

Sand Mining: A Need for Stricter Laws and Stringent Enforcement

Sand is both a natural resource and a commercial commodity. In the present Indian context, sand is often treated more like a commodity than a natural resource, exploited rather than protected from unscientific extraction and erosion. As a result, rampant sand mining activities have taken a toll on the environment in India. In Madhya Pradesh, sand mining has ravaged major rivers like the Narmada, the Chambal, and the Betwa, as well as numerous other rivulets and streams. Similarly, the Bharathappuzha River in Kerala has fallen victim to indiscriminate sand mining. Problems are widespread: many other states, including Gujarat, Karnataka, and Tamil Nadu have also reported the negative impact of sand mining on their rivers.

An important factor leading to excessive sand mining in India is the expansion of the realty and infrastructure industries, which are heavily dependent upon sand. Responsible sand mining is, of course, necessary. However, indiscriminate and unscientific sand mining is a threat to the environment. The situation has worsened due to the control of sand mining in India by powerful and influential organizations known as “sand mafias.” Sand mafias run a high-level network involving politicians, bureaucrats, police, and others, who let them carry out illegal sand mining activities.

Checking illegal and environmentally harmful sand mining has become a great challenge. In 2010, the Ministry of Environment & Forests (MoEF) recommended several amendments to the existing regulatory framework on the quarrying of minor minerals and its impact on the environment.¹ Recently, the Supreme Court of India also called for stricter mining norms in this sector. However, a closer look at existing regulations suggests that implementation, rather than the regulations themselves, is the problem. In India, illegal sand mining exists despite everything that is required to control it. There are laws that

regulate and restrict sand mining in sensitive areas, such as river beds and coasts. There is also a higher judiciary that regards a pollution-free environment as an essential component of the right to life and is open to regulating economic activities that harm the environment.

Regulating Sand Mining in India

Existing Licensing Regime

Sand comes within the definition of “minor minerals” under the Mines and Minerals (Development and Regulation) Act of 1957 (Mines Act).² Any mining operations, reconnaissance, or prospecting of sand³ can only be undertaken with prior permission or license from the government. Since minor minerals fall under the legislative purview of the state governments, the licensing for sand mining is regulated by the states, under their respective “minor mineral concession rules” framed under the Mines Act.

These state-specific rules restrict the areas where mining activities may be undertaken or the quantity of sand that may be extracted under a license. For example, under the Karnataka Minor Mineral Concession Rules of 1994, sand mining may only be undertaken in notified areas and mining should not exceed 1,000 metric tons under each permit. Under the rules, licensees are generally responsible for ensuring that their activities do not pollute the environment. The licensing authorities are also empowered to prematurely terminate the mining leases if the mining is leading to environmental pollution or ecological imbalance.

The Kerala Protection of River Banks and Regulation of Removal of Sand Act of 2001 (Kerala Act), is an important piece of legislation enacted to regulate, among

¹ MINISTRY OF ENVIRONMENT & FORESTS, GUIDELINES ON ENVIRONMENTAL ASPECTS OF QUARRYING MINOR MINERALS (Mar. 2010).

² Under the Mines Act, ordinary sand is not treated as a minor mineral when used for metallurgical or optical purposes or in the manufacture of ceramic, silvitrete cement, sodium silicate, pottery, and glass, or for the purposes of stowing in coal mines.

³ This refers to ordinary sand, rather than sand used for prescribed purposes.

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other activities, the removal of river sand. Under the Kerala Act, only a *gram panchayat* (village government) or the municipal body concerned is permitted to carry out the sand removal operations in a *kadavu*,⁴ pursuant to obtaining a pass from the Geology Department. The Geology Department grants such passes on the recommendation of the District Expert Committee (set up under the Kerala Act). In addition, state authorities are empowered to take appropriate steps to maintain the river banks in safe condition, including ordering the closure of a *kadavu* for sand mining. Under the Act, the maximum quantity of sand that may be extracted from a *kadavu* or a riverbed is also specified. The Act also provides for sand auditing, whereby the state government is required to provide for the periodical measurement of the quantity of sand that may be available for removal. This provision is important for checking the adverse effects of mining on ecology.

If such provisions are followed in other states and are implemented efficiently, the adverse effects of sand mining can be addressed to a great extent.

A few states have banned mechanized mining,⁵ and licensees are only permitted to use manual labor, in order to prevent destruction of the environment. Sand mining is prohibited in ecologically sensitive areas, such as coastal regulation zones.⁶

Environmental Clearance for Sand Mining

As per the Environment Impact Assessment Notification of 2006 (EIA Notification), the mining of minerals with a lease area of five or more hectares would require prior environmental clearance. The EIA Notification does not distinguish between the mining of minor minerals or major minerals. As per the MoEF, the mining of minor minerals also requires prior environmental clearance.⁷ The MoEF's position has been affirmed by the Allahabad High Court in *Mohammed Kausar Jah v. Union of India and Others*.⁸ It is pertinent to note that environment clearance is given after due consideration of the potential environmental and social impacts of the proposed development project. Conditions for ensuring protection to the environment and ecology are also imposed under the clearance.

4 Kadavu in Malayalam refers to the bank of a river where there is no bridge and people use country boats to cross the river.

5 Andhra Pradesh, Karnataka, and Maharashtra.

6 CRZ Notification of 2011.

7 In March 2010, the MoEF issued the Guidelines on Environmental Aspects of Quarrying Minor Minerals, *supra* note 1, wherein the MoEF clarified that the EIA Notification will apply to sand mining over an area equal to or more than five hectares.

8 2011 (5) A.D.J. 125.

Judicial Approach

Indian courts generally follow a pro-environment approach and are open to imposing bans on sand mining activities where threats to the environment are evident.

In *A. Chidambaram v. District Collector*,⁹ the High Court of Madras directed the Tamil Nadu government to ban the removal or extraction of sand from rivers where the present sand bed level is below the required level as fixed by the state, because such activities were causing environmental degradation in that area. Similarly, in *Parishithi Samrakshana Sangham v. State of Kerala*,¹⁰ the High Court of Kerala stated that when the government is presented with a choice between irreparable injury to the environment and severe damage to economic interests, protection of the environment would have precedence. The court further held that no permit shall be given to any person for sand mining in the concerned area unless a sand audit is conducted.

The most celebrated of such decisions was the order of the High Court of Bombay on September 23, 2010, imposing a ban on sand extraction across Maharashtra while asking the state government to come out with a new policy on sand mining, given the environmental significance of the issue. However, the ban was lifted by the court itself in the subsequent month after a draft of the new policy was laid by the state government. Similarly, in Andhra Pradesh, the High Court has stayed sand mining in the state by way of an interim order on public interest litigation (PIL) filed by two farmers.¹¹

The courts have further been promoting the government to impose conditions on sand mining activities in India. The High Court of Kerala in *Soman v. Geologist* stated that the principle of sustainable development is now a part of environmental jurisprudence, flowing from Article 21 of the Constitution of India, and hence the state is bound to impose any conditions while granting the permit for sand mining.¹² The court stated, "[E]ven if such conditions are omitted to be mentioned in the Kerala Minor Mineral Concession Rules, still the State can impose them, in view of Article 21 of the Constitution of India." In other words, even if conditions are not authorized by the parent legislation from which the rules flow, the state is empowered to lay down such conditions under Article 21 of the Constitution.

The courts have also been insistent on formulating comprehensive policies on mining and its implementation. Notably, the Supreme Court of India, in *Deepak Kumar v.*

9 2010 A.C.J. 1912.

10 I.L.R. 2009 (2) Kerala 415.

11 By way of an order dated March 21, 2012.

12 2004 (3) K.L.T. 577.

State of Haryana,¹³ directed all the states, union territories, the MoEF, and the Ministry of Mines (MoM) to give effect to the recommendations made by the MoEF in its March 2010 report¹⁴ and the model guidelines framed by the MoM,¹⁵ within a period of six months from the date of the judgment, which was handed down on February 27, 2012. The states and the ministries are required to submit their respective compliance reports with the court. Further directions have been issued to the MoM to take steps to bring into force the Minor Minerals Conservation and Development Rules of 2010 at the earliest. State governments and union territories were also asked to take immediate steps to frame necessary rules, taking into consideration the MoEF's recommendations and model guidelines framed by the MoM.

Conclusion

Under the existing legal and regulatory regime, sand mining is reasonably regulated. There are strong provisions that require the mining industry to ensure that its activities are not harmful to the environment. The regulatory authorities are also empowered to monitor the environmental impacts of both proposed and existing sand mining projects. The mining activities that are potentially harmful to the environment can be regulated or even terminated. States are free to close certain areas for sand mining, specify the maximum amount of sand that may be extracted, and monitor the overall impact of sand

mining on the environment. However, despite a robust legal framework, the sand mining sector has been largely unregulated. The state governments have squarely failed to implement the laws in their true spirit. It is common for the licensing authorities to grant mining leases or permissions without regard to the environmental factors. In various instances, leases are issued without imposing any terms and conditions on the mining. In some cases, illegal mining operations are undertaken without obtaining relevant clearances and permissions.

Nonetheless, there are areas under the existing regime where improvements are possible. As highlighted by the MoEF, the end use of the mineral and its impact on the environment should be considered while classifying minerals as minor and major. Minimum national standards in terms of area, depth, and time period of mining leases are also required. The mining industry should also be made responsible for the restoration of areas damaged on account of their mining operations by application of the polluter-pays principle.

Further, an important aspect of regulating sand mining is to bring about a regime that can curb the existing role of sand mafia. The MoEF's report does not address this issue. The task of ousting sand mafias from sand mining may require a whole change in the system, but if the legislators, the executive, and the enforcement authorities work collectively toward achieving this goal, harmful sand mining in India can be curbed.

¹³ A.I.R. 2012 SC 1386.

¹⁴ The MoEF issued a report on Environmental Aspects of Quarrying Minor Minerals and also requested the states to issue necessary instructions for incorporating the recommendations made in the report. *See supra* note 1.

¹⁵ The MoM has issued the draft rules called the Minor Minerals Conservation and Development Rules of 2010 and the Model State Mineral Policy of 2010.

Water Law and Policy in India: The Way Ahead

The Ministry of Water Resources recently released a draft of the National Water Policy of 2012 (Draft Policy), laying down the basic principles of planning, development, and management of water resources. The Draft Policy underscores the fact that with approximately 4% of the world's renewable water resources and 2.6% of the world's land area, India is faced with the large task of meeting the survival needs of more than 17% of the world's population. The demands of agriculture and industry add to the pressure on already-scarce water resources. The Draft Policy also highlights the unequal distribution of water in different regions and among different populations, as well as the challenge of securing safe drinking water to all.

When compared to previous water policies, the Draft Policy shows a change in the government's approach towards water governance and management. The policy has done away with water allocation priorities and argues for the use of water as an economic good after meeting survival and ecological needs. The Draft Policy makes a case for the management of water as a "community resource," hinting at the eventual dilution of the long-standing proprietary rights of landowners. The Draft Policy raises several elementary questions regarding water as an economic resource, water allocation priorities, states' constitutional rights over water, and the need for a uniform water management policy and practice across all Indian states.

Water Law in India

The existing water law framework in India is fragmented and consists of state irrigation and fisheries statutes, mostly from the colonial period, as well as water pollution laws regulating water quality and pollution, and fairly recent state groundwater regulations. The inclusion of the "right to water" as a component of the fundamental right to life also forms part of the legal framework on water in India.

There are two central issues underlying the legal framework on water in India: a human rights approach based on the "right to water" and the commercial approach based on the "ownership of water."

Ownership of Water in India

One of the earliest laws on water control and distribution, the Northern India Canal and Drainage Act of 1873, was enacted to regulate irrigation, navigation, and drainage in Northern India. It established state control over water,

while refraining from asserting ownership rights over it. The Act vested the government with the right to "use and control for public purposes the water of all rivers and streams flowing in natural channels, and of all lakes." The Act established the cardinal principle of government control over water. The subsequent laws that were framed in this regard affirmed state ownership of rivers, natural streams or natural drainage channels, natural lakes, and other natural collections of water. For instance, the Madhya Pradesh Irrigation Act of 1931 provided that all rights in the water of any river, natural stream, or natural drainage channel, natural lake or other natural collection of water shall vest in the government. Similar provisions are contained in the Bihar Irrigation Act of 1997.

In the context of natural resources, state ownership cannot be equated with proprietary or absolute rights. While the state reserves rights over water resources, it acts as a trustee of the public under a legal obligation to protect the resources. In *M.C. Mehta v. Kamal Nath*,¹ the Supreme Court first recognized the "public trust doctrine" as part of the Indian legal system. The court noted that certain resources like air, the sea, waters, and forests have such great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life.² The doctrine calls on the government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.

Legislative Powers of the Union and States

As per the Constitution of India, the state governments are empowered to frame laws on water, including water supplies, irrigation and canals, drainage and embankments, water storage, and water power,^a except interstate rivers and river valleys^b (which fall under the legislative powers of the central government). Accordingly, most states have enacted their own state irrigation laws. The central government can legislate on interstate water disputes, shipping, navigation, and fishing and fisheries beyond territorial waters.

a. Entry 56, Part I of the Seventh Schedule, Constitution of India.

b. Entry 56, Part I of the Seventh Schedule, Constitution of India.

1 *M.C. Mehta v. Union of India* (1997) 1 S.C.C. 388.

2 *Id.*

In India, the easement rights of a landowner over the water courses flowing through his land are fairly established by virtue of the Indian Easements Act of 1882. In 1912, the Madras High Court observed, “[S]o long as the water rises naturally and squanders itself over the surface, it has no public character and before it arrives at any defined natural channel, it belongs solely to the owner of the land it covers and he may deal with it exactly as he thinks fit while he is making a reasonable use of his own land.”³ However, the easement rights are only limited user rights and do not conflict with the state ownership and control over water. The Easements Act upholds the right of the government to regulate the collection, retention and distribution of the water of natural water bodies or other works constructed at public expense for irrigation.⁴

While it is established that the ownership of surface water vests with the state, the legal position regarding groundwater is complex. There is no legislation that proclaims government ownership of groundwater. Customarily, landowners used to manage, control, and use the groundwater, whether contained in wells or under the land. The Easements Act establishes the rights of the land owner to collect and dispose within his own limits all water under the land that does not pass in a defined channel. However, at best, the Easements Act defines user rights over groundwater and cannot be interpreted as establishing ownership rights.

Lately, the government has affirmed its control over groundwater and the regulation of its extraction and use. In 1972, the Ministry of Agriculture created the Central Ground Water Board (CGWB) to oversee the exploration, investigation, management, and development of groundwater. The CGWB was subsequently notified under the Environment Protection Act of 1986 (EPA) to oversee and implement federal groundwater regulation. Several states have framed their own groundwater regulations in order to prevent the indiscriminate extraction of ground water.⁵ These regulations primarily regulate groundwater extraction in different areas and for different purposes, such as industrial or residential purposes. A mechanism for registering each well or tube well with the groundwater authority at the local level has been established and groundwater extraction is

discouraged for industrial and commercial purposes. A model central law to regulate and control the development of groundwater is also being developed.

Right to Water

An important aspect of the legal framework on water laws in India is the fundamental “right to water.” The higher judiciary has often interpreted the right to water as being part of the larger “right to life.” In the Sardar Sarovar case, the Supreme Court observed that water is the basic need for the survival of the human beings and is part of right of life and human rights as enshrined in Article 21 of the Constitution of India.⁶

In addition to securing access to drinking water, there are several other dimensions to the right to water. Access to clean and pollution free water is inherent to the overall right to water and environment. In *Subhash Kumar v. State of Bihar*, the Supreme Court recognized that the right to life “includes the right of enjoyment of pollution free water and air for full enjoyment of life.”⁷ Where livelihoods are directly linked to the availability of pollution-free water, such as in fishery and agriculture, the right to water gets merged with the right to livelihood.

By virtue of the public trust doctrine, the ownership of water resources vests with the government, so it is logical that the government is responsible for ensuring access to water to and for all purposes. This holds true for a welfare nation, where securing human rights is more important than the use of water for economic interests.

While the overall policymaking and planning of water resources is dealt with by the Ministry of Water Resources (MoWR), the task of water supply and sanitation is a state responsibility under the Constitution of India. States have further delegated the responsibility of water supply to municipal or other local authorities in urban areas and Panchayati Raj Institutions (PRI) in rural areas. At present, states generally plan, design, and execute water supply schemes through their state departments or state water boards. As per the 73rd and 74th constitutional amendments, states may transfer powers and responsibilities to Panchayati Raj Institutions (PRIs) and municipal bodies, with regard to minor irrigation, watershed development (to PRIs), and water supplies for domestic, industrial, and commercial purposes (to municipalities).

³ 1912 A.I.R. (Mad.) 507.

⁴ The Easements Act provides that its provisions do not affect or derogate “the right of the government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation.”

⁵ Kerala Ground Water (Control and Regulation) Act, 2002, and Goa Groundwater Regulation Act, 2002.

⁶ *Narmada Bachao Andolan v. Union of India*, Writ Petition (Civil) No. 319 of 1994, A.I.R. 2000 SC 3751.

⁷ *Subhash Kumar v. State of Bihar*, A.I.R. 1991 SC 420.

The Policy Challenges

The Draft Policy must be viewed in light of the above discussion.

The Right to Water Versus Water as an Economic Commodity

The Draft Policy addresses the human right to safe and clean drinking water and sanitation, and stipulates that water for human needs should have pre-emptive priority over all other uses. The central government, the state governments, and local bodies are required to ensure access to the minimum quantity of potable water for essential health and hygiene to all citizens. Ecological needs are also separately addressed, whereby the Draft Policy provides for keeping aside a portion of river flows for meeting such needs.

However, the Draft Policy argues that after meeting basic human needs and ecological needs, water should be treated as an “economic good” with higher priority placed on basic livelihood support for the poor and national food security. Although the Draft Policy can be termed the first official document in which the concept of treating water as an economic resource is so eloquently stated, it is not entirely new to India. The earlier Swajaldhara drinking water scheme enjoins water users to take partial responsibility for the capital costs of new drinking water infrastructure and full responsibility for operation and maintenance.

Internationally, the Dublin Statement on Water and Sustainable Development⁸ asserted that water has an economic value in all its competing uses and recognized water as an economic good. This approach suggests an allocation of water for multiple purposes based on its market price, which in turn would be determined by demand and supply factors. Economists are of two minds regarding whether this basic economic theory can be applied to water, which is a scarce resource and is essential for human life. This approach, however, checks wastages in water consumption as one pays for the volume of water he consumes.

In the Indian context, it is feared that this approach may translate into irrigation needs competing against water requirements of industry, especially those sectors with high rates of water consumption, such as alcohol, beverages, and paints. This may have significant implications on irrigation and agro-based small-scale industries, which may suffer at the hands of large industries.

⁸ Also known as the Dublin Principles, this was a meeting of experts on water related problems that took place on January 31, 1992, at the International Conference on Water and the Environment in Dublin, Ireland.

This should further be seen in light of the fact that under the Draft Policy, the water allocation priorities have been done away with. The current water policy, the National Water Policy of 2002 (Water Policy) sets water allocation priorities with drinking water on the top, followed by irrigation and hydropower. In contrast, the Draft Policy does not appear to be sincere or serious regarding water allocation to basic livelihood support for poor and national food security. Further, if water is to be treated as an economic commodity, how would food security take precedence over other uses? Or does this mean that the government proposes to prioritize food security and livelihood needs over industrial and other commercial uses? If so, why does the Draft Policy not enunciate that in so many words? Further, the Draft Policy also hints at an overhaul in water pricing, proposed to be guided by economic principles in order to promote efficient usage and to maximize the derived value from water.

Water Allocation Priorities

- Drinking Water
- Irrigation
- Hydro-power
- Ecology
- Agro-based industries and non-agricultural industries
- Navigation and other uses

The absence of allocation priorities, coupled with the treatment of water as an economic resource, may leave this resource to the mercy of market forces. Unless the government puts in place systems of subsidies and incentives for agriculture, hydro-power, and agro-based industries, it is possible that the largest amount of water gets allocated to polluting industries, which have the economic power to pay for the water. This would have social as well as economic implications. Further, the Draft Policy may aggravate the already unequal allocation of water between the poor and the rich.

National Versus State Laws

The Draft Policy envisages a broad overarching national legal framework, which may serve as model legislation for the states for their respective regulations in this area. This not only conflicts with the constitutional authority of the states to legislate on water but would also disrupt local water planning and management practices. In India, water availability, climatic conditions, rainfall, and land use patterns differ from one state to another. What may serve as a good policy for one state may fail in another

state completely. An overarching national framework laying down general principles of water management is welcome, but it should not obliterate state water planning and management practices.

The Draft Policy fails to explicate the areas and principles to be reflected in such a national framework. A crucial question is whether the Draft Policy would lead to the end of old state irrigation and fishery laws.

The management of water as a community resource also conflicts with state control and management. In such a scenario, it is expected that states may oppose the formulation of national laws that challenge their powers and authority over such an important resource.

Public-Private Partnership

The Draft Policy proposes community management of water resources while maintaining that water is to be held by the state under the public trust doctrine. It envisages a shift in the role of the government from service provider to regulator and facilitator. The water-related services are proposed to be transferred to the community and/or private sector with appropriate “public-private partnerships.”

The Draft Policy makes it clear that a water regulatory authority will be established in each state, which would be responsible for maintaining a water tariff system and charges, allocating water, monitoring operations, and reviewing performance. Since important decisions regarding water allocation and pricing would remain the government’s function, what can only be delegated to local communities or the private sector is administrative services. In principle, this is contrary to community management of water resources, which comprises the active participation of the private sector in planning and managing the resource. Adequate checks and balances are necessary to prevent any mismanagement of water.

The Draft Policy, in a nutshell, appears to be an attempt to commercialize the trade in water in the name of water management.

The Draft Policy is a disappointment as no concrete measures for the restoration of polluted water bodies and prevention of further damage are suggested. The water supply can only meet the increasing demand if polluted water bodies are restored from time to time. India’s water policy must also incorporate the “polluter pays” principle, thereby mandating the polluting industry to bear the cost of damage.



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Legal Updates

E-Waste

Draft Guidelines on the Implementation of the E-Waste (Management & Handling) Rules of 2011

The E-Waste (Management & Handling) Rules of 2011, which were notified in May 2011, came into effect on May 1, 2012. To help all stakeholders in effective compliance and implementation, the Central Pollution Control Board (CPCB) has recently issued draft guidelines on the implementation of the E-Waste Rules.

The draft guidelines enumerate the obligations and responsibilities of producers, consumers, bulk consumers, dismantlers, and recyclers under the E-Waste Rules and provide guidance on various aspects relating to extended producers' responsibility, the take-back mechanism, and the recycling and dismantling of e-waste.

These guidelines are still in draft form and the CPCB will finalize them shortly.

Budget

Indian Budget and the Environment

In March, the Finance Minister of India presented the budget for the 2012-2013 financial year. The budget allocates 24,300 million rupees (US\$430 million) for the Ministry of Environment & Forests, an increase from the 2011-2012 allocation, 23,000 million rupees (US\$408 million).

The budget also provides for 9,066.8 million rupees (US\$161 million) to be used for generating forests, protecting wildlife, and developing eco-development programs. This includes the allocation for some ambitious government programs, such as the Green India Mission

and the National Afforestation Program. The Green India Mission is one of the eight missions under the National Action Plan for Climate Change and it has been operationalized with an objective to increase forest cover on five million hectares of land and improve the quality of forest cover on another five million hectares.

The budget also proposes concessions and exemptions to encourage the consumption of energy-saving devices, industrial plants, and equipment needed for solar thermal projects. Concessions from basic customs duties are also stipulated for certain items imported for the manufacture of hybrid or electric vehicles and battery packs for such vehicles.

International

India Opposes the Imposition of the EU Carbon Tax on Airlines

The European Union (EU) imposed carbon taxes on airlines in order to combat climate change, a regulation that came into force on January 1, 2012.

All airlines flying to EU countries are obligated to get permits to cover their carbon emissions for the whole length of the flight. They must also monitor emissions. India, along with China, the United States, Russia, Brazil, and others, has opposed the regulation. These countries are also contemplating taking retaliatory measures against the EU, including reviewing or abrogating the bilateral service agreements and open skies agreements with each EU country, suspending all negotiations on operating rights for EU airlines and aircraft operators, and imposing additional levies and charges on flights coming in from EU nations.