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Your Gateway to International Practice

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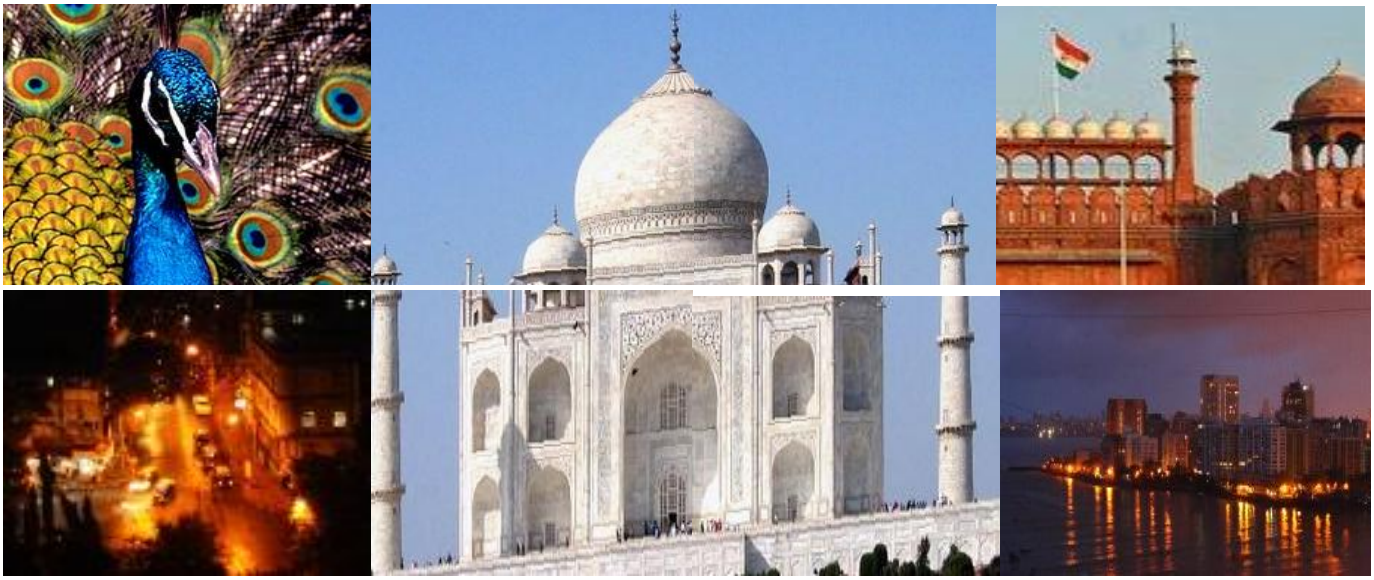

The Many Challenges Facing Civil Aviation in India

By Robert S. Metzger

India has experienced extraordinary growth in civil aviation over the past decade and is forecast to be on of the world's largest aviation markets in just a few years. To achieve (and afford) the promise of civil aviation, India faces challenges posed by national and state policies, law, regulation and practice. Crucial questionsare presented to policy makers, regulators, business leaders and to lawyers who advise them.

Civil aviation in India may be taken as a study in contrasts. Despite extraordinary growth in traffic, most of India's airlines are in a precarious condition.

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Civil Aviation in India—The View From 30,000 Feet

By VivekLall

Indian aviation has great underlying potential. However, the market continues to under-perform due to structural issues and the business models of almost all the major carriers are under stress.

The fiscal and cost environment in which the civil aviation sector is operating has turned particularly hostile at present as a result of stubbornly high fuel prices compounded by a sharp depreciation of the Rupee and a punitive ad valorem sales tax.

There is a need to take a holistic view of the sector and address concerns of all the stakeholders and all aspects of the civil aviation business.

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SAVE THE DATE (FEBRUARY 13-15, 2014 – NEW DELHI, INDIA)

Come join your colleagues from the United States and India, ABA Section of International Law Leadership, ABA Leadership, and Leadership from Major Indian Bar Associations, government officials, and prominent Indian business personalities at a jointly sponsored conference of the American Bar Association Section of International Law India Committee, Society of Indian Law Firms, and the Bar Association of India, as well as the Indian Services Export Promotion Council to be held in New Delhi, India.

The conference will focus on trade and investment between the U.S. and India. MCLE credit will be requested.

For more information, including information about speaking possibilities, contact James Duffy (jpduffy@bergduffy.com) or Sajai Singh (sajai@jsalaw.com).

ABOUT THIS ISSUE

India represents one of the largest markets for civil aviation in the world – but one that also possesses unique legal and business challenges. Between October 29 – 31, a U.S.-India Aviation Summit will be held in Washington, D.C., to examine such topics as air traffic management,aircraft environmental issues, safety certification, airport sustainability and general aviation development, among other subjects that are critical to an expanding aviation infrastructure.

Because India is a market of opportunity, but also challenge, there are many subjects that require attention of policy makers, legislators, regulators and lawyers. These include subjects such as taxation and import policies, limitation on foreign direct investment, land acquisition, concession arrangements with airport operators, public-private partnerships, regulatory strategy, aviation safety administration, and the relationship between India's national and state governments. The articles here provide an introduction to many of these subjects as well as focused insight on several of the most pressing concerns.

In addition to guest editing this issue of India Law News, we have each contributed an article on different aspects of civil aviation in India. One article, The Many Challenges Facing Civil Aviation in India (Robert S. Metzger), is intended to cover the broad landscape of legal, business and regulatory issues that concern civil aviation in India. The second article, The Growth of Airports and their Environmental Impact—The India Perspective (Atul Sharma), looks specifically at the acute questions of how to reconcile necessary infrastructure growth with environmental protection. We thank also Dr. Vivek Lall, who heads the aviation enterprise of Reliance Industries, for his authorship of the introduction to this issue with an article entitled Civil Aviation in India—The View From 30,000 Feet. Our other articles focus on infrastructure issues and are contributed by distinguished Indian lawyers with active practices involved in aviation regulation and infrastructure. William Vivian John and Sumithra Suresh of Luthra & Luthra discuss regulatory challenges affecting airport development economics for private sector participation. Yogesh Singh, Pia Singh & Aditya Alok of the law firm Trilegalhave written on obtaining land for airports and infrastructure. Amitabh Chaturvedi and Sumita Chauhan of Mine & Young discuss legal restraints on infrastructure development in the aviation sector.

We hope you find the above articles interesting and useful.

Robert S. Metzger and Atul Sharma
Guest Editors, Fall Issue 2013

Robert S. Metzger is a shareholder at the law firm of Rogers Joseph O'Donnell, P.C., and is based in Washington, D.C. Mr. Metzger counsels leading U.S. and international companies in aviation and defense matters. He is a member of the Defense Executive Committee of the U.S.-India Business Council and has published several articles in international journals on the subject of the U.S.-India aerospace and defense industrial relationship. Mr. Metzger was a Research Fellow at the Center for Science & International Affairs, Harvard University Kennedy School of

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Government, and is a member of the International Institute of Strategic Studies (London). He can be reached at rmetzger@rjo.com.

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CO-CHAIRS' COLUMN

Welcometo the India Committee. The Committee is proud to present yet another outstanding issue of the India Law News, on a topic that is rapidly gaining interest for Indo-U.S. legal practitioners – civil aviation. Those of us who grew up in India in the eighties and early-nineties remember a time when flying to get from city A to city B within India was an expensive and cumbersome option, to be exercised only in the most dire of circumstances. Today, even the most cost-conscious of India consumers now has a range of flight options between most large and mid-size Indian cities. And the journey isn't over – the Indian Ministry of Civil Aviation appears committed to encouraging competition in the civil aviation industry and potentially open to revisiting the fleet, equity and other barriers to entry in this sector. The articles in this issue of the India Law News cover a range of topics impacting this sector – from infrastructure to airport development, including the land acquisition approval process, as well as environmental regulations. Our grateful thanks to the co-guest editors of this issue, Robert Metzger and Atul Sharma, and, as always, our heartfelt gratitude to BhalinderRikhye, editor-in-chief of the India Law News and the highly capable team of co-editors.Also, many thanks to PoorviChothani and her colleagues at LawQuest for desktop publishing. The Winter(January) 2014 issue of the India Law News will present part 2 of this two-part series on civil aviation which will focus on commercial issues in this sector.

Also to note on your calendars for the coming months is the India Committee's biennial stand-alone program in India. On February13-15, 2014, the ABA India Committee, along with the Society of Indian Law Firms (SILF), the Bar Association of India and the Indian Services Export Promotion Council is organizing a two-day program in New Delhi on trade and investment between the U.S. and India. The conference is topical; despite the slow-down of the India economy, the significance of U.S. trade and investment on India and vice versa remains strong. U.S. companies' investment in India was a record $28 billion in 2012 and Indian companies for their part invested $14 billion in the U.S. in 2012. According to the Reserve Bank of India, the U.S. remains India's second largest trading partner in terms of export of Indian goods, and among the top five in terms of imports to India. It is with this background that the India Committee expects to lead a sizable U.S. delegation to India for this program, including key members of the India Committee and ABA Section of International Law leadership. Featuring experienced attorneys from the U.S. and India, the program will provide an outstanding opportunity for networking and exchanging of news, views and developments from the intersecting U.S. and Indian legal and business worlds. Watch this column for further information or contact your co-chairs for registration and other information on this program.

India Law News

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SUBMISSION DEADLINES

Fall Issue	**August 1st**
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Spring Issue	**February 1st**
Summer Issue	**May 1st**

Potential authors should review the Author Guidelines and send manuscripts via email to the Editorial Board.

Produced by India Committee

With such exciting developments ahead of us at the India Committee, a quick look at the past months. On August 6, we organized a teleconference on "Raising Venture Capital in the United States: What Every Indian Entrepreneur Should Know." Speakers gave engaging and informative presentations on the legal regime for an Indian start-up to raise early-stage capital in the U.S., as well as what Indian and U.S. incubators and venture capital funds would typically look for in a start-up. With more than 70 participants, both start-ups as well as those who advise them, the program engendered a lively discussion and Q&A session.

In other news, just as we had given up hope that the Indian Companies Bill 2012 would be passed before the upcoming national elections put an end to substantive legislative activities, the Rajya Sabha, the upper house of the Indian Parliament, passed the Bill on August 8. One of the most controversial provisions of the Bill, which requires companies above a certain size to spend a portion of their annual profits on corporate social responsibility (CSR) activities, has survived unscathed in the new Act. The new Companies Act has also given effect to recommendations of various corporate governance committees on topics such as director independence and auditor rotation. India has also joined the ranks of the select few countries across the world that have legislatively enforced Board diversity by requiring listed companies and companies above a certain size to have a woman member on the Board of Directors. The significant provision of the new Companies Act, what the Act means to U.S. companies operating in India, and other legislative and judicial developments affecting U.S. businesses operating or seeking to expand into India, will be the focus of our next teleconference, slated to be held in winter 2013. Please visit the India Committee web page on the ABA's website at http://www.americanbar.org/ in the coming days for more information on this upcoming teleconference.

We hope you will register for the teleconference, and we sincerely hope to see a good number of our readers at the program in New Delhi on February 13-15. In the meantime, and until the next India Law News, we wish our Indo-U.S. community a safe and happy Diwali and Thanksgiving!

Sajai Singh
Sanjay Tailor
Richa Naujoks

CIVIL AVIATION IN INDIA—THE VIEW FROM 30,000 FEET

By VivekLall

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Though it is difficult to build a consensus on certain issues due to differing opinions of various stakeholders, there are many aspects of the business where there is a unanimous demand from the community for action.

A glaring example is the Maintenance, Repair and Overhaul sector. Despite the growing potential of the MRO market, India continues to represent a challenging environment with high taxation, expensive infrastructure, a shortage of skills and strong competition from neighboring markets such as Sri Lanka and the UAE.

Another potential opportunity on the policy front is the current regulation requiring Indian carriers to have completed 5 years of domestic operations and have a fleet size of 20 aircraft before being permitted to launch international services. It appears that this may also require a policy re-look to ensure Indian carriers get a level playing field.

We must also welcome certain positive steps in the recent past, especially the decision to allow foreign airline investment, which has the potential to be game-changing for Indian aviation.

The New Civil Aviation Act, 2012 will soon replace the Aircraft Act of 1934, which does not cover issues such as viability and security, and has been severely criticized in safety audits conducted by global aviation bodies. The new law will provide for a new regulator to replace the Directorate General of Civil Aviation (DGCA). The Ministry for Civil Aviation is also in the process of setting-up a new Civil Aviation Authority of India (CAA), which will operate through collective decision-making of a board.

The Civil Aviation Authority of India Bill 2013, recently introduced by the Minister of State for Civil Aviation, would provide the CAA full operational and financial autonomy to regulate all issues concerning civil aviation safety and protect the interests of consumers in a fast-changing aviation scenario. With full functional and financial autonomy, the proposed CAA would be able to recruit its own staff, decide on their pay structure and have powers to fix and collect fees for rendering services like safety oversight and surveillance of air navigation services.

With regards to Aviation infrastructure, government has announced plans to issue tenders for the construction of 50 low cost airports to improve regional connectivity. This could give boost to the civil aviation sector in India and all related ancillary industries.

A significant recent development is the decision by the government to invite private international operators to bid for operations and management contracts for Chennai and Kolkata airports (and eventually 15 profitable airports over subsequent years), which are currently under the state-owned Airports Authority of India (AAI).

I would also like to touch upon the area of General Aviation which has huge potential, but has been given low priority by successive administrations. Development of heliports is important to support the growth of general aviation in India, especially in areas that cannot have runways for financial or terrain

related challenges. The disaster management authorities in Uttarakhand could have utilized such an infrastructure if it was available to evacuate trapped civilians and provide relief to locals in much less time.

There is a need to consider developing a public-private partnership (PPP) policy for development of heliports. There is also a need to develop standardized route operating procedures for helicopters. Non-operational air strips need to be upgraded in places of economic significance such as ports, mining areas, tourist places and industrial clusters. These need to be done at the lowest possible cost without compromising on safety. The air-strip may attract a small number of flights initially and if it has a strong business case, it may ultimately lead to full scale operations in future, with significant benefits to the local economy.

The major concern today is of regulating safety, efficiency and viability in all aspects of aviation. I believe that through a combined effort of the stakeholders we can unlock the huge potential in the Indian Civil Aviation Sector.

Vivek Lall is President and Chief Executive Officer, Reliance Industries Limited and specializes in the defense and aerospace sectors. Previously, he was Vice President and Country Head (India), Boeing Defense Space & Security. Prior to that he was Managing Director of Boeing Commercial Airplanes in India. Before joining Boeing, Vivek was with Raytheon and the NASA Research Center. He holds a Master's degree in aeronautical engineering and a Ph.D. in aeronautical engineering & modeling. He is a founding Co- Chair of the U.S. - India Aviation Cooperation Program and President of the Mathematical Society of America.



THE MANY CHALLENGES FACING CIVIL AVIATION IN INDIA

By Robert S. Metzger

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Despite forecasts that India will add more than a thousand transport aircraft to civil fleets in the two next decades, India has too few airports and today lacks the aviation safety infrastructure required to handle the growth.

AKPMG report in 2012 cited a 15.6% increase in the Compound Annual Growth Rate (CAGR) in domestic passenger throughput over the five year period concluding in FY 2011, and KPMG forecast domestic throughput of 293 million passengers by FY 2020, up from 106 million (actual) in FY 2011, and 51 million (actual) in FY 2006. Late in 2012, the International Air Transport Association (IATA) predicted that India's domestic air traffic would experience double-digit growth between 2012 and 2016. For air cargo, India was forecast by IATA to be among the five fastest growing international freight markets.

For a variety of reasons, however, growth has slowed. IATA reported that domestic air traffic had dropped 9.1% in February 2013 versus February 2012.The growth rate of India's Gross Domestic Product (GDP) has eased and disposable incomes have been pressured by inflation and the declining value of the rupee. Airline costs have been rising in part because of the reduced currency valuation, very high charges for aviation fuel levied by Government Public Sector Undertakings (PSUs) and high sales taxes imposed by state governments. (One recent news article asserts that the overall cost of airline operations increased by 20% in just three months in 2013 because of jet fuel prices and rupee devaluation.) The Indian domestic air travel market is clearly sensitive to pricing. Some of the growth in air travel has been fueled by a "middle class" willing and financially able to fly. There also may be price elasticity given the availability of travel by rail, as India enjoys one of the world's largest rail networks.

Irrespective of the recent dip, Boeing's 2013 commercial aviation forecast, covering the period between 2013 and 2032, estimates that Asia Pacific airlines will need 12,820 new airplanes, valued at $1.9 trillion, over the next 20 years. Late in 2012, Boeing forecast that India would have the highest passenger traffic growth in the world – higher than China's – and predicted the Indian market itself would require 1,450 new aircraft worth $175 billion by 2031.

But the Boeing forecast also cautions that India is one of several regions where "aviation growth outpaces planned infrastructure development."

Today, most of the civil air carriers in India are in a financially distressed condition. India's leading airlines posted a combined loss of $1.65 billion between 2012 and 2013, according to one report. The government-owned carrier, Air India, has a total debt of $6.4 billion (at the exchange rates as of this writing) and is expected to post a net loss of nearly $625 million in the current financial year. Just a few years ago, exploding demand brought several new, low-cost carriers to the India market, leading to the purchase or lease of several dozen modern single-aisle transport aircraft. The financial results, taken as a whole, are discouraging. Only one Indian carrier, IndiGo, is expected to be profitable in 2013. Several of the budget carriers (Kingfisher, Paramount and MDLR) have ceased operation.

At the same time, however, interest remains keen among prospective entrants to join the Indian market, especially in the wake of Government decisions allowing increased investment by foreign airlines in

Indian carriers. (See below.) The Tata Group has announced its return to civil aviation. Through a link-up with AirAsia, a new budget carrier, AirAsia India, is expected to start flying domestic routes in January 2014.The Tata Group also has announced an intention to partner with Singapore Airlines (SIA) to create a new, full-service airline, Tata SIA Airlines Ltd., with Tata Sons as the majority partner with a 51 per cent stake. These developments show confidence on the part of the airline industry that there is as-yet unmet demand for air traffic to be served to and from and within India.

Air carriers face other challenges in the web of national and state regulation and taxation. Indian airlines operate with some of the highest fuel costs in the world. India imports a huge percentage of Aviation Turbine Fuel (ATF) from foreign sources and prices are set by Government-owned PSUs that exclude competition from private sources. State surcharges on fuel vary widely, from 4% to 30%, and are not under effective control by the national Government. Further pressure is a consequence of the fall in the value of the rupee relative to the dollar; according to some estimates, as much as 70% of the costs of airline operations in India are dollar-based.

The negative movement of the rupee may prove transitory. The central Government knows of the financial difficulties of Indian airlines and may show forbearance from new charges and efforts to mitigate existing levies. Also, there are some signs of restraint on the part of state governments. Five states reportedly have agreed to reduce their taxes to as low as 4% and Bengal recently announced a 3-year sales tax waiver on ATF and a sales tax reduction as an incentive to bring more flights to the Kolkata airport.

Apart from the distressed financial condition of most of India's air carriers, and the availability of cheap rail transport, another constraint on the growth of civil air passenger traffic and cargo operations is the relatively small size of the aircraft fleet available for domestic routes or international destinations. One source reports that the total fleet size for commercial airlines in India was 371 as of February 2013. In recent years, India has seen a dramatic increase in the number of transport aircraft owned and operated by domestic air carriers, and more are on order. Nonetheless, actual capacity compares unfavorably with other countries in South Asia whose domestic airlines own many more aircraft to serve smaller populations. Indonesia, with a population of 240 million, about 20% that of India's, has a substantially larger fleet in being and many more aircraft on order.

The not yet resolved status of Kingfisher aircraft affects the ability of Indian carriers to lease aircraft or obtain financing for purchase. India in 2008 ratified the so-called "Cape Town" agreement (formally, the "Convention on International Interests in Mobile Equipment" adopted in Cape Town, South Africa, in 2001). The Cape Town agreement is intended to assure financiers that they will have prompt ability to repossess collateral, such as airplanes, in the event of financial default. Kingfisher Airlines, which leased Airbus A320 aircraft from several lessors, suspended operations in 2012. Several lessors have encountered stiff legal and bureaucratic obstacles in recovering the airplanes, in part because of demands by local airport and tax authorities for payments Kingfisher failed to make. As a consequence of Kingfisher's default and the obstacles encountered by aircraft lessors, the financiers now are demanding a premium from the hard-pressed Indian carriers to cover added risks. However, all but two of the controverted airplanes have been recovered as of this writing. The Government of India reportedly has agreed to consider legislative and rule changes to expedite the ability of lenders to take possession of aircraft. Until the Government completes these actions, however, the problems exemplified by Kingfisher will constrain the financing of aircraft fleet growth.

At the level of the national Government, India sometimes has exhibited an ambivalent and contradictory attitude towards civil aviation. Periodically, the Government has acted to increase charges upon carriers and passengers as a revenue-generating device. But Civil Aviation Minister Ajit Singh said, in May 2013, that the Government is

looking to reduce charges to land and park planes at 80 smaller airports in India. The Government also indicated it is re-examining a long-standing rule that Indian airlines are prohibited from flying internationally unless they have five years of domestic operations and a minimum of 20 aircraft.

For some time, the national Government has pledged to take necessary steps to replace the Director General of Civil Aviation (DGCA), criticized as lacking in authority and resources, with a new and more powerful central aviation administration, the Civil Aviation Authority (CAA). CAA would have independent funding and improve upon recruitment and retention of trained aviation personnel. Though the Union Cabinet has approved the proposal to replace DGCA with CAA, and the commercial aviation community has expressed widespread support for this change, it will take several years to occur. DGCA has taken several positive steps recently, however. Most important is the decision to extend by one year the term of Arun Mishra, the head of DGCA. DGCA also has announced it intends to hire 100 airworthiness officers to improve its staffing of safety oversight.

Problems with DGCA figure into new concerns that raised by international authorities about India's attention to air safety. Late in the summer of 2013, a delegation from the International Civil Aviation Organization (ICAO) conducted fact-finding in India, and its scrutiny was followed by an audit by the U.S. Federal Aviation Administration. It is expected that these reviews will place pressure upon India to shore up its aviation oversight,answer shortages of trained aviation specialists and improve supervision of aircraft repairs. There are indications that the Government is responding promptly. If its efforts are not sufficient, then India's status among countries in the aviation schema could be downgraded and there would be restrictions on the ability of Indian carriers to add flights to international destinations. This would be especially harmful to Air India, which has announced intentions to use its growing fleet of Boeing 787 passenger aircraft on new international routes.

India's approach to foreign investment in its domestic air carriers also has exhibited ambivalence, uncertainty and inconsistency. In 2012, the Indian Government announced that it would relax limits on foreign airline direct investment (FDI) in Indian carriers, allowing a new maximum of 49%. Realization of the benefits of the change has been beset by competing bureaucracies and frustrating delays. Early in April 2013, UAE-based Etihad Airlines announced its intention to buy a 24% stake in Jet Airways. The subsequent processing of that investment has been tortuous, with allegations of impropriety as well as various interventions by multiple government agencies and bureaus, among them the Prime Minister's Office, the Central Vigilance Commission (CVC), the Securities and Exchange Board of India (SEBI), the Foreign Investment Promotion Board (FIPB), the Department of Industrial Policy & Promotion (DIPP), the Competition Commission of India(CCI) and the Cabinet Committee on Economic Affairs (CCEA).All have been involved in the route to approval and many have intervened to require changes to the commercial deal.However, it appears that this deal will be concluded in the near future and the lessons learned should be instructive. Despite the travails of the Etihad-Jet Airways deal, the recently announced plans for AirAsia India and Tata SIA Airlines suggest that the Government's FDI changes are working to bring foreign airline capital to India's carriers.

There are many analysts who advocate further relaxation of FDI limits on civil aviation. There are several sectors encompassed within civil aviation – among them domestic airlines, ground handling, setting up new airports and non-scheduled operations – that have different FDI limits. India, like many sovereign nations, naturally has a strong desire to assure that its nationals have an active role, if not controlling authority, in these vital commerce sectors. Due recognition of these national interests is India's right, of course. However, India's present experience is one where the pace of foreign investments has fallen and where the current account deficit has risen, together contributing to the decline in the rupee's value. Liberalizing FDI in all sectors of civil aviation

should encourage greater inflow of capital and could help India to increase carrier fleets, improve carrier operations and profitability, and enhance infrastructure.Stronger air carriers should bring more competition for domestic and international travel.

Infrastructure remains a continuing challenge and potentially is the critical restraint upon the growth of India's civil aviation. Only 21 airports in India served more than 1 million passengers in 2012, according to figures published by the Airports Authority of India (AAI) and some of these do not match Western standards. Six airports dominate the traffic statistics – Delhi, Mumbai, Chennai, Bengalaru, Kolkata and Hyderabad. Considering a "middle class" population variously estimated at between 300 million and 600 million, India is woefully short of airports.The potential demand for domestic air travel in India will not be realized without massive improvements in airport infrastructure and there are reasons to question whether that can be accomplished on the scale required or in time to answer demand.

Despite the impressive recorded growth in domestic traffic, measured over the past ten years, air travel "penetration"in India (total domestic passengers divided by total population) has been reported at about 5%, far behind developed countries and one-fifth the domestic traffic of China (which is only 10% larger). A 2009 DeloitteReport on India aerospace cites infrastructure limitations as "the weakest link in the chain" and indicates that only 45% of the major city pairs in India have direct connectivity by air. The situation is even worse for the many "Tier II" and "Tier III" cities – which have adjacent populations numbering into the hundreds of millions. The problem of un-served or under-served smaller cities has drawn attention at the highest level of the central Government. Prime Minister Manmohan Singh, in late September, pledged that India would have 100 airports in small towns by 2020. The strategy to achieve this goal will be to privatize more of the larger airports so that the Government can focus on smaller facilities.

There has been considerable public discussion, in recent months, over new airport initiatives, as would be led by the Airports Authority of India (AAI). Various strategies have been promoted, including privatizing more airports and promoting more private-public partnerships for airport modernization and new airport development. Earlier this summer, the "Mayaram Committee" recommended 100% FDI in existing airport projects. Also under consideration are reduced landing, route navigation and security charges for air services to Tier II and III cities.

A critical problem is in the limited availability of land, except where unused land can be found and dedicated for "greenfield" projects. The process to acquire land is rendered daunting under the present legal regime, though the newly enacted Land Acquisition Bill may help to abate the problem. Another problem is that the national and state governments have imposed sizable fees and concession demands upon private airport operators, raising a question as to whether a business case for investment can succeed. It remains to be determined whether the private sector will answer calls for new airport privatization initiatives without wholesale reform in the way in which the national and state governments regulate and tax airport operations and economics. There is no doubt, however, that the private sector remains very much interested in opportunities to invest in the modernization of India's airports. Eleven companies, including several industry leaders, recently responded to a call for expressions of interest in projects to modernize airports at Chennai, Lucknow, Kolkata, Ahmedabad, Guwahati and Jaipur.

Apart from the challenge to provide the necessary airports, air traffic management and security infrastructure, today the fleets of India's civil carriers are optimized for high density passenger transport between primary city pairs. Although regional aircraft, especially turboprops, offer advantages in operating efficiently with short runways and from relatively less improved facilities, India's air carriers today have relatively few regional aircraft (whether jets or turboprop). With uncertain demand and doubtful

basic infrastructure, Indian air carriers have been reluctant to purchase aircraft optimized for regional service. However, Government officials have spoken of intentions to conduct a trial to subsidize airlines to increase regional service. Air India has announced an intent to lease turboprop aircraft to enhance connectivity to non-metro cities.

India has not clearly articulated policies to promote business and general aviation, and various DGCA actions imposefrustrating operational and regulatory barriers. India's use of rotary-winged aircraft is surprisingly small, considering the utility of helicopters and their ability to serve areas lacking airports suitable for conventional, fixed-wing aircraft. Pawan Hans Helicopters Limited, a PSU, is reported to have less than 50 helicopters in its fleet.In 2012, the fleet size of helicopters operated by private concerns actually fell from 293 to just 266, according to a report published in September 2013. The root causes are said to include high import duties and the regulatory environment, where complex rules frustrate helicopter operation and add costs. The central Government has said it recognizes the need for more heliports, in part to aid in disaster response, and has expressed an intent to improve training of helicopter pilots. Until these changes are accomplished, the rate of induction into private service of new private sector helicopters likely will remain very low.

In recent months, the Prime Minister's office announced an intention that India develop, indigenously, a 70-90 seat medium range turboprop aircraft, ostensibly to answer presently underserved demand, and to assist the Indian military in tactical airlift. The project also is intended to build up a domestic airframe and support industry. This is a commendable goal – but its commercial viability and technical realism are open to question. The notional turboprop transport would face tough competition from ATR and Bombardier, that already have products in this space and are working on larger capacity, even more efficient aircraft. Moreover, the Indian medium range civil aircraft could face aggressive competition from regional jets newlyavailable from Russia and models soon to come from Japan, Canada, Brazil and China.

Realism should temper national aspirations. India's track record in the domestic development of civil or military aircraft is not distinguished. There is no establishedprivate sector resource with the necessary competencies (or technology) to lead a new aircraft development program, much less to produce a civil aircraft in quantity that meets world-class safety and reliability standards. Unless the Indian Government agrees to underwrite the development program, there is not likely to be sufficient assured demand to justify the risk and expense of private development.

Indian leadership would benefit from assessmentof the experience of other "BRIC" nations in the development of national civil aerospace programs. Embraer in Brazil, of course, stands out as a shining example of how much can be accomplished. That experience took decades to achieve, however, and may not be replicable. China's experience is instructive and should serve to caution India. Creation of a domestic air transport industry has been a matter of high national policy, priority and investment. But China, despite the expenditure of billions of dollars and years of effort, has experienced continuing frustration and delays in three new civil aircraft that its state-supported enterprises have sought to bring to market: the XIAN MA60 turboprop, the Comac ARJ21 regional jet and the new Comac C919 single-aisle transport.

There should be no question that India has the capacity to develop and sustain a civil aviation industry. The nation's world-class accomplishments in many technology-driven areas speak to its inherent abilities and the potential of its highly educated workforce. India has announced it will open an aviation university in September 2014. But India should not underestimate the difficulty of "going it alone" to achieve the desired result. India should actively promote aeronautics in the private sector *and*encourage foreign investment. So long as India limits FDI, and presents an opaque maze of regulations

and approvals, it denies itself the opportunity to form successful ventures with accomplished Western companies to plan, design, develop and sustain a capable Indian civil aviation industry.

To foster a successful civil aviation industry will take decades. A coherent and consistent national policy is needed. India should welcome rather than frustrate foreign partnerships; its domestic industry will succeed only if it has access to technology and technical assistance from accomplished foreign partners. Those foreign partners will not put at risk their enterprise-critical technology without a high degree of assurance of return on their investment and without confidence they can do business in India without threat to their intellectual property or compromise to their business integrity. Continuing vigilance to eradicate routine governmental corruption is essential to attract ethical global partners.

If development of new aircraft is a long-term objective, India can focus with higher confidence of near-term success on creation of an aviation supply chain, e.g., specialized service and manufacturing. India should harness its prodigious information technology and software development capabilities to contribute to the design, development, manufacturing and sustainment objectives of the major players in the global aviation industry. Certainly, India should facilitate and promote national resources for maintenance, repair and overhaul (MRO) of civil aircraft. All of these areas today are subject to rules, regulations, policies, taxes and levies that frustrate accomplishment. For example, very high tariffs now inhibit original equipment manufacturers from importing into India the parts that are needed for MRO operation.These barriers should be removed and replaced with a responsible, businesslike, predictable administration of civil aviation matters. Senior government officials recognize the huge opportunity for MRO operations in India to service Indian aircraft, but coordination of the necessary actions among involved ministries will be difficult, particularly when the Finance Ministry may be asked to reduce taxes and tariffs to promote the long term opportunity.

Moreover, and most important, India needs to give national attention to civil aviation and should establish a holistic national policy to promote both the industry and infrastructure needed. There exists a correlation between the effectiveness of civil aviation – both passenger transport and cargo – and growth of the national economy. Stronger civil air carriersand a better aviation infrastructure will contribute to GDP growth. Successful nurturing of a civil aviation industry will add manufacturing jobs for India's enormous population of skilled, younger workers. Over the longer term, a credible aerospace supply chain will enable India's airlines to buy aviation supplies and services from domestic sources, and this will help to reduce the pressure on currency accounts by reducing outflows to foreign sources. Aircraft that are operated in Indiashould receive MRO within India.Indeed, the devaluation of the rupee increases the appeal of Indian-sourced supplies and services where costs are in rupees and receipts are in U.S. dollars.

For several years, much attention has been paid to refinement to the Defence Procurement Policies and the accompanying "offset" obligation that foreign sellers must buy from or invest in Indian sources in an amount equal to 30% of the equipment sale value. India has been disappointed with the results from the offset program, as growth of indigenous capability has been slower than hoped. Better results would be obtained if India opens up its offset program to permit discharge by more transactions in the civil aviation sectors, including "dual use" projects where a product or service could be used either for military or commercial purposes. Credit against offset obligations should be granted for work done by India-based aerospace companies with more than 26% foreign ownership. A fundamental restraint upon the willingness of India's domestic companies to invest in *military* aerospace is that the size of the market is limited and the certainty of purchases is inherently in doubt. In contrast, the market for civil aviation is larger by orders of magnitude and its duration is essentially indefinite. The national Government would be well-counseled to devote more of its attention and energies to promotion of a civil aviation industry and

infrastructure in India. Benefits to India's national defense will follow.

The U.S. and India are natural partners in the promotion of civil aviation in India. Since 2007, the U.S.-India Aviation Cooperation Program (ACP) has operated as a private-public partnership to promote the growth of the civil aerospace sector in India. In July 2011, the countries signed a Bilateral Aviation Safety Agreement (BASA) in July 2011, to facilitate reciprocal safety and certification activities, and explicitly to promote an indigenous aircraft and aeronautical products industry with U.S. cooperation and technical aid. Through the ACP, the U.S. Government and leading American companies are cooperating and assisting Indian counterparts for the advancement of civil aviation across a broad spectrum. Several key opportunities are on the horizon for coordination of public and private sector initiatives between the countries. A U.S.-India Aviation Summit, sponsored by the U.S. Trade and Development Agency and the Government of India, is to be held on October 29-31, 2013 in Washington, D.C. Planning now is underway for the 4th International Exhibition & Conference on Civil Aviation to be held on March 12-16, 2014, in Hyderabad.

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LEGAL RESTRAINTS ON INFRASTRUCTURE DEVELOPMENT IN THE AVIATION SECTOR

By Amitabh Chaturvedi and SumitaChauhan

Infrastructure, the back-bone of economic development, is the foundation on which the fort of economic success is built. India, poised to embark on a new journey of economic liberalization and revolutionary growth has witnessed major reforms, brought forth with the aim of achieving planned and consistent economic development, thereby gradually causing a shift from the controlled to an open market economy where private players including foreign investors have assumed an imminent and important role.

In the aviation sector, the government's policy on airport infrastructure envisages detailed master plans for upgradation and development of major airports in India by implementing recommended practices of the International Civil Aviation Organization. The importance of private participation for a sustained development of airport infrastructure has been recognised by policy makers. Corporatization of airports is aimed at divesting government holdings in future.

Although India has a well-developed legal system, the current legal and regulatory environment may, in certain situations, act as an obstacle to the sustained development of airport infrastructure. The aviation sector is governed by specific statutes which clearly provide for modes and means of private participation, which is generally allowed through grant of licenses to the private developer or through a contractual relationship.

Legal & Regulatory Framework Governing Airports in India

Airports in India are governed, inter-alia, by Airports Authority of India Act, 1994, The Airports Economic Regulatory Authority of India Act, 2008, the Aircraft Act, 1934 and the Aircraft Rules, 1937. The above legislations allow private participation through issuance of licenses for an airport other than owned by the Central Government and formation of joint ventures by private participants with the Airports Authority of India. The scope and extent of private participation is determined by the concerned State Government and may be of varying degrees and dimensions. However, development of infrastructure in the Aviation Sector faces restraints and roadblocks.

Financial Challenges Facing the Aviation Sector

The aviation infrastructure sector, apart from the regulatory factor, is currently facing the challenges of a weak global and domestic economy and deteriorating financial health of airlines. As a result, revenue generation by airports has been adversely affected, which, along with the pressures on liquidity, has caused funding gaps to arise both for private players as well as the state-owned Airport Authority of India ("AAI"). Another development that has hit the aviation infrastructure segment has been the downturn in the real estate sector, which has forced some private airport concessionaires to look for alternative sources of funds, given that their business models rely significantly on the development and sale of land adjacent to the airports. Some measures also need to be taken to avoid delays caused by judicial procedures which come in the way of development. Such delays need to be visualized and remedied beforehand.

At present, even as the four major airports at Bangalore, Delhi, Hyderabad, and Mumbai are being run by private operators, an independent regulatory authority for the aviation sector, though constituted, is yet to formulate detailed tariff guidelines. The Airports Economic Regulatory Authority ("AERA") is a statutory body constituted under the Airports

Economic Regulatory Authority of India Act, 2008 effective December 5, 2008. AERA has its head office in Delhi and regulates tariffs for aeronautical services rendered at major airports in India. It also determines airport charges and monitors the performance standards of such airports. The extent to which AERA is able to balance the conflicting interests of airport operators and airport users will determine how conducive the environment is for private investment in the Indian Aviation Infrastructure sector. Aeronautical charges (levied on aircraft and passenger movement) are a major source of revenues for any airport.

The current slowdown in air traffic is also likely to impact the capital expenditure plans of AAI, the apex body of aviation infrastructure in the country. A large part of this capital expenditure was proposed to be funded through internal accruals.However, the slowdown in traffic and the subsequent moderation in revenues could lead to either curtailment of the expenditure initially proposed or an increase in the debt funding requirements.

The airlines industry is the primary source of revenue for airports in India, given the high proportion of aeronautical revenues in their total turnover. Till about a year back, with traffic movement reporting robust growth, the airlines industry saw many private players entering the market and almost all carriers expanding their routes. However, the slowdown in traffic soon led to the industry being burdened by overcapacity even as increasing aviation turbine fuel (ATF) prices were pushing up costs. The result was that the domestic airlines industry reported sizeable cumulative losses.

The Challenge of Land Acquisition

One of the single largest roadblocks for development of infrastructure in the aviation sector is the acquisition of large parcels of land for airports. Attempts at land acquisition more often than not causes opposition from local communities resulting in litigation due to the huge differences in the value offered and the actual market value of such land. Lack of proper dispute resolution mechanism leads to prolonged litigation and substantial delays.

However, a new bill, the Land Acquisition and Rehabilitation & Resettlement Bill, 2013, has been passed in Parliament. The new law may ease the process of land acquisition and reduce the volume of litigation. The Government is now required to established improved procedures for compensation and rehabilitation. But, this could lead to a substantial increase in the cost of acquiring land, which may be severely detrimental to private investments in the long term, since sustainability of projects would definitely be adversely affected.

The regulatory framework must also meet the basic objectives of autonomy, transparency and predictability. At the same time regulation of aeronautical charges is necessary considering the monopolistic nature of airports. While aeronautical charges for all operational airports are regulated by the Ministry of Civil Aviation ("MoCA"), the Operation & Management Agreements and various Concession Agreements between the joint venture companies and AAI/MoCA also allow for revision in these charges and the levy of special charges like a user development fee (UDF). Significantly, some of these provisions, particularly those pertaining to the levy of UDF for greenfield airports, are not very clear on important issues such as the period of validity, amount and/or method of calculation of these charges.

Lack of a regulatory framework causes delays in implementation of projects leading to loss of time and revenue. Often these projects require multiple sequential clearances at various levels of the government. Various categories of approvals required across the project cycle at every stage, right from the pre-tendering to post construction stages often leads to delays and obstacles. While it is important to have a rigorous procedure that ensures transparency and quality, administrative and bureaucratic complexities for securing approvals are often considered serious disincentives for developers and contractors and lead to loss of time and revenue.

Further Delays due to Environmental Issues

Environment-related issues often lead to delays caused by legal procedures. Environmental safeguards and guidelines have proven to be one of the major reasons for delay in infrastructure projects. While new projects need to obtain clearances from the environmental point of view and need to comply with these regulations, even projects under construction need to comply with revised standards from time to time midway through the execution stage. While the Ministry of Environment and Forestsstates that the delays in seeking approvals may primarily be due to non-compliance with the procedures of the notifications and circulars issued in respect of mandatory Environment Impact Assessment ("EIA") and Environmental Clearance ("EC") and the terms of compliance involve a complex and time consuming procedure.

Another roadblock in infrastructure development is the Archaeological Sites and Remains Act 1958 as amended the Ancient Monuments and Archaeological Sites and Remains (Amendment & Validation) Act, 2010 which provides for the preservation of ancient and historical monuments and archaeological sites and remains of national importance for the regulation of archaeological excavations and for the protection of sculptures, carvings and other like objects. This Act prohibits construction and development work in a "prohibited area" and "regulated area" which means any area near or adjoining a "protected monument", which the Central Government has, by notification in the Official Gazette, declared to be a prohibited area, or, as the case may be, a regulated area, for purposes of mining operations or construction or both.

Even industrial laws of India impede the development of infrastructure in the aviation sector. For example, in 2011, the Supreme Court of India in *Airports Authority of India Vs. Indira Gandhi Airport TDI Karamchari Union and Ors.*held that notwithstanding the privatization of the Delhi International Airport, an earlier federal (Union) law abolishing contract labor at the Airports Authority of India (a government undertaking) would also apply to the private operator Delhi International Airport Limited. The private operator was required to absorb the contract laborers as regular employees of Delhi International Airport Limited.

The aviation sector in India faces many taxes on the inputs to production – fuel, aircraft leases, airport charges, air passenger tickets, air navigation service charges, maintenance costs, fuel material fees, into-plane fuel fees, and other items subject to service taxes. These fees and taxes on inputs are either not present in other matured aviation markets, or are much lower there. The Indian air transportation industry is thus laden with very high costs and larger operating losses than their other counterparts globally. This is not to say that air transport industry should be completely exempt from taxation – rather, it is the menace of distortion that needs to be addressed.

One of the key cost drivers for the airline industry, which is the pivotal segment of the entire civil aviation sector, is the price and taxes payable for aviation turbine fuel (ATF) by the scheduled domestic carriers in India. A number of representations received from airlines in India suggest that the rates of value added tax on ATF is high, which affects the financial viability of their operations. In most of the States, VAT applicable on ATF is in the region of 25-30%. Fuel cost alone constitutes nearly 40% of the operating cost of the airlines in India. There is no doubt that the current regime of aviation fuel taxation regime adversely impacts the financial performance of Indian air carriers, particularly in the domestic sector. If aviation fuel taxes are disproportionately higher without any basis, then it retards the industry development vis-à-vis the overall growth in the economy and limits its potential contribution to economic well-being of India. Multiple and higher levies on ATF impact the operating cost environment of air lines and need to be done away with.

There is an urgent need to also amend the laws so that even Defence/Military Airports can be upgraded and converted into civil airports.

Ironically, while overall infrastructure remains inadequate, there is also slack capacity caused by both internal and external factors. This must be squarely dealt with. Both problems need targeted outlays on equipment modernization and adoption of efficient management practices. To garner investments for upgrading the airports, particularly the second tier of airports, there is urgency to develop suitable PPP models.

There is also no standardization in the concession agreements across the different infrastructure sectors. As a result, the development of aviation sectors in India has been hampered due to lack of adequate and co-ordinated planning. However, the approach of adoption of standardized documents, such as model concession agreements and bidding documents for award of PPP projects, has over a period of time been streamlined. There has also been an accelerated decision-making by agencies in a manner that is fair, transparent, and competitive.

Given the large investment needs of the Indian aviation infrastructure segment, private sector participation is critical. In the case of Airports, Green field airports have come up in the private sector. There are also successful cases of upgradation of metro airports under the PPP mode. Increased private participation has now become a necessity to mobilise the resources needed for infrastructure expansion and upgrading. The PPP model has been fairly successful in many advanced countries. The PPP model in India is in a nascent stage, but is steadily gaining popularity and support given the dire need to improve infrastructure in the country. However, continued economic viability of private players operating in India's aviation infrastructure sector hinges on several factors, including the penetration of air travel in the country, scope to exploit non-aeronautical and real estate revenue opportunities, favourability of regulatory environment, and the funding support available during the initial years of development (considering the fixed cost intensive nature of operations). The recent downturn in the global economy also poses additional challenges in the form of declining traffic levels, liquidity pressures and reduced inflow from real estate development. Major PP Projects are governed by concession agreements signed between public authorities and private entities. As is the case in many countries, there is no single regulator which formulates the policy for all infrastructure projects. The absence of a transparent and regulatory framework aggravates the risks and uncertainties for private investors and there is a pressing need for an equitable and transparent regulatory framework to be put in place. Although AERA has been set up under the AERAI Act, 2008, the Act does not provide a uniform and comprehensive legal and regulatory framework for promoting private investment in the aviation sector. Even private operators like Delhi International Airport Limited and Mumbai International Airport Limited, which successfully overcame the aforesaid challenge to privatization, have been facing further hurdles. The levy of development fees by these private operators upon passengers using the privatized airport facility was struck down on technical grounds by the Supreme Court of India in a 2011 case titled *Consumer Online Foundation Vs. Union of India& Ors.*

Given the current environment, the extent to which private sector players would be interested in bidding for other greenfield airports that are proposed to be developed using the public-private partnership (PPP) model remains to be seen. More often than not, most PPP projects end up being challenged due to the bidding process. In the first instance, the challenge is to find reasons as to why a tender was rejected and, upon doing so, the second round of litigation is to challenge the reasons. The entire legal process could take anywhere between 3-5 years if not more, and therefore investors are often wary of investing in PPP projects that may end up into litigation. Often cases are filed only with the intention to wrongfully restrain the successful bidder from commencing its operations. To illustrate, the tenders for privatization of the Mumbai International Airport and the Delhi International

Airport were challenged in the matter of *Reliance Airports Developers Pvt. Ltd. Vs. Airports Authority of India & Ors* before the High Court of Delhi in early 2006, and the privatisation was finally upheld by the Supreme Court of India in November of that year.

While cyclical downturns are inevitable, the current need is to have a legal and regulatory framework that would do away with the presently existing restraints on infrastructure development in the aviation sector and a paradigm shift in the manner of judicial interpretation of the existing law so as to facilitate private investment in the aviation infrastructure segment.

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OBTAINING LAND FOR AIRPORTS & INFRASTRUCTURE

By Yogesh Singh, Pia Singh &AdityaAlok

Several airports across the world that are owned by state and national government authorities are increasingly being operated and managed by private developers under various public private partnership models and the Indian story is no different. Over the last decade, the civil aviation sector in India has grown exponentially and is currently positioned as the ninth largest market globally with an expected growth that is likely to place it within the top five aviation markets in the world by the year 2020.

This article provides a broad overview of the legislative and institutional framework governing acquisition of land for infrastructure projects and airports in particular. We have primarily focused on instances of the government acquiring private land for infrastructure projects, as this has been the general trend in India. Having said that, if a project developer was to purchase private land for the project they could face a number of issues such as ownership, title, number of sellers for the land, land owners demand for higher prices due to proposed project activity and cost implications of resettlement and rehabilitation of project affected families.

Background

Until recently, the Airports Authority of India (AAI) had exclusively been responsible for developing, operating and managing airports in India. In 2004, the central government began an airport privatization and modernization drive. The privatization drive was probably motivated by severe constraints in capacity and the magnitude of investments required for this modernization. Growing interest from private operators led to the greenfield development of five airports in India i.e. Delhi, Mumbai, Bangalore, Hyderabad, Chennai and Cochin through the public private partnership model. By 2017, the Ministry of Civil Aviation has targeted the development of 17 new airports at various locations.

The development of an airport generally involves complex interplay between various government agencies and authorities. Some of the key players include the Ministry of Civil Aviation, which is responsible for the formulation and development of policies and the administration of the Aircraft Act, 1934, Aircraft Rules, 1937 and other legislations relating to the aviation sector; the Directorate General of Civil Aviation who is responsible for safety, the Bureau of Civil Aviation Security, responsible for security and the Airport Economic Regulatory Authority to safeguard the interest of users and service providers at airports and set tariff for provision of aeronautical services.

Legal and Regulatory Framework for Acquiring Land

In India, broadly speaking, there are four categories of land (a) forest land; (b) government revenue land; (c) agricultural land; and (d) private land. It is the inherent right of every sovereign nation to acquire property from its citizens for public use. This right, also known as "eminent domain" is contained in the Indian Constitution which provides the extent within which such power should be exercised. Firstly, acquisition of private property should be for public purposes only and secondly that, no property can be acquired without the payment of compensation to the seller, under the applicable laws.

The Land Acquisition Act, 1894 (LA Act) is the umbrella legislation detailing the procedure for involuntary acquisition of land from private land owners by the central government and/or any state government. Under the LA Act, the definition of 'public

purpose' is very broad and set out in inclusive terms. Public purpose includes provision of village sites, planned development or improvement of existing village sites, provision of land for town and rural planning, provision of land for residential purpose to the poor or landless, educational and housing schemes, the provision of land for planned development of land from public funds in pursuance of any scheme or policy of the central government or state government etc.

The LA Act Procedure

The Central or State Government (as the case may be) issues a notification in an official publication and two local newspapers stating it's need to acquire a particular tract of land for a "public purpose." Consequently, any person interested in the notified land has a right and is given an opportunity to object to such acquisitions in the presence of the relevant government official (in this case the Collector). This objection must be given in writing, within 30 days from the date of the notification. Post hearing of any and all objections and after making further enquiries, the Collector submits a report to the State Government stating the objections he or she has received, the record of the proceedings held and its recommendations. If after considering the Collector's report, the government is satisfied that the specific tract of land needs to be acquired for a 'public purpose', it will make a declaration in the official publication and two local newspapers. Such declarations are made only after the government is completely satisfied that the compensation for the acquisition will be wholly or partly out of public revenues or some fund controlled or managed by the relevant local authority. Finally, award letters are issued by the land acquisition officer (in this case the Collector) finalizing area, purpose, value and amount of compensation payable to each interested party.

It is noteworthy that a lack of adequate compensation under the LA Act is one of the key reasons for legal action against the government. Compensation payable to private landowners is determined by the Collector on a case to case basis. The Collector does so after holding a public consultation and determining market value of the land on the relevant date. Market value is not a defined term under the LA Act. In land acquisition proceedings, sale deeds from previous land transactions are used to benchmark the market value.

Apart from practical issues and delays faced by project developers due to compensation assessment, other hurdles that are faced under the LA Act include the requirement for prior permission from the relevant authorities before the land can be mortgaged. Additionally that there is no time limit specified within which the land has to be put to use for the purpose for which it has been acquired.

New Law Enacted - to be notified shortly

To address these and other issues, the Central Government has proposed a new Land Acquisition legislation i.e. the Right to Fair Compensation, Resettlement, Rehabilitation and Transparency in Land Acquisition Bill, 2013 (the LA Bill). The Land Acquisition Bill, 2013 was deliberated and passed in the monsoon session of both the houses of Parliament and on receiving Presidential assent, will be enacted to repeal the LA Act.

Key Changes in the LA Bill:

(a) A new integrated legislation, dealing with fair compensation, land acquisition and rehabilitation and resettlement;

(b) Public purpose has been re-defined to include amongst others, specific activities such as acquisition of land for strategic purposes (i.e. national security and defense); for infrastructure projects including transport, energy, water and sanitation, communication and social and commercial infrastructure; and for project affected families. The acquisition of land for airports will fall in infrastructure/transport category.

(c) For land being acquired for public private partnerships (PPP) projects and for private companies, the consent of 70% and 80% respectively from project affected families is required.

(d) The requirement of resettlement and rehabilitation of project affected families has been extended to land acquired by private companies through negotiations.

(e) Social impact assessment studies has been made compulsory in all cases where the government intends to acquire land for public purposes;

(f) With a view to ensure equitable development for land owners, a lease model has been contemplated. However, at present, no lease mechanism has been provided for.

(g) Unless the land acquired has been rendered unusable, no change of purpose will be permitted.

(h) If any acquired land remains unutilized for a period of 5 years from the date of possession, it should be returned either to the original owners or the government.

(i) The LA Bill will apply to acquisition proceedings in some instances where the land acquisition process has not been completed under the LA Act.

1. (h) Several layers of checks and balances have been introduced at a municipal government level to ensure for local participation and transparency.

(j) As far possible, acquisitions in land owned by schedules castes and tribal areas should be avoided.

(k) In cases where a company or body corporate offers its shares to the owners of the lands as a part of the compensation, for acquisition of land then such shares cannot exceed 25% of the market value determined by the Collector.

In spite of the State governments in India being empowered to adjudicate on matters relating to land, the Central Government also has a role in the land acquisition process and this often leads to an overlap between the State and Central Government, often creating more layers in an already complicated land acquisition process.

Acquiring Land for Airports and Infrastructure Projects

The acquisition of land requires complex coordination between several stakeholders including the Central and State Governments, local authorities and land owners. Land requirements for infrastructure projects across sectors differ. Simply put, in larger infrastructure projects and these include airports, roads, ports, land procurement is generally the responsibility of the appropriate government.

Airports

The intention of the Government to lease land to the private airport operator is provisioned for in the Operation, Management and Development Agreement (OMDA) (executed by the AAI and the private airport operator) and this includes real estate development rights in and around airports. Additionally, the private airport operator is granted this 'right to use' under a long-term land lease deed, which also contains the right to sub-lease the project land. Airport property development is divided into aeronautical and non-aeronautical activities. Aeronautical activities include development focusing on terminals, hangars, maintenance and fuelling facilities. Generally, private airport developers outsource non-aeronautical activities include hotels, business parks, restaurants and shops to third parties better qualified to operate and manage such activities.

Roads

In a road concession, the Central Government (empowered under a separate legislation – The National Highways Authority of India Act, 1988)

acquires land, if it is satisfied that the acquisition is solely for public purpose and that the land is required for building or operating the infrastructure asset. NHAI's obligation and risk of acquiring the land is captured in the model concession agreement developed by the Planning Commission for national highways. The land acquisition process for a roads project is very similar to that followed under the LA Act.

Ports

The ports sector in India is divided into 'major ports' and 'non-major ports.' Major ports are declared as such by or under laws made by the Parliament of India and are governed by the Major Ports Trust Act, 1963. All other ports that are not major ports are covered by the 'concurrent list' in the Constitution of India, and both the Central Government and the State Governments can legislate on matters relating to such non-major ports. Land to develop major port projects is acquired by the Central Government, under the Major Ports Land Policy which encourages private participation by putting in place a procedure for allotment of land either by lease or license. Land for minor ports is acquired under the LA Act. The concessioning authority's obligation to provide land has been set out in two model concession agreements, developed by the Planning Commission and developed by the Ministry of Shipping.

Power

In some cases, arranging for land is the obligation of a private developer. For example for conventional power procurement in India which is increasingly being done through the competitive bidding route, procurement has been classified into two mechanisms i.e. Case I and Case II projects. Case I projects are those where a power distribution utility calls for bids from private developers to procure a specified quantum of power without specifying the location, technology or fuel of the source of supply. Case II projects are those where a power distribution utility invites bids for setting up projects on the basis of tariff, and also specifies the fuel and location of the project. In a Case I project, the onus of arranging land is that of the project developer whereas in a Case II project the government arranges for the project land.

In the renewable space in India which generally comprise of smaller projects, the obligation of arranging project land is almost entirely on the developer.

Challenges Faced In Land Acquisition

One of the key challenges in developing and financing infrastructure projects and airports in particular, have been uncertainties and delays associated with the land acquisition process in India.

Encroachment

While the AAI has the authority to evict any person illegally occupying airport premises, this authority has been of little value in the context of the Mumbai airport which has been massively plagued by illegal encroachments in the form of slums Given the proximity of the encroachments there is a risk to national security. Also such illegal encroachments have meant that non-aviation related developments have been stalled, which have then translated into lower revenues and profit for the concessionaire, a lesser annual fee (percentage of revenue) to the AAI and an ultimately higher cost being passed on to the users in the form of user development fees, as alternate means of raising revenue.

Political Delays

Infrastructure projects in India tend to get caught between the political agendas of the ruling parties and the opposition. Examples include protracted land acquisition processes experienced by the steel company POSCO in the state of Odisha. This project was inordinately delayed for 6 years and was then eventually abandoned. Another example was Tata Motors moving out of West Bengal because of issues with the land acquisition process, which included massive protests by displaced farmers. Illustrative of

the fact that, not only foreign direct investment (FDI) funded projects but, even projects funded by Indian entities have faced real time land acquisition issues.

Forest Land Related Approvals

If there is a component of forest land that comprises a part of the project land, this can delay matters significantly. While administrative control of forest land in India lies with the relevant State Governments, the Ministry of Environment and Forests is that Central Government ministry empowered under the Forest Conservation Act, 1980 to grant final approval for diversion of forest land for non-forest purposes and this is a two stage process. In case the project developer starts construction on the non-forest land, the developer assumes the risk of the forest land user approvals not coming through. If the developer waits for the forest clearance to come through upfront, it can lead to project financing delays and delays under the project agreements.

Agricultural Land- FDI restrictions

It is important to point out that the FDI policy of the Central Government prohibits foreign investment in agricultural activities (barring few exceptions). This risk is not applicable to the government's acquisition of land so should ideally not be relevant in the present context as we are discussing investment in infrastructure projects. However, some officials seem to have taken the view that the purchase of agricultural land (especially using foreign funds) would amount to investment in agricultural activities even if the land has been purchased for an infrastructure project and the intention is to use the land only after appropriate user change approvals have been obtained. We are of the view that this is an incorrect stand but till the time this issue is not clarified by the central government, it will continue to be a concern for various project land acquisitions. Till then, developers would be well advised to seek a clarification from local authorities before they acquire any such private land.

Litigation

As mentioned above, assessment of compensation is estimated as the number one reason for complex and long standing disputes. It is hoped that with the enactment of the LA Bill this will be remedied as it is proposed that compensation to be paid to the landowners will not be less than four times the market rate in rural areas and up to two times the market rate in urban areas. However, a potential downside is that this could result in a significant increase in project costs.

The second most important cause is not following the due process under the statute. The LA Act contains provisions detailing steps that need to be followed for the actual process for land acquisition. Often when these steps have not been completed or are not entirely followed through, legal action is initiated by landowners under protest. In fact, for this reason alone, it is estimated that due to such delays the cost of land acquisition specifically for airport projects may go up to $1 billion by 2018.

Resettlement and Rehabilitation Issues

Acquiring large tracts of land for infrastructure projects has involved displacing several project affected families. Presently while the LA Act does not contain any provisions relating to rehabilitation and resettlement of displaced persons, the LA Bill has provisioned for the resettlement and rehabilitation of landowners. However, resettlement and rehabilitation is provided for land acquisitions made by private companies in excess of a certain threshold which would be specified by the appropriate government on a case by case basis and all acquisitions made by the Government. This effectively excludes owners with smaller pieces of land who will be displaced without any compensation.

Conclusion

India is one of the largest democracies in the world and while the land acquisition process can be time consuming and fraught with issues, the government

doesn't have the easiest task. The real issue is a lack of sensitivity towards the needs of all stakeholders and the government's inability to comply with regulatory processes'.

The involvement of multiple authorities does not always lead to clear thinking and decisive action. Greater coordination between the government departments and/or regulators is essential. New metros will soon require bigger and better airport infrastructure including new terminals to avoid natural bottlenecks beyond which they cannot be expanded and these should be planned for now.

As government authorities, private stakeholders, international consortiums and banks commit funding to planning and development of new airports, the uncertainty (time and cost) attached to the land acquisition process must be curtailed if not eliminated. Unviable models for airport development will prove to be deterrents to future airport development - an economic opportunity India cannot afford to miss.

Developers especially non-resident investors should consider some of the following steps that may have an impact on the process of acquiring and/or transferring land in India (a) conducting a detailed due diligence of the proposed land covering nature of land, title, revenue records, physical verification, encumbrance and litigation checks; (b) examining if the compensation process adopted for the land acquisition is reasonable and has been duly complied with; and (c) commit funds to resettlement and rehabilitation of project affected persons. The latter will be crucial under the new land acquisition regime when it comes into effect.

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REGULATORY CHALLENGES AFFECTING AIRPORT DEVELOPMENT ECONOMICS FOR PRIVATE SECTOR PARTICIPATION

By William Vivian John and Sumithra Suresh

The recent transformation of the Indian airport sector and modernization of significant Indian airports represents the culmination of more than a decade of effort by successive Indian Governments to upgrade airport infrastructure in India. Recognizing the need to keep pace with steep traffic growth and the changing expectations and profile of the Indian air traveler, the Government undertook several initiatives to revamp the legal framework to encourage private participation and reduce entry barriers for foreign investment into the nation's airport infrastructure. These initiatives resulted in the privatization and modernization of key Indian airports. While this journey has brought with it many lessons, there is still a long way to go, with several new airport projects remaining to be developed and older airports requiring an overhaul in their functioning, management and infrastructure.

We shall seek to examine what we believe were, and continue to be, key challenges in the legal framework, which affect airport economics and should be re-evaluated, to continue to incentivize private sector investment into future airport projects. These challenges relate to the relatively recent Indian airport economic regulatory regime and the legal framework governing privatization of airports owned by the Government of India-controlled statutory corporation, the Airports Authority of India ("AAI").

To set the context for this discussion: the preferred vehicle for modernization of Indian airports has been the Public-Private Partnership ("PPP") model, the essence of which is a 'concession'. In simple terms, a concession is the grant of a right to undertake an activity (frequently a public function discharged by a government authority) and collect the revenues generated by such activity, in consideration of payment of a 'concession fee' to the grantor (frequently the government authority that is responsible for that function). Under the PPP model, a concession is typically granted by a government authority, the 'public' side of the partnership, to a private party selected typically through a tender process, the 'private' side of the partnership, which discharges the concessioned functions within a framework defined by the public side. The private side leverages its strengths and resources to undertake the project and the public side circumscribes, regulates and supports the project and hence, the 'partnership'.

In the case of airport infrastructure in India, while any person could apply for an aerodrome license and establish an airport, historically, airports in India were set up by the Government of India and eventually came to be vested in AAI. Private participation in airports is a relatively recent phenomenon with Cochin International Airport being the first Indian airport to be set up by a private entity in 1999. In 2003, the Airports Authority of India Act, 1994 ("AAI Act"), the parent statute governing the establishment, powers and functions of AAI, was amended to permit AAI to grant concessions in respect of airports owned by it, to private parties for their operation and development. Subsequently, concessions to establish and operate an airport under the PPP model were granted to private parties in consideration of a concession fee determined as a percentage of the gross revenue of the airport. In 2004, the concessions to establish new international airports at Bangalore and Hyderabad were granted by Government of India. These airports were set up as greenfield projects at new locations on the outskirts of their respective cities, with the older AAI-run airports, which were by the time landlocked with little room for expansion in the heart of these cities, being closed down. Then in 2006, the Delhi and Mumbai airports

which were operated by AAI, were concessioned to private parties as brownfield projects for their expansion and modernisation.

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The attractiveness of airport concessions, and indeed any other concession, for private participation lies in the difference between what you make, i.e., the revenue the concession can generate, and what you pay for the concession, i.e., the concession fee. The revenue that can be generated from the concession is typically subject to regulation because most infrastructure projects are natural monopolies.

What is interesting to note is that while the concession fees (arrived at through tendering process) in case of Bangalore and Hyderabad airports, was 4% of the gross revenue, in case of Mumbai and Delhi airports, the concession fee was an unexpected 38.7% and 45.99%, respectively, of the gross revenue. One obvious reason for this difference would have been that Delhi and Mumbai were operating airports, with steady revenue streams compared to Bangalore and Hyderabad, which would yield revenues only after the construction phase. The other reason would have been the relatively higher potential for real estate development (an integral part of the airport concessions), in these two cities, with the airports being located in the heart of the cities, and the relatively higher importance of Delhi and Mumbai as travel destinations (one being the national capital and the other the 'financial capital' of the country), compared to Bangalore and Hyderabad.

In case of airport concessions, revenue arises from two types of sources and is broadly classified as aeronautical and non-aeronautical. Aeronautical revenue may be understood as that which arises directly from the airport's operations, such as landing and parking charges paid by airlines using the airport. Non-aeronautical revenue on the other hand is that which arises from incidental activities such as the operation of food and beverage and retail outlets, lounges and car parks at the airport. While the global trend has been of higher non-aeronautical revenue, in the range of 40-60% of total revenue, in India, non-aeronautical revenue potential was long under exploited, with non aeronautical revenue constituting only 30-35% of the total revenue; a trend that is being reversed only in recent years in privatized airports.

The tangible benefits of airport privatization in India have been many. These include new, improved and modern facilities, evidenced by the significant rise in rankings of privatized airports by Airport Council International ("ACI"), a global airports body, and increase in revenues to Government; the revenue share to AAI from the Mumbai and Delhi airports has steadily increased and has contributed significantly to its ability to invest in infrastructure development at its other airports. On the other hand however, privatized airports have faced flak in recent times for increasing the costs to passengers, airlines and service providers operating at the airport. It is against this background that we discuss two issues, which can have a significant impact on airport economics, viz., the single till v. dual till debate and the issue of land use at AAI airports.

One of the distinguishing features of an airport concession compared to those in other sectors such as roads or ports is that a significant portion of its revenue arises from non-core activities, i.e. non-aeronautical operations. It is in this context that these two issues become extremely significant.

Single Till Versus Dual Till

Independent economic regulation of Indian airports came into effect after the privatization of the Bangalore, Hyderabad, Mumbai and Delhi airports, with the establishment of the Airport Economic Regulatory Authority ("AERA") in 2008. Soon after its establishment, AERA, after consultation with various stakeholders, issued regulations for fixation of tariffs at airports, under which it, inter alia, proposed to set airport tariffs on the single-till model as opposed to the dual-till model. These regulations were challenged almost immediately by the privatized airports on several counts before the appellate authorities and the issues raised in these appeals are yet to be conclusively determined.

Before we can understand 'till' in this context, we may briefly delve into the capital asset pricing model which forms the basis for airport economic regulation. Airport tariffs are set under this model, in very simplistic terms, as follows. The capital expenditure in creating fixed assets is determined - referred to as the Regulatory Asset Base ("RAB"). A fair return is allowed to the airport operator in the form of a fair rate of return determined by the regulator and applied to this asset base. The aggregate revenue requirement ("ARR") for the airport is then determined as a sum of the fair return, depreciation on assets, operation and maintenance expenditure and tax, and the tariffs to be charged are derived from the ARR. It is at the stage of arriving at ARR that the concept of till becomes relevant.

'Till' in airport economics is used in the sense of a money drawer. The fundamental question of till is whether when ARR is determined, the non-aeronautical revenues of the airport should be set-off to lower the ARR and correspondingly lower the aeronautical tariffs. In other words, should non-aeronautical revenues subsidize the airport project? If this question is answered in the affirmative, the model is referred to as the 'single till' model i.e., one money drawer for all airport revenues aeronautical and non-aeronautical. If answered in the negative, the model is referred to as the 'dual till' model, i.e. aeronautical and non-aeronautical revenues are kept separate.

There are convincing arguments for both models. Proponents of single-till argue that the airport project is one, and that non-aeronautical revenues are a by-product of the aeronautical operations of the airport. The customer visits the airport bookstore because he was brought to the airport by the aeronautical services he wishes to utilize. The arguments for dual till on the other hand are centered around incentivizing investments into airport infrastructure and that the reduction in airport charges to airlines (which it is argued in any case do not form an appreciable part of the airlines fare) due to adoption of single till, will not necessarily be passed on to passengers by airlines, more so in congested airports, where air fares are determined by the scarcity value.

The Capital Asset Pricing Model and single and dual till are visually depicted in Figure 1:

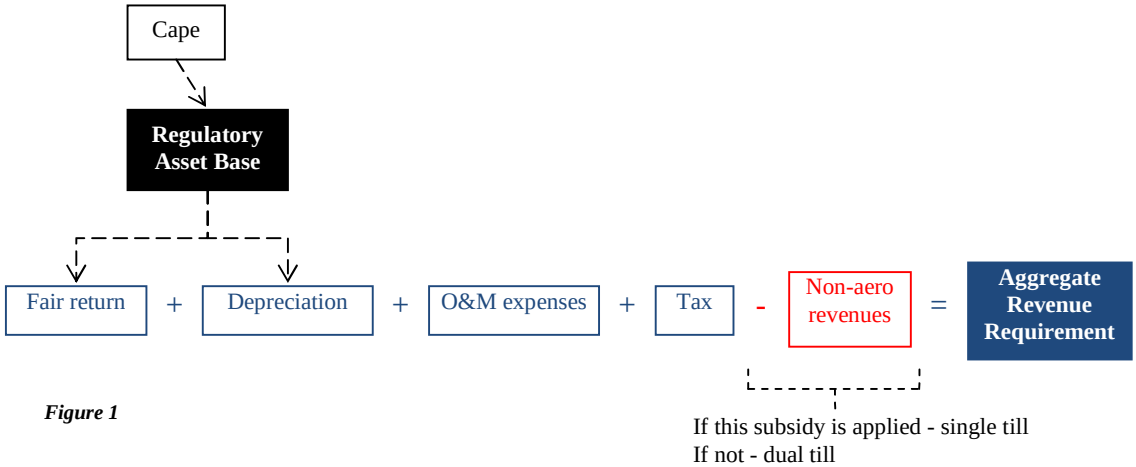

Figure 1

A third model, which lies between the above two, referred to as the 'shared' or 'hybrid' till is where not all non-aeronautical revenues, but only a certain part of it is used to subsidize airport tariffs. This has been followed in the case of Mumbai and Delhi airports, because the concession agreements for these airports, which anticipated the coming of airport economic regulations, included an obligation on the Government to make reasonable endeavors to ensure that aeronautical tariffs will be set on the basis of the hybrid till model elaborated in the concession agreements. This turned out to be more favorable for these airports, compared to the cases of Bangalore and Hyderabad, where the concession agreements merely stated that tariff fixation should be consistent with ICAO ("International Civil Aviation Organisation") policies, as a consequence of which these airports were subjected to the single till model.

From the perspective of encouraging private sector investment into airport infrastructure, we are of the view that having a dual or hybrid till will attract private investors as these models allow the developer to benefit from the upside of non-aeronautical revenues – which acts as a hedge against the uncertainties and volatilities air traffic demand in a growing aviation market like India. Also from the perspective of increasing revenue to government, in the tenders for future airport projects, if the return to investor is to be capped by regulation, there will be limited flexibility for a bidder to propose a unique value proposition and make a better financial proposal than its competitors. This issue gains significance in the context of upcoming projects such as Navi Mumbai Airport, which has already seen several delays, and environmental and land acquisition issues drive the estimated project cost up to about U.S. $ 2 billion.

Land Use at AAI Airports

The other issue that would have an impact on non-aeronautical revenues relates to the extent to which airport land can be used for non-aeronautical purposes. This is relevant in case of AAI airports, because AAI being a creature of statute cannot do more than what is permitted under its parent Act. And since concessions to private parties are granted by AAI under the Act, the private party concessionaire cannot do more than what AAI could have done.

The question therefore is what AAI can do under the statute. This question first arose when the Mumbai and Delhi airports, were privatized. Initially, in the concession agreements for these airports it was proposed to permit the concessionaire to develop on the airport land: commercial offices, business parks, golf courses, shopping complexes, sports complexes and other similar facilities. However, there was a difference of opinion within the Government on whether this was permitted and opinions on the matter were sought from the legal advisors to the Government of India. Two views emerged from this. One view essentially was that one of the functions expressly permitted to be undertaken under the statute by AAI was the carrying out of *'any other activity at the airports… …in the best commercial interests of the Authority'*, and therefore that AAI could undertake these activities. The other, contrary view was essentially that from the context of the statute, 'airport' is meant to include only passenger facilities and therefore 'any other activity' that AAI was empowered to undertake under the above function was confined only to passenger facilities. This was the view that the Government eventually took and consequently the list of permitted commercial activities under the concession agreements for Delhi and Mumbai were curtailed to exclude the activities referred above. The current concession agreements for these airports include only facilities relating to passenger services, such as hotels, restaurants, bars, refreshment facilities. Other facilities such as retail shops, business centers and conference centers are permitted, but only if they are located within the terminals.

Without going into the merits of the view finally taken, it can be stated that the result of this approach is that a very limited set of real estate development activities have been permitted on airport land. Between Mumbai and Delhi airport, about 400 acres of land was available for real estate development. It is also telling that when this view was taken some of the bidders, who were real estate firms, dropped out of the tendering process for the Mumbai and Delhi airports.

At present both Delhi and Mumbai airports have tendered out several sub-concessions for real estate development, which are almost entirely for hotels. Given the number of hotels already in the vicinity of these airports, it remains to be seen whether there will

be sufficient demand for the new hotels and whether the sub-concessionaires will be able to fruitfully exploit their hotel sub-concessions. This is manifest in concerns recently by the Delhi airport concessionaire about the need to expand permitted land uses beyond the limited activities like hotels and warehousing, as there were already a significant number of hotel projects on the lands developed so far.

Also relevant to this discussion is the concept of 'aerotropolis' - a form of urban development centered around, and fuelled by, an airport - that is being heard of increasingly in the context of airport development projects. This development is seen as arising out of the advantages afforded by the location of certain types of industries and commercial activities near airports, such as offices for business people who travel frequently by air, time-sensitive manufacturing, logistics, hotels, retail outlets, entertainment complexes and exhibition centers. Another observed effect is the increase in real estate prices in the vicinity of an expected greenfield airport development.

It is in this context that we submit: should the airport project, the very anchor for these developments, be prevented from partaking in this growth in real estate value? Should not the legal concepts of "airport" and "passenger facilities" be re-examined in light of the emerging concept of aerotropolis?

The need for re-considering these questions becomes relevant in the context of AAI's stated intention to concession Chennai, Kolkata and other airports run by it, for what is expected to primarily be city-side development. The necessity for statutory amendments should remain an impediment for airports being able to derive and appropriate some part of the value that they bring to the urban economic landscape to which they contribute.

In conclusion, we believe that the favorable resolution of the two issues highlighted above by suitable policy intervention can dramatically improve the viability and attractiveness of airport development projects for private sector participants, and bring long term benefits to the government, the AAI and other stakeholders.

The importance of encouraging private sector participation in airport infrastructure cannot be overstated in light of Government of India estimates that Indian airports would require investments of about U.S. $ 12 million (close to 75% of which is expected from the private sector) to meet the traffic growth projections, during the 12th Five Year Plan (2012-2017). More immediately, global tenders for the overdue new airport at Navi Mumbai along with six significant AAI-run airports including two in the metro cities of Chennai and Kolkata, is imminent.

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GROWTH OF AIRPORTS AND THEIR ENVIRONMENTAL IMPACT- THE INDIA PERSPECTIVE
Between Greenfield and Brownfield—Green Is TheOnly Option

By Atul Sharma

The rate of growth of air transport is often seen as an indicator of the economic development of a country. India is no exception to this rule and has witnessed an explosion in the number of peoplewho use air transport services alongside its economic growth over the last 23 years. The civil aviation sector has benefitted not only by increased patronization from existing air travelers but also from converts who are increasingly taking to the skies. This is a remarkable feat for the young Indian civil aviation sector, especially considering the fact that the India boasts of one of the widest and most reliable rail networks in the world thathas been providing cheap and reliable transport to the masses for over one hundred fifty years.

Open Skies-Impact on airlines and airports

India had its tryst with Open Skies in 1995 when several Indian Private Airlines set up operations in collaboration with well known international carriers. While some of these joint ventures flourished, others met a cruel fate for many reasons, some of which were attributable to government policies and a hangover from the protectionist regime which survived until 1990.

While airlines continued to grow and extend their reach to tier-II cities, the Airports Authority of India (AAI) – the sole custodian and operator of airport assets in India – failed to keep pace with the increasing expectations of air passengers, cargo operators and the air service providers. Indian airports were constantly rated amongst the least efficient in the world, which caused great embarrassment to an otherwise progressive nation. It took the Government almost 15 years after liberalization to implement reforms in the civil aviation sector. In 2004, the Government for the first time decided to adopt the Public-Private Partnership (PPP) model by granting concessions for development and management of two greenfield airports at Hyderabad and Bengaluru (then called Bangalore). The PPP model was thereafter replicated and adopted for the modernization of the two brownfield airports at Delhi & Mumbai. The new policy spurred the growth of the civil aviation sector, and for the first time India was afforded the opportunity of building and maintaining world class airports. While these airports have achieved international recognition since their privatization, they also threw up novel challenges. One of these challenges concerns the environment and juggling the exponential growth in aviation infrastructure while protecting India's diverse natural assets.

In this article, I intend to highlight two recent issues pertaining to environment protection:the need to balance the scales between aviation related infrastructure growth and protection of the environment from the effects of such growth.

The Delhi Airport And Noise Pollution

In 2009, the residents of localities surrounding the Indira Gandhi International Airport (IGI Airport)at Delhi filed certain class action Petitions in the High Court of Delhi alleging infringement of their rights including their right to sleep in peace, held to be a part of the all encompassing right to life guaranteed by the Constitution of India. The Petitioners raised many issues and alleged that overflying aircrafts were routinely breaching the prescribed noise norms thereby depriving these residents of peaceful sleep and a reasonable quality of life.

The Environment (Protection) Act of 1986 is the fountainhead of most environment related legislation

in India and, in addition to addressing various environmental issues, enables the Central Government, by notification in the Official Gazette, to make rules for carrying out the purposes of the said Act. In exercise of such powers, the Central Government notified the Noise Pollution (Regulation and Control) Rules (the "Rules") in 2000. In addition to other benchmarks, the Rules laydown ambient air quality standards in respect of noise. The Rules recognize the need for different noise levels in industrial, commercial and residential areas, including silence zones (hundred meters around hospitals, educational institutions etc.). While the Rules prescribe an outer limit of 75 dB(A) Leq and 70 dB(A) Leq during day time and night time respectively in industrial areas (being the highest permissible noise standards amongst the four categories mentioned above), they do not envision an airport zone or a separate set of norms for such zones, as in certain other jurisdictions.

During the pendency of the aforesaid action, various brainstorming sessions were held between all the stakeholders including the petitioners, AAI and the Delhi International Airport Pvt. Ltd. (the Airport operator). In order to reduce the impact of aircraft noise, a basket of noise mitigation measures were implemented by the Airport operator in collaboration with the AAI, the aviation regulator-Directorate General of Civil Aviation (DGCA) and the airlines. These measures included introduction of runway mixed mode operations, phasing out noisy Chapter 2 aircrafts, utilization of all available runways simultaneously to evenly distribute aircraft noise, adoption of low power-low drag landing procedures etc. While these measures collectively reduced the noise impact considerably, the residents consistently demanded clamping of a comprehensive night curfew on Runway 29/11– the primary runway at the IGI Airport. Although initially, the night curfew was implemented by the DGCA on a trial basis, it could not be sustained on a long term basis for operational reasons and was subsequently withdrawn.

Pertinently, many jurisdictions do not consider a night curfew on an airport's primary runway as a viable operational alternative, least of all at airports located in developing countries which witness departure and arrival of international flights during the night hours due to different time zones. In its studies, the International Civil Aviation Organization (ICAO) has observed that unilateral night curfews imposed by certain European countries are not conducive to international air transportation. ICAO has noted that the need to continue with any kind of night restriction is questionable in light of improvement in aircraft noise standards over the years and that current aircraft engines are quieter than earlier ones. Airports with night curfews are generally capacity constrained during the day and restrict the ability to open up new slots of traffic, which creates opportunity costs to airlines. This is all the more relevant for India, as air travel is even more expensive considering the high prices of Aviation Turbine Fuel. Another relevant factor which militates against imposition of night curfew is the fact that the establishment of the aviation industry in Europe pre-dates by several years India's development in the sector. India's aviation industry is in its infancy as the Open Skies Policy was initiated recently. This has led to a situation where most flights originate from Europe and the United States during the day and arrive at night at Indian airports. Any restriction on runway usage would restrict such movement of aircraft from such countries and would prove detrimental to the growth of civil aviation in India. This could also possibly encourage foreign airlines to use neighboring countries as their hub in preference over India.

As per a report prepared by Deccanaires Ltd., an independent aviation consultant, while a few airports impose some form of restriction on night-time operations, very few airports across the world impose comprehensive night curfews on aircraft operations. Further, while some airports including Heathrow, Gatwick and Standsted have some form of night restrictions, many other airports have refrained from curbing night time operations as the same has proven to be detrimental to civil aviation. Interestingly, in various international for a including ICAO, India has taken a stand opposing unilateral implementation of night time curfews by a few European countries.

Recognizing the need to have in place airport-zone specific noise norms, the Central Pollution Control Board (CPCB), a body entrusted with various environmental functions in its role as technical consultant to the Ministry of Environment and Forests, has commenced the exercise of formulating noise

norms for airports zones and is in the process of defining noise contours at various Indian airports for implementation of such norms. As the exercise initiated by the CPCB is a time consuming one, the High Court of Delhi while hearing the Petitions, felt it necessary to implement interim norms pending the outcome of CPCB's study and consequent implementation of its findings. Pursuant thereto, the High Court directed the aviation regulator DGCA to notify interim noise limits, which limits were implemented by the DGCA by way of an Aviation Environment Circular. The Circular issued by DGCA fixes the interim noise limit at 105 dB(A) and 95 dB(A) during day time and night time respectively and is the existing noise benchmark at the IGI Airport.

While the Supreme Court of India and the various High Courts routinely adjudicate matters concerning the environment, the Parliament enacted the National Green Tribunal Act (NGT Act) in 2010, which envisages setting up of a specialized National Green Tribunal which shall have the exclusive jurisdiction to hear and decide disputes pertaining to the environment. The NGT Act empowers the National Green Tribunal to decide all civil cases where a substantial question relating to environment is involved, provided such question arises out of the implementation of the enactments specified in Schedule-I of the NGT Act. Schedule-I to the NGT Act includes various legislations including the Environment (Protection) Act of 1996 (deriving power from which the Rules of 2000 have been notified). Pursuant to the National Green Tribunal coming into place, the Supreme Court of India in another environmental dispute in the case of *Bhopal Gas Peedith Mahila Udyog Sangathan & Ors. v. Union of India & Ors.*, I.A. No. 62-63/2011 in Civil Appeal No. 3187-88/1988, vide its Order dated August 09, 2012 directed that "cases filed and pending prior to coming into force of the NGT Act, involving questions of environmental laws and / or relating to any of the seven statutes specified in Schedule-I of the NGT Act, should also be dealt with by the specialized Tribunal, that is the NGT, created under the provisions of the NGT Act. The Courts may be well advised to direct transfer of such cases to the NGT in its discretion, as it will be in the fitness of administration of justice."

In furtherance of the direction of the Supreme Court in the *Bhopal Gas Peedith Mahila Udyog Sangathan case* (supra), the High Court of Delhi sought to transfer the pending Petitions to the National Green Tribunal. The transfer was opposed by the Airport operator on the ground that the interim norms implemented by the DGCA hold the field as far as the noise norms at the IGI Airport are concerned. The Airport operator also contended that as these interim norms have not been implemented under any of the enactments specified in Schedule-I of the NGT Act (but under the various powers vested in the DGCA under other legislations), the National Green Tribunal does not have the jurisdiction to decide the said dispute and the transfer is bad in law.The High Court of Delhi, despite the opposition by the Airport operator, directed transfer of the class action Petitions to the National Green Tribunal. The Airport Operator challenged the Order of transfer of the High Court of Delhi before the Supreme Court of India, which directed an interim stay of the transfer and is presently seized of the matter.

The Setting Up Of A Second Airport At Mumbai

Mumbai, the financial capital of India,is also one of the most congested cities in the world. The Chatrapati Shivaji International Airport (CSI Airport) is undergoing a major upgrade which will involve a substantial capacity increase. However, due to severe constrains of availability of land at the Airport site, the CSI Airport operates under severe limitation and is unlikely to be able to accommodate any further expansion. Demandfor a second airport to cater to Mumbai has been getting louder and louder over the years. Setting up of a second airport in Mumbai has been in contemplation for a considerable period.

While nobody denies the need for a second airport, a long debate has ensued as to whether the chosen site is appropriate for building a world class airport. The proposed site falls in the middle of a mangrove forest comprising of trees and shrubs that grow in saline coastal sediment habitats. Environmentalists have argued that dislocation of the mangroves is likely to have an irreversible effect on the ecology of Mumbai and its surrounding areas which will have far reaching environmental consequences. In the face of stiff opposition from various quarters, the Ministry of Environment and Forests (the body responsible for providing environmental clearances for such projects) has dragged its feet on the subject.

After prolonged contemplation, the Forest Advisory Committee of the Ministry of Environment and Forests in June of 2013 has finally recommended that the project be cleared. However, the Forest Advisory Committee has attached various caveats to its clearance. For starters, the clearance is contingent upon forestation of mangrove species over an area equivalent in extent to the mangrove forest area being diverted. Such area would have to be raised and maintained by the concerned "user agency" (read airport developer) at its own cost. Further, as the proposed site is located near a bird sanctuary, the Forest Advisory Committee has mandated that no proposal for extension of the project for extension of the project towards the bird sanctuary shall be entertained. In addition, the concerned government has been directed to ensure that settlement of persons displaced by the project must not take place on forest land. To ensure constant and continued compliance with the conditions based on which the clearance is proposed to be given, a specially constituted committee of experts shall monitor compliance with and shall submit its report every six months.

While Mumbai desperately needs another airport, the cautious approach of the Ministry of Environment and Forests and the Government of India shows the resolve to manage expectations of growth while ensuring that no damage is caused to the environment. The stringent conditions imposed by the environment watchdog is likely to have severe financial ramifications on the project which are likely to affect its viability and ability to compete with the existing airport.

In the context of the above, the conflict between the environmentalists and the protagonists of development of aviation in India becomes apparent. It is a settled principle of Constitutional jurisprudence that a balance be struck between the larger public interest (read: the need for aviation infrastructure for growth and development of the economy and the country, at large) and the environment. Indian judicial pronouncements include a large number of precedents where the Indian courts have played a pragmatic role and have acted like stakeholders in the economic growth of the county. It will be a challenge for the policy makers and the Indian judiciary to do the fine balancing act when considering development projects like airports vis-a-vis their impact on the environment.

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SUBMISSION REQUESTS

Annual Year-in-Review

Each year, ABA International requests each of its committees to submit an overview of significant legal developments of that year within each committee's jurisdiction. These submissions are then compiled as respective committee's *Year-in-Review* articles and typically published in the Spring Issue of the Section's award-winning quarterly scholarly journal, *The International Lawyer*. Submissions are typically due in the first week of November with final manuscripts due at the end of November. Potential authors may submit articles and case notes for the India Committee's Year-in-Review by emailing the Co-Chairs and requesting submission guidelines.

India Law News

India Law News is looking for articles and recent Indian case notes on significant legal or business developments in India that would be of interest to international practitioners. The Winter 2014 issue will be Part 2 of our two-part series on civil aviation. Please read the Author Guidelines available on the India Committee website. The deadline for submissions has been extended to December 1, 2013. Note that, *India Law News* does not publish any footnotes, bibliographies or lengthy citations. Submissions will be accepted and published at the sole discretion of the Editorial Board.

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The India Committee is a forum for ABA International members who have an interest in Indian legal, regulatory and policy matters, both in the private and public international law spheres. The Committee facilitates information sharing, analysis, and review on these matters, with a focus on the evolving Indo-U.S. relationship. Key objectives include facilitation of trade and investment in the private domain, while concurrently supporting democratic institutions in the public domain. The Committee believes in creating links and understanding between the legal fraternity and law students in India and the U.S., as well as other countries, in an effort to support the global Rule of Law.

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Membership in the India Committee is free to all members of ABA International. If you are not an ABA International member, you may become one by signing up on the ABA website. We encourage active participation in the Committee's activities and welcome your interest in joining the Steering Committee. If you are interested, please send an email to the Co-Chairs. You may also participate by volunteering for any of the Committee's projects, including editing a future issue of the *India Law News*.

Membership in the India Committee will enable you to participate in an online "members only" listserv to exchange news, views or comments regarding any legal or business developments in or concerning India that may be of interest to Committee members.

We hope you will consider joining the India Committee!

UPCOMING SECTION EVENTS (India Committee)

SAVE THE DATE (FEBRUARY 13 - 15, 2014 – NEW DELHI, INDIA)

Come join your colleagues from the United States and India, ABA Section of International Law Leadership, ABA Leadership, and Leadership from Major Indian Bar Associations, government officials, and prominent Indian business personalities at a jointly sponsored conference of the American Bar Association Section of International Law India Committee, Society of Indian Law Firms, and the Bar Association of India, as well as the Indian Services Export Promotion Council to be held in New Delhi, India.

The conference will focus on trade and investment between the U.S. and India. MCLE credit will be requested.

For more information, including information about speaking possibilities, contact James Duffy (jpduffy@bergduffy.com) or Sajai Singh (sajai@jsalaw.com).

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