

PRIVATIZATION AND/OR COMMERCIALIZATION OF AIR NAVIGATION SERVICES AND ITS LIABILITY IMPLICATIONS

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**International Conference on Contemporary Issues
in Air Transport, Air Law and Regulation**

New Delhi, India

April 23-25 2008

INTRODUCTION

- **Recent developments** suggest a visible trend towards privatization/commercialization of State-owned and managed ANSPs
- **Commercialized ANSPs worldwide Now Total 46:** During the last quarter of 2007, three more self-supporting ANSPs joined CANSO as full members. They are: ISAVIA of Iceland, CAAS of Singapore, and GACA of Saudi Arabia
- **India May Commercialize ATC:** December 2007 announcement by AAI; KPMG International selected as consultants

OTHER DEVELOPMENTS IN INDIA

- AAI has also been proceeding with its plans for transition to satellite-based Communication, Navigation, Surveillance and Air Traffic Management (CNS/ATM)
- AAI is not only responsible for providing ANS in Indian Air Space but also over a large portion of the Indian Ocean included in the Mumbai Flight Information Region (FIR), encompassing about 2.8 million square miles

INTERNATIONAL OBLIGATIONS

- **Article 28 of Chicago Convention:**
“Each contracting State undertakes, so far as it may find practicable, to: provide, in its territory, ... **radio services, meteorological services and other air navigation facilities** to facilitate international air navigation ... ”.
- Under Art. 28, States have discretion to determine the appropriate manner in which ANS shall be delivered: (i.e. by a state-owned organization, a commercialized or privatized entity, or indeed, by any other means)

INTERNATIONAL OBLIGATIONS

- Art. 28 **DOES NOT** expressly prescribe any sanctions or remedial action for breach of the undertaking by States to provide ANS.
- It also **DOES NOT** make provision for liability issues arising from such breach
- It has been suggested that Art. 28 provides grounds for establishing **State Responsibility**, and by logical extension, **State Liability** on the part of the State party in breach thereof under general international law

THE CURRENT SITUATION IN INDIA

- As a State party to the Chicago Convention, India is obliged under Art. 28 to provide air navigation facilities and services in its territory.
- Presently, ANS is provided by the Airports Authority of India (AAI), which continues to be State-owned.
- **Domestically**, the AAI and its employees (Air Traffic Controllers, etc) are immune from civil and criminal suit and liability arising from their operations –**Sec. 33 of the Airports Authority of India (Amendment) Act, 2003**

THE CURRENT SITUATION IN INDIA

- **Internationally**, however, India may be held liable to make reparations under general international law principles of state responsibility and liability if the ANS system should fail and cause liability
- The decision to provide ANS by means of a privatized or commercialized entity **WILL NOT** discharge India from its international obligations
- It may, however, expose India to other grounds for establishing potential liability

LIABILITY IMPLICATIONS

- If ANS services and facilities are privatized or commercialized, the existing legislation will have to be re-visited to determine whether or not the statutory immunity would continue to apply to the new entity
- Privatization/commercialization of ANS in India will inherently cast an obligation upon the Indian government to **REGULATE** or **SUPERVISE** the privatized and/or commercialized entity.
- This may provide grounds for legal action to be brought against the government for negligence in the exercise of regulatory or supervisory functions.

LIABILITY IMPLICATIONS Cont'd

- Existing laws will again have to be re-examined to determine whether the government may have a right of recourse to the privatized entity(ies).
- Statutory provisions in some countries where ANSPs have recently been commercialized or privatized allow the government to have a right of recourse against the new entity (e.g. NAVCANADA, ACNZ, etc)

CONCLUSION

- The liability implications of privatization of ANS facilities and services cannot be underestimated. They must be seriously considered and assessed before any step is taken towards privatization or commercialization.

THANK YOU
for NOT asking questions