AVIATION INDUSTRY: EMERGING LEGAL CHALLENGES

Prof. (Dr.) Ghanshyam Singh*

Introduction

In the presence of a more globalized environment all over the world, the policies of a country act as a key determinant for getting the real benefits of the same. Particularly for the developing nations, the Government's policies largely affect its economic environments. After the adoption of the new Aviation policies in India, the country has reviewed its policies and made it friendlier in almost all the sectors.

In the recent past the outlook of the Government of India towards the Aviation Industry has undergone an intense change in almost all the areas. The emerging trends in the industry include new and different concepts of ownership, financing the projects and a hassle free management and operations. Airport owners and operators who realize this situation are trying to improve their facilities and services to attract major airlines. Therefore, airport owners and operators are devising the privatization of airports to solve the problem.

The new trends emerging in the aviation industry in a global scenario are the increased globalization of economies, liberalization of aviation policies, new technological developments in civil aviation, privatization of airlines and airports and liberal and open skies bilateral agreements. Deregulation and intensified global competition are forcing airlines to become responsive, competitive and efficient by focusing more closely on their customers and operations.

Private participation is encouraged and opportunities created for investors to realize adequate returns on their investments; Recognizing that aviation today is an important element of infrastructure, rapid up gradation of airport infrastructure to world class with priority to the busiest airports and those handling international flights; Recognizing that transportation of air cargo is vital to the economic growth of the country, creation and development of specific infrastructure for air transportation of cargo and express cargo is encouraged, "Airline operations and acquisition of aircraft" is conferred "infrastructure" status for overall growth of civil aviation sector in the country Domestic and international aviation in the country are encouraged to grow at par with world aviation industry; Inter-linkages with other modes of transport are encouraged and stimulated; Trade, tourism and overall economic activity and growth is encouraged.

* Prof. (Dr.) Ghanshyam Singh, Prof. of Law & Registrar, National Law University, Delhi, Sector-14, Dwarka, New Delhi-110078.

But the other side of the story is that we have grown, but grown at the cost of our own abode, the Mother Nature. The question that we have to answer at the moment is "do we belong to this earth or does this earth belong to us". The aviation industry is one of the fastest growing in the global market. Commercial aviation is experiencing dramatic growth in regions throughout the world. It consumes significant amounts of non-renewable fuel, leading not only to its fast depletion but also to the pollution of the environment. Over the past 50 years global demand for air travel has risen by 9 per cent per annum (pa) and growth (at a reduced rate of 3-7 per cent) is predicted for the next 20 years[1]. The environmental impact of the aviation industry has long been a focus of environmental activists around the world. Aviation has a number of environmental impacts that are experienced by local residents in the vicinity of airports and under flight paths. Noise has been the focus of concern in aviation and more recently air pollution and the health effects of air pollution from aircraft and land based transport have begun to cause concern. It is also associated with a significant and growing contribution to the global inventory of greenhouse gases which are thought to be implicated in climate change.

This paper seeks to bring forward the need for privatisation of the aviation industry in India, keeping in mind the environmental hazards of the same, and proposing adequate regulatory measures to achieve most efficient results.

Why Privatize?

The desire to involve the private sector in the management and provision of port Infrastructure and services is prompted by the recognition that government regulations and processes are not always conducive to efficient operations of commercial activities and by recognition of the private sector's relative strength in this field. Also, in recognizing that investment sources outside government must be tapped in the provision of such infrastructure and services involvement of the private sector provides the opportunity to share risks and, in times of rapidly changing economic environment to respond quickly to market/demands and opportunities. The principal strengths of the private sector are:

- A much stronger management capability due to its ability to recruit and compensate qualified managers and technicians.
- Relative freedom to operate outside of political and bureaucratic constraints (e.g. in procurement and the working of overtime).
- Better company specific labour management.
- Potentially greater experience in developing facilities and providing services attuned to the competitive world of global trade.
- Access to non-traditional resources for investment in the infrastructure to serve trade which some individual governments may lack.

Benefits of Airport Privatization can more efficiently deliver many goods or service than government due to free market competition. In general, it is argued that over time this will lead to lower prices, improved quality, more choices, less corruption, less red tape, and quicker delivery. Many proponents do not argue that everything should be privatized. According to them, market failures and natural monopolies could be problematic. However, some Austrian school economists and anarcho-capitalists would prefer that everything be privatized, including the state itself. The basic economic argument given for privatizations is that governments have few incentives to ensure that the enterprises they own are well run. One problem is the lack of comparison in state monopolies. It is difficult to know if an enterprise is efficient or not without competitors to compare against. Another is that the central government administration, and the voters who elect them, have difficulty evaluating the efficiency of numerous and very different enterprises. A private owner, often specializing and gaining great knowledge about a certain industrial sector, can evaluate and then reward or punish the management in much fewer enterprises much more efficiently. Also, governments can raise money by taxation or simply printing money should revenues be insufficient, unlike a private owner.

Apprehensions Towards Privatisation

If a Country wishes to consider change in the ownership or management structure of its airports, a number of issues will require to be considered. While considering such issues airport management should be involved at every stage of the process. It is also necessary to be clear about the short-term and long-term objective of the change. Some of the initial issues, which require consideration, are:

- Examine in depth the present stage of the airport infrastructure in the country and the problems faced by it, including financial and managerial problems.
- Prepare a detailed profit and loss account of the airports and the air navigation services separately, make a forecast for the future, if feasible for the next twenty years. It may be desirable to prepare such forecasts for individual airports, which are considered for privatization. Also, make an assessment of the capital development requirements and the possible options to meet financial and managerial needs.
- If privatization is considered as an option, decide what services and facilities are to be privatized and the method of privatization. Also consider what is to be done for the remaining services. It is to be noted that the private sector is essentially interested in profit making facilities or facilities which have the potential to make profit. It may be possible to tag some unprofitable airports to profitable airports so long as there is overall profitability, although care must be taken to ensure that this does not prejudice international non-discrimination principles.

For a change in the ownership and management structure of airports or air navigation services, changes in national laws may be necessary. It can be done by amending the existing laws or enacting a new legislation. The nature of legislative action will depend upon the provisions of the existing laws, rules and regulations and the selected option. The new laws apart from enabling the government to make changes in the ownership and management, should enable the government to restructure the remaining civil aviation organization.

Regulations come at a price because they place constraints on the flexibility of the private operator. Discretionary powers with the Governments in the regulations increase the risks of the private operator and these may lead to higher expectations of return on investment and possibly lesser value for the State. It is important that regulations should be the minimum necessary and precise. Wherever discretionary powers are unavoidable, the principles or guidelines, to the extent possible, should be laid down. Ideally, the regulatory authority should be an independent entity.

The overall objective of privatization should be to balance the interests of various stakeholders including private investor, passengers, airlines, business interests, local communities and wider public at large.

Every business activity has certain risks and airports cannot be an exception. The major risks are:

- The leasing entity may become bankrupt.
- The private entity may ignore safety requirements.
- If a group of airports is owned or managed by one private entity, the entity may ignore the developmental needs of those airports which are likely to yield less profitable results.
- The private entity may increase the charges too much, which may not be in the best national interest.
- The private entity may not honour the committed lease payments.
- The private entity may pressurize the State to renegotiate the terms of lease, after quoting unrealistic payments terms or if the expected traffic does not materialize.

If the contract documents have been well prepared, the risks can be minimised. Wherever privatization of airports (and air navigation services where applicable) is contemplated, the regulatory authorities should review their own organizational structure in order to be able to ensure that even in the new environment, safety of operations is assured. To this end, it may be necessary for States to review the national legislation related to aviation and have suitable provisions empowering their civil aviation administration to be able to inspect, monitor and ensure implementation of ICAO specifications. This also facilitates

the State to meet its obligations under the Convention on International Civil Aviation to comply with the ICAO Standards and Recommended Practices (SARPs) contained in the applicable Annexes to the Convention.

Increasing Commercialisation: Environmental Hazards

With increasing commercialisation and growth of the aviation industry, it is a hard fact that aviation is an unsustainable technology that it will not be a significant feature in humans' future, and it will eventually be abandoned. The main reason for this approach is that the impact of Aviation on environment is so bad. The effects of aviation that are of concern to the environment as follows:

1. Air Pollution
2. Noise Pollution
3. Water Pollution
4. The Green House Effect
5. Depletion of Ozone Layer
6. Other Environmental Hazards Caused by Aviation

Aircraft and airports have raised issues some of which have been mentioned earlier. Crop dusting, airport expansion, new airport construction, and low-flying aircraft can also negatively impact the environment with noise, emissions, polluted water runoff, and habitat destruction etc. Aerial Spraying of Pesticides results in wide environmental problems. Usually very harmful pesticides are sprayed using this means. There is every possibility that pesticide may spread to other neighbouring farms and other areas and destruct the flora and fauna. Runway Expansion may result in destruction of habitat of many animals and plants. Also it has grave impact on Impact on National Parks and Wildlife Refuges, Noise is the primary impact of aviation on national parks and wildlife refuges.

Many of these impacts are generic to most large infrastructure developments and are amenable to mitigation to some extent. For example, careful location of Airport infrastructure can avoid the most ecologically valuable sites and areas of great landscape or cultural value. Similarly, to minimise water pollution, controlling the run-off of surface water from an airport is readily achievable and subject to strict regulatory control. On waste management, Airports and Airlines increasingly acknowledge that action is necessary to minimise and recycle all types of waste. However, Airport operators point out that most waste is produced by sources outside their direct control, so waste minimisation is rarely implemented.

In order to tackle this problem there must be policy intervention into this aspect both in the International Level and at National level.

Remedial Measures And Suggestions

Now the time has come to take up remedial measures to alleviate the said concern. There is scope to reduce the environmental impacts of aviation using technological means. For instance aircraft engines and airframes can be made quieter, the emissions of air pollutants and greenhouse gases can be reduced by improving the efficiency of engines, the environmental impacts of Airport operations can be lessened through careful engineering and mitigation (e.g. recycling wastes, ensuring energy efficiency in buildings and locating infrastructure away from sensitive habitats).However, there are likely to be diminishing returns of incremental improvements to the environmental performance of aircraft. Furthermore, significant improvements in the technology to control noise, air pollution and greenhouse gas emissions will not become widely available or adopted throughout national or global aircraft fleets within the next 20 years. Moreover, even if available in the short term, were air travel to grow at forecast rates, these improvements would be negated within a decade[30].

Another problem is that Air travel has an unfair advantage over other transport modes such as the car, bus and train because airlines don't pay tax on aviation fuel. The absence of a fuel tax or an emissions based levy allows airlines to charge artificially low ticket prices as the cost of pollution is passed on to society and not the passenger.

Fuel taxes: An aviation fuel tax would encourage more efficient aircraft by taxing fuel consumption. According to the International Air Transport Association, fuel makes up less than 15 % of the cost of flying so there is little incentive for airlines to invest in more efficient aircraft. Unlike an emissions trading scheme, which will take years to develop, an aviation fuel tax could be implemented relatively quickly by removing the fuel tax exemption from existing bilateral air service agreements.

Emissions levy: an alternative way to make Airlines pay for their pollution is through a charge or tax on aircraft emissions. The European Union has suggested an environmental charge (levy) on aircraft emissions could be implemented on a European wide basis if no action is taken internationally to reduce aircraft emissions. The emissions levy has advantages over a fuel tax in that it would directly tax emissions and not just fuel consumption. It would also be easier to introduce a levy as bilateral air service agreements don't prevent levies on emissions, unlike fuel taxes.

An aviation tax or emissions levy is necessary as airlines should pay for the pollution they cause just like other transport operators, it would encourage the development of more efficient and less polluting aircraft, it would help reduce demand for air travel and it would much easier to implement than emissions trading permits.

Emissions trading - profiting from pollution: Some Airline operators are arguing for an emissions trading system to reduce greenhouse gas emissions from aircraft. Emissions trading would enable Airlines to buy and sell greenhouse gas permits. Each permit would allow an agreed level of a greenhouse gas such as CO_2 to be emitted. The attraction for Airlines is that those who have chosen to invest in more efficient Aircraft will be rewarded under such a scheme, not least because they will be able to profit from selling their excess CO_2 allowance. The other major attraction is that there will be no real constraint on air travel expansion if Airlines are able to buy emissions permits from other industry sectors.

Alternatives to flying: There have been a number of studies showing how air travel produces far more CO_2 emissions per passenger than rail compared to the emissions from other modes of transport. So air travel is more polluting than rail. There should be more investment on High speed rails. Moreover rely more on Advances in telecommunications which can reduce the need to travel. Tele- and videoconferencing are a viable alternative to flying for many business travellers. They can also reduce travelling time, traffic congestion and aircraft pollution, Government should ensure the new Airports policy has a clear strategy to reduce aircraft greenhouse gases. They should also properly enforce these policies and should suspend any further major Airport developments until its Airports policy is published.

Conclusion

The need of the hour is sustainable development in the aviation industry. A few guidelines have been put forward by the Stockholm Environment Institute in this regard, i.e. "the establishment of a wide-ranging dialogue that brings together regulators, government, the industry, citizens and NGOs, the implementation of the internalisation of external costs, the adoption of World Health Organisation recommended values on noise thresholds and implementing polices to deliver a healthy noise environment, the implementation of surface access strategies that can deliver at least 50 per cent of all passengers to and from airports by non-car modes of transport, the adoption of the "environmental bubble" concept to give airports clear quantitative limits for a small set of pollutants, ban on night-time flights (2300-0700 hrs) to protect human health, Air tickets subject to VAT (in Europe) and its equivalent in non-European countries, Governmentally supported strategies delivered by clearly defined partnerships to shift passengers from air transport to rail for journeys of up to 500km in length, improved methods for recording and monitoring the greenhouse gas emissions from aviation globally, and the incorporation of aviation's emissions in national and international reduction strategies to achieve a 60 per cent reduction in greenhouse gases from aviation by 2050".

Thus these steps could help not only in making the aviation more efficient but also guarantee a secured life for the generations to come tomorrow. We should ensure that the aviation industry develops not at the cost of our

environment. Both should be taken hand in hand and none given more importance than the other. We should satisfy the needs of the present day without putting the needs of tomorrow at stake, i.e. the concept of sustainable development which means that environmental considerations are closely integrated into the economic development processes, so as to ensure that the natural resource base that supports economic growth is not depleted by that growth, that the ecological diversity or regenerative capacity of natural systems is not reduced, and that both environmental and economic health are sustained through time.

Select References

1. Airport is Too Important to Privatize—A letter to the Editor. 1992. Wall Street Journal, 19 September, 15(A).
2. Babcock and Brown, Inc. and John F. Brown Company, Inc. 1992. Los Angeles International Airport Privatization Study. Los Angeles, CA: City of Los Angeles. Department of Airports (May).
3. Berry, Steven T. 1990. Airport Presence as Product Differentiation. The American Economic Review 80, no.2:394–399.
4. Delbono, Flavio. 1992. Privatization and Liberalization in Labour-Managed Industries. Journal of Industrial and Comparative Economics 1, no.7:325–333.
5. Doganis, Rigas. 1992.The Airport Business. London, England: Routledge.
6. Federal Aviation Administration. 1992. Airport Activity Statistics of Certified Route Air Carriers. Washington D.C.: US Government Printing Office.
7. Forsyth, Peter J. 1984. Airlines and Airports Privatization, Competition and Regulation. Fiscal Studies 5, no.1:51–75.
8. Hutchinson, Gladstone. 1991. Efficiency Gains Through Privatization of UK Industries. In Privatization and Economic Efficiency: A Comparative Analysis of Developed and Developing Countries, ed. Attiat F. Ott and Keith Hartley, 87–108, Brookfield, VT: Edward Elgar Publishing Company.
9. Jones, Leory P., Pankag Tandon, and Ingo Vogelsang. 1991. Net Benefits from Privatization of Public Enterprises. In Privatization and Economic Efficiency, ed. Attiat F. Ott and Keith Hartley, 53–70, Brookfield, VT: Edward Elgar Publishing Company.
10. Jones, Leory P., Pankag Tandon, and Ingo Vogelsang. 1990.Selling Public Enterprises: A Cost Benefit Methodology. Cambridge, MA: The MIT Press.

11. Karscig, Mark P. 1990. Tracing the Privatization Movement in the U.K. and the U.S.: An Attempt to Address the Question of Industry Productivity.Eastern Economic Journal 16, no.4:355–368.
12. Linowes, David F. 1988. Privatization Toward More Effective Government. Chicago, IL: University of Illinois Press, 71–78.
13. Merlis, Edward A. 1992. Privatization or Piratization? Dallas, Ft. Worth International Airport Texas: National Airports Conference (29 Sept): 1–5.
14. Nauss, Donald W. 1993. Privatization of Airports has UPS and Downs. Los Angeles, CA: Los Angeles Times (19 Dec):1–2.
15. Poole, Robert W., David Haarmeyer, and Lynn Scarlett. 1992. Mining the Government Balance Sheet: What Cities and States Have to Sell. Reason Foundation, no.139 (April):1–14.
16. Semmler, Willi. 1984. Competition, Monopoly, and Differential Profit Rates. New York: Columbia University Press.
17. Utt, Ronald D. Privatization in The United States. 1991. In Privatization and Economic Efficiency: A Comparative Analysis of Developed and Developing Countries, ed. Attiat F. Ott and Keith Hartley, 73–86, Brookfield, VT: Edward Elgar Publishing Company.
18. Vicker, John and George Yarrow. 1988. Privatization: An Economic Analysis. Cambridge, MA: The MIT Press.
19. Aviation and Sustainability, "John Whitelegg and Howard Cambridge", Stockholm Environment Institute, July 2004
20. Daniel M. Warner, "Commercial Aviation: An Unsustainable Technology" Cited as: 74 J. Air L. & Com. 553
21. Press Release, Sightline Institute, Air Travel Heats Up The Planet; How Does Flight Compare To Travelling By Bus, Train, Or Car? http://www.sightline.org/research/energy/res_pubs/rel_air_travel_aug04.
22. Supra (FN 1).
23. The Ozone Hole, Air Traffic: Contributing to Climate Change and Ozone Destruction, http://www.theozonehole.com/airtraffic.htm
24. F. Kaid Benfield, "Running On Empty: The Case for a Sustainable National Transportation System", 25 Envtl. L. 651 (1995).
25. The Greening of Aviation 45 (1996), Transport Canada.
26. Paul Stephen Dempsey, Trade & Transport Policy In Inclement Skies--The Conflict Between Sustainable Air Transportation And Neo-Classical Economics".

27. See International Civil Aviation Organization, Airport Planning Manual I-41 (2d ed. 1987).
28. See Martin Noble, A Volcano That May or May Not Erupt, Interavia Bus. & Tech. Jan. 1, 1999.
29. U.S. Gen. Accounting Office, Aviation and the Environment: Airport Operations and Future Growth Present Environmental Challenges 50 (Aug. 2000), available at http://www.gao.gov/archive/2000/rc00153.pdf.
30. Linda Luther, Congressional Research Serv., Environmental Impacts of Airport Operations, Maintenance, and Expansion CRS-7 (2007), http:// www.fas.org/sgp/crs/misc/RL33949.pdf.
31. Environment Centre, The Greenhouse Effect (1996).
32. Martin Hindley, "Emission Control", Flight Int'l, Jan. 31, 1996.
33. Environment Centre, The Greenhouse Effect (1996).
34. Supra (FN 11).
35. Jose A Egurbide, Stop Biting the Hand That Feeds Us, 22 Pepp. L. Rev. 1089 (1995).