Legal Implications of airport privatization in India

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Chapter 3

Topic IV: Another Dilemma: Public or Private Airports?

Research Paper 8

Private Airports in India – Private or Public?

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Private Airports in India – *Private or Public?*

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I. Introduction

As in many other countries, airports were under state ownership in India since British times. Later, independent authorities were formed to own and manage the state-owned airports more efficiently. In the last decade, India has witnessed the privatization of a few of its international airports. An attempt is made in this paper to examine the nature of these private airports: private or public.

2. Background

Before independence, the airports were mainly owned by the government of India (GoI) and some princely states. However, as in the United Kingdom, India formed autonomous airport authorities for better management of its international and domestic airports.[2] Subsequently, by merger of these authorities, the Airports Authority of India (AAI) was established. India has introduced privatization in the airport infrastructure sector in the last decade. In 1997, GoI published a new policy concerning airport privatization.[3] As a result, in 1999, the first private greenfield airport, located in Cochin, was commissioned and in 2006, two major airports in Delhi and Mumbai were handed over to private parties for operation. Also under this policy, two new greenfield airports – in Bangalore and Hyderabad – were established in 2008. For a better understanding of the background of this issue, readers are encouraged to read the two-part article, *Public Monopoly to Private Monopoly –A Case Study of Greenfield Airport Privatization in India*,[4] in which the issue of replacing the AAI monopoly in two cities with that of private airport companies was discussed. In this article, however, the nature of these private airports is discussed.

Privatization of state-owned entities was a part of the economic reforms instituted in India by 1990. In the sectors that were privatized, which include telecom, insurance, banking, and airlines, the new private entities are truly treated as private entities. However, in the airport sector, the treatment is quite different.

3. Research Questions

1. Whether the private airports are to be considered as purely private entities or as "State" enterprises:

- As per the airport policy of GoI;
- As per the AAI Act 1994;[5]

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1 The views expressed are authors personal views

2 The International Airports Authority of India (IAAI) was formed in 1975 and the National Airports Authority was formed in 1987 to manage international and domestic airports, respectively.

3 *See* GOI, MINISTRY OF CIVIL AVIATION, AIRPORT INFRASTRUCTURE POLICY 1997, *reprinted in* GOI, MINISTRY OF CIVIL AVIATION, POLICY ON AIRPORT INFRASTRUCTURE 5–27 (Aug. 2011), *available at* http://civilaviation.gov.in/cs/groups/public/documents/policy(ad)/moca_001334.pdf.

4 *See* 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); Moses George, *Public Monopoly to Private Monopoly – A Case Study of Greenfield Airport Privatization in India – Part II*, 9 ISSUES AVIATION L. & POL'Y 307 (2010).

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

- As per Articles 12 and 19.1(g) of the Indian constitution.

2. Whether the private airports are a "public authority" as per the Right to Information Act 2005.[6]

3. The possible implications as per the legal status.

4. Traditional Models

As in many other States, airports in India had been within the government sector since British times, aside from a few private airports. However, scheduled commercial aviation operations were mainly limited to state-owned airports. The traditional model of airports in India can be classified as follows:

(i) State-owned airports, which are either owned by GoI and state governments or by the Airports Authority of India;

(ii) Private airports, which are owned by private individuals or private companies and mainly used for private operations; and

(iii) Civil enclaves, which are defined as:

> [An] area, if any, allotted at an airport belonging to any armed force of the union, for the 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.[7]

Prior to 1975, aerodromes were classified as government, private, and public only. A government aerodrome was defined as "an aerodrome which is maintained by or on behalf of the Central Government and includes an airport to which the Airports Authority of India Act, 1994 applies or is made applicable."[8]

The Aircraft Rules 1937 were amended in 2004. As per the amendment, and aerodrome license was made mandatory for all airports irrespective of ownership. Also, the concept of a "Government Aerodrome" was removed from Part XI, though the definition was retained. Hence, private airports were placed at par with AAI airports as far as aerodrome licensure was concerned.

Airports from which scheduled flights were operated before the 2004 amendment were permitted to operate on the same basis until they obtained a license from the Directorate General of Civil Aviation (DGCA) by a date to be notified by the central government.[9] Subsequent to the amendment, GoI banned scheduled operations from/to any airport which was not licensed with effect from December 31, 2005 in the case of international flights and with effect from March 31, 2006 in the case of domestic flights.[10] However, according to the DGCA, there were 18 licensed aerodromes in the private use category and 66 in the public use category.[11] This means that the other aerodromes (out of a total 87) were permitted by a special provision in Rule 78 to continue to be used, until a particular date, for scheduled operations. GoI has given notice from time to time of the extension of this date. As per the July 2010

6 The Right to Information Act, 2005, No. 22 of 2005; India Code (2005) [hereinafter RTI Act].
7 AAI Act 1994, *supra* note 4, sec. 2(i).
8 Aircraft Rules, 1937, sec. 3(27), *available at* http://www.dgca.nic.in/airule-ind.htm.
9 *Id.* Pt. XI, Rule 78.1.
10 No. 108, Regulations, 2005, Gazette of India (extraordinary), Pt. II, sec. 3(i) (Mar. 14, 2005).
11 Directorate General of Civil Aviation, List of Licensed Aerodromes, http://dgca.nic.in/aerodrome/aero-list-ind.htm (last visited Sept. 18, 2012) [hereinafter List of Licensed Aerodromes].

notification in the official gazette, all airports were required to obtain a license before June 30, 2011.[12] However, the exceptions remain.[13]

5. Policy of the Government of India

In 1997, GoI issued a draft policy on airport infrastructure in which the privatization of airport infrastructure was encouraged. The Ministry of Civil Aviation has made this clear: "Airport Infrastructure Policy formulated in 1997 recognised the need for private sector participation in this sector for improving quality, efficiency and increasing competition."[14]

One can see the reasons for privatization of airports in the *Naresh Chandra Committee Report*:

- Low standards of AAI Airports;
- Low efficiency of AAI Airports;
- Capital investment requirements;
- AAI's financial situation;
- High airport charges in India.[15]

Privatization was introduced as a solution for capital investment to upgrade the standards of Indian airports. GoI's new airport policy aim can be summed up as follows: "Airport infrastructure Policy formulated in 1997 provides for the private sector participation for improving quality, efficiency and increasing competition."[16]

In a nutshell, the intentions of GoI for introducing privatization in the airport infrastructure field were to bring in international standards, private capital investment, and ensure international operators' efficiency in the airport infrastructure field, thereby lowering airport charges, which AAI could not achieve as a state entity.

6. Pre-Policy Attempts

In 1993, there was a proposal for constructing a modern, international, privately financed airport, the first to be built without public funds, by a consortium of Raytheon, India's Tata Industries, and Singapore Group, which had developed Changi International Airport for the island state. The consortium planned to operate the airport privately and reap profits from landing fees and retail operations. Everything went well for some time until negotiations reached the final stage. Then, abruptly, the rules were changed; GoI demanded that the airport

12 No. 1473, 2010, Gazette of India, Pt. II, sec. 3(h) (July 19, 2010) ("In pursuance of proviso to rule 78 of the Aircraft Act 1937 and in suppression of notification No. S.O. 525(E) dated 25th February 2010, published in the official Gazette of India, part II, Section 3, Sub-section (H) dated 3rd March 2010, the Central Government hereby directs that no person shall operate scheduled air transport services to/from an aerodrome with effect from 30th June 2011, unless it has been licensed by the Director General of Civil Aviation.").

13 List of Licensed Aerodromes, *supra* note 10.

14 *See* The Airports Economic Regulatory Authority of India Bill, 2007, 133rd Report of the Department-Related Parliamentary Standing Committee on Transport, Tourism & Culture 3.1 (2008) [hereinafter 133rd Report], *available at* http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Transport,%20Tourism%20and%20Culture/133.htm.

15 A committee headed by Mr. Naresh Chandra was appointed by GoI to study the civil aviation sector and advise GoI on the reforms. *See* Report of the Committee on a Road Map for the Civil Aviation Sector (2003) [hereinafter Naresh Chandra Committee Report], *available at* http://civilaviation.gov.in/cs/groups/public/documents/newsandupdates/moca_000740.pdf.

16 *See* 133rd Report, supra note 13, 2.1.

be transferred to the Indian government as soon as the investors had earned their investment back. The reason stated was that it was against the "national interest" for an airport to be privately owned.[17] Finally the project was scrapped, as the private parties did not agree to the new terms. This reveals GoI's intention in the pre-policy era that airports remain State entities.

7. First Private Greenfield Airport after Liberalization (Pre-Policy Model)

The first private international airport was started in 1999 at Kochi (Cochin), which was a turning point in the history of airport infrastructure in India. Cochin International Airport (CIAL) was built to replace a small naval airport used for civil operations. The new airport was built before the new policy was introduced. In fact, this private project was not GoI's idea, but rather a response by the state of Kerala to the refusal of the federal government to construct a new airport at Kochi through AAI. Hence, it cannot be said to be a result of the airport infrastructure policy initiative of GoI. To its credit, this airport has many unique features. The stakeholders are approximately 11,000 individuals, including non-resident Indians from 30 countries.[18] Also, this first greenfield airport was not provided with any kind of concessions by GoI, as was the case with later projects in Bangalore and Hyderabad, nor was any concession agreement signed between CIAL and GoI.[19] CIAL is the first private international airport in India licensed by the DGCA in accordance with the Aircraft Rules 1937.[20]

The pattern of CIAL's revenue collection is also unique. It is the only Indian airport that earns more non-traffic revenue than traffic revenue. The non-aeronautical revenue of CIAL in 2009-10 was 47 percent[21] and in 2011-12 was 63 percent,[22] whereas that of AAI was 17 percent in 2010.[23]

8. The New Policy of GoI

In 1997, GoI published a new draft policy which permits private participation in airport infrastructure in India. Based on this policy, new greenfield airports in Bangalore and Hyderabad were planned and started operation in 2008. Also based on this policy, two brownfield airports – in Delhi and Mumbai – were handed over to private parties. Hence, this policy is the basis for airport privatization in India. As per the policy, it was the intention of GoI to replace government-owned airports with private airports. It can be seen that, due to public opposition, the fully-privately-owned model was replaced by the Public Private Participation (PPP) model, though it is nothing but a camouflaged privatization.

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17 This was the stand of the then-new Aviation Minister Mr. C.M. Ibrahim.

18 See *Rediff on the Net, The Rediff Business Interview – V.J. Kurien, http://www.rediff.com/business/1999/dec/06inter.htm (last visited Oct. 11, 2012).*

19 The Government of India has signed separate concession agreements with BIAL and HIAL, two private limited companies, with respect to the greenfield airports in Bangalore and Hyderabad.

20 Bangalore HAL Airport was licensed in 1959, but for domestic operations only.

21 KITCO LTD., KITCO: AN ASIAN ANSWER TO THE COST EFFECTIVE AIRPORT QUEST 13 (2012), *available at* http://indianaviationnews.net/allimages/Cost%20Effective%20Airport.pdf.

22 *See Duty-Free Sales Add to CIAL Revenue Growth*, THE HINDU BUS. LINE, June 29, 2012, http://www.thehindubusinessline.com/industry-and-economy/logistics/article3585190.ece. *See also Interview with V.J. Kurian*, AIRPORTS INT'L (India), Aug.–Sept. 2011, at 20.

23 Centre for Aviation, Indian PPP Airports Drive 340% Growth in Retail and Other Non-Aero Revenues Over 5 Years, http://centreforaviation.com/analysis/indian-ppp-airports-drive-340-growth-in-retail-and-other-non-aero-revenues-over-5-years-67675 (last visited Oct. 11, 2012).

9. Legal and Policy Framework

A. Legal Provision

The Indian Aircraft Act 1934[24] was enacted to enable the government to give full effect to the provisions of the Convention Relating to the Regulation of Aerial Navigation.[25] In 1937, Aircraft Rules were promulgated under the provisions of the Aircraft Act 1934.[26] Together, the Aircraft Act 1934 and Aircraft Rules 1937 provide the basic legislative framework and regulate civil aviation in the country. In addition, the Civil Aviation Requirements (CARs) spell out the standards and specifications concerned with air safety.

The Airports Authority Act[27] was enacted by the central government in 1994, which states that all government airports are to be developed, financed, operated, and maintained by the Airports Authority of India (AAI). AAI now controls 124 airports in the country including international and domestic airports, and the civil enclaves in some of the Defense airports.[28] In addition to the airports under AAI, there are several airstrips around the country which are owned and managed by state governments or the private sector.

1. Post-Privatization Policy

The greenfield airports policy of GoI clearly states that airports other than those managed by AAI are to be governed by the provisions of the Aircraft Act 1934 and the rules promulgated there under.[29] Such airports are to obtain licenses from DGCA under Rule 79 of the Aircraft Rules 1937 and must be developed and operated in accordance with the license conditions.

As the legislative and executive powers on the subject of civil aviation are limited to GoI, state governments cannot enter into any concession agreements with the airport developer. However states can provide the following incentives to an airport company:

(a) Land, concessional or otherwise;
(b) Real estate development rights in and around the airports;
(c) Airport connectivity; rail, road;
(d) Fiscal incentives by way of exemptions from State taxes; and
(e) Any other assistance that the State Government deems fit.[30]

Originally, greenfield airports were not excluded from the ambit of the AAI Act 1994. At the insistence of the private investors, to avoid running afoul of the Act, the 1994 Act was amended by the AAI Amendment Act 2003.[31] This bill:

- Amends section 1 as well as section 2 of the Act to exclude the private airports from the purview of the AAI Act except for certain limited purposes and to provide for definition of a private airport; and

24 The Aircraft Act, No. 22 of 1934; India Code (1934).
25 Oct. 13, 1919, 11 L.N.T.S. 173. *See* RASAL SINGH, AIR LAW AND POLICY IN INDIA 100 (1994).
26 *See* Aircraft Rules, 1937, *supra* note 7.
27 AAI Act 1994, *supra* note 4.
28 *See* AAI, AAI Today, http://www.aai.aero/public_notices/aaisite_test/AAI_today.jsp.
29 Greenfield Airports Policy of Government of India, 2.4, *available at* http://aera.gov.in/documents/pdf/GREENFIELDAIRPORTPOLICY.pdf.
30 *Id*. 5.4.
31 AAI (Amendment) Act, 2003, No. 43, Acts of Parliament, 2003.

- Provides adequate comfort levels to enhance investors' confidence and to ensure a level playing field to the private sector greenfield airports by lifting control of the AAI except in certain respects.[32]

Accordingly, the AAI Act was amended as follows:

> 3(a) Applicable to all airports whereat air transport services are operated or are intended to be operated, other than airports and airfields belonging to, or subject to the control of, any armed force of the Union;
>
> 3(aa) All private airports insofar as it relates to providing air traffic service, to issue directions under section 37 to them and for the purposes of chapter VA.[33]

Though the purpose of the AAI Act was to exclude private airports, the term "Private Airport" is not defined in Aircraft Act 1934 or in Aircraft Rules 1937, which would become applicable to private airports. The term "Private Airport" is defined only in AAI Act 1994, which states:

> Private airport means an airport owned, developed or managed by–
>
> (i) any person or agency other than the Authority or any State Government; or
>
> (ii) any person or agency jointly with the Authority or any State Government or both where the share of such person or agency, as the case may be, in the assets of the private airport is more than fifty percent.[34]

It can be seen that the entity "Private Airport" was not defined prior to the amendment of the AAI Act in July 2004. Just four days after said amendment, the concession agreement was signed for the first private airport (post-policy) to ensure that the AAI Act was not applicable to private airports.[35] It is interesting to note that since private airport operators did not want the AAI Act apply to the private airports, the amendment excluded private airports from the AAI Act as far as control by AAI is concerned. However, the amendment ensured that chapter V of the AAI Act was still applicable to private airports. This chapter makes the Public Premises Eviction Act (PPE Act) applicable to AAI since AAI is a state entity. This Act deals with the procedure to evict unauthorized occupants on any public premises, which otherwise may take years of civil litigation. Hence, though private operators did not want to be public entities in terms of state control through the AAI Act, the amendment ensured that the special provisions of the law, e.g., application of the PPE Act, would be available to such private entities. As the High Court of Karnataka observed:

> The effect of exclusion of provisions of Chapter VA of the A.A.I.A. Act from the ambit of Rent Control Act from the premises leased to BIAL[36] is that the Government while dealing with the citizens in respect of its property, would

32 *Id.*, Statement of Objects and Reasons.
33 AAI Act 1994, *supra* note 4, Ch. 1, secs. 1.3(a), 1.3(aa).
34 AAI Act 1994, *supra* note 4, Ch. 1, sec. 2(nn).
35 The concession agreement for Bangalore Greenfield Airport was signed July 5, 2004, whereas the amendment of the AAI Act 1994 came into effect on July 1, 2004.
36 Bangalore International Airport Ltd.

not act for its own purpose as a private landlord but would act in public interest.[37]

This shows that the parliament expected the private airports to behave like the "State," and not like any private entity.

The Ministry of Civil Aviation, under the recommendations of the Airports Authority of India, carried out the economic regulation of airports until 2008. A new Act, the Airports Economic Regulatory Authority Act 2008 (AERA Act) was passed in 2008, and under this Act the Airports Economic Regulatory Authority (AERA) was formed to govern the economic regulation of major airports.

2. AAI Act 1994 and Private Airports

a. Financing and Share in the Airport

As stated *supra*, a "private airport" is:

> [A]n airport owned, developed or managed by–
>
> (i) any person or agency other than the Authority or any State Government; or
>
> (ii) any person or agency jointly with the Authority or any State Government or both where the share of such person or agency, as the case may be, in the assets of the private airport is more than fifty percent.[38]

Hence, the available greenfield and brownfield private airports fall in the second category. However, to qualify the private person should have more than a 50 percent share in the "assets of the . . . airport," and not in the airport company. Bangalore International Airport (BIA) may be examined as a case study.

Financing of Bangalore Greenfield Airport[39]

	Source of Fund	Rs. In Millions	Percentage	Equity
A	Equity			
	Private Entities	2,417.6	12.52 %	74 %
	KSIDC	424.7	2.20 %	13 %
	AAI	424.7	2.20 %	13 %
B	State Support from Government of Karnataka	3,500.0	18.13 %	
C	Debt	11,850.9	61.39 %	
D	Internal Accrual/Security Deposit	685.0	3.55 %	
	Total	**19,302.9**	**100.00 %**	**100 %**

As per the chart, the share of the private persons is 74 percent of equity. The financing pattern can be stated as follows, when other assets are considered.

37 Flemingo Duty Free Shops Pvt. Ltd. v. Union of India, Writ petition No. 14215 of 2006 (Karnataka H.C. Dec. 19, 2008).
38 AAI Act 1994, *supra* note 4, Ch. 1, sec. 2(nn).
39 Sri Benson Issac v. (i) Bangalore International Airport Ltd. (ii) PIO, KSSIDC, Bangalore, KIC 1286/COM 2007, paras. 2–3, 25 (Karnataka Info. Comm'n May 14, 2008), *available at* http://bangalore.citizenmatters.in/docs/show/20.

A. Financing by private promoters equity	**Rs. 326.70**
B. Financing (direct & indirect) by Government	
a. Equity KSIIDC	**42.47 Cr**
b. Equity Airport Authority of India	**42.47 Cr**
c. Debt under SSA	**350.00 Cr**
C. Total (Government promoters)	**434.94 Cr**

Non-quantified state financing:

i. Exemption from entry tax
ii. Exemption from property tax for five years
iii. Lease of land on concessional rent
iv. Waiver of stamp duty and registration charges
v. Exemption from fee for change of land use
vi. Exemption from payment of road cess[40]

Thus, if the financing by the state government is considered, the government's share would be above 50 percent. Moreover, the Government of Karnataka has leased 4316.26 acres of land to BIAL at meager charges, costing around 215.80 Crores.[41] In addition, AAI has invested around 90 Crores for ATS facilities in the airport. If these assets were also considered, the share of the private promoter would fall far below 50 percent of the assets of the airport. In such a case, the AAI Act would become applicable to these private airports.

The situation in Australia, another common law country with privatized airports, differs dramatically. Before privatization, federal airports were governed by the Federal Airports Corporation Act 1986,[42] which is similar to India's Airports Authorities Act 1994. Under Australian law, an "authority of the Commonwealth" includes "a company in which the whole of the shares or stock, or shares or stock carrying more than half of the voting power, is or are owned by or on behalf of the Commonwealth . . . ."[43]

In India, whenever an AAI (brownfield) airport is leased out, legal ownership of the airport remains with AAI. Hence, such an airport cannot fall within the statutory definition of a "Private Airport."[44]

However, in the case of Australia, when a federal airport is privatized by way of a lease, the nature of the airport changes. Under the Airports (Transitional) Act 1996,[45] airport land and certain other assets and liabilities must be transferred from the Federal Airport Corporation (FAC) to the Commonwealth before it is leased out to an airport-lessee company.[46] When

40 Cess = tax.
41 1 lakh = 100,000;1 crore = 10 million. Calculated at the rate of rupees, 5 lakhs per acre, prevailing at the time of acquisition of the said land. As the land price increases, the share of the government in the assets of the airport also increases.
42 Federal Airports Corporation Act, No. 4 of 1986 (Austl.), *available at* http://www.austlii.edu.au/au/legis/cth/num_act/faca1986306/s3.html#corporation.
43 *Id.* sec. 3(g).
44 AAI Act 1994, *supra* note 4, Ch. 1, sec. 2(nn).
45 Airports (Transitional) Act, No. 36 of 1996 (Austl.), *available at* http://www.comlaw.gov.au/Details/C2012C00071/Html/.
46 *Id.* sec. 11 (Transfer of FAC Land to the Commonwealth).

airport land is transferred to the Commonwealth, the airport ceases to be a Federal airport for the purposes of the Federal Airports Corporation Act 1986.[47]

Although the grant of an airport lease to a Commonwealth-owned company would render the company an agency of the Commonwealth, that situation is statutorily barred.[48]

b. Captive Customers as Assets

Per the concession agreement, GoI has closed down the old HAL airport in Bangalore for all commercial operations. Hence the customers of HAL airport, which included 12 million passengers per annum – around 300 aircraft movements per day, all cargo operations, and all non-traffic related customers – were effectively transferred to the new airport. These customers are assets in accordance with the Indian Companies Act 1956. If these assets also were considered, then the share of the government in the assets of the airport would go much above 50 percent, though the equity of the government agencies would remain at 26 percent.

Thus, if the definition of "Private Airport" as stated in the AAI Act 1994 was applied, this so-called private airport would not fall under the category of private airport. In other words, these airports would become government aerodromes and thereby part of the "State" in accordance with Article 12 of the Constitution.[49]

3. Resultant Effect of Non-Private Airport

As government aerodromes, these airports would become subject to the AAI Act, as in the case of other AAI airports. This would, in turn, result in AAI superseding the decisions of the private airport operator. In the case of non-major private airports, such as CIAL, which do not come under AERA Act, economic regulation would come under the powers of the AAI.

As pointed out *supra*, the reasons for privatization included AAI's inefficiency and the low standards of AAI airports because of the public entity statutes of AAI.[50] Should the private airports become non-private airports – with the resultant imposition of the AAI Act upon them – the purpose of privatization would be frustrated.

10. RTI Act and Private Airports

The much-appreciated transparency statute, The Right to Information Act, 2005[51] (RTI Act), has begun to change the way governance is conducted in India. Armed with this Act, citizens are able to access information which was earlier kept inaccessible to them. However, the RTI Act is only applicable to "public authority." Hence, private airport operators are not subject to this Act, though AAI, being a public authority, comes under the Act.[52] Recent

47 *Id.* sec. 15 (Transferred Airport Ceases to be a Federal Airport for Purposes of the FAC Act).
48 *Id.* sec. 82 (Airport-Lessee Company Not to Be an Agency of the Commonwealth, Etc.).
49 "In this Part, unless the context otherwise required, 'the State' includes the Governmental and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India." INDIA CONST. art. 12.
50 *See* text accompanying note 14. *See also* Naresh Chandra Committee Report, *supra* note 14.
51 RTI Act, *supra* note 5.
52 A "Public Authority" is defined in section 2(h) of the Act as:

> [A]ny authority or body or institution of self-government established or constituted –
> a) by or under the constitution;
> b) by any other law made by the Parliament;
> c) by any other law made by the State Legislature;
> d) by notification issued or order made by the appropriate Government, and includes any
> i) body owned, controlled or substantially financed;

decisions of the Chief Information Commission (CIC) have held that the private airports are "public authorities" considering the state support these airports enjoy and the state functions they are carrying out.

To decide whether or not BIAL is substantially financed by the State, the CIC considered the definition of "substantially financed," as contained in Section 14 of the Comptroller and Auditor General (Duties, Powers and Conditions of Services) Act 1971 (CAG Act):

> [The] Commission noted that under the said section, the Comptroller and Auditor General (CAG) can audit the accounts of a body or authority, if the said body or authority is substantially financed by the Government. According to the provisions of section 14 of the said Act, the CAG can audit the accounts of a body or authority under the following two circumstances:
>
> a. If the grant or loan to a body or authority from the Consolidate Fund of India or of any State is not less than Rs. 25 lakhs and the amount of such grant or loan is not less than 75% of the total expenditure of that body or authority.
>
> b. With the previous approval of the President or the Governor, if the grant or loan to such body or authority from the Consolidated Fund of India or of any State in a financial year is not less than Rs. 1.00 crore.[53]

Considering that apart from the two Governments holding 26 percent shares of BIAL – the State Government is also supporting the project through a State Support Agreement (SSA), which provides for a loan up to Rs. 350 crores to BIAL, and other non-quantified state support – the Commission held that BIAL is a body substantially financed by the Government and is therefore a "Public Authority" as defined under section 2(h) of the RTI Act.[54]

If these appeals are decided in line with the CIC's decisions, then these private operators would, like AAI, be compelled to provide information to citizens. Hence, these private airports would come under the definition of "Public Authority," and not "private entity."

11. The Indian Constitution and the Nature of the Private Airports

It is well settled law that under the Constitution of India, state owned/controlled entities are treated as "State." It would be interesting to analyze the nature of the private airports from this perspective. Two similar decisions of the High Court of Bombay (Mumbai)[55] and the High Court of Karnataka[56] have already discussed this issue. The high courts have considered many aspects while deciding the matter. The major parameters are:

- Substantial state support by the states and the Union government;

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ii) non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government

53 Sri Benson Issac v. (i) Bangalore International Airport Ltd. (ii) PIO, KSSIDC, Bangalore, KIC 1286/COM 2007, para. 10 (Karnataka Info. Comm'n May 14, 2008), *available at* http://bangalore.citizenmatters.in/docs/show/20.

54 The private airport, Bangalore International Airport Ltd. (BIAL), has appealed the decision of the State Information Commission before the High Court of Karnataka. The order of the Commission has been stayed.

55 Flemingo Duty Free Shop Pvt. Ltd. v. Union of India, Writ petition No. 617 of 2007 (Bombay H.C. June 5, 2008).

56 Flemingo Duty Free Shops Pvt. Ltd. v. Union of India, Writ petition No. 14215 of 2006 (Karnataka H.C. Dec. 19, 2008), *available at* http://judgmenthck.kar.nic.in/judgments/handle/123456789/31424.

- Functions of public importance carried out by the private airports, i.e. providing airport facilities like the state entity, AAI;
- Concession and state support agreements entered into by GoI and the states;
- Transfer of state-operated entity, AAI, to private airports; and
- The monopoly created by the State action.

Considering the above, the high courts have held that these private airports are "State." However the courts have not looked into the definition of a private airport and the issue of share in *the assets of the airport*.

Three main aspects from above will be considered for a more detailed discussion. First, the State responsibility to provide airports and air navigation is very clear from the provisions of the Chicago Convention.[57] Article 28 of the Convention places on each contracting State the responsibility for provision of airports and air navigation services in its territory in accordance with the standards and practices recommended or established pursuant to the convention.[58] Hence, even if the ownership and management of airports and air navigation services may be delegated to the private sector, the overall responsibility for the provision of services in compliance with the Convention and Standard and Recommended Practices (SARPs) remains with the State.

The Karnataka High Court relied upon the earlier decision of the Supreme Court of India:

> Another factor which might be considered is whether the operation is an important public function. The combination of state aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a state agency. If a given function is of such public importance and so closely related to governmental functions as to be classified as a government agency, then even the presence or absence of state financial aid might be irrelevant in making a finding of state action. If the function does not fall within such a description, then mere addition of state money would not influence the conclusion.
>
> The state may aid a private operation in various ways other than by direct financial assistance. It may give the organization the power of eminent domain, it may grant tax exemptions, or it may give it a monopolistic status for certain purposes. All these are relevant in making an assessment whether the operation is private or savours of state action.[59]

Based on the above rationale, the Karnataka High Court held:

> From the aforementioned legal principles laid down by the Constitutional Benches of the Supreme Court and American Law, the doctrine of "State action" would with all fours applicable to the facts of the case to come to the conclusion that to provide duty free shops in the BIAL as per the agreement referred *supra* is necessary in the international airport. The facilities provided therein are in the nature of Statutory functions/public functions by BIAL for the convenience of traveling public. All the facilities provided by

57 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].
58 *Id.* art. 28.
59 Sukhdev Singh v. Bhagatram, (1975) 3 S.C.R. 619, 650.

> BIAL, be it a State, lessee or entity performs s[t]atutory/public functions in the airport. This is expressly apparent from Clause 7.1 of [State Support Agreement] dated 20/1/2005.[60]

In accordance with the Chicago Convention, a State must ensure that there is no discrimination as to nationality between the application of its laws relating to the admission to or the departure from its territory of aircraft engaged in international aviation.[61] Further, the Convention requires that every aerodrome in a Contracting State open to public use by its national aircraft shall be open under uniform conditions for the aircraft of all other Contracting States.[62] The aforementioned Articles show that a private airport will be carrying out the functions of the State while operating the airport.

By its latest interim order,[63] which is the appeal against the Karnataka High Court order,[64] the Supreme Court has allowed the petitioner to go ahead with the tendering process:

> Accordingly, I.A. Nos.7-8 and 10 of 2012, are allowed, with leave to the appellant-applicant to initiate and complete the tender process for awarding the contracts for operation of duty free shops at the Bangalore International Airport, but, after following all the norms and guidelines, as may have been indicated in the impugned judgment, so that transparency, both in the tendering process and awarding of the contract, is maintained.[65]

Though the earlier decision of the High Court is stayed, by this order, the Supreme Court has required the private airport to carry out the tendering process in a transparent manner. While the order does not say whether or not the private airport is a "State," it indicates that the private airport is expected to conduct itself like a "State" in the tender action process.[66]

12. The Nature of the Concession Agreements

The nature of the agreements by which the private operators are permitted to operate the airports is also of importance. GoI has entered into these agreements by private and commercial agreements (*acta jure gestionis*). But the implementation of the agreements' provisions can be done only by governmental acts or *acta jure imperii*, including issuing licenses to the new private airports and closing old AAI airports. Hence, the execution of the agreements is by *acta jure gestionis*, but the performance of the contractual commitments is by *acta jure imperii*. These governmental acts point to the public nature of the private airports.

13. Monopoly and the Nature of the Private Airports[67]

60 *Flemingo Duty Free Shops Pvt. Ltd.*, *supra* note 55, para. 31(xiv).
61 Chicago Convention, *supra* note 56, art. 11.
62 *Id.* art. 15.
63 Bangalore Int'l Airport Ltd. v. Flemingo Dutyfree Shops P. Ltd., I.A. No. 10 of Civ. App. No. 2148 of 2009 (India Aug. 27, 2012), *available at* http://courtnic.nic.in/supremecourt/temp/ac%20214809p.txt.
64 *See Flemingo Duty Free Shops Pvt. Ltd.*, *supra* note 55.
65 *Flemingo Dutyfree Shops P. Ltd.*, *supra* note 62, at 2.
66 The appeals have been pending since 2009 and the High Court order declaring the private airports as State entities remains stayed.
67 For a detailed analysis of the issue of monopoly, see George, *supra* note 3. However, the monopoly is a reality and the new airport has been functioning as the only airport in Bangalore since May 2008.

The Constitution of India does not allow any kind of monopoly.[68] Yet, one exception is allowed, that of state entities acting in the public interest.[69] As stated *supra* in the case of privatization, GoI has closed the old airports for commercial operation and their traffic was transferred to the new airports by gazette notifications as specified in the concession agreements. Hence if Article 19 of the Constitution is considered, these private airports should be state entities. In other words, if these private airports were purely private entities, or non-State entities, then the creation of a monopoly would be unconstitutional.

The Karnataka High Court has taken this issue of monopoly into consideration while deciding the matter referred *supra*.[70] The High Court has observed:

> [I]n pursuant to the Concessional agreement referred to *supra*, there is transfer of powers of respondent no.2 [AAI] to R-3 [BIAL] in relation to air traffic services to be rendered to the public at large. The grant of monopoly status in the concession agreement given to given to the BIAL is State conferred or State protected as the concession agreement provides exclusivity of private concession to the existing airport and prohibits any airport being set-up within 150 Kms from BIAL.[71]

Therefore, as the State has created a monopoly in favor of these private airports, that too by a governmental notification, these private airports are deemed state or public entities.

14. Airport Charges and the Nature of Private Airports

Though charges were said to be very high during the AAI pre-privatization era, new airport charges have been introduced after privatization. The authority to charge such fees points to the nature of the private airports. As per the AAI Act, AAI, a state entity, is entitled to charge passengers an Airport Development Fee (ADF).[72] However, the Ministry of Civil

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68 INDIA CONST. art. 19, § 1(g).

69 *Id.* art. 19, § 6.

70 *Flemingo Duty Free Shops Pvt. Ltd.*, *supra* note 55.

71 *Id.* para. 31(xvii).

72 AAI Act 1994, *supra* note 4, sec. 22A. The text of section 22A, as amended, reads as follows:

22A. Power of Authority to levy development fees at airports. –

The Authority may, –

(i) after the previous approval of the Central Government in this behalf, levy on, and collect from, the embarking passengers at an airport other than the major airports referred to in clause (h) of section 2 of the Airports Economic Regulatory Authority of India Act, 2008 the development fees at the rate as may be prescribed;

(ii) levy on, and collect from, the embarking passengers at major airports referred to in clause (h) of section 2 of the Airports Economic Regulatory Authority of India Act, 2008 the development fees at the 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,

and such fees shall be credited to the Authority and shall be regulated and utilized in the prescribed manner, for the purposes of –

(a) funding or financing the costs of upgradation, expansion or development of the airport at which the fees is collected; or

(b) establishment or development of a new airport in lieu of the airport referred to in clause (a); or (c) investment in the equity in respect of shares to be subscribed by the Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in clause (a) or advancement of loans to such companies or other persons engaged in such activities.

Aviation has permitted the Delhi (DIAL) and Mumbai (MIAL) airports, which were handed over to private operators in 2006, to charge an ADF. While dismissing the petition challenging the ADF for these airports, the Delhi High Court opined that, since the new operators are in the shoes of the state entity, i.e. AAI, the operators are allowed to charge an ADF. This further points to the "State" tag for the operators.

In a case challenging the legality of the Delhi ADF, the Supreme Court of India held:

> Though Airports Authority can utilize the fees levied by it, for all or any of these purposes mentioned in clauses (a), (b) and (c) of Section 22A, what can be assigned by the Airports Authority to a lessee under a lease entered into under Section 12A of the 1994 Act is the power to levy fees for the purposes mentioned in clause (a) of Section 22A of 1994 Act.[73]

In light of the Supreme Court decision, a new rule was introduced, "Airports Authority of India (Major Airports) Development Fees Rules, 2011,"[74] which allows the levy of an ADF by private operators. This shows that the private airport has been considered a State entity for the purpose of charging a fee that is otherwise chargeable only by a State entity. Accordingly, AERA has permitted DIAL and MIAL to levy and collect ADFs at the rate fixed by it. But, as noted *supra*, Section 1.3.aa of the AAI Act 1994 states that the Act is not applicable to private airports (except Chapter VA), whereas Section 22a falls under Chapter V. Hence, if the Supreme Court decision is read together with Section 1.3.aa as far as ADF is concerned, the AAI Act is applicable to private airports. Once the AAI Act is applicable, the private entity tends to become "State." Alternatively, considering the current situation where the private airport operators are permitted by AERA to levy a tax, an ADF, the private airports' nature becomes that of a state entity.

In the case of another charge, the User Development Fee (UDF), which was introduced through amendment of the Aircraft Rules 1937, AERA defines the purpose as *revenue enhancement* instead of a fee for usage of the airport as indicated by the name UDF. This definition, and a decision of Kerala High Court[75] in a connected matter, changes the nature of the UDF from a user fee to that of a tax. The Supreme Court has held:

> Levy of development fee is not charges or any other consideration for services for the facilities provided by the Airports Authority – The levy u/s 22-A though described as fee is really in the nature of cess or a tax for generating revenue for the specific purposes mentioned in clauses (a), (b) and (c) of s.22-A – Article 265 of the Constitution of India is, therefore, attracted which provides that no tax can be levied or collected except by the authority of law. . . .[76]

When the fee itself becomes a tax, the nature of the person levying such tax becomes significant. The logic explained in the case of the ADF also becomes applicable in the case of the UDF. As AERA has permitted the private airports to charge a UDF, the nature of the

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73 Consumer Online Found. v. Union of India, (2011) 5 S.C.R. 911, 947, *available at* http://supremecourtofindia.nic.in/scr/2011_v5_piv.pdf.

74 Ministry of Civil Aviation, Notification, G.S.R. 597(E), Airports Authority of India (Major Airports) Development Fees Rules, 2011, Gazette of India (extraordinary), Pt. II, sec. 3(i) (Aug. 2, 2011), *available at* http://civilaviation.gov.in/cs/groups/public/documents/rule(ad)/moca_001085.pdf.

75 Comm'r Cent. Excise v. Cochin Int'l Airport Ltd., C.E. Appeal No. 16 of 2008 (Kerala H.C. 2009).

76 Consumer Online Found. v. Union of India, (2011) 5 S.C.R. at 911–12.

private airport needs to be that of a state entity. If not, the levying of a UDF itself would become *ultra vires.*

15. Immunity

As in the case of other common law countries, in India, State officials enjoy immunity from legal action for an act that was done in good faith. This specific immunity is available to AAI officials since AAI is considered as State. The relevant clause states:

> 33. Protection of action taken in good faith.—No suit, prosecution or other legal proceeding shall lie against the authority or any member or any officer or other employee of the authority (or the chairperson of the tribunal) for anything which is in good faith done or intended to be done in pursuance of this Act or of any rule or regulation made thereunder or for any damage sustained by any aircraft or vehicle in consequence of any defect in any of the airports, civil enclaves, heliports, airstrips, aeronautical communication stations or other things belonging to or under the control of the authority.[77]

As the AAI Act is not applicable to private airports as such, the immunity clause is not applicable to the private airport employees. However, private airport employees are involved in ATM-related jobs such as apron control, in addition to the terminal, cargo, and engineering sectors. Hence, in the event of an incident or accident, private airport employees will not be protected by the immunity clause. This specific liability-related scenario may become a topic of discussion in the future. But, if private airports are considered as State, the scenario may change. In such case, immunity may become applicable to the private airports as it is in the case of AAI airports. This may protect the private airports in matters connected to liability.

16. Conclusion

The analysis of the issues in the preceding paragraphs shows that the private airports qualify for the definition of a state entity or a public authority. If the private airports are a state or public entity, there will be far-reaching effects in many areas. As a state entity, the private airports would come under the writ jurisdiction of the high courts, and the ambit of the Comptroller and Audit General (CAG). Also, as state entities, the private airports will have to follow government rules and policies regarding tendering, transparency, etc. The private airports may not be exempted from implementing State policies of social interest, such as affirmative state actions and official languages, for example. From the transparency angle, the RTI Act would become applicable to these airports and thus details of the function of these airports would be available to the public. Finally, if these airports lose the status of a "private airport" as per the AAI Act, then the Act would become applicable to them, the precise situation the Amendment Act had intended to eliminate.

Under the current situation, the private airports and their operators are private entities as far as management flexibility, transparency, and public accountability are concerned. At the same time, these airports are treated as "public" or "State" entities in terms of special powers and legal support in the areas of levying tax, monopoly, and procedures to evict unauthorized occupants from their premises. If they are indeed "State" entities, the private airports end up in the same situation as AAI, for which privatization was expected to be a remedy. This is neither the desired scenario nor was it the purpose of introducing privatization in the airport

77 AAI Act 1994, *supra* note 4, sec. 33.

sector, as per the policy. However if the private entities continue to avail themselves of the benefits, as well as the special powers available to "State" entities, then they would be considered as "State."