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Legal Implications of airport privatization in India

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Introduction

1.1 The Context

The air transport sector including airlines, airports and providers of air navigation services have largely been State controlled. Formerly, most airlines were State owned. However, the ownership pattern of airlines has changed gradually to the majority of the airlines being privately owned as a part of globalization and liberalization of economies.

These observations can be made in the case of airports too. State owned airports are being privatized in many States due to various reasons. The trend started with the privatization of British Airports Authority (BAA) owned airports in United Kingdom (UK). Europe, Asia and Latin America are now witnessing privatization of airports on a fast track basis. Australia and New Zealand have also privatized their State owned airports in the last decade. Though the models vary depending upon the economic policy of the State, the concept of privatization or private participation in airport infrastructure is gaining momentum in these States. However, the United States of America (USA) remains an exception to this trend of airport privatization.

In 2006, India joined the global trend of privatization in airport infrastructure, by privatizing two State owned airports in New Delhi and Mumbai. Though the first privately owned international airport started operations in 1999 in Kochi (Cochin),¹ two other privately owned airports were operationalized in Bangalore and Hyderabad only in 2008.

1.2 Relevance of the Study

It is important to study the perspectives of different States towards airport privatization so that the international perspectives drawn from these experiences are more informative and better shaped. It is particularly essential to study the Indian experience of airport privatization, as India is one of the fastest growing aviation markets in the world and this will contribute to better understanding of the legal and other considerations pertaining to privatization of airports across the globe. Privatization also impacts the manner in which the State's responsibilities are being perceived around the world. Therefore, this study will deal with the experiences of privatization in various States in a comparative setup, focusing on India. These experiences, facets of privatization and proposed or implemented solutions are analysed in this study.

1.3 Aims and Objectives of the Research

The existing literature on airport privatization outlined below will form the background of this study.

This thesis proposes to discuss and resolve various legal and regulatory questions that arise as a direct consequence of many of the steps taken during privatization of airports which are not discussed which include tender process, environmental clearances, funding arrangement, security, environmental issues etc. Thus the following research questions are formulated.

Research Questions

¹ Cochin International Airport (CIAL), see www.cial.com / www.cial.co.in

- Has privatization of airports resulted in an efficient solution to the problems related to State ownership of airports, taking into account the opinion of international organizations?
- Has the privatization of airports in India resulted in a monopoly of airports? If it has, does it conform to the State's constitution, policy and aviation laws?
- What is the model for privatizing airports in India?
- What is the impact of State aviation laws and constitutional obligations on this model?
- How are the State's airport licensing rules applied to privatized airports in India?
- Has privatization led to any improper usage of the licensing rules?
- Whether airport charges introduced in India after privatization are charges or taxes? Do airport charges introduced after privatization conform to the Chicago Convention, the ICAO guidelines on charges and the national laws?

This thesis is a collection of research articles in relation to the above research questions. An outline of the thesis is presented below.

I. Chapter 2

This Chapter examines the developments in the field of airport privatization in selected States. Sector specific issues emerging from the change in ownership from State to private are studied, taking into account models applied in these States. The international organizations' response to privatization trends, especially ICAO, and various documents on privatization are analysed. This chapter is based on the article titled *Airport Privatization - International Organizations and Emerging Issues* published in *Issues in Aviation Law and Policy* Volume 14 Spring 2015 Number 2.

II. Chapter 3

Chapter 3 introduces legal and regulatory aspects connected with privatization of airport infrastructure in India. Four major subjects as identified below are addressed through articles published in various international journals.

A. Topic I: Monopoly and Privatization

In India, when two new greenfield airports in the private sector began operating in 2008, the old airports in these cities were closed for commercial civil aviation operations. This led to a monopoly of the new greenfield airports. The article examines legal and commercial questions related to the closing of the old airports in these two cities - Bangalore and Hyderabad. The article consists of two parts titled *Public Monopoly to Private Monopoly - A Case Study of Greenfield Airport Privatization in India* Part I&II was published in *Issues in Aviation Law and Policy* Volume 9 Autumn 2009 Number 1 & Volume 9 Spring 2010 Number 2.

B. Topic II: Safety - Aerodrome Licensing and Aerodrome Operations.

In two separate articles, the author discusses how aerodrome certification and aerodrome operation are affected by privatization of airports.

The first article deals with the aerodrome certification system in India prior to privatization and the application of these rules after privatization. The title of the article is *Aerodrome Certification and Airport Privatization in India - A critical Study*, was published in *Zeitschrift für Luft- und Weltraumrecht (ZLW)* Volume 61 Issue 1, 2012.

The second article deals with aerodrome operation. In a unique case in India, non-scheduled flights are operating from the two airports which have specifically been closed for all commercial civil aviation operations. Though these airports were closed citing safety considerations after private greenfield airports started operations in these cities, non-scheduled aircraft are still operated from these airports. The provisions of Aircraft Rules used to issue the notifications and the ramifications of the violations, including the penal clauses, liability issues are analysed. The article titled *Non-Scheduled Aircraft Operations and Aerodrome Certification - A Case Study of Two Indian Airports* was published in the *Asian journal of Air & Space Law* Volume II Number 2, July- December 2012.

C. Topic III: Economic Regulation

This section discusses the elements of economic regulation prevailing in the Indian sector and examines the issues connected with the establishment of airport charges and the Airport Economic Regulatory Authority (AERA)², in India.

Privatization has brought in an enormous change in the economic context, especially in terms of airport charges. An attempt is made in this article to analyse a new category of airport levy namely the User Development Fee (UDF). Various legal and regulatory aspects connected with the UDF are discussed with respect to national laws and international conventions and guidelines. The article titled *The User Development Fee (UDF) in Indian Airports - Legal and Regulatory Issues* was published in *Issues in Air Law and Policy* Volume 13 Spring 2014 Number 2.

The latter part contains an article which deals with the case study of a new levy (Development Fee) introduced in the privatized AAI airports. The Indian Supreme Court decision on the issue is analysed from the international and national perspective. This article titled *Development Fee in India Airports - A case Study* was published in *Journal of Air Law and Commerce*, Issue 80 Winter 2015 Number 1.

D. Topic V: Another dilemma: Public or Private Airports?

The airport privatization models applied in the UK, Australia and New Zealand are different from each other but basically the resultant entities are private entities. In India, the original model envisaged in 1999 was of private entities with minority stakes of the State. This model was applied to brownfield and greenfield airports and the entities were considered as private entities. However of late, these entities are emerging as State entities or instrumentalities of the State, in the light of public statutes. This article analyses the background of the model applied in India, models applied in other States, the decisions of various Indian courts, the effect of these entities being considered as

² Airport Economic Regulatory Authority of India Act 2008(Act 27 of 2008); received the assent of the President on 5 December 2008 and published in the Gazette of India (Extra Ordinary, Part I) dated 5 December 2008

‘State entities’ with respect to various statutes. The article titled *Private Airports in India - Private or Public?*, was published in Issues in Air Law and Policy Volume 12 Autumn 2012 Number 1.

III. Chapter 4

This chapter presents remarks and recommendations on the legal and regulatory questions connected with privatization of airports.

Though many States consider privatization as the “miracle cure,” airport user organizations, such as the International Air Transport Association (IATA), and passengers do not consider this as an effective solution. The privatization program in U.S. has not been successful for various reasons.

The transition from public monopoly to private monopoly in India was not as per the original scheme but was introduced at a later stage. Closure of the old airports in Bangalore and Hyderabad cannot be said to be in accord with published policy, provisions of applicable law, industry demand, or the larger public interest. The kind of concession agreements used in the cases of Bangalore and Hyderabad may take away the sovereign powers from the State and statutes may become irrelevant as they will be subject to such commercial contracts.

ICAO has developed an aerodrome certification model to ensure safety of civil aviation. In India, the same provisions are used to achieve economic policies. The regulatory authority of India has used its licensing power to create a monopoly in the airport infrastructure sector and curtail the use of two aerodromes. Also the authority of the State with respect to licensing has been subjected to private and commercial agreements.

The User Development Fee (UDF) has been presented to the passenger in the form of a user charge, but is a tax levied by private airports. In the absence of a clear provision in the relevant act, that is, the Aircraft Act 1934, the UDF can be thus called a tax without legal sanction.

The Airport Development Fee (ADF) or DF is projected as a charge but as per Supreme court DF is a tax. If India maintains that DF is a charge, then it is against the findings of the Supreme Court, and if India identifies Development Fees as taxes, then it is a violation of Article 15 of the Chicago Convention.

Under the current situation, private airports are private entities as far as management flexibility, transparency, and public accountability are concerned. At the same time, these airports are treated as “public” or “State” entities in terms of special powers and legal support in the areas of levying tax, monopoly, and procedures to evict unauthorized occupants from their premises.

1.4 Methodology

Against this background the study first examines provisions of the current international aviation law regime. Sector specific issues emerging from the change in the pattern of ownership from State to private are analysed taking into account various models applied in various States. It then proceeds to introduce some of the legal and regulatory aspects connected with the privatization of airport infrastructure in India. The research questions are analysed

through a collection of research articles on legal and regulatory issues of airport privatization in India from the national and international comparative perspective.

Internationally oriented studies suggest that privatization of airports in many States has been successful for the State and the users.³ And some international organisations are encouraging such initiatives. Privatization is projected as a panacea for any and all problems faced by States across the globe, regarding airports, like management efficiency, capital requirement, standards of airports etc. Many studies have been conducted in this regard.

The present study evaluates these experiences critically and with due regard to the theoretical underpinnings and the practical manifestations of privatization, drawn from personal experiences in the field. Examination of international and national regulations, analysis of case studies, study of literature and the author's personal experience as an airport executive are used in the process to critically analyse the research questions.

For analysing the research questions use is made of various sources including the Chicago Convention on international civil aviation of 1944, Standards laid down in Annexes of the Chicago Convention and ICAO Documents; case law of India, US and EU; domestic regulations; parliamentary committee reports; World Bank reports, Comptroller and Auditor Generals (CAG) reports; IATA reports; as well as literature in the area of study by scholars including Prof. Paul Stephen Dempsey, Prof. Brian F. Havel, Dr Niels van Antwerpen, Rachel Y. Tang, G. Cook, Frost & Sullivan, Anil Kapoor, Julian Ellison..

This study seeks to emphasize and establish that, rather than being just a one stop solution to all problems faced, privatization also brings in its own set of new problems which may affect the growth of the aviation industry in future.

1.5 Literature Review

Despite its importance, privatization of airports in India has not received the scholarly attention it deserves. There has been some literature on the international initiatives of other States in the past. Most scholars who have attempted to do so have concentrated their studies on the privatization of airports in other States such as the UK, Canada and Australia, but not on India though the privatization of Indian airports started in 1990s. In this section a brief review of the most significant literature is discussed.

Tulsi R. Kesharwani wrote several articles in the late 1990s and these articles form the earliest work on the subject. In 1996, an article titled "*Runways to private airports*"⁴ was published by Tulsi R. Kesharwani, dealing with international developments regarding airport privatization. The next publication on the issue by Tulsi R. Kesharwani in 1999, titled "*Privatization of airports in India: recent developments and contemporary Issues*"⁵ dealt with the need for India to adapt the global privatization trend in the airport sector. An article titled "*Rapidly growing private presence in airports takes several different forms*"⁶ published in 2000, looks at the various models of privatization applied globally.

3 Airlines, cargo operators, passengers, concessionaries, car operators, MRO users

4 Kesharwani, Tulsi R., 'Runways to private airports' The Economics Times daily, 1996

5 Kesharwani, Tulsi R., "Privatization of airports in India: recent developments and contemporary Issues", A monograph published by The foundation for aviation and sustainable Tourism, New Delhi, 1998

6 Kesharwani, Tulsi R., "Rapidly growing private presence in airports takes several different forms", ICAO Journal, Montreal (April 2003)

Another article touching on privatization is S.K.Saraswathi's "*Operating environment for a civil aviation Industry in India*".⁷ This article was published in 2001 when privatization was just being contemplated and the article does not go into the legal aspects of privatization.

All of these articles are basically related to economics and airport planning, and have not discussed legal or regulatory questions.

In an article published in 2002 titled "*Civil aviation in India: deregulation and constraints to growth and efficiency*"⁸ Subir Gokarn analyses the policy of 1997 and lists out the existing bottle necks detailed in the policy of 1997 and says "*..but the policy on airport infrastructure does not directly address problems. In fact the policy paper touches on every topic from modernization and upgradation of airport infrastructure, to airport security and legal framework, but they do not directly address these identified needs.*" This article also does not go in to the proposed research area.

In 2002, Tulsi R. Kesharwani published a book titled "*Privatization of airport Infrastructure*".⁹ In this book the author presents a detailed review of developments taking place in the area of aviation infrastructure in different parts of the world. The author examines the theoretical aspects of privatization and presents selected case studies. However as an airport planning expert no attempt has been made to address legal issues.

In 2003, Naresh Chandra headed a high power committee and submitted a report titled "*A Road Map for the Civil Aviation Sector*". In this report the committee suggested the introduction of privatization of airport infrastructure and guide lines for the same. This has become a basic recommendation on airport privatization in India. Though this being an expert committee report it does not discuss legal or regulatory questions. This report tried to analyse the then civil aviation scenario and suggested some measures to improve the facilities which includes privatization of airports. However this report is one of the primary sources of information in this area.

In an article written by Dr. Balakista Reddy in 2007 titled "*Airport privatization and emerging issues*",¹⁰ which has come up before commissioning of the greenfield airports, Prof. Balakista Reddy discusses policy issues related to airport privatization. He suggests having a comprehensive aviation policy and an independent regulatory agency along the lines of Naresh Chandra committee report of 2003. As the article was written well before the commissioning of the greenfield airports, the related legal issues proposed to be addressed in this research were not considered. However the proposed study will attempt to complement the policy analysis carried out in this article.

Another article by Sumeet Kachwaha titled "*Airport project in India: Privatization process*",¹¹ was published in March 2008. As the name suggests the author analyses the privatization

7Saraswathi ,S.K, 'Operating environment for a civil aviation Industry in India' Journal of Air transport Management, Volume 7, Issue 2, Pages 127-135

8 Gokarn, Subir, "civil aviation in India: deregulation and constraints to growth and efficiency Published in "India Infrastructure report 2002"

9 Kesharwani, Tulsi R, 'Privatization of airport Infrastructure', Manohar publishers and distributors , New Delhi (2002)

10 Balakista Reddy, Recent Development in Air and Space Law, , Uppal publishers , New Delhi, 2007

11 Sumeet Kachwaha, "Airport project in India: Privatization process", Construction Law International Vol.3 Issue 1 March 2008

process adopted, that is mainly the features of the concession agreement and the absence of a regulatory mechanism in place at that time. The article was a very short one and the author has not gone into the depth of the legal and regulatory considerations connected with privatization of airports. Moreover at the time of writing the article the new greenfield airports had just started operations. The proposed study is based on many legal and regulatory arguments that came to light after the new greenfield and brownfield airports started functioning.

Of the above referred articles no detailed studies discussing the legal aspects could be found. Also no earlier studies have critically analyzed the privatization process. However there are articles on management related questions of the privatization process which do not deal with any legal facets of privatization issues. The literature surveyed advocates privatization in any form kind as evidenced by writings of Tulsi R. Kesharwani and the Naresh Chandra Committee report.

In 2013, Prof. Shafi has published a book titled '*Airport Privatization in India – Legal and Policy Issues*'. In his book, Prof. Shafi focuses on policy matters. Among the legal issues on privatization, the author mainly deals with labour matters and land acquisition process related to airport privatization. Many issues dealt in this research are not addressed such as monopoly, nature of private airports, airport licensing and the Development Fee (DF).

This study also considers the Department Related Parliamentary Standing Committee reports on tourism, culture and civil aviation which have dealt with the privatization issue and the report of the Joint House Committee of Karnataka Legislative Assembly on the issue of new greenfield airport in Bangalore.

From the literature surveyed above, there is clearly a paucity of research and published literature by other authors, regarding the multiple legal and regulatory questions connected with the airport privatization in India. Thus, the study attempts to address them, and to provide recommendations designed to provide solutions.

