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Legal Implications of airport privatization in India

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Chapter 2

Research Paper 1

Airport Privatization –International Organizations and Emerging Issues

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Chapter 2

Airport Privatization –International Organizations and Emerging Issues

by Moses George*

I. *Introduction*

In many States, the airport ownership pattern has changed since the privatization of airports began in the United Kingdom in the 1980s. Airport privatization has become a worldwide trend, and privatization has been termed by many as a “miracle cure” for state-owned airport-related issues. States are encouraging privatization of airports and are relying on the benefits offered by privatization. More than two decades’ experience from privatization all over the globe will help in providing a closer examination of the developments in the area.

This paper discusses international perspectives and the global scenario of airport privatization. For this purpose, it is important to examine the legal framework regarding privatization, especially the Chicago Convention, documents of the International Civil Aviation Organization (ICAO) connected with privatization, and State sovereignty issues vis-à-vis airport privatization. Since aviation is an international subject, it is also necessary to look at the international organizations in the field, and their initiatives and responses in the area of airport privatization.

II. *Reasons for Privatization*

To study the effects of privatization, it is necessary to review the reasons for privatization. Privatization was considered as the universal panacea for the shortcomings of public/State ownership. The main reasons stated for privatization of airports are: (1)deficiency in capital investment by the State; (2)higher airport charges; (3)lack of competition;(4)lack of transparency; (5)under-exploitation of non-aeronautical revenue;(6)slower development of airports; and(7)lower efficiency level.¹

It can also be seen that the fiscal and debt crisis in the 1980s had an impact on public/state-owned entities in general. This crisis led many States to seek support from the International Monetary Fund (IMF) and the World Bank (WB). IMF and WB attributed developing countries’ inability to adjust to global financial shocks to the state-owned entities’ inefficiency and in turn advised privatization as a cure. Many developing States agreed to such a privatization clause in order to obtain financial assistance from IMF and WB. In effect, WB’s policy prescription was liberalization, deregulation, and privatization. The World Bank is the most important protagonist of privatization. It favors complete privatization of airports without much delay. A World Bank report states:

Over the last decade, governments faced fiscal crises that severely curtailed meeting critical investment needs in maintenance and rehabilitation of national stock vital for full participation in emerging global markets. To meet the urgent investment requirements and to increase competitiveness and sector efficiency,

* The views expressed in this article are the personal views of the author and not that of AAI.

¹ Various reports and studies reflect these issues. See, e.g., SHERI ERNICO ET AL., TRANSP. RES. BD., AIRPORT COOP. RES. PROGRAM REP. 66: CONSIDERING AND EVALUATING AIRPORT PRIVATIZATION (2012), available at http://onlinepubs.trb.org/onlinepubs/acrp/acrp_rpt_066.pdf; G. Cook, et al., Airport Commercialisation and Privatization. Why? (Dec. 3, 2001), http://www.spoudmet.civil.upatras.gr/2001/pdf/5_3.pdf; FROST & SULLIVAN, AIRPORT PRIVATIZATION (2006).

private sector involvement in infrastructure is a key element of economic growth strategies worldwide.²

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Given the variety of responses by government relative to private sector involvement, a strategic framework will be needed to provide a blueprint for capturing the potential economic benefits of the airport sector to the national economy and to stimulate private sector involvement. This framework will need to consider the development of an integrated transport policy framework; facilitating private sector participation; a restructuring agenda; a privatization agenda; and a regulatory agenda at both the national and international level.³

In its own report on privatization of airports, the Asian Development Bank (ADB) opined:

[T]here are significant advantages in expanding the role of the private sector in financing and implementing transport infrastructure and related services in the [developing member countries], principally for two reasons:

- First, private sector participation (PSP) may help to overcome constraints on public sector borrowing, and, equally or possibly even more important, on the public sector's capacity to implement efficiently and cost-effectively large-scale infrastructure programs.
- Second, the active participation of the private sector in all phases of the project life cycle may secure better value-for-money in the project than the traditional design-build model, where the private sector's role was limited to the project construction phase.⁴

It can be seen that the trend of developing State entities continued until the 1970s as an alternative to private capital. However, the new liberal experiments supported by the world financial institutions started challenging the role of governments in the service sectors and demanded the withdrawal of State machinery from economic activities.

As the international organizations advocated privatization, States were encouraged to introduce privatization of airports for various reasons. While New Zealand tried to generate revenues to meet budgetary deficits through airport privatization, countries in South America and Asia used private capital to upgrade their airports. As the rest of the world embraced privatization, the United States also attempted to introduce the concept, but it brought neither results nor favorable public opinion toward privatizing public-owned airports in the U.S.

Each State has faced different challenges connected with privatization, despite the high expectations that privatization would be the cure for many problems.

²ANIL KAPOOR, AIRPORT INFRASTRUCTURE – THE EMERGING ROLE OF THE PRIVATE SECTOR xi (World Bank Technical Paper No. 313, 1995), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/1995/12/01/000009265_3961214183520/Rendered/PDF/multi_page.pdf.

³*Id.* at xiv.

⁴ASIAN DEV. BANK, DEVELOPING BEST PRACTICES FOR PROMOTING PRIVATE SECTOR INVESTMENT IN INFRASTRUCTURE: AIRPORTS AND AIR TRAFFIC CONTROL 18 (2000), *available at* <http://www.adb.org/sites/default/files/publication/27907/airports.pdf>.

III. *International Legal Framework and Privatization*

A. *The Chicago Convention and State Sovereignty*

International law is based on the concept of State sovereignty. Like all branches of international law, air law also has developed under the principle of State sovereignty, wherein the final decision depends on the consent and political will of the respective governments for both their internal and external affairs. The cornerstone of the Convention on International Civil Aviation (also known as the Chicago Convention)⁵ is a State's sovereignty over its airspace. Article 1 of the Chicago Convention reads: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."⁶

The provisions of the Chicago Convention are derived from or reflect general principles of international law regarding the sovereignty of a State.

The concept of State sovereignty is embedded within the Convention's Preamble:

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically; Have accordingly concluded this Convention to that end.⁷

The sovereignty of the States over their airspace brings in well-defined aviation-related responsibilities, which include airport services. The provisions of the Chicago Convention are binding upon all contracting States and States are obliged to ensure full compliance with all provisions of the Convention and its Annexes.

Article 28 of the Convention places on each contracting State the responsibility for providing airports and air navigation services in its territory in accordance with the Standards and Recommended Practices (SARPs) established pursuant to Convention.

As per Article 11, a State must ensure that there is no discrimination in the application of its laws relating to the admission to or departure from its territory of aircraft engaged in international aviation based on nationality.

Article 15 requires that every aerodrome in a contracting State open to public use by its national aircraft shall be open under uniform conditions to the aircraft of all other contracting States.

⁵ Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947) [hereinafter Chicago Convention]. The ninth and latest edition of the quadrilingual text is available from the International Civil Aviation Organization (ICAO). See Convention on International Civil Aviation, ICAO Doc. 7300/9 (9th ed. 2006), *available at* http://www.icao.int/publications/Documents/7300_cons.pdf.

⁶ *Id.* art. 1.

⁷ *Id.* pmb1.

Article 15 further sets forth that any charges that may be imposed or permitted to be imposed 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 than those that would be paid by its national aircraft of the same class engaged in similar international operations. Further, no fees, dues, or other charges may be imposed by any contracting State in respect of the right of transit over or entry from its territory on any aircraft of a contracting State or persons or property thereon.

Under Article 37, contracting States undertake 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. Therefore, by virtue of Article 37, States agree to adopt the international specifications developed by ICAO in an effort to harmonize regulations, standards, procedures, and organization in relation to, among others, airports and air navigation aids. But the list⁸ attached to Article 37 does not include the “ownership” of airports. Also, the phrase “to this end” is significant because, as per this clause, ICAO may adopt and amend SARPs only for the purposes detailed in the first part of Article 37.

Article 68 stipulates that each contracting State may, subject to the provisions of the Convention, designate the route to be followed within its territory by any international air service and the airports which any such service may use.

These obligations on the part of a contracting State remain unchanged today. ICAO has not expressed that the obligations of the States can be delegated to private entities operating airports. As an international treaty, the Chicago Convention thrusts the sole responsibility of airports and air navigation upon the States. Hence, international air law is implemented through the States when State sovereignty is respected as far as airspace is concerned. The Chicago Convention, however, is silent about non-State entities which may be allowed to operate the airports of the contracting States.

With this background, various deliberations, circulars, and documents of ICAO regarding privatization of airports can be analyzed.

B. ICAO Policy Documents

The International Civil Aviation Organization is a United Nations specialized agency, created in 1944 upon the signing of the Chicago Convention. ICAO works with the Convention’s 191 signatory States and global industry and aviation organizations to develop international SARPs,⁹ which are then used by States when they formulate their legally-binding national civil aviation regulations. ICAO also serves as the global forum of States for

⁸ Article 37 lists the areas in which ICAO can formulate SARPS: “(a) Communications systems and air navigation aids, including ground marking; (b) Characteristics of airports and landing areas; (c) Rules of the air and air traffic control practices; (d) Licensing of operating and mechanical personnel; (e) Airworthiness of aircraft; (f) Registration and identification of aircraft; (g) Collection and exchange of meteorological information; (h) Log books; (i) Aeronautical maps and charts; (j) Customs and immigration procedures; (k) Aircraft in distress and investigation of accidents; and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.” Chicago Convention, *supra* note 5, art. 37.

⁹ See ICAO, About ICAO, <http://www.icao.int/about-icao/Pages/default.aspx> (last visited Jan. 16, 2015) (“There are currently over 10,000 SARPs reflected in the 19 Annexes to the Chicago Convention which ICAO oversees, and it is through these provisions – as well as ICAO’s complementary policy, auditing and capacity-building efforts – that today’s global air transport network is able to operate over 100,000 daily flights, safely, efficiently and securely in every region of the world.”).

international civil aviation. ICAO polices on various aspects of aviation, which are reflected in a variety of ICAO-issued documents,¹⁰ are normally followed by the contracting States.

1. Guatemala Seminar

The first such document regarding airport privatization is the policy adopted by the Guatemala Seminar in 1999. In the Guatemala Seminar, it was reiterated that “[i]n accordance with the Convention on International Civil Aviation, States cannot delegate their obligations and responsibilities to ensure the safety, security, efficiency and economics of airport services to a private entity. National aeronautical legislation and regulation should adequately reflect this principle.”¹¹

The specific provision of the Chicago Convention upon which this observation was based is not mentioned in the Seminar report. The seminar summary further states, “ICAO is neither for nor against airport privatization.”¹² However, the report recommends establishment of autonomous authorities – independent entities which can be of either public or private ownership – for the management and operation of airports, with operational and financial independence to undertake these functions, where this is in the best interest of airport service providers and users.¹³ This observation implies that the Chicago Convention framework does not allow States to delegate their responsibilities and obligations under the Convention.

2. ICAO Circular 284

Circular 284,¹⁴ ICAO’s first official publication on airport privatization, discusses information on privatization of airports and different models. These models include lease, management contract, lease or concession, transfer of minority ownership and public private partnership (PPP), and private sector ownership and control. However, this document does not advocate for privatization nor suggest any specific model for privatization of airports by the contracting States. ICAO’s working paper on Commercialization and Privatization of Airports and Air Navigation Services Providers maintains that “States should ensure full compliance with all relevant obligations of the State under the Chicago Convention, its Annexes and in air services agreements, and should ensure ICAO policies on charges are observed whenever an autonomous entity is established.”¹⁵ The recommendations also include the following:

¹⁰ See ICAO, Vision & Mission, <http://www.icao.int/about-icao/Pages/vision-and-mission.aspx> (last visited Jan. 16, 2015) (“ICAO . . . undertakes compliance audits, performs studies and analyses, provides assistance and builds aviation capacity through many other activities and the cooperation of its Member States and stakeholders.”).

¹¹ ICAO AIRPORT PRIVATIZATION SEMINAR FOR THE NAM/CAR/SAM REGIONS: REPORT, para. 2.2.1 (Dec. 13–16, 1999) [hereinafter GUATEMALA SEMINAR REPORT], available at <https://www.yumpu.com/en/document/view/6396806/international-civil-aviation-organization-north-icao/4>.

¹² *Id.* para. 2.2.2 (“ICAO is neither for nor against airport privatization. ICAO does recommend the establishment of autonomous authorities for the management and operation of airports, with operational and financial independence to undertake these functions, where this is in the best interest of airport service providers and users. Autonomous authorities are independent entities which can be of either public or private ownership.”).

¹³ *Id.*

¹⁴ ICAO, PRIVATIZATION IN THE PROVISION OF AIRPORTS AND AIR NAVIGATION SERVICES 26, Cir. 284 AT/120 (March 2002) [hereinafter CIRCULAR 284].

¹⁵ *Commercialization and Privatization of Airports and Air Navigation Services Providers* 4 (ICAO, Working Paper No. ATConf/6-WP/6, 2012), available at http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp006_en.pdf. The Working Paper was presented by the Secretariat at the Sixth Meeting of the Worldwide Air Transport Conference, held in Montréal, March 18–22, 2013.

- a) States should consider the establishment of autonomous entities to operate airports, taking into account their economic viability, as well as the interests of the users and other interested parties;
- b) ICAO should ensure that policies, guidance and other material related to governance, ownership, control and management of airports remains relevant, current, and responsive to the changing situation; and
- c) ICAO should continue to monitor changes in airport commercialization and privatization.¹⁶

Considering the diverse circumstances involved,¹⁷ ICAO did not recommend any specific organizational format over another but rather it provided guidance to States by describing relevant aspects of each format. However, keeping in view of the experience gained worldwide, ICAO recommended that governments may wish to explore the possibility of establishing autonomous authorities to operate their airports and air navigation services where this is in the best interest of providers and users.¹⁸ Significantly, this Circular states that it was prepared by the Secretariat and approved by the Secretary General. Unlike other publications, the Circular does *not* state that it was approved by the Council.

ICAO did not state any conclusions about the performance of these models in 2002, apart from discussing various privatization models. Rather it stated that there is no best ownership or management option.¹⁹ The Circular also stressed that the State remains ultimately responsible for safety and security of civil aviation.²⁰

3. ICAO Document 9980

In view of the developments that took place in the ensuing decade, the material contained in Circular 284 needed to be updated and thus a new manual, Document 9980,²¹ was prepared by the Secretariat, approved by the Secretary General, and published under his authority in 2012. Document 9980 presents information on developments taking place in various parts of the world regarding airport ownership and management, and possible implications.

Document 9980 is an updated version of Circular 284, which discusses the issue of privatization of airports vis-à-vis air navigation service. However, the contents in respect of airport privatization in Circular 284 and Document 9980 are almost identical. The Circular and the Document:

- a) Discuss the growth of air transport, autonomous authorities, private participation, and privatization as part of global trends, including motivation for privatization, forms of privatization, private sector ownership, control and management, and pricing regulation;

¹⁶ *Id.*

¹⁷ Different organizational formats in various States, such as government directly owned, corporations controlled by States, public sector undertakings, company owned by State or private, etc.

¹⁸ ICAO, STATEMENTS BY THE COUNCIL TO CONTRACTING STATES ON CHARGES FOR AIRPORTS AND AIR NAVIGATION SERVICES, paras. 6, 27, Doc. 9082/5 (5th ed. 1997), available at http://www.icao.int/publications/Documents/9082_5ed.pdf.

¹⁹ CIRCULAR 284, *supra* note 14, at 26.

²⁰ *Id.*

²¹ ICAO, MANUAL ON PRIVATIZATION IN THE PROVISION OF AIRPORTS AND AIR NAVIGATION SERVICES, Doc. 9980 (1st ed. 2012) [hereinafter DOCUMENT 9980].

- b) Provide definitions and analyses of the options available, together with the possible implications of these options;
- c) Discuss major issues to be examined by States when considering a change in ownership and management;
- d) Discuss various ownership and management options for airports and air navigation services; and
- e) Bring to the notice of the States important provisions of the Chicago Convention and other ICAO policy and guidance documents regarding regulatory measures and the need for providing safeguards.

C. Analysis – ICAO Policy and Documents

Both the Circular and the Document reiterate that the provisions of the Chicago Convention, such as Articles 11,15,28, and 37, are binding upon all contracting States. These documents, though not advocating privatization *per se*, encourage States to consider privatization by narrating various possible advantages of privatization and detailing various models employed by various States.

The Guatemala Seminar recommended that “ICAO should develop a document which contains the most important technical, financial and legal aspects to be taken into account by the aeronautical authorities when these processes of airport privatization and concession are implemented.”²²

The forewords of the Circular and the Document states that they were prepared by the Secretariat as per the need expressed by the States for guidance from ICAO regarding privatization. Unlike other ICAO documents,²³ these publications do not state that they were based on the recommendations or approval of the Council.²⁴ These publications also state that they are for the “guidance” of the States. Articles 54 and 55 of the Chicago Convention do not require the Council to issue guidance to States on any matter pertaining to air transport. In the case of privatization, the Secretariat itself has issued these “guidance” materials. But other ICAO document series or manuals state that they are “*approved by the Council and published under its direction.*”²⁵ This takes on added significance when considering that the Secretariat published Circular 284 and, after 10 years, published a manual in the Document series on privatization without an unambiguous direction to publish such a Circular or Document, and without the approval of the Council.

Thus, it may be observed that these material lack the guidance value of other ICAO materials which have received the Council’s approval. Moreover, the provisions of these materials are not binding upon the States as are the provisions of the Chicago Convention, its Annexes, and Standards and Recommended Practices (SARPS) as per Article 37.

²² GUATEMALA SEMINAR REPORT, *supra* note 11, para. 2.3.

²³ *See, e.g.*, ICAO, POLICIES ON CHARGES FOR AIRPORTS AND AIR NAVIGATION SERVICES vii, Doc. 9082 (9th ed. 2012).

²⁴ DOCUMENT 9980, *supra* note 21. The Manual states that it is consistent with and complimentary to the guidance provided in The Airport Economics Manual (Doc. 9562) and the Manual on Air Navigation Services Economics (Doc. 9161), and that it takes into consideration relevant recommendations adopted during the Conference on the Economics of Airports and Air Navigation Services (CEANS, Montreal Sept. 15–20, 2008) and subsequently approved by the Council.

²⁵ *See, e.g.*, ICAO, *supra* note 23, at vii (emphasis added).

Circular 284 and Document 9980 state:[T]he provisions of the [Chicago] Convention are binding upon all Contracting States . . . they do not prohibit Contracting States from delegating some of the functions for which they are responsible to private entities. . . .²⁶

However, Circular 284 and Document 9980 reiterate that even when the States delegate some of their functions to private entities, the responsibility for ensuring compliance with the provisions of the Convention and Annexes remain with the States. Though the Circular and the Document detail the specific provisions of the Convention by which States are responsible for the airport and air navigation services within their territory, the Document does not get into the do's and don'ts regarding criteria, service standards, and quality specifications required for an airport which is to be operated by a private entity. If this logic is accepted then it can be safely concluded that there are no prohibitions in delegating the responsibilities by the contracting States.

Document 9980 further states that in the event a contracting State has entered into other international treaties, bilateral or regional agreements regarding privatization of airports and air navigation services, it is essential that legislative and regulatory arrangements be made to ensure full compliance with the provisions of the Chicago Convention and other international obligations of the State by the provider of the airports and/or air navigation services.

To ensure the safety and security of airports, Document 9980 recommends that a State's aviation regulations include a requirement for certification of public use aerodromes. ICAO has developed a manual²⁷ to provide such guidance.

These publications of the ICAO Secretariat²⁸ cannot be considered as the views of the ICAO Assembly, or even the Council. The publications emphasize that, as per the provisions of the Convention, States are responsible for the safety and security of civil aviation and provision of airports and air navigation services. Moreover, the provisions of the Convention cannot be overridden by these publications.

Document 9980 concludes that the impact of privatization on government and shareholders of the companies holding equity stakes in privatized airports appeared to be positive, and that aircraft operators generally welcomed private participation due to the expected improvements in efficiency.²⁹ Nevertheless, it noted that aircraft operators were of the opinion that airport charges and rates had increased in many cases after privatization.³⁰

²⁶ CIRCULAR 284, *supra* note 14, at 13.

²⁷ ICAO, MANUAL ON CERTIFICATION OF AERODROMES, Doc. 9774 (1st ed. 2002).

²⁸ CIRCULAR 284, *supra* note 14; DOCUMENT 9980, *supra* note 21.

²⁹ DOCUMENT 9980, *supra* note 21, 3.11 at 3-7. Regarding the impact of privatization, Document 9980 states: The impact of privatization should be viewed from the perspective of various stake holders, such as State, the private participants, aircraft operators, passengers, shippers, employees, concessionaries, and the local community. However information in this regard is limited. Since the impact of privatization of airports varies over time and is not same in all States, it would be difficult to draw any definite conclusions. Nevertheless, the impact for governments appears to be positive in the sense that they have generated some funds and transferred the responsibility for development and operation of major airports to the private sector. The shareholders of the companies holding a stake in equity of airports have generally gained substantially because airport company shares have increased more than overall index of other shares in the equity market. Aircraft operators generally welcomed private participation in provision of airports as they expected improvements in efficiency. However, they feel that there have been unreasonable increases in airport charges and rates in many cases. Overall, it has been reported that aeronautical charges have generally decreased in real terms and services have improved after private participation and privatization. However, in the case of India, share prices of airport operators (companies such as GMR) have fallen. IATA and airlines have complained about very high aeronautical charges, as well as high user charges, after privatization (According to IATA, Delhi has become the costliest airport in the world). Even the Task Force on Privatization has opined that privatization has increased the charges, even though it was expected to reduce them.

³⁰ *Id.* 3.11 at 3-8.

IV. *Emerging Issues*

A. *The Chicago Convention and State Responsibility*

As stated *supra*, even if the ownership and management of airports and air navigation services may be delegated to the private sector under Article 28 of the Chicago Convention, the overall responsibility of the provision of services in compliance with the Convention and the SARPs remains with the State.

Many States have adopted the “concession method” to privatize their airports. In this method, States enter into agreements with private entities to build, own, operate, and transfer (BOOT) airports. In such cases, the State’s power to annul the agreement is not unconditional, and it is often subject to many conditions. Hence, vesting the State’s responsibility with reference to the provisions of the Convention does not seem to be consistent with the spirit of the Convention while privatization is being encouraged.

States generally welcome foreign direct investments. But it is possible that State control over privatized airports may diminish, for example, in a case where another foreign company takes over, in due course, the private company that had initially secured the right to operate the airport from the State through privatization. In such a situation, the view that a State may encourage privatization but be responsible as far as the provisions of the Convention are concerned, may not be realistic given the State’s diminished degree of control over such private entities.

On the other hand, if the contracting States prefer privatization in spite of any clear provision in the Convention, has the time come to consider amending the Convention accordingly? By such an amendment, States may legalize privatization by express provision instead of relying upon the absence of prohibition.

B. *Sovereign Powers of State and Privatization*

State sovereignty over the airspace is a well-accepted maxim in air law.³¹ State responsibility regarding the airport and airspace is based on this maxim. Also, as discussed *supra*, the State’s responsibility to comply with the provisions of the Convention is not disputed. In the case of airport privatization, States have entered into agreements with the private entities for construction, management, and operation of airports. As provision of airports and air routes are sovereign functions, in such cases the State is expected to execute the contract in its sovereign capacity. In some cases, the States have entered into concession agreements in their private capacity, giving away their sovereign immunity against the private operator. Even in this case, the responsibility regarding the provisions of the Convention lies with the State, whereas the State will not be in a position to use its sovereign powers with respect to the contract.³²

C. *State Aid and Private Airports*

Airports were traditionally seen as public services, but after privatization they are viewed as attractive private enterprises.³³ State-owned airports were not considered to be

³¹ Chicago Convention, *supra* note 5, art. 1.

³² In the case of two greenfield airports in the cities of Bangalore and Hyderabad, the government of India has entered into concession agreements with the private operators. These agreements are private and commercial acts and not public or governmental acts. Also, it was agreed that, should any proceedings be brought against the operators or their assets in relation to the agreements or any transaction contemplated by them, no sovereign immunity from such proceedings would be claimed by or on behalf of themselves or with respect to their assets.

³³ Recent decisions of the Court of Justice of the EU point to this view. See Case T-128/98, *Aéroports de Paris v. Comm’n*, 2000 E.C.R. II-3929, confirmed on appeal in Case C-82/01P, 2002 E.C.R. I-9297, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998TJ0128:EN:HTML>. See also Joined

economically efficient, and this was one of the reasons for privatizing airports in many parts of the world. Hence, private airports were expected to be more efficient. Privatization was expected to bring in private capital as States were finding it difficult to fund huge capital investments for the development and upgrade of airports. Through privatization, airports were expected to be run as profit-oriented businesses instead of state-controlled public service entities. Airports were privatized by open tendering or by sale of the State's equity.

Against this background, any aid from the State for such privatized entities was not expected. Rather, the private entity which owned or controlled the airport was expected to raise private capital for its development and operation. But in reality, many privatized airports failed to be managed as profit-making entities. Some privatized airports, like Blackpool Airport and Kent International Airport (in Manston) in the U.K., were shut down in 2014.³⁴

Currently, 63 percent of EU citizens live within two hours' driving distance from at least two airports.³⁵ Though the European economy is improving, 42 percent of European airports are loss-making.³⁶ This is significant, as many of the airports in Europe have been privatized. When airports receive aid, their more efficient and innovative competitors see their efforts shortchanged.

In the case of Europe, state aid to airports is an emerging issue. Initially, the European Commission was not in favor of such aid, and many earlier decisions of the Commission reflect this stand. However, lately there has been a change of view.

In 2014, the Commission published a new set of state aid rules, replacing its 2005 guidelines.³⁷ These new rules permit: (1) investment aid if there is a genuine transport need; and (2) operating aid³⁸ for unprofitable airports for a transition period so as to adjust gradually to changing markets.

Recently, the Commission approved³⁹ state aid granted by Italian authorities to the Alghero airport on the island of Sardinia, by Germany to Saarbruecken and Frankfurt Hahn airports, and Swedish aid to Vasteras Airport.

However, the Commission, which enforces the 28-member bloc's competition rules, has said financial aid granted to the airports of Zweibrücken in Germany and Charleroi in

Cases T-443/08 & T-455/08, *Freistaat Sachsen v. Comm'n and Mitteldeutsche Flughafen AG v. Comm'n*, 2011 E.C.R. II-1311, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008TJ0443&from=EN>.

³⁴ See *Blackpool International Airport Closes after Last Flight*, BBC.COM, Oct. 15, 2014, <http://www.bbc.com/news/uk-england-lancashire-29619126>; Andrew Bounds & Jane Wild, *UK Regional Airports Join Forces as Blackpool Fights for Survival*, FT.COM, Oct. 5, 2014, <http://www.ft.com/intl/cms/s/0/25cad65e-4974-11e4-9d7e-00144feab7de.html#axzz3PI3hciUU>.

³⁵ *New State Aid Rules for a Competitive Aviation Industry*, COMPETITION POL'Y BRIEF (Eur. Comm'n), Feb. 2014, at 2.

³⁶ *Id.*

³⁷ See Memo from the European Comm'n, *State Aid: Commission Adopts New Guidelines on State Aid to Airports and Airlines (Aviation Guidelines)* (Feb. 20, 2014), available at http://europa.eu/rapid/press-release_MEMO-14-121_en.htm.

³⁸ *New State Aid Rules for a Competitive Aviation Industry*, *supra* note 35, at 3. Operating aid is permissible for a transition period of 10 years, during which 50 to 80 percent of the initial funding gap of small airports may be covered by aid.

³⁹ Foo Yun Chee, *EU Rules Low Cost Carriers, Airports Given Illegal State Aid*, REUTERS.COM, Oct. 1, 2014, <http://in.reuters.com/article/2014/10/01/eu-airlines-stateaid-idINL6N0RW26T20141001>.

Belgium had violated EU law.⁴⁰ As ordered by the Commission, Zweibrücken airport, in the western German State of Rhineland Palatinate, will be required to pay back about €47 million (\$59 million) in illegal subsidies, while Charleroi airport, south of Brussels, must return around €6 million.⁴¹ Zweibrücken airport is currently in insolvency proceedings.

The Commission's decisions reflect its intention to avoid duplicating unprofitable airport infrastructure that wastes taxpayers' money and distorts competition. But the scale of state aid in the EU paints a different picture. In general, state aid in the EU rose from less than one percent of the EU GDP to 13 percent during the recession period. The total of all state aid between 2007 and 2013 was €360bn.⁴² Research also shows that 50 percent of companies that received rescue aid and 33 percent of companies that received restructuring aid ultimately went out of business despite receiving the aid.⁴³ It is yet to be known how much airports depend on state aid and how States continue to provide state aid, even to privatized airports.

In the case of India, new taxes have been introduced to bridge the capital shortfall⁴⁴ and the revenue shortfall⁴⁵ in the privatized airports, which are similar to Europe's investment and operational aid.

On the other hand, in the U.S., the Federal Aviation Administration's (FAA) Airport Privatization Pilot Program (APPP)⁴⁶ is yet to create any major breakthrough. APPP was introduced to explore privatization as a means of generating access to various sources of private capital for aviation infrastructure development and to reduce reliance on federal grants and subsidies. One of the major reasons for the lack of enthusiasm for APPP is the restriction in federal Airport Improvement Program (AIP) grants once an airport is privatized under APPP.⁴⁷

The above points to the relationship between privatization of airports and state aid. Though privatization was seen as a "miracle cure" for State ownership-related problems, State aid in Europe and India demonstrate that private ownership does not necessarily ensure profitable airport operation and state aid in some form is becoming necessary to keep the airports operating in many cases.

V. *Response of International Organizations*

Performance of the privatization models is necessary to understand the applicability/suitability of privatization over State airport ownership/control/management models. Therefore, it would be informative to review how major international stakeholder organizations evaluate airport privatization initiatives across the globe.

⁴⁰ See Press Release, Europa, State Aid: Commission Adopts a Package of Decisions Regarding Public Support to Airports and Airlines in Belgium, Germany, Italy and Sweden (Oct. 1, 2014), *available at* http://europa.eu/rapid/press-release_IP-14-1065_en.htm.

⁴¹ Tom Fairless, *Two EU Airports, Four Airlines to Repay Illegal State Aid*, WALL ST. J., Oct. 1, 2014, *available at* <http://www.wsj.com/articles/two-eu-airports-four-airlines-to-repay-illegal-state-aid-1412159786>.

⁴² Julian Ellison, *Play It, SAM: Is the State Aid Modernisation Programme a Significant Achievement or a Cause for Concern?*, COMPETITIONLAWINSIGHT.COM, Oct. 14, 2014,

<http://www.competitionlawinsight.com/competition-issues/state-aid/play-it-sam-103731.htm>.

⁴³ *Id.*

⁴⁴ A Development Fee (DF) introduced in the cases of Delhi and Mumbai airports is to generate the shortfall in capital requirement.

⁴⁵ A User Development Fee (UDF), first introduced in all private airports (and thereafter in some government airports) is to cover the revenue shortfall.

⁴⁶ See 49 U.S.C. § 47134 (2012).

⁴⁷ See RACHEL Y. TANG, CONG. RES. SERV., R43545, AIRPORT PRIVATIZATION: ISSUES AND OPTIONS FOR CONGRESS 9 (2014), *available at* <https://www.fas.org/sgp/crs/misc/R43545.pdf>.

A. IATA's Response to Privatization

The International Air Transport Association (IATA), while not particularly concerned about the ownership of airports, is keenly interested in facilities and the costs involved with airport operations.⁴⁸ IATA, which represents air carriers, has considered developments in airport privatization worldwide and is concerned with increasing airport charges resulting from privatization. On the specific issue of airport charges, IATA is against cross-subsidies of any kind. As far as IATA is concerned, more efficient management is the key to successful privatization, since the cost of capital is always higher in the private sector.⁴⁹ IATA also considers that

“[g]ood governance is more important than transferring ownership to the private sector, in order for privatization to be in the public interest. However, privatization through lease sales will be detrimental to the public interest if royalties to the Government are excessive.”⁵⁰

According to IATA, in the current scenario of privatization, economic regulation and its modalities are more important. IATA's view on this important aspect is reflected in the following:

Independent, robust, economic regulation will always be necessary to create incentives for efficiency improvements and for sharing these gains with customers, in the private monopolies created by privatization. If the Government retains a shareholding and controls the economic regulator, there is automatically an unacceptable conflict of interest. . . .⁵¹

IATA summarizes its view on privatization as follows:

A new model, for structuring infrastructure providers in the private sector, is emerging, which could in theory better serve customers; a debt-financed private company structure limited by guarantee, accountable to a board of customers and business partners. In practice this still may not prevent ‘Gold-plating’ on investment programmes. Customer involvement remains essential. . . .⁵²

This view was reiterated by IATA in 2013. IATA is more concerned about commercial revenue generation in privatized airports. It claims that even the British Airports Authority (BAA) struggles to achieve 60 percent non-aeronautical revenue.⁵³

Although airport ownership is not a consideration, from a user perspective there clearly needs to be a strong regulator that enforces tough service level agreements and ensures transparency and efficiency at all times.

⁴⁸ IATA, Economics Briefing 2006 – Airport Privatization, <http://www.iata.org/policy/Documents/airport-privatization-econ.pdf>.

⁴⁹ BRIAN PEARCE, IATA, IATA ECONOMICS BRIEFING: AIRPORT PRIVATIZATION 27 (2005), http://www.iata.org/whatwedo/Documents/economics/airport_privatization.pdf.

⁵⁰ *Id.*

⁵¹ *Id.* at 5.

⁵² *Id.* “Gold plating” takes place when businesses incorporate unnecessary and costly features or refinements into something that pushes up the cost of a project. See, e.g., Tarun Shukla, *Regulator Looks into Airport Cost Inflation*, LIVEMINT.COM, Jul. 7, 2014, http://www.livemint.com/Politics/3qM2J5dTqngBy5TfsiRSIJ/Regulator-looks-into-airport-cost-inflation.html?utm_source=copy.

⁵³ *New Airport Partners*, AIRLINES INT'L, Feb. 2013, available at <http://airlines.iata.org/analysis/new-airport-partners>.

Otherwise, putting a monopoly provider in the hands of the private sector could prove disastrous to service levels, prices, and the economy.⁵⁴

Ultimately, a successful privatization cannot be measured solely on how much money can be generated for the government. It must be seen as part of a long-term vision for economic development. As such, a strong regulator and clear service level agreements must be in place. This requires better collaboration between governments, potential concession companies and airline users well before the privatization takes place.⁵⁵

IATA equally raises concerns about quality and airport charges. In this context, the organization's recent comment regarding airport charges in Europe, which has witnessed major airport privatization, is relevant. According to IATA, even in 2010, at the height of the European economic crisis and with passenger numbers in decline, more than a third of European airports, including 23 of 24 major airports, raised their charges, compared with just 17 percent that reduced them.⁵⁶ Regarding airport charges in India, IATA commented: "It is important to ensure that past mistakes are not repeated and that the undesirable outcome of the sudden emergence of a high-cost environment that stifles traffic growth such as that witnessed at Delhi and Mumbai airports is avoided."⁵⁷ IATA also cautioned that any unnecessary "private shareholding" may increase the focus on "profit-maximisation" and lead to higher user costs.⁵⁸

IATA's experience is that, in many cases, commercialization has resulted in significant increases in the airport and ANS cost base that are used to determine charges and, in addition, the promised increases in efficiency and productivity have not always materialized.⁵⁹

B. Airports Council International's Response on Airport Privatization

Airports Council International (ACI), the world forum of airports, does not recommend any specific form of airport ownership, and is neutral in its stand.

Privatization can bring a spirit of innovation and entrepreneurship to airport management. It can release an airport operator from political considerations and agendas. . . . Privatization can also open up new sources of capital to build capacity, which in today's growth market is a very positive factor.⁶⁰

ACI's policy on ownership of airport states:

Airports should be permitted to operate under a range of types of ownership. The type of ownership, and any participation by private capital, varies from airport to airport depending on local circumstances. The type of

⁵⁴ *Special Report – Infrastructure: Breaking the Bottlenecks*, AIRLINES INT'L, Aug.–Sept. 2011, at 44, 44, available at <http://training-www.iata.org/publications/airlines-international/august-2011/Pages/infrastructure-bottlenecks.aspx>.

⁵⁵ *New Airport Partners*, *supra* note 53.

⁵⁶ JAMES WILTSHIRE, IATA ECONOMICS BRIEFING NO. 11: AIRPORT COMPETITION (2013), available at <http://www.iata.org/whatwedo/Documents/economics/airport-competition.pdf>.

⁵⁷ Vikas Dhoot, *Airport Privatization May Lead to Higher Fares: IATA*, ECONOMICTIMES.COM, Aug. 27, 2013, http://articles.economictimes.indiatimes.com/2013-08-27/news/41499062_1_iata-international-air-transport-association-aviation-sector.

⁵⁸ *Id.*

⁵⁹ See Paul Stephen Dempsey, *Airport Privatization: Navigate Carefully* (2012), http://www.mcgill.ca/iasl/files/iasl/aspl613_paul_dempsey_airportprivatization2012.pdf.

⁶⁰ Airports Council Int'l (ACI), ACI Position Brief: A Global Industry, at 1 (Mar. 2008), http://www.aci.aero/Media/aci/file/Position%20Briefs/position%20brief_LIBERALISATION.pdf.

ownership at any individual airport should be such as to allow the airport flexibility in its business and to ensure that the interests of airport users are protected by the application of sound economic principles to the airport's operations.⁶¹

While ACI's opinion about the ownership model is neutral, it gives importance to interests of airport users and sound economic principles. If the interests of users and economic principles are read in conjunction with ICAO principles on airport charges, it points to a possible reduction in airport charges as the result of privatization.

VI. Privatization - Global Scenario

Having looked at the views and discussions at the international level, this part of the paper focuses on the various models adopted by different countries with varied backgrounds, and a possible assessment of their performance, experiences, and failures.

Privatization of airports has been initiated as a part of the globalization and liberalization of the economies of the world and it was an obvious move towards privatization of many commercially oriented industries and services which were hitherto managed by States. There has been a worldwide trend towards privatization of airports since the mid-1980s. The most notable privatizations among these took place in Australia, the United Kingdom, Canada, and Latin America. Presently, airports and air navigation services in different countries are operated under different organizational formats. In many countries, like the U.K., India, and Australia, the air transport sector – airlines, airports, and the provision of air navigation services – had been controlled by the State.

A. United Kingdom

In the U.K., airports were owned by the State through the Civil Aviation Authority(CAA). The British Airports Authority (BAA) was established in 1965 as a government-owned independent commercial enterprise.⁶² Thereafter, the major airports were transferred to BAA ownership. Other government-owned airports were transferred to their respective local authorities. Later, BAA was converted to a public limited company through legislation.⁶³ In July 1987, BAA was privatized by selling its shares.⁶⁴ In 1996, the government sold its remaining 2.9 percent stake in BAA plc, but the Secretary of State has retained a golden share primarily to prevent a takeover by foreign investors. In September 2003, the golden share was redeemed because of the judgment of the European Court of Justice.⁶⁵

Though privatization of U.K. airports is generally considered a success, it is not free from criticism, which pointed out that the U.K. government had converted public assets to private monopoly by selling seven airports.⁶⁶ However, in 2009, the U.K. Competition

⁶¹ ACI, *POLICIES AND RECOMMENDED PRACTICES HANDBOOK* 1.21 (7th ed. Nov. 2009).

⁶² See Airports Authority Act, 1965 (Eng.).

⁶³ BAA plc was incorporated under the Airports Act, 1986, which called for dissolution of BAA and the transfer of its property, rights and liabilities to a newly-formed public limited company.

⁶⁴ 500 million shares in BAA plc were offered for sale and the company was listed on the London Stock Exchange with a capitalization of £1,225 million. See ICAO, *AIRPORTS AND AIR NAVIGATION SERVICES PROVIDERS (ANSPs), CASE STUDY: UNITED KINGDOM* (Dec. 5, 2008, revised June 22, 2011), available at <http://www.icao.int/sustainability/CaseStudies/United%20Kingdom.pdf>.

⁶⁵ See Case C-98/01, *Comm'n v. United Kingdom*, 2003 E.C.R. I-4641.

⁶⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, *AIRPORT FINANCE: ISSUES RELATED TO THE SALE OR LEASE OF U.S. COMMERCIAL AIRPORTS* 6, GAO/T-RCED-96-82 (Feb. 29, 1996).

Commission ordered BAA to sell off three airports (Gatwick, Stansted, and either Edinburgh or Glasgow) to eliminate the monopoly.⁶⁷

Following Britain, many other States privatized government-controlled airports. However the progress was slow, and they did not follow the route adopted by Britain. A number of models of airport privatization emerged in different parts of the world, depending upon economic policy and the condition of the airports.

B. Europe

In the case of Europe, many countries established companies wholly owned by government and local bodies to own and operate airports. Later disinvestment in these companies led to privatization. According to a 2010 survey, only nine percent of European airports are in full private ownership, while 78 percent remain fully publicly owned.⁶⁸ Other major airport privatizations in Europe include: Copenhagen, Denmark; Vienna, Austria; Zurich, Switzerland; Brussels, Belgium; and Athens, Greece.

While many State-owned European airports were privatized, some public-sector airport operators, like AENA and Schiphol group,⁶⁹ expanded their activities by providing management services at airports in other States.

C. Canada

In 1992, major Canadian airports were transferred to local not-for-profit corporations (Local Airport Authorities, or LAAs) for operation, management, and development without any payment, but ownership of the land was retained by the government.⁷⁰ Four airports – Calgary, Vancouver, Edmonton, and Montreal – were leased out in 1992, and the government collects annual ground rent from these airports.⁷¹

In 1994, 26 airports were leased to Canadian Airport Authorities (CAAs), not-for-profit and non-share corporations similar to LAA, under the National Airport Policy (NAP).⁷² Another 31 small airports were transferred to provisional and local authorities and locally established airport commissions, along with the title for ownership at a nominal fee.⁷³ The government stopped subsidies to regional and local airports over a five-year period and in their place established the Airports Capital Assistance Program (ACAP), which funds safety-related projects at the airports; the government continues to support remote and Arctic airports.⁷⁴

The airport authorities are permitted to fix the charges as long as they are non-discriminatory and competitive. However, this system of airport charges generates frequent criticism. Passengers departing Canadian airports often pay 60 to 75 percent above the base airfare to cover taxes and charges, compared to between 10 percent and 18 percent in the United

⁶⁷ See U.K. COMPETITION COMM'N, BAA AIRPORTS MARKET INVESTIGATION: A REPORT ON THE SUPPLY OF AIRPORT SERVICES BY BAA IN THE UK 234, 237 (Mar. 19, 2009), *available at* http://webarchive.nationalarchives.gov.uk/20140402141250/http://competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2009/fulltext/545.pdf.

⁶⁸ See WILTSHIRE, *supra* note 56, at 7.

⁶⁹ Terminal 4 of Kennedy International Airport in New York was rebuilt and operated by Schiphol Group, Netherlands.

⁷⁰ TANG, *supra* note 47, at 12.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

States.⁷⁵ As a result, Canadian airports are losing passengers to U.S. airports. In 2011 alone, 4.8 million passengers crossed over to the U.S. to fly from bordering U.S. airports, according to the Canadian Airports Council.⁷⁶

D. Australia

Airport privatization in Australia began following the Commonwealth government's privatization decision in 1994. This process was initiated in 1997 with the sale of three airports, followed by the sale of another three airports and the remaining smaller airports in 1998. The sale of Sydney Airport took place in 2002 and the process was completed in late 2003 with the sale of the Sydney Basin Airports of Bankstown, Camden, and Hoxton Park. A peculiarity of Australian airport privatization has been the use of the lease model for management of domestic terminals.

E. Latin America

In Latin America, the most common way of privatizing airports has been through concession contracts. Concessions allow a country to retain ownership of airport assets while private promoters carry out the necessary investments.

In the case of Mexico, in 1998 – under a plan named Mexican Airports System (Sistema Aeroportuario Mexicano – SAM) – the 58 federal airports were regrouped into five subsets of administrative entities, with four⁷⁷ of them open to some degree of private participation, and were managed by a state-owned agency.⁷⁸ In Argentina, 32 airports were taken over by AA2000 in 1998.⁷⁹ Other States, such as Brazil⁸⁰ and Peru have also introduced privatization.

While privatization is the trend in Latin America, two “reverse privatizations” or nationalizations, took place in the region during 2013. Three airports were nationalized in Bolivia that had been modernized by Lockheed Air Terminal in the 1990s.⁸¹ Also, the Grand Bahama Airport Company was acquired by the Bahamas government from Hong Kong's Hutchison Whampoa.⁸²

F. Asia

Many Asian countries have followed the privatization route, especially Malaysia, Japan, and India, though the models are different. Interestingly, Singapore Changi airport,

⁷⁵ DENNIS DAWSON & STEPHEN GREENE, *THE FUTURE OF CANADIAN AIR TRAVEL: TOLL BOOTH OR SPARK PLUG?*, prepared for the Standing Senate Committee on Transport and Communications (June 2012), available at <http://www.parl.gc.ca/content/sen/committee/411/trcm/rep/rep05jun12-e.pdf>.

⁷⁶ *Id.*

⁷⁷ The four groups: Pacific Airports Group (Grupo Aeroportuario del Pacífico – GAP); Central and Northern Airports Group (Grupo Aeroportuario del Centro Norte – OMA); South Eastern Airports Group (Aeropuertos del Sureste de México – ASUR); and Mexico City International Airport (Aeropuerto Internacional de la Ciudad de México – AICM).

⁷⁸ Aeropuertos y Servicios Auxiliares – ASA (Airport and Auxiliary Services). See Oscar Armando Rico Galeana, *The Privatization of Mexican Airports*, 14 J. AIR TRANSP. MGMT. 320, 321 (2008).

⁷⁹ *Special Report – Infrastructure: Privatization Takes Hold*, AIRLINES INT'L, Aug.–Sept. 2011, at 44, available at <http://training-www.iata.org/publications/airlines-international/august-2011/Pages/special-privatization.aspx>.

⁸⁰ During 2012, three major airports in Brazil were privatized. See *New Airport Partners*, *supra* note 53.

⁸¹ Lockheed Air Terminal was later taken over by Airport Group International. The AGI contracts were subsequently acquired by TBI, and were later sold by them to Abertis. See ROBERT W. POOLE, JR., REASON FOUNDATION ANNUAL PRIVATIZATION REPORT 2014: AIR TRANSPORTATION 7 (2014).

⁸² *Id.*

though state-owned, is performing well and has been able to compete successfully with private airport operators in other States.⁸³

India also has followed the global trend of privatization. Beginning in 2006, the state-owned Airports Authority of India's airports were privatized and new private greenfield airports were constructed in two cities.⁸⁴

G. *United States of America*

Unlike many airports in the rest of the developed world, U.S. airports remain largely public assets, owned and operated by city, county, or state governments. Nevertheless, compared with airports elsewhere in the world, major U.S. airports involve an extensive degree of private control.⁸⁵

In October 1996, the U.S. Congress created an Airport Privatization Pilot Program (APPP) as part of the Federal Aviation Reauthorization Act of 1996, and authorized the FAA to explore privatization as a means of generating access to various sources of private capital for aviation infrastructure development and reducing reliance on federal grants and subsidies.⁸⁶ Under the program, private companies may own, manage, lease, and develop public airports. This Act authorized FAA to permit up to five public airport sponsors to sell or lease an airport, with one slot reserved for a large-hub commercial airport and at least one slot for a general aviation airport. In 2012, Congress increased the number of slots to 10 – but retained the “only one large hub” restriction.⁸⁷ Under the Act, the airport owner or leaseholder would be exempt from certain federal requirements that could otherwise make privatization impractical. The program began in September 1997 and six airports applied for privatization under the scheme, although three later withdrew. New York's Stewart airport was the first and only one to go private under this plan. U.K.-based National Express Group was awarded a 99-year lease by the New York State Department of Transportation. However, in October 2007, the Port Authority of New York and New Jersey acquired the remaining 93 years of the lease, effectively ending the privatization experiment.

In the case of Chicago Midway airport, the application was approved in 2008. But the privatization process fell through when the consortium that would have taken over the airport

⁸³ See Press Release, Changi Airport Group, Another Record Breaking Year for Changi Airport in 2013 (Jan. 28, 2014), available at <http://www.changiairport.com/our-business/media#/pressreleases/another-record-breaking-year-for-changi-airport-in-2013-954032>. Changi Airports International, a wholly-owned subsidiary of Changi Airport Group, is a partner in many airport projects other States, including Antonio Carlos Jobim International Airport (Galeão) in Rio de Janeiro, Brazil; Airports of the South (Krasnodar region), Russia; and Bengal Aerotropolis Projects Ltd., India. See Changi Airports Int'l, A Growing Portfolio, <http://www.cai.sg/portfolio/portfolio.htm> (last visited Feb. 9, 2015).

⁸⁴ These airports are located in Bangalore and Hyderabad. For more information on greenfield airport privatization in India, see Moses George, *Public Monopoly to Private Monopoly – A Case Study of Greenfield Airport Privatization in India - Part I*, 9 ISSUES AVIATION L. & POL'Y 173(2009); Moses George, *Public Monopoly to Private Monopoly – A Case Study of Greenfield Airport Privatization in India - Part I*, 9 ISSUES AVIATION L. & POL'Y 307(2010).

⁸⁵ See ERNICO, *supra* note 1, at 11; ICAO, CASE STUDY OF COMMERCIALIZATION, PRIVATIZATION AND ECONOMIC OVERSIGHT OF AIRPORTS AND AIR NAVIGATION SERVICES PROVIDERS: UNITED STATES (Dec. 9, 2011, revised Feb. 18, 2013), available at <http://www.icao.int/sustainability/CaseStudies/UnitedStates.pdf>. See also Richard de Neufville, *Airport Privatization :Issues for the United States*, 1662 TRANSP. RES. REC.24 (1999); Zhang Qin, Comprehensive Review of Airport Business Models (Dec. 1, 2010), available at <http://aci-asiapac.aero/upload/page/817/photo/4f2fa5776056b.pdf>.

⁸⁶ See Federal Aviation Reauthorization Act of 1996, § 149, 110 Stat. 3224 (1996) (codified as amended at 49 U.S.C. § 47134(b) (2012)).

⁸⁷ See FAA Modernization and Reform Act of 2012, § 156, 126 Stat. 18, 36 (codified as amended at 49 U.S.C. § 47134(b) (2012)).

failed to put together the necessary financing. A new privatization process for Midway was launched in 2013,⁸⁸ but the process was dropped in September 2013⁸⁹ and the application has been withdrawn. The latest activity under this program is the FAA's approval in February 2013 for privatization of Puerto Rico's Luis Muñoz Marín International airport, which is the second privatization under the program.⁹⁰ Privatization initiatives under APPP are summarized below.

Table 1. Participation in the APPP⁹¹

Airport	Location	Status
Brown Field Municipal Airport	San Diego, CA	Application withdrawn in 2001.
Chicago Midway International Airport	Chicago, IL	Application withdrawn in 2011.
Gwinnett County Briscoe Field Airport	Lawrenceville, GA	Application withdrawn in 2012.
Hendry County Airglades Airport– Active	Clewiston, FL	Preliminary application approved in 2010; approval of final application pending.
Louis Armstrong New Orleans International Airport	New Orleans, LA	Application withdrawn in 2010.
Luis Muñoz Marín International Airport	San Juan, PR	Preliminary approved in December, 2009; final application approved in February, 2013. Privatized under long-term lease.
New Orleans Lakefront Airport	New Orleans, LA	Application terminated in 2008.
Niagara Falls International Airport	Niagara Falls, NY	Application withdrawn in 2001.
Rafael Hernandez Airport	Aguadilla, PR	Application withdrawn in 2001.
Stewart International Airport	Newburgh, NY	Airport privatized in 2000 after FAA approval; reverted to public operation in 2007.

Note: As of April 2014.

The lack of success of the FAA's privatization efforts has been attributed to the following:

- Restriction on using privatization revenue for non-airport purposes by the existing public operators;
- Overly restrictive or vague regulatory requirements;⁹²
- Infrastructure bonds issued by private sector operators would not be tax-free, as are bonds issued by public sector airport operators;
- Tougher requirements for private owners to obtain Airport Improvement Program(AIP) grants; and
- Time-consuming application and approval procedures for APPP.

Considering the above issues, the following measures were suggested to stimulate privatization under APPP:

- Offering the same tax treatment to private and public airport infrastructure bonds;
- Changing AIP funding requirements for private operators;
- Relaxing AIP grant assurances;
- Liberalizing rules regarding imposing Passenger Facility Charges and on increasing aeronautical and non-aeronautical charges; and

⁸⁸ ICAO, *supra* note 85.

⁸⁹ John Byrne, Jeff Coen & Hal Dardick, *Emanuel Halts Midway Privatization Bidding*, CHI. TRIB., Sept. 6, 2013, available at http://articles.chicagotribune.com/2013-09-06/news/chi-emanuel-halts-midway-lease-talks-20130905_1_great-lakes-airport-alliance-midway-airport-midway-advisory-panel.

⁹⁰ Darwin Bond Graham, *Airport Privatization Takes Off in Puerto Rico*, TRUTH-OUT.ORG, Apr. 23, 2013, <http://truth-out.org/news/item/15891-airport-privatization-takes-off-in-puerto-rico>.

⁹¹ FAA, Airport Privatization Pilot Program, http://www.faa.gov/airports/airport_compliance/privatization/ (last visited Jan. 13, 2015).

⁹² For example, requiring that 65 percent of air carriers serving an airport must approve a lease or sale of the airport, and restrictions on increases in airport rates and charges that exceed the rate of increase of the Consumer Price Index (CPI), etc.

- Easing limits on the use of privatization revenue.⁹³

It can be seen that financial issues are the main reasons for the weak response to the privatization program. Moreover, the public airport sector in the U.S. is financially better positioned than the private sector,⁹⁴ whereas in other States the private sector is better positioned due to airport privatization programs.

Hence, although it is in the world's biggest aviation market, the FAA's pilot program for privatizing airports has not obtained the desired result. Compared with other countries, the new privatization model has not been successful. At the same time, in the United States private participation in airport management and operations is very significant when compared with Europe or Asia. The existing model of airport ownership, management, and operation in the U.S. has more elements of private participation, which is a distinct model in itself, whereas in other parts of the world private participation in airports is a relatively new trend.

VII. *Alternate Models*

While in many States public airports were handed over to private hands, the situation is reversed in the U.S. This includes public airports providing private contract services,⁹⁵ privatized airport services reverting back to public control, and privately owned airports reverting to public ownership and operation.⁹⁶

The U.S. model of locally owned airports in which the facilities and operations are privatized seems to be the preferred model considering the efficiency. The success of this model is not necessarily limited to the U.S., as the same can be applied elsewhere. Local ownership of the airport is significant when considering the scope of development and expansion plans in comparison with those of privatized airports elsewhere.

The U.S. model may be a time-tested model, and it is interesting to note that in India, the first international airport outside federal ownership has adopted a successful model similar to that of the U.S.⁹⁷ Cochin International Airport Ltd. (CIAL)⁹⁸ was started in 1999 with more than 11,000 individual investors in addition to the local government, and it became profitable in 2003. Unlike other privatized airports in India, this airport generates 70 percent non-aeronautical revenue. This model is significant, as the privatized airport in Delhi (DIAL) has been said to be the costliest airport in the world following a recent hike in its charges. Similarity exists between the U.S. model and the CIAL model, in respect of its ownership by local people⁹⁹ and local government.¹⁰⁰ Hence, the possibility of local *ownership* can be a relevant factor while exploring privatization options for state-owned airports. The degree of local ownership may also reduce "gold plating," which results in higher airport charges.

⁹³ TANG, *supra* note 47.

⁹⁴ Largely due to regulatory provisions regarding airport charges (e.g., Passenger Facility Charges (PFCs)), and rules regarding the issuance of bonds by public sector airport operators.

⁹⁵ The Allegheny County Airport Authority, which operates Pittsburgh International airport, has entered into an agreement with JBT Aerotech GHA, to renovate jetways for JBT customers. *See* ERNICO, *supra* note 1.

⁹⁶ Clinton County Port Authorities taking over privately owned Wilmington Air Park in Ohio from private entity Deutsche Post DHL. *See id.*

⁹⁷ This airport is classified as a private airport. Considering the ownership pattern, it is an airport owned by the local people.

⁹⁸ Cochin is a city in Kerala, a southern state in India.

⁹⁹ Many of the individual investors are non-resident Keralalits (locals) working in 30 different countries.

¹⁰⁰ These States are politically at opposite poles; while the U.S. is a market-driven economy, Cochin is a part of the State of Kerala, where communists share power every five years alternatively. The State of Kerala was the first state in the world where the communists came to power through ballot. Thus, its socialist leaning makes the state different from the U.S.

VIII. Conclusion

Privatization of airports is in vogue in many States, while the Chicago Convention does not stipulate anything specific, merely stating that airports and their regulation are the responsibility of the State.

The ICAO Secretariat has issued a Circular and a Manual regarding privatization, which is not an advice but merely gives details of the developments in the field. However, the possibility exists that States may consider these documents as ICAO's advice for privatization. The documents are not approved by the ICAO Council, unlike other ICAO documents which are approved by the Council and published by its decision.¹⁰¹ This aspect is very important as normally ICAO manuals and documents are considered as the advice/position of ICAO on the subject by the contracting States. In a nutshell, the Chicago Convention does not have any specific provision which supports privatization of airports *per se*, and ICAO's publications in this field are both vague and nonbinding. States are ultimately responsible for the functioning of their airports even if they privatize them.

The ICAO Secretariat is of the view that the contracting States bear the responsibility of ensuring compliance with all provisions of the Convention and the Annexes.¹⁰² However, in support of privatization, the Secretariat states that the provisions of the Convention do not prohibit contracting States from delegating to private entities some of the functions for which they are responsible and hence privatization is permissible. Interestingly, these two arguments are contradictory. Absence of prohibition is to be interpreted as the permission to delegate as far as functions are concerned, and the same logic should be valid for delegating the responsibilities. Otherwise, if delegation of responsibility is not permissible though there is no prohibition, then delegation of functions also should not be permissible.

Privatization in various countries has brought varied responses. Different models of privatization have fared differently in different countries¹⁰³ and many factors are responsible. Fundamentally, performance rather than the model determines the success of privatization. By privatizing airports, governments and private companies, which have a stake in the projects, are benefitted while airlines and passengers are subjected to higher charges.

Though privatization in the U.K. and other European States is generally considered successful, it also has invited criticism. In Latin America, privatization is not without problems. Most importantly, the privatization program in U.S. – the biggest aviation market – has not been successful for various reasons. The lukewarm response to privatization in the U.S., the most liberalized economy, points to the unsuitability of privatization as the solution for problems related to State ownership of airports across the world. At the same time, many publicly owned airport operators in many countries are expanding their operations in other parts of the world. As a whole, the main issues emerging are monopoly, the impact of change of character from State entity to private entity, state aid to airports, and, most important of all, higher airport charges at privatized airports. Finally, State laws play a very vital role in privatization, given that the Chicago Convention and ICAO do not mandate any rules or methodology for privatization.

¹⁰¹ See, e.g., ICAO, *supra* note 18 (stating that it is approved by the Council and published by its decision).

¹⁰² CIRCULAR 284, *supra* note 14, para. 4.1.

¹⁰³ For details on airport privatization in different States, see ICAO, Infrastructure Management: Case Studies on Commercialization, Privatization and Economic Oversight of Airports and Air Navigation Services Providers (ANSPs), http://www.icao.int/sustainability/pages/Eap_ER_Databases_CaseStudies_ANSPs.aspx (last visited Jan. 13, 2015).

Though many States consider privatization as the “miracle cure,” airport user organizations, such as IATA, and passengers do not consider this as an effective solution. Privatization need not be the only cure for the problems of state-owned airports. Locally owned public airports in the U.S. and other States are examples of more effective models. Such alternative models should be given sufficient consideration when contemplating the replacement of classical models with those promising more efficiency.

