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## Legal Implications of airport privatization in India

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## **Chapter 3**

### **Topic III: Economic Regulations**

#### **Research Paper 6**

#### **The User Development Fee (UDF) in Indian Airports– Legal and Regulatory Issues**

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## The User Development Fee (UDF) in Indian Airports –Legal and Regulatory Issues

Moses George\*

### 1. Introduction

Privatization of airports has been the trend since the sale of British Airports Authority (BAA)<sup>1</sup> owned airports in the 1980s. India has also followed this trend by privatizing its airports since 2006. As of now, three brownfield airports<sup>2</sup> and three greenfield airports have been privatized.

One of the main reasons for privatization was that airport charges in India were 70 percent higher than the world average.<sup>3</sup> The monopoly of Airports Authority of India (AAI) has been quoted as the primary cause.<sup>4</sup> Against this background, the new charges introduced post-privatization are analyzed.

Airport charges are paid by airlines and other users, such as passengers, for the use of airports and their facilities. Charges for landing, parking, and housing, as well as air navigation charges, are paid by airlines. However, passengers are also bound to pay various charges, including security charges and charges for usage of the airport. In many countries, these charges are merged into the ticket cost, so passengers are unaware that the charges are being collected from them.

This article attempts to address issues connected with one type of charge only, the Development Fee (DF), more specifically the User Development Fee (UDF), charged by various Indian airports. The concept of UDF, the applicable international and Indian legal framework, the definition and purpose of UDF, and major issues concerned with its application are discussed.

### 2. Background

Prior to privatization of airports in India, all major airports were under a specialized authority, the Airports Authority of India (AAI), formed under the Airports Authority of India Act 1994<sup>5</sup> (AAI Act). The statutes that governed aviation in the pre-privatization era were the AAI Act 1994, Aircraft Act 1934,<sup>6</sup> and Aircraft Rules 1937.<sup>7</sup>

Post-privatization, through an amendment in the AAI Act, private airports are excluded from the ambit of the Act. Hence, as far as private airports are concerned, only the Aircraft

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<sup>1</sup> British Airports Authority (BAA), which was operating airports in UK.

<sup>2</sup> The operations at AAI airports in the cities of New Delhi, Mumbai, and Nagpur were handed over to private companies.

<sup>3</sup> Report of the Committee on a Road Map for the Civil Aviation Sector, at 12, para. 2.3 (2003) [hereinafter Naresh Chandra Committee Report], available at [http://civilaviation.gov.in/cs/groups/public/documents/newsandupdates/moca\\_000740.pdf](http://civilaviation.gov.in/cs/groups/public/documents/newsandupdates/moca_000740.pdf).

<sup>4</sup> Part I of the Naresh Chandra Committee Report describes the negative aspects of AAI-owned airports: low standards, high airport charges, lack of efficiency, and lack of power to infuse capital. The Report suggests privatization in line with international trends. In addition, IATA's comments on high airport charges in India also point in this direction. See, e.g., Press Release, IATA, Confederation of Indian Industry, Delhi (Sept. 24, 2008), available at <http://www.iata.org/pressroom/pr/pages/2008-09-24-01.aspx>.

<sup>5</sup> Airports Authority of India Act, 1994, No. 55, Acts of Parliament, 1994 [hereinafter AAI Act 1994].

<sup>6</sup> The Aircraft Act, No. 22 of 1934; India Code (1934) [hereinafter The Aircraft Act, 1934].

<sup>7</sup> Aircraft Rules 1937, available at <http://www.dgca.nic.in/airule-ind.htm>.

Act 1934 and the Aircraft Rules 1937 are applicable. In the pre-privatization era, AAI was authorized to determine airport charges, subject to approval by the Ministry of Civil Aviation. However, post-privatization, India established an independent regulatory authority, the Airport Economic Regulatory Authority (AERA), under the Airport Economic Regulatory Authority of India Act 2008.<sup>8</sup> This regulatory authority came into existence in 2009.

Two new levies, the UDF and the Airport Development Fee (ADF), have been introduced since privatization and are being collected by the private airports.<sup>9</sup> However in the post-privatization era, AAI also has started charging one of these levies, UDF, for some public airports. In this article, legal and regulatory issues connected with UDF will be discussed.

The UDF is a charge/levy collected by the airport operator from passengers, which is based on Rule 89 of Aircraft Rules 1937<sup>10</sup> and the concession agreements between the state and the private operators.

### 3. Research Questions

The following questions are addressed in connection with respect to the UDF:

- Is the UDF a charge for usage of any facility in accordance with Section 15 of the Convention on International Civil Aviation?<sup>11</sup>
- If not a charge for usage of any facilities, is UDF is a tax on aviation?
- Is UDF in agreement with International Civil Aviation Organization (ICAO) policies and guidelines?
- How do competition issues affect UDF?
- What is the impact of privatization on the introduction of UDF?
- Is UDF legal in light of the recent Supreme Court decision on ADF?<sup>12</sup>

## Part I

### 4. International Framework

#### 4.1 Chicago Convention and ICAO guidelines

The international legal framework regarding airport charges consists of provisions of the Chicago Convention and documents of the International Civil Aviation Organization (ICAO) regarding policies and recommendations on airport charges. Airport charges are dealt with in Article 15 of the Chicago Convention:

Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services,

<sup>8</sup> Airport Economic Regulatory Authority of India Act, 2008, No. 27, Acts of Parliament, 2008 [hereinafter AERA Act 2008].

<sup>9</sup> Delhi and Mumbai airports charge ADF as well as UDF, Bangalore and Hyderabad airports charge only UDF

<sup>10</sup> Aircraft Rules 1937, Rule 89 (2009), available at <http://www.dgca.nic.in/airrule-ind.htm>.

<sup>11</sup> Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947) [hereinafter Chicago Convention].

<sup>12</sup> See *Consumer Online Found. v. Union of India & Ors.*, (2011) 5 S.C.C. 360 (India), available at [www.indiankanoon.org/doc/1390087/](http://www.indiankanoon.org/doc/1390087/).

which may be provided for public use for the safety and expedition of air navigation.

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,

(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and

(b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

All such charges shall be published and communicated to the International Civil Aviation Organization, provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.<sup>13</sup>

It can be seen that Article 15 refers mainly to charges applied to aircraft as far as the usage of the airports is concerned, in particular that any charges imposed shall not discriminate between the aircraft of the state imposing the charge and those of other carriers.

ICAO Document 9980<sup>14</sup> reiterates the cardinal principles governing airport charges in accordance with the Chicago Convention.

Further, as per a recommendation adopted by the Conference on the Economics of Airports and Air Navigation Services (CEANS 2008) and endorsed by the ICAO Council, States are encouraged to incorporate the four key principles of non-discrimination, cost-relatedness, transparency, and consultation with users into their national legislation, regulation, or policies, as well as into their air services agreements in order to ensure compliance by airport operators and air navigation service providers (ANSPs).<sup>15</sup>

However, a more appropriate policy and recommendation of ICAO on the concept of UDF with respect to new airports can be seen in Document 9082, entitled *ICAO's Policies on Charges for Airports and Air Navigation Services*.<sup>16</sup> The recommendations and advice of ICAO in this document, which is based on Article 15 of the Chicago Convention, are guidance material only and not binding on the contracting states, in contrast with the Chicago Convention's provisions. However, this guidance is applicable in the case of a "charge" and not a "fee," which is distinguished in the document itself. ICAO recommends that contracting

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<sup>13</sup> *Id.* art. 15.

<sup>14</sup> ICAO, MANUAL ON PRIVATIZATION IN THE PROVISION OF AIRPORTS AND AIR NAVIGATION SERVICES, ICAO Doc. 9980 (1st ed. 2012) [hereinafter ICAO PRIVATIZATION MANUAL].

<sup>15</sup> ICAO, REPORT OF THE CONFERENCE ON THE ECONOMICS OF AIRPORTS AND AIR NAVIGATION SERVICES (CEANS) 46, ICAO Doc. 9908 (2008). See ICAO, ICAO'S POLICIES ON CHARGES FOR AIRPORTS AND AIR NAVIGATION SERVICES, ICAO Doc. 9082 (8th ed. 2009), available at [http://www.icao.int/publications/Documents/9082\\_8ed\\_en.pdf](http://www.icao.int/publications/Documents/9082_8ed_en.pdf).

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

states impose charges only for the use of facilities used by aircraft/airlines, which is expressed in very clear terms in the introduction to Document 9082:

The Council recommends that States:

- a) Permit the imposition of charges only for services and functions which are provided for, directly related to, or ultimately beneficial for, civil aviation operations; and
- b) Refrain from imposing charges which discriminate against international civil aviation in relation to other modes of international transport.<sup>17</sup>

#### 4.2 Nature of Development Fee (DF) – A Charge or a Tax under ICAO Guidelines?

As per the ICAO Council's understanding – which is clearly expressed in Document 9082 – airports should levy only charges, not taxes, from users of airports. Further, the Council recommends that States should impose charges only according to the two principles stated *supra*: a) charge only for usage of facilities; and b) do not discriminate.<sup>18</sup>

The council further distinguishes a charge and tax:

[A] charge is a levy that is designed and applied specifically to recover the costs of providing facilities and services for civil aviation, and a tax is a levy that is designed to raise national or local government revenues which are generally not applied to civil aviation in their entirety or on a cost specific basis.<sup>19</sup>

It is clear the Council considers charges and taxes as clearly distinct levies, and the airport is expected to only levy charges for the specific services used by the airline (or other end user) and nothing else.

As far as India is concerned, as per ICAO Document 8632,<sup>20</sup> the only tax applied to aviation is a departure tax called the Foreign Travel Tax.<sup>21</sup> India also confirms that there is no tax on air cargo or on air tickets.<sup>22</sup> From this it is clear that India does not recognize there is any tax on aviation or air tickets other than the Foreign Travel Tax. It is in this context that the UDF introduced in the post-privatization era will be analyzed.

<sup>17</sup> ICAO, MANUAL ON AIR NAVIGATION SERVICES ECONOMICS, para. 1.8, ICAO Doc. 9161 (5th ed. 2013), available at [http://www.icao.int/publications/Documents/9161\\_en.pdf](http://www.icao.int/publications/Documents/9161_en.pdf); ICAO Doc. 9082, *supra* note 14, para. 9.

<sup>18</sup> ICAO Doc. 9082, *supra* note 14, para. 8.

<sup>19</sup> *Id.* para. 3. The same concept is reiterated in ICAO Doc. 8632, which states:

*Whereas* ICAO, for the purpose of its policy objectives, makes a distinction between a charge and a tax, in that charges are levies to defray the costs of providing facilities and services for civil aviation while taxes are levies to raise general national and local government revenues that are applied for non-aviation purposes.

ICAO, ICAO'S POLICIES ON TAXATION IN THE FIELD OF INTERNATIONAL AIR TRANSPORT, AND SUPPLEMENT (Nov. 24, 2009).

<sup>20</sup> *Id.*

<sup>21</sup> Supplement to ICAO Doc. 8632, at 69 ("Clause 1. The fuel and lubricants filled into receptacles forming part of any aircraft registered in any country (other than India) which is a party to the Convention on International Civil Aviation signed at Chicago on 7th December 1944 or which has entered into an Air Services Agreement with India and operating a scheduled or non-scheduled international air service to or from India, are exempt from the levy of all taxes and duties in India. Clause 2. A list of countries with whom Double Taxation Avoidance Agreement has been concluded is attached. Clause 3. There is no tax on air cargo shipments or on air tickets. But a departure tax called Foreign Travel Tax is levied on every passenger leaving India by flight.").

<sup>22</sup> *Id.*



## Part II

### 5. Indian Scenario – Privatization and New Airport Fee

#### 5.1 UDF in the Pre-Privatization Era

Before privatization, AAI did not levy UDF. However, the first private airport in India, Cochin (Kochi) International Airport, in Kerala State, formerly charged Rs. 400<sup>23</sup> as a user fee, but the charge was dropped after legal opposition. It has been reported that the request of AAI to levy a development fee was turned down by the high-powered task force on economic affairs in 2006:

**7.6** It was suggested by AAI that most of the projects being contemplated under the non-Metro airports development initiative pertain to Airside and Terminal Buildings and the projects are likely to yield either negative IRR [Internal Rate of Return] or an IRR below the PIB[Public Investment Board] norm of 12%. As such, levy of ADF/UDF on passengers at these airports was proposed.

**7.7** The Task Force felt that users should not be burdened with ADF/UDF for financing un-viable projects. This is particularly important in the context of the policy objective to make civil aviation a mass rather than an elitist mode of travel and to make air travel more affordable.<sup>24</sup>

In the final recommendation, the Task Force recommended that:

**8.13** ADF/UDF charges would add to travel costs unnecessarily and the Task Force did not, therefore, recommend any new charges. Secretary, Civil Aviation felt that the option should not be foreclosed. Finance Ministry (Department of Expenditure) also supported the same stand. The Planning Commission was of the view that costs should be kept low and available resources should be leveraged by AAI, if necessary, through PPP [Public Private Partnership]. The Task Force was of the view that recourse to ADF/UDF should be the last resort in individual cases after all efforts at implementation through PPP have not succeeded.<sup>25</sup>

In 2007, the planning commission<sup>26</sup> itself objected to the concept of UDF, as introduced by the Ministry of Civil Aviation, in the proposed Airports Economic Regulatory Authority

<sup>23</sup> Approximately US\$6.60 (2013).

<sup>24</sup> GOI, SECRETARIAT FOR THE COMMITTEE ON INFRASTRUCTURE, PLANNING COMMISSION, REPORT OF THE TASK FORCE: FINANCING PLAN FOR AIRPORTS 14 (July 2006), *available at* [http://www.infrastructure.gov.in/pdf/airport\\_report.pdf](http://www.infrastructure.gov.in/pdf/airport_report.pdf). The Report was issued in response to the direction of the Committee on Infrastructure, chaired by the Prime Minister, to evolve a plan for creating a world-class airport infrastructure. It was prepared by a Task Force chaired by Shri Anwarul Hoda, Member, Planning Commission, and included experts and representatives from the Ministry of Civil Aviation, the Airports Authority of India, Planning Commission, and Ministry of Finance. It was considered and approved by the Committee on Infrastructure in June 2006.

<sup>25</sup> *Id.* at 18.

<sup>26</sup> The Planning Commission was set up by a Resolution of the Government of India in March 1950 in pursuance of declared objectives of the Government to promote a rapid rise in the standard of living of the people by efficient exploitation of the resources of the country, increasing production, and offering opportunities to all for employment in the service of the community. The Planning Commission was charged with the responsibility of making assessments of all resources of the country, augmenting deficient resources, formulating plans for the most effective and balanced utilization of resources, and determining priorities. Jawaharlal Nehru was the first Chairman of the Planning Commission. See <http://planningcommission.nic.in/aboutus/history/index.php?about=aboutbdy.htm>.

(AERA) Bill 2006, which was due to be presented in the budget session of the Parliament in 2007. As per the proposal, such development fees would be applicable in the case of airports where annual passenger turnover exceeds 15 lakh,<sup>27</sup> and the fees would be used for the upkeep and development of such airports.<sup>28</sup>

It is reported that the Commission objected to the concept as follows:

According to government sources, the Planning Commission has put a spoke in the ministry's proposal by pointing out that the PSF[Passenger Service Fee], in any case, was meant to provide facilities at airports, and so there would appear to be no need to impose a separate airport development fee.

....

According to sources, the Commission has also suggested that such charges should form part of airport tariffs collected from airline companies rather than from as levies on air passengers.<sup>29</sup>

It is clear from the above that the Planning Commission, which is the highest planning authority in the country, had suggested that ADF and UDF should not be introduced, either by AAI or any other agency in the aviation sector, as airport user charges. In spite of this, the AERA Act 2008 empowers AERA to determine the development fee in major airports.<sup>30</sup> The Planning Commission's view was in agreement with the guidelines of ICAO.

## 5.2 National Legal Provision for Levying UDF

UDF first appeared in the Aircraft Rules 1937 in 2004 through a government notification by a substitution.<sup>31</sup> Previously there was no provision for levying UDF, and the Aircraft Act 1934 does not mention anything about UDF. Currently, Rule 89 of the Aircraft Rules 1937 states:

89. User Development Fee. —The licensee may, -

- (i) levy and collect at a major airport the User Development Fee at such rate as may be determined under clause (b) of sub-section (1) of section 13 of the Airports Economic Regulatory Authority of India Act, 2008;
- (ii) levy and collect at any other airport the User Development Fees at such rate as the Central Government may specify.<sup>32</sup>

UDF was brought within the jurisdiction of AERA in 2009.<sup>33</sup> Before that, the Ministry of Civil Aviation was the authority that permitted such charges. The Aeronautical Circular by which Rule 89 was introduced does not mention anything about the reason to introduce such a new fee. Hence, the provision of UDF was introduced through subordinate legislation and not through an act of Parliament. It is asserted that the legal provision for levying UDF did not

<sup>27</sup> 15 lakh = 1.5 million.

<sup>28</sup> *Planning Commission Objects to Further Levies on Air Travelers*, DOMAIN-B.COM, Mar. 17, 2007, [http://www.domain-b.com/aero/20070317\\_planning\\_commission.htm](http://www.domain-b.com/aero/20070317_planning_commission.htm).

<sup>29</sup> *Id.*

<sup>30</sup> AERA Act 2008, *supra* note 8, sec. 13(b).

<sup>31</sup> Aircraft Rules, 1937, rule 89, substituted by GSR No. 732 (E), Feb. 11, 2004, *available at* <http://www.dgca.nic.in/airrule/rule89.pdf>.

<sup>32</sup> Aircraft Rules, 1937, rule 89 (2009).

<sup>33</sup> *Id.*

come from parliamentary sanction or the legislature's collective wisdom; rather it was an executive decision.

### 5.3 Introduction of UDF at Indian Airports

The first time the term UDF was introduced in the aviation scenario in India was the concession agreement between Government of India (GoI) and a private entity to operate the Bangalore airport. The concession agreement defines UDF as follows:

User Development Fee. Means a fee collected from embarking passengers for the provision of passenger amenities, services and facilities and will be used for the development, management, maintenance, operation and expansion of facilities at the Airport.<sup>34</sup>

Further, the Concession Agreement states:

User Development Fee (UDF) (Domestic and International):

BIAL[Bangalore International Airport Limited] will be allowed to levy UDF, w.e.f Airport Opening Date, duly increased in the subsequent years with inflation index as set out hereunder, from embarking domestic and international passengers, for the provision of passenger amenities, services and facilities and the UDF will be used for the development, management, maintenance, operation and expansion of the facilities at the Airport.<sup>35</sup>

At the time of execution of the concession agreement (CA), on July 5, 2004, the above referred provision of UDF (Rule 89) was not available in the Aircraft Rules 1937.<sup>36</sup> Hence, the inclusion of an ability to charge UDF in the BIAL CA was *ultra vires* in light of the inability to charge such fees under national legislation.<sup>37</sup> Moreover, the concept of UDF was not available in the tender document.

## 6. Legal and Regulatory Aspects of UDF

### 6.1 Effect of Change in Law

The CA provides for GoI to compensate BIAL if it suffers loss and increases in costs or reduction in net after tax return or other financial burdens, loss, liability, or damage in connection with its development or operation of the airport, the aggregate financial effect of which exceeds ten million (10,000,000) Rupees in any year.<sup>38</sup> But the CA does not say anything about gain or profit on account of change in law after the date of the agreement. In fact, UDF was not permissible under any law on the date of the agreement, Rule 89 having been introduced afterwards. Hence, BIAL gained by the change in law. But there is no provision in the CA for BIAL to compensate GoI by paying a higher license fee for example.

When GoI approved UDF on an adhoc basis, its order permitting BIAL to charge UDF merely stated that it was to be per clause no. 10.2 of the CA. The order does not state anything about applicable rules, which means the executive order was a specific performance of the contract and not per any law. The order also states that the permission to charge UDF is purely

<sup>34</sup> Concession Agreement for the Development, Construction, Operation and Maintenance of the Bangalore International Airport between Ministry of Civil Aviation, Government of India and Bangalore International Airport Limited art. 1, Definitions and Interpretation, July 5, 2004 [hereinafter Concession Agreement], available at [http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca\\_000743.pdf](http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca_000743.pdf).

<sup>35</sup> *Id.* schedule 6, Regulated Charges.

<sup>36</sup> Aircraft Rules, 1937, rule 89, substituted by GSR No. 732 (E), Feb. 11, 2004.

<sup>37</sup> The Concession Agreement between GoI and BIAL was signed on July 5, 2004.

<sup>38</sup> Concession Agreement, *supra* note 33, art. 15.5. 10,000,000 Rupees = approximately US\$160,000.

on an ad hoc basis. However it does not state for how long the UDF can be charged. The lack of a time limit implies that BIAL can continue to charge UDF as it pleases, though the order is purely ad hoc. In the case of Hyderabad International Airport Limited (HIAL), the ad hoc permission granted by the GoI to levy UDF in 2008 was extended by AERA in 2010, again on an ad hoc basis.<sup>39</sup> In practice, BIAL and HIAL continue to charge UDF today on the basis of ad hoc orders.

Subsequent to GoI's permission to the private airports to charge UDF, AAI also requested GoI to permit it to charge UDF for the airports which were upgraded. Accordingly, GoI and AERA have permitted various AAI airports also to charge UDF.<sup>40</sup> Later, new brownfield airport operators in Delhi<sup>41</sup> and Mumbai<sup>42</sup> were also allowed to charge UDF in addition to ADF.

It can be seen from the orders that in the case of BIAL, UDF was permitted, on an ad hoc basis, as per CA clause 10.2, while in the case of AAI airports and brownfield airports it was permitted under Rule 89 of the Aircraft Rules 1937.

However, if UDF is declared illegal and is stopped, the private airports (e.g., BIAL) will not be in a position to raise Article 15.5 against GoI for compensation of the loss because the situation would then be identical to that which existed on the date of execution of the agreement – July 5, 2004 – when UDF was not permissible under the then-existing Aircraft Rules 1937.

## 6.2 UDF–Charge or Tax?

The definitions and provisions of the CA make it amply clear that UDF is a fee *for the provision of passenger amenities, services and facilities*. In other words, UDF is a charge for the facilities provided to the passengers in particular as per the concession agreements. However, one cannot find a definition of UDF anywhere in the statutes, viz the Aircraft Act 1934 or the Aircraft Rules 1937 – even in Rule 89, which permits airport licensees to charge UDF – nor has any methodology been prescribed in the Aircraft Rules for determining UDF.

Some clarity regarding the nature of UDF was given for the first time in the consultation paper issued by AERA in 2010. AERA observes that:

11.36 The Concession Agreements for BIAL and HIAL [Hyderabad International Airport Limited] provide for levy of UDF “from embarking domestic and international passengers, for the provision of passenger amenities, services and facilities” and for the UDF to be “used for the development, management, maintenance, operation and expansion of the facilities at the Airport”.

11.37 Draft guidelines for determination of UDF issued by the Ministry of Civil Aviation in the past for discussions had noted that levy of UDF was to be considered only in cases and years where the Target Revenue of a major airport was projected to fall short of the Admissible Expenditure. Hon'ble High Court of Kerala, in its judgement in the case of Commissioner of Central Excise Vs. Cochin International Airport Ltd. [2009 (16) S.T.R. 401 (Ker.)], has noted that the purpose of UDF “is to augment revenue”. Thus, UDF may be taken as

<sup>39</sup> Aeronautical Information Circular (AIC) No. 6/2010 (Oct. 29, 2010), available at <http://www.dgca.nic.in/rules/aero-ind.htm>.

<sup>40</sup> *Id.*

<sup>41</sup> Delhi International Airport Limited (DIAL).

<sup>42</sup> Mumbai International Airport Limited (MIAL).

a revenue enhancing measure to ensure economic viability of the airport operations.

....

11.39 Keeping in view the position that UDF and other aeronautical charges essentially cover the same range of services, the Authority feels that UDF levy for an airport may be considered as a revenue head to be permitted in specific cases upon due consideration. To illustrate, in case of recently operationalised Bangalore and Hyderabad airports, where large investments needed to be remunerated, such remuneration predominantly through aeronautical charges may have raised such charges to completely unacceptable levels for the airlines. Therefore, part of the remuneration is being allowed through a passenger based levy i.e. UDF. The Authority considers it prudent that UDF levy should be allowed for airports in future only in cases of like nature i.e. the cases where large lumpy investments need to be remunerated in the near future. It is felt that such an approach would also ensure a simple tariff structure. Any proposal for levy of UDF by airports would, therefore, need to be specifically substantiated with rationale for levying such a user specific charge as against the various other aeronautical charges possible.<sup>43</sup>

Thus, the independent airport economic regulator, AERA, agrees with the decision of the Kerala High Court that UDF is merely a revenue-enhancing method and not a charge for any specific airport services. A special leave petition (SLP) filed by the service tax department against the Kerala High Court decision was dismissed by the Supreme Court.<sup>44</sup> This view is reiterated in the AERA's order permitting an ad hoc UDF in the case of an AAI-owned airport in Trivandrum which states: "[t]hus UDF may be taken as a revenue enhancing measure to ensure economic viability of airport operations."<sup>45</sup> It is clear that the UDF is not a charge for using any services within the meaning of the Chicago Convention, but is simply a way to enhance revenue.

Levy of another new fee, namely ADF<sup>46</sup> [Airport Development Fee], was challenged before Indian courts.<sup>47</sup> The Supreme Court of India's decision<sup>48</sup> on the issue states that ADF is a tax and not a charge for any services provided. Section 22(i)(c) of the Aircraft Rules 1937 provides for levying a charge from air passengers for facilities offered to them and for security, namely by a Passenger Service Fee (PSF) – which is being levied from every passenger who uses the airport – at the rate of Rs. 225<sup>49</sup> in addition to the ADF.

<sup>43</sup> AERA, Consultation Paper No. 3/2009-10, *Regulatory Philosophy and Approach in Economic Regulation of Airports and Air Navigation Services*, at 22 (Feb. 26, 2010) [hereinafter AERA Consultation Paper] (emphasis added).

<sup>44</sup> Supreme Court 2009 (17) J79.

<sup>45</sup> AERA, Order No. 1/2010-11, para. 4.2 (Apr. 30, 2010), *available at* <http://aera.gov.in/writereaddata/order/173.pdf>.

<sup>46</sup> ADF is also referred as Development Fee (DF)

<sup>47</sup> The permission given by MoCA to levy the Airport Development Fee (ADF) was challenged before the Delhi High Court in three public interest petitions, which were dismissed on August 26, 2009. The High Court held that there is no illegality attached in imposition of Airport Development Fee by DIAL with the prior approval of the Central Government.

<sup>48</sup> *Consumer Online Found. v. Union of India & Ors*, (2011) 5 S.C.C. 360 (India), *available at* [www.indiankanoon.org/doc/1390087/](http://www.indiankanoon.org/doc/1390087/).

<sup>49</sup> Rs. 225 = US\$3.68, Rs. 1 = US\$0.0147.

Rule 88 of the Aircraft Rules 1937 states:

Passenger Service Fee. —The licensee is entitled to collect fees to be called as Passenger Service Fee from the embarking passengers at such rate as the Central Government may specify and is also liable to pay for security component to any security agency designated by the Central Government for providing the security service.

Provided that in respect of a major airport such rate shall be as determined under clause (c) of sub-section (1) of section 13 of the Airports Economic Regulatory Authority of India Act, 2008.<sup>50</sup>

Hence there is a specific provision under which any licensee can levy a charge for the services/amenities provided to them under Rule 88, which is in line with the ICAO policies detailed in Document 9082. However, the UDF levied under Rule 89 is not a consideration for any services or facilities provided by AAI. The Supreme Court has considered this aspect while deciding whether the ADF is a charge or tax.

The court held:

The nature of the levy under Section 22A of the 2004 Act, in our considered opinion, is not charges or any other consideration for services for the facilities provided by the Airports Authority. This Court has held in *Vijayalashmi Rice Mills & Ors. v. Commercial Tax Officers, Palakot & Ors.* (supra) that a cess is a tax which generates revenue which is utilized Section 22A though described as fees is really in the nature of a cess or a tax for generating revenue for the specific purposes mentioned in clauses (a), (b) and (c) of Section 22A.<sup>51</sup>

<sup>50</sup> Rule 89, Aircraft Rules 1937, <http://www.dgca.nic.in/airrule/rule88.pdf>.

<sup>51</sup> *Consumer Online Found.*, (2011) 5 S.C.C. 360. The Supreme Court held:

14. The High Court was not correct in coming to the conclusion in the impugned judgment that the development fees to be levied and collected under Section 22A of the 1994 Act is in the nature of tariff or charges collected by the Airports Authority for the facilities provided to the passengers and the airlines. It will be clear from a bare reading of Sections 22 and 22A that there is a distinction between the charges, fees and rent collected under Section 22 and the development fees levied and collected under Section 22A of the 1994 Act. *The charges, fees and rent collected by the Airports Authority under Section 22 are for the services and facilities provided by the Airports Authority to the airlines, passengers, visitors and traders doing business at the airport.* Therefore, when the Airports Authority makes a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) in favour of a lessee to carry out some of its functions under Section 12, the lessee, who has been assigned such functions, will have the powers of the Airports Authority under Section 22 of the Act to collect charges, fees or rent from the third parties for the different facilities and services provided to them in terms of the lease agreement. The legal basis of such charges, fees or rent enumerated in Section 22 of the 2008 Act is the contract between the Airports Authority or the lessee to whom the airport has been leased out and the third party, such as the airlines, passengers, visitors and traders doing business at the airport. But there can be no such contractual relationship between the passengers embarking at an airport and the Airports Authority with regard to the up-gradation, expansion or development of the airport *which is to be funded or financed by development fees as provided in Clause (a) of Section 22A.* Those passengers who embark at the airport after the airport is upgraded, expanded or developed will only avail the facilities and services of the upgraded, expanded and developed airport. Similarly, there can be no contractual relationship between the Airports Authority and passengers embarking at an airport for establishment of a new airport in lieu of the existing airport or establishment of a private airport in lieu of the existing airport as mentioned in Clauses (b) and (c) of Section 22A of the 1994 Act. In the absence of such contractual relationship, the liability of the embarking passengers to pay development fees has to be based on a statutory provision and for this reason Section 22A has

If this decision of the Supreme Court is considered, it can be seen that the Court has held that, since the Passenger Service Fee (PSF) is a charge for the usage of airport facilities as per Rule 89 of The Aircraft Rules 1937, ADF is not a charge but a tax. The name “User Development Fee” gives the impression that UDF is a charge for usage of airport facilities, but since PSF is already levied as a charge for the usage of airport facilities by the passenger, UDF cannot be considered as a user charge. It is also reported that in connection with the applicability of service tax on UDF, private operators have contended that the UDF was not being collected against any service offered and they were not required to pay the tax.<sup>52</sup>

If the AERA’s above-stated definition/purpose of UDF is read in conjunction with the Supreme Court decision on ADF, and supported by the above-stated contention of the private airport operators, it becomes clear that UDF is not a charge for service or facilities provided by the airport but it is purely a tax, similar to ADF.

### 6.3 UDF – Legal Validity

If UDF is a tax, the aforementioned Court decision in the case of ADF becomes applicable in the case of UDF as well:

15. Once we hold that the development fees levied under Section 22A is really a cess or a tax for a special purpose, Article 265 of the Constitution which provides that no tax can be levied or collected except by authority of law gets attracted.<sup>53</sup>

As stated *supra*, the authority for charging UDF can be traced to Rule 89 of the Aircraft Rules 1937, which was inserted in 2004. The Rule simply states *licensee is entitled to collect a fee called UDF*. It does not elaborate on the methodology or the basis of calculation. This lacuna is accepted by AERA in its consultation paper, which states:

11.35 However, no methodology has been prescribed in the Aircraft Rules for determining the UDF.<sup>54</sup>

In accordance with the decision of the Court set out above, Article 265 of the Constitution must be considered. Hence, to charge UDF there should be a clear provision of law permitting a tax called UDF. However, if the legislative sanction of UDF is traced, one can see only a rule, Rule 89, and not a specific provision in the Aircraft Act 1934. In other words, the Aircraft Rules are formed in exercise of the powers conferred by Sections 5,7, and subsection (2) of Section 8 of the Aircraft Act, in order to regulate various aviation-related activities. Subsection (2)(ba) of Section 5 states that a rule may be promulgated regarding a fee to be charged by an airport. However, there needs to be a power in the Act for a Rule to be

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been enacted empowering the Airports Authority to levy and collect from the embarking passengers the development fees for the purposes mentioned in Clauses (a), (b) and (c) of Section 22A of the Act. In other words, the object of Parliament in inserting Section 22A in the 2004 Act by the Amendment Act of 2003 is to authorize by law the levy and collection of development fees from every embarking passenger de hors the facilities that the embarking passengers get at the existing airports. The nature of the levy under Section 22A of the 2004 Act, in our considered opinion, is not charges or any other consideration for services for the facilities provided by the Airports Authority. This Court has held in *Vijayalashmi Rice Mills & Ors. v. Commercial Tax Officers, Palakot & Ors.* (*supra*) that a cess is a tax which generates revenue which is utilized Section 22A though described as fees is really in the nature of a cess or a tax for generating revenue for the specific purposes mentioned in clauses (a), (b) and (c) of Section 22A (emphasis added).

<sup>52</sup> K.V. Ramana, *GMR to Consolidate Airport Assets*, DNAINDIA.COM, Oct. 28, 2009, [http://www.dnaindia.com/money/report\\_gmr-to-consolidate-airport-assets\\_1303935](http://www.dnaindia.com/money/report_gmr-to-consolidate-airport-assets_1303935) (last visited Dec. 20, 2013).

<sup>53</sup> *Consumer Online Found.*, (2011) 5 S.C.C. 360.

<sup>54</sup> AERA Consultation Paper, *supra* note 42, at 22, para. 11.35.

promulgated to prescribe a tax. Further, the Aircraft Act does not specifically permit UDF to be charged from the passengers, nor does it define UDF.

5. Power of Central Government to make rules. — (1) <sup>a</sup>[Subject to the provisions of section 14,] the <sup>b</sup>[Central Government] may, by notification in the <sup>b</sup>[Official Gazette], make rules <sup>c</sup>[regulating the manufacture,] possession, use, operation, sale, import or export of any aircraft or class of aircraft <sup>d</sup>[and for securing the safety of aircraft operation.]

(2) Without prejudice to the generality of the foregoing power, such rules may provide for –

....

(ba) the fees which may be charged at those aerodromes to which <sup>h</sup>[the Airports Authority of India Act, 1994] does not apply or is not made applicable;

....<sup>55</sup>

Similarly there needs to be a power in the Aircraft Act for a rule to be promulgated to prescribe UDF, since UDF is a tax.

The rule for levying UDF was notified in 2004 under this provision. But the Aircraft Act 1934 does not provide for a tax called “UDF” anywhere in its provisions, unlike the ADF, which is provided under Section 22A of the AAI Act. Section 22A specifically defines the purpose of a tax called a “development fee” which can be collected from AAI airports in addition to various charges provided in Section 22. For clarity, one may need to examine Section 22 of the AAI Act in detail. Section 22 permits AAI to charge fees, rent, and so on for the various services provided by AAI, which entitle AAI to collect various charges or fees for landing, parking, and housing charges, route navigational charges, passenger facilitation fees (PSF), rent and licensee fees.

But to levy a tax called a “development fee,” a new section, 22A, was inserted in the AAI Act. In the case of the Aircraft Act 1934 no special section authorizing a tax (which is different from a charge) is available.

The Supreme Court has held that, although a special provision with regard to a Development Fee (ADF) is available in Section 22A, no specific rule has been framed. Hence, the Court held that levy of ADF is illegal. If the same rationale is applied in the case of UDF, there is no specific provision in the Act itself, though the Aircraft Rules contain a provision to levy UDF, which is insufficient. Moreover, the rule is silent about the rate at which it should be charged. Hence, as a tax, UDF becomes *ultra vires*.

Alternatively, UDF is levied under delegated legislation, the Aircraft Rules 1937, that is, rules made by a department of the government. There is no statute, including the Aircraft Act 1937, and there can be no law which can authorize any private person to levy and collect the taxes. Hence, UDF is a tax without any sanction of law and thus, by Article 265 of the Constitution, it would be unconstitutional and therefore an illegal tax.<sup>56</sup>

<sup>55</sup> The Aircraft Act, 1934, *supra* note 6, sec. 5.

<sup>56</sup> M.K. Gupta, *Airport Services – Development Fees – Issue of Chargeability to Service Tax*, TAXINDIAONLINE.COM, May 28, 2012, [http://www.taxindiaonline.com/RC2/inside2.php3?filename=bnews\\_detail.php3&newsid=15094](http://www.taxindiaonline.com/RC2/inside2.php3?filename=bnews_detail.php3&newsid=15094) (last visited Dec. 20, 2013).



## 7. Competition Law and UDF

### 7.1 Competitive Bidding for Construction and Services

Lack of transparency in awarding contracts is against the fundamental requirement envisaged by ICAO in Document 9082 for levying even pre-funding charges.<sup>57</sup> The absence of competitive bidding for any construction may lead to increases in cost. This may affect the determination of the quantum of the UDF. The Ministry of Civil Aviation has formulated draft guidelines for UDF at airports.<sup>58</sup> Under the guidelines, authorities should confirm whether transparent competitive bidding has been followed when construction contracts connected with the construction of an airport are awarded.<sup>59</sup> As a state entity, AAI must seek competitive bidding for award of any work related to airport construction and service. But private airports and their operators are not bound, like AAI, to use competitive bidding for construction and services. Hence, it was necessary to ensure compliance in this regard. The Ministry of Civil Aviation (MoCA) letter,<sup>60</sup> permitting BIAL to collect UDF on a purely ad hoc basis, clearly states that a certificate from statutory auditors affirming that a transparent competitive bidding process has been carried out must be submitted.<sup>61</sup> However, the ad hoc permission was given without such a certificate. It can be seen that the private airport entities are of the opinion that competitive bidding conditions – similar to those applicable to AAI – do not apply to the contracts they issue.<sup>62</sup> However, under recent judgments, the private airports have been equated with state entities.

During the tender process to select the operator for Bangalore Airport, on the request of the negotiating team of the supervising steering committee, AAI carried out a benchmarking exercise on the basis of recent quotes obtained for different domestic airport works, for the same bill of quantities (BOQ) as contained in the preferred bidder's bid on the Bangalore Airport project, to facilitate a comparison.

#### Comparative Analysis of Cost for Bangalore Airport Construction<sup>63</sup>

Items	Siemens (in \$m)	AAI (in \$m)
Passenger Terminal System	68.6	37.6
Airside Infrastructure	27.5	18.1
CNS-ATC	13.4	8.4
Design, Project, etc.	9.0	3.2
Contingencies	18.0	3.6
<b>Total of 5 items</b>	<b>257.1</b>	<b>70.9</b>

<sup>57</sup> ICAO Doc. 9082, *supra* note 14, para. 32.

<sup>58</sup> Press Release, GoI Press Info. Bureau, Draft Guidelines for UDF at Airports Formulated (Aug. 18, 2008), available at <http://pib.nic.in/newsite/erelease.aspx?relid=41419>.

<sup>59</sup> *Id.*

<sup>60</sup> Ministry of Civil Aviation, Letter to BIAL Permitting Levy of UDF on Ad-hoc Basis, File No. AV 20036/007/2008-AD (Jan. 9, 2009). The letter states, “[i]n the meantime, BIAL is permitted to levy a UDF @ Rs. 260/- per departing domestic passenger with effect from 16.01.2009 on an ‘ad hoc’ basis. This levy shall be inclusive of all applicable taxes.”

<sup>61</sup> *Id.*

<sup>62</sup> *Flemingo Duty Free Shops Pvt. Ltd. v. Union of India*, Writ petition No. 14215 of 2006 (Karnataka H.C. Dec. 19, 2008).

<sup>63</sup> Proceedings of the 15th Meeting of the Steering Committee on the New International Airport at Devanahalli near Bangalore, para. 3.8 (Oct. 1, 2001), available at <http://www.slideshare.net/Prajasevaka/steering-11-17-presentation?type=document>.

The Siemens quotes were accepted based on discussions with the negotiating team for a maximum project cost of \$US 230M. The 328.57 percent higher cost proposed by Siemens compared to AAI's estimate for the project is important when considering the issue of competitive bidding for the construction, and while determining UDF as per the guidelines issued by the MoCA. It may be interesting to note that, according to IATA, India has the lowest construction cost in the world.<sup>64</sup>

The issue of whether the construction/electrical-related contracts could be given to constituents of the consortium that operates the airport without competitive bidding was dealt with by the steering committee constituted for supervising the Bangalore greenfield airport project. This has become an issue of discussion in the parliamentary committee on aviation. It was reported that the consortium partners were given engineering procurement and construction (EPC) contracts for Rs. 884 crore.<sup>65</sup>

Note that these contracts for Rs.884 crore were out of the total project cost estimated to be Rs.1411 crore in 2005,<sup>66</sup> that is to say 62 percent of the project cost.

A more recent report of the Joint Legislative Committee on Examination of Construction of Bangalore International Airport states that the promoters were given more contracts for Rs. 1400 crore.<sup>67</sup>

This shows that all of the three private promoters executed various contracts valued at Rs. 1400.00 crore (as of March 31, 2009) out of a total project cost of Rs. 1932.60 crore, which amounts to 72 percent of the total project cost. This excludes payments for operations and management services awarded to the fourth private promoter, Unique Zurich. The report states that, although BIAL disclosed an operational loss, the private promoters received substantial business through contracts.<sup>68</sup>

Coming back to the parliamentary committee's observation, and to answer the specific question, the Ministry officials quoted the steering committee and said that the issue was cleared by the committee after it had obtained a legal opinion from the legal advisor:

The Steering Committee after deliberations, decided as follows for the above query:

"In view of the project, and the complexities, it would be desirable to harness the vast experience and resources commanded by the bidders to enable its successful implementation. This can be done by providing the JVP freedom to implement and operate the project, subject to some supervisory guidelines.

<sup>64</sup> IATA, AIRPORT DEVELOPMENT REFERENCE MANUAL 131 (9th ed. Jan. 2004). According to the Manual, the international construction cost factor for India is 19, which shows India as the cheapest in this sector. For reference, the construction cost factor for the U.K. is 100.

<sup>65</sup> M/s. Siemens Germany – Rs. 159 crore (Rs. 1.59 billion); M/s. Siemens India Limited – Rs. 175 crore (Rs. 1.75 billion); M/s. L&T – Rs. 550 crore (Rs. 5.50 billion). The Ministry of Civil Aviation, *vide* their O.M. No. h.11013/3/2004-aa (June 28, 2005), informed the Parliamentary Standing Committee. PARLIAMENT OF INDIA, DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON TRANSPORT, TOURISM & CULTURE, NINETIETH REPORT ON DEVELOPMENT OF AIRPORT SECTOR WITH SPECIAL EMPHASIS ON NEW MODERN AIRPORTS, *available at* <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Transport,%20Tourism%20and%20Culture/90threport.htm>.

<sup>66</sup> The estimated project cost was revised later, and in 2008 the project stood at Rs 1932.60 crore.

<sup>67</sup> M/s. Siemens Germany – Rs. 888.64 crore; M/s. Siemens India – Rs. 249.10 crore; L&T – Rs. 263.07 crore; Total – Rs. 1400 crore. Joint Legislative Committee Report on Examination of Construction of Bangalore International Airport, at 78, para. 2.12.3 (Dec. 21, 2010) [hereinafter Joint Legislative Committee Report].

<sup>68</sup> *Id.*

It is envisaged that the project implementation would be guided by the DPR, which has been scrutinized and approved by the GoI and GoK. After finalization of the DPR, including the project specifications and cost basis, the JVP would be provided freedom to implement the project and also enable it to create value to the project through its vast experience in implementing, financing and operating large infrastructure projects.”

. . . .

The Legal advisor . . . opined . . . the involvement of the Government in the venture makes it important that any decision involving the expenditure of public money must generally be carried out through a transparent competitive bidding process and the deviation from the bidding process can be resorted to in certain exceptional case. Therefore any decision of the Government to disregard the process of competitive bidding should be properly reasoned. Further, the legal advisor has also stated that the procedure adopted for selection of the JVP being in itself a bidding process the same is a valid ground for not adopting a bidding process for the realization and operation of the project.<sup>69</sup>

Finally the parliamentary committee observed:

The Committee observes that the replies of the Ministry of Civil Aviation in the context of award of contracts at Bangalore International Airport Limited are evasive and highly unsatisfactory. The Committee notes that the Ministry of Civil Aviation was aware that as per the provisions of the concession agreement of BIAL, the promoters themselves would be participants in executing contracts. Since the equity holders are themselves the service providers in Bangalore International Airport Limited, there is certainly a case for conflict of interest involved in Bangalore International Airport Limited. The Committee would like to highlight that it had expressed its apprehensions on the issue during the oral evidence of the representatives of Ministry of Civil Aviation held on the 8<sup>th</sup> November 2004. However, at that time, the Ministry of Civil Aviation had not accepted the observations of the Committee. Ministry of Civil Aviation had, on the other hand, emphasized that there is going to be an open tendering and there will be no conflict of interest reflected in the awarding of the contracts. Now the apprehensions of the Committee have come true. The Committee is of the view that there was complete lack of transparency in the awarding of EPC contracts at Bangalore International Airport Limited and that the role of Government of India representatives on the Board of Bangalore International Airport Limited was not above board. The Committee recommends that in view of the facts brought out above, a proper enquiry should be conducted into the entire matter by an independent agency.<sup>70</sup>

Hence, it can be seen that the EPC contracts at BIAL were awarded to the promoters themselves, even though MoCA had assured an open tender process to the parliamentary standing committee in 2004. In this case, the difference of estimation quoted by AAI and

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<sup>69</sup> PARLIAMENT OF INDIA, DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON TRANSPORT, TOURISM & CULTURE, NINETIETH REPORT ON DEVELOPMENT OF AIRPORT SECTOR WITH SPECIAL EMPHASIS ON NEW MODERN AIRPORTS, para. 36 (2005), *available at* <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Transport,%20Tourism%20and%20Culture/90threport.htm>.

<sup>70</sup> *Id.* para. 43.

Siemens as detailed *supra* is significant as far as determining the need and the quantum of the UDF in the case of BIAL.

The legislative committee commented:

Even while awarding the contracts, the normal procedure of calling for global tenders was not resorted to. Instead, lump sum contracts were awarded to the private promoters. This procedure lacked ascertainment of competitive rates. The various works undertaken by the private shareholders with absolute secrecy at the rates fixed by themselves under lump sum contracts and so called verification by the Engineer appointed by themselves give raise to many doubts.<sup>71</sup>

The committee's observations point to two aspects – lack of competition in awarding contracts and the cost which violates MoCA guidelines. Further, the lack of transparency in awarding contracts violates the fundamental requirement envisaged by ICAO in Document 9082 for levying even pre-funding charges.<sup>72</sup>

Two additional issues invite attention connected with this situation:

- First, the steering committee has relied on the local counsel's advice rather than obtaining the legal opinion of the Law Department of the GoI, or of government advocates such as the attorney general, on such an important issue. It is a well-known fact that for all state entities competitive bidding/tendering is an essential condition;
- Second, as per the Companies Act 1956, approval should be obtained from the Ministry of Corporate Affairs for awarding any contract of one parent company to any of its shareholders or any of its affiliates/subsidiaries/sister concerns.<sup>73</sup> This demonstrates that the Companies Act 1956 provision itself has safeguards against the practices commented on by the Parliamentary standing committee.

## 7.2 Airport Monopoly and UDF

In accordance with the concession agreements for the private greenfield airports, GoI closed the existing airports in the cities of Bangalore and Hyderabad. This has eliminated possible competition between airports in the same city, in clear contrast with many other cities around the world. The lack of competition also has a direct impact on UDF determination because if the competitor (old) airport lacks a UDF it would have an advantage over the new airport with a UDF. In these cities in India, passengers have no choice but to travel through the new airports and to pay the UDF. If a UDF is allowed in the greenfield airports, then the old airports in these cities should have been kept open to ensure that the optimum UDF is levied.

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<sup>71</sup> Joint Legislative Committee Report, *supra* note 65, at 79, para. 2.12.3. The Committee even takes an example of the cost of electrical transformers in the case of BIAL. It states that Siemens India charged Rs.420 lakhs for a 16 MVA transformer without accessories, while the market price was only Rs.115.27 lakhs with all accessories. *Id.*

<sup>72</sup> ICAO Doc. 9082, *supra* note 14, para. 32.

<sup>73</sup> As per the information supplied by the Office of the Regional Director, Southern Region, Ministry of Corporate Affairs, *vide* its letter dated March 23, 2009, the Ministry has not granted any approval under section 297 of the Companies Act to BIAL to enter into contract with any parties during 2000-08.

## 8. ICAO Policies and UDF

ICAO policies on airport charges and taxes are detailed in Documents 9082 and 8632. However, as per GoI, UDF comes under the policies detailed in Document 9082. This is clear from the fact that MoCA, while giving ad hoc permission to BIAL, refers to Document 9082 in connection with article 10.2 of the CA.<sup>74</sup> The Document was quoted to justify the demand made by the MoCA, for certain documents/information from BIAL before approving UDF as per the CA. The CA states that the regulated charges should be consistent with ICAO policies.<sup>75</sup>

It can be seen that ICAO Document 9082 does not support levying of taxes from passengers for the use of airport. Secondly, the argument that the ICAO Document permits pre-funding charges is also not applicable in the case of these airports – basically because these are not pre-funding charges but are only to enhance revenue, as observed by AERA and the Kerala High Court. Also, the ICAO Document does not support any double charges. In the case of Indian airports, PSF is already charged for usage of the airport, as observed by the Supreme Court. Given this factual and legal background, MoCA's comment that the permission granted to BIAL in January 2009 to charge UDF was taken after considering ICAO's policies is noteworthy.<sup>76</sup>

## 9. Privatization and Airport Charges

From the above discussion it can be seen that airport charges in India have gone up considerably after privatization, especially by the introduction of ADF and UDF in private airports. It is also true that by following in the footsteps of private airports, the state airport operator, AAI, has started levying a UDF, which was denied to AAI prior to privatization as per the recommendations of the Planning Commission and Ministry of Finance and Civil Aviation. This trend is bound to follow as the agreements in the case of privatizations are watertight. These agreements are even made binding on AERA by non-sovereign acts of the state (*acta jure gestionis*).

Though privatization is still projected as the “miracle cure” for inefficient state operators, the worldwide trend points to increases in airport charges. This is clear from the statements and opinions of actual users, that is aircraft operators, as stated in Document 9980:

Aircraft operators generally welcomed private participation in the provision of airports as they expected improvements in efficiency. However, they feel that there have been unreasonable increases in airport charges and rates in many cases.<sup>77</sup>

## 10. Conclusion

The concept of a user development fee was introduced through airport concession agreements. As there were penalty clauses for not adhering to the concession agreement, GoI has approved the levy of UDFs on an ad hoc basis without going into the details of the projects. These ad hoc approvals are still continuing even after many years, pending determination of

<sup>74</sup> Ministry of Civil Aviation, *supra* note 58.

<sup>75</sup> Concession Agreement, *supra* note 33, art. 10.2.1.

<sup>76</sup> MoCA's letter dated January 9, 2009 states that the delay was due to the fact BIAL had delayed submission of documents. These documents were essential for MoCA to ensure the UDF complied with ICAO policies as per Articles 10.2.1 and 10.2.2 of the Concession Agreement.

<sup>77</sup> ICAO PRIVATIZATION MANUAL, *supra* note 13, at 3–8.

UDF by the regulator, AERA. Taking a clue from the private airports, the state operator has also started levying UDFs in the case of airports it has developed or modernized.

Competitive bidding is a basic requirement under the guidelines of GoI and AERA, and transparency is a basic requirement under ICAO guidelines. However, in the case of private airports in India, competitive bidding and transparency are not guaranteed.

The UDF has been presented to the passenger in the form of a user charge, though from the opinion of AERA and in the light of the Supreme Court decision in the ADF case, a UDF cannot meet the definition of a “charge,” but can only be a tax levied by private airports and AAI, a state entity. Being a tax, in the absence of a clear provision in the relevant Act (in this case, the Aircraft Act 1934), UDF may be a tax without legal sanction, if anyone challenges the same.

UDF is a by-product of privatization which has contributed to the increase in aviation charges in India. But for privatization, the state would not have approved the levy of UDF on aviation. Also, UDF and ADF are against the recommendation of the state’s highest planning body, the Planning Commission.

It is time for the authorities to examine the concept of UDF from a broader perspective, rather than only as the performance of contract provisions.

