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## Legal Implications of airport privatization in India

George, M.

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**Author:** George, Moses

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## **Chapter 3**

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#### **Research Paper 2**

##### **Public Monopoly to Private Monopoly**

##### **- A Case Study of Greenfield Airport Privatization in India – Part 1**

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## **Public Monopoly to Private Monopoly—A Case Study of Greenfield Airport Privatization in India Part I**

by Moses George\*

### *1. Introduction*

Privatization in the field of airport infrastructure in India started with greenfield airports. Greenfield airports at Bangalore and Hyderabad are the first two initiatives as per the policy of the Government of India.<sup>1</sup> These two new greenfield airports began operating on 16 March and 24 May 2008, respectively. The old airports in these cities were closed for commercial civil aviation operations with effect from the opening date of the new greenfield airports. Though everyone welcomed the opening of the new greenfield airports in these cities, considerable public debate has resulted from the closure of the old airports. In this context, this article examines various legal and commercial issues related to closing of the old airports in Bangalore and Hyderabad and the monopoly created thereby.

The article consists of two parts. Part I deals with the issues related to the legal and policy framework, the concession agreement, AAI Act 1994, and the notification regarding closure of the old airports. Part II deals with issues related to other aviation laws, the Constitution of India, competition laws, and public interest issues.

### *2. Research Questions*

Part I of the article considers the following research questions:

- Whether the closing of the old airports is in agreement with the published policy and the procedures thereof;
- Whether the closing of the old airports is in agreement with the existing legal framework;
- Whether the procedure adopted in closing these airports is in accordance with the statutes; and
- Whether the notification regarding such closure is in accordance with law.

### *3. Background*

As in the case of many other developing countries, in India, airports were under the control of the state. The opening up of the Indian economy in the 1990s resulted in tremendous growth in air traffic. Privatization in the airlines sector started in 1990 with the introduction of air taxi operations. However, airport operations in India remained under the control of the government through public sector entities. Until the formation of the International Airports

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\* Moses George is a Manager for the Airports Authority of India (AAI) at Bangalore Airport. Currently, he is pursuing a Ph.D. in air law from Leiden University, The Netherlands.

<sup>1</sup> Cochin International Airport was the first private greenfield airport in India. But this airport was an initiative of the government of Kerala and some non-resident Indians and was conceived much before the greenfield airport policy of the Government of India was announced. Hence Cochin airport is not discussed in this article in detail; for more, see Cochin Airport, <http://www.cochin-airport.in>.

Authority (IAA) in 1972<sup>2</sup> and the National Airports Authority (NAA) in 1985<sup>3</sup> all airports were managed by the Government of India (GoI) directly. International Airports Authority (IAA) was given the responsibility for the international airports at Mumbai, Delhi, Kolkata, and Chennai<sup>4</sup>, and later Trivandrum airport was added. After seeing the functioning of IAA, National Airports Authority was set up to manage and operate the remaining government airports as well as all aeronautical communication stations.<sup>5</sup> However, due to various problems faced by NAA, in 1995 these authorities were merged to form the Airports Authority of India (AAI)<sup>6</sup> through the AAI Act 1994. Since then, all public airports and civil enclaves have been under the control of AAI.

In order to attract the huge investment required in the airport infrastructure sector, GoI introduced privatization of airports under a public private partnership (PPP) scheme. This method is called "private participation" instead of "privatization." Both of the new airports have been built under this PPP model, in which AAI and the state governments hold a 13 percent stake each and the remaining 74 percent is with the private parties. However AAI has invested additional funds in these airports for communications, navigation and surveillance, and air traffic management services (CNS/ATM). State governments supported these projects by providing land in the amount of 4000 acres and financial assistance of Rs. 3750 million, in the case of Bangalore airport. In the case of Hyderabad, the state government has provided Rs. 3150 million as state support and Rs. 1070 million as grant, in addition to over 5000 acres of land on a concessional rate. As both these projects are similar, the case of Bangalore will be analyzed and the variations in the Hyderabad case will be mentioned.

**Table 1: Traffic Trend –Bangalore Airport<sup>7</sup>**

Year	Passengers		Passengers		Passengers	
	International	% Change	Domestic	% Change	Total	% Change
2002-03	367,190	-	2,397,093	-	2,764,283	-
2003-04	477,634	30.1%	2,703,614	12.8%	3,181,248	15.1%
2004-05	678,206	42.0%	3,435,177	27.1%	4,113,383	29.3%
2005-06	862,652	27.2%	4,792,051	39.5%	5,654,703	37.5%
2006-07	1,273,452	47.6%	6,863,965	43.2%	8,137,417	43.9%
2007-08	1,548,432	21.6%	8,572,189	24.9%	10,120,621	24.4%

The growth in civil aviation operations in the last decade has resulted in a lack of required airport capacity in the major cities. For example, Table 1 shows the growth in passenger movements at Bangalore airport. This was one of the reasons for building new greenfield airports in Bangalore and Hyderabad. However, the basic reason for GoI to introduce privatization in this field was to build airports according to international standards.

<sup>2</sup> See International Airports Authority Act of 1971, No. 43 of 1971, available at [http://www.commonlii.org/in/legis/num\\_act/iaaa1\\_971396/](http://www.commonlii.org/in/legis/num_act/iaaa1_971396/) [hereinafter IAA Act 1971].

<sup>3</sup> See National Airports Authority Act of 1985, No. 64 of 1985, available at [http://dgca.nic.in/nat\\_conv/NatConv\\_Chap5.pdf](http://dgca.nic.in/nat_conv/NatConv_Chap5.pdf) [hereinafter NAA Act 1985].

<sup>4</sup> IAA Act 1971, *supra* note 2, clause 1

<sup>5</sup> NAA Act 1985, *supra* note 3, clause 1.3

<sup>6</sup> Airports Authority of India Act of 1994, No. 55 of 1994, available at [http://dgca.nic.in/nat\\_conv/NatConv\\_Chap6.pdf](http://dgca.nic.in/nat_conv/NatConv_Chap6.pdf) [hereinafter AAI Act 1994]

<sup>7</sup> Airports Authority of India, Directorate of Corporate Planning and Management Services [CP&MS], *Traffic Trend—Bangalore Airport*

In 1999, GoI agreed to the government of Karnataka's (GoK) suggestion to build an airport at Devanahalli near Bangalore and gave its permission to build an international airport at the pro-posed site on 4 May 1999.<sup>8</sup> GoK designated Karnataka State Industrial Investments & Development Corporation (KSIIDC) as its nodal agency and GoI designated Airports Authority of India (AAI) as its nodal agency to conceptualize and implement the project. Accordingly, KSIIDC and AAI signed a Memorandum of Understanding (MoU) to develop India's first greenfield international airport with private participation at Devanahalli near Bangalore.<sup>9</sup> A global Notice Inviting Expression of Interest (NIT) was given on 9 June 1999.<sup>10</sup> Based on the global tendering process in August 1999, a consortium led by Siemens, Germany, with Unique Zurich, Switzerland and Larsen and Tourbo India Limited as other members was chosen as the strategic joint venture partner in July 2001.<sup>11</sup> In 2002, a shareholders agreement was executed between KSIIDC, AAI, Siemens, Unique Zurich, Larsen, and Tourbo.<sup>12</sup>

GoI entered into a concession agreement with each airport operator. Vide this agreement GoI assured the airport operator that the existing airports would be closed for Commercial civil aviation operations with effect from the date of opening of the new airports.<sup>13</sup> Accordingly, the old airports were closed by GoI from the date of opening of the new airports for commercial civil aviation operations vide two separate notifications. Hence all scheduled airlines stopped operations from the old airports and shifted their operations to the new airports.

#### 4. *Role of AAI in Airport Infrastructure*

AAI is a body corporate established by Airports Authority of India Act 1994.<sup>14</sup> AAI is required to function according to the provisions of the Act. AAI controls 124 airports in the country, consisting of international airports, domestic airports, and the civil enclaves in some of the defence airports.<sup>15</sup> Apart from managing all its airports, AAI controls the air traffic management (ATM) of all Indian airspace. AAI provides communication navigation and surveillance (CNS) services at all the airports in the country, including brownfield and greenfield airports. These include the few commercially viable airports and the many commercially nonviable airports. AAI cross subsidizes the commercially nonviable airports by the profit it makes from the commercially viable airports. Old Bangalore and Hyderabad airports were commercially viable airports. AAI's competency in airport infrastructure is a well-known and appreciated fact. AAI has even constructed many airports in other countries including South Yemen (Riyan and Algaith airports) and Libya (Ghat and Brak airports). In addition, AAI is providing consultancy services to airport projects in Algeria, Nauru, Seychelles, and Afghanistan.

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<sup>8</sup> Permission of the Ministry of Civil Aviation (MoCA) for the development of the new international airport in Bangalore was conveyed to the Government of Karnataka. See Letter No. AV-200014/0002/90-VB (Vol. IV) (May 4, 1999). This permission conveyed the decision of MoCA on the parameters concerning the location, land, project format, aeronautical charges, and future of HAL Airport, along with landing rights for international airlines.

<sup>9</sup> The Memorandum of Understanding was signed on May 3, 1999.

<sup>10</sup> *Notice Inviting Expression of Interest*, Bus. LINE DAILY, June 9, 1999

<sup>11</sup> *Draft concession agreement for airport approved*, THE HINDU, Jan. 21, 2004, available at <http://www.hindu.com/2004/01/21/stories/2004012105110600.htm>

<sup>12</sup> The shareholders agreement was signed on Jan. 23, 2002

<sup>13</sup> Concession Agreement between the Government of India and BIAL/ HIAL, July 5, 2004 [hereinafter Concession Agreement], art. 5.5, available at [http://www.civilaviation.nic.in/bial/CA\\_BIAL.signed.05.07.2004.pdf](http://www.civilaviation.nic.in/bial/CA_BIAL.signed.05.07.2004.pdf).

<sup>14</sup> See *supra* note 6.

<sup>15</sup> See Airports Authority of India, <http://www.aai.aero>

## 5. *Legal Framework*

Civil aviation in India, especially airport operations, is regulated by the Aircraft Act 1934, Aircraft Rules 1937, and AAI Act 1994. In addition to these, Civil Aviation Requirements (CAR), issued by the Director General of Civil Aviation (DGCA) from time to time, lay down the standards and specifications in detail. All airports controlled by AAI come under the AAI Act and private airports are regulated by Aircraft Act 1934, as well as Aircraft Rules 1937 and CAR.<sup>16</sup>

India has not enacted any privatization law so that the privatization policy would have sanction of the parliament. Such a privatization law would have helped to provide consistency in policy. Also, it could have been a guide to the private entities as well as to the public as far as privatization policy is concerned.

## 6. *Policy Framework*

In 1997, for the first time, GoI published a policy document called "Policy on Airport Infrastructure" setting out broad guidelines for the airport sector.<sup>17</sup> This policy can be seen as the basis of any domestic and foreign private investment in the airport infrastructure sector. However, no legislation was passed by the parliament in line with this policy. Hence it remained as a policy document only.

In 2008, GoI announced a policy called "Greenfield Airport Policy."<sup>18</sup> This document is in line with the earlier policy document except for a few changes.

Recognizing the need for expeditious redress of many deficiencies in the field of civil aviation, GoI constituted a committee headed by Mr. Naresh Chandra, former cabinet secretary, to prepare a road map for rationalizing and reforming the aviation sector in India.<sup>19</sup> The committee submitted its report in November 2003. This committee gave its recommendations about airport privatization, especially that of greenfield airports, in its report. This is the latest expert committee report on the aviation sector.

Privatization of government controlled sectors is not a new policy in India. Many other sectors, including the airline sector, have been opened up for privatization. The policies followed in these sectors also form a broad basis for the policy in the airport infrastructure sector.

## 7. *Issues Related to Policy*

### *Precedence in Privatization*

Privatization, or "private participation," is not a new concept in India. In the post-liberalization era, India has witnessed privatization of many sectors in which only public sector organizations were present, such as airlines, insurance, banking, and petroleum. Private investment and participation by Indian and foreign private investors were allowed

<sup>16</sup> Greenfield Airports Policy of the Government of India, clause 2.4, available at <http://civilaviation.nic.in/greenfield/Greenfield%20Policy.pdf>.

<sup>17</sup> ASHURST LLP, AIRPORT PRIVATIZATION IN INDIA 1 (2004), [http://www.ashurst.com/page.aspx?id\\_Content=1327](http://www.ashurst.com/page.aspx?id_Content=1327).

<sup>18</sup> Greenfield Airports Policy of the Government of India, *supra* note 16.

<sup>19</sup> MINISTRY OF CIVIL AVIATION, REPORT OF THE COMMITTEE ON A ROAD MAP FOR THE CIVIL AVIATION SECTOR (2003), available at <http://civilaviation.nic.in/moca/nccommittereport.pdf>



in all these sectors. However, in all these sectors not even a branch of any Public Sector Undertakings (PSU) was closed down when private investors entered the sector. For example, in the airlines sector no agreement was signed by Gol or the Ministry of Civil Aviation (MoCA) with any private players to close down operation of any flight of state owned Indian Airlines Corporation (IAC) or Air India (AI), nor was any flight of IAC or AI withdrawn to make the private air-line companies more profitable. Similarly, no agreement was signed with other private players to close any branch of Life Insurance Corporation of India (LIC) when private companies were allowed into the insurance sector. In all these sectors, the resultant competition between public sector and private sector entities has helped the public to get better services at much more competitive prices. Also, the total volume of business in all these sectors has increased due to competition. A classic example is the telecom sector. State-owned Bharat Sanchar Nigam Limited (BSNL) was the only operator in the telecom sector. But when private companies were allowed in this sector the traffic volume increased many times due to the competition.

However, in the case of airports Gol signed agreements with Bangalore International Airport Limited (BIAL) and Hyderabad International Airport Limited (RIAL) to close down the existing airports owned by AAI in these cities, to make the private ventures more profitable. This is not consistent with policy or in line with precedent in any other sector.

#### *Gol's Declared Policy on Privatization of Public Sector Undertakings (PSU)*

It is the current government's policy that no profit-making PSUs would be privatized. AAI is an authority created by an act of parliament.<sup>20</sup> AAI was started with no budgetary support but has continuously made profits since its inception. In 2006-07, AAI's profit was Rs. 8600 million.<sup>21</sup> AAI is the only profit-making PSU in the aviation sector in India. All other public sector entities, such as National Airlines Corporation Ltd. and PawanHans, are loss-making companies. Hence the closing down of AAI-owned airports is not in line with Gol's policy not to privatize profit-making PSUs.

#### *Published Policy on Airport Infrastructure*

As stated *supra*, the 1997 GoI policy on airport infrastructure was the only document available in the public domain when the greenfield airport in Bangalore was announced. This policy contains a chapter on greenfield airports.<sup>22</sup>

### VIABILITY OF GREENFIELD AIRPORTS

The policy document states that an expert committee, the "Airport Approval Commission," should examine the following issues regarding the need and viability of a greenfield airport:

- a. Whether there is need for a Greenfield airport at the suggested place, taking into account the existing airports in the vicinity and projected increase in traffic;
- b. Which is the best site, which is technically feasible and economically viable;
- c. In case there is need for a Greenfield airport and it is found to be *prima facie* feasible and viable, whether it should be executed in the public or private sector or be taken

<sup>20</sup> See AAI Act 1994, *supra* note 6

<sup>21</sup> Airports Authority of India [AAI], *Highest Ever Dividend From AAI*, CRUISING HEIGHTS, Dec.14, 2007.

<sup>22</sup> AAI, Policy on Airport Infrastructure, available at [http://aai.aero/misc/policy\\_main.jsp](http://aai.aero/misc/policy_main.jsp)

up as a joint venture.<sup>23</sup>

Hence the policy envisages that a greenfield airport should be viable considering the traffic in excess of the capacity of airports in the vicinity, instead of taking away the traffic of the existing airports.

#### DISTANCE RESTRICTIONS FOR GREENFIELD AIRPORTS FROM EXISTING AIRPORTS

The policy on airport infrastructure states:

No Greenfield airport will normally be allowed within an aerial distance of 150 kilometres of an existing airport. Where it is allowed as a second airport in the same city or close vicinity, the parameters for distribution of traffic between the two airports will be clearly spelt out.<sup>24</sup>

But in the case of Bangalore and Hyderabad, greenfield airports were permitted within a 150 km radius of the existing AAI airports in violation of this clause. Moreover, instead of setting the parameters for distribution of traffic between the two airports clearly in accordance with the policy document, a clause to close down the existing airports was introduced in the concession agreements.

Also, the clause regarding the 150 km restriction mentioned in the policy is applicable only in case of sanction of a new green-field airport where an existing airport is functioning and not to an existing or brownfield airport where a greenfield airport is permitted. Hence the use of the clause to restrict an existing airport which is not a greenfield airport is contrary to the policy.

#### GREENFIELD AIRPORT AS REPLACEMENT OR FOR SIMULTANEOUS OPERATIONS

The policy also states:

A Greenfield airport may be permitted where an existing airport is unable to meet the projected requirements of traffic or a new focal point of traffic emerges with sufficient viability. It can be allowed both as a replacement for an existing airport or for simultaneous operation. This aspect has to be clearly spelt out in the notice inviting tenders.<sup>25</sup>

Therefore, as per the policy document, where a second airport is permitted, as in the case of Bangalore and Hyderabad, whether the new greenfield airport is the replacement of the existing airport or for simultaneous operation should have been clearly spelled out in the Notice Inviting Tenders (NIT). Interestingly, the notice inviting tenders in the case of Bangalore states:

In view of the potential air transport growth and in pursuance of the policy of GoI on creation of airport infrastructure and GoK has taken an initiative to establish a greenfield International Airport at Devanahalli, near Bangalore Karnataka, India.<sup>26</sup>

<sup>23</sup> *Id.* para. 6 (Private Sector Participation).

<sup>24</sup> Policy on Airport Infrastructure, *supra* note 22, para. 3

<sup>25</sup> *Id.* para. 2.

<sup>26</sup> *Notice Inviting Tenders*, THE HINDU, June 9, 1999

From this it is clear that the notice inviting tender (expression of interest) was as per the policy of the GoI and not independent of it. Moreover, the Notice Inviting Expression of Interest does not say the new greenfield airport is a replacement of the existing one. In the absence of such affirmation in the Notice Inviting Expression of Interest closure of the old Bangalore airport is not as per the policy guidelines and the Notice itself.

## VIABILITY ENHANCEMENT METHODS

Viability enhancement methods detailed in the procedure guidelines to set up greenfield airports suggest many methods, including giving land on a concessional rate, exempting taxes, and others. But these methods do not envisage closure of the existing airport as a method to enhance the economic viability of a greenfield airport project. Traffic volume at Bangalore in the year 1999 and the growth rate of the preceding years were not encouraging; whereas, after the tender was called, there was an exponential growth in air traffic at Bangalore.

### *Expert Opinion – Naresh Chandra Committee Report*

In its report submitted in November 2003, the expert committee on aviation appointed by GoI stated that GoI had decided to review the clause that "no greenfield airport will normally be allowed within an aerial distance of 150 kilometers of an existing airport."<sup>27</sup>

It is hence clear that, at least until 2003, GoI had a policy of not allowing new greenfield airports within 150 kms of existing airports. Thus, permitting a new greenfield airport within 150kms of the existing AAI airport, in the year 1999, was not in line with the then-existing policy of GoI. This also points to the inconsistency of the policy and its application

## 8. *Issues Related to Procedure*

### *Permission of GoI*

Based upon GoI's in-principle approval for the greenfield airport project in Bangalore in 1999, tender was called for the new greenfield airport. This permission document does not state that the old Hindustan Aeronautics Ltd. airport (HAL) would be closed for all commercial operations. Rather, it states that HAL airport would be open for short haul flights.<sup>28</sup> From this it is clear that, at the time of the notice inviting tenders, the executive decision was to keep HAL airport open for short haul flights, chartered, and VIP flights. Considering the meager traffic at Bangalore airport in 1998-99, the 1999 decision to keep HAL airport open demonstrates the need for two airports now as the traffic has passed the 10 million mark in 2008.

### *MoU between AAI and KSIIDC*

KSIIDC<sup>29</sup> and AAI signed a MoU to develop India's first greenfield airport with private participation at Devanahalli, near Bangalore, in May 1999. This MoU does not state that the

<sup>27</sup> MINISTRY OF CIVIL AVIATION, *supra* note 19, at 13

<sup>28</sup> The existing HAL airport could continue to be available to small aircraft (up to 52 seater capacity) for short haul operations, training, emergency and VIP flights." Letter of the Under Secretary to the Govt. of India (May 4, 1999).

<sup>29</sup> Karnataka State Industrial Infrastructure Development Corporation is a fully owned corporation of the State of Karnataka

old HAL airport would be closed for commercial operations once the proposed greenfield airport started operations. The MoU discusses only the proposal of the government of Karnataka to build a new greenfield airport at a site near Devanahalli in order to meet the growing demand of the Bangalore city. The high level meeting regarding the project before executing the MoU decided that HAL airport would be opened for small aircraft.<sup>30</sup> Also, the MoU provided for constitution of a steering committee consisting of GoI, GoK, and AAI to supervise the tender process and the agreement.

### *Notice Inviting Expression of Interest*

The Notice Inviting Expression of Interest<sup>31</sup> was the basic document on the basis of which private investors submitted their expression of interest. The document stated it was an invitation to design, finance, construct, operate, and maintain a Greenfield international airport on a joint venture basis.<sup>32</sup> Hence, it is clear that the project is in respect of a new greenfield *international* airport on a build-operate-transfer (BOT) basis and the project did not involve a domestic airport. In 1999, Bangalore airport was even granted international airport status. Only in the year 2000 was the old airport in Bangalore declared an international airport. Any such important condition, like the closure of HAL airport when the proposed greenfield international airport started functioning, should have been included in this publication. However, no such condition was proposed in this notice. It shows that at the time of this notice, too, there was no plan to close down HAL airport once the greenfield international airport started operation. Moreover, all the parties who participated in the tender process made their offers on this basis only. Making an offer of closure of HAL airport after publishing the Notice Inviting Expression of Interest does not go well with established practices.

### *Shareholders Agreement*

After selecting a joint venture partner through the tender process, AAI, KSIDC, and the joint venture partners Siemens, Unique Zurich, Larsen, and Turbo entered into a share holders agreement in 2002.<sup>33</sup> By this time the new joint venture company, called Bangalore International Airport Limited (BIAL), was registered under Companies Act 1956. The shareholders agreement states that "the private promoters had proposed that the project is feasible only with state support and lease of land on concessional terms, as financing for the project could not be fully met through the equity contributions and the debt financing from lenders," and "[i]n view of the aforesaid, GoI and GoK have agreed to support the company in terms of Airport development Agreement, State support Agreement, and Land lease Agreement." It can be seen that the shareholders agreement does not say anything about the condition of closure of HAL airport once the new greenfield airport starts operation. This shows that the promoters of the company did not consider closure of HAL airport as a method necessary to make the project financially viable.

The concession agreement to be signed by the GoI and the promoters itself was not mentioned in the shareholders agreement. It is pertinent to note that in the case of the first greenfield airport project in India, namely Cochin International Airport (CIAL), which also was a PPP model project, there was no concession agreement between GoI and the

<sup>30</sup> Minutes of the meeting held in Apr. 15, 1999.

<sup>31</sup> *Notice Inviting Expression of Interest*, *supra* note 10.

<sup>32</sup> *Id.*

<sup>33</sup> *See supra* note 12.

promoters. The company, CIAL, started operations in 1999 without any support from GoI and began paying dividends in 2003-04.<sup>34</sup>

### *Draft Concession Agreement*

No draft agreement was available in the beginning of the Bangalore greenfield airport project. Though the tender process was started in 1999, not even a draft concession agreement was finalized until 2004. This was due to the objections raised by different ministries and BIAL to many proposed drafts.

As stated *supra*, a steering committee was set up in May 1999 as per the MoU between AAI and KSIIDC, consisting of members representing GoI, GoK, and the state promoters, mainly to: (a) oversee and manage the process of selecting; (b) address the concerns of state promoters; and (c) decide about important aspects of the project in the technical, financial, organizational, and legal (project agreements) areas. As per the draft concession agreement proposed by this committee in its September 2002 meeting, the clause regarding the exclusivity in respect of the proposed new greenfield airport was as follows:

#### Exclusivity (domestic airports)

No new greenfield airport excluding those in the pipeline (where land has been acquired) would be allowed within an aerial distance of 150 kms from Bangalore International Airport (BIA). No existing airport in the above aerial distance range would be declared as an international airport. Upgradation and expansion of existing airports would not be covered under this exclusivity.<sup>35</sup>

However, the aforementioned draft concession agreement proposed by the steering committee was not considered subsequently. Instead, another draft concession agreement submitted by BIAL to MoCA was considered.<sup>36</sup> Comments of various ministries were invited to the BIAL submitted draft concession agreement. In June 2003, the finance ministry objected to the agreement, saying "it impinged on the sovereign right of the country to decide on aviation matters." It said the agreement had given Bangalore International Airport Ltd. (BIAL) the right to be consulted on any negotiations on civil aviation issues between India and other countries.<sup>37</sup> Discussions on the agreement had been ongoing between the civil aviation ministry and the BIAL since May 2002. Some of BIAL's demands were even accommodated in the Airports Authority Act 1994 (Amendment) 2003.

Finally, a draft concession agreement was evolved by a working group constituted by the Prime Minister's Office (PMO) with representatives from MoCA, the Department of Economic Affairs, the Ministry of Law and Justice, and the Government of Karnataka in January 2004,<sup>38</sup> in line with the draft concession agreement submitted by BIAL. The draft agreement evolved by the working group was approved by the union cabinet on 20 January

<sup>34</sup> See *supra* note 1.

<sup>35</sup> See Proceedings of the 16th Meeting of the Steering Committee on New International Airport at Devanahally, near Bangalore, available at [http:// bangalore.praja.in/blog/rithesh/2009/01/14/bial-rti-bial-development-over-view-and-steering-committee-meeting](http://bangalore.praja.in/blog/rithesh/2009/01/14/bial-rti-bial-development-over-view-and-steering-committee-meeting).

<sup>36</sup> See Proceedings of the 17th Meeting of the Steering Committee on New International Airport at Devanahally, near Bangalore, available at [http:// bangalore.praja.in/blog/rithesh/2009/01/14/bial-rti-bial-development-over-view-and-steering-committee-meeting](http://bangalore.praja.in/blog/rithesh/2009/01/14/bial-rti-bial-development-over-view-and-steering-committee-meeting).

<sup>37</sup> Draft concession agreement for airport approved, *supra* note 11.

<sup>38</sup> *id*

2004.<sup>39</sup> However, the private promoters of BIAL objected to many clauses in the draft agreement.<sup>40</sup> One of the main objections concerned the absence of a concrete obligation on the part of GoI regarding the closing of HAL airport. BIAL had objected to the not-so-solid version of the obligation contained in the clause - "the Government of India will endeavour closure of the existing HAL airport."<sup>41</sup> Considering these objections, MoCA proposed some language related modification in the draft agreement.<sup>42</sup> The union cabinet approved the new draft on 15 June 2004.<sup>43</sup> In this new draft the wordings "the Government of India will *endeavour* closure of the existing HAL airport" was changed to "the Government of India will *ensure* closure of the existing HAL airport" (emphasis added). Finally, a concession agreement based on the new draft was signed by GoI and BIAL on 5 July 2004.

In connection with the proposed language-related modifications, it can be seen that MoCA advised the union cabinet that there was hardly any difference between "endeavour to ensure" and "will ensure" with regard to closure of the HAL airport.<sup>44</sup> As per available cabinet papers, the wording "GoI will ensure" was suggested considering the insistence of BIAL, comments of MoCA, and in view of section 40 of AAI Act 1994.<sup>45</sup>

As there was no proposal to sign a concession agreement in the Notice Inviting Expression of Interest, most probably the authorities had not included a draft concession agreement in the Notice or in the EOI. If such a draft concession agreement had been made a part of the Notice Inviting Expression of Interest this complication could have been avoided. However, it is clear that there was no condition regarding closure of HAL airport in the draft concession agreement until May 2004 and that such a major change in the clause was introduced in the name of "language modification."

## 9. Concession Agreement

The concession agreement (CA) dated 5 July 2004 has a clause making it an obligation of GoI to publish a notification declaring that HAL airport will not be available for commercial civil aviation operations from the date of opening of the new BIAL airport in Devanahalli. The relevant articles of the concession agreement regarding monopoly are as follows:

### Exclusivity

#### 5.2.1 International

No new or existing airport shall be permitted by GoI to be developed as, or improved or upgraded into, an International Airport within an aerial distance of 150 kilometres of the airport before the twenty-fifth anniversary of the Airport Opening Date.

#### 5.2.2 Domestic

No new or existing airport (except for Mysore and Hassan airports) shall be permitted by GoI to be developed as, or improved or upgraded into, a Domestic Airport within an

<sup>39</sup> *id*

<sup>40</sup> Ministry clears Bangalore airport project- BIAL seeks review of draft version of concession pact, Bus. LINE DAILY, Mar.19, 2004, available at <http://www.thehindubusinessline.com/2004/03/19/stories/2004031901131700.htm>.

<sup>41</sup> Centre clears changes to BIAL agreement, THE HINDU, June 16, 2004, available at <http://www.hindu.com/2004/06/16/stories/2004061605680800.htm>.

<sup>42</sup> *id*

<sup>43</sup> *id*

<sup>44</sup> Government of India, Ministry of Civil Aviation, *Cabinet Papers*, AV 20014/002/2000-AAI, Annexure 1.

<sup>45</sup> *id*

aerial distance of 150 kilometres of the airport before the twenty-fifth anniversary of the Airport Opening Date.<sup>46</sup>

And Article 5.5 regarding the existing airports states:

5.5 Existing Airport

5.5.1 Existing Airport

- (i) BIAL shall, six (6) months prior to the anticipated Airport Opening Date, notify Gol of the date it expects Airport Opening to occur.
- (ii) From and with effect from the date on which Airport Opening occurs Gol will ensure that the Existing Airport shall not be open or available for use for commercial civil aviation operations and shall no longer be classified as a civil enclave under the AAI Act 1994.

From and with effect from the date on which Airport Opening occurs Gol will issue and publish an appropriate notification stating that the Existing Airport is no longer open or available for commercial civil aviation operations (which shall, for these purposes, not include use for Airport activity at times of national emergency or (at any time) by air-craft owned or operated by or for the Indian Air Force or other Armed Forces of India or for transportation of dignitaries by special government hired VIP aircraft or otherwise for their use or activities) and that it is no longer classified as a civil enclave under the AAI Act and also for ensuring that the international code (BLR) of the Existing Airport is transferred to the Airport.

- (iii) General Aviation Services (other than those relating to commercial aircraft) may continue to be provided at the Existing Airport notwithstanding its closure to commercial aircraft pursuant to paragraphs (ii) and (iii) above.<sup>47</sup>

*Scope of the Concession Agreement*

The concession agreement states that the concession is with respect to "the airport,"<sup>48</sup> which is defined in Article 1 as:

Airport – means the greenfield international airport comprising of the initial phase, to be constructed and operated by BIAL at Devanahalli, near Bangalore in the State of Karnataka and includes all its buildings, equipment, facilities and systems and including, where the circumstances so require, any Expansion thereof, as per the master plan annexed hereto as Attachment 1.

Hence the concession is with respect to the greenfield airport at Devanahalli only. Since the scope of the concession agreement is limited to Devanahalli airport, the inclusion of a clause regarding HAL airport closure is beyond the scope of the agreement.

*Applicable Laws*

The concession agreement states that it is subject to Indian law.<sup>49</sup> But no Indian law has a provision regarding closure of an airport belonging to AAI, that too because of a

<sup>46</sup> Concession Agreement, *supra* note 13, art. 5.2

<sup>47</sup> *Id.* art. 5.5.

<sup>48</sup> *Id.* art. 3.1.1

<sup>49</sup> *Id.* art. 3.1.1 (read along with the definition of "applicable law" in art.1.1).

contractual commitment made by the Gol by a private act, nor to prohibit an airport within 150 kms of a new airport. Hence clauses 5.2 and 2.5, creating a condition regarding the minimum distance from the new airport, are in contradiction to the basic applicable law accepted by the parties in the concession agreement.

### *Nature of the Parties to the Agreement*

The concession agreement states:

18.13.1 GoI unconditionally and irrevocably agrees that the execution, delivery and performance by it of this agreement and those agreements and other documents comprising the security to which it is a party constitute private and commercial acts rather than public or governmental acts.<sup>50</sup>

Since the execution, delivery, and performance of the concession agreement by GoI are not governmental or public acts, but only private and commercial acts, the question is whether GoI – in its private capacity – can enter into an agreement to close an AAI airport. It is clear that without exercising its governmental power GoI cannot close an AAI airport.

To avoid the possibility of GoI exercising sovereign immunity at a later stage, the agreement defines the execution, delivery, and performance of the agreement as private and commercial acts. This may be appropriate in cases where GoI is entering into a private agreement like any other private entity. But in this case, the concessions given by GoI to BIAL could be given only by governmental acts, not by private acts. GoI's power to administer the issues related to airports in accordance with statutes falls within its governmental capacity only. No other private person has power to grant any concession for an airport as per the delegation of powers. Also, GoI decided to give the concession to BIAL by a governmental act, a cabinet decision. Hence the grant of concessions cannot be a private act. On this count the concession agreement itself is *ultra vires*.

### *Approbation and Reprobation of the Distance Restriction Clause*

The basic concession granted by the concession agreement is permitting a new greenfield airport within 150kms of the existing HAL airport,<sup>51</sup> but the concession agreement in subsequent portion prohibited any new or existing airport within 150kms of the new greenfield airport.<sup>52</sup> The approbation and reprobation of the clause regarding an airport within 150 kms of an existing airport in the same concession agreement are not in harmony with one another.

### *Third Party Interest*

The parties to the concession agreement are Gol and BIAL, a company registered under Companies Act 1956. But the old airport belongs to AAI and Hindustan Aeronautics Ltd., two public sectors undertakings (PSU).<sup>53</sup> These two PSUs are different legal entities from Gol and BIAL. However, neither AAI nor HAL are parties to the concession agreement. Gol's

<sup>50</sup> *Id.* art. 18.

<sup>51</sup> *Id.* art. 3.1.1

<sup>52</sup> Concession Agreement, *supra* note 13, arts. 5.2 & 5.5.

<sup>53</sup> In the case of Hyderabad, the airport belongs to AAI only.



promise in the concession agreement to close HAL, an airport owned by two other legal entities, is not in accord with the AAI Act. It is not appropriate to create an obligation on the part of AAI, which is not a party to the agreement. In this connection, it can be seen that the cabinet was advised that no binding obligation could possibly be created by an agreement against a third party, *i.e.*, DGCA, when DGCA is not a party to the concession agreement.<sup>54</sup>

#### *Applicability of the Concession Agreement to Other Airports*

Another private airport near Bangalore, Hosur airport, continues to be operational within 150 kms of the new Bangalore greenfield airport. As per the concession agreement this airport also should not be developed as, or improved or upgraded into, a domestic airport before the twenty-fifth anniversary of the greenfield airport opening date. However, the concession agreement is silent about banning *commercial civil aviation operations* from this airport. Hence commercial operations are taking place at this airport, including chartered aircraft operations. Similar conditions are applicable to any other existing or new airports within 150 kms of the new airport. Chartered aircraft operations, including air taxi operations, need to be permitted from these airports, which can easily bypass the concession agreement clause. Thus, except for HAL/Begumpet airports which are owned by AAI, all other existing or new airports are permitted to have commercial civil aviation operations. Hence the terms of the concession agreement specifically deprive public-owned AAI airports only, and not any private airports. This also establishes that Gol cannot create an obligation on a third party by an agreement between itself and an airport operator.

#### *10. NoC for Setting up of Bangalore Greenfield Airport by Ministry of Defence*

As per the Aircraft Rules, 1937 and CAR, a No Objection Certificate (NoC) by the Ministry of Defence (MoD) is a mandatory clearance required for the issuance of a site clearance by the DGCA for setting up an airport. As per the CAR,

The potential owner/operator shall submit an application in Form CA 93(A) as set out in Attachment I of this CAR to the DGCA for technical approval of the aerodrome site. And the applicant may forward along with the application form attested copies of the clearances/permission from the Ministry of Defence<sup>55</sup>

The MoD had given its NoC subject to a condition: "the operations at HAL airport, Bangalore will continue even after the BIAL becomes functional and the choice of airport to be utilized should be left to the operators /commuters/general public."<sup>56</sup>

However, the airport developers objected to this clause in the NoC. Subsequently, MoD issued a clarification in February 2005 deleting this condition from the NoC.<sup>57</sup> Two factors need to be considered in the light of this development. First, in the original NoC, issued in

<sup>54</sup> This advice was given in connection with language modification proposed in the concession agreement in article 7.6 of the draft concession agreement. The original wording was "Gol shall use its good office to assist BIAL for DGCA's grant of an Airport license" and the proposed amendment was "DGCA shall grant an Airport license." See Government of India, Ministry of Civil Aviation, *Cabinet Papers*, AV 200014/002/2000- AAI, Serial No. 2

<sup>55</sup> Civil Aviation Requirements, section 4, ser. F, pt. I, available at <http://www.civilaviation.nic.in>.

<sup>56</sup> The Ministry of Defence had given its NoC for Devanahalli Greenfield Airport in its letter dated Mar. 3, 2004. See File No. 3(48)/02/D (Air. II) (Mar. 3, 2004).

<sup>57</sup> Ministry of Defence Letter, File No. 3(48)/02/D (Air. II) (Feb. 7, 2005).

March 2004, just before the signing of the concession agreement, the stand of MoD, which has authority over HAL, was very clear - not to close down HAL airport. Hence it is clear that at the time the concession agreement was signed MoD had not agreed to the closure of HAL airport. In its subsequent letter, dated February 2005, MoD deleted the condition as far as the NoC for the new airport was concerned, but there was no confirmation or assurance that HAL airport would be closed.<sup>58</sup>

### 11. *Airports Authority Act 1994*

Various issues and violations with respect to the Airports Authority Act 1994 (AAI Act) are discussed in this section. AAI was created as a separate legal entity by the AAI Act. All airports, except private airports, come under the AAI Act - including the civil enclave of HAL airport. The AAI Act does not stipulate any kind of distance restriction between two airports. Hence the 150 km restriction stipulated in the concession agreement is not in accordance with the provisions of AAI Act.

There is no provision as per the AAI Act to close down an AAI airport, especially only for commercial civil aviation operations. AAI Act chapter III section 12 defines the functions of AAI. Though this section states it is the function of AAI to establish and maintain airports, it does not discuss the closing of an airport in the event that another company or organization builds an airport where an AAI airport or civil enclave is functioning. It shows that the parliament in its wisdom has never envisaged closing down of a public airport. In the absence of any parliamentary approval for such a closure, the executive action of closing down HAL airport is not in accordance with the AAI Act 1994. Further, if AAI could close down an airport then, in line with section 11 of the Act, it should have closed down scores of non-operating airports in India which drain away AAI's revenue.

As per the AAI Act, AAI is expected to function on business principles.<sup>59</sup> Hence it is in violation of the AAI Act to close down a profit-making airport of AAI which will result in a loss of revenue estimated at Rs 1450 million per annum in case of Bangalore and Rs 2210 million in case of Hyderabad.<sup>60</sup> This loss to AAI is ignored, while a clause has been inserted in the concession agreement to ensure maximum profit to another entity at the AAI's expense. In the absence of clauses 5.5 and 5.2 of the concession agreement, AAI would have faced stiff competition from the greenfield airports and the market forces would have decided the fate of AAI's civil enclave in comparison to a new private airport built to international standards. Hence the clauses 5.2 and 5.5 of the concession agreement are in violation of AAI Act.

As per AAI Act 1994, the AAI board must decide on all matters related to AAI.<sup>61</sup> Hence the closure of HAL airport, owned by AAI, also had to be decided by the AAI board. However, the AAI board did not make any decision to close down HAL airport when BIAL airport

<sup>58</sup> This issue is not relevant in case of Hyderabad as the old airport is fully owned by AAI

<sup>59</sup> Clause 1 states: "Authority to act on business principles. In the discharge of its functions under this Act, the Authority shall Act, so far as may be, on business principles." AAI Act 1994, *supra* note 6.

<sup>60</sup> With respect to the revenue collection of Bangalore and Hyderabad airport for the financial year 2007-08.

<sup>61</sup> Clause 8.3 states: "(3) All questions which come up before any meeting of the Authority shall be decided by a majority of the votes of the members present and voting and in the event of an equality of votes the Chairperson, or in his absence the person presiding, shall have and exercise a second or casting vote." AAI Act 1994, *supra* note 6.

started functioning. Hence the decision to close down the old airport also violates the AAI Act on this count.

As stated *supra*, HAL and AAI are not signatories to the concession agreement between GoI and BIAL. Under the AAI Act, any agreement in which AAI is a party must be signed by the AAI chairman or a board member generally or specially empowered in this behalf by the authority.<sup>62</sup> The concession agreement is, however, signed by the Joint Secretary, MoCA for the President of India. Hence in the first place the concession agreement should not have had a clause which would adversely affect a third party, namely AAI (or HAL); secondly BIAL or GoI should have entered into a separate agreement regarding the closure of AAI's civil enclave with AAI. However, one may think that GoI was competent to sign the concession agreement in place of AAI due to two possible reasons: (a) AAI is a PSU working under the control of the government; or (b) AAI is a part of the company called BIAL. If this is considered true, there was no need to have an agreement with AAI in any case. But the actions of the parties prove otherwise. For this purpose another agreement entered between AAI and BIAL, known as the CNS-ATM agreement, may be considered. By this agreement AAI agreed to provide CNS/ ATM services to BIAL airport. As per the AAI Act, AAI is responsible for providing air traffic services within Indian airspace and all civil airports in India.<sup>63</sup> In spite of this statutory obligation on AAI to provide CNS-ATM services, even in BIAL airport, BIAL preferred to enter into the separate CNS-ATM agreement with AAI. Hence it is clear that BIAL and AAI are two different legal entities. It is also clear that BIAL has understood that in the case of any contract affecting AAI, there has to be a specific agreement between BIAL and AAI to that effect, though AAI is also a shareholder of BIAL.

Another relevant question is whether the concession agreement limits AAI's power in any way to manage AAI airports as envisaged in the AAI Act. This would be possible only in a case where the concession agreement can supersede the AAI Act, which is not true. Moreover, as AAI is not a signatory to the concession agreement, the agreement between GoI and BIAL cannot limit AAI's powers under AAI Act to manage its airports.

In a hypothetical case, if the old airports were owned by a private entity, could the authorities have signed such a concession agreement with the new airport operators, assuring closure of the old airports without the concurrence of the airport operators? Would the operators of the old airports have agreed to such a closure? Could the authorities have used the issue of financial viability of the new airport as a reason to close the old airports? Could the executive have closed the old airports through a notification under section 5A? Business and legal principles do not support affirmative answers for these questions.

## 12. Notification Regarding Closure of Old Airports

Two different notifications were published on 20 March and 16 May 2008 in the Gazette of India declaring that commercial civil aviation operations would not be permitted from Begumpet airport, Hyderabad, and HAL airport, Bangalore.<sup>64</sup> In this section various issues connected with the notifications, including violations, are analyzed.

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<sup>62</sup> *Id.* clause 21.1

<sup>63</sup> AAI Act 1994, *supra* note 6, sec. 12(3).

<sup>64</sup> The text of the notification dated May 16, 2008 in respect of HAL airport is as follows:

In the case of the HAL airport at Bangalore, the first part of the first sentence of the notification describes which provision of law was used as the basis for the power to issue such notification, and its second part for what purpose the said power was used. Basically, Gol invoked the power under section 5A of the Aircraft Act 1934 and used it in deference of the contractual commitments, including clause 5.5 of the concession agreement signed between Gol and Bangalore International Airport Limited (BIAL).

At the outset, from the sections of relevant acts and rules quoted in the notification, it is clear that, in the opinion of Gol, these are the sections which give powers to Gol to close down an AAI airport.

Section 5A of the Aircraft Act 1934 provides:

5A. Power to issue directions.- (1) The Director- General of Civil Aviation or any other officer specially empowered in this behalf by the Central Government may, from time to time, by order, issue directions, consistent with the provisions of this act and the rules made thereunder, with respect to any of the matters specified in clauses (aa), (b), (c), (e), (f), (g), (ga), (gb), (gc), (h), (i) and (m) and (qq) of sub-section (2) of section 5, to any person or using an aerodrome or engaged in the aircraft operations, air traffic control, maintenance and operation of aerodrome, communication, navigation, surveillance and air traffic, management facilities and safeguarding civil aviation against acts of unlawful interference, in any case where the Director-General of Civil Aviation or such other officer is satisfied that in the interests of the security of India or for securing the safety of aircraft operations it is necessary so to do.

The notification does not specify with respect to which topic specified in section 5 the notification was issued under section 5A of the Aircraft Act 1934. It can be seen that the clauses (aa), (b), (c), (e), (f), (g), (ga), (gb), (gc), (h), (i) and (m) and (qq) of sub-section (2) of section 5 do not discuss the closing of an airport for commercial civil operations. Hence, the usage of section 5A in the current case cannot be in accordance with the provisions of the Aircraft Act 1934. This clause cannot be used to close down an airport under these sections of Aircraft Act 1934.

Section 5A makes it very clear that these powers can be used only in two situations, *viz.*:

- (a) if the security of India is in danger;
- (a) if the safety of the aircraft is in danger. In the case of HAL Bangalore and Hyderabad neither of these situations exists. No incidents have been reported on the issue of security of India with respect to HAL airport Bangalore and the old Hyderabad airport. Also, the exemption of VIP flights from the ambit of the notification itself shows that safety of aircraft operations is not in danger as far as these airports are concerned. Moreover the notifications state that these powers were used "in deference

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[S.0.1170(E) – In exercise of powers conferred by Section 5A of the Aircraft Act, 1934, read with Rules 11 and 78 of the Aircraft Rules, 1937 and all other applicable statutes and other enabling powers on that regard and in deference of the contractual commitments including Clause 5.5 of the Concession Agreement signed between Government of India and Bangalore International Airport Limited (BIAL) on 05th July, 2004, the Central Government hereby notifies that consequent on commissioning of the Bangalore International Airport at Devanahalli, w.e.f. 0001 hours of 23rd May, 2008, the HAL Airport at Bangalore will no longer be available for commercial civil aviation operations except at times of national emergency. The International Air Transport Association code "BLR" for the HAL Airport is hereby transferred to the Bangalore International Airport at Devanahalli with effect from the above date and time.

of the contractual commitments"<sup>65</sup> which clearly shows that the use of powers under section 5A was not due to the reasons detailed in the section but only in deference to the contractual commitments of GoI with BIAL.

An example of appropriate use of power conferred under section 5A by DGCA can be seen in its recent direction declaring airspace up to 10,000 ft. within a radius of 10 km from Kalpakkam nuclear power plant in the state of Tamilnadu a "no-fly-zone" to prevent any 9/11 kind of incidents in this sensitive site.<sup>66</sup> In this case the notification clearly states "DGCA was convinced that in the interest of security of India it was necessary to do so" unlike in the case of notifications regarding the closure of HAL and Begampet airports.

Also, the competency of the authority to issue the order under section 5A is a major issue. The notifications regarding the closure of HAL and Begampet airports for commercial aviation were issued by joint secretaries of MoCA, whereas, in case of the Kalpakkam notification, it was issued by the DGCA. As per the Aircraft Act 1934, a direction under section 5A of the Act may be issued by "DGCA or any other officer specially empowered in this behalf by the central government." So as per section 5A, if the notification is not issued by DGCA then it can be issued only by an officer specifically empowered to that effect by GoI.<sup>67</sup> In absence of clear government orders specially empowering the particular joint secretaries to issue the said notifications, the notification is *ultra vires*.

Also, as per section 5A, the Director-General of Civil Aviation or such other officer should be satisfied that in the interest of the security of India or for securing the safety of aircraft operations it is necessary to impose any restriction. In the case of the Kalpakkam notification it was made clear that DGCA was satisfied about the requirement to do so whereas in the case of Bangalore the notification is silent on this requirement.

There is no provision to use section 5A in deference of any contractual commitments made by GoI. In this case execution of the concerned agreement needs to be a purely private and commercial act and not a public and government act.<sup>68</sup> Justification can-not be seen for GoI using a power available to it for governmental acts to honor a private and commercial act, *i.e.*, an assurance given to a private entity- especially when the purpose of such commitment is nothing more than the economic benefit of the private entity.

Section 5A of the Act was used to honor a private and commercial agreement in the notification. However, the very same concession agreement says the performance of the agreement constitutes a private and commercial act, not a governmental or public act. Hence, when the agreement itself limits the scope of the performance of the agreement to private and commercial acts, usage of a governmental act to perform the agreement is contradictory to the provisions of the agreement itself.

<sup>65</sup> AAI Act 1994, *supra* note 6, sec. 12.(3).

<sup>66</sup> *Kalpakkam N-plant made a no-fly zone*, TIMES OF INDIA, Dec. 17, 2008, available at <http://mobile.timesofindia.indiatimes.com/city/chennai/Kalpakkam-N-plant-made-a-no-fly-zone/articleshow/3848207.cms>. The direction issued by Director General of Civil Aviation Dr. Nasim Zaidi's states that "[t]he DGCA, being satisfied that in the interest of the security of India it is necessary so to do, hereby directs that no person shall fly or assist in flying an aircraft up to the height of 10,000 feet over the area included within a radius of 10 km from Kalpakkam nuclear installation."

<sup>67</sup> The DGCA or MoCA Internet websites also do not give any information about any special order/notification empowering any particular joint secretaries MoCA, to issue directions under section 5A of Aircraft Act 1934.

<sup>68</sup> Concession Agreement, *supra* note 13, art.18.13.

The notification in the case of restricting flying over the Kalpakkam nuclear plant is published in the Aeronautical Information Service (AIS),<sup>69</sup> whereas the notifications regarding HAL/ Begumpet airports are published in the Gazette of India only.

The requirement to issue the notification was clearly spelled out in the concession agreement. Hence the notification is just part of performance of the concession agreement, by way of publication of a notification in the official gazette, which is not permitted under section 5A. However, the executive was aware that it has no power to issue such a notification for commercial reasons (in deference to a contractual obligation) at the time of execution of the agreement. Thus the execution of the agreement was *ultra vires* as far as the power to perform such contractual obligations is concerned.

From the cabinet papers regarding language modification in the draft concession agreement in case of BIAL, it is clear that MoCA had opined that "in view of section 40 of AAI Act it appears permissible to agree to retain original the wordings '*GoI will ensure closure (of existing airport)*' because Gol can give policy directions under provisions of section 40 which shall be binding and final."<sup>70</sup> This opinion points to the fact that during the time of approval of the draft concession agreement it was envisaged to use section 40 of the AAI Act, not section 5A of the Aircraft Act 1934.

In case of Hyderabad airport there is some change in the sections of the Aircraft Act 1934, the Aircraft Rules 1937, and AAI Act invoked.<sup>71</sup> This notification is under section 5 of the Aircraft

Act 1934 and section 40 of the AAI Act 1994, in addition to section 5A of the Aircraft Act 1934. First of all, the purposes of these two sections are totally different. While under section 5(1), subject to section 14, the central government may make rules, by notification in the official gazette, regulating the manufacture, possession, use, operation, sale, import, or export of any aircraft or class of aircraft and for securing the safety of aircraft operations. Its subsection (2) states that such rules may provide for certain matters detailed in clauses (a) to (r).

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<sup>69</sup> Order, Prohibited Area: Kalpakkam Nuclear Installation, AV. 20011/2/07- AL, available at [http://dgca.nic.in/aic/aic\\_14\\_2008.pdf](http://dgca.nic.in/aic/aic_14_2008.pdf).

<sup>70</sup> Government of India, Ministry of Civil Aviation, *Cabinet Papers*, AV 20014/002/2000-AAI, Serial No. 1.

<sup>71</sup> The text of the Hyderabad notification:

In continuation of and further to the notification No. SO 504[E] dated 14th March 2008, in exercise of powers under section 5 and section 5-A of the Aircraft Act, 1934, read with Rule 11 and 78 of the Aircraft Rules, Section-40 of Airports Authority of India Act, 1994 and all other applicable statutes and other enabling powers in that regard and to honor all contractual commitments including clause 5-3 of the Concession Agreement signed between Government of India and Hyderabad International Airport Limited (HIAL) on December 20<sup>th</sup> 2004, the Central Government hereby notifies that consequent on commissioning of the Rajiv Gandhi International Airport at Shamshabad, w.e.f. 00:01 hours of 23rd March, 2008, the existing Airport at Hyderabad will no longer be available for civil aviation operations [which shall for these purpose, not include use of airport activity at times of national emergency or (at any time) by aircraft owned or operated by or for the Indian Air Force or other authorities or for transportation of dignitaries by special government owned, leased or hired VIP aircraft]. The International Air Transport Association Code "HYD" for the existing airport is transferred to Rajiv Gandhi International Air- port from the above date and time.

General Aviation Services [other than those relating to commercial aircraft, charter flights, aircraft hired or operated under commercial arrangements] may continue to be provided at the existing airport at Hyderabad, notwithstanding the exclusion of Civil Aviation operations for commercial aircrafts. The license issued to AAI for operating the existing airport at Begumpet, Hyderabad shall stand amended specifically to the above extent

Since the notification is under section 5 of the Aircraft Act 1934 it has to be a common rule. There is no provision to make a restriction only in respect of one airport out of two airports in one city. At least the rule should have been in respect of all airports in a certain category.

As per section 14A of the Aircraft Act 1934, every rule made under the Act should be laid before each house of the parliament. However, any modification or annulment by the parliament shall be without prejudice to the validity of anything previously done under that rule. In light of this provision, it is clear that the parliament did not want the executive to use the power contained in Section 5 without parliamentary approval.

As per Section 40 of the AAI Act 1994, GoI can issue directions to AAI on questions of policy subject to the condition that AAI, as far as possible, be given an opportunity to express its views before any such direction is given. However, AAI was not asked to give its view before issuing the said direction in the case of its Begumpet airport in Hyderabad. Also the notification itself states it is "to honor all contractual commitments including clause of the concession agreement signed between GoI and Hyderabad International Airport Limited (HIAL) on December 20th 2004" and not in connection with any policy regarding the functions of AAI. Further, it is not a policy of GoI to close AAI air ports wherever private companies construct greenfield airports so as to implicate section 40 of the AAI Act. Rather, the closing of AAI airports without mentioning the same in the Notice Inviting Expression of Interest is against the published policy of GoI. Moreover, section 40 of the AAI Act can be used to give a direction to AAI only, not to give a notification to air passengers and airlines regarding closure of an airport.

The first paragraph of the notification says Begampet airport was closed for civil aviation operations. This means the airport is closed for all aviation activities except military use. As per the notification even private civil aircraft operations are not permitted from the airport. But the second part of the notification says general aviation services may be provided at the airport. Though this may not seem to be in line with the first paragraph closing the airport for civil aviation operations, it is not so. As per the second paragraph only general aviation services are permitted to be provided at the airport but general aviation operations are not permitted. Hence the old airport is closed for all civil aviation operations. Additionally, by the notification the license issued to AAI for operating Begampet airport was amended specifically to the extent detailed in the notification. If the airport is closed for all civil aviation operations, there is no relevance of having an aerodrome license. Since the remaining operation is only military, the requirement of an aerodrome license does not exist.

However, the concession agreement stipulated that GoI should provide notice that the old airport would not be available for commercial civil aviation operations, not for civil aviation operations. But in the notification, GoI went one step further and banned all civil aviation operations from Begampet Airport.

Application of different sections of the Aircraft Act 1934 and Aircraft Rules 1937 for closing down HAL and Begumpet airports based on similar concession agreements is interesting. There is hardly any difference between the two cases except the application of different sections of the relevant Acts. Either the authorities may not have been clear about which section would be appropriate in the given case, or in the case of Hyderabad a more fool proof method might have been used. However the difference in the sections used in these two cases shows the uncertainty about the appropriate method to provide notice of the closure of airports, as well as the lack of statutory authority to do so.

### 13. *Conclusion*

Privatization of greenfield airports in India has resulted in private monopoly in the airport sector, unlike other sectors which have been opened up for privatization. The published policy does not envision monopoly in the sector. The transition from public monopoly to private monopoly was not as per the original scheme but was introduced at a later stage in contradiction to the declared policy, procedures, and provisions of various statutes. The closure notifications in respect of old airports are also not in conformity with the provisions of the relevant laws. Further issues on the topic related to the Constitution of India, national laws on competition, viability of two airports, and the opinions of various forums and parliamentary committees will be discussed in part II of the article.



