

Mexico: Opening to Private Investment of the Mexican Airports Network System

JUAN FRANCISCO TORRES-LANDA *

I. Background

With the purpose of modernizing, expanding, maintaining, and improving aeronavigation services, in 1965 the Mexican Government centralized all operation and management activities for the national airport network system in a single decentralized public institution called Aeroportos y Servicios Auxiliares (ASA).¹ Since ASA's inception, all operation, management, exploitation, and construction activities of the Mexican airport network that constitute public services have been conducted through this public entity. Rendering of public services, as in the case of airports, must satisfy public interest and collective needs. Therefore, the Mexican government must ensure that those services are rendered in a continuous, uniform, regular, and permanent manner, and in strict accordance with the existing legal framework.

Currently, all Mexican airports are owned by the Mexican Government and operated by ASA, notwithstanding that since the Law of Airports (LA)² was enacted, the statute has permitted the Ministry of Communications and Transportation (SCT) to grant concessions to private parties to operate, manage, exploit, or construct airports.³ A private party may not operate an airport unless it has a prior concession issued by the SCT, even if the party owns the real estate on which the airport is built.

According to the Foreign Investment Law (FIL),⁴ and consistent with the LA, foreign investment participation in the capital stock of a company that holds a concession to operate an airport may not exceed forty-nine percent of its equity. This threshold may be increased by securing specific approval from the Foreign Investments National Commission (FINC), a

*Juan Francisco Torres-Landa is with Barrera, Siqueiros y Torres-Landa, SC in Mexico City, Mexico and is co-chair of the Mexican Law Committee.

1. Through decree published in the Federal Official Gazette (FOG) of June 10, 1965 [hereinafter FOG].

2. Published in the FOG of December 22, 1995.

3. The Law of Airports defines "airport" as a public service civil airport that has the necessary installations and services adequate for the reception and dispatch of aircraft, passengers, freight and mail of regular, irregular, commercial and private non-commercial air transportation services.

4. Published in the FOG of December 27, 1993, as amended on December 24, 1996, and January 23, 1998.

sub-agency of the Ministry of Trade and Industrial Promotion.⁵ The regulatory framework for the operation and construction of national civil airports is found principally in the LA and some international treaties.⁶ There are other instruments that may also be applicable in this area.⁷

II. Private Investment Participation

With the purpose of improving, modernizing, and expanding the airport network infrastructure to meet the current needs of the country, the Mexican Government issued general guidelines for participation of private investment in the development of this economic sector. The Guidelines for the Opening to Investment of the Mexican Airport Network System (*Lineamientos Generales para la Apertura a la Inversión en el Sistema Aeroportuario Mexicano*) (the Guidelines) were published in the FOG on February 9, 1998. The goal of the Guidelines is to promote and develop the airport network through opening to private investment under competitive and non-discriminatory conditions.

According to the Guidelines, the basic principles for opening the airport network⁸ to private investments are as follows:

- The promotion of an equal, objective, transparent and, expedited investment opening process;
- The promotion and participation of investors and operators of known quality and capacity, and known technical, operational, management, and financial standing;
- The full respect of the employees' rights according to applicable laws; and
- Insuring that the best conditions are obtained for the Mexican government regarding price, timeliness, and other applicable circumstances.

The Guidelines set forth that the opening process for private investment will consist of the sale of shares of the capital stock of each of the holding companies,⁹ through two stages: (a) the first consisting of the sale of the above-mentioned shares to a strategic partner¹⁰ through a public bidding procedure; and, (b) the second consisting of a sale of shares, preferably through one or several public offers.

5. Foreign Investment Law 8-III and Law of Airports 19.

6. These international treaties, however, deal primarily with the rules that countries have decided to abide by in order to harmonize the operation of international flights and coordinate the activities of international passenger and freight carriers.

7. Among these instruments are: (i) Law of General Means of Communication; (ii) General Law of National Assets; (iii) Law of Civil Aviation; (iv) Federal Law of Administrative Procedures; (v) Federal Law of Measures and Standards; (vi) Commerce Code; and (vii) Civil Code for the Federal District in Local Matters and for the entire Republic in Federal Matter.

8. Formed by the 58 airports that are currently administered and operated by ASA.

9. Defined as commercial companies created by the Federal Government as majority state-owned companies holding the Concession Companies of the corresponding Group of Airports. The Concession Company is defined as the majority state-owned company created for each of the airports that form each of the Group of Airports, and granted a concession title (i.e., to manage, operate, exploit and, in its case, build) pursuant to the terms of the Law of Airports. By Group of Airports we must understand any of the four groups (i.e., Central North Group, Mexico City Group, Pacific Group and South Eastern Group) in which most of the 58 airports currently operating in Mexico have been distributed.

10. Defined as those commercial companies created according to Mexican Law whose members evidence practice in economic and labor areas in Mexico, with renowned technical, administrative and financial standing, and with international recognition in the development of airport and commercial activities, all of whom will be selected through a public bid to acquire shares and participate in the operation of the Holding Companies, pursuant to the respective Participation Agreements.

In order to implement these phases, the Federal Government will create a majority state-owned company (Concession Company) for each airport, a company that will hold the concession title to manage, operate, exploit and in its case build the respective airport, as well as a holding company for each Group of Airports,¹¹ also a majority state-owned company, that will hold the respective Concession Companies. Initially through a public bidding procedure, Mexican commercial companies (Strategic Partners) may acquire equity participation and engage in the operation of one of the Holding Companies. Thereafter, the Federal Government will sell the shares of the capital stock of the Holding Companies in one or more public offerings in national or international security markets.

Pursuant to the Guidelines, one Strategic Partner will be selected for each Group of Airports. The equity participation of the Strategic Partner in the capital stock of a Holding Company will be guided by the following factors:

- The obligation to purchase shares that represent ten percent of the capital stock;
- The possibility of acquiring up to a five percent additional participation jointly with the previous group; and
- An option to acquire shares that represent an extra five percent of the capital stock, which may be exercised in a staggered manner from the fifth year from the purchase of the first package.

The Strategic Partner, as well as all of the shareholders of the Holding Company, will be subject to the following general participation limits:

- They may not hold more than fifteen percent of the capital stock of the Holding Company, therefore making it necessary for the above-mentioned option to be sold at the time of its exercise; and
- They will only have full corporate rights for ten percent of the capital stock of the Holding Company so that any additional participation up to fifteen percent will be without voting rights.

Regarding this first step of the investment opening process, that is, the selection of the Strategic Partner which will participate in the Holding Company through a public offer, the Guidelines establish requirements that must be complied with under the procedures indicated below:

a. *Registration of Interested Party.* The registration allows the SCT to identify the presence of groups that are interested in participating in the selection process of the Strategic Partners. The parties interested in obtaining registration must file a written statement of their interest with the "Mexican Airport Network System Reorganization Committee" (*Comit de Reestructuración del Sistema Aeroportuario Mexicano*),¹² so that, the SCT may furnish the applicant with one

11. The four current Group of Airports have been distributed in the following manner: (i) Central North Group: airports of Monterrey, Acapulco, Mazatlán, Zihuatanejo, Zacatecas, Culiacán, Ciudad Juárez, Chihuahua, San Luis Potosí, Durango, Toluca, Tampico and Reynosa; (ii) Mexico City Group: International Airport of Mexico City; (iii) Pacific Group: airports of Guadalajara, Puerto Vallarta, Tijuana, San José del Cabo, Bajío, Morelia, Hermosillo, La Paz, Aguascalientes, Los Mochis, Mexicali and Manzanillo; and (iv) South Eastern Group: airports of Cancún, Mérida, Villahermosa, Cozumel, Oaxaca, Huatulco, Minatitlán, Tapachula and Veracruz.

12. Created according to official accord published in the FOG of February 2, 1996. The official information body with respect to the participation process will be the President or Technical Secretary of the Mexican Airport Network System Reorganization Committee (Technical Secretary and Committee, respectively). Inquiries regarding the Guidelines will be addressed by the referred Technical Secretary, located at Avenida Universidad and Xola, Cuerpo "C", Planta Baja, Col. Narvarte, México, Distrito Federal 03020. Tels: 538-55-61, 538-52-65 and Fax: 530-11-90.

set of the informational questionnaire.¹³ This questionnaire must be delivered jointly with the registration statement.¹⁴ Once all of the foregoing documents, information or standing requirements are met, the SCT will grant the registration certificate, within a term of fifteen business days following the date on which all requirements are met. Likewise, in due course, the registered interested parties will be given a basic description containing general information about the most relevant aspects for the airports in each of the Group of Airports. This information includes movement of passengers and operations, location, weather conditions, real estate description, as well as the airport terminal buildings for general and commercial services.

b. *Technical-Financial Evaluation.* The SCT will perform a technical-financial evaluation of the purpose of each public bid, to ensure the Mexican government the best possible conditions regarding price, timeliness, and other circumstances.

c. *Public Tender.* The SCT will first issue the call and basis for bid¹⁵ for the sale of the stock participation in each Holding Company, which will be published in the FOG. In order to submit a bid, in addition to having a registration certificate, the interested parties must request an authorization¹⁶ from the SCT, deliver the respective guaranty deposit,¹⁷ and undertake

13. Specific information is required in this document, such as general data of the interested party, its main activities, the corporate purpose and reason to participate in the process, as well as a statement of its intention, if that is the case, of participating individually or as part of a group. The registration applications must adjust to the specific rules indicated in that informational questionnaire.

14. From the date of publication of the Guidelines in the FOG (February 9, 1998), the registration applications may be submitted during business days and hours at the office of the Technical Secretary. The call for bids in the respective public tender will indicate the deadline for interested parties to submit their registration application. The SCT may request additional informational documents in order to clarify questions, as well as to hold interviews with the interested parties.

15. The call and basis will include the purpose of the bid, the stages that will be included therein, the procedures and requirements for the evaluation of interested parties, the calendar of activities, the specific form and terms for bids to be submitted, causes to disqualify bidders, awarding criteria and terms for issuance of the final award, events for which the bid may be declared void or suspended, as well as other general restrictions. The profile, characteristics and participation requirements of the Strategic Partners, the terms and conditions for the acquisition, holding and selling of the equity ownership by the Strategic Partner, as well as the terms, conditions and reach of the Participation Agreement will be disclosed to the interested parties in the call and basis for selection of the Strategic Partner that will be published for each Holding Company. The "Participation Agreements" are those that will govern the relationship between each Holding Company, the respective Concession Company, the Federal Government and the respective Strategic Partner.

16. To obtain this authorization, the interested parties must evidence their legal, technical, administrative, and financial standing in order to comply with the obligations indicated in the bidding procedures, the Participation Agreement and the acquisition of the equity participation, and to comply with all other requirements that are indicated in the call and basis for bid. The application to request the authorization must include a copy of the registration certificate previously granted by the SCT. In the case of interested parties that form groups, the applications must be filed by a common representative for each group, the SCT having the ability to request certification of signatures of the designation of the common representative before a Notary Public. If the representation is requested from third parties, a special power of attorney granted before a Notary Public will be required.

Once the interested parties file the information requested in the Guidelines and the call and bidding procedures, the SCT will evaluate, based on the objective criteria, the authorization applications and will inform in writing the interested parties with respect to the respective ruling, with a prior notice to the Divestiture Inter-Ministry Commission (the Commission) created through Presidential Accord published in the FOG of April 7, 1995.

The authorization will be granted through the document signed by the Technical Secretary, which will be non-transferable and may only be modified in its terms and conditions through another document issued by the Technical Secretary.

17. The purpose of this deposit is to secure seriousness of the bids submitted. Its terms and amount will be established in the basis for each of the bids. The deposit, as well as the principal and interest accrued, for that deposit will be returned to the interested parties pursuant to the rules indicated for that purpose in the call and rules for bid.

in writing to safeguard the confidentiality¹⁸ of the information received. Having met those requirements, the "Participant" status will be granted for the right to participate in the respective bid. Each Participant must submit only one bid for the acquisition of the equity ownership. Participants will have the right to: receive information including the description, prospectus, and draft of agreements; perform technical visits to the installations of each of the Group of Airports related to that bidding procedure; participate in question and answer sessions and clarify questions with officials from the SCT, the Committee, or ASA; submit questions in writing; attend data rooms; and participate in other clarification meetings.

Likewise, the Participants must attend a meeting with officials of the Ministry of the Comptroller and Administrative Development (SECODAM), with the representative of the auditing firm,¹⁹ and with a Notary Public. The purpose of this meeting will be to inform the Participants as to the terms and conditions of the procedure, as well as to ratify the information that served as the basis for the granting of authorization, as indicated in the respective calls and rules for bids.

The bids will be two-tiered: a technical and an economical proposal. These two must be delivered in the same act in separate closed envelopes according to the call and rules for bid. In the first stage of the delivery of the proposals by the Participants, the technical proposal will be opened for analysis and evaluation. Once the evaluation of the technical proposals is known, the economic proposals of the Participants whose technical proposals have been approved will be opened. The economic proposals will be final, unconditional and will bind those who filed them from the date of submission. The filing and opening of the proposals will be performed in the presence of a Notary Public, representatives of the SECODAM, the Committee, the Commission, and the Participants.

The award in each bidding procedure will be granted in favor of those that offer the best economic conditions, once the technical proposals have been approved. According to the Guidelines the SCT reserves the right to establish restrictions in the respective rules for the issuance of favorable awards in two or more bidding procedures for one single Participant. Participants may hold exclusive rights under a "Participation Agreement" of only one Group of Airports.

In the event that technical proposals do not guaranty the best safety, quality, and efficiency conditions for rendering of the services, the economic proposals are not satisfactory, or the requirements under the Guidelines or the basis for bid are not completely or only partially met, the SCT may suspend, cancel, or declare null any of the bidding procedures.

During the second stage of the investment opening process, which will consist of the sale of shares of the Holding Companies (through one or more public offerings in national or international security markets), the Guidelines establish that a) the public offerings will be performed according to the applicable legal provisions; b) the public offering characteristics will be made known in a timely basis according to applicable national and international securities regulations; and c) the Federal Government will cancel any public offering if the appropriate conditions in the financial market are not present.

18. Through a commitment letter that must be filed with the SCT according to the format that is indicated for that purpose.

19. The SCT will have an auditing firm of recognized prestige, which will be in charge of the review and supervision of each of the stages in the opening process, and that will include, among other things, its participation in the interviews and meetings of the Participants with officials of the SCT or ASA.

III. Conclusion

For the first time since 1965, there is an opportunity for national and foreign private investment to participate in the operation, construction, and modernization of the Mexican Airport Network System. The recently published Guidelines set forth the basis for participating in the public bidding procedures which will distribute the airports of the Mexican system among various companies. The purpose of those rules is to create a transparent and clear procedure for this radical change in the system, which requires an urgent capitalization and modernization of infrastructure to be able to cope with current needs and those of the upcoming century.