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## Legal Implications of airport privatization in India

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## **Chapter 3**

### **Topic I: Monopoly and Privatization**

#### **Research Paper 3**

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

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

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## Public Monopoly to Private Monopoly – A Case Study of Greenfield Airport Privatization in India – Part II

by Moses George\*

### *Introduction*

The first two privatization ventures in the airport infrastructure sector in India were greenfield airports in Bangalore and Hyderabad. Consequent to the opening of these new airports, the existing airports in these cities (HAL Airport in Bangalore, Begumpet Airport in Hyderabad) were closed in accordance with conditions set forth in the concession agreements between the Government of India (GoI) and the new airport operators. 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.

This article consists of two parts. Part I, which discussed issues related to the legal and policy framework, the concession agreements, the Airports Authority of India Act 1994,<sup>1</sup> and the notification regarding closure of the old airports, appeared in the previous issue of this journal.<sup>2</sup> Part II deals with issues related to other aviation laws, the Constitution of India, competition law, the public interest, and other factors. It is suggested that Part II be read in continuation to Part I for a better understanding of the issues and background.

### *2. Background*

Concession agreements (CAs) were signed between GoI and the airport operators,<sup>3</sup> which specifically provided for the closure of existing airports in these cities once the new greenfield airports started functioning.<sup>4</sup> In accordance with this provision, notifications<sup>5</sup> regarding closure of these airports for commercial civil aviation operations were published and scheduled airlines have stopped operating from these airports.

### *3. Research Questions for Part II*

- What is the precedence regarding the use of airports in India in respect of civil aviation, commercial aviation, and defence airports?
- May an executive action supersede legislative sanction in the Indian context?
- What is the nature of the parties to the agreement in respect of the greenfield airports and its effect on the performance of the agreement concerning closure of the old airports?
  - On a practical level, how effective is the closure in terms of civil aviation?
  - Is the monopoly created in agreement with the Constitution of India?
  - Is the monopoly created in agreement with national competition laws?

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<sup>1</sup> Airports Authority of India Act of 1994, No. 55, Acts of Parliament, 1994 [hereinafter AAI Act 1994].

<sup>2</sup> Moses George, *Public Monopoly to Private Monopoly – A Case Study of Greenfield Airport Privatization in India - Part I*, 9 ISSUES AVIATION L. & POL'Y 173 (2009).

<sup>3</sup> Concession Agreement Between the Government of India and Bangalore International Airport Ltd., July 5, 2004 [hereinafter Concession Agreement], available at [http://civilaviation.nic.in/bial/CA\\_BIAL.signed.05.07.2004.pdf](http://civilaviation.nic.in/bial/CA_BIAL.signed.05.07.2004.pdf); Concession Agreement Between the Government of India and Hyderabad International Airport Ltd., Dec. 20, 2004, available at [http://civilaviation.nic.in/bial/CA\\_HIAL.signed.20.12.2004.pdf](http://civilaviation.nic.in/bial/CA_HIAL.signed.20.12.2004.pdf).

<sup>4</sup> Concession Agreement, *supra* note 3, sec. 5.5.

<sup>5</sup> For notification in respect of Bangalore airport, see Gaz. India pt. II, sec. 3(ii), No. 675 (May 16, 2008); for that of Hyderabad, see Gaz. India pt. II, sec. 3(ii), No. 375 (Mar. 20, 2008).

- Does the capacity of the airports and level of traffic justify such a monopoly?
- Is the closure of the old airports in the public interest?
- What is the opinion of the public, airlines, the Parliament committee, and others about the closure of the old airports?

#### 4. Notification and Licensing of Aerodromes

The notification dated May 16, 2008 states it is specifically “[i]n exercise of powers conferred by Section 5A of the Aircraft Act, 1934, read with Rules 11 and 78 of the Aircraft Rules, 1937.” As stated *supra*, Section 5A concerns the power to issue directions, Rule 11 of the Aircraft Rules 1937 allows commercial flights and scheduled airlines to use only airports licensed or approved under Rule 78 of the Aircraft Rules, and Rule 78 is exclusively concerned with licensing of aerodromes. Thus, Section 5A of the Aircraft Act 1934, read along with the Rule 11 and Rule 78 of the Aircraft Rules 1937, shows that the notification is with respect to the licensing of aerodromes, permitting flights for reward, and scheduled airlines using an aerodrome.

##### 4.1 Types of Aerodrome Licenses

As per the Aircraft Rules 1937, there can be only two categories of Aerodrome licenses:

- a. *for public use;*
- b. *for private use, that is to say, for use by the licensee and by individuals specifically authorized by the licensee.*

*(4) No person shall operate or cause to be operated any flight from a temporary aerodrome or an aerodrome which has not been licensed or approved, as the case may be, under these rules unless it meets the minimum safety requirements laid down by the Director-General.<sup>6</sup>*

Further, the Civil Aviation Requirements (CAR) state:

*The aerodromes shall be licensed in one of the following categories, namely: -*

- i. *For Public Use; the aerodrome, which, when available for operation of aircraft, shall be so available to all persons on equal terms and conditions;*
  - ii. *For Private Use; that is to say, for use by the licensee and by individuals specifically authorized by the licensee.*
- (Note: Usage of Private use aerodromes excludes the operation of schedule flights therefrom)<sup>7</sup>*

Rule 83 of the Aircraft Rules 1937 states that the Directorate General of Civil Aviation (DGCA) may grant or renew an aerodrome license subject to conditions it considers necessary to ensure compliance with the Chicago Convention<sup>8</sup> and the safety of aircraft operations.<sup>9</sup>

<sup>6</sup> Aircraft Rules 1937, sec. XI, Rule 78, available at <http://www.dgca.nic.in/airule-ind.htm>

<sup>7</sup> Civil Aviation Requirements (2006), sec. 4, series F, pt. I, available at <http://www.dgca.nic.in/cars/D4F-F1.pdf>

<sup>8</sup> Convention on International Civil Aviation, opened for signature Dec. 7, 1944, entered into force Apr. 4, 1947, 61 Stat. 1180, 15 U.N.T.S. 295.

<sup>9</sup> Aircraft Rules 1937, *supra* note 6, Rule 83(1).

As per the above provisions of the relevant Rules and CAR, it can be seen that an aerodrome can be either for “public use” or “private use” only. There is no provision for a third category such as “for public use but not for commercial civil aviation operations.” Moreover, Rule 83 clearly states that DGCA can subject the license to conditions to ensure compliance with the Chicago Convention and for the safety of aircraft operations. Hence, it is clear that DGCA cannot subject an aerodrome license to commercial conditions as in the current case. As per the notification, HAL airport/Begumpet airport would become an airport “for public use but not for commercial civil aviation operations.” This violates the provisions of the relevant rules and CAR. Significantly, there is no airport in India (except HAL and Begumpet airports) which is licensed for “public use” and at the same time closed for “commercial civil aviation operations.”<sup>10</sup> If commercial civil aviation is not permitted from an airport licensed for “public use,” the only operations permitted would be those of private aircraft, which means the airport would turn out to be one which is licensed for “private use.” For this reason it makes little sense for a public owned airport to have a license in the category of “public use” and at the same time be closed to all commercial civil aviation.

As per the CAR provision quoted *supra*, all airports categorized for “public use” when available for operations of aircraft, “shall be so available to all persons on equal terms and conditions.”<sup>11</sup> Hence, an aerodrome like HAL airport or Begumpet airport, which is available for public use, cannot be closed only for commercial civil aviation operations.

According to a list appearing on the DGCA Internet website, there are 18 licensed airports in the category of “private use” and 22 in the category of “public use.”<sup>12</sup> The old Hyderabad airport was included among them, but the license was not initially renewed by DGCA. Bangalore HAL airport was not on the list. At present, Begumpet airport appears on the list of licensed airports “for public use” though the notification had the effect of amending the license issued.

None of the airport licenses issued by DGCA state that commercial civil aviation operations are permitted from a specific airport or otherwise. The licenses mention only the safety aspects of the airport and the validity and any special condition, such as load restrictions. As per Rule 78, “[a]n aerodrome may be licensed for all types of aircraft or for certain specified types or classes of aircraft and the license may specify the conditions on which the aerodrome may be used.”<sup>13</sup> It can be seen that the term used is “type or class of aircraft,” and not “class of operations.” In practice, an aerodrome license is classified in accordance with the biggest type of aircraft the aerodrome can accommodate, the runway length, etc., demonstrating that an aerodrome license primarily is associated with the safety of aircraft operations and not with the commercial nature of the aerodrome’s aircraft operations.

#### **4.2 Applicability of Rule 78 to HAL Airport**

Bangalore HAL Airport has been classified as a civil enclave<sup>14</sup> in terms of its operations. This is due to the fact that HAL is a public sector company under the ministry of defence. The term “civil enclave” is not defined in the Aircraft Act 1934 or Aircraft Rules 1937. However, the AAI Act 1994, which states that it is applicable to all civil enclaves,<sup>15</sup> defines “civil enclave” as

<sup>10</sup> As per the clarification issued by DGCA.

<sup>11</sup> Civil Aviation Requirements, *supra* note 7.

<sup>12</sup> Directorate General of Civil Aviation, List of Aerodromes Issued with License’ <http://www.dgca.nic.in/aerodrome/aero-list-ind.htm> (last visited Nov. 10, 2008).

<sup>13</sup> Aircraft Rules 1937, *supra* note 6, Rule 78.

<sup>14</sup> Airports Authority of India, Airport Classification, <http://civilaviation.nic.in/aai/airport.htm#CLASSIFICATION>.

<sup>15</sup> AAI Act 1994, *supra* note 1, sec. 1.3(b).

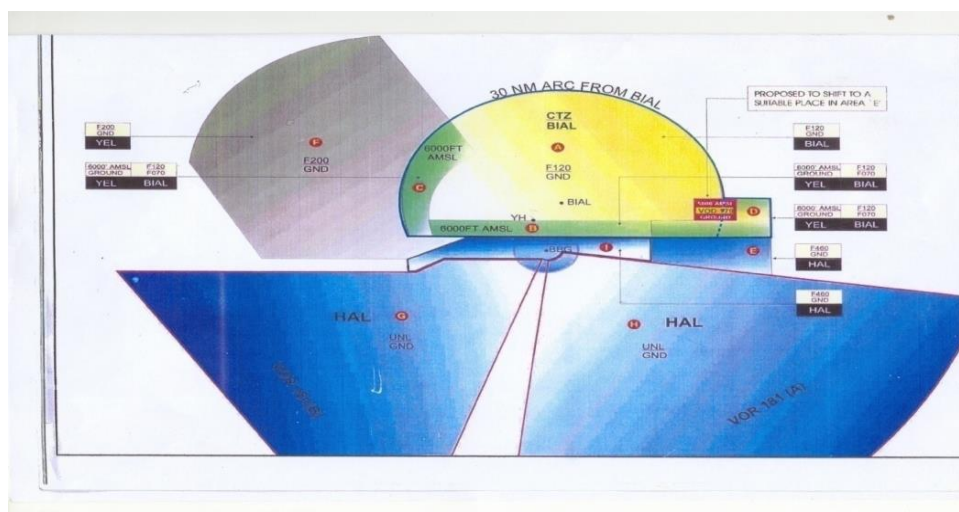
... an airport belonging to any armed force of the Union, for use by persons availing of any air transport services from such airport or for the handling of baggage or cargo by such service, and includes land comprising of any building and structure on such area.<sup>16</sup>

It is clear from the provisions of the Aircraft Act 1934, Aircraft Rules 1937, and AAI Act 1994, that civil enclaves, such as HAL, fall under the AAI Act only.

Incidentally, in case of HAL airport three specialities are there (1) HAL is considered a “defence airport” which does not come under DGCA, the licensing authority; (2) only the terminal building is owned by AAI and there cannot be a license for the terminal only. Irrespective of the aerodrome license issued by DGCA for any particular airport, the Bureau of Civil Aviation Security’s (BCAS) clearance is essential for terminal building operations, as it is terminal-specific; (3) Rule 78 contains an exemption providing that any airport in use could continue to be used until such time it obtained a license from DGCA by a date fixed by DGCA. However, in the strict sense, Bangalore HAL airport cannot be considered as a civil enclave as the aerodrome is not under the control of defence authorities. It is staffed and controlled by civilians. It is a public aerodrome owned by two public sector undertakings, HAL and AAI.

### 5. Implementation of the Notification

It may be examined whether such a notification can be implemented in practice. HAL airport Air Traffic Control (ATC) regulates almost half of the Bangalore airspace even after the commissioning of the new BIAL airport. This is in accordance with the airspace management plan approved by DGCA.



**Bangalore Airspace Management Diagram<sup>17</sup>**

As seen in the airspace diagram above, Bangalore airspace has been trifurcated among the Indian Air Force controlling its Yelahanka airspace, HAL controlling southern parts of the airspace and BIAL controlling the rest of the airspace. This trifurcation is official and has been in practice since opening of BIAL.

<sup>16</sup> *Id.*, sec. 2(i).

<sup>17</sup> The new Bangalore airspace management plan was approved by DGCA on Jan. 6, 2004.

<http://www.bangaloreaviation.com/2008/03/real-capacity-of-bengaluru.html>

HAL ATC is an integral part of Bangalore HAL airport. Even for the operations of BIAL airport, HAL ATC operation is necessary because HAL ATC controls the approaching and departing traffic from southern side. HAL ATC still controls—and will continue to control—all air traffic operations, including commercial operations, through the part of Bangalore airspace it regulates. In case of Hyderabad, all ATC operations of the new HIAL airport still function from the old Begumpet airport only, including area and approach control operations. This is in addition to the tower control of Begumpet airport. Hence, the notification could not, in practical terms, still ban commercial civil aviation operations of HAL airport or Begumpet airport.

## 6. *Waivers*

Even after the notification, HAL airport and Begumpet airport are being used by all types of chartered aircraft. As these flights are of small capacity, the revenue from these aircraft may not be of interest to the new airport operators, and these small and slow aircraft would effectively reduce the utilization of the new airports. Since the issuance of the notification, hundreds of such chartered flights have used the old airports. These flights are categorized and licensed as Non-Scheduled Operators Permit (NSOP) aircraft. As per the NSOP conditions, the aircraft concerned can be used for “only non-scheduled (passenger) services or non-scheduled (charter) services.”<sup>18</sup> In a matter related to customs duty with respect to NSOP aircraft, it has been confirmed that these NSOP aircraft are used only for commercial operations.<sup>19</sup> Hence it is clear that the condition stipulated by the notification banning commercial civil aviation from HAL airport has, for all practical purposes, been waived.

Non-scheduled operations are only one type of commercial operations occurring at HAL airport. Another type of operation is helicopter taxi service between old HAL airport and other places in the city, including the new BIAL airport. After the notification closed HAL airport for commercial civil aviation, HAL authorities had initially refused permission for such commercial operations from HAL airport on the basis of the notification. The operators of these heli-taxi services approached BIAL for a No Objection Certificate (NOC) for the proposed heli-taxi service from HAL airport. BIAL informed them that, although no commercial operations can be permitted from HAL airport as per the concession agreement, as these heli- services are in the interest of BIAL they can be permitted. The authorities, on the clarifications sought by Deccan Aviation on the issue, confirmed to HAL that in light of the clarification given by BIAL no further clarification was required. The helicopter operations could be started from HAL airport only after such clearance by BIAL.

Clearly, BIAL has waived the condition in the concession agreement by granting permission to M/s Deccan Aviation Limited and M/s Global Vectra Helicorp to conduct air taxi operations from and to HAL airport. The authorities have also violated the notification by informing Deccan Aviation that they do not have any objection for air taxi operations out of HAL airport since BIAL has no objection. Hence, both parties to the concession agreement – GoI and BIAL – have, by their express actions, waived their right with regard to the closure of HAL airport for commercial civil aviation operations as stipulated in section 5.5 of the concession agreement.

## 7. *Violations of the Notification*

Irrespective of whether the notification is in accordance with the concession agreement, and whether BIAL has waived the condition in writing, a notification by GoI banning all commercial civil aviation operations remains in force. The notification was not modified due to the waiver by

<sup>18</sup> *No Duty Evasion by GMR Aviation* FIN. EXPRESS, Apr. 28, 2009, available at <http://www.financialexpress.com/news/no-duty-evasion-by-gmr-aviation/451835/>.

<sup>19</sup> *Id.*

BIAL or GoI as stated *supra*. Hence any civil aviation operation from (or to) HAL airport is in violation of the notification. It can be seen that a number of aircraft operations have violated the notification of GoI banning commercial civil aviation operations from HAL airport.<sup>20</sup> Interestingly, the Minister of Civil Aviation of India has himself has used HAL airport on two occasions for commercial civil aviation operations in violation of the notification.<sup>21</sup> Though the authorities are well aware of these violations, no action has yet been taken.

Today, in spite of GoI's notification banning commercial civil operations at HAL airport, the current situation is that, except for scheduled aircraft, HAL is open for all commercial operations. VIPs and those who can afford to charter an aircraft are able to use the airport for commercial civil aviation operations. Only ordinary travellers, who must depend on scheduled aircraft, are not in a position to use the old airport. If the authorities consider that HAL/Begumpet airports are not to be used to make BIAL/HIAL financially viable, the burden of such airport closures should be applicable across all classes of the public. It also throws light on the fact that, given an option, air passengers prefer HAL airport which is an in-city airport. Hence closing the airport only to the common public may not be termed as an impartial policy.

## 8. *Limiting the Powers of the Parliament*

Entries 29 and 30 of List 1 of the Seventh Schedule of the Indian Constitution state:

29. Airways, aircraft and air navigation; provision of aerodromes; regulation and organization of air traffic and aerodromes; provision for aeronautical education and training and regulation of such education and training provided by states and other agencies.

30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.

In accordance with these entries, only Parliament is competent to legislate on civil aviation. And the executive has been assigned to regulate the civil aviation. Accordingly, GoI may frame rules in accordance with the Aircraft Act 1934, which is again subject to parliamentary approval, or give orders in accordance with Aircraft Rules, 1937. By signing a concession agreement with BIAL, as a private and commercial act, the executive ceded the powers assigned to it by parliament to regulate civil aviation, to private companies, *viz.* BIAL and HIAL, within a radius of 150 kms of the new greenfield airports.<sup>22</sup> However, the Constitution does not permit the executive to assign these powers to a private party through a private agreement, in this case the concession agreement. The powers of Parliament cannot be transferred by the executive to a private party in any form or by any action or agreement. Any agreement which transfer any powers of the Parliament violates the spirit and provisions of the Constitution of India.

As stated *supra*, regulation of civil aviation throughout the geographical area of India is a sovereign function. There is no provision to limit these sovereign powers in certain geographical areas within India. By private agreement, the executive has limited the sovereign powers of Union of India to the whole of India, excluding an area within a 150 km radius of new Bangalore airport, Devanahalli, and within 150 kms of Shamshabad airport, Hyderabad, as far as its authority over aerodromes and commercial civil aviation. The impact of this agreement is that, in the future,

20 Non-scheduled and chartered operations regularly occur at HAL airport. Hundreds of such commercial operations have taken place since the closure of HAL airport for commercial operations.

21 On Aug. 24, 2008 the minister flew from HAL airport to BIAL airport in a Deccan Aviation air taxi, which is a commercial operation. On June 28, 2009 the minister used HAL airport for commercial aviation operations when travelling on a chartered flight.

22 Concession Agreement, *supra* note 3, sec. 5.2.

exercise of any sovereign powers by Union of India will be subject to conditions of these private agreements. This aspect is clear from the action of GoI, discussed *supra*, when it asked BIAL for clearance to give permission for private helicopter operations from HAL airport.

If the statutes are made subject to conditions of agreements entered into by the executive with other entities on subjects under its jurisdiction without Parliament's approval, a series of such agreements may make the statutes irrelevant and the sovereign's powers may become subject to many such agreements.

## 9. Supremacy of Legislative over Executive Action

Whether an executive action can go beyond the provisions of the statutes is a core issue in the present discussion. This issue was deliberated upon by the Supreme Court of India in *Centre for Public Interest Litigation v. Union of India*.<sup>23</sup> The court allowed the petitions restraining the central government from proceeding with disinvestment, resulting in Hindustan Petroleum Corporation Limited (HPCL) and Bharat Petroleum Corporation Limited (BPCL) ceasing to be government companies without appropriately amending the relevant statutes.<sup>24</sup>

In the case of the closure of old airports, the situation is similar. The provision of the concession agreement regarding closure of old airports and the notifications by which GoI has closed old airports clearly demonstrates that, in the opinion of GoI, the only statutory provision which could be used by the executive to close an airport for commercial operations was Section 5A of the Aircraft Act 1934. It is interesting to note that no provision of AAI Act 1994 provides for the closure of an AAI airport or civil enclave, especially when another entity starts an airport in the same city and in deference to a commercial contract. As stated *supra*, Section 5A is meant to be used only in cases involving the security of India or the safety of aircraft. Hence it is clear that none of the relevant statutory provisions envisage the closure of an AAI airport only for commercial operations. Only by executive action has GoI closed the old airports. Thus, in light of the *Centre for Public Interest Litigation* decision, such executive action without amending the statutes is illegal.

A later decision of the Delhi high court further clarifies the applicability of said ruling on executive action with respect to the AAI Act.<sup>25</sup> In the case of brownfield airport privatization in India, the existing airports in New Delhi and Mumbai were leased to private companies. As there was no provision to hand over airports on lease at that time, the AAI Act was amended in 2003.<sup>26</sup> While dismissing the petition filed by AAI Officers Association challenging the leasing out of the airports, the Delhi high court held that “[i]n the present case, it is not the action taken by the executive, but it is an Act of the parliament by an amendment of the statute to authorize AAI to enter into a lease deed for a period specified.”<sup>27</sup> Clearly, this demonstrates that an executive action which goes beyond the provisions of the AAI Act is unlawful.

23 *Centre for Pub. Interest Litig. v. Union of India*, A.I.R. 2003 S.C. 3277.

24 This writ petition was filed in public interest on the ground that the method adopted by the government in exercising its executive powers to disinvest Hindustan Petroleum Corp. Ltd. (HPCL) and Bharath Petroleum Corp. Ltd. (BPCL) (two PSUs), without repealing or amending the acquisition law, was not permissible. In this matter the only question before the court was whether disinvestment in two oil majors could be made without parliamentary approval as they were governed by specific statutes — ESSO (Acquisition of Undertaking in India) Act, 1974 and the Burma Shell (Acquisition of Undertaking in India) Act, 1976. The apex court was of the view that in the light of the statute of acquisition, the character of a government company cannot be changed to an ordinary company without parliamentary clearance.

25 *Airports Auth. Officers' Ass'n (India) v. Union of India*, WP (C) 8229-30/2004 (Delhi H.C. May 16, 2005).

26 The AAI Act 1994 was amended in 2003 by inserting a clause, 12A(1), which states “Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit.”

27 *Airports Auth. Officers' Ass'n*, WP (C) 8229-30/2004, 7.

In the most recent decision of the Delhi high court on the issue of legality of charging an airport development fee (ADF) by the M/s Delhi International Airport, the court held that

[t]he lease under section 12-A(1) is thus a statutory lease which enables the lessee to perform the functions of the Airports Authority of India enumerated in section 12. In other words, there is a statutory assignment of the functions under section 12 to the lessee<sup>28</sup>. . . . A statute, as is well known, must be construed having regard to the legislative intent. The legislative intent in amending the Act was to facilitate the process of improvement of standard of services and facilities at the airports by bringing in infusion of private sector investments as also for restructuring of airports.<sup>29</sup>

Hence, in absence of a clear provision in the statute, such executive action is *ultra vires*.

## 10. Monopoly and Statutes

### 10.1 The Constitution of India

The Constitution of India prohibits monopoly in very clear terms. Hence the applicability of Article 19.1.(g) of the Constitution needs to be examined. Article 19.1.(g) enshrines one of the rights of freedom to all citizens of the country to practice any profession or to carry on any occupation, trade or business. However this Article contains an exemption clause. Subclause (6)(ii) permits the state to make any law relating to the carrying on by the state, or by a corporation owned or controlled by the state, of any trade, business, industry, or service, whether to the exclusion, complete or partial, of citizens or otherwise, but not vice-versa.

Though subclause (6)(ii) exempts state owned or controlled corporations from the ambit of Art.19.1.(g), the question is whether BIAL/HIAL are state owned or controlled corporations. From the structure of these entities it is clear that they are neither state owned nor state controlled. However, sections 5.5 and 5.2 of the concession agreements show that the state intended to create monopolies for BIAL/HIAL by barring any other airport from operating or being developed within 150 kms of these greenfield airports. Accordingly, the question is whether a monopoly permitted by an agreement of the state in its private capacity—with a private entity which is neither owned, controlled, nor created by the state by legislation—would come under the scope of subclause 6 (ii) of Article 19.1. On the other hand, AAI is an authority created by legislation, which comes under subclause 6(ii) of Article 19.1. A recent decision of the Supreme Court with respect to 19.1.(g) is relevant in this context:

When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of “level playing field”. We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of “level playing field” is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed

<sup>28</sup> Res. of Aviation Redressal Ass'n v. Union of India, WP (C) 8918/2009 (Delhi H.C. Aug. 26, 2009) at 20.

<sup>29</sup> *Id.* at 20-21. See *also* *supra* note 26.

to bid so as to subserve the larger public interest. “Globalization”, in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of “globalization”. Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of “level playing field” embodied in Article 19(1)(g).<sup>30</sup>

Moreover, the notification banning commercial civil aviation in AAI airports was promulgated under Section 5A of the Aircraft Act 1934 and not under subclause 6(ii) of article 19 of the Constitution. Hence the concession agreement and the notification violate Article 19.1.(g).

### **10.2 Aircraft Act 1934 and Aircraft Rules 1937**

The primary statutes governing aviation are Aircraft Act 1934 and the rules made under the Act, called Aircraft Rules 1937. Under this Act and the Rules thereunder any citizen/company/society/central and state government/any company or corporation owned or controlled by central or state governments is permitted to build an airport and to obtain an airport license for the same.<sup>31</sup> These rules only encourage competition. Consequently, the clauses in the concession agreements, as well as the notifications, are in violation of Aircraft Act 1934 and the Aircraft Rules 1937.

### **10.3 Indian Contract Act 1872**

Section 27 of the Indian Contract Act 1872 declares in plain terms, “[e]very agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, to that extent, is void.” In the given case, the concession agreements restrain business and trade related to airports within 150 kms of the greenfield airports. Hence these concession agreements violate Section 27 of the Indian Contract Act 1872.

## **11. Competition Laws and Policy in India**

Two antimonopoly laws have been enacted in India, the Monopolies and Restrictive Trade Practices Act, 1969, (MRTP Act) and the Competition Act, 2002.

### **11.1 MRTP Act 1969**

In accordance with Section 32.b.(iii) of the MRTP Act, every monopolistic trade practice shall be deemed to be prejudicial to the public interest, except where the central government, being satisfied that any such trade practice is necessary to give effect to the terms of any agreement to which the central government is a party, by a written order, permits the owner of any undertaking to carry on any such trade practice. Under this provision, GoI could sign a monopolistic agreement with a written order. But GoI has not specifically issued any such order under section 32.b.(iii).

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<sup>30</sup> Reliance Energy Ltd. v. Maharashtra State Rd. Dev. Corp., No. 3526 of 2007, MANU/SC/3810/2007, at 17 (India, Sept. 11, 2007).

<sup>31</sup> Aircraft Rules 1937, *supra* note 6, Rule 79. *See also* Civil Aviation Requirements, *supra* note 7.

However, the notification rendering HAL airport unavailable for commercial civil aviation was promulgated under Section 5A of the Aircraft Act 1934. Hence the question is whether this notification under the Aircraft Act 1934 can be deemed to be an order under Section 32.b.(iii) of the MRTP Act. The answer is no. The notification cannot be an order under Section 32.b, as Section 5A of the Aircraft Act is intended to be used only in two cases: (1) in the interest of the security of India; or (2) for securing the safety of aircraft operations. Furthermore, the notifications clearly state they are published “*in deference of the contractual commitments including Clause 5.5 of the Concession Agreement*” (in the case of Bangalore HAL airport) and “*to honour all contractual commitments including clause 5-3 of the Concession Agreement*” (in the case of Hyderabad airport) (emphasis added).

As discussed earlier, subclause 6(ii) of Article 19 of the Constitution permits the creation of a monopoly only for state-owned corporations or entities. Thus, even if it is assumed that the notification under Section 5A is an order under 32.b.(iii) of MRTP Act, it cannot supersede Article 19.1 of the Constitution.

The MRTP commission, in disposing of an application filed by the Bangalore-based Association of Outsourcing Professionals (AoP) has ruled that section 5.5 of the concession agreement does not fall within the scope of the MRTP Act, as GoI is a signatory to the concession agreement. However, the applicant has filed a writ petition before the High Court of Karnataka challenging its order and the same is pending.

### **11.2 Competition Act 2002**

The new antimonopoly law, the Competition Act 2002, is designed to repeal the MRTP Act. The purpose of the Competition Act is “to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.”<sup>32</sup>

As of the date of the concession agreement and the notification, only a few provisions of the new law were in force and the process of constituting the regulatory authority, namely, the Competition Commission of India. Subsequently the Competition Act 2002 has been brought into force.<sup>33</sup> Agreements which cause or are likely to cause an appreciable adverse effect on competition within India are prohibited by the Competition Act 2002.<sup>34</sup> Any agreement entered into between parties which limits or controls provision of services shall be void. Under this provision the concession agreement is void.

### **11.3 Competition and the Concession Agreement**

Though section 5.5 of the concession agreement restricts the use of old airports to non-commercial operations, section 8.12 of the concession agreement makes it obligatory on the part of GoI to follow a policy of non-discrimination with regard to the classes or descriptions of air traffic that are permitted to use the airport and not to impose unfair limitations on aircraft movements at the airport or otherwise restrict the capacity at the airport.<sup>35</sup> This clause is contrary to clause 5.5 of the

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<sup>32</sup> Competition Act 2002, No. 12, Acts of Parliament, 2003 [hereinafter Competition Act 2002] preamble.

<sup>33</sup> The Competition Act 2002 came into force with effect from May 20, 2009, which was notified on May 15, 2009.

<sup>34</sup> Competition Act 2002, ch. II.

<sup>35</sup> Concession Agreement, *supra* note 3, sec. 8.12.

concession agreement. Hence this demonstrates that the closure of an airport for commercial operations is not correct as per the parties to the agreement, *i.e.*, GoI and BIAL.

In connection with the privatization of Delhi airport the executive argued that it was necessary to have different ownership, which would attract competition, as opposed to single ownership (AAI). It was suggested that one of the objectives in privatizing Delhi and Mumbai airports is “[d]iversity of ownership between Delhi and Mumbai airports, to enhance competition, encourage innovation and allow competitive benchmarking.”<sup>36</sup> (emphasis added.) In the case of Bangalore and Hyderabad, the old airports were closed to promote monopoly.

## 12. Regulatory Mechanism and Competition

The Airports Economic Regulatory Authority of India (AERA) was recently constituted but is yet to become fully functional. Under GoI’s new greenfield airport policy, economic regulation of all airports would be governed by the AERA, as and when enacted.<sup>37</sup> The regulator would, *inter alia*, set down or regulate standards, approve charges, and impose penalties. The agency also would settle disputes – between the public and the government and/or concessionaires in relation to the airport as well as between concessionaires and the government. The bill authorizing the AERA was passed only after multiple airport operators had started operation.<sup>38</sup> Various charges and fees in respect of airports were expected to be decided by this authority. Further, AERA is expected to ensure a level playing ground among airports developers.

It is interesting to read the following extract from the Statement of Objects and Reasons of the Airports Economic Regulatory Authority of India Bill, 2007,<sup>39</sup> as placed before the Parliament:

The Airport Infrastructure Policy formulated in 1997 provides for the private sector participation for improving quality, efficiency and increasing competition. As a result of this initiative, greenfield airports are now coming up at Bangalore and Hyderabad in Public-Private-Partnership. A private airport is already fully operational at Cochin. Delhi and Mumbai Airports have also been restructured through the Joint Venture route for modernisation and development. The trends indicate growing competition and requirement of level playing field amongst different categories of airports in future.

....

In the above background, it is felt that an independent economic regulator, namely, the Airports Economic Regulatory Authority (the Regulatory Authority), may be established so as to create a level playing field and foster healthy competition

<sup>36</sup> Development of Airport Sector with Special Emphasis on New Modern Airports, 90th Report of Parliamentary Standing Committee on Transport, Tourism & Culture (2005) <sup>5</sup>, available at

<http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Transport,%20Tourism%20and%20Culture/90threport.htm>.

<sup>37</sup> Greenfield Airports Policy of Government of India, 4.2, available at <http://www.civilaviation.nic.in/greenfield/GreenfieldPolicy.pdf>.

<sup>38</sup> Press Release, Press Information Bureau, Government of India, Government Approves Amendment<sub>s</sub> to AERA Bill, 2007 (Aug. 29, 2008) available at <http://www.pib.nic.in/release/release.asp?relid=42051&kwd=>

<sup>39</sup> The Airports Economic Regulatory Authority of India Bill, 2007, was enacted into law as the Airports Economic Regulatory Authority of India Act, 2008, No. 27, Acts of Parliament, 2008.

amongst all major airports to encourage investment in airport facilities to regulate tariffs for aeronautical services etc.<sup>40</sup>

The condition set out in the concession agreement ensuring the closure of the AAI-owned airports when the new greenfield airports began functioning runs counter to paragraph 3 of the AERA Bill. Moreover, even before the Parliament passed the bill, the very concept of "Competition" and "level playing field," as stated in the bill's text, was defeated by the closure of the AAI-owned airports at Hyderabad and Bangalore.

In other sectors where privatization was allowed, regulatory mechanisms were put in place to ensure a level playing field. In the case of the power sector, state and central electricity regulatory commissions; in the case of banks, the Reserve Bank of India (RBI); in the case of the insurance sector, the Insurance Regulatory and Development Authority (IRDA); and in the case of the telecom sector, the Telecom Regulatory Authority (TARI). Though AERA came into existence to regulate airport related issues, it remains to be seen what impact the agency can have where issues already are decided, such as removing competition by closing the old airports.

Competition or anti-monopoly rules are being implemented worldwide. In the United Kingdom, the competition law authorities are forcing the British Airports Authority (BAA) to divest its ownership of some airports to ensure better competition in the sector. But in India monopolies are permitted in the airport infrastructure sector. According to the UK Competition Commission,

[t]here is evidence to suggest that air-lines based at Glasgow and Prestwick compete with one another, for example a study by Sean Barrett found that Ryanair's Prestwick–Dublin service had a 60 per cent share of the Glasgow–Dublin route by 2002. The behaviour of volume and prices also demonstrates that introducing rivalry between airports can have a real impact on market outcomes.<sup>41</sup>

Hence such anti-competitive actions cut against the international trend. This aspect needs to be given sufficient attention by Indian authorities and a clear long-term policy needs to be put in place to encourage competition.

### **13. Demerger and Company Law**

The Airports Authority of India is a body corporate incorporated under the AAI Act 1994, having perpetual succession and a common seal, with power, subject to the provisions of the Act, to acquire, hold, and dispose of property, both movable and immovable.<sup>42</sup> Thus, for all practical purposes, AAI is a government company under the Companies Act 1956.<sup>43</sup> It is also clear that AAI is different from GoI, based upon a recent judgment of the Supreme Court of India.<sup>44</sup> The right to

<sup>40</sup> Press Release, Press Information Bureau, Government of India, AERA Bill Introduced in Parliament Today (Sept. 5, 2007), *available at* <http://www.pib.nic.in/release/release.asp?relid=30860&kwd=>

<sup>41</sup> [UK] Competition Commission, BAA Airports Market Investigation, 3.16, *available at* [http://www.competition-commission.org.uk/rep\\_pub/reports/2009/fulltext/545.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2009/fulltext/545.pdf).

<sup>42</sup> AAI Act 1994, *supra* note 1, sec. 3.2.

<sup>43</sup> *Mun. Comm'r of Dum Dum Municipality & Ors. v. Indian Tourism Dev. Corp. & Ors.*, 1995 (5) SCC 251.

<sup>44</sup> *Id.*

do business is an asset as per Income Tax Act. Since the Bangalore civil enclave and Hyderabad airport were sub-units of AAI, the closure of two of its airports and transferral of their business to BIAL/HIAL amounts to a demerger of the company under Section 390 of the Companies Act 1956. The expression “demerger” is not expressly defined in the Act, but it is covered under the expression “arrangement,” as defined in clause (b) of Section 390. Under the Companies Act 1956, to carry out such a demerger the company is required to pass a special resolution which is subject to confirmation by the high court by making an application.<sup>45</sup> It also is necessary that the articles of association contain a provision for demerger, division, or split of the company in any way. In the given case, the AAI Act does not provide for closure of its airport and handing over of the business of any airport to another company. Further, the appropriate general body of AAI is the Parliament; a demerger without the concurrence of the Parliament would be illegal. Strict norms for demerger, prescribed by law, point to the need for a cautious approach in the interest of the shareholders. In the case of AAI, a public owned company, the closure of HAL and Begumpet airport deserves better scrutiny. Finally, the absence of confirmation by the high court renders such a demerger unlawful.

#### 14. Financial Impact on AAI

As AAI cross subsidizes non-economical airports in remote areas the financial impact on AAI by the closure of the old airports is significant. On one hand AAI has been constructing or developing airports which are economically non-viable<sup>46</sup> and on the other hand profit-making airports are being shut down. This aspect is important as AAI is expected to operate on sound business principles.<sup>47</sup>

##### 14.1 Loss of Revenue from Old Airports

The financial Impact on AAI is twofold: First, loss of revenue from the old airports and second, the investment vs. return from the greenfield airports. Due to the closure of the old AAI Airports at Bangalore and Hyderabad, AAI is losing revenue of around Rs. 366.15 crores<sup>48</sup> per annum.<sup>49</sup>

**Table 2. Revenue collection details of Bangalore airport<sup>50</sup>**

Financial Year	Aeronautical Revenue		Non-Aeronautical Revenue (Rs. in crores)	Total Revenue
	RNFC+TNLC (Rs. in crores)	PSF (Rs. in crores)		(Rs. in crores)
2004-05	44.79	36.03	17.11	<b>97.93</b>
2005-06	60.48	60.78	32.18	153.44
2006-07	85.83	87.02	39.29	211.14
2007-08	100.21	103.04	42.04	245.90
2008-09	98.67	16.46*	8.27*	123.40

\* Revenue collection data pertains to two months of operation of HAL airport before the closure (April 1, 2008 to May 23, 2008).

In the case of Bangalore, AAI will lose non-aeronautical revenue and the passenger service fee (PSF) due to the closure of HAL airport. As AAI is cross-subsidizing unprofitable airports with income from profit-making airports, this kind of revenue loss will push AAI into red.

<sup>45</sup> The Companies Act, 1956, No. 1, Acts of Parliament, 1956, sec. 394.

<sup>46</sup> For example, AAI developed airports at Gonida in Maharashtra and at Mysore in Karnataka at costs of around 80 crores and 75 crores, respectively. However, no scheduled flights operate from these airports.

<sup>47</sup> AAI Act 1994 *supra* note 1, sec. 11.

<sup>48</sup> 1 crore = 10 million.

<sup>49</sup> Rs. 145.69 crores and Rs. 221.15 crores per annum on account of HAL airport and Begumpet airport closure, respectively.

<sup>50</sup> AAI, Bangalore Airport.

## 14.2 AAI's Investment vs. Return in the Greenfield Airports

In the old airports in Bangalore and Hyderabad AAI had its own CNS-ATM equipment and manpower to handle existing traffic. In the case of HAL Airport, HAL itself was providing ATM services and AAI was providing CNS facilities. The revenue from landing, parking, and housing goes to HAL while AAI gets Route Navigation Facility Charges (RNFC), Terminal Navigation and Landing Charges (TNLC), and passenger facilitation charges. In the case of old Hyderabad airport, all the revenue from air traffic goes to AAI as the airport is fully owned and managed by AAI.

In the new greenfield airports, AAI has invested to establish entirely new CNS-ATM systems. The investment in the CNS-ATM equipment alone is 81 crores in the case of Bangalore greenfield airport and 88 crores in the case of Hyderabad. Moreover, total additional manpower for these greenfield airports will further increase expenses for AAI.

In both new airports, AAI's revenue would come from RNFC and TNLC charges only, unlike the old airports where AAI received both aeronautical and non-aeronautical income. AAI's revenue from aeronautical charges would be same as in the case of the old airports. In a nutshell, AAI has invested Rs. 169 crores and incurred additional expenses for manpower without the hope of generating any aeronautical revenue from these new greenfield airports. These investments are not considered for AAI's equity share in the new airport projects. In contrast, the private investors, who invested Rs. 240 crores in the case of Bangalore, have been given 74 percent of the equity share in the greenfield airport project. To worsen the matter, AAI is bound to provide CNS-ATM facilities in the old airports for the non-commercial and military operations that remain there, with negligible revenue from such operations.

## 15. Capacity of the New Airport and Viability of Two Airports

In the case of Bangalore, a larger airport was envisioned as the present airport was saturated in the 1990s. At that time, the expected traffic for the year 2010 was 4 million passengers per annum. Accordingly, the new airport was designed for an annual capacity of 4 million. According to the concession agreement, the first-phase airport was to be built to a peak hour passenger capacity of 2017 passengers and the total built-up area was to be 55,850 sq.m. at a projected cost of Rs. 1,411.79 crore.<sup>51</sup> But due to significant increases in both aircraft movements and passenger traffic through Bangalore airport the parties to the concession agreement felt the need to redesign the airport. The revised traffic study showed that a traffic level of 8.4 million passengers, which the airport was projected to handle in 2020, would actually be achieved in 2010.<sup>52</sup> Similarly, the initial forecast that the airport would handle 41,000 aircraft movements annually by 2010 was revised to 1.06 lakh<sup>53</sup> aircraft movement annually.<sup>54</sup> Hence BIAL had redesigned the initial phase of the project by adopting the forecast traffic for 2015 for the terminal building capacity and 2010 for airside infrastructure.<sup>55</sup> Accordingly, the concession agreement was amended in 2006. As per the amendment, the first phase of the project was redefined for a peak hour passenger capacity of 2733, with the built-up area of the passenger terminal building at 71,000 sq.m.,<sup>56</sup> at a revised project cost of Rs. 1,930.29 crore.

<sup>51</sup> Concession Agreement, *supra* note 3, sched. 2, sec. 14.2.

<sup>52</sup> Centre Okays Revised Concession Deal for Bangalore Airport, BUS. LINE, Sept. 8, 2006, *available at* <http://www.thehindubusinessline.com/2006/09/08/stories/2006090802710700.htm>.

<sup>53</sup> 1 lakh = 100,000

<sup>54</sup> Centre Okays Revised Concession Deal for Bangalore Airport, *supra* note 51.

<sup>55</sup> *Id.*

<sup>56</sup> Concession Agreement, *supra* note 3, sched. 2, secs. 14.1, 14.2.

In accord with the amended concession agreement, the first phase of the 71,000 sq.m. terminal building is designed as a two-level structure with facilities for passenger check-in, baggage make up, baggage break down, and baggage claim at ground level, and retail, shopping centers, security check, passport control, and holding areas at level one.<sup>57</sup> The basement below is used for services.<sup>58</sup> Prior to the amendment, the schedule called for a terminal building of 55,850 sq.m. In the new airport, the current terminal building measures 52,645 sq.m.,<sup>59</sup> including the ground and the first floor. The services area in the basement has a total area of 18,665 sq.m., but this cannot increase the terminal building capacity as a basement is not a part of the terminal as per the definition<sup>60</sup> nor as per usage. Pointing out this issue, the Infrastructure Committee chairman stated “as per concession agreement there should have been two level terminals, basement excluded.”<sup>61</sup> However the Internet website of BIAL shows the total area is 71,310 sq.m., which means the basement area is added to the ground and first floor area for the purpose of calculating the total area of the terminal building. If a terminal building measuring 71,000 sq.m. was supposed to service a 2733 peak hour passenger (php) capacity, the actual capacity of the current terminal of 52,645 sq.m. would have to be far below the agreed capacity of 2733 php.

The main concession agreement is silent about the standards to be followed in the airport’s construction. It states only that the work should conform to good industry practice.<sup>62</sup> However, Schedule 9 of the concession agreement states that the new airport should adhere to International Air Transport Association (IATA)/International Civil Aviation Organization (ICAO) norms.<sup>63</sup> As per the International Air Transport Association’s Airport Development Reference Manual (ARDM), level of service C is recommended as the minimum design objective.<sup>64</sup> However, in level C the maximum occupancy recommended is 65 percent, compared to the maximum occupancy as per the space requirements.<sup>65</sup> If this parameter is considered, an airport with a terminal space measuring 52,645 sq.m. would go far below the contractual specification of 2733 php.

The first airport traffic study for Bangalore, conducted in 2002, projected traffic for 2007-08 at 4 million passengers. By the time of the 2005 study, the figure was 6 million, (Graph 1) whereas the actual traffic on the date of closure of the old airport was 10.12 million, which was the projected traffic for the year 2025-26. It is clear that no one had anticipated a traffic level of 10 million for the new airport. Thus, it is not correct to say that the airport was designed for present traffic levels. Consequently, the closure of the old airport is not justified considering the traffic and the capacity of the new airport.

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*, sec. 1.1.1, schedule 9.

<sup>59</sup> Functioning of Private Airports and the Related Issues, 142nd Report of the Department-Related Parliamentary Standing Committee on Transport, Tourism and Culture (2008) 19, available at [http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee on Transport, Tourism and Culture/142.htm](http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Transport,%20Tourism%20and%20Culture/142.htm). See AAI, Report on Capacity Assessment Study at New Bangalore International Airport (2008), 14.6, Annex 4, “distribution of passenger facilitation area”; “visitor area at the kerb” (outside the terminal).

<sup>60</sup> *Id.* See also Concession Agreement, *supra* note 3, sched. 2, secs. 14.1, 14.2, read with sched. 9, pt. 1.1.1.

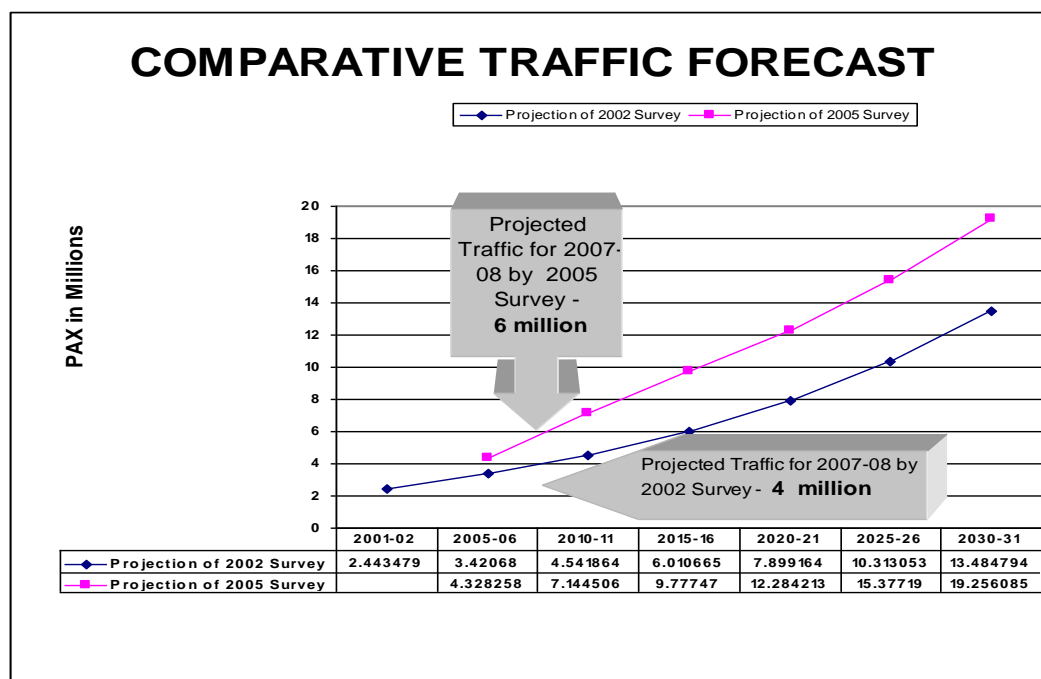
<sup>61</sup> Report of the Joint House Committee of Karnataka Legislative Assembly, 2.11.2, at 77.

<sup>62</sup> Concession Agreement, *supra* note 3, sec. 7.2.

<sup>63</sup> *Id.*, sec. 14.2, schedule 9.

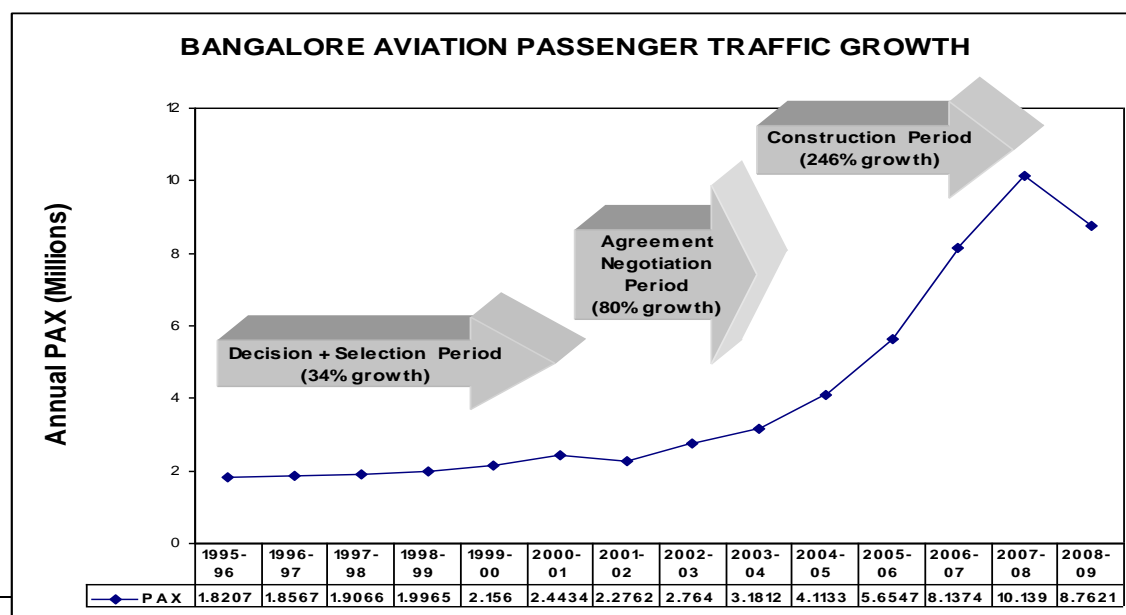
<sup>64</sup> IATA, Airport Development Reference Manual (ARDM), F9.1.2.

<sup>65</sup> *Id.* F9.4.



**Graph 1 - Comparative Traffic Forecast of Bangalore Airport<sup>66</sup>**

Another important factor is the growth rate of traffic. The traffic growth rate of Bangalore during the decision-making and selection period (1996-2001) was 34 percent, and during the agreement negotiation period (2001-2004), the growth rate was 80 percent. But from the date of agreement until the airport was opened (2004-2008) there was exponential growth of 246 percent (Graph 2). Hence the capacity of the new airport cannot be said to be as per the traffic requirement. Additionally, it is clear that while the concession agreement was signed the exponential growth had not even been considered.



<sup>66</sup> Source of data for the graph

[http://www.bialairport.com/facts\\_figures\\_traffic\\_forecast.htm?cid=topmenu&ses=bial](http://www.bialairport.com/facts_figures_traffic_forecast.htm?cid=topmenu&ses=bial)

### Graph 2 - Bangalore Aviation Passenger Growth<sup>67</sup>

Regarding the contractual commitment of BIAL with respect to capacity, the parliamentary Standing Committee on Transport, Tourism and Culture noted

. . . that the Government of India appears to be unconcerned about the obligation of BIAL to construct and provide an airport as per the concession agreement. Even the area and capacity were not verified before permitting to open new and closing HAL Airport. This appears to be an irregularity committed by Government of India in this matter.<sup>68</sup>

The question is whether there is sufficient traffic for two airports. If the actual terminal area of the new airport and the reported traffic volume are considered, it can be seen that there is sufficient traffic to make both airports economically viable. In the case of two functioning airports, there is an opportunity for developing more traffic compared to having only one out-of-city airport. Hence the monopoly created in favor of the new private airport is not justified.

However, in the case of Hyderabad, the terminal buildings of the new airport as well, as the old airport, are capable of handling the current traffic. In fact, it was opined by the Ministry of Civil Aviation that the old airport could have handled traffic volume for next 10-12 years.<sup>69</sup>

#### 16. Public Interest

Another important question is whether the closure of the old airports is in public interest. The only reason for the closure of the old airports is the financial benefit of the new greenfield airports which was made a condition in the concession agreement. Multiple airports in many cities show that for the public convenience as well as for competition in the field, multiple airports are preferred. In cases where multiple airports are not banned, the resultant competition will ensure better service to the public. For example, by the introduction of a user development fee (UDF) in the greenfield airports, the public is forced to pay UDF as it does not have a choice to use the AAI-run airport. The monopoly granted to the greenfield airports can help them raise any tariff, aeronautical or non-aeronautical.

In contrast, if AAI is permitted to operate the old airports, the revenue from such airports would go to construction, upgrading, and operation of unprofitable airports which would benefit the larger public interest.

In this connection it may be pertinent to mention that scores of airports owned and maintained by AAI across India are kept open even though they lack scheduled air operations. Hence one way AAI is burdened with keeping such airports open due to social obligations and on the other hand profit-making airports are being shut down only to ensure the profitability of private airports. If keeping such loss-making airports is in the public interest, then closure of profit-making airports which cross-subsidise the loss-making airports is against the public interest.

Finally, it must be asked whose interest is affected by the closure of old airports? VIPs and those who can afford to charter a flight can still use the old airports, whereas only ordinary air

<sup>67</sup> Source of traffic data is AAI website [www.aai.aero](http://www.aai.aero)

<sup>68</sup> Functioning of Private Airports and the Related Issues, *supra* note 58, 19.6.

<sup>69</sup> Development of Airport Sector with Special Emphasis on New Modern Airports, *supra* note 35, 47.

passengers who depend on scheduled flights are deprived of the use of the old airports. In such a situation it cannot be said that the closure of the old airports is in the larger public interest.

## **17. Opinions of Various Forums and Committees**

### **17.1 Expert Committee Recommendation**

As stated *supra*, the Naresh Chandra Committee, an expert committee, recommends in its report that “central and state governments may refrain from extending concessions in general and subsidies in particular to Greenfield airports in close proximity to the existing airports, which might impinge on the viability of existing airports.”<sup>70</sup> But in the case of Bangalore and Hyderabad airports, GoI has given a concession in the form of closing down the existing airports, among the many concessions offered to the greenfield airport operators.

### **17.2 Asian Development Bank**

In the opinion of the Asian Development Bank, monopoly in the airport sector may be misused. In its report titled “Developing Best Practices for Promoting Private Sector Investment in Infrastructure in Airports and Air Traffic Control,” the agency states:

The monopoly power enjoyed by airport operators in the markets for air transport services and airport-related ancillary services could be used by profit-seeking businesses to earn profits in excess of those required to attract new investment into the business (so-called “supernormal” profits). Such a policy might manifest itself not only in terms of high prices for services supplied by the airport, but also in under investment in airport facilities, such that capacity expansion programs were unreasonably delayed, leading to poor quality of service to airlines and passengers. Market power can also be abused if the monopolist is able to earn sufficiently high profits given super-competitive cost levels. The ability to abuse monopoly power in these ways would need to be constrained in order to protect the interests of all types of airport user, including airlines, passengers, and freight shippers.<sup>71</sup>

### **17.3 IATA Chief's Observations**

IATA Director General Giovanni Bisignani said during a speech in Tokyo that “[w]e have seen too many privatizations fail because governments sold the crown jewels without appropriate guidance to the new owners,” and “[t]here is no need to repeat the mistakes in other places.”<sup>72</sup> The warning to the other countries over the adverse impact of airport privatizations without efficient regulation<sup>73</sup> is relevant in the case of India where only profit-making metro airports have been privatized.

### **17.4 Parliamentary Standing Committee Recommendations**

<sup>70</sup> Report of the Committee on a Road Map for the Civil Aviation Sector (Naresh Chandra Committee Report) 65 (2003), available at <http://civilaviation.nic.in/moca/nccommitterreport.pdf>.

<sup>71</sup> Asian Development Bank, Developing Best Practices - Part Two: Airports and Air Traffic Control Report 25 (1998), available at

[http://www.adb.org/Documents/Books/Developing\\_Best\\_Practices/Airports/Part2\\_Airport.pdf](http://www.adb.org/Documents/Books/Developing_Best_Practices/Airports/Part2_Airport.pdf).

<sup>72</sup> IATA Chief Warns Japan on Airport Privatization, AFP, Feb. 14, 2008, available at

<http://afp.google.com/article/ALeqM5iJvuDGMOr0pM7faU2Q6AX5MT7wcw>.

<sup>73</sup> *Id.*

The parliamentary Standing Committee on Transport, Tourism and Culture, comprised of members from the upper and lower houses belonging to the ruling coalition and the opposition parties, has submitted to the Parliament many reports on the issue of the closing of old airports. The reports are advisory in nature hence not binding on the GoI. Before the closure of the old airports, the committee in its 131st Report submitted on March 5, 2008 advised GoI to desist from closing down the old airports due to many reasons. The Report states, in part:

10. The Committee in its 88th, 90th, 96th and 97th Reports had discussed in detail about these airports and submitted its recommendation regarding the closure of existing airports at these places. The Committee in its above mentioned reports has categorically stated that the existing airports should not be closed for commercial operations once the new airports are commissioned for operation.<sup>74</sup>

It can be seen that this committee has consistently recommended against the closure of the old airports, to wit:

The Committee unanimously feels and recommends that the existing airports at Bangalore and Hyderabad should not be closed for commercial operations to make the way for the commissioning of the private Greenfield airports. The Committee also feels that this is the first time in the country that the Government owned airports built on the tax payers' money are being closed for the commissioning of the private Greenfield airports where profit earning is the main motto rather than the service to the passengers. This is contrary to the Government's policy particularly in a situation where both the airports are required in view of the changing scenario in passenger traffic.<sup>75</sup>

The committee by its 141st Report, which was submitted after the closure of the old airports, again advised GoI to open the old airports for short-haul operations. It stated:

Meanwhile, the committee came to know that the ministry of civil aviation asked the BIAL to make arrangements to increase its capacity in the next eight months as the construction of the second terminal would take three years. It would, therefore be a better option to augment the capacity by restarting the functioning of existing HAL airport. In order to ensure that the wide winged aircraft be accommodated properly at the greenfield airports, the government can take a policy decision to allow the small aircraft and ATRs to operate from the existing airports. The committee, therefore, once again calls upon the ministry of civil aviation to take necessary steps to ensure that the existing airports at Hyderabad and Bengaluru are kept functional.<sup>76</sup>

The 142nd Report of the committee, tabled on October 23, 2008, states:

The Committee further recommends that the old airports may be made operational for short-haul passengers. Moreover, this is the practice being followed in many of

<sup>74</sup> Closure of Bangalore and Hyderabad Airports and Matters Related Thereto, 131st Report of the Department-Related Parliamentary Standing Committee On Transport, Tourism & Culture (2008) 10, available at <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Transport,%20Tourism%20and%20Culture/131.htm>.

<sup>75</sup> *Id.* 16.

<sup>76</sup> Modernization of Airports, 141st Report of the Department-Related Parliamentary Standing Committee on Transport, Tourism & Culture (2008) 62,

available at

<http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Transport,%20Tourism%20and%20Culture/141threport.htm>.

the major cities in the world wherein more than one airport exists. There is no reason or justification for keeping the hundreds of crores of worth infrastructure at the old airports idle just to be use for VIP and other flights.<sup>77</sup>

### 17.5 Airline Forum's Suggestion

Vijay Mallya, Federation of Indian Airlines (FIA) Chairman, commented about the old airports at the India Economic Summit. According to Mr. Mallya, “[i]f the government decided to keep the old airports at the two cities operational after the new ones became operational, they could have been used as low-cost airports.”<sup>78</sup> While commenting about what airlines expect from airports, Mr. Mallya, who also heads Kingfisher Airlines said “We do not need fancy terminals. We do not need all that razmatazz. What we need is a simple and safe runway and navigational aids that function. If these facilities are there, connectivity is no problem.”<sup>79</sup>

Criticizing the government's decision to close HAL airport, Capt. G.R. Gopinath of Deccan Aviation, who was the driving force in bringing the low-cost airlines concept to India,<sup>80</sup> said “it was a mistake to give a monopoly to BIAL.”<sup>81</sup> He has also said that the projection in air traffic made during the time the contract was signed did not hold water, as the traffic had exceeded the projection. He suggested that “[w]e should not lose one infrastructure to another and this move may affect some short haul flights.”<sup>82</sup>

### 17.6 Report of Joint House Committee<sup>83</sup>

The report of the Joint House Committee made specific recommendations to reopen HAL airport.<sup>84</sup> It further states that “Government merely replaced the public monopoly of AAI with private monopoly. Sweet coated policies towards building private airports and the watertight concession agreements that are skewed in favour of private players.”<sup>85</sup> Criticizing the closure of HAL airport, the committee said “the closure . . . negated the healthy competition and created private monopoly.” Referring to the specific example of competition between Glasgow and Prestwick airports in the UK, the committee added:

It has been argued that with the opening up of civil aviation in India, if passengers could be allowed to choose airlines, why not allow them to choose airports? It has been felt that existing HAL airport can be kept open for low-cost carries regional flights, courier services, executive jets and so on. All categories of users and service providers would gain.<sup>86</sup>

<sup>77</sup> Functioning of Private Airports and the Related Issues, *supra* note 58, <sup>27</sup>.

<sup>78</sup> Mallya for Use of Old Hyd, B'lore Airports for Low-Cost Ops, ECON. TIMES, Nov. 17, 2008, available at <http://economictimes.indiatimes.com/articleshow.cms?msid=3724470>.

<sup>79</sup> *Id.*

<sup>80</sup> Air Deccan, owned by Capt. Gopinath, was the first low-cost air carrier in India.

<sup>81</sup> Capt. Gopinath Slams HAL Airport Closure, DECCAN HERALD, Feb. 15, 2008, available at <http://archive.deccanherald.com/Content/Feb152008/city2008021552438.asp>.

<sup>82</sup> *Id.*

<sup>83</sup> A joint House committee of the Karnataka Legislative Assembly was set up to examine various issues connected with the construction of Bangalore International Airport at Devanahalli. The committee tabled its report on Dec. 21, 2009 before the Karnataka Assembly. Chapter III of the report deals with the issue of the closure of HAL airport.

<sup>84</sup> Report of the Joint House Committee on Bangalore International Airport Ltd., 4.8 at 86.

<sup>85</sup> *Id.* 2.10.4.

<sup>86</sup> *Id.* 3.1.

### 17.7 Comments of the Minister of Civil Aviation

The union civil aviation minister has reportedly stated that “there was a fundamental flaw in the concession agreement the government had signed with the new international airports in Hyderabad and Bangalore. The policy of permitting only one airport within a radius of an airport is basically flawed.”<sup>87</sup> This points to the fact that such policy was not fully justified. “The government is looking into the existing legal framework to review this, as there is a demand for two airports in many cities,” the minister added.<sup>88</sup>

### 18. Other Infrastructure Projects

Other public-private partnership (PPP) infrastructure projects do not support monopoly. For example, a new highway built under the PPP scheme connects the cities of Bangalore and Mysore in the state of Karnataka. However, the agreement in this case does not stipulate closure of the existing highway between these cities.

### 19. Conclusion

In light of the foregoing discussion, closure of the old airports in Bangalore and Hyderabad cannot be said to accord with published policy, provisions of applicable law, industry demand, or the larger public interest. It is strange that when anti-competition laws are given importance the world over, in India certain agreements/notifications make anti-competition laws ineffective. Moreover, the notifications regarding the closure of old airports have effectively denied the right to use the airports to the general public which depends solely on scheduled airlines. The only reason for such a provision in the concession agreements and notifications can be commercial considerations of the new airports. This may set a wrong precedent. If the trend continues, there will be no competition in the field of airport infrastructure which, in turn, may lead to unhealthy practices. This kind of concession agreement may take away the sovereign powers of the state and statutes may become irrelevant as they will be subject to such commercial contracts.

In the case of cities like Bangalore and Hyderabad, functional in-city airports are beneficial to the air passengers and airlines considering, *inter alia*, the traffic pattern, location of the old and new airports, and the rate of traffic growth in these cities. It is suggested that, instead of creating a private monopoly or replacing a public monopoly with a private monopoly, that competition between the private and public sectors be encouraged in the larger public interest, and that market forces be allowed to decide the fate of non-performing airports.

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<sup>87</sup> *Patel Ignites Hopes of Second Airport in City*, TIMES OF INDIA, Oct. 17, 2008, available at <http://timesofindia.indiatimes.com/articleshow/msid-3606571.prtpage-1.cms>.

<sup>88</sup> *Id.*

