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Legal Implications of airport privatization in India

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Chapter 4

Summary

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The purpose of the study is to examine regulatory issues connected with the privatisation of airports in India, including competition, the legal status of private airports, safety, and airport charges and taxes. The subject of my research has been while contextualised under international aviation law rules whereas it suggests possible remedies for the issues identified.

4.1 International Legal Dimensions of Airport Privatisation

The Global Approach

In Chapter 2, airport privatisation experiences from around the world are discussed. Further responses from selected States in relation to the emerging trend are examined with a special reference to the responses from international organisations.

Except that sovereignty-based responsibilities regarding airports and air safety are bestowed upon States, the Chicago Convention does not address the question of ownership of airports. The International Civil Aviation Organization (ICAO) does neither advocate nor exclude privatisation. The ICAO Secretariat has issued a Circular (Cir 284) and a Manual (Doc 9980) regarding privatisation, which gives details of the developments in the field. States may consider these publications as a document that reflects ICAO encouraging privatisation. These documents are not approved by the ICAO Council, unlike other ICAO documents which are approved by the Council and published by it, and hence are not binding on States. Domestic laws play a pivotal role in privatisation, given that the Chicago Convention and ICAO do not mandate any rules or methodology for privatisation.

ICAO and particularly the International Air Transport Association (IATA) are not against the privatisation of airports. However, these bodies recognize the emerging trends in the aviation industry and the anxieties apparent at many stages of policy making with regard to the increase of airport charges as a corollary of privatisation.

Though many States consider privatisation as the “miracle cure”, airport user organizations, such as IATA, and passengers do not consider this as an effective solution. Privatisation need not be the only cure for the problems of State-owned airports. IATA, which represents air carriers, has considered developments in airport privatisation worldwide and is concerned with increasing airport charges resulting from privatisation. On the specific issue of airport charges, IATA opposes cross-subsidies of any kind. As far as IATA is concerned, more efficient management is the key to successful privatisation, since the cost of capital is always higher in the private sector.¹ Regarding airport charges in India, IATA commented:

¹ BRIAN PEARCE, IATA, IATA ECONOMICS BRIEFING: AIRPORT PRIVATISATION 27 (2005), http://www.iata.org/whatwedo/Documents/economics/airport_privatisation.pdf.

“It is important to ensure that past mistakes are not repeated and that the undesirable outcome of the sudden emergence of a high-cost environment that stifles traffic growth such as that witnessed at Delhi and Mumbai airports is avoided.”²

IATA also cautioned that any unnecessary ‘private shareholding’ may increase the focus on ‘profit-maximisation’ and lead to higher user costs.³

IATA’s experience is that, in many cases, commercialization has resulted in significant increases in the airport and ANS cost base that are used to determine charges and, in addition, the promised increases in efficiency and productivity have not always materialized.⁴

The study by Van Dender (2007)⁵ which analyses the determinants of airport revenues for US airports(55 airports) shows that US airports are publicly owned, and forced to do cost-based charges via Airport Improvement Program (AIP) grants. Whereas Bel and Fageda’s (2010) study⁶ of charges at 100 European airports found that non-regulated private airports charge higher prices than public or regulated airports.

From these studies it can be seen that privatization tends to result in higher charges if not regulated whereas public airports work on cost recovery basis. In other words airport charges in privatized airports are higher so it is necessary to regulate the charges. This is in line with IATA’s opinion on airport charges in privatized airports. ICAO document also reflect this concern of user agencies regarding higher airport charges in privatized airports.

Experiences in States

Different models of privatisation have been applied, and their effects vary from one State to another. Many factors are responsible for these variations. Fundamentally, performance rather than the model determines the success of privatisation. Most importantly, the privatisation program in U.S. – the biggest aviation market – has not been successful for various reasons⁷ including the following factors:

- restrictions on using privatisation revenue for non-airport purposes by the existing public operators;
- overly restrictive or vague regulatory requirements;
- infrastructure bonds issued by private sector operators would not be tax-free, as are bonds issued by public sector airport operators; and tougher requirements for private owners to obtain Airport Improvement Program(AIP) grants and Time-consuming application and approval procedures for APPP.

² Vikas Dhoot, *Airport Privatisation May Lead to Higher Fares: IATA*, ECONOMICTIMES.COM, Aug. 27, 2013, http://articles.economictimes.indiatimes.com/2013-08-27/news/41499062_1_iata-international-air-transport-association-aviation-sector.

³ *Id.*

⁴ See Paul Stephen Dempsey, *Airport Privatisation: Navigate Carefully* (2012), http://www.mcgill.ca/iasl/files/iasl/aspl613_paul_dempsey_airportprivatisation2012.pdf.

⁵ Van Dender K. (2007), Determinants of fares and operating revenues at US airports. *Journal of Urban Economics* 62: 317–336

⁶ Bel, G. & Fageda, X. *J Regul Econ* (2010) 37: 142, see <http://www.ub.edu/graap/Charges.pdf>

⁷ The U.S. Congress created an Airport Privatization Pilot Program(APPP)as part of the Federal Aviation Reauthorization Act of 1996, and authorized the FAA to explore privatization as a means of generating access to various sources of private capital for aviation infrastructure development and reducing reliance on federal grants and subsidies.⁷ New York’s Stewart airport was the first and only one to go private under Airport Privatization Pilot Program(APPP) in the US. The latest activity under this program is the FAA’s approval in February 2013 for privatisation of Puerto Rico’s Luis Muñoz Marín International airport, which is the second privatisation under the program.

Though privatisation in the U.K. and other European States is generally considered successful, it also has received criticism. It was pointed out that the U.K. government had converted public assets to private monopoly by selling seven airports.⁸ However, in 2009, the U.K. Competition Commission ordered the British Airport Authority (BAA) to sell off three airports, namely, Gatwick, Stansted, and either Edinburgh or Glasgow) to eliminate BAA's monopoly.

In Latin America, privatisation is not without problems either. While privatisation is the trend in Latin America, two "reverse privatisations" or re-nationalisations, took place in the continent during 2013. Three airports were re-nationalised in Bolivia that had been modernized by Lockheed Air Terminal in the 1990s.⁹ Also, the Grand Bahama Airport Company was acquired by the Bahamas government from Hong Kong's Hutchison Whampoa.¹⁰

The lukewarm response to privatisation in the U.S., one of the most liberalized economies in the world, points to the unsuitability of privatisation as the solution for problems related to State ownership of airports across the world. Privatized airports are reverting to public ownership.¹¹ At the same time, many publicly owned airport operators in different countries are expanding their operations in other parts of the world. For example, Singapore Changai Airports International Company¹² is expanding its operations into other countries like Tom Jobim International Airport in Rio de Janeiro, Brazil, Airports of the South of Russia (Krasnodar region). Schiphol Group is involved in the operation of Terminal 4 at JFK International Airport in New York, and engaged in a strategic collaboration with Incheon Airport, while it also has an interest in Brisbane Airport and conduct operations at the airports of Hong Kong and Aruba. Locally owned public airports in the U.S. and other States are examples of more effective models.¹³ Such alternative models should be given sufficient consideration when contemplating the replacement of classical models with those promising more efficiency.

4.2 The Indian Experiment and Emerging Issues

Following the trend of privatizing State owned airports in Europe and other parts of the world, private ownership replaced State ownership of airports in India also. The Indian experience of privatisation is examined and specific issues are discussed contextualising it public international air law.

⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, AIRPORT FINANCE: ISSUES RELATED TO THE SALE OR LEASE OF U.S. COMMERCIAL AIRPORTS 6, GAO/T-RCED-96-82 (Feb. 29, 1996).

⁹ Lockheed Air Terminal was later taken over by Airport Group International. The AGI contracts were subsequently acquired by TBI, and were later sold by them to Abertis. See ROBERT W. POOLE, JR., REASON FOUNDATION ANNUAL PRIVATIZATION REPORT 2014: AIR TRANSPORTATION 7 (2014).

¹⁰ *Id.*

¹¹ Three airports were nationalized in Bolivia that had been modernized by Lockheed Air Terminal in the 1990s.¹¹ Lockheed Air Terminal was later taken over by Airport Group International. The AGI contracts were subsequently acquired by TBI, and were later sold by them to Abertis. Also, the Grand Bahama Airport Company was acquired by the Bahamas government from Hong Kong's Hutchison Whampoa. See ROBERT W. POOLE, JR., REASON FOUNDATION ANNUAL PRIVATIZATION REPORT 2014: AIR TRANSPORTATION 7 (2014).

¹² See Press Release, Changi Airport Group, Another Record Breaking Year for Changi Airport in 2013 (Jan. 28, 2014), available at <http://www.changiairport.com/our-business/media#/pressreleases/another-record-breaking-year-for-changi-airport-in-2013-954032>. Changi Airports International, a wholly-owned subsidiary of Changi Airport Group, is a partner in many airport projects other States, including Antonio Carlos Jobim International Airport (Galeão) in Rio de Janeiro, Brazil; Airports of the South (Krasnodar region), Russia; and Bengal Aerotropolis Projects Ltd., India. See Changi Airports Int'l, A Growing Portfolio, <http://www.cai.sg/portfolio/portfolio.htm>

¹³ Examples Changai airport, Singapore, Cochin airport, Kerala, India

4.2.1 Competition

In chapters 3.1.1 and 3.1.2 the monopoly created in the airport sector as a result of privatisation is discussed. While other States promote competition between airports, like in the case of BAA airports in UK, Love field airport and Dallas/Fort Worth airport in US, and Swarnbhoomi airport and Don Mueang airport in Bangkok, privatisation agreements in India make competition laws ineffective. It also seems to me that the monopoly created in the airport sector by the closure of the existing airports in two cities, namely, Bangalore and Hyderabad, impedes the advancement of civil aviation which is embedded in the Preamble of the Chicago Convention.¹⁴ The original scheme of privatisation in India did not envisage the transition from public monopoly to private monopoly.

Regulation of civil aviation throughout the geographical area of India is a sovereign function. By private agreements, the executive has limited the sovereign powers of the Union of India on the territory of India, excluding an area within a 150 km radius of new Bangalore airport, Devanahalli, and within 150 kms of Shamshabad airport, Hyderabad, as far as its authority over aerodromes and commercial civil aviation. The impact of this agreement is that, in the future, exercise of any sovereign powers by Union of India will be subject to conditions of these private agreements. The monopoly clause in the concession agreements has taken away the sovereign powers of the State resulting in the statutes becoming irrelevant as they are subject to commercial contracts.

Closure of the old airports in Bangalore and Hyderabad namely the HAL airport (VOBL) and Begumpet airport (VOHY) cannot be said to be in line with the published aviation policy, provisions of applicable law, the Airports Authority of India Act, henceforth also referred to as the AAI Act, Aircraft Act, Competition Act, industry demand, or the larger public interest and the Indian Constitution. Commercial considerations of the new airports are the only reason for closing down the existing airports pursuant to the terms of the concession agreements and notifications.

The feasibility of having the old and new airports in Bangalore and Hyderabad are viable due to the following reason. In the case India, passenger growth is in the range of 15-20 % for the last many years. Hence the possibility of both airports becoming loss making is not there. In the case of Bangalore, the traffic has been growing steadily for many years before and after opening of the new airport. The passenger growth of Bangalore from 2008 to 2016 is around 89%¹⁵. Since the first concession agreement in 2004, the new Bangalore airport was expanded twice¹⁶ and the third phase expansion has started with a second runway. This points to the feasibility of both airports, the old airport and the new private airport, functioning in Bangalore.

¹⁴ The Preamble of the Chicago Convention stipulates “Therefore, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.”

¹⁵ http://www.apaoindia.com/?page_id=840

¹⁶ Bangalore airport construction commenced on 2 July 2005. When a study predicted the airport would receive 6.7 million passengers in 2008, the airport was redesigned from its initial capacity of 4.5 million passengers to 11 million before opening. After inauguration, the second phase of expansion was launched in June 2011 and finished in December 2013. The expanded terminal, dubbed "Terminal 1A", has raised the annual passenger capacity of the airport to 20 million. In the third expansion the second runway and a new terminal building are included. Both the second runway and terminal building are expected to be operational by 2020. And when completed, the new terminal will accommodate 55 million passengers. See <http://www.thehindubusinessline.com/economy/logistics/bangalore-international-airport-begins-ground-work-for-the-second-runway/article7375418.ece>, See also Table 1 on page 36 and <http://www.bangaloreaviation.com/2008/03/bial-needs-to-soften-their-stand-no.html>, http://www.bangaloreaviation.com/2008/03/bangalore-to-beat-passenger-traffic_14.html

It is recommended that, instead of creating a private monopoly or replacing a public monopoly with a private monopoly, competition between the private and public sectors be encouraged in the larger public interest. In case old airports in these cities are allowed to function they can be used by the airlines. These old airports would provide competition to the new airports, which would in turn result in reduction of airport charges. The old airports would help the airlines to operate flights to the city airport to cater to business travellers. On the other hand as these old airports are cheaper, low cost airlines would find it more suitable for its operations. The market forces are to be allowed to decide the fate of non-performing airports, like losing flights to the better performing airports.

4.2.2 Safety

4.2.2.1 Aerodrome Licensing in India

Chapter 3.2.1 deals with the effect of privatisation on various aspects related to aerodrome safety especially aerodrome licensing.

Aerodrome certification is an important instrument to ensure safety. ICAO encourages States to implement Aerodrome certification.¹⁷ However, the aerodrome licensing system existed and was used by India even before the creation of ICAO and long before the introduction of Annex 14. However, the privatisation of airports in India had affected the aerodrome certification /licensing system and rules as concisely described below.

India uses licensing regulations to ensure specific performance of the privatisation agreements. Although ICAO has developed aerodrome licensing policies and rules to ensure safety of international civil aviation, in India the aerodrome licensing provisions are used for achieving economic policies. The regulatory authority of India for airports, the Director General of Civil Aviation has used its licensing power to create a monopoly in the airport infrastructure sector and to curtail the use of two aerodromes, HAL airport in Bangalore (VOBG) and Begumpet airport in Hyderabad (VOHY) which were considered to be safe by the same authority for civil aviation operations until the opening of the new private greenfield airports. Hence, the authority of the State with respect to licensing has been subjected to private and commercial agreements and the licensing authority had to comply with the terms of private contracts. The usage of aerodrome licensing regulatory powers in the above manner is contrary to the spirit of international regulations on the subject, that is, the above Annex 14. No provision exists in Annex 14 or the Aircraft Rules 1937 of India to close down a licensed airport for ensuring monopoly of another airport. The only consideration for certification or licensing should be the safety of civil aviation.

It is suggested that India should free aerodrome licensing regulations from political considerations and treat it purely as an aviation safety issue. Also, India should ensure that the aerodrome licensing regime is strictly beyond the scope of any private and commercial

¹⁷ While the time limit for airport certification was 27th November 2003 States were required to ensure aerodrome licensing from 27th November 2003. Also, the SMS needs to be in operation from 24th November 2005. The 4th Amendment to Annex 14, Volume I – says “As of 27 November 2003, States shall certify aerodromes used for international operations in accordance with the specifications contained in Annex 14 as well as other relevant ICAO specifications through an appropriate regulatory framework”. The amendment was adopted by the Council in March 2001 and became applicable from 1 November. By this amendment, coverage of other relevant Annexes for certifying airports, Protection of visual and non-visual navaids sites and co-ordination with other service providers and agencies for a seamless safe operating environment are ensured

agreements and should allow the certification authorities to consider safety of civil aviation as the only criterion for licensing.

4.2.2.2 Non – Scheduled Aircraft Operation and Aerodrome Licensing

Chapter 3.2.2 deals with the post-privatisation scenario in India (post 2006) where on one hand commercial civil aviation operations are banned from the old airports in Bangalore and Hyderabad through notifications and on the other hand violations of the notification of closure of old airports at Bangalore and Hyderabad are permitted by the civil aviation authorities.

To encourage aviation the aircraft imported for Non-Scheduled operations (NSOP) are exempted by GoI from paying customs duties. In pursuance of this purpose, one of the conditions imposed by the Central Government is that the aircraft should be used for non-scheduled revenue chartered flights in order to avail customs duty exemptions. Import of aircraft, including helicopters, by the Government and scheduled airlines, were already exempted from customs duties before 2007. However the government levied 28% customs duty on aircraft brought to the country or imported under private category. In May 2007, the Government specifically accorded customs duty exemptions on aircraft imported by non-scheduled operators and spelt out conditions that had to be adhered for this benefit. Import condition specified that non-scheduled operators should use the aircraft “only” for providing non-scheduled (passenger) services or non-scheduled (charter) services, and not for private use. As per Serial No.347 B of the exemption notification,¹⁸ all kinds of aircraft are entitled to a NIL rate of basic customs duty subject to condition No. 104 of the exemption notification. Condition 104,¹⁹ *inter alia*, stipulates that the aircraft has to be imported by an operator who has been granted approval by the competent authority in the Ministry of Civil Aviation to import aircraft for providing non-scheduled (passenger) services or non-scheduled (charter) services.

On the other hand, the “commercial civil aviation operations” from the two closed airports of Bangalore and Hyderabad are prohibited by the above mentioned notifications of 16 May 2008 and 20 March 2008 respectively.

In a zeal to promote private investments, contradictory norms are framed, which is evident from the fact that commercial civil aviation aircraft operations are prohibited from the old airports in Bangalore and Hyderabad on the one hand, whereas violations regarding Non-Scheduled Operations Permit flights - NSOP operations are permitted by the aviation authorities from the old airports in Bangalore and Hyderabad on the other hand. The situation also points towards problems pertaining to administrative rule-making resulting in conflicting notifications, which would hamper the development of civil aviation. This clearly warrants prompt action in the direction of clarifying the law and rectifying the irregularity of the civil aviation authorities.

4.2.3 Economic Regulation

Privatisation of airports in India invites attention to economic regulation of airports. A new regulatory authority namely, the Airport Economic Regulatory Authority (AERA) has been created for economic regulation in the light of privatisation. One of the reasons for privatisation in India was that airport charges were high in the State owned AAI airports, as opined by the

¹⁸ Ministry of Finance (Department of Revenue) Notification No. 61/2007-Customs (3 May 2007), available at <http://www.cbec.gov.in/htdocs-cbec/customs/cs-act/notifications/notfns-2007/cs-tarr2007/cs61-2k7>, Last visited on 28 May 2015

¹⁹ *Id.*

Naresh Chandra Committee,²⁰ in comparison to that of the neighbouring Asian States. In addition, IATA's comments on high airport charges in India also point in this direction.²¹ However, after privatisation, new charges and taxes have been introduced in addition to the existing airport charges. These charges and taxes have further made air travel costlier. Regulatory issues connected with such charges and taxes are important against the background of privatisation.

Also in the case of India, airport privatisation and economic regulation has resulted in higher airport charges²² and, in turn, it has become a restraint for international airlines to fly to India.²³ IATA statistics show that in other States airport charges have also increased after privatisation.²⁴ The IATA Director General commented in this regards as follows:

“My suggestion is the government should carry out a rigorous cost-benefit analysis before taking a decision on (privatisation of) these four Airports Authority - run airports in Chennai, Kolkata, Ahmedabad and Jaipur.”²⁵

In the case of India, UDF and DF was not levied in any of the state airports before privatization. Introduction of UDF and DF in the privatized airports has resulted in higher airport charges

4.2.3.1 User Development Fee (UDF)

Chapter 3.3.1 deals with a post-privatisation levy in India, that is the User Development Fee (UDF), introduced by the private airports through concession agreements as part of airport privatisation. As there were penalty clauses for not adhering to the concession agreement, the Government of India (GoI) has approved the levy of UDFs on an *ad hoc* basis without going into the details of the projects.

²⁰ 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.

²¹ 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>

²² 'IATA against outright sale of AAI-developed metro airports' see

http://articles.economictimes.indiatimes.com/2015-07-16/news/64494891_1_tony-tyler-aii-airports

²³ In 2011, Air Asia stopped operations to [Hyderabad](#), while its long-haul low cost arm Air Asia X closed operations to [New Delhi](#) and [Mumbai](#) in 2012 and Thai Air Asia stopped flights to [Kolkata](#) starting this month (February 2015) All these moves followed hikes in airport charges.

http://articles.economictimes.indiatimes.com/2014-02-15/news/47358921_1_airasia-group-airasia-x-airasia-india

'Air Asia pulls out of Hyderabad airport over increased levies' See

<http://www.livemint.com/Companies/yuAcGv1cyCN0F8JqpaAmTI/AirAsia-pulls-out-of-Hyderabad-airport-over-increased-levies.html>

'Air France-KLM Into Battle Over Asia Airport Fees', See

<http://www.advfn.com/nyse/StockNews.asp?stocknews=AMR&article=50860201>

²⁴ Prof Paul Dempsey has opined about IATAs concern about commercialisation as follows:

“Commercialization may have a negative side, in particular when the principal objective is to maximize profits. No matter what organizational form an airport or ANSP assumes through the process of commercialization, it remains by its nature a monopoly on which the users are completely dependent. There are a growing number of cases of abuse of this monopolistic situation by newly created commercial organizations, often with the complicity of the governments concerned. IATA's experience is that, in many cases, commercialization has resulted in significant increases in the airport and ANS cost base that are used to determine charges. In addition, the promised increases in efficiency and productivity have not always materialized.”

see https://www.mcgill.ca/iasl/files/iasl/aspl613_paul_dempsey_airportprivatization2012.pdf

²⁵ 'IATA against outright sale of AAI-developed metro airports' see http://articles.economictimes.indiatimes.com/2015-07-16/news/64494891_1_tony-tyler-aii-airports

Though this levy is projected as a user charge, from the opinion of AERA and in the light of the Supreme Court decision in the ADF case,²⁶ 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, and in the absence of a clear provision in the Aircraft Act 1934, the UDF may be a tax without legal sanction. Hence the UDF, as the by-product of privatisation, is in contravention of the Chicago Convention principles and ICAO guidelines.

Article 15 of the Chicago Convention 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 registered in other States. However, the Chicago Convention does not refer to taxes applicable to such aircraft as far as the usage of airport is concerned.

ICAO policies on airport charges and taxes are detailed in Documents 9082 and 8632. ICAO Document 9082 does not support levying of taxes from passengers for the use of an 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 mentioned ICAO Document does not support any double charges. In the case of Indian airports, a Passenger Service Fee (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.²⁷

Following the private airports, the State operator of airports, AAI, has also started levying UDFs in the case of airports it has developed or modernized.

State and ICAO guidelines²⁸ stipulate transparency and competitive bidding for airport construction. The Ministry of Civil Aviation has formulated draft guidelines for the imposition of a UDF at airports.²⁹ Under the ICAO Guidelines, authorities should confirm whether a transparent competitive bidding has been followed when construction contracts connected with the construction of an airport are awarded.³⁰ However, in the case of private airports in India, these guidelines are not mandated.

4.2.3.2 Development Fee

Chapter 3.3.2 deals with another post-privatisation levy, Development Fee (DF), permitted in the private airports. Though DF was projected as a charge for the usage of airport, as per the Supreme Court decision,³¹ the levy is declared as a ‘tax’ on aviation by the Supreme Court.

²⁶ *Consumer Online Found. v. Union of India & Others*, (2011) 5 S.C.C. 360 (India), available at www.indiankanoon.org/doc/1390087/

²⁷ 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.

²⁸ 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.

²⁹ 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>.

³⁰ *Id.*

³¹ *Consumer Online Found. v. Union of India & Ors*, (2011) 5 S.C.C. 360 (India), available at www.indiankanoon.org/doc/1390087/. at 911–57.

Actions undertaken after this Supreme Court decision actions including proposals for new rules and the permission for private airports to retain DFs already collected indicate efforts to legalize a *private* tax³² on aviation. The current legislation does not comply with the Supreme Court decision³³ and Article 15 of the Chicago Convention reading as follows:

“[n]o 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 there on.”³⁴

DFs are not for “recovering the costs of providing any facilities or service for civil aviation,” but for “funding or financing the cost of up-gradation, modernization or development of the airport.”³⁵ Hence, after this judgment from the Indian Supreme Court, the category and the nature of DFs has changed from ‘charge’ to ‘tax.’ This provides much clarity, and it brings DFs into the purview of Article 15 of the Chicago Convention - that DFs are against the provisions of Article 15 of the Chicago Convention, because they are not a charge for the usage of any facility.³⁶ Also the AAI Act is not applicable to private airports. The term “private airport” was defined³⁷ and private airports were removed from the ambit of the AAI Act, except for Section 37 and Chapter V.A³⁸ The Supreme Court has not considered this limitation while deciding the legality of DFs. DFs are against the recommendation of the highest planning body of the state, the Planning Commission. That recommendation is in line with the Chicago Convention. The latest demand from Ministry of Civil Aviation (MoCA) that AAI should not levy a DF in Chennai or Kolkata confirms that India agrees that DFs are against the Chicago Convention. In 2007, the Planning Commission objected to the concept of the DF introduced by the Ministry of Civil Aviation in the proposed AERA Bill 2006.³⁹

Following the privatisation of airports, India and its independent regulatory agency, AERA, permit DFs by private airports but not by the State agency, AAI. Though privatisation was expected to bring in private capital in order to modernize airports, instead it is the public who fund these projects. One of the main reasons for privatisation of Indian airports were high airport charges, but privatisation has resulted in higher charges and taxes.

Prefunding charges are permitted only as charges, not as a tax, like DFs. ICAO Doc. 9082, explaining prefunding methodology, refers to charges, not taxes.⁴⁰ ICAO Doc. 8632, which deals with taxation, does not refer to any prefunding taxes.⁴¹ This clearly shows that, as per ICAO policy, prefunding, if permissible, can be implemented only by charges and not by taxation on aviation, whereas the DF charged by private airports in India is a tax as per the

³² Supreme Court of India has held DF is not a charge but a tax, because it not charged for any services provided by the operator. But Airport Economic Regulatory Authority (AERA) has permitted the private airport operators of Delhi and Mumbai airports to levy Development fee (DF) under AAI Act. But the private operators show it as a charge not a tax. And the airlines show it as a tax in the ticket, not a charge.

³³ *id*

³⁴ Chicago Convention,

³⁵ ICAO Doc. 9082/9,

³⁶ Chicago Convention, *supra* note 347, art. 15.

³⁷ See Airports Authority of India (Amendment) Act, § 2(nn) (providing that “‘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.”).

³⁸ See Res. of Aviation Redressal Ass’n.

³⁹ The Airports Economic Regulatory Authority (AERA) of India Bill, No. 72 of 2007, India Code (2007). The bill was passed on October 22, 2008. *Id.*

⁴⁰ ICAO Doc. 9082/9

⁴¹ *Id.*

above-cited Supreme Court decision.⁴² On the AAI's website, even after the Supreme Court decision, DFs are categorized as a 'pre-funding charge.'⁴³ This position of AAI is not in agreement with the Supreme Court decision which says DF is a tax and not a charge.⁴⁴ Since DF is a tax, their position is also not in agreement with ICAO's definition of 'pre-funding charges' because ICAO Doc. 9082 deals with pre-funding charges, not "pre-funding taxes".⁴⁵

In short, if India maintains that Development Fees (DF) are charges, then it is against the findings of the Supreme Court, and if India accepts that Development Fees are taxes, then it is a violation of Article 15 of the Chicago Convention.

4.2.4 Nature of Private Airports – Private or Public Entity

In Chapter 3.5 the emerging nature of private airports is discussed. Especially in the post privatisation scenario, the dilemma regarding the nature of private airports in India is significant. The analysis of the subject shows that private airports qualify for the definition of a State entity or a public authority, though they are considered private entities in many public acts, including the Right To Information Act (RTI Act) provisions, the public procuring process, Official Language Act and the State Affirmative Action. If the private airports are a State or public entity, there will be far reaching legal effects in many areas like the applicability of writ jurisdiction⁴⁶ of the high courts, and audit by the Comptroller and Auditor General (CAG). Also, as State entities, private airports may not be exempted from implementing State policies of social interest, such as affirmative State actions and the use of official languages (Hindi). 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', the AAI Act would become applicable to them, the precise situation the Amendment Act had intended to eliminate. This is neither the desired scenario nor was it the purpose of introducing privatisation in the airport sector as per the policy on airport infrastructure. Currently, the private airports and their operators switch their nature between private entities and bodies coming under State for public authority to suit their convenience and to avail benefits like exemption from writ jurisdiction of high courts, State affirmative actions, CAG audit as private entity, getting funding through taxes and exception from taxes or other state support as a State entity.

4.3 Legal Framework for Privatisation

No specific legal frame work was created for privatisation in the case of India. The exercise was mainly based on non-sovereign contracts (*acta jure gestionis*). Only amendments in the AAI Act 1934, and the Aircraft Rules 1937 were done to facilitate the provisions of the contracts for privatisation. On the request of private airport operators, private airports were

⁴² Consumer Online Found. v. UOI, (2011) 5 S.C.R. 911, 950.

⁴³ See Frequently Asked Questions, Airport Authority India, http://www.aai.aero/public_notices/aaisite_test/faq_Gen.jsp (last visited Mar. 26, 2015)(AAI website states: "What is Development Fee (DF) and why Development Fee is charged by Airport Operators? Development Fee is a levy made under section 22A of the AAI Act, 1994, inter-alia, for funding or financing the cost of upgradation, modernization or development of the airport. The levy is in the nature of a 'pre-funding' charge and is consistent with ICAO policies.").

⁴⁴ See Consumer Online Found., 5 S.C.R. at 950.

⁴⁵ ICAO Doc. 9082/9

⁴⁶ Article 226 of the Indian Constitution empowers High Courts to issue directions, orders or writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*. Such directions, orders or writs may be issued for the enforcement of fundamental rights or for any other purpose. The remedy provided for in Article 226 of the Constitution of India is a discretionary remedy and the High Court has always the discretion to refuse to grant such a relief in certain circumstances even though a legal right might have been infringed.

removed from the ambit of AAI Act. But in some cases, like provision to levy the Development Fee in private airports, provisions of AAI Act have been invoked. It was a piecemeal approach to the airport privatisation rather than a holistic approach.

Privatisation has created contracts before putting the regulator in place, putting the cart before the horse situation, though an independent regulatory system should have predated privatisation of monopolistic services. These private contracts bind the State regarding airport charges. Ideally the private airport operator should have been subjected to the regulation, but in the case of India, the regulator had to follow private contracts, which make the regulatory system a non-independent system. GoI should come out with clear a legal framework for airport privatisation.

4.4 Concluding Remarks

Privatisation in India has presented many concerns, which needs to be looked into by the authorities before proceeding with further privatisation. Privatisation was introduced as a cure for inherent problems of State ownership of airports, like high airport charges, abuse of monopoly positions and low economic and operational management efficiency. A profit making economic activity model of private airports was expected to be better than the State owned AAI's cost recovery model.

However, privatisation has not provided a cure for these problems rather problems are cropping up. Introduction of private airports has resulted in more State aid that is given in different forms to such private airports than to the State owned airport operator, AAI. Further, privatisation contracts which are non-sovereign contracts dictate the terms to the State regarding its sovereign and regulatory functions. Privatisation has resulted in State sovereignty regarding aviation activities becoming inferior and subject to commercial contracts.

These issues need to be looked into by the authorities before proceeding with further privatisation. An impact study on privatisation, especially on the issues identified above may be done before any further privatisation. A comprehensive law regarding airport privatization may be promulgated covering all aspects of airport privatization bringing clarity on the issues discussed in the thesis.

The issues pertaining to the airport development and operation across the world in the post privatisation era, that is a shift from State or public activity to private or economic activity, public funding for the private or economic activity through new taxes or financial aid, gold plating, higher user charges, cost recovery model to profit making economic activity model, sovereign power related to aerodrome and to commercial contracts, alternate models to private ownership based on local ownership need to be noticed by the international community due to its possible impact on civil aviation. The outcome of these studies should address the signalled problems and provide guidance for curing them

On the basis of the study, the author is of the opinion that, in the case of India, airport privatisation has resulted in ‘*socializing the cost and privatizing the profit*’ model⁴⁷ of economic regulation, rather than the expected high financial efficiency with low public cost.

Suitability of such privatized airport ownership model⁴⁸ along with the legal and regulatory challenges produced by privatisation, needs to be considered while gauging the suitability of such models to replace State ownership model. However, local ownership seems to be a more critical factor regarding the financial and operational efficiency. Cases of US and other States including India, where local ownership models perform better, should be given sufficient consideration when contemplating replacement of classical models with those promising more efficiency.

4.5 Future Research Areas

More study and research is required on various aspects of airport privatisation such as, the need of a legal frame work for privatisation from an international perspective that defines the model, standards and charges. The emerging nature of private airports as commercial activity needs to be analysed further on the basis of the existing international framework, the Chicago Convention, ICAO Annexes and its policies.

The concerns of privatisation in India discussed in this study are relevant in the case of many other States also. Further studies on the issues identified will help to evolve a more relevant international legal framework in the changing scenario due to airport privatisation.

⁴⁷ In the case of all privatized airports, the cost of development of the new airports are recovered through User Development Fee (UDF) and in the case of Delhi airport even a part of the capital is generated through Development Fee (DF). And for the UDF calculations return on the capital is also considered. Whereas private developers are selling its stake in these private airport companies at a very high rate (for instance, BIAL see *L&T offers to sell Bial stake at Rs108 a share; 10-fold return*, <http://www.livemint.com/Companies/zSzzDtPqx5aKcwbNq9PMBM/LampT-offers-to-sell-Bial-stake-at-Rs108-a-share-10fold.html>. Also see *GVK buys 14% Siemens stake in Bangalore airport for Rs 620 cr*, <http://www.businesstoday.in/sectors/aviation/gvk-buys-14percent-siemens-stake-in-bangalore-airport/story/18126.html>.)

Also see *GVK sells Bangalore Airport stake for Rs 2,149 cr*, <http://www.financialexpress.com/article/industry/companies/gvk-sells-bangalore-airport-stake-for-rs-2149cr/230351/>

Also non aeronautical revenue generation to cross subsidise the cost (and thereby reducing UDF) is not effectively explored by the private operators (eg BIAL, See *Airport real estate was to cushion UDF, but it isn't*. <http://www.thehindu.com/news/cities/bangalore/airport-real-estate-was-to-cushion-udf-but-it-isnt/article5827381.ece>).

⁴⁸ The private airport operators demand that the economic regulation should be dual till rather than single till, which means non aeronautical revenue should not be considered to cross subsidise the aeronautical charges, as to which see *Aera vs government: regulator losing out?* <http://www.livemint.com/Companies/RRFoFARx2rnsnBWQtOBaUO/Aera-vs-government-regulator-losing-out.html> and <http://aera.gov.in/documents/pdf/BIAL%20pb%2012-2013-14.pdf>

It is also reported in the case of Delhi airport that Comptroller and Auditor General has pointed out that the State partner AAI has not got the share of revenue from the private operators as per the contract. See *Minister deflects CAG queries on revenue loss* <http://www.thehindu.com/todays-paper/tp-national/minister-deflects-cag-queries-on-revenue-loss/article8321974.ece>