INDIA

Regulatory framework in Indian airports

Sumeet Kachwaha and Ashok Sagar
Kachwaha & Partners, New Delhi

Recent reform in India has brought privatisation of many infrastructure projects, in particular in the airports sector. One of the main features of the reform is the attribution of responsibility to a newly created regulator. It is likely that the regulator will have an impact on the policy and rules governing construction projects with respect to specific infrastructure sectors within its competence.

India has a challenging task ahead in terms of developing its infrastructure. Privatisation, a somewhat new concept in India, is being pursued as part of this development. An independent regulator plays a key role in encouraging private participation. This ensures a level playing field and a transparent mechanism to settle conflicting interests of stakeholders and the general public.

This article examines the regulatory mechanism recently put in place for airports in India. It also gives some indication of what may follow in several other infrastructure sectors where a regulator is yet to be constituted.

Privatisation in India

With the opening up of the Indian economy in the early 1990s and the rapid growth that followed, it became evident that the infrastructure in India needed to be ramped up. As the state did not have the necessary resources, private investments in infrastructure projects were encouraged. Four major airports (Delhi, Mumbai, Bangalore and Hyderabad) have all been privatised through long-term concession agreements. Fourteen greenfield airports have been cleared by the government for privatisation. The 11th five-year plan for the years 2007–2012 envisaged an investment of US$5.15bn in airport infrastructure from the private sector, amounting to about 64.07 per cent of the total investment. In the next five years, private investment is expected to exceed US$10bn.

One missing link in India's privatisation effort has been the lack of an adequate regulatory mechanism. This is critical to support an investor-friendly environment and a level playing field. Until recently, the regulatory mechanism remained on paper in the concession agreement, and the tasks envisaged for the regulator were performed by the Ministry of Civil Aviation. While waiting for the regulator to be appointed, the regulatory mechanism was neither independent, nor transparent, thus hampering the privatisation efforts.

Concept paper on the philosophy and approach to regulation of infrastructure

In light of the above situation, the Indian government focused its attention on the significant task of investigating the type of regulatory mechanism it should adopt in all sectors of infrastructure. Thus, in September 2008, the Planning Commission published a comprehensive paper entitled *Approach to Regulation of Infrastructure* ('the Approach Paper'). Some issues that were considered in the Approach Paper include:

- the scope of the regulator's powers;
- the regulator's independence and autonomy; and
- the regulator's accountability.

The recommendations and proposals put forward in the Approach Paper are set out below.

Scope of the regulator's powers

The Approach Paper, spanning virtually every segment of the infrastructure sector, proposed a powerful and independent regulator. It recommended that the regulator be empowered to make regulations, issue licences, set performance standards and determine tariffs. The regulator should also have the power to enforce its regulations, licence conditions and orders by imposing punitive measures, including suspension or cancellation of licences. It should adjudicate disputes among the licensees, and between the licences and the government, subject to review on appeal before a specialised appellate tribunal. The regulator should act as a quasi-judicial entity.

The Approach Paper recognised that competition is the best safeguard for consumer interest and, hence, regulation should aim at removing barriers to competition and eliminating abuse of market power.

It recommended that in infrastructure segments which are amenable to competition, regulation should be 'light handed' and tariff setting should be left to competitive markets. However, where there are elements of a monopoly, it should be subject to closer regulation. In all cases, performance standards should be regulated in order to ensure the quality of services.

The regulator's independence and autonomy

The basic rationale for setting up a regulator is to create a level playing field. Hence, independence and autonomy received special attention in the Approach Paper.

The selection, appointment and removal of the chairperson and the members should be insulated against any perceived interference or manipulation that may influence the outcome. A high-powered selection committee would shortlist two or three names and, from these, the appointment would be made by

the President of India on the recommendation of the Prime Minister. Similarly, removal of the chairperson or a member can only be on defined grounds, such as insolvency, physical or mental incapacity, conviction for an offence, etc. The removal of a chairperson or a member can take place only with the approval of the President of India on the recommendation of the Prime Minister. Further, the regulator's independence covers the hiring and compensation of the staff necessary to carry out its operation. In particular, the regulator should have the freedom to appoint experts on a contract basis following market-determined compensation (and not be bound by the usual government salary rules).

The regulator's budget is to be presented by the concerned ministry and subject to parliamentary approval. Once it is approved, the budget is to be at the disposal of the regulator.

Finally, the Approach Paper recommended that the concerned ministry should not issue any guidelines to the regulator that relate to any specific regulatory decision.

Accountability of the regulator

As the regulator was proposed to be made independent of government control, it was important to make it accountable through various processes. The Approach Paper suggested that accountability be largely achieved through transparency. Accordingly, any regulation made by the regulator must be subject to the requirement of prior publication with sufficient time for notice and comments. The regulator is obliged to respond to any comment received before any regulation enters into force. The regulator's activity is subject to parliamentary scrutiny: the regulator shall table all regulations made before parliament. Further, the regulator is obliged to submit a full report to parliament setting out the approach that it proposes to adopt in the forthcoming year and the outcome it hopes to achieve. At the close of the year, the regulator shall be required to present a report to parliament, assessing its success in achieving the objectives set out in the annual plan. Finally, the regulator would be made accountable to a specialised judicial body, which shall be set up as an appellate authority.

Statutory framework

On 5 December 2008, following the aforesaid recommendations in the Approach Paper, parliament passed the Airports Economic Regulatory Authority of India Act 2008 (the 'Act') constituting the regulator and the appellate judicial forum to hear appeals. The Act was brought into force on 1 September 2009 and the judicial forum was constituted in February 2010. The Act applies to 'major' airports, being defined as those having an annual traffic of 1.5 million passengers or more and notified by the government as such. Currently, there are 13 'major' airports in India and they all fall within the purview of the regulator. The regulatory authority set up under the Act is comprised of a chairperson and two members.

The regulatory authority has two functions:

- to regulate tariffs and other charges for aeronautical services; and
- to monitor performance standards for airports.

The regulatory authority may determine different tariff structures for each airport. To determine tariffs for the aeronautical services, the authority is required, among other things, to take into account the following:

- the capital expenditure incurred and timely investment in improvement of airport facilities;
- the kind and quality of services provided and other relevant factors;
- the costs for improving efficiency;
- economic and viable operation of the airport;
- revenue received from services other than aeronautical services; and
- the concession offered by the government in any agreement, memorandum of understanding or otherwise.

The regulatory authority will also determine the amount of development fees in respect of major airports and the amount of the passenger service fee payable by law. Lastly, the regulatory authority is to monitor and set performance standards relating to quality, continuity and reliability of services, keeping in view the parameters set forth in the concession agreements.

The tariff shall be determined once every five years, but may be amended in the interim in the public interest.

The regulator's transparency

Following the recommendation in the Approach Paper, the Act requires the regulatory authority to ensure transparency in the discharge of its functions. This is to be ensured, among other things, through consultations with all stakeholders, allowing them to make submissions and ensuring that all decisions of the regulatory authority are fully documented and motivated. The annual reports and regulations are required to be tabled before parliament.

As transparency is the main feature of the functioning of the regulatory authority, and is mandatorily required under the Act, one of the first acts of the regulatory authority was to make public the consultation procedure it would follow. A guideline dated 14 December 2009 entitled *Guidelines for Stakeholder Consultations* (the 'Guidelines') was issued by the regulatory authority. The Guidelines set out the stakeholders and other entities with whom the regulatory authority would consult. They state that for cargo facilities, it would consult the local associations of freight forwarders, airport cargo agents, custom house agents and the leading chambers of commerce. For different categories of passengers, different bodies would be consulted:

- for business travellers, the leading chambers of commerce would be consulted;
- for government travellers, specified officers of the ministry would be consulted; and
- for leisure or individual travellers, certain specified consumer welfare associations would be consulted.

Soon thereafter, on 22 December 2009, the regulatory authority issued a White Paper entitled *Regulatory Objectives and Philosophy in Economic Regulation of Airports and Air Navigation Services* (the 'White Paper'). The White Paper set out the issues to be considered by the regulatory authority and invited feedback, comments and suggestions. Based on the responses received, the regulatory authority prepared a consultation paper, listing the major issues requiring determination which would impact the definition of its regulatory philosophy and approach and laying out its rationale for the position/approach it proposed to adopt. A consultation meeting was then convened to elicit the views of the stakeholders. Finally, the regulatory authority formulated its philosophy and approach regarding economic regulation of air navigation services via an order dated 28 June 2010.

Continuing with its mandate of being transparent, the regulatory authority then issued a series of guidelines on subjects it was expected to decide. The first guideline, dated 10 January 2011, related to the determination of tariffs for services provided for cargo facilities, ground handling and the supply of fuel to aircrafts. A further guideline, dated 28 February 2011, was issued relating to the determination of tariffs for airport operators.

The regulator's judicial accountability

Judicial accountability is again an important safeguard to balance out autonomy. It is important that the decisions of the regulatory authority do not get enmeshed in the civil courts and are instead reviewed by a competent tribunal. That is why the Act constituted an appellate tribunal called the Airport Economic Regulatory Authority Appellate Tribunal (the 'Tribunal'). The Tribunal has been conferred jurisdiction in relation to any dispute between two or more service providers or between service providers and consumers. The Tribunal has also been given jurisdiction to hear appeals from any order of the regulatory authority. The Tribunal is headed by high judicial officers and the chairman must be a current or former judge of the Supreme Court of India or chief justice of a High Court. The members must have held secretary-level or an equivalent position within the government with at least two years' experience in aviation, economics or law.

The Tribunal has the same powers vested in civil courts to summon and to enforce the attendance of any person, administer oaths, order the production of documents, receive evidence, and issue commissions. A final order of the Tribunal may be appealed directly to the Supreme Court of India.

To avoid any conflict between the Tribunal and other judicial bodies, the Act provides that the Tribunal shall not hear matters which substantially fall within the jurisdiction of the competition commission or of the consumer courts. However, this provision could still create confusion as different authorities may have conflicting views as to the nature of a dispute and the relating jurisdiction, thereby leading to waste of time, costs and possibly even a miscarriage of justice. In order to overcome any possible confusion, the government (showing rare foresight), appointed the chairman of the Competition Commission Appellate Tribunal as the chairman of the Tribunal (thereby conferring dual charge on the same individual). Further, the members of the two bodies are also common.

Hopefully, this practical solution will be maintained in the future to avoid overlap and gridlock in the functioning of these vital institutions.

Conclusion

The Indian government has made a commendable effort to set up an autonomous and powerful regulatory authority while assuring its accountability through the mechanism of transparency and parliamentary control. This is backed by a specialised appellate tribunal. All this makes for a promising beginning in the privatisation efforts of this important sector and may well point to what may follow in several other infrastructure sectors that do not as yet have a regulator in place.

Sumeet Kachwaha and **Ashok Sagar** are partners in the law firm of Kachwaha & Partners, New Delhi (India). They can be contacted at **mail@kaplegal.com**. Sumeet Kachwaha is active in the ICP Committee and is currently a Co-Chair of the Project Execution Subcommittee of the ICP.

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