL is a specialized entity with a technical character that is part of Colombia's Ministry of Transportation, with legal personality, administrative autonomy and independent patrimony, in charge of civil aviation activity in Colombia. The body is a result of a fusion between the Civil Aeronautics Administrative Department ("Departamento Administrativo de Aeronáutica Civil" - DAAC) and the National Aeronautic Fund ("Fondo Aeronáutico Nacional" - FAN), ordered by Article 67 of the Decree 2171 of 1992.

The AEROCIVIL regulates the use and administration of national air space as well as the aeronautic and airport infrastructure in the country. It is in charge of selecting, adopting and maintaining the applicable technology in the provision of services associated to them, as well as determining the growth policies and regulations of the air industry. It also guarantees operational safety through the planning, design, implementation, regulation and control of the civil aviation activity, meeting national and international standards as well as providing improvement in the environmental conditions. By promoting and regulating the development of civil aviation, the industry, and aeronautical investigations, it guarantees national and international geographical connectivity¹³⁷ and contributes to the growth of the economy and the quality of life of its citizens.¹³⁸

¹³⁷ The more air transport connections Colombia has, the better for its economical development and growth. New routes have to be introduced or expanded to important destinations within the global air transport network. As an example, one can mention the route from Bogotá to Atlanta, opened a few years ago, and that actually accounts for one fourth of the increase in the country's connectivity since the year 2000, and it also provides a significant contribution within the total in general. The IATA affirms that Colombia's connectivity rose by 21% between 2002 and 2007. This increase in connectivity represents wider economic benefits for the country, "providing a boost to its long-run productivity and GDP growth." Actually, Colombia has very low air connectivity as a proportion to its GDP when compared to other countries, where Colombia's GDP-weighted connectivity within the global airline is below other countries such as Panama and Mexico, however higher than in Brazil. (See, IATA's report on *"Economic Benefits from Air Transport in Colombia"* at 5-11 Online: <http://www.iata.org/NR/rdonlyres/D9738A02-0219-4165-B5F9-E72888678175/0/air_transport_colombia.pdf> [IATA Colombia]).

¹³⁸ Unidad Administrativa Especial de la Aeronáutica Civil de Colombia Online: <www.aerocivil.gov.co>.

In the development of its functions, the AEROCIVIL must guarantee its financial sustainability at all times. Therefore, it is also entitled to promote and optimize the investments, commercialization and exploitation mechanisms through private participation in the provision of airport and commercial administration services, in accordance with the national and international standards of civil aviation, thus guaranteeing the sustainable development of the air transport sector.

3.3. Air transportation regulation in Colombia

The development, operation and administration of the air transport infrastructure, known as the airport network and the ANS, has historically been held by the AEROCIVIL, who has maintained, constructed and expanded it with public resources obtained from the collection of airport charges and tariffs from its users (airlines and passengers). Since the 1990's, when Law 105 of 1993¹³⁹ ("Law of Transportation") came into force, the option of decentralizing the airports of the Nation was established, whereby the concession type model was included as one of the possible alternatives for such effect. As mentioned before, the Law is the instrument that gives the State its faculty to intervene in air transportation matters. This law specifically deals with the fundamental principles that apply to transportation in general, in which State intervention is included. It establishes that the planning, control, regulation and supervision of transportation and all its related activities are functions that correspond to the State.¹⁴⁰

The AEROCIVIL is also given the faculty, under Article 48 paragraph 1, to "... *celebrate administration, concession or similar contracts over the airports that are under its ownership, with specialized entities or with regional associations in which*

¹³⁹ Law 105 of 1993, "by which basic regulations on transportation are dictated, attributions and resources between the Nation and the Territorial Entities are redistributed, the planning in the transport sector is regulated and other regulations are promulgated" (Translated by the author).

¹⁴⁰ Ministry of Transportation of Colombia. Online: Ministerio de Transporte de Colombia < <http://www.mintransporte.gov.co/Servicios/Normas/archivo/normasdgtaereo.pdf> > .

the State's participation is not greater than 50%." It also expressly indicates that ANS will be exclusively provided and maintained by the AEROCIVIL.¹⁴¹

The public service of air transportation is regulated exclusively by a series of legal dispositions contained in various instruments, including supranational¹⁴² and national laws, decrees¹⁴³, resolutions and international conventions.

In relation to air transport Articles 64 and 68 of the Law 336 of 1996, also known as the "National Transport Statute", establish the exclusive legal framework by which it is regulated. It declares the hierarchy of applicable normativity which basically consists of the following: (i) the National Constitution of 1991, (ii) the Code of Commerce (specifically Book Five, Preliminary Chapter and Second Part), (iii) the RAC issued by the AEROCIVIL and (iv) the International Treaties, Agreements, Conventions and Practices that are duly adopted or practiced in Colombia. Article 68 further defines the term "public utility" (as used in Art. 1776 of the Code of Commerce) to describe air transportation as an essential public service.

As mentioned, air transportation has been regarded in Colombia as a public service that has been traditionally provided by the Government, with the exception of those airports given in concession. Article 365¹⁴⁴ of the National Constitution of 1991

¹⁴¹ This Article was further regulated by Decree 1647 of 1994, where an in depth analysis is further provided in Chapter 4.4.

¹⁴² Andean Pact Decisions numbers 297, 320, 360 and 361, all regulating air transportation in the Andean region and adopting a freedom of flight regime in the sub region.

¹⁴³ Among the relevant Decrees to the matter, only the following will be included as they are mentioned further on in the text:

- i) Decree 2053 of 2003, *"by which the structure of the Ministry of Transportation is modified and other regulations are promulgated."*
- ii) Decree 1647 of 1994, *"by which Article 48 of Law 105 of 1993 is regulated."*
- iii) Decree 260 of 2004, *"by which the structure of the U.A.E. de la Aeronáutica Civil-AEROCIVIL is modified and other regulations are promulgated"* (Translated by the author).

¹⁴⁴ National Constitution of Colombia, Art. 365: *"The public services are inherent to the social aim of the State. It is the State's responsibility to insure the efficient provision of them to all the inhabitants in the national territory. The public services will be subject to the legal regime determined by the law, they may be provided by the State, directly or indirectly, by organized communities or by particulars. In each case, the State will retain the regulation, control and vigilance of such services. If by reasons of sovereignty or social interest, the State, through law approved by each of the members of one or other chamber, by the government's initiative decides to retain certain strategic activities or public services, it shall previously and entirely indemnify all the persons that because of such law, are not*

says, among other things, that the State is obliged to ensure the efficient provision of public services in the territory of Colombia. Additionally, it states that the services may be provided directly or indirectly by the State, by “organized communities” or by private entities. This important provision is the foundation for private sector involvement of other entities or communities in providing public services. As mentioned, the government will always retain the regulation, control and supervision of such services in order to guarantee their correct provision.

Article 333 also indicates that economical activity and private initiative are free within the limits of the public interest and that free competition is a right of all, but brings with it certain responsibilities. It also points out that the State shall evade or control any dominant position abuse that may come from persons or companies in the national market. Article 334 further indicates that the Government will intervene by mandate of the Law in the public and private services, among others, to rationalize the economy in order to pursue an improvement in the quality of life of its citizens as well as the equitable distribution of opportunities and benefits obtained from development.

Following in order of importance after the National Constitution of 1991, comes the Code of Commerce of Colombia that regulates all air transportation matters through articles 981 to 103 and 1773 to 1909.

Article 1773 is practically the backbone of all the applicable legislation to air transportation highlighting three important elements: First, it declares that all the civil aeronautics activities are under the supervision and control of the Government, which confirms the legal principle of the State's intervention in the development of these activities; Second, it refers to the aircraft that are subject to such legal framework, stating that it shall only apply to all aircraft that use spaces that are subject to national sovereignty as well as to Colombian licensed aircraft found in

permitted to carry out a legal activity” (Translated by the author).

spaces that are not under national sovereignty or that simply form part of the jurisdiction of another State; and third, that military aircraft, on the other hand, will be subject to this legal framework only in the cases specifically mentioned.

Further on, Article 1777 declares complete and exclusive sovereignty of the Republic of Colombia over its national air space.¹⁴⁵ It then defines the term “civil aeronautics”, as all the activities that are linked to the employment of civil aircraft¹⁴⁶, and further declares it as a public utility.¹⁴⁷ Finally, it dedicates all Chapter 5 to the aeronautic infrastructure.¹⁴⁸

Following the legal dispositions that are applicable to air transport in the Code of Commerce are the RAC, or the technical and operational regulations relating to the service. According to Article 1782 of the Code of Commerce, the AEROCIVIL, and not the Ministry of Transportation, is the only governmental body that has the faculty to issue the RAC.

The RAC are issued by the General Director of the AEROCIVIL acting on the faculty conferred by Articles 47 and 48 of Law 105 of 1993, Article 5, numbers 8 and 10, and Article 9, number 4 of the Decree 260 of 2004, and Article 68 of Law 336 of 1996. The RAC are published through resolutions and have been subject to various reforms that bring into context the applicable Standards and Recommended Practices (SARPs) established from time to time by ICAO.

The following sections will clarify the reasons behind the decision of the Government to support private sector participation in the management and operation of

¹⁴⁵ Code of Commerce of Colombia, Art. 1777: *“Notwithstanding the international treaties ratified by Colombia, the Republic will retain the complete and exclusive sovereignty over its national space. The national space involves the territory as mentioned in Article 3 of the National Constitution and the vertical prolongation of the limits of such territory and its jurisdictional waters”* (Translated by the author).

¹⁴⁶ Code of Commerce of Colombia, Art. 1774: *“The term “civil aeronautics” is understood as the totality of the activities that are linked to the use of civil aircraft”* (Translated by the author).

¹⁴⁷ Code of Commerce of Colombia, Art. 1776: *“The civil aeronautics is declared as a public utility”* (Translated by the author).

¹⁴⁸ See Articles 1808 through 1826 of the Code of Commerce of Colombia.

Colombia's main airport, in order to understand how the AEROCIVIL has been carrying out this process. The following rationale and privatization policy apply equally to other airports in the territory of Colombia.

3.4. "Privatization" in Colombia

The Colombian government believes that there are a series of factors that support the benefits of introducing private capital for the modernization and expansion of the airports. It seems that it is the only feasible way to remain competitive.

From a purely private sector stand point, privately owned companies have higher efficiency in the administrative and financial management aspects of companies compared to public ones. This means they enjoy a series of benefits such as agility in the contracting processes, more budget handling flexibility, autonomy in obtaining liquidity, and a greater chance of achieving economies of scale, or in other words, optimization in the utilization of the resources.¹⁴⁹ With this in mind, it is clear that under a public contracting and budgetary regime, it is very difficult to administer and operate an airport like Eldorado International efficiently. Both the Laws 80 of 1993 ("Government Contracts Act") and 617 of 2000 ("Budgetary regime") slow down the bidding and adjudication processes, reducing the budgets and limiting investments.

The private sector also enjoys greater capacity in the processes of investment and commercialization. Under a private regime, it is more likely that the airport operator can obtain a higher level of revenue because it can easily generate an increase in the non-regulated airport incomes (i.e. commercial exploitation of spaces) and has greater bargaining power with suppliers. In the case of Eldorado International Airport, this will undoubtedly prove beneficial as it integrates more deeply at an international level with other airports, while it positions itself as the Latin American

¹⁴⁹ Juan Carlos Vélez Uribe, "Planes del Gobierno Nacional para el Aeropuerto Eldorado" (Paper presented to the Bogotá's Chamber of Commerce Forum on "*Experiencias Internacionales en Concesiones Aeroportuarias*" Bogotá: Cámara de Comercio de Bogotá, 2004). [Vélez].

passenger, cargo and maintenance hub.¹⁵⁰ Ultimately, it is believed that the private operator has a greater capability in enhancing the levels of services offered to consumers.¹⁵¹

The AEROCIVIL, not being capable of financing large-scale projects in order to modernize and expand infrastructure, must promote greater participation of the private sector in the management and operation of airports. Despite the experiences obtained from the cases studied in the next section, private sector participation/involvement is practically the best means by which functional, modern and efficient airports are to be developed in Colombia.

3.5. Airport concession experiences prior to Eldorado International Airport

The airport concession processes that have been undertaken to date in Colombia started in 1995 with the construction of a second runway in Eldorado International Airport, followed by Cartagena's airport in 1996, Barranquilla's in 1997, Cali in 2000, most of Eldorado International Airport in 2006 as discussed in this last section, and the airports in the islands of San Andrés and Providencia in 2007. A brief overview on the first four follows:

3.5.1. Second runway - Eldorado International Airport

The construction of the second runway of Eldorado International Airport was given in 1995 by the Government to the consortium named *Compañía para el Desarrollo del Aeropuerto Eldorado* (CODAD S.A.), integrated by Dragados from Spain, Ogden from the United States and Concreto from Colombia, for a total cost of about US\$150 million. The contract included not only the construction of a second parallel runway in Eldorado but also the operation and maintenance of both runways. The

¹⁵⁰ It is important to bear in mind that actually Colombia does not act entirely as a hub for international transfer and connecting traffic. Therefore, the benefits generated by increasing the level of business and leisure traffic will be directly perceived by the national economy, as the majority of this traffic has Colombia as its final destination. (See, *IATA Colombia*, *supra* note 137 at 4).

¹⁵¹ Vélez, *supra* note 149.

project proposed that the investment of the concessionaire was to be recuperated from the transfer of the income generated by landing fees from the existing runway and the new one for a term of twenty (20) years.¹⁵²

Among other faults identified in this contract, it did not include additional works such as new equipment for the ATC tower, recuperation of taxi runways, renovation of the Instrument Landing System (ILS) and the Approach Lighting System (ALS), all of which form an integral part of the correct operation of the runways. The Government in return has had to guarantee the provision of the required resources periodically and select the party responsible for carrying out these additional works. This translates into the airlines having the extra burden of paying landing fees that have not been equally set, affecting the airport's operational costs directly. Another major fault is that this concession was granted before the environmental license was obtained, violating Colombian law that states that for any infrastructure construction work that may affect the environment a license has to be issued beforehand. This fault generated additional costs principally derived from the social conflict that arose as a consequence, and from the series of additional environmental works¹⁵³ that had to be done later and that were overlooked in the contract.¹⁵⁴

The IATA has also identified other faults regarding this contract. From the airline's point of view, the concession process was undertaken behind "closed doors" between the AEROCIVIL, the Ministry of Treasury and the National Planning Department ("DNP" in Spanish), without a consulting phase in which users could participate on issues regarding their rights or the elaboration of the master plan¹⁵⁵ of the airport. An investment bank that was foreign to the concession process

¹⁵² *ATAC CONCESSIONS*, *supra* note 57 at 18.

¹⁵³ The additional environmental works that had to be done in addition included the deviation of the Bogotá's river bed, the construction of sound proof barriers in the airport and in nearby houses that would've been affected by the noise levels, and for the airlines, a huge pressure in having to renovate their fleets before the year 2000 to be able to operate in Eldorado International Airport, which today only allows Category 3 aircraft to operate.

¹⁵⁴ *ATAC CONCESSIONS*, *supra* note 57 at 20.

¹⁵⁵ The master plan of an airport consists of a "comprehensive conception of the long-term development of an existing airport, or creation of a new airport and land adjacent thereto." (Laurence Gesell, *The Administration of Public Airports*, (3rd ED, Coast Aire Publications, 1992) at 144-151).

prepared the bidding conditions that were not entirely exposed to the public. In addition, the airlines operating at the time had to pay for the investment done in the construction of a quite large military platform for the Colombian Air Force (“FAC” in Spanish).¹⁵⁶

3.5.2. Cartagena de Indias, Barranquilla and Cali

Before shedding light on the following three cases, it is useful to mention the characteristics that they have in common:

- i) The only concessionaires that were authorized to participate were those formed by public limited companies that were duly incorporated in Colombia, with a foreign specialized partner who could only hold up to thirty percent (30%) of the shares of the company;
- ii) The operating partner chosen for all three was “Aeropuertos Españoles y Navegación Aérea” (AENA), for a total term of fifteen (15) years in the case of Cartagena and Barranquilla, and twenty (20) years for Cali;
- iii) The purpose of the contracts included the administration and direct maintenance of the terminal, runway, ramp, airport installations, landing visual aids and accessory zones. They expressly excluded ATC services, radio aid operations and communications, and
- iv) The transferred regulated income was primarily composed of the national and international airport charges and the rights of use of national and international aerodromes. In contrast, the non-regulated income included the ones derived from commercial activities, installments from the transferred places of businesses, and other limited services, sometimes reaching a reasonable utility of fifteen percent (15%) of the capital invested.

¹⁵⁶ Escobar Corradine, *supra* note 37.

3.5.2.1. Rafael Núñez International Airport – Cartagena de Indias¹⁵⁷

The public bid offer to choose the concessionaire for the administration and maintenance of Rafael Núñez International Airport was opened on November 1995, for which only two offers were made. The concession contract for Cartagena's airport was awarded to the concessionaire "Sociedad Aeroportuaria de la Costa S.A." (SACSA).

The total amount of the project had a value of COP\$24,150,000,000 in 1996, which had to be paid in sixty (60) trimestral payments including interests and capital payments. Thirty percent (30%) of the total amount was destined to mandatory investments in the airport, while the remaining seventy percent (70%) was given to the AEROCIVIL as a licensing fee.

Initially, the Dutch Group Schipol, a Colombian company named Concecol Terpel, and other local investors, composed the company that was awarded the contract. Among the duties assigned to the operator was to update the master plan of the airport (dated 1973) during the first six months of operation. The AEROCIVIL had to approve those changes and in fact did so in 2001 after disapproving them twice. This had a negative impact on the construction of certain facilities, which were behind schedule because of this. In addition, international traffic decreased, affecting the financial structure of the contract, which was already linked to the traffic projections presented. SACSA was forced to declare a cessation of payments, or in other words, it went into bankruptcy, and new traffic projections had to be made in accordance with new cash flow of the concessionaire. In 1998, Schipol sold to AENA its stake in the project.

¹⁵⁷ Miguel Angel Acosta Osío, "Concesiones Aeroportuarias en Colombia" (Paper presented to the Bogotá's Chamber of Commerce Forum on "*Experiencias Internacionales en Concesiones Aeroportuarias*" Bogotá: Cámara de Comercio de Bogotá, 2004). [Acosta Osío].

3.5.2.2. Ernesto Cortissoz International Airport – Barranquilla¹⁵⁸

Only one offer was made when the public bid to award the concession for the administration and maintenance of Ernesto Cortissoz International Airport was opened. The concession contract for Barranquilla's airport was awarded to the concessionaire "Aeropuertos del Caribe S.A." (ACSA).

The total amount of the project had a value of COP\$9,400,000,000 in 1996, which had to be paid in sixty (60) trimestral payments including interests and capital payments. Thirty percent (30%) of the total amount was destined to mandatory investments in the airport, while the remaining seventy percent (70%) was given to the AEROCIVIL as a licensing fee.

Initially, AENA and other local investors made up the company that was awarded the contract. The concessionaire, among all of the duties assigned once the contract was awarded, had to present to the AEROCIVIL the master plan within sixty (60) days from the transfer of the airport. Once reviewed by the AEROCIVIL, it was concluded that it granted a lot of liberties to the concessionaire after observing that the date in which the construction was to be initiated and the quality of the constructions were not specified. In addition, international traffic decreased resulting in lower cash flows. The airport was qualified as oversized and therefore only required maintenance. On the positive side, ACSA did a very good job in reducing costs and increasing the levels of non-regulated incomes. Complaints were filed for the bad service provided by the fire department, also given under concession.

3.5.2.3. Alfonso Bonilla Aragón Airport – Cali¹⁵⁹

The first public bid to choose the concessionaire for the administration and maintenance of Alfonso Bonilla Aragón Airport was declared void in 1994. A second one opened in 1999, where only three offers were made in total from the six bidding

¹⁵⁸ Acosta Osío, *supra* note 157.

¹⁵⁹ *Ibid.*

conditions that were sold, impeding a competitive environment. The concession contract for Cali's airport was awarded to the concessionaire "AEROCALI S.A."

The total amount of the project differs a little bit from the previous two in its fixed and variable consideration. The fixed one, payable every two months, comprises a portion of COP\$470,000,000 in their year 2000 value, indexed every year with the Consumer Price Index (CPI) in Colombia, and a portion of USD\$245,000 in their year 2000 value, indexed every year with the CPI of the United States of America. The variable one, on the other hand, is payable every six months and is composed of 41.01% of the concessionaire's net gross income, liquidated annually.

Initially, the concession was awarded to the company made up by Corficolombiana, Dragados y Construcciones Colombia and ANSA, a subsidiary company of AENA. In this case, it was previously determined that the specialized partner did not have to be partner of the company, and could be contracted through a service rendering contract for a minimum term of five (5) years. The contract attributed to the concessionaire the obligation of constructing the necessary rehabilitation infrastructure during the first twelve (12) months, as well as the planning, design, execution and finance of the project in general. Both the master plan and the investment plan were not considered prior to the concession, resulting in an unclear estimate of the investments needed. Considerations were fixed during the entire term of the contract, impeding the participation of the AEROCIVIL in the project. The amount of private capital invested for the development of the infrastructure was not very significant, given that those investments came from a 30% charge to the agreed consideration. The contract was weak in certain aspects such as fire department and security issues.

3.5.3. Concession's overall performance

Despite the enormous efforts made by the Colombian Government in each of the aforementioned processes, several conclusions can be drawn out from these

experiences, all of which have produced a direct negative impact on the overall development of private sector participation processes in Colombia. First, there was an absence of an elaborated long-term plan before the contracts were concluded, resulting in a major structural weakness. This clearly contradicts the predominant world tendency, in the sense that a master plan should exist before a project of this magnitude is to be executed, or in other words, the existence of a master plan is an essential prerequisite for an airport development project. Second, in none of these four processes neither the airlines nor any other airport user was given the opportunity to actively participate in the awarding of the concession, ignoring principles such as transparency and equality, all based on the argument of the confidentiality of the concession process.

Third, as a general trait of the concessions of Cartagena and Barranquilla, the AEROCIVIL proposed a series of contracts that did not specify the proper risks of the concession. For example, the contracts stipulated the obligation of carrying out the construction of some building works without specifying what had to be constructed in detail or determining the responsibilities for its execution. The investment plans of each of the airports had to be made by the administrator according to the master plan of each airport but it was not possible to determine the investments that had to be made, as they needed to be adjusted throughout the term of the contract by the operator. Also, the terminals did not have operational, maintenance and airport security plans as stipulated by international standards. It is still not clear which party is responsible for updating each airport master plan.¹⁶⁰

The experience and ensuing results have also shown that the administration system proposed in each of these concession contracts is a great impediment for the competitiveness of air transport in the country. This is so not only because it generates additional costs in the major tariffs of the services, but also it creates waste in administering and controlling a wide variety of tariffs from each of the different concessionaires that in several occasions have different or contradictory

¹⁶⁰ ATAC CONCESSIONS, *supra* note 57 at 12, 13.

billing, discount, payment and exemption proceedings.¹⁶¹ For example, it is not clear among the aeronautic authority and the airports under concession who has the responsibility in collecting the airport charges for transit or connecting passengers, leaving the airlines with the obligation to collect them directly from the passengers and then transferring them to the airport.

The legal guidelines and criteria that govern tariff fixing in the use of transport infrastructure have not been followed. All these concessions have also generated inconsistencies and discrepancies in the tariff structure of air transportation services in Colombia that have resulted in more expensive operations in airports with less developed infrastructure or lower levels of service.¹⁶² In the end, the most affected are not only the airlines as users of the airport services but also the passengers, as they are forced to pay in some cases excessive airport charges.¹⁶³ Raising airport tariffs and charges perpetually and not in relation to traffic clearly contradicts the international criteria to determine them.¹⁶⁴ Unfortunately, there is not much that can be done with respect to these tariffs, as they were previously fixed in the concession contracts for fifteen and twenty year terms.

In summary, inconsistent, indexed and costly tariff structures in the monopolistic management of the airports have generated an anti-competitive environment for the air transport industry in Colombia. Additionally, all these concessions were awarded

¹⁶¹ Also known as first and second concession generations in Colombia.

¹⁶² The clearest example is the landing fee cost for an international flight in Cartagena's airport, being 8% higher than in Eldorado, which has two runways, one of them capable of operating in Category 2. (Asociación del Transporte Aéreo de Colombia (ATAC), "*Estudio económico del transporte aéreo en Colombia 1970-2006*" Bogotá, January 2008, at 161, 162. Online: <http://www.atac.aero/estumacro.htm>) [ATAC].

¹⁶³ In this case, for example, the airport charge that a passenger has to pay in Cartagena's airport is 40% more expensive than that from Bogotá's or Rionegro's airport, which both have greater amounts of installations and infrastructure. (*Ibid.* at 162).

¹⁶⁴ "For example, in Eldorado International any airline pays for a domestic flight almost 40% more than that same airline would pay in Jose María Córdova (Medellín); the airports of Barranquilla and Cartagena are around 20% more expensive than the one in Medellín, and also, Cali's is 10% more than Medellín as well. The case of an international flight is almost similar, but in this case the total operational cost of landing and flight protection is less disperse than a domestic flight. Bogotá's airport had the higher costs, but during the last two years the airports of Cartagena and Barranquilla became more expensive than Eldorado because of the indexation of their tariffs. Meanwhile, Cali's airport maintains its tariffs close to those from Medellín." (*Ibid.* at 158).

without the existence of an independent regulatory body that would be in charge of supervising the development of the contracts and controlling the applicable tariffs. Currently, the AEROCIVIL still assumes the function of auditor during the supervision phases of the contracts and the role of judge and party in the process, thus making it virtually impossible to guarantee the protection of users' rights through non-judicial means.¹⁶⁵

The problem of charges and tariffs results from the weakness in contracts that lack proper mechanisms in order to avoid the operator's abuse of its dominant position. The Colombian experience has shown that the operator has always had the intention to impose its own interests over the public interest in order to accomplish the execution of the contract. This behavior breaks the equilibrium that must exist between the State, the operator, and the users, where the AEROCIVIL only ends up focusing on the execution of the contract and not on the interest of the community, and the concessionaire only focusing on obtaining its own benefits at any price.¹⁶⁶

Despite the problems that have risen due to the poor structuring of the processes, the efficiency and effectiveness in the provision of services has been enhanced in view of the general public, thus increasing consumer satisfaction. The airports' infrastructure has been designed in each case to support the increasing traffic demand and to comply with national and international standards in safety and security. As a means to avoid previous errors, with the exception of the creation of an independent body to regulate the concession contract, the contract for Eldorado International Airport was elaborated considering the aforementioned issues and faults. Thus, although the results obtained from all the concessions have not always been the expected ones, the sum of all these previous experiences is leading towards better-defined concession models for future airports in Colombia, including the new Eldorado International.

¹⁶⁵ *Escobar Corradine, supra* note 37 and *ATAC CONCESSIONS, supra* note 57 at 32.

¹⁶⁶ *ATAC CONCESSIONS, supra* note 57 at 16.

4. ELDORADO INTERNATIONAL AIRPORT

4.1. History - Background

The first airport the city ever had was constructed in 1930 and was known as the *Aeropuerto de Techo*. For reasons of location and physical facilities, and considering the growth of aerial transportation and the vertiginous advance of aeronautical technology, this airport presented serious difficulties in rendering the service, particularly due to the location of the radio diffusion towers that obstructed the visibility of the flight crews during the landing maneuver. The frequent floods in the platform constituted another great setback, the wideness of the runway was insufficient and the terminal building was too narrow to receive the number of passengers that it did.¹⁶⁷

All these factors raised the need for a completely new airport. On December 11, 1959, the former President of Colombia Alberto Lleras Camargo inaugurated Eldorado¹⁶⁸ International Airport, a project that was considered then an ambitious and far-ahead-of-its-time project, taking into account the real proportions and necessities of the country and aviation in general in Colombia. As demonstrated throughout this thesis, reality has shown that the above statement is actually an overstatement since demand has grown at a faster pace than expected. Considered in its time the most modern airport of Latin America, it was projected to have two runways to receive the full range of existing aircraft. By 1973, air traffic had ascended to almost three million passengers per year, with a significant growth in the circulation of passengers and cargo mobilized through the airport. This led to the construction of the second runway as a substitute to the already existing one to be used in case of an obstruction. The airport also underwent two major expansions

¹⁶⁷ Eldorado International Airport Online: <www.elnuevodorado.com> [El Nuevo Dorado].

¹⁶⁸ Named after a pre-Colombian legend that referred to the mythical gold reserves that Spaniards looked for in America.

in 1981 and 1994 with the creation of a new terminal and the remodeling of its facilities. The second runway was officially inaugurated in 1998.¹⁶⁹

To this date, Eldorado International is the principal and most important airport in Colombia, ranking fourth in passenger¹⁷⁰ movement and first in cargo¹⁷¹ in the Latin American region. It is located fifteen (15) kilometers to the west of the downtown area and less than a forty-minute ride by car to the most important business, commercial and tourist centers of Bogotá, D.C. Its elevation is two thousand five hundred and forty seven (2,547) meters above sea level, and occupies a landmass of approximately six hundred and ninety (690) acres. It handles both domestic and international flights, serving the nation's primary international gateway.¹⁷² In brief, Eldorado International Airport is not only the distribution center of the entire national air system, but also the engine of international trade and commerce in Colombia and the Andean region, as well as the port of entry to all South and Latin America.

Eldorado International Airport is part of the Colombian airport system, where fifty percent (50%) of the domestic routes of the country begin or end, as it mobilizes thirty-six percent (36%) of the total number of passengers in the country. With regards to international operations, practically all international routes are handled through Bogotá, with almost seventy percent (70%) of international passengers using Eldorado International.¹⁷³ Therefore, Eldorado International must not be regarded as an isolated, independent or autonomous airport, but as an essential component of the system.¹⁷⁴ Its existence depends on other national and international airports as well.

¹⁶⁹ *El Nuevo Dorado*, *supra* note 167.

¹⁷⁰ Approximately thirteen million passengers moved through the airport in 2007.

¹⁷¹ Approximately five hundred ninety thousands tons were moved through the airport in 2007.

¹⁷² *El Nuevo Dorado*, *supra* note 167.

¹⁷³ Vélez, *supra* note 149.

¹⁷⁴ According to the Ministry of Transportation of Colombia, the airport system is made up of 590 airports and landing fields in which seventy four (74) are owned by AEROCIVIL, fourteen (14) are owned by the Departments, ninety four are owned by the Municipalities, nine (9) are military, one hundred and eighty five (185) are for fumigation purposes and two hundred and fourteen are private registered runways. (See, Ministerio de Transporte de Colombia Online: http://www.mintransporte.gov.co/online/faq/consultaxno.asp?CODI_FAQ=85).

Domestic traffic is very significant in Colombia compared to other countries in Latin America. México, Brazil and Colombia have a percentage of domestic traffic that far exceeds its international traffic. In other countries, such as Peru, Ecuador, Bolivia and Chile, international passenger traffic invariably exceeds domestic. This special feature further strengthens and facilitates the development of Bogotá as a hub¹⁷⁵, making it the leading airport in the Americas.¹⁷⁶

In 2007, the concessionaire OPAIN¹⁷⁷ proposed to the Government of Colombia to modernize and expand the airport in order to satisfy its user needs and improve the service offered to travelers. The main goal of this project is to bring the airport to optimal standards in order to support sixteen million passengers and one and a half million tons of cargo a year. With this new management system, Eldorado International Airport is preparing itself to handle the increasing air traffic and the accelerated development of the aeronautical industry in the country.¹⁷⁸

4.2. Modernization and expansion

Eldorado International Airport's infrastructure has been under a lot of pressure due to the concentration of the majority of the air transport activities in only a few airports

¹⁷⁵ Only three airports in the region have been carefully considered as candidates to be converted into major hubs on the basis of their geographical position. These are Panama, which actually already is a hub, Caracas and Bogotá. Presently, the conditions between Caracas and Bogotá are very similar. Venezuela enjoys significant domestic traffic, but not as much as Colombia. From a geographical point of view, Bogotá, Colombia's capital city, is located no more than six hours by plane to any capital city of the continent and less than nine hours to the main cities of the world. With regards to air transport, Bogotá is also much closer than the majority of the international market suppliers; it is four times closer in economic distance by air from the principal market in the world (the USA) than the Asian countries, or three times closer than European countries. (Araújo, Ibarra Asociados, CARCE y Cámara de Comercio de Bogotá, Plan Estratégico Exportador Regional (PEER), 2001). Despite these facts, Venezuela has other advantages in comparison to Colombia, especially in altitude and meteorological conditions that allow them to receive larger capacity aircraft. Nonetheless, there is a clear disadvantage for them because there is almost no possibility of building a new runway in Maiquetía International Airport in Caracas due to its high costs and the limitations in the increase of its operations. (See, Vélez, *supra* note 149).

¹⁷⁶ *Ibid.*

¹⁷⁷ OPAIN stands for Operadora Aeroportuaria Internacional, a consortium composed of 100% Colombian construction and engineering firms and the Swiss Flughafen Zurich AG. Created in 2006, OPAIN will operate the airport for the next 20 years initially. (See, *El Nuevo Dorado*, *supra* note 167).

¹⁷⁸ *Ibid.*

in the country as well as due to the rapid increment in air operations. The “open skies” policy, which eliminated the restrictions of entry to airlines and permitted liberty in routes and schedules, has influenced the increase in traffic demand. The rise in demand reflects the increase in the number of airlines that provide passenger and cargo air transport services, the increase in the frequency of flights and the volume of passengers and cargo transported, as well as the decrease in the applicable tariffs for certain routes.

Traffic patterns, both historical and projected, constituted one of the most important factors that the Colombian Government took into consideration when adopting the decision to give in concession Eldorado International airport. This data aids the government in determining if the capacity the airport currently offers is enough to support the future demand in traffic and if not, how much of it needs to be expanded or reconstructed. In other words, the expansion, modernization or construction of a whole new airport, in Bogotá's case, cannot be undertaken without having previously analyzed how air traffic behaves over a certain period of time and how it will behave in the future. All this data supports and determines the construction works that are to be done and how they will be financed, regardless of whether the operation and maintenance of the airport is in the hands of the Government directly or in those of the private operator.

Studies¹⁷⁹ have shown there is a strict relationship between the rhythm of economic growth and the development of passenger and cargo air transportation activity in many countries, including Colombia. In other words, air transportation has higher variation rates compared to GDP per-capita in both peak and recession periods. This means that when the economy grows, air traffic grows at a higher rate, and when the economy goes into recession, air traffic falls sharply at a greater intensity.¹⁸⁰

¹⁷⁹ The most recent and detailed analysis of such correlation is contained in ICAO's Circular 292-AT/124 (Economic contribution of civil aviation).

¹⁸⁰ ATAC, *supra* note 162 at 17.

Over the last five years, Colombia's economy has experienced steady growth thanks to stable macroeconomic policies, the increase in trade and reduced security concerns. This strong growth is also due to the significant role the aviation sector plays in the country's economy, not only by providing an essential link between Colombia and the global economy that allows Colombian businesses to penetrate global markets, producing in return larger economic benefits as well as attracting business travelers to the country, but also for facilitating the access of tourists.¹⁸¹ Air transportation has been one of the fastest growing sectors of the economy as its direct contribution to GDP grew by 9.1% in 2006 and it is also above the total GDP growth of 6.8%.¹⁸²

The importance of the airport to the country's economy is undisputable. During the last thirty years, the airport has seen a significant growth in both the national and international passenger and cargo air traffic demand despite the difficulties that the industry is facing as a result of several factors such as oil prices, terrorist acts, etc. Without private sector involvement, the adaptation of the airport to attend the future demand and therefore penetrate deeper into the economy could not have been possible if the Government were to assume entirely its reconstruction. Large amounts of capital are needed to carry out the project all at the same time as the airport operates at its full capacity all year round.

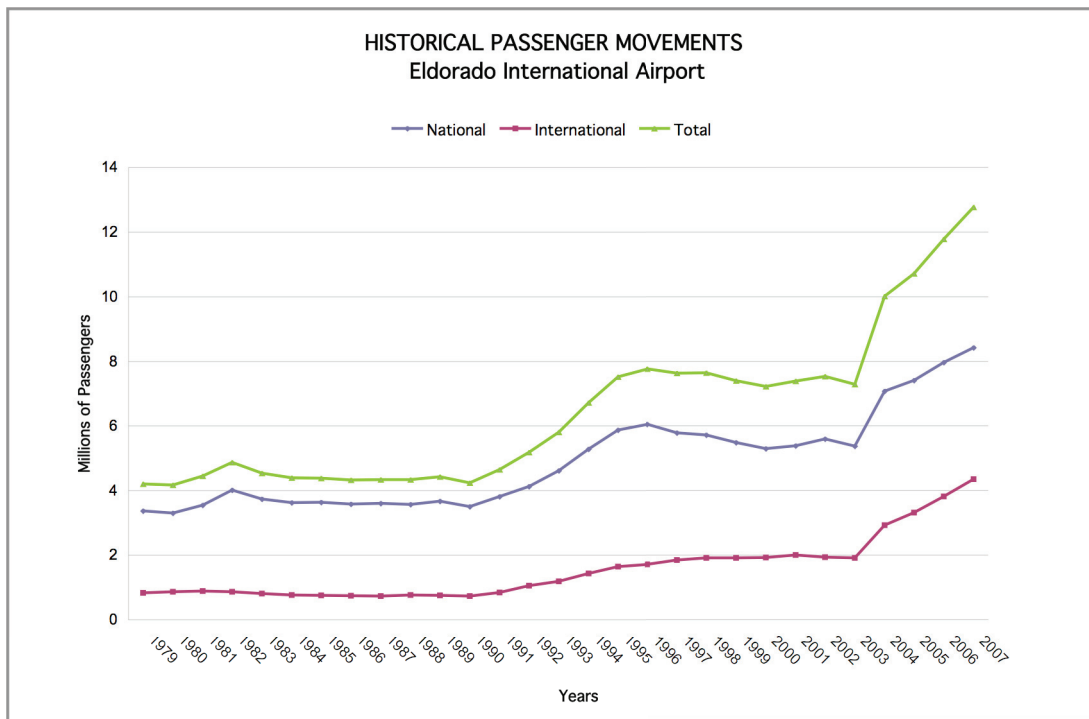
The following graphs illustrate how air traffic in Eldorado International has behaved during the last thirty (30) years in relation to the economy. Graphs No. 1 and 2 show the historical evolution of passenger and cargo air traffic movements during the period between 1979 and 2007 in Eldorado International Airport, respectively. In

¹⁸¹ "Air transport accounts for over 85% of international tourist arrivals to Colombia. It has already provided a boost to the sector, accounting for almost all of the increase in tourists since 2003. Further investment in air transport infrastructure and services can play a key role in developing significant further growth in tourism, especially from higher-spending tourists from the US, Europe and Asia." (See, *IATA Colombia*, *supra* note 137 at 3).

¹⁸² The IATA states that air transport "directly accounted for 0.5% of Colombia's GDP in 2005, though its role in facilitating growth across other sectors means that its total contribution will be significantly higher. Air transport has grown at a similar rate to the overall Colombian economy since 1994. However, its contribution has grown at an increasingly faster rate in recent years." (*Ibid.* at 2, 3).

general terms they show that demand has a tendency to rise in the long-run as it is greatly influenced by the cycles of the country's economy.

Graph No. 1



*Source: Aeronáutica Civil de Colombia (AEROCIVIL)

Several conclusions can be drawn from Graph No. 1 in relation to passenger air traffic. It can be observed that there are a few cycles of economic boom where demand tended to increase significantly during the 1970's, the first half of the 1990's and the "actual" period since 2005; it also illustrates the stages of recession particularly between the 1980's and the period of 1997-2003.

By 2004, Colombia's economy did much better overall despite the tense political and social atmosphere. Colombia's new Constitution came into force in 1991 and with it a new liberal economic model was introduced during President Cesar Gaviria's term. The liberalization of the economy resulted in greater consumer buying power,

thus stimulating the supply of international air transport services and pushing passenger air traffic to levels never seen before.¹⁸³

With respect to domestic traffic, during 2006 more than eight million passengers were mobilized, almost three times more than the flow of passengers that were mobilized in 1970, showing a 3% growth rate, with two very clear periods of recession: 1982-1990 and 1996-2004. On the other hand, international traffic was close to 4.5 million passengers in 2006, nine times more than those mobilized in 1970, achieving a much more dynamic annual average growth rate of 6% compared to domestic traffic. The effects of globalization and liberalization of international commerce may explain this increase in the international segment.¹⁸⁴

As mentioned before, this graph also shows that domestic passenger air traffic exceeds international, while maintaining a constant increase in the last 36 years.¹⁸⁵ Nevertheless, and according to the data, the increasing rate of international passenger air traffic has doubled in average in comparison to domestic, meaning that in less than ten (10) years both traffic flows may equal each other.¹⁸⁶ In effect, while in 1970 the domestic passenger air traffic market was six times larger than the international market in passenger volume, by 2006 the gap between the two was significantly reduced, with the domestic market being only 1.9 times greater than the international. Indeed, international passenger air traffic has demonstrated consistently higher increment rates than those of the economy.¹⁸⁷ This rapid growth

¹⁸³ The decisions adopted at the beginning of the 1990's that led to the creation of new international air transport services and the expansion of the existing ones include: the authorization given to the former airline ACES to fly to Miami, the increase in the frequencies of American Airlines in Colombia, the penetration of Continental Airlines, Mexicana de Aviación, Alitalia and KLM in the Colombian market, and the intensive operations from Venezuelan airlines like Avensa, Servivensa, Zuliana and Valenciana de Aviación. (ATAC, *supra* note 162 at 21).

¹⁸⁴ *Ibid.* at 10-17.

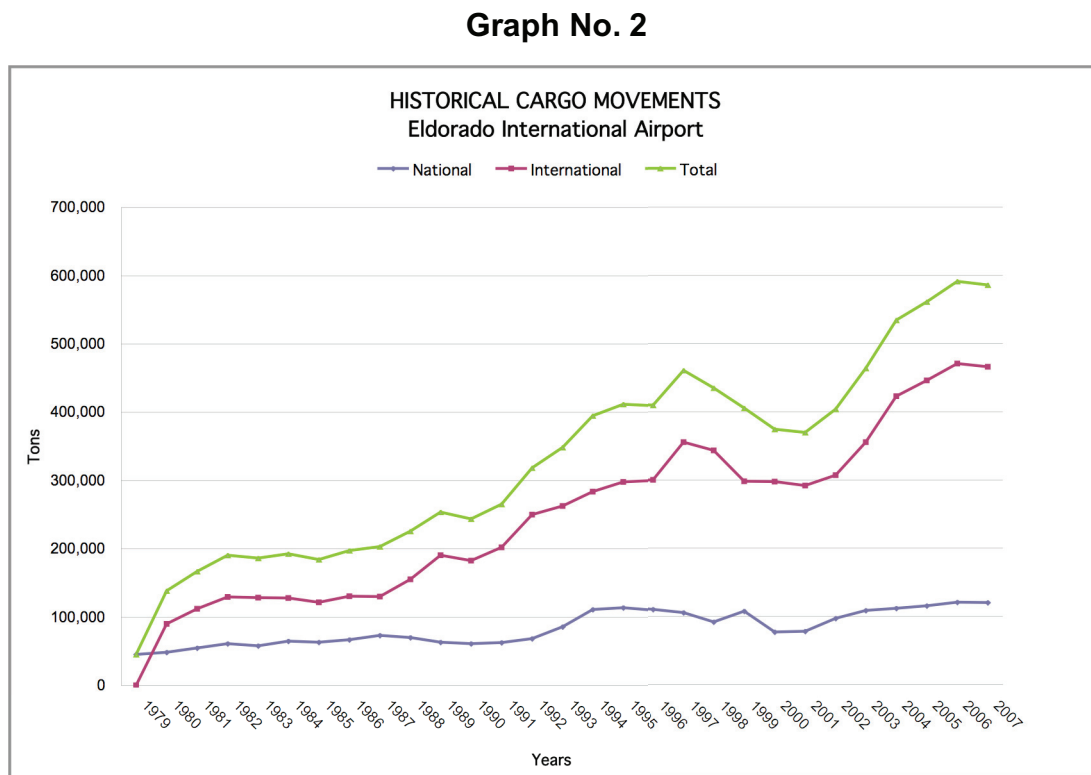
¹⁸⁵ Even though the graph only shows the period between 1979 and 2007 (28 years), it can be stated that during the 1970's the curves did not fluctuate significantly.

¹⁸⁶ ATAC, *supra* note 162 at xvi.

¹⁸⁷ The IATA declares "the number of international air passengers to and from Colombia has almost doubled since 1995, reaching 4.6 million in 2006. The rate of growth has picked up strongly since 2003, reflecting the boost to business and leisure travel provided by a more stable economy and a more secure environment. International air traffic grew by over 50% between 2003 and 2006, an

is of major importance for the long-term planning of the air transport sector in the country, not only with regards to infrastructure, but also with regards to ANS, route network, market structuring, etc.¹⁸⁸

Graph No. 2 shows the Historical Cargo Movements during the period between 1979 and 2007 in Eldorado International Airport.



*Source: Aeronáutica Civil de Colombia (AEROCIVIL)

National air cargo transportation has experienced steady growth throughout the years compared to international. National cargo fluctuates around one hundred thousand tons (100,000), representing only an annual growth of 1.6% during the entire period, while the international segment has grown at an average rate of 9% annually during that same period, reaching almost six hundred thousand tons

average annual growth rate of around 15%, well above the rate of growth of the GDP over the same time.” (See, *IATA Colombia*, *supra* note 137 at 4).

¹⁸⁸ ATAC, *supra* note 162 at 8, 19.

(600,000) of cargo in 2006. It is also important to note that national cargo transportation has experienced moderate growth over time, representing only an average rate of 2.2% annually. This confirms that domestic air transportation business is still incipient, considering that most of the domestic cargo is transported by passenger aircraft.¹⁸⁹

The projections for air traffic in Colombia demonstrate that traffic by far exceeds the capacity the airport currently offers. In order to remain competitive, the airport's infrastructure must be expanded and carried out according to both passenger and cargo traffic projections, where cargo is especially important, as Eldorado International Airport holds the first position in cargo movements throughout the LATAM region and would expect to remain there. If the economy continues to grow at its current rate, it is very feasible that these goals will be met ahead of projections, as import and export activities will increase significantly. As it is illustrated in Graphs No. 1 and 2, the growth that the Colombian economy has experienced since 2000 has pushed traffic cargo and passenger traffic to unforeseen levels.

Passenger and cargo projections are essential to any airport infrastructure development project as well as for its financing. These forecasts serve to "identify traffic developments and establish the associated capacity requirements of the airport."¹⁹⁰ Projections estimate the potential growth the airport would represent to the nation and region in general. Graphs No. 3 and 4 demonstrate cargo and passenger traffic projections until 2025 for Eldorado International airport, respectively.

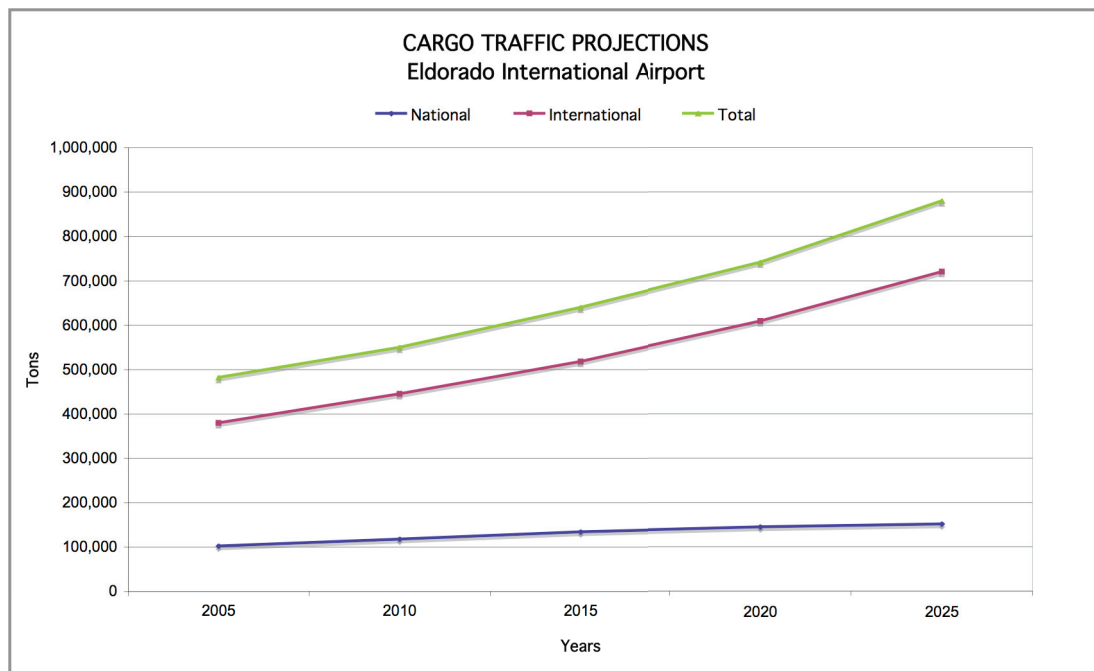
According to Graph No. 3 and the master plan of the airport, international air cargo traffic will reach 435.800 tons in 2010, and national air cargo traffic will reach 113.500 tons in that same year. For 2025, the volume will reach 713.400 and 149.200 tons, respectively. This means that international air cargo traffic will grow

¹⁸⁹ *Ibid.* at xvii, 22.

¹⁹⁰ ICAO Doc 9562, *supra* note 12 at 7-1.

3.9% in average annually during the period 2000 and 2010 and 3.3% during the period between 2010 and 2025. Furthermore, national air cargo will grow at an annual rate of 4.1% and 1.8% during the aforementioned periods.¹⁹¹ As it can be observed, cargo projections are below the historical tendency as reported by the AEROCIVIL up to 2007.¹⁹²

Graph No. 3



*Source: Aeronáutica Civil de Colombia (AEROCIVIL)

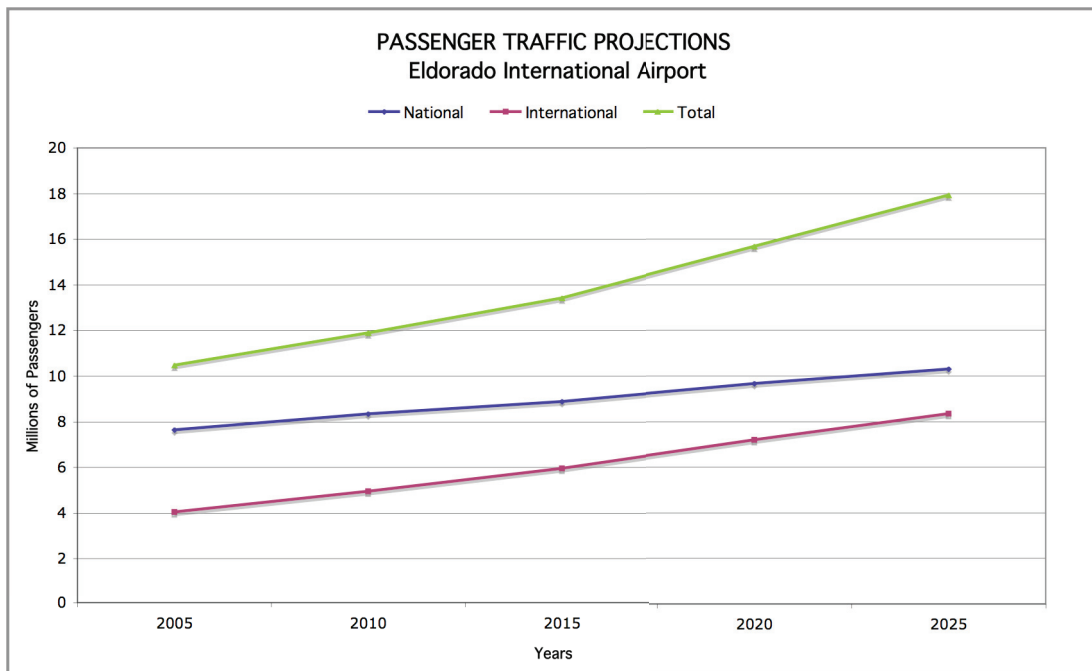
On the other hand, passenger projections, as seen on Graph No. 4, have been more accurate through the years when compared to the historical passenger movements in 2005 as shown in Graph No. 1. Projected traffic levels are expected to be met

¹⁹¹ CARCE, *supra* note 6 at 15.

¹⁹² As an example, if the official historical data for cargo movements contained in Graph No. 2 is compared to the cargo projections in Graph No. 3, they indicate that during 2003, the airport mobilized 355.050 tons of international cargo and 108.394 tons of national cargo, meaning that the growth rate in international and national air cargo transportation since 2000 was of 6.1% and 12.2%, respectively. In other words, by 2003, the cargo air transportation traffic demand had already reached what the master plan had estimated for 2005 well ahead of schedule. Another example in the case of freight is that the master plan projected that by 2005, around four hundred and fifty thousand (450,000) tons of cargo were to be moved through the airport, while as seen before in Graph No. 2, total cargo transported through the airport reached approximately five hundred and fifty thousand (550,000) tons. (*Ibid.*).

more rapidly as the constant growth of the economy has the same impact on both passenger traffic and freight.

Graph No. 4



**Source: Aeronáutica Civil de Colombia (AEROCIVIL)*

Whether referring to passenger or cargo, an “unexpected” increase in traffic levels does not necessarily mean that the airport’s future capacity will fall short, because as explained before, not only can these projections change abruptly, but adapting airport infrastructure based on optimistic projections may lead to disaster if they do not materialize on time. Due to the current conditions that airlines and airports are facing, air traffic projections cannot be as accurate as desired because of the difficulty in estimating and controlling the impact certain circumstances and variables have on the industry. Whether negative or positive, the industry is being forced to adapt in all ways possible in order to “survive”. It is important to recall that previously analyzed projections were made within the master plan before the concession was awarded, and relying on the information available, they have not been updated in accordance to past and current traffic statistics.

These projections demonstrate that air traffic is expected to increase significantly in the long term making the construction of a new airport a crucial step that will enable it to support the traffic demand and satisfy the needs of its users and the country alike. The incapacity of the Colombian Government to provide the necessary capital and effort to carry out a project of this magnitude at the same time, as it should be done, has led the Government to transfer the management and operation of the airport to OPAIN.

An important aspect to keep in mind is that whether the operation and administration is done by either the AEROCIVIL or through a concessionaire, it will invariably be exercised through monopolies, resulting in two types of barriers: elevated costs of services and the slow infrastructure development that lead to deficiencies in the provision of quality services. Undoubtedly, these constitute another challenge for air transportation's competitiveness in Colombia.¹⁹³ In order to make the region more competitive, the project that will expand, operate, and administer the airport must be carried out considering its physical and economical development. Special attention should be given to airport charges and costs, as they must remain competitive at an international level. The quality of services and security issues must meet international standards.¹⁹⁴ The Government has to be very sensitive to the economical environment surrounding the sector as the performance of the airport is heavily influenced by the economic cycles of the country.

Finally, the modernization of the airport is neither a simple development of an infrastructure project, a change in its form of operation, nor a way to increase revenues for the AEROCIVIL. It is rather a more complex strategy for its competitiveness, which will bring both economic and social benefits for the region.

¹⁹³ ATAC, *supra* note 162 at 157.

¹⁹⁴ Maria Fernanda Campo, "Concesión del Aeropuerto Internacional Eldorado" (Paper presented to the Bogotá's Chamber of Commerce Forum on "*Experiencias Internacionales en Concesiones Aeroportuarias*" Bogotá: Cámara de Comercio de Bogotá, 2004). [Campo].

From an economic stand point, it will stimulate the development of the principal urban centers and from a social one it will generate employment and revenues.¹⁹⁵

4.3. The Contract

The “privatization” model type of concession, used primarily in the Latin American countries that have undergone such processes, was the alternative chosen by Colombia's Government to inject capital in this major infrastructure project. Eldorado International Airport's Concession Contract No. 6000169 (the Contract), signed between the AEROCIVIL and the selected concessionaire OPAIN S.A., is the framework that will guide the course of the airport for the next twenty (20) years. The project involves the construction of a new, efficient and modern airport suitable to attend the increasing demand in traffic, offering its users quality services at reasonable and justified charges and a cargo area that will facilitate the operation and location of governmental agencies that participate in the import and export operations of the country. It must also be suitable to perform as a regional development center, where the input and coordination between other sectors and governmental entities to develop the surrounding areas is imperative. The airport must also increase its connectivity to assist the country's access into the global market.

Law 80 of 1993 regulates concession contracts, and any other form of public contracting scheme in Colombia.¹⁹⁶ It establishes its fundamental characteristics and points out that in order to determine if a contract is a concession or not, one must

¹⁹⁵ Andrés López Valderrama, “El Aeropuerto Eldorado y la competitividad de la región y el País” (Paper presented to the Bogotá's Chamber of Commerce Forum on “*Experiencias Internacionales en Concesiones Aeroportuarias*” Bogotá: Cámara de Comercio de Bogotá, 2004).

¹⁹⁶ The Law 80 of 1993 in Article 32.4 defines the concession contract as “*Those celebrated by State entities with the purpose of awarding to a person called concessionaire the provision, operation, exploitation, organization or management, total or partial, of a public service, or the construction, exploitation or total or partial conservation, of a construction work or destined to a service or public use, as well as all other activities that are necessary for the adequate provision or function of the construction work or service, where the concessionaire assumes all risks while the vigilance and control remains in the conceding entity, in return of a remuneration that may consist on rights, tariffs, charges, valorization or in the participation that is awarded in the exploitation of the property, or in a periodic amount, and in general, any other type of consideration agreed upon the parties*” (Translated by the author).

examine its object, the distribution of risks between the parties, the supervision and control regime and the different remuneration models. Although this will be analyzed in detail in the case study of Eldorado International Airport, these contractual stipulations must include:

- i) Object: it must relate to the total or partial granting of the provision, exploitation, or administration of a public service, or the granting of the total or partial construction, exploitation or conservation of a building work destined either to the service or public use, and in which the faculties to realize any other activity necessary for the adequate provision or functioning of the building works or the services are assigned. In other words, it is a contract that falls on public domain therefore satisfying public needs. This type of contract must contain the basic principles of public law including exorbitant or exceptional clauses of termination, expiration, unilateral modification and interpretation clauses in favor of the State, all of which are understood as part of the contract even if they are not expressly stipulated.
- ii) Risks: in all cases, the concessionaire must assume the development of the contract at its own risk.
- iii) Supervision and control: it must always correspond to the entity that transfers the ownership, in this case the State. Nevertheless, the State can transfer that obligation to an auditor or a delegate. This faculty cannot be shared or waived and basically consists of its faculty to order, instruct and regulate the operator's execution of the construction, exploitation and/or maintenance of the works or service.
- iv) Remuneration: each party has an economic burden. The law stipulates different forms to remunerate, including fees, tariffs, charges or valuations, participation in the exploitation, a periodic amount or a percentage

commission. The important aspect is that it has to be clearly defined in the contract.

- v) Reversion: this is obligatory when giving out or transferring State property.¹⁹⁷

In the following paragraphs, all of the activities related to the purpose of the Contract will be deconstructed to better understand the responsibilities and obligations assigned to the parties, the assumption of risks and what it entails, and in general, the overall execution of the Contract. Throughout the analysis, emphasis will be made on the core aspects that deserve crucial attention for the correct development of both the contract and project.

4.3.1. Purpose

The purpose of the Contract is to carry out the administration, operation, commercial exploitation, modernization and expansion and maintenance of the areas given under concession of Eldorado International Airport. The area given under concession encompasses almost all the areas of the airport including, among others, the passenger terminals, the national and international cargo areas, the general aviation area, the administrative tower, deposit, and the building of the Secretary of Operational Systems of the AEROCIVIL, the goods and services center, and the Air Traffic Control (ATC) tower.

On the other hand, the Contract excludes specifically from the object of the concession, and therefore, the concessionaire has no rights or duties over the following areas: the area given in concession to CODAD S.A. (second runway), the area occupied by the *Comando Aéreo de Transporte Militar* (CATAM), the National Police Area (Antinarcotics) to the west of CATAM, certain areas given in commodatum to the Ministry of National Defense and specified under the Contract BO-CM-0060-05, the hangar of the AEROCIVIL, the National Aeronautic Center

¹⁹⁷ *IATA Colombia*, *supra* note 137 at 5-7.

(CNA in Spanish) and the Center for Aeronautics Studies (CEA in Spanish). Additionally, the concession excludes all the necessary equipment for the provision of ATC services in route or the responsibility for the correct operation of air navigation aids in accordance with paragraph 3 of Article 48 of the Law 105 of 1993. In other words, the AEROCIVIL reserves to itself the operation and responsibility of the control and supervision functions related to air traffic in route.¹⁹⁸

From a structural point of view, the Contract coincides to some extent with the master plan of the airport and it is completely aligned with the *Plan de Ordenamiento Territorial* (POT) of the city of Bogotá. It was established that there was no need to acquire new terrain for the contemplated works of expansion from those already owned by the AEROCIVIL.¹⁹⁹

The magnitude of the project encompasses a great number of risks that each party has to assume throughout the contract. It assigns to the parties involved different types of obligations and responsibilities that are to be followed to reduce and control those risks in order to ensure the correct execution of the Contract.

The coordination and supervision of the execution and fulfillment of the Contract is to be done by an auditor who must comply with the totality of both the concession and auditing contracts. The auditor's role is very important in the execution of the construction works as it is in charge of determining which of the regulated aspects in the Contract and its annexes have to be strictly observed by the concessionaire. As well, it has the power to solicit any type of information in relation to the purpose of the Contract as it sees fit. Its main functions include the technical, legal, administrative, financial and accounting control of the Contract, among with the detailed functions listed in Clause 77 of the Contract. Any controversies that may arise between the auditor and the concessionaire are to be resolved by the

¹⁹⁸ Concession Contract 6000169, Clause 2.

¹⁹⁹ KPMG, *Plan de Modernización y Expansión del Aeropuerto Internacional El Dorado*: Bogotá's Chamber of Commerce Forum on "Experiencias Internacionales en Concesiones Aeroportuarias." (Bogotá: Cámara de Comercio de Bogotá, 2005).

AEROCIVIL. In case the concessionaire is not pleased with the final decision emitted by the AEROCIVIL, it may resort to any of the dispute resolution mechanisms contained in the Contract, either an amicable composition or an arbitration court.²⁰⁰

Also, an important thing to bear in mind is that the Contract does not create any type of association, joint venture, company or agency type relationship among the parties, nor does it impose any type of obligation or responsibility derived from a legal partnership relationship.²⁰¹

Through the Contract, the AEROCIVIL transfers to the concessionaire the administration²⁰², operation²⁰³, commercial exploitation²⁰⁴, modernization and

²⁰⁰ Concession Contract 6000169, Clause 77.

²⁰¹ Concession Contract 6000169, Clause 82.

²⁰² For a comprehensive list of the administration acts that the concessionaire may carry out refer to Concession Contract 6000169, Clause 40. See also Concession Contract Clauses 60 and 61.

²⁰³ The concessionaire is under the obligation of carrying out the operation of the area given in concession according to the terms provided by the Technical Operational Specifications (Appendix F) and the Contract. This Appendix describes what the Associated and Non Associated Services to Regulated Income are, and establishes how those services must be provided and charged to the general users of the airport. The operation component refers to the execution of all the necessary and complementary activities to guarantee the provision of Associated and Non Associated Services to the Regulated Incomes to any user of the airport in the terms provided under the mentioned Specifications, and also taking special consideration of the conditions listed in Clause 41 of the contract, particularly in relation to the prohibition of charging the users additional charges not listed in the Tariff Structure, or altering them. The applicable Tariff Structure is contained in AEROCIVIL's Resolution 05496 of 2005, which contains the Regulated Incomes that the concessionaire can collect. Any other not listed there has to be previously and expressly authorized by AEROCIVIL if the concessionaire intends to collect from it. The contract also foresees that in case the concessionaire would like to provide and charge the users for a new service not listed in the Operational Technical Specifications, it would have to follow the procedure established under Clause 41.3 in the contract. Lastly, each agreement or contract done by the concessionaire with third parties for the execution of the Contract must include a clause that stipulates that if the Contract were to end by any cause, it would constitute a cause for termination of the other contracts celebrated between the concessionaire and third parties, unless AEROCIVIL is willing to take over the concessionaire's position and continue with such contract. In such case, AEROCIVIL must follow the procedure established under Clause 41.4 of the Contract.

²⁰⁴ It refers to all activities carried out from which the concessionaire receives any type of consideration that may come from the users of Associated and Non Associated Services to Regulated Incomes, from third parties that carry out commercial activities in the area given under concession and/or from any other natural or legal person that acquires goods or services provided by the concessionaire. A list of the activities is included in Concession Contract 6000169, Clause 41.

expansion²⁰⁵ and maintenance²⁰⁶ of the areas given under concession of Eldorado International Airport for a specific period of time and gives it its right to receive the Regulated²⁰⁷ and Non Regulated (commercial exploitation of spaces) Incomes as defined in the Contract. On the other hand, the concessionaire is obliged to carry out all the obligations set forth in the Contract (including, but not limited to protecting the environment and the natural resources, providing fire control services, preventing bird hazards, providing and installing machinery, equipment, materials and personnel, and protecting intellectual property rights) as well as paying a consideration to the AEROCIVIL in the terms provided in the Contract. Additionally, the concessionaire is also responsible for the airport security in the area given under concession.²⁰⁸ During the entire term of the Contract, the AEROCIVIL retains supervision and control of the airport.

²⁰⁵ Both include the works of construction, remodeling, rehabilitation or any other specified in Appendix D ("Technical Specifications for the Modernization and Expansion of Eldorado International Airport") of the Contract, which must be executed in the terms provided by the Construction Chronogram of the Contract in accordance with the Modernization and Expansion Technical Specs Sheet.

²⁰⁶ It includes all activities executed by the concessionaire to maintain the quality of service of the area given under concession in the terms provided by Clause 42 and Appendix G ("Technical Maintenance Specifications") of the concession contract. The concessionaire is also responsible for the maintenance of all the property given under the concession in accordance to the Maintenance Technical Specifications.

²⁰⁷ According to Concession Contract 6000169, Clause 19, the Regulated Incomes include: the national and international airport charges that must be paid by passengers using the airport, parking fees that must be paid by the airlines, right to use the counters to register passengers and the use of the national and international boarding gates by the airlines, the rights of expedition of carnets and permits to circulate vehicles on the platform, and the rights for each of the fire trucks used for fueling aircraft and those for cleaning up the platform.

²⁰⁸ Colombia is not an exception to the general rule mentioned in the first part of this thesis where the governments always retain the responsibility in the security of aviation in general. Therefore, AEROCIVIL is the only one in charge and responsible of the airport's aeronautic security in the terms provided by paragraph 3 of Article 48 of the Law 105 of 1993, in Clause 2 of the Concession Contract and in the applicable national and international legislation. The activities and procedures the concessionaire must develop to guarantee the minimum security standards include the ones listed in Clause 44.2 of the Contract, Appendix H ("Airport Security") of the Contract, the National Airport Security Program (*Programa Nacional de Seguridad Aeroportuaria*), the Airport Security Plan (*Plan de Seguridad del Aeropuerto*), and all other national and international legislation related to airport security that result applicable to the security aspect of the area given under concession to prevent acts of illicit interference, as defined in Clause 1.7 of the Contract. In relation to the Airport Security Plan, it must be elaborated and presented by the concessionaire in conformity with Clause 44.3 of the Contract in relation to the National Airport Security Program, the ICAO Annex 17 and any other legislation related to airport security. As discussed before, the concessionaire is also obliged to comply with the totality of the applicable airport security legislation applicable in Colombia, including the international treaties that Colombia has ratified, and other laws, decrees and resolutions issued by Colombia in relation to airport security, all of which were mentioned in Chapter 3.3 of this thesis.

4.3.2. General obligations and assumption of risks

Clauses 10 and 11 of the Contract enumerate the general obligations that pertain to both the concessionaire and the AEROCIVIL in its execution. These mainly determine the role of each of the parties, and based on this allocation, the Contract also establishes the applicable penalties to be imposed in case they are not fulfilled. The Contract also contemplates and assigns to the concessionaire the responsibility in the treatment of additional, voluntary or unforeseen works to be done.²⁰⁹ In general terms, the private operator must assume all required investments in the way and time they were previously determined, with the required quality and at a reasonable price. The private investor's responsibility must be measured in terms of results and not of procedures.²¹⁰

The transfer of managerial and operational capabilities to the private operator implies assuming a great amount of risks, forcing the State to ensure the private operator also guarantees the complete fulfillment of its obligations. In general terms, the concessionaire must assume the effects, whether favorable or unfavorable, of variations in the economic and technical components necessary to fulfill its obligations while executing the Contract, in relation to its financing, elaboration of studies and designs, hiring of personnel, administrative tasks, materials and equipment needed, environmental and social handling obligations that correspond to the part ceded in the environmental license to the concessionaire, the macroeconomic conditions of the country, and the political and legal frame of the Republic of Colombia, among others.²¹¹

(Concession Contract 6000169, Clause 44.7). AEROCIVIL's role in airport security is also prominent despite the functions assigned to the auditor. The National Airport Security Program confers to AEROCIVIL the constant revision of the obligations carried out by the concessionaire in airport security matters. In case the concessionaire does not fulfill its obligations in this matter, AEROCIVIL is entitled to impose the administrative sanctions that are authorized by the applicable regulations (Concession Contract 6000169, Clause 44).

²⁰⁹ Concession Contract 6000169, Clause 33 and 34.

²¹⁰ *ATAC CONCESSIONS*, *supra* note 57 at 26.

²¹¹ Clause 12 of the Contract includes a comprehensive list of risks.

Having signed the Contract, the concessionaire was obliged to issue a series of bonds in order to guarantee its main obligations. Among these, a sole performance bond ("*Garantía Única de Cumplimiento*" - GUC) in favor of the AEROCIVIL for the contractual obligations to guarantee the performance of the Contract, the payment of salaries, social benefit payments or compensations of employees hired by the concessionaire, the stability and quality of the construction, equipment, goods and services, and the quality of maintenance over the area given under concession.²¹² Additionally, a non-contractual liability insurance to keep the AEROCIVIL harmless from any actions, claims or suits of any nature derived from damages (torts) caused to property or to the life or personal integrity of third parties or any person from the AEROCIVIL, as a direct or indirect consequence of an action, event or omission by the concessionaire in the execution of the Contract.²¹³ In that sense, the concessionaire must also insure against all damages caused by force majeure that could occur in the building works, property or equipment included in the project.

On the other side, the AEROCIVIL must assume the risks listed in Clause 13 of the Contract, which basically include any effect derived from the existence of a damage that is a consequence of force majeure, those effects derived from the variations of the Tariff Structure, and the unfavorable effects generated by the obligations contained in the environmental license and that were not subject to the partial cession to the concessionaire, particularly in the relevant costs associated with noise abatement, among others. Clause 9.2 of the Contract also includes as risks to be assumed by the AEROCIVIL the ones produced as a consequence from the following events, excluding lost earnings: "(i) declared or non-declared foreign war; (ii) terrorist acts; (iii) civil war; (iv) coup; (v) national or regional strikes in which there is no participation from the concessionaire, or provided by it or any of its directors or management employees, and (vi) archeological treasures, mines or other deposit site discoveries."

²¹² Note: To see the characteristics of the guarantees, their modifications and their duration, refer to Concession Contract 6000169, Article 8.3. To determine the total volume of each bond, refer to the procedure contained in Concession Contract 6000169, Clauses 8.1.1. - 8.1.4.

²¹³ Concession Contract 6000169, Clause 8.2.

4.3.3. Economical aspects of the concession

Bearing in mind that airports constitute natural monopolies and in order to preserve the competitiveness in the region, the tariffs that are regulated throughout the Contract will not be raised arbitrarily. There are certain limits established to the tariffs that the concessionaire is allowed to charge as consideration for the exploitation of the Associated and Non Associated Services to the Regulated Incomes. Additionally, it is established that the concessionaire may not provide any other service to its users from which it expects to perceive a profit that has not been expressly transferred to them; prior permission from the AEROCIVIL is required.

The remuneration of the concessionaire is composed only of what it perceives as a result from the cession of the Regulated and Non Regulated Incomes, excluding those obtained by the AEROCIVIL for the provision of ANS and the ones corresponding to CODAD S.A. for landing rights.²¹⁴ With respect to the tariffs that are to be applied for the Regulated Incomes, the concessionaire must follow not only those contemplated in the Tariff Structure but also the indexation mechanism included in Resolution 05496 of 2005. Clause 56 of the Contract brings the procedure to be applied in the indexation and the rules that the concessionaire must follow in their application.

That same Resolution and Clause 58 of the Contract also establish that the concessionaire will collect the Regulated Incomes at its own risk. It explains the term and form of payment for a variety of services including, but not limited to, the ones provided to the airlines (such as parking fees, right to use the check-in counters, right to use the national and international boarding gates), authorization of operations, national and international airport charges, services provided to other users and also how the Non Associated Services to the Regulated Incomes are to be collected.

²¹⁴ Concession Contract 6000169, Clause 2.

In accordance with Clause 55 of the Contract, this basically means that the sum of both incomes integrally remunerates the obligations assumed by the concessionaire under the Contract, and therefore, the totality of the administration, operation, modernization and expansion, commercial exploitation and maintenance obligations, including the consideration in favor of the AEROCIVIL, must be assumed directly by the concessionaire without having to require any further payments or compensations from the AEROCIVIL for such purposes. The collection of the Regulated and Non Regulated Incomes also remunerates all the assumption of risks overtaken by the concessionaire.

The consideration that the concessionaire has to pay to the AEROCIVIL is fixed. OPAIN must pay a percentage of the net income every six (6) months, where the total value to be paid is determined by the procedure contained in Clause 60 of the Contract.

Additionally, the concessionaire is also obliged to pay taxes to the district and to the Nation as well. The taxation scheme for air transport in Colombia is composed of the following: There is a 16% Value Added Tax over air tickets and the majority of supplies from the sector, such as fuel and spare parts importations, a 35% income tax, a stamp tax applied to contracts and also when leaving the country, a custom duty for importation of goods, and other local industrial and commercial taxes.²¹⁵

As stated before, the concessionaire must also ensure the continuity of the service during the period of execution of the Contract. In cases where the concessionaire does not fulfill any of its obligations related to the provision of the services causing an interruption in the service of air transportation for a period of more than twenty-four (24) hours, the AEROCIVIL has the power to declare immediately the termination of the contract without having to follow the procedure established in

²¹⁵ ATAC, *supra* note 162 at xv.

Clause 68 of the Contract, which lists the causes the AEROCIVIL may rely on to declare the unilateral termination of the Contract.²¹⁶

4.3.4. Sanctions regime and resolution of disputes

Clause 63 of the Contract specifies the fines that are applicable when the concessionaire generates a breach of contract or non-fulfillment of its obligations during its execution, only in the circumstances and following the procedure described therein. Any of these situations allows the AEROCIVIL to terminate the Contract immediately in the state where it is found. The Contract limits the value of the fines by specifying they cannot exceed five percent (5%) of the Estimated Value of the Contract. The purpose of these fines is mainly to oblige the concessionaire in complying with its obligations, but in any way include an anticipated estimate of compensatory damages. Payment of the fines by the concessionaire does not liberates it from its obligation of executing and concluding the modernization and expansion works, the adequate operation and commercial exploitation of the area given under concession, the realization of maintenance works and any other responsibility or obligations that may arise under the Contract.

The causes to declare the termination of the Contract for failure to comply may only be brought up by the AEROCIVIL in the case of a breach of contract or non-fulfillment of any of the obligations that correspond to the concessionaire, affecting seriously and directly the execution of the Contract to the point where it can paralyze airport operations. The parties understand that all the cases listed in Clause 63 of the Contract where a fine can be imposed to the concessionaire, also constitute causes the AEROCIVIL could invoke to terminate the Contract if the concessionaire persists in any of them. The Contract also includes the non-fulfillment of the obligations between the concessionaire and its moneylenders in the cases specifically indicated in Clause 68 of the Contract as another cause for declaring the termination of the contract for failure to comply. If such were the case, and once

²¹⁶ Concession Contract 6000169, Clause 62.

approved the resolution that authorizes and declares the termination of the Contract, the AEROCIVIL must receive the entire project in any state that is found and may decide to make effective the correspondent guarantees, the fines that have not been paid yet and the applicable penal clause.

Once the AEROCIVIL declares the termination of the contract for failure to comply not only the concessionaire is obliged to pay the respective fine depending on the cause, but also the penal clause which comes into force because of it. Clause 64 of the Contract specifies the way in which this penalty shall be liquidated in such a case.

With respect to the faculty the AEROCIVIL has to terminate unilaterally the Contract in circumstances different from the ones discussed above that are specifically the ones used to declare the termination of the contract for failure to comply, the contract also provides that according to Article 32 of the Law 105 of 1993, the AEROCIVIL may unilaterally declare the anticipated termination of the Contract during the first two phases of the project in the cases established under Article 17 of the Law 80 of 1993.

Any differences that may rise in relation to the execution of the Contract and are associated with engineering or technical operational aspects, or financial aspects, and only in the cases expressly stated in the Contract, must be resolved through the amicable composition mechanism in compliance with all applicable legislation related to the matter in Colombia.²¹⁷ Clause 65 establishes that the resolution board is to be composed of three (3) natural persons following the procedure therein, and also mentions how the mechanism shall operate in any case. Finally, the decision adopted will be binding for the parties and also enjoys the effect of final resolution.

²¹⁷ Basically Law 446 of 1998 and Decree 1818 of 1998, or any other norms that replace, modify or add to them.

Additionally, the Contract also contains the mandate of establishing a court of arbitration for those cases in which a difference between the parties in the celebration, execution or liquidation of the Contract arises and only if it does not have to be solved by the amicable composition mechanism. In accordance with Clause 66 of the Contract, the court of arbitration will be an institutional arbitration that will decide on Law, it will be composed of three (3) arbitrators chosen by the parties or by the Chamber of Commerce of Bogotá in case the parties do not reach an agreement. The Contract also specifies that the application and effects of the causes to declare the termination of the contract for failure to comply, its unilateral termination, interpretation and modification, may not be submitted to the arbitration court.

In any case, whether there is an intervention by either the amicable composition mechanism or by the court of arbitration, the execution of the Contract will not be suspended unless it depends exclusively on the resolution from the controversy in place.²¹⁸

4.3.5. Termination and reversion

There are certain events in which the Contract may end in advance or, in other words, before the expiration of the estimated term of the Contract. Many of them have been described before, but nonetheless are being included in the following list of causes: (i) declaration of termination of the contract for failure to comply; (ii) declaration of unilateral termination; (iii) by modification in the tariffs; (iv) by the impossibility in renovating the guarantees; (v) by expiration of the maximum term of duration of the extension period of the previous phase; (vi) by suspension of the Contract, which only occurs when the execution of the contract is strongly affected for a continuous period of four (4) months; (vii) by paralysis of the totality of airport operations for more than five (5) continuous days and for causes exclusively

²¹⁸ Concession Contract 6000169, Clause 67.

attributable to the AEROCIVIL derived from the failure in executing its ATC functions or from the bad conditions of the runways, and lastly, (viii) by mutual consent.²¹⁹

At the expiry of the Contract, the concessionaire must transfer all the property listed in the concession's inventory free of any burden or liabilities back to the AEROCIVIL, including also all intellectual property rights in accordance with Appendix J ("Reversible Property") of the Contract. The AEROCIVIL will then assume, at that same instant, the operation, commercial exploitation and maintenance of all of them.²²⁰

Additionally, the AEROCIVIL will then become the beneficiary of all Regulated and Non Regulated Incomes once both parties have signed the act of termination of the Contract. It will also have the opportunity to decide whether or not to continue with any contract the concessionaire had celebrated with third parties for the operation, administration and commercial exploitation of the area given under concession throughout the Contract.²²¹

4.4. Concluding remarks on the Contract

The Contract, as well as all the previous phases to its adjudication, was done in compliance with the principles of transparency, equality and access of information. Opposed to the previous Colombian experiences, this contract was based on the existing master plan of the airport and during its elaboration, all previous phases to the awarding of the concession were held and carried out completely as mandated by the Law, where the general public, the airlines, and other interested parties had the opportunity to actively participate in them. The analysis of the Contract shows that it is a complete and detailed document that covers entirely the relationship between the parties, and in a very specific way the one between the AEROCIVIL and the concessionaire. The Contract regulates thoroughly all aspects of the

²¹⁹ Concession Contract 6000169, Clause 74.

²²⁰ Concession Contract 6000169, Clause 72.

²²¹ Concession Contract 6000169, Clause 72.

management of the concession, including among others, the royalties, guarantees, fines and penalties that are applicable and must be undertaken over a series of circumstances. It lists and specifies all risks, responsibilities and obligations in the building works according to the approved architectural designs.

The Colombian government has not yet created an independent body in charge of regulating these contracts to release the AEROCIVIL from assuming that task. With the Decree 2050 of 2003, which modifies the structure of the Ministry of Transport, a new Economic Regulation Office (*Oficina de Regulación Económica*) was created to replace the Transportation Regulation Commission (*Comisión de Regulación de Transporte - CRTR*) and which by nature, should be the body in charge of the economic regulation of airport concession contracts in Colombia. Article 7 of the above-mentioned Decree stipulates the Economic Regulation Office's obligations, but it does not include among its functions the regulation and oversight of concession contracts. Even though these contracts are still regulated by the AEROCIVIL, the Ministry of Transportation, through the Directive Council with the Minister at its head, fixes the general guidelines to which the AEROCIVIL must comply with. Additionally, the Ministry of Transportation participates actively in the regulatory matters through the Technical Committees that are created during the structuring phases of the concessions, participation that was almost null in the previous concessions. Finally, this control ensures and guarantees, among others, that airlines and passengers will not have to pay excessive charges and that they will be provided with quality services.

Nevertheless, and taking into consideration that six more airports are actually in the process of being awarded in concession, all grouped under what is known as "Centro Norte Concession"²²², the Government should consider either appointing the regulation of these contracts to the Economic Regulation Office by amending the Law, or establish the creation of another independent entity for such purposes. The

²²² The group of airports includes: Jose María Córdova Airport in Rionegro, Olaya Herrera Airport in Medellín, Los Garzones Airport in Montería, El Caraño Airport in Quibdó, Las Brujas Airport in Corozal and Antonio Roldán Betancurt Airport in Carepa.

future of air transportation in Colombia and the correct execution and completion of these contracts depends directly on adequate and “strict” regulations to ensure competition and growth. Special attention needs to be given to the guidelines contained in ICAO Document 9082 for the regulation of tariffs. Security and safety regulations of air transport operations remains a faculty of the Government for the reasons explained before.

To guarantee the sustainability of air transport in Colombia, the AEROCIVIL must identify a series of obstacles or factors that limit or affect its competitiveness. Based on a study made by the Air Transport Association of Colombia, the factors can be listed as either structural (i.e. demand for basic supplies in monopolistic or oligopolistic markets) or directly from the intervening and regulatory actions of the State. Among the structural ones the study mentions:

- i) The cost of fuel, not only because of its high international price, but also because of the excessive overcharges and taxes in Colombia that raise the price considerably as well as compared to the one charged in other airports in the LATAM region;
- ii) An increase in the charges and tariffs for the use of the aeronautical infrastructure. Even though its impact in the cost structure is less than the cost of fuel for example, it is still a basic component of the service. This has been mainly motivated by the concession processes that have been undertaken in Colombia, where costs are raised through expensive tariffs that are indexed each semester, thus generating mixed and inconsistent range of airport tariffs, making users pay higher prices for less quality services;
- iii) An inefficient provision of services as a result of the shortage of aeronautic infrastructure resources and equipment. The development of the aeronautical infrastructure has lingered behind because of the low tendency of the public sector to invest, although during the last years the AEROCIVIL has had

surplus revenues that have not been destined for such purposes. This is evident in the case of Eldorado International Airport, where the passenger and cargo terminals, parking spaces and operational capacity have reached levels of saturation, especially during peak hours and high season demand. In regards to ANS, the AEROCIVIL has done quite a good job in this aspect as it has invested in the modernization and expansion of the coverage of the equipment. Nevertheless, the optimization of the operational ATC proceedings and technically updating the available equipment constitutes a key factor to guarantee the operational efficiency, as well as it demands permanent and coordinated joint efforts from the airlines and the authorities.;

Additionally, the State can also limit competitiveness by excessive intervention in regulatory issues. The study includes a series of them that have to be identified and modified accordingly:

- i) The need to modernize the customs and duties regime as it actually imposes taxes on the air transport sector importations, contradicting the guidelines set forth by the World Trade Organization that basically promote the free commerce of civil aircraft, its parts and its pieces;
- ii) Regulation on the commissions paid to travel agencies for the selling of passenger tickets, and
- iii) The curfew imposed to the runways by the environmental license that authorized the construction of the second runway of Eldorado International Airport.²²³

Lastly, one important topic has to be mentioned if the project's goal is to raise the level of competitiveness of the region and convert the airport into a fully profitable business: *cross-subsidization*. Presently, Decree 1647 of 1994, which regulates

²²³ ATAC, *supra* note 162 at 189-192.

Article 48 of Law 105 of 1993, groups all Colombian airports into three main categories depending mainly on the volume of passengers handled. It also imposes the duty for the stronger or profitable airports to subsidize the least profitable ones in order to sustain the airport network, thus enabling the Government to ensure access to all remote areas in the country.

Table No. 2 “Categorization of airports in Colombia” illustrates:

Table No. 2 CATEGORIZATION OF AIRPORTS IN COLOMBIA			
CATEGORY	ANNUAL PASSENGER VOLUME	GENERAL CHARACTERISTICS	EXAMPLES
A	More than 300,000	<ul style="list-style-type: none"> • High profitability potential • High transfer to the network • International passengers 	Bogotá, Cali, Rionegro, Cartagena, San Andrés and Barranquilla.
B	More than 50,000 and less than 300,000	<ul style="list-style-type: none"> • Low profitability • Low transfer to the network • National passengers • Regional operation 	Bucaramanga, Santa Marta, Montería, Cúcuta, Pasto, Villavicencio, Neiva, Armenia.
C	Less than 50,000	<ul style="list-style-type: none"> • Low or none profitability • Low or none transfer to the network • National passengers • Regional operation 	Valledupar, Florencia, Arauca, Puerto Asís, Popayán, Riohacha, Tumaco, Leticia, etc.

According to this categorization, airports belonging to Category “A” have the responsibility of transferring to the rest of the airport network a certain amount of financial resources. These airports cannot be separated from the airport network or

from the transfer of the resources to the rest of the network because in that case, the network will collapse financially.²²⁴

Others, like the IATA, believe that privatization should not, by any means, result in a new source of obtaining fiscal resources for the States. If this were to happen, a new tax will have been created and imposed to the airlines. The IATA, as well as the ICAO and the Latin American Civil Aviation Commission (*CLAC – Comisión Latinoamericana de Aviación Civil*), also believe that it may not act as a source for obtaining resources to be used as cross subsidies²²⁵, as they favor the increase in airport charges and low quality of services. In other words, from a strict private enterprise point of view where the consumer must only pay for the service received, the cross subsidy scenario would result in a rise in the costs the users (airlines and passengers) would have to pay for services and facilities they do not really need, causing distortion in competition as airlines would end up subsidizing other airlines. This situation resulting from the broken link between costs and prices ignores the principles contained in ICAO Document 9082 that encourages efficiency and reduction in costs.

²²⁴ Miguel Acosta, "Experiencia en las Concesiones de los Aeropuertos de Cali, Barranquilla y Cartagena" (Paper presented to the Bogotá's Chamber of Commerce Forum on "*Experiencias Internacionales en Concesiones Aeroportuarias*" Bogotá: Cámara de Comercio de Bogotá, 2004).

²²⁵ The IATA has identified different types of cross subsidization in costs and charges that exist between airports and ANSPs. These types include subsidies between: "(i) ANSPs and airports (under single ownership or where the services are provided by the same operator), (ii) airport cross-ownership and alliances, (iii) airport networks (within the same country), (iv) airport systems (serving the same city), (v) airlines (through differential charging between domestic and international traffic), (vi) Air Navigation Services (between en route and terminal navigation or between terminal navigation at different airports within the same airport system), (vii) MET services paid for by airlines but also used by others." (IATA Position Papers on Aviation Charges – "Cross subsidisation", February, 2007 Online: International Air Transport Association (IATA) <http://www.iata.org/NR/rdonlyres/FCD3E418-F227-4677-80E3-71ECDBB36B56/0/Cross_subsidisation_Feb07.pdf>). The IATA also states that the link between costs and price paid is lost, meaning that airlines and passengers end up paying charges and tariffs that are not cost-related, and therefore not meeting the ICAO's Policies on Charges for Airports and ANS contained in ICAO Document 9082 in order to encourage cost reduction and cost efficiency. *Note: Guidance on cost allocation is contained in the Manual on Air Navigation Services Economics (ICAO Document 9161) and the Airport Economics Manual (ICAO Document 9562), although States may use any accounting approach they consider meets their particular requirements.*

In this sense, it is imperative that the Colombian government separates Eldorado International Airport from the airport network giving it administrative and financial autonomy. The State should be the only one responsible in covering the respective costs to maintain and operate other airports.

Finally, the Contract was awarded recently so it is somewhat difficult to prove now how flexible it will be in facilitating the adaptation of each of the parties to the circumstances that surround the industry. Only time will tell if this new concession model, also referred to as “third generation” in Colombia, will be adequate in ensuring the correct execution and development plans for the airport during the next twenty years.

Internally, two important conclusions can be made: the first one, the airport is to handle the amount of traffic expected while delivering a cost-based quality service in the most efficient way to the passengers, airlines and shippers and second, it must integrate deeper and adapt to the multimodal transportation system of the region in order to act as a center of regional and national development. Strict and careful monitoring is necessary, as the master plan of the airport has to be adapted from time to time in accordance with the development and financial plans of the city of Bogotá and its surroundings. Externally, the long-term view of Eldorado International Airport (or El Nuevo Dorado International Airport) is to maintain itself as the number one cargo airport in the region, never lose its position as the port of entrance to the continent, keep on penetrating in the global airport business, and continue widening Colombia's opportunities in the global market.

5. CONCLUSIONS

Eldorado International Airport's concession contract, as well as the other Colombian and worldwide case studies, are clear examples that prove that private sector participation/involvement in the development and operation of airport infrastructure projects is still in its infancy. No more than thirty years have passed since the first airport privatization process with the British took place, and there are still lots of issues that pose significant barriers for their correct development.

Compared to other industries such as telecommunications and electricity, the majority of which have been privatized in industrialized countries to facilitate their operation in a competitive environment, airports have not had an easy path to success. The monopolistic status of airports, one of its most dominant characteristics, is an obstacle for an airport's improvement in efficiency and productivity as controlling costs, tariffs and charges is complex. In the end, the most affected ones are the users (passengers, airlines and shippers), who end up paying disproportionate prices in relation to the quality of services received and sometimes paying for services they do not use.

This is why the importance of having an independent regulatory body that regulates, defines and controls the activities carried out by the private operator arises, independent from the civil aviation authority or the airport itself. It is believed to be the best alternative to ensure the efficiency of the airport's operations while preventing an abuse in the fixing of tariffs and charges derived from the operator's position. In this respect, landing fees and other airport charges, which constitute an important percentage of operational costs of airlines, must also be carefully regulated in order to prevent a major financial crisis that could lead airlines to bankruptcy, further deteriorating the transportation infrastructure. In other words, excessive charges have a negative effect not only on the competitiveness of airlines but also on the airports when regarded as private enterprises.

Many of the previous mentioned cases in Latin America as well as in other countries have been successful in some areas and not that successful in others. The rigid conditions of the contracts and the application of general principles that are peculiar to the discipline, have not completely and effectively managed the diverse problems and necessities that have emerged. The existing applicable legal framework for the airport activity is insufficient, causing a negative impact on airport's operation. In the majority of the cases, there was no independent regulatory body to deal directly with the regulation of the activity and the operation by the private operator, nor a willingness to create one. As a consequence, concessionaires have had to present lots of claims, governments have failed in the execution of their obligations and have shown unwillingness to recognize certain changes in the contracts, airlines have exerted significant pressure in their struggle to reduce costs, and uninformed users have not had the opportunity to participate in vital core aspects of the concessions, just to name the most relevant issues that continue to complicate privatization

In Colombia's case, Eldorado International airport's reconstruction was a must and practically the only way out was by involving the private sector in the project. Apart from the previously discussed matters that deserve special consideration in the Contract, only time will demonstrate the impact that "privatizing" this airport will have on the country's economy, as well as how beneficial it will be as it continues evolving as a focal point of regional development. The competitiveness and prosperity of the region not only depends on the airport's capacity to handle the increasing demand in traffic, but also on its strategic connections to the global market.

As the industry faces and strives to adapt to the rapidly changing conditions that globalization, liberalization, and the world economy constantly impose, the Government and the private operator must work together by charting the ideal course of the airport during the entire term of the concession. All in all, the State is detaching itself from one of its most valuable assets by transferring the most important managerial and operational aspects of the airport to the private operator.

To conclude, the success of concession contracts for the management and operation of international airports depends basically on the relationship between the civil aeronautics authority, the concessionaire, and the users, especially the airlines. The experience until now has shown that the parties have to work hand-in-hand, showing a positive commitment and attitude towards the change that is being made.

To guarantee and facilitate the participation of all interested users in the development plans of any airport, including or not ANS, an adequate consultation process shall be established from the beginning. These consultations will allow the users to actively participate in defining and setting the investments required, determine the available budget, establish how the projects are to be financed, analyze the costs, and the corresponding airport tariffs and rates following the principles set by the ICAO in Document 9082. Participation of the users and their access to the control mechanisms created for such purposes are essential even before the public bid to award the concession has taken place. Based on the fact that private administration and operation of airports involves a profit-making business, and that in order to prevent the private operator from obtaining exorbitant gains from the increase in rates and tariffs as it tries to recuperate as fast as possible the investments made, not only strict regulations, but also precise contract clauses and an effective and close control from the airport authorities is mandatory.

Not many legal disciplines are as dynamic and international as air law. The special features that characterize airport activities and commercial aviation in general make the industry more sensitive to the challenges created by technological, political, social and economical conditions with which it strives to cope with and adapt. Airports play a vital role in the air transport sector as they have transformed into companies that promote and foster economic and social development in cities and regions they serve. The reality has shown that airports have evolved substantially and are now conceived differently; they are slowly erasing their monopolistic label as they are shifting from being simple ports of transportation to not only centers of logistics and distribution but also regional development centers, acting as privately

owned enterprises that penetrate and compete in the global market. Despite the risks that the volatile aviation market presents, the airport business is attracting more and more investors all the time. The importance airports have gained has been such that even the idea of creating a discipline that deals directly with airport legislation, apart from air law, is gaining more force and acceptance. This new “vision” not only contemplates the delegation of provision of air transport services from the public sector to the private, but also recognizes the airport’s new role in the development of a country’s economy.

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