

Air Transport in India: Some Legal, Regulatory and Economic Issues

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Air transport in India is at the cusp of an unstoppable forward march towards reaching eminence in the aviation industry in the years to come. Although the turn towards liberalization of air transport came in 1990 with an open skies approach, the industry was beleaguered with restrictions on foreign investment, stringent regulation imposed on burgeoning carriers with regard to international operations, and a cumbersome bureaucracy. The inflexion point arrived in 2016 with the new National Civil Aviation Policy. This policy revolutionized the industry with the removal of foreign direct investment constraints hitherto imposed on the industry, as well as the regulation of airfares and ease of business concerning such commercial aspects as the provision of ground handling services and code sharing. Airports have been given a boost by the Policy with regard to the disposal of their non-aeronautical revenue with a 'hybrid till' approach. The policy has also enabled the welcome advent of low cost carriers and an overall environment conducive to fair and equal opportunity for carriers to compete. It has also infused a Keynesian flavour to governmental involvement with a regional connectivity scheme and a regional connectivity fund which stimulates the domestic industry. Additionally, a progressive open skies policy both regionally and internationally has opened out the air transport market. Foreign aircraft manufacturers have been given a welcome boost.

With all this, there are still considerations that need to be looked at with a sense of purpose and direction. With global megatrends such as the economic shift from the West to the East, demographic change, and rapid urbanization, all of which can be seen within India, competition among Asian air carriers will be ominous, requiring vigilance and forward thinking on the part of the Indian government. This article looks at the legal, regulatory and economic factors driving air transport in India with an analytical look at its strengths, weaknesses, opportunities and threats.

1 INTRODUCTION

To say India is an emerging giant in air transportation is no exaggeration. Aviation in India supports 8 million jobs and provides an overall output of USD 8 billion. More importantly, to recognize that India is one of the most progressive countries in the world when it comes to air transport policy and regulation is a reality one cannot deny. Available data show that in the first quarter of 2017, international traffic flowing to and from India grew by 7.5% and domestic traffic increased by a

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phenomenal 21.77% during the period 2016/2017.¹ IATA² recognizes that India would become the third largest aviation market in 2026 next to the United States and China.³ India is currently ranked tenth in the world in terms of the number of passengers carried. With its economy growing exponentially, which has brought about 300 million Indians into the middle class and plans to increase the number of operational airports to 250 by 2030, the 2026 forecast of IATA does not seem unrealistic.

In 2016 India made a giant stride toward revamping its air transport policy with the adoption of the National Civil Aviation Policy. This policy did away with what was called the 5/20 policy which required national carriers aspiring to operate international air services to operate a minimum of five years on domestic routes and have a minimum fleet of twenty aircraft. Under the 2016 policy the only requirement for carriers is that they must deploy either twenty aircraft or 20% of total capacity (in term of average number of seats on all departures put together), whichever is higher for domestic operations. In pursuance of this new policy, the basis for monitoring will be the published schedule of airlines, on the assumption that one aircraft would have six departures per day. There is seemingly some justification for this policy, when viewed from the context of India's aim of regional connectivity within the country and its objective of growing domestic passenger traffic from 80 million in 2015 to 300 million by 2022. This can only be done by assuring a certain minimum allocation of capacity to domestic routes. From the passenger's perspective, the availability of adequate capacity to connect regions by air would be meaningless unless air travel were to be made affordable. This problem has been overcome to an extent by having a cap on airfares on routes which are connected by distances of 500–600 kilometers, as discussed in the following paragraph, also makes sense.

As mentioned in the previous paragraph, another proactive initiative is the *Regional Connectivity Scheme* (UDAN) which applies to states in India that reduce their value added tax on aviation fuel at participating airports to 1% or less for a

¹ Mahesh Kumar & Simran Soni, Aviation in India, Legalics India, Lexology, <https://www.lexology.com/library/detail.aspx?g=c1856642-5358-432a-a956-b6bcffda941f>. The market was shared by Jet Airways (14.5%); Air India (10.7%); Emirates (9.5%); Air India Express (6.2%) and Etihad Airways (4.9%).

² International Air Transport Association is the trade association for the world's airlines, representing some 280 airlines carrying 83% of total air traffic. IATA supports many areas of aviation activity and help formulate industry policy on critical aviation issues. IATA's mission is 'to represent, lead, and serve the airline industry'. Its vision is 'to be the force for value creation and innovation driving a safe, secure and profitable air transport industry that sustainably connects and enriches our world'.

³ In its twenty-year forecast IATA estimates: 'India will overtake the United Kingdom to become the third largest market with 278 million passengers in 2025. By 2035, India is expected to be a market of 442 million passengers, with the aviation industry supporting 19.1 million jobs and contributing to USD 172 billion in GDP'. See IATA, Approach to Realize India's Aviation Potential, http://www.iata.org/about/worldwide/asia_pacific/Pages/India-Aviation-Potential-.aspx.

continuous period of ten years. This connectivity scheme is calculated to boost domestic air transport by placing a cap on air fares to a maximum of rupees 2500 per passenger on flights that involve a distance of 500–600 kilometres on routes coming within the Scheme.⁴ Indian companies registered and having their principle place of business in the country and where at least two thirds of Directors and the chairman must be Indian citizens having substantial ownership and effective control of an airline are permitted to attract 100% foreign direct investment where 49% is permitted automatically and anything beyond must have government approval through the Ministry responsible for aviation.

The drastic increase in the number of airports by 2030 comes with a relentless focus on improving infrastructure. From a total of USD 12.1 billion planned for such improvement, USD 9.3 billion would come from investments by the private sector.⁵ Heavy reliance will be placed on using public private partnership (PPP) which would enable the government to create jobs and improve government revenues.⁶

There are three distinguishing characteristics that separate air transport from other modes of transport. Firstly, unlike in road, rail and maritime transport, where permission or agreement of the State into which such transport enterprises are operated is not required, no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.⁷ This means that a national carrier of India cannot operate scheduled commercial operations into and out of any country without its

⁴ Under UDAN, airlines such as Air India, Air Deccan, Spicejet, Air Odisha and Turbo Megha have been given the right to fly 128 routes across the country, on condition that these airlines cap half the seats at 50% of the airfare.

⁵ Yarimoglu, Emel Kursunluoglu, *A Review of Dimensions of Service Quality Models*, 2(2) J. Mktg. Mgmt. 79–93, 83 (2014).

⁶ Ipseeta Satpathy, B. C. M. Patnaik & Sharad Kumar, *Indian Aviation Industry: An Overview*, 2(6) Int'l J. Acad. Res. & Dev. 802–805, 802 (Nov. 2017). However, The Aviation Policy has come under judicial scrutiny for a preferential clause in the policy that favours PPP airports. S. 12(d) states: 'There are restrictions on the use of land allocated for commercial use of airport. Ministry of Civil aviation (MoCA) will explore ways to unlock the potential of the same by liberalising the end-use restrictions for existing (excluding PPP) and future greenfield and brownfield airports of Airports Authority of India (AAI) and future greenfield and brownfield airport projects under PPP'. The Supreme Court of India held that s. 12(d) which gives preferential treatment to PPP airports over non PPP airports violated Art. 14 of the Indian Constitution which guarantees equality. The Supreme Court further said that the classification drawn between the existing PPP airports and future PPP airports in the National Civil Aviation Policy (NCAP) 2016 violates the right to equality provided in the Constitution. The Court held: We hold that clause 12(d) of NCAP 2016 to the extent of excluding 'existing PPP airports' is ultra vires Art. 14 of the Constitution of India'. See All airports will get equal benefit of new aviation policy: High Court, *The Indian Express*: 10 Apr. 2017. See <http://indianexpress.com/article/india/all-airports-will-get-equal-benefit-of-new-aviation-policy-high-court-nacp-2016-4607847/>.

⁷ Convention on International Civil Aviation, signed at Chicago on 7 Dec. 1944 (hereafter referred to as the Chicago Convention), ICAO Doc 7300/9 Ninth Edition, 2006, Art. 6.

special permission or authorization. With a view to encouraging liberalization, India has introduced an open skies policy with all SAARC countries⁸ and those beyond a 5000-kilometre radius from New Delhi. With regard to countries within that radius where Indian national carriers have not utilized 80% of their traffic rights, carriers of these countries could be allowed to operate through special agreements with the aeronautical authorities of India. The second distinguishing factor in air transport is that the majority of ownership and effective control of any air transport enterprise must be with nationals of the country of nationality of that enterprise. This means that foreign direct investment (FDI) is generally restricted to 49% within an air transport enterprise. India has proactively addressed this restriction – which is not seen in any other trade sector – by introducing regulations allowing up to 100% FDI in Indian companies operating scheduled air transport services on government approved routes. This however, is subject to a threshold of 49% over which government approval is required. Resident Indian companies are allowed 100% FDI for government approved routes.⁹ Additionally, with a view to streamlining the regulatory and monitoring process and making the safety oversight system more effective, the Director General of Civil Aviation (DGCA) has been accorded autonomy in the administrative and financial components of the industry. The DGCA is mandated and required to review all requirements pertaining to civil aviation in the country at least once every five years.

2 LEGAL AND REGULATORY ISSUES

2.1 LEGISLATION

The Air Corporations Act of 1953 established two corporations in India – Indian Airlines and Air India International and stipulated that the function of each of the corporations was to provide safe, efficient, adequate, economical and properly co-ordinated air transport services, whether internal or international or both, and the corporations were required to exercise their powers so as to secure that the air transport services were developed to the best advantage of passengers and, in particular, exercise those powers so as to improve air transport services to the greatest extent possible and, in particular, to exercise those powers so as to ensure that the charges for those services are reasonable.¹⁰ These two corporations were

⁸ South Asian Association for Regional Cooperation comprises Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

⁹ A scheduled operator's permit is granted to a company under three conditions: that the company is registered and has its principle place of business in India; the chairman and minimally two-thirds of the directors in that company are Indian nationals; and substantial ownership and effective control are vested in nationals of India.

¹⁰ The Air Corporations Act of 1953 (27 of 1953) s. 7(1).

empowered by the Act to operate any air transport service, or any flight by aircraft for a commercial or other purpose, and to carry out all forms of aerial work,¹¹ excluding other air operators of Indian nationality. This did not preclude carriers established in other countries from operating commercial air services with the permission given or other agreement entered into by them and the Indian government. Also, any air operator offering joy rides, air ambulances and training flights were not precluded from operating such services for lack of permission.¹²

Under the Act, the central government retained absolute authority and discretion to give to either of the Corporations directions regarding the exercise and performance by the corporations of their functions, which obligated corporations to give effect to any such directions. Some of the directions that The Central Government could give the corporations, if it was of opinion that it is expedient in the national interest to do so, and subsequent to consultation with the corporation concerned, were: to undertake any air transport service or other activity which the corporation has power to undertake; and to discontinue or make any change in any scheduled air transport service or other activity which it is operating or carrying on; and not to undertake any activity which it proposes to do.¹³ This law has been replaced by the Air Corporations (Transfer of Undertakings and Repeal) Act of 1994. This Act transferred the undertakings of Indian Airlines to a limited liability entity called Indian Airlines Limited, and the undertakings of Air India to a similar limited liability entity called Air India Limited. The Act also stipulated that all contracts and working arrangements subsisting immediately before the establishment of the limited liability entities would cease to have effect and be unenforceable against the earlier existing entities and would have full force and effect against or in favour of the companies established by virtue of the 1994 Act.

The Aircraft Act of 1934 (updated in February 2008) entitles the Government of India to make rules aimed at implementing the provisions of the Chicago Convention¹⁴ as well as the Annexes thereto. Regarding the provision of air transport services, The Airports Authority Act of 1994 provides that the function of the Authority is to manage the airports, the civil enclaves, and the aeronautical communication stations efficiently as well as to provide air traffic services and air transport services at any airport and civil enclaves.¹⁵ Regarding the operation of air transport in India, The Aircraft Rules of 1937 prescribes that no person is entitled

¹¹ *Ibid.*, s. 7(2)(a).

¹² *Ibid.*, s. 18.

¹³ *Ibid.*, s. 34.

¹⁴ *Supra* n. 7.

¹⁵ The Airports Authority of India Act, 1994, NO. 55 of 1994 As Amended by the Airports Authority of India (Amendment) Act 2003, ss 12(1) and (2).

to operate any scheduled air transport service from, to, in, or across India except with the permission of the central government, granted under and in accordance with and subject to the provisions contained in the Act. The central government may, with a view to achieving better regulation of air transport services and considering the need for air transport services of different regions in the country, direct, by general or special order issued from time to time, that every operator operating any scheduled air transport service must render the service in accordance with the conditions specified in such order including any condition relating to their due compliance. The central government also has the ability to permit any air transport undertaking of which the principal place of business is in any country outside India to operate a scheduled air transport service from, to, or across India in accordance with the terms of any agreement for the time being in force between the Government of India and the government of that country, or, where there is no such agreement, grant a temporary authorization by the Government of India.¹⁶ Regarding non-scheduled services, the rules stipulate that no air transport service, other than a scheduled air transport service, is to be operated by any air transport undertaking of which the principal place of business is in any country outside India except with the special permission of the central government and subject to such terms and conditions as it may think fit to impose in each case. Furthermore, no air transport service, other than a scheduled air transport service, can be operated by an Indian air transport undertaking unless it holds a non-scheduled operator's permit granted by the central government.¹⁷ It is also required that a non-scheduled service operator obtain a permit from the authorities to operate such services.

The operator of an air transport service is required to obtain the concurrence of the DGCA prior to operating a scheduled air transport service on a new route or when intending to make a substantial alteration in, or effecting the discontinuance of, any of the existing routes of such services. This requirement also applies when introducing a new time-table for a service, where the operator must obtain the concurrence of the Director-General, in so far as such operation or, as the case may be, such discontinuance affects, or is likely to affect, the air route or aerodrome facilities. At least seven days' previous notice must be given to the DGCA before the date proposed for the operation of the new route, or for the substantial alteration of an existing route or for the introduction of a new time-table or, as the case may be, for the discontinuance of an existing route.¹⁸

¹⁶ The Aircraft Rules, 1937, s. 134.

¹⁷ *Ibid.*, s. 134A.

¹⁸ *Ibid.*, s. 140A.

The Civil Aviation Requirements (CAR) which are in the nature of delegated legislation published by the DGCA – mandatorily to be followed by the airlines – cover a wide gamut of regulations which governs civil aviation in India. Although the Aircraft Act along with the Aircraft Rules provide a broad framework and legislative authority, the detailed regulations are governed by the DGCA CAR.

2.2 REGULATION: THE NATIONAL CIVIL AVIATION POLICY 2016

The National Civil Aviation Policy of 2016 laments the fact that, despite the enormous potential for India to be the third largest air travel market both domestically and internationally, it languishes as tenth on the list of passenger numbers. Accordingly, the Government of India has followed an overall policy to make flying affordable and convenient for the masses in the country by providing ‘an eco system for the harmonised growth of various aviation sub sectors, i.e. airlines, airports, cargo, maintenance repairs and overhaul services (MRO), general aviation, aerospace manufacturing, skill development, etc.’¹⁹ Elements that are focused for this policy are: enhanced use of technology while ensuring safety and security; promotion of investment, tourism and employment. The Policy envisions that, with its implementation, 300 million tickets will be sold domestically by 2020 and 500 million tickets will be sold by 2027 with cargo volumes going up by 10 million tonnes by that time. In order to achieve this, the Air Transport Policy endeavours, as its mission, to provide safe, secure, affordable and sustainable air travel for passengers and air transportation of cargo with access to various parts of India and the world.

A key driver of the Policy is regional connectivity, implemented through the Regional Connectivity Scheme (RCS) which came into effect in the second quarter of 2016/2017. This Scheme relates to short haul passenger traffic where the airfare is envisioned to be not more than Rs 2500 per passenger approximately, indexed to inflation, for a significant part of the capacity of the aircraft for 500–600 kilometres, or flights covering the duration of one hour or so. This measure is calculated to lead to the revival of un-served or under-served airports/routes, involving concessions by different stakeholders. It also admits of a Viability Gap Funding (VGF) for operators under approved routes and achievable and affordable security solutions. State governments are required to provide land free of cost and airlines will be exempt from airport charges for a period of ten years when they operate on approved routes. Also waved are landing, parking and terminal navigation landing charges. State governments will provide police and fire services free of

¹⁹ National Civil Aviation Policy, 2016, s. 1.2, http://www.civilaviation.gov.in/sites/default/files/Final_NCAP_2016_15-06-2016-2_1.pdf.

cost. Power, water and other utilities will be provided at substantially concessional rates. State service tax on tickets will be levied on 10% of the taxable value (abatements of 90%) of tickets for passengers embarking from or terminating in an RCS airport, without any input credits for an initial period of 1 year from the date of commencement of operations of the routes that are approved.

Airlines will be allowed to use their own ground handling services and an excise duty of only 2% will be levied on aviation fuel taken for consumption at approved airports for at least three years. VGF for the operator will be drawn on the Regional Connectivity Fund (RCF) which will eventually be reimbursed by the State governments concerned. RCF will be funded by a levy from a date to be notified by the Government under section 5(2) (ab) of the Aircraft Act 1934. The RCF levy per departure will be applied on all domestic routes other than Cat II/Cat IIA routes,²⁰ RCS routes and small aircraft below 80 seats irrespective of the routes. The rate of the levy will be decided by the Ministry of Civil Aviation from time to time. As for air freighters, similar concessions would apply under the Policy. These concessions would apply for up to 10 years from the date of commencement of cargo operations at the Radar Cross Section (RCS) airports on the following basis: there will be no airport charges levied for operations under RCS. terminal navigation landing charges (TNLC) are waived and Route Navigation and Facilitation Charges (RNFC) will be levied on a nominal basis. There will be only a 2% charge on excise duty on aviation turbine fuel (ATF) drawn by cargo operators from the (RCS) airports. This will be at the rate of 2% for a period of three years from the date of notification. However, Cargo operators will not be entitled to VGF. Continuance of VGF for a route will be continuously subject to the appropriate passenger load factor for a prescribed period and subject to review after three years. The aeronautical authorities will carry out a prioritization of routes which will be reviewed from time to time so that there is balanced growth of regional connectivity in different parts of the country. Operators will be provided a menu of options, with an in-built mechanism for ease of entry into and exit from RCS.

From an economic perspective, The Civil Aviation Policy scores on two points. The first is on code share agreements²¹ between airlines which have been

²⁰ 'Category II (CAT II) operation' means a precision instrument approach and landing operation using Instrument Landing Systems (ILS) or Microwave Landing System (MLS) – an all-weather, precision radio guidance system installed at large airports aircraft in landing which enables the approaching aircraft to determine when it's on the correct glidepath for a safe landing at a given runway – with: (a) Decision Height (DH) below 200 ft but not lower than 100 ft; and (b) Runway Visual Range (RVR) of not less than 300 m. According to the Route Dispersal Guideline (RDG), all airlines are bound to fly at least 10% capacity on CAT-II, 1% capacity on CAT-IIA and 50% capacity on CAT-III routes compared to what they fly on CAT-I routes.

²¹ A code-share agreement between two airlines allows one airline ('marketing airline') to sell seats on a flight operated by another airline ('administrating airline'), with the airline code and flight number of the marketing airlines.

significantly liberalized. The Policy liberalizes domestic code share points in India within each air services agreement (ASA) India enters into where Indian carriers will be free to enter into domestic code-share agreements with foreign carriers to any point in India available under the respective ASA. For the designated carriers of India, international code-share arrangements with foreign carriers can be liberalized as per the provisions relating to code-share arrangements in the ASA, and no prior approval from the Ministry of Civil Aviation (MoCA) will be required. The only requirement for the designated carriers of India to comply is simply to inform MoCA thirty days prior to starting the code share flights. However, if it is found at any point in time that the code share agreement violates the ASA, the agreement stands to be disallowed, notwithstanding prior intimation given to MoCA. The MoCA is required to conduct a review as and when required on need basis and at least once in five years to consider the requirement of further liberalization in code-share agreements.

The second economic aspect is that the Aviation Policy addresses airport charges involving the single till-dual till debate²² with a compromise. The Policy states that, with a view to ensuring equity, uniformity and balance, tariffs at all airports will be calculated on a 'hybrid till' basis, whereby 30% of non-aeronautical revenue will be used to cross-subsidize aeronautical charges. In the event the tariff in one year or contractual period turns out to be excessive, the airport operator and regulator are required to explore ways to keep the tariff reasonable and spread the excess amount over the future.

One of the many beneficiaries of the Aviation Policy is the aircraft maintenance, repair and overhaul (MRO) sector in India which has been given an exemption from paying taxes such as customs duty, airport royalty and value added tax (VAT), which may enable domestic air carriers to maintain the aircraft within the country. For airlines operating domestically, the benefits are palpable with drastic concessions and relief from the State governments through the RCF. For passengers, there will be protection from indiscriminate pricing by airlines which are effectively precluded by the Aviation Policy. In other words, the Civil Aviation Policy of India is recognized as a 'game changer' which has been subsumed well by *Rediff Business* in ten key improvements to the aviation scene in India: the Policy will boost regional connectivity, since airfares are fixed at Rs 2,500 for one-hour long flights; the policy aims at increasing connectivity to smaller towns and cities by offering incentives to airlines; 80% of the losses incurred by airlines due to the cap in fare on such routes will be refunded; It covers subsidies well

²² The single till is where all aeronautical and non-aeronautical revenues of an airport is collected as one resource of income, while the dual till is where the airport is allowed to separate aeronautical revenues from non-aeronautical revenues. See Ruwantissa Abeyratne, *Revenue and investment management of privatized airports and air navigation services—a regulatory perspective*, 7(4) J. Air Transp. Mgmt. 217–230 (July 2001).

where the government will impose a 2% tax on domestic and international air travel, which is calculated to make airfares costlier on longer routes; the government has scrapped the 5/20 norms to allow Indian carriers to fly abroad if it dedicates twenty aircraft or 20% of its fleet to domestic routes. It does not need to have operated in the domestic sector for five years to fly in foreign skies, thus benefitting new operators like Vistara, Air Asia; airlines will be allowed self handling of their flights; an easier to claim refund policy has been introduced for the benefit of the passenger; the new policy will promote balanced regional growth, tourism, infrastructure and help improve the ease of doing business; it will benefit cargo operations, as well as maintenance and repair industries; and code sharing has been liberalized, which enables foreign carriers to code share with Indian carriers on domestic routes.²³

3 ECONOMIC ISSUES

3.1 THE INDUSTRY

Deregulation in the aviation industry²⁴ in India occurred in 1990 with the introduction of its open skies policy and for the nearly 30 years that have lapsed since then, the industry has evolved considerably making a significant contribution not only economically but socially as well. Prior to 1990 the aviation industry was over regulated and haphazardly managed with no coherent direction. It was after 2004 that the aviation policy burgeoned into an open, liberal and welcoming policy particularly to foreign investment. From 2007 to 2017 the civil aviation sector in India grew steadily, showing a consistent growth of 13.8%.²⁵ The economic benefits derived by India from air transport cannot only be measured in terms of the industry's contribution to the GDP of the country but also by the benefits gained by the passenger and shipper in terms of the cost efficiency brought to bear by the ongoing connectivity and improvements to the infrastructure. The aviation sector contributes 0.5% to the GDP of the country, which is approximately 330 billion Indian Rupees.²⁶ The aviation sector supports 1.7 million jobs

²³ 10 points that make the new aviation policy revolutionary: 15 June 2016, *Rediff Business*, <http://www.rediff.com/money/report/ten-points-that-make-the-new-aviation-policy-revolutionary/20160615.h>.

²⁴ In this article 'aviation industry' refers to the air transport industry; the airport industry; and the air navigation services. The 'air transport industry' refers to air carriers.

²⁵ Anuradha Yadav, *Emerging Scenario of Indian Aviation Sector Facing Issues and Challenges in Economy*, 8(6) *Int'l J. Recent Sci. Res.* 17527–17531, 17527.

²⁶ This overall contribution is comprised of INR 147 billion directly contributed through the output of the aviation sector (airlines, airports and ground services, aerospace); INR 107 billion indirectly contributed through the aviation sector's supply chain; and INR 77 billion contributed through the spending by the employees of the aviation sector and its supply chain. In addition, there are INR 582 billion in 'catalytic' benefits through tourism, which raises the overall contribution to INR 912 billion or 1.5% of GDP. See Economic Benefits from Air Transport in India, *Oxford Economics*, 2011 at 4. <https://www.iata.org/policy/Documents/Benefits-of-Aviation-India-2011.pdf>.

in India.²⁷ The key drivers of this contribution are some of the megatrends that are sweeping the world: economic shift from the West to the East resulting in rapid economic growth; demographic change which is favourable to India; and rapid urbanization. Additionally, higher disposable incomes, increased tourism, and rising aspirations of the emerging middle class are drivers propelling the forward march of air transport in India. With this advancement have come new airports; FDI;²⁸ low cost carriers and groundbreaking information technology initiatives that have cumulatively placed the Indian aviation market at No 10 in the civil aviation industry index with an output of approximately USD 16 billion.²⁹

The aviation industry in India has been largely influenced and facilitated by India's foreign direct investment policy, which netted FDI inflows worth USD 60.1 billion in 2016–17 – the highest on record. The current FDI policy (2017–2018) issued by the Department of Economic Affairs on 5 June 2017, has introduced the progressive measure of abolishing the Foreign Investment Promotion Board (FIPB), which was empowered to approve proposals for FDI requiring government approval and the introduction of the Foreign Investment Facilitation Portal (FIFP) – an administrative body that facilitates approval of FDI applications. The FDI Policy recognizes as competent authorities, sector-specific administrative ministries/departments which are mandated to grant government approval for FDI applications. The policy has also introduced standard operating procedures (SOP) that contain procedural guidelines to process FDI applications. These SOPs require investors to apply on the website of the FIFP with supporting documentation. These applications are forwarded to the relevant authorities i.e. the competent authority and the Reserve Bank of India within two days of application. The competent authority processes the proposals and conveys the approval/rejection of such proposals to the applicant in the format prescribed under the SOP. The Ministry of Home Affairs gets involved in such applications whenever matters of security are a concern with a particular application. Another positive aspect of the Policy is that a competent authority may only reject a proposal or prescribe conditions in addition to those listed in the Policy or relevant law with the concurrence of the Department of Industrial Policy and Promotion (DIPP).³⁰

²⁷ This total comprises: 276,000 jobs directly supported by the aviation sector; 841,000 jobs indirectly supported through the aviation sector's supply chain; and 605,000 jobs supported through the spending by the employees of the aviation sector and its supply chain. In addition, there are a further 7.1 million people employed through the catalytic (tourism) effects of aviation. *Ibid.*

²⁸ FDI in the air transport sector from 2000 to 2014 amounted to USD 542.55 million. See Anuradha Malviya & Farida Shah, *Indian Aviation Industry: Emerging Opportunities and Challenges*, 2(3) Asian Res. J. Bus. Mgmt. 85–95, 90 (2015).

²⁹ *Ibid.*, at 89.

³⁰ The Government of India established the Department of Industrial Policy & Promotion in 1995, and in 2000 merged the Department of Industrial Development with the DIPP. The DIPP is working under the Ministry of Commerce and Industry.

The policy increased the threshold for FDI in existing projects under the automatic route from 74% to 100%.³¹

To implement the progressive National Civil Aviation Policy and ensure the exponential growth of traffic expected, a ground based infrastructure is needed. The liberalization of FDI policy affects airports as well. The Government of India has approved the construction of eighteen greenfield airports needing an investment of USD 232.8 billion in its plan to double the number of functional airports over the next three years. By all measures, this is a gigantic undertaking, but it would be in keeping with the vast economic strides the country is taking. All these developments must be considered against the backdrop of global aviation trends if India were to compete as a global player. For one, the growth in air traffic must be considered where, by 2025 the number of passengers carried globally would double. While currently, globally 100,000 flights take to the air every day, by 2025 this would triple to 300,000 per day. India must have a clear policy of how to retire ageing aircraft with the advent of new aircraft under order. India will see airline mergers within the country and large infrastructure developments involving ground services, catering, maintenance and fuelling, which would call for additional trained human resources. To prepare for this India must engage in a training programme with a sense of purpose and direction, particularly for managers. Aviation education and training is a must if India is to keep its third place in 2020 and first place in 2030. The Policy acknowledges that the growth of civil aviation in the country has been hamstrung by the shortage of appropriate skills required in different sectors of civil aviation. This is not only in the area of trained pilots but also aircraft engineers and technicians, cabin crew, ground handling staff, cargo handling staff, administrative and sale staff. The Government is on the right track in planning to create the necessary eco system and architecture for ensuring full utilization of the skill development capacities of the institutes under the control of Government/Public Sector Undertaking, and to expedite the commencement of training courses.

4 CHALLENGES

4.1 SWOT ANALYSIS

Challenges faced by air transport in India can be discussed under an analysis of the industry's strengths, weaknesses, opportunities and threats (SWOT).

³¹ The Department of Industrial Policy and Promotion has stated in a report released in 2017 that FDI flows in air transport (for passenger and freight traffic) accounted for USD 1.01 billion between Apr. 2000 and Mar. 2017. See Annual Report 2016–2017, Airports Authority of India, at 33.

Strengths: As for strengths, arguably the most compelling is India's strong economic growth. The International Monetary Fund (IMF) stated that in 2015, there was a five-fold increase in India's GDP reaching USD 2.2 trillion. During the January–March period of 2015 India's growth was at 7.5% compared to China's 7%, making it the fastest growing economy in the world. Another strength is that India has great potential for tourism growth. However, this needs to be enhanced through more flexible immigration and customs procedures, particularly for outbound passengers, and better airport service quality (ASQ). The availability of continuous services on arrival to complete the travel experience where the traveller expects seamless, efficient and enjoyable transportation would be another consideration for India. Tourism growth and convenience in travel such as easy connectivity from city to city without transit points is a key consideration for the modern traveller.³² and rising income levels in India, and in particular disposable incomes, is also a key strength for air transport. The advent of the low-cost carrier and the regional connectivity scheme would be catalysts for the promotion and enhancement of growth in air transport in India. Another strength is the cutting-edge information technology (IT) coming out of the country, which is a key contributor to India's economy, contributing nearly 10% to the overall GDP of India. The annual revenue generated by IT in the 2014/15 financial year was around USD 120 billion. *Statista* – a firm with expertise on statistics, reports that this jump was a 'significant increase from around USD 60 billion in 2008/09. Of this revenue in 2015, the majority, USD 8.1 billion, was generated in exports while domestic revenue totaled more than USD 20 billion'.³³ Political stability and government support is another strength that buttresses the air transport industry. The current policies of investment promotion and liberalization of business practices, coupled with the principles of the National Civil Aviation Policy already discussed, will go towards enhancing the prospects of the industry.

Weaknesses: India has a few shortcomings to focus attention on. For one, India has so far not taken effective and positive measures to capitalize on its geographic location of a hub between the east and the west and, above all, not embarked on a programme that would adequately train aviation managers. Infrastructure

³² A survey carried out by *FlightView* shows that: '70% of travelers surveyed said they'd be willing to pay even more for a direct flight from their local airport (when flights with a stop or connection are the only option). Of that 70%, more than two-thirds would be willing to pay 10–15% more and nearly a third would be willing to pay an additional 16% or higher. Millennials – a group everyone's paying close attention to these days – seem even more willing to pay for the convenience of a direct flight; 31% more willing, to be exact'. See Convenience & Choice: What Travelers Want Most (And Are Willing to Pay For) Throughout Their Journey How Airlines and Airports Can Capture More Revenue & Loyalty by Improving the Travel Experience, *FlightView*, <http://cdn2.hubspot.net/hubfs/278711/Convenience-and-Choice-in-Travel-July2015.pdf>.

³³ IT industry in India – Statistics & Facts, *Statista*, <https://www.statista.com/topics/2256/it-industry-in-india/>.

development has been slow, and professionals have not been adequately rewarded. This has given more impetus to robust and energized Middle East carriers such as Emirates, Etihad and Qatar Airways to capitalize on their geographic locations, obtain the active involvement of their governments in proactive decision making in the development of air transport in their countries as hubs between the west and the east, and, above all, attract Indian professionals to leave India and work for them. Improvements in the carriage of cargo out of India is a compelling need to bring the 'Make in India'³⁴ objective into fruition. Currently only 2.5 million tonnes are carried out of India from all the Indian airports which contrasts with, say, Hong Kong, which carried 4.4 million tonnes in 2015. This coupled with a high cost structure will have to be carefully monitored.

The lack of skilled resources is another issue that would affect progress. Although the growth in Indian aviation has created significant employment opportunities, the supply does not accord with the demand, as the supply of skilled human resources has not kept pace with the rapid growth in demand. A background paper submitted in 2016 states that 'the need to strengthen the human resource development infrastructure is immediate given that passengers and aircraft fleet are likely to double by 2020 and the total manpower requirement of airlines is estimated to rise to 120,000 by FY-2017. This includes the number of pilots, cabin crew, aircrafts engineers and technicians round handling staff, cargo handling staff, administrative and sales staff. This is based on benchmarks provided by ICAO for different classes of personnel (pilot, cabin crew, etc.) per aircraft. In addition, the aviation industry is typically estimated to generate indirect and induced employment of nearly six times the direct employment. A paper submitted in 2016 states that, with direct employment across airports and airlines expected to be around 200,000 by 2017, the aviation sector in India was expected to provide an indirect and induced employment to over 1.2 million people by 2017'.³⁵

Opportunities: The biggest opportunity for Indian air transport is the Civil Aviation Policy itself. Its many facets, discussed above, bring multifarious opportunities. India's tourism potential, and its geographic location as well as its rich history and culture which have not been exploited to the optimal, need to be looked at both internationally and domestically. The rising millennial demography is another opportunity. Rapid urbanization and the development of new airports augur well for the air transport industry. There are opportunities for the

³⁴ The 'Make in India' initiative was launched by Indian Prime Minister Narendra Modi in Sept. 2014 as part of a wider set of nation-building initiatives. Devised to transform India into a global design and manufacturing hub, Make in India was a timely response to a critical situation: by 2013, the much-hyped emerging markets bubble had burst, and India's growth rate had fallen to its lowest level in a decade.

³⁵ Background Paper, India Aviation 2016 – Mar. 16–20 2016, at 59–61. <https://www.rvo.nl/sites/default/files/2016/03/India%20aviation%20report%202016.pdf>.

manufacturing sector as well as foreign companies are sourcing the manufacture of aircraft components in India.

Threats: IATA has identified the following problems faced by Indian aviation: high operational costs; high cost of aviation turbine fuel; high service tax and other charges; shortage of maintenance facilities; high foreign exchange rate; competition from foreign airlines; congestion at airports; lack of qualified pilots and technical manpower etc. However, these are not threats but problems that any air transport industry across the globe could face. Some other challenges are the possible reduction of per passenger yields, brought about by serving large markets at low yield; the dominance of intra regional routes that would enhance competition in particular in the ASEAN³⁶ region where carriers are fiercely competitive; privatization of airports, which, although could result in efficiency and streamlining, would be harmful if there is no strong regulatory structure to strike a balance between service quality and profit making. Although India is a participant in the Paris Agreement on Climate Change of 2015, it has refrained from signing on to the ICAO Carbon Offsetting and Reduction Scheme for Aviation (CORSA). This poses a dichotomy for India which may not be able to participate fully towards reaching the aim of carbon neutral growth in 2020. Furthermore, India has to be aware of possible declining yields brought about by intense competition in the region, as well as the deficiencies it faces in infrastructure which competing aviation countries do not have. This coupled with a steadily increase in cost structure would also have to be watched.

4.2 CHINA

China and India – neighbours separated by borders – are the two most populous countries in the world with China having 1.379 billion people while India has 1.34 billion. Both countries have an emerging class of business entrepreneurs focusing on high technology with a global outlook. Both countries together are responsible for 40% of the world's trade. Both countries have taken the path of liberalization. Although China lags behind India in terms of passenger carriage, its airlines are progressing fast and will be a threat to airlines worldwide, once they build a viable and competitive route network. The distance from India to China is a mere 2982 kilometres. Although this distance comes within the 5000-kilometre range of the Indian open skies policy, the Indians would have to beware of Chinese competition in the event Indian carriers do not utilize 80% of their traffic rights into China,

³⁶ Association of South East Asian Nations comprising Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam, with one observer – Papua New Guinea.

whereby carriers of China could be allowed to operate through special agreements with the aeronautical authorities of India. India and China, which share long histories and cultures, have adopted a sustained relationship of mutual coexistence and have much to lose if they do not cooperate and work together. Both countries therefore would walk a thin line of diplomacy and commercial cooperation and compromise. China has so far concentrated on strengthening its three large carriers while not concentrating on smaller carriers while India's liberal policy has spawned numerous low-cost carriers.

Against this backdrop it is noteworthy that China and India have maintained strong trade ties with each other. In 2004–2005, China was the third largest importer of India's goods next to the US and United Arab Emirates. Both countries have shown a proclivity to regional agreements rather than multilateral agreements. A Joint Study Group was established by India and China in 2003 to examine the potential for economic engagement between the two countries, and a Joint Task Force established in 2007 submitted its report on the feasibility of a China-India Regional Trading Arrangement (RTA), claiming that such an agreement would be advantageous to both countries. The recommendation of the Study Group was welcomed by both countries, which agreed to explore the prospect further through discussions. This approach augurs well for both countries which are well on their way toward becoming giants in aviation and possible competitors.

Air transport in both countries would be influenced by similarities between them, where India and China are steeped in civilization and ancient culture that is a significant tourism attraction; They have massive populations with potential some of which can be turned into skilled aviation professionals and rising GDPs; and an increasing thirst for energy and technological advancement. However, India is a democracy and China is a one-party State, and both will be financially dissimilar. Arguably, an ominous threat to the development of air transport ties between the two countries would be their ambitions to be global powers with influence in other parts of Asia as well as global fora such as the United Nations and its specialized agencies, in particular the International Civil Aviation Organization.

5 CONCLUSION

India needs to broad base both its domestic and international markets. Domestically, India should spread the wings of low-cost carriers while encouraging new entrants within an equitable regulatory regime of fair and equal opportunity to compete. India has at least 300 million people who are in the middle class and have spare money to afford air transport, particularly in the domestic market. Already, those able are taking to air travel between cities in India and abandoning their reliance on travel by train, mostly because of the cap of 2500 rupees placed on

air tickets involving distances of 500–600 kilometers. This is a new market that low-cost carriers in particular can attract. Air transport in India can also greatly benefit by the leaps and bounds advancement of its information technology industry making the travel experience seamless and more enjoyable. Linked to this approach would be ancillary revenue generation based on the need of the passenger – whether it be millennial or baby boomer. In every phase of development, the involvement of State governments would be crucial, both in the development of regional airports, infrastructure as well as the promotion of training for personnel. Their collaboration with the Ministry of Civil Aviation would be a key factor in this regard. The national air cargo policy is apathetic at best and requires much revision for this burgeoning market to thrive. Cargo infrastructure has to be strengthened and procedure for the carriage of cargo must be streamlined.

From a legal and regulatory perspective, India should consider ratifying three important instruments – Article 3 bis of the Chicago Convention, which inter alia calls on States to refrain from using weapons against civil aircraft in flight; the Convention on Compensation for Damage Caused by Aircraft to Third Parties Montréal, (2 May 2009) and the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft Montréal, (2 May 2009). It is interesting that there is no unified civil aviation legislation and/or air navigation in India. The Carriage by Air act of 1972 purely covers private air carrier liability.³⁷ The National Civil Aviation Policy is not a law but a policy that is calculated to encourage and enable ease of business in India. This has to be upgraded to the status of legislation.

Another area where India could have more clarity is in aircraft leasing. Aircraft leases in India are subject to the approval of the Director General of Civil Aviation.³⁸ Once approval is obtained, a formal lease agreement must be executed by the lessor and lessee of the aircraft. Depending on the type of lease (wet lease or dry lease) the registration, airworthiness and safety aspects could be subject to the provisions and requirements of Article 83 bis of the Chicago Convention³⁹ which India ratified on 5 August 1994. Article 83 bis provides that when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease,

³⁷ *The Carriage by Air Act of 1972* was amended by *The Carriage by Air (Amendment) Act, 2016* No. 12 Of 2016 which vests power with the Minister of Aviation to revise liability limits as necessary.

³⁸ The consent of the applicable foreign civil aviation authority is required before a leasing permission can be issued. This consent should be in writing. See *Aircraft Leasing Manual CAP 3200 Revision 2* (2017), at 7.2.2. To be acceptable for registration in India a foreign aircraft must be: in the DGCA type-acceptance list; registered in the foreign State; have a valid Certificate of Airworthiness; and will not be made the subject of another lease during the term of the lease authorized by DGCA for that aircraft; less than 15 years of age for passenger transportation and less than 25 years of age for cargo operations. *Ibid.*, at 7.2.3.

³⁹ Art. 83 bis entered into force in 1997.

charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft. Although this provision admits of oversight of certain functions, its mere ratification does not necessarily mean that such transfers take place in all instances of a lease.

Yet another area which needs looking into under the air transport policy of India is asset-based financing. India acceded to the Convention on International Interests in Mobile Equipment signed in Cape Town on 16 November 2001 (the Cape Town Convention), which entered into force in India on 1 July 2008. The Cape Town Convention, which has provisions that facilitate asset-based financing, lay dormant with no influence on domestic law until 2015 when changes were made to regulations of civil aviation as well as the Aircraft Act, 1934, and the Aircraft Rules, 1937 (Aircraft Rules). This lapse of seven years was a period of uncertainty where the Cape Town Convention, although ratified, remained outside the purview of Indian law, until rules were changed to give recognition in the Aircraft Rules to the concept of the Irrevocable Deregistration and Export Request Authorisation (IDERA) under the Cape Town Convention and its Protocol. This enables the owner of an IDERA, if he produces relevant documents, to apply for the cancellation of the registration of the aircraft without the consent of the airline operator. The DGCA is legally obligated to deregister an aircraft upon such application without obtaining the consent or agreement of the Indian airline operator. Although this protects the lessor, and the Indian Courts have judicially recognized that the provisions of the ratified Cape Town Convention must be followed by the Indian authorities, it is not clear how the process of deregistration would be carried out. Furthermore, all other provisions of the Cape Town Convention are yet to be incorporated into Indian law so that lessors and other interested parties will be assured of full protection under the ratified treaty.

For the abovementioned reasons, and since the National Civil Aviation Policy is not a law but a policy that is calculated to encourage and enable ease of business in India, serious consideration must be given toward upgrading practical issues contained in the policy to the status of legislation.