

**Planning Commission**  
(Secretariat for Infrastructure)

**Commercial use of land at Delhi and Mumbai Airports**  
*An analysis of the questions of law and public policy*

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**This case study should not be reported as representing the views of the Planning Commission.**

The views expressed in this case study are those of the author and do not necessarily represent the views of the Planning Commission. This study is being published as part of a larger effort in the Planning Commission to identify and disseminate best practices and highlight areas for improvement in the design of concession contracts for PPPs and the process for awarding them.

**1. Introduction**

1.1 In June 2003, the Airports Authority of India (the “**AAI**”) had approved a proposal for the modernization of the Delhi and Mumbai airports through Public-Private Partnership (**PPP**). The bidding process began in May 2004 but was not bereft of controversies. One contentious issue that arose was with respect to the legality of permitting the proposed Concessionaire to develop the airport for commercial uses unrelated to the airport, especially with reference to the provisions of the Airports Authority of India Act, 1994. Besides the legal angle, this issue had significant financial and policy implications for the bidding process. Further, it would also determine the pattern of airport development during the proposed concession period spanning 60 years.

1.2 Since there was a difference of opinion on the issue between the constituents of the Inter-Ministerial Group that was finalizing the transaction documents, it was decided to seek the opinion of the Solicitor General of India (the “**SGI**”), and thereafter, of the Attorney General of India (the “**AGI**”). The final decision was taken by the Empowered Group of Ministers. The following is a legal perspective on this issue.

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1.3 The paper begins with an introduction to the issue at hand followed by a summary of the opinion of the SGI; interpretations of the SGI's opinion by the Planning Commission and the Ministry of Civil Aviation; brief analysis of the opinion of the AGI; the final decision of the Empowered Group of Ministers; and a concluding note.

## **2. Issue**

2.1 *Whether commercial activities listed in Schedule 19 of the draft Operation, Management and Development Agreement (hereinafter, the OMDA) like building of golf courses, business parks, high tech parks, commercial offices, leisure facilities, commercial arcades, sports complexes, shopping complexes and convention centres etc., unconnected with the scope of airport development and management, can be undertaken by the Concessionaire (constituted as a Joint Venture Company with 26% stake of the Authority) on the land leased out by the Airport Authority of India?*

2.2 This question arose because the aforementioned **activities were to be carried on independent of the operation of the Airport**, i.e., primarily for the general public and not for passengers, crew or staff who generally use the airport for commuting from one place to another. This issue arose as conflicting positions were taken by the Planning Commission and the Ministry of Civil Aviation. To resolve this matter, the Empowered Group of Ministers (the “**EGoM**”), in its meeting held on 3.5.2005, directed that the opinion of AGI may be sought. However, the Ministry of Civil Aviation referred the matter to SGI whose opinion was placed before the EGoM.

## **3. Opinion of the Solicitor General of India**

3.1 To address the issue at hand, the learned Solicitor General, in his opinion dated 19.5.2005, first referred to the following sections and specific sub-sections and clauses of the AAI Act, 1994:

*12 (1) Subject to the rules, if any, made by the Central Government in this behalf, it shall be the function of the Authority to manage the airports, the civil enclaves and the aeronautical communication stations efficiently.*

*(2) It shall be the duty of the Authority to provide air traffic service and air transport service at any airport and civil enclaves.*

(3) *Without prejudice to the generality of the provisions contained in sub-sections (1) and (2), the Authority may—*

(f) *establish and maintain hotels, restaurants and restrooms at or near the airports;*

(n) *form one or more companies under the Companies Act, 1956 or under any other law relating to companies to further the efficient discharge of the functions imposed on it by this Act;*

(o) *take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power or the discharge of any function conferred or imposed on its by this Act;*

(r) *any other activity at the airports and the civil enclaves in the best commercial interests of the Authority including cargo handling, setting up of joint ventures for the discharge of any function assigned to the Authority.*

12A. (1) *Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit: Provided lease shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports and civil enclaves.*

(2) *No lease under sub-section (1) shall be made without the previous approval of the Central Government.*

(3) *Any money, payable by the lessee in terms of the lease made under sub-section (1), shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of section 24.*

(4) *The lessee, who has been assigned any function of the Authority under sub-section (1), shall have all the powers of the Authority necessary for the performance of such functions in terms of the lease.*

3.2 Next, the SGI discussed the sections which he considered to be the most material in the present case - sections 20 and 21, which are reproduced below:

*20. Subject to the provisions of Section 21, the Authority shall be competent to enter into and perform any contract necessary for the discharge of its functions under this Act.*

*21. (1) Every contract shall, on behalf of the Authority, be made by the Chairperson or such other member or such officer of the Authority as may be generally or specially empowered in this behalf by the Authority and such contracts or class of contracts as may be specified in the regulations shall be sealed with the common seal of the Authority: Provided that no contract exceeding such value or amount as the Central Government may, from time to time, by order, fix in this behalf shall be made unless it has been previously approved by the Authority: Provided further that no contract for the acquisition or sale of immovable property or for the lease of any such property for a term exceeding thirty years and no other contract exceeding such value or amount as the Central Government may, from time to time, by order, fix in this behalf shall be made unless it has been previously approved by the Central Government.*

*(2) Subject to the provisions of sub-section (1), the form and manner in which any contract shall be made under this Act shall be such as may be specified by regulations.*

*(3) No contract which is not in accordance with the provisions of this Act and the regulations shall be binding on the Authority.*

3.3 His interpretation of all the aforementioned sections can be summarized as under:

(a) The AAI enjoys the power to enter into sale or lease of immovable property provided the latter must be approved by the Central Government if the lease is for a term exceeding 30 years.

- (b) Section 12(3)(r) enables the AAI to undertake activities at the airports and civil enclaves **in its best commercial interests** and can also set up JVCs for discharging its functions.

3.4 In conclusion, the SGI stated that:

- a) similar lease agreements with third parties have been entered into in the past at several airport sites;
- b) the list of commercial activities specified in Schedule 19 of the draft OMDA **cannot be justified under section 12A** of the AAI Act but **can be carried out under sections 11, 12, 20 and 21**; and
- c) a proper policy must be framed in this regard at the highest level so that “indiscriminate and unrestricted commercial development does not take place”.

#### **4. Planning Commission’s interpretation of the SGI’s opinion**

4.1 The SGI had opined that carrying out the proposed commercial activities cannot be justified under section 12A but can be undertaken under sections 11, 12, 20 and 21 of the AAI Act, 1994. However, **the OMDA was to be executed specifically under section 12A**. Hence, the aforesaid commercial activities would have to be excluded from the scope of the Concession and undertaken as a separate transaction.

4.2 The Planning Commission shared the SGI’s view that such activities must be carefully determined so as to ensure that real estate does not acquire predominance over airport development, which was the primary function and objective of the AAI.

4.3 The Planning Commission suggested that a policy note be prepared within two weeks pursuant to the advice of the SGI that a policy in this regard be formulated at the highest level.

#### **5. Ministry of Civil Aviation’s interpretation of the SGI’s opinion**

5.1 The Ministry of Civil Aviation (the “MoCA”) interpreted the SGI’s opinion as follows:

- a) No section of an Act can be read in isolation and it was necessary that section 12A be read with other relevant provisions of the Act, i.e., sections 11, 12, 20 and 21. This view was shared by their legal consultants, M/s Amarchand Mangaldas.
- b) **Section 12A may be construed as empowering AAI to authorize the Concessionaire**, if it so deems fit, to undertake some, even if not all of its functions spelt out under section 12 of the Act.
- c) A perusal of section 20 read with section 21 indicates that AAI has the right to enter into and perform any contract for acquisition or lease of immovable property.
- d) A combined reading of sections 11, 12(3), 12A, 20 and 21 indicates that AAI has the right to lease immovable property under section 12A for activities set forth in section 12(3)(f), (g) and (h) as well as to undertake commercial exploitation of unutilized or under-utilized land for generating revenues as this is in the best commercial interest of AAI.

## **6. Opinion of the Attorney - General of India**

6.1 As the matter could not be resolved satisfactorily, the EGoM in its meeting held on 14.6.2005, directed the Ministry of Civil Aviation to take the opinion of the learned Attorney General on **“Use of Airport land and limit on commercial use of land at airport complex by the JVC”**. Accordingly, the opinion of the AGI was solicited through the Ministry of Law and it has been briefly discussed hereunder.

6.2 The learned AGI in his opinion dated 17.6.2005, noted that as per the proposed Agreement, the rights and authorities assigned to the Concessionaire by AAI are the ones possessed by AAI itself. This is clear from a perusal of **Clause 2.1** of the draft OMDA which reads as under:

*“AAI hereby grants to the JVC, the exclusive right and authority during the Term to undertake some of the functions of the AAI being the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and to perform services and activities constituting Aeronautical Services, and*

*Non-Aeronautical Services (but excluding Reserved Activities) at the Airport..."*

6.2 Hence, whether or not the activities described under Schedule 19 of the draft OMDA could be undertaken by the Concessionaire was to be determined by examining whether AAI has the requisite power to undertake such activities.

6.3 The AAI was a statutory entity created by the Airports Authority of India Act, 1994 (hereinafter, the Act) and, hence, all its functions and powers must be in conformity with the said Act. Actions which were beyond the functions and powers conferred by the Act would be *ultra vires* its powers and shall be considered void. For the definition of *ultra vires*, the AGI referred to the case of *Khargram Panchayat Samiti v. State of West Bengal*<sup>1</sup> wherein the Honourable Supreme Court has quoted with approval Wade on Administrative Law (5th edn. p. 217) which defined the doctrine of *ultra vires* as follows:

*"Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions"*

6.4 The provisions of the 1994 Act considered relevant by the AGI for resolving the issue at hand were Sections 2, 11, 12, 12A, 20 and 21. The Preamble of the Act was also considered. On examining the aforementioned sections, the learned AGI concluded the following:

- a) Section 12A specifically deals with leases that can be lawfully made by the AAI and such leases can only be for carrying out functions stated in section 12 of the Act; and
- b) Section 12 has to be read with Section 2, i.e., the definition section of the Act.

6.5 The AGI had specifically referred to the following definitions contained in Section 2 of the Act:

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<sup>1</sup> (1987) 3 SCC 82

2. *In this Act, unless the context otherwise requires-*

(b) *“airport” means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes aerodrome as defined in clause (2) of section 2 of the Aircraft Act, 1934;*

(d) *“air traffic service” includes flight information service, alerting service, air traffic advisory service, air traffic control service, area control service, approach control service and airport control service;*

(e) *“air transport service” means any service, for any kind of remuneration, whatsoever, for the transport by air of persons, mail or any other thing, animate or inanimate, whether such service relates to a single flight or series of flights.*

6.6 It must be noted that these definitions relate specifically to airports and civil enclaves. As an example, he reasoned that keeping in mind that an “airport” is meant for passenger facilities according to its definition under Section 2, any facility which is not intended primarily for passengers would not be covered within the functions of AAI. Hence, a reading of Sections 12(1) and (2) with Section 2 indicates that any power or function not conferred on AAI under Section 12 read with the said definitions cannot be exercised or performed by it. Furthermore, he stated that Section 12(3)(r) of the Act is a residuary clause and the words ‘*any other activity*’ have to be read in light of other functions and powers enumerated in Sections 12(1) and (2). With respect to Section 11, the AGI referred to the doctrine of *noscitur a sociis*, i.e., the meaning of a word must be ascertained in relation to the meaning of the words associated with it and not in isolation. Finally, he asserted that Sections 20 and 21 do not permit the AAI to lease immovable property for any purpose it chooses to, except in conformity with its powers and functions as laid out in Section 12.

6.7 The AGI also took into consideration Clause 12 of the Policy on Airport Infrastructure which deals with commercial activities. The relevant portions have been reproduced here for the sake of convenience:

*12.1 Across the world, the trend is towards a very high percentage, ranging from 60 to 70%, of the total revenue of airport operators being generated from non-aeronautical sources at major airports. In India,*



*although these services are even now provided by private agencies, the comparable figure for AAI at international airports is just 22%. There will be a major thrust towards increasing the share of commercial revenue emerging from non-aeronautical sources. This will help in optimal exploitation of the full commercial potential of airports and make many airports not only viable but capable of generating surpluses for further expansion and development.*

*12.2 In order to maximize the revenue while at the same time maintain transparency, there will be a master plan for development of commercial activities and facilities, as part of the overall master plan approved by the management, for the airport as a whole. The space-use patterns will normally not be deviated from.*

6.8 In this regard the AGI opined that policies have to be read in conformity with the statute and cannot have an effect beyond it. Here, he also placed reliance on the case of *Federation of Railways Officers Association v. Union of India*<sup>2</sup> where the Honourable Supreme Court has held that the policy of the Government cannot be contrary to the law or Constitution.

6.9 Thus, in conclusion, the essence of the opinion of the AGI was that it would not be lawfully permissible for the AAI to grant a lease to any person in respect of any airport property for the purposes of commercial activities listed in Schedule 19 of the draft OMDA like building of golf courses, business parks, high tech parks, commercial offices, leisure facilities, commercial arcades, sports complexes, shopping complexes and convention centres etc. unconnected with the scope of airport development and management, including provision of passenger facilities and amenities. If it was considered necessary to permit lease of land to the Concessionaire for undertaking commercial activities that go beyond the provision of passenger facilities at the airport, then it must be done only after an amendment was made to the AAI Act, 1994.

## **7. Comments on the opinion of SGI and AGI**

7.1 The SGI and the AGI have both rightly pointed out that a lease agreement that includes the commercial activities, as contemplated under Schedule 19 of the draft

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<sup>2</sup> 2003 4 SCC 289

OMDA, cannot be lawfully executed under Section 12A of the AAI Act, 1994. While, the SGI has not provided his reasoning for the same, the AGI has reasoned that Section 12A is an addition made by an amendment to the Act for empowering the AAI to grant a lease of any premises of an airport only for the purpose of carrying out some of AAI's functions under Section 12 of the Act. Therefore, grant of a lease by AAI of any of its immovable properties, whether as part of the concession or otherwise, can only be for the purpose of carrying out AAI's functions specified under Section 12. In the circumstances, if the lease allows a concessionaire to use the airport land for any purpose other than for carrying out the functions specified under Section 12, then such lease would be contrary to the provisions of the Act, and hence, void. The author concurs with this opinion.

7.2 Further, the SGI considered the commercial activities under Schedule 19 of the draft OMDA to be justified under sections 11, 12, 20 and 21 of the Act while the AGI had opined otherwise. The author disagrees with the SGI's opinion on the following grounds:

- a) The powers and functions stated in Sections 12 and 12A of the Act clearly indicate that the AAI is empowered to enter into an agreement primarily for discharging its functions in relation to managing the airports, civil enclaves and aeronautical communication stations effectively. All these terms have been defined in Section 2 of the Act and include the commercial activities proposed in Schedule 19 of the draft OMDA. Evidently, these activities cannot be regarded as passenger facilities as they do not primarily cater to the needs of the passengers and are aimed at serving the general public. Hence, the said commercial exploitation of airport land is beyond the scope of Section 12 of the Act and shall be void if undertaken. The AGI also arrived at this conclusion by taking into consideration the definitions of "airport", "air traffic service" and "air transport service".

The SGI also relied on sub-sections 12(3)(f), (n), (o) and (r). However, the Act clearly stipulates that these sub-sections must be read without prejudice to section 12(1) and (2), i.e., they cannot include powers wider than those contemplated under section 12(1) and (2). Furthermore, the specific powers conferred under section 12(3) must be seen as illustrations of what has been generally conferred under section 12(1)

and (2), as has been suggested by the AGI. The author also agrees with the AGI's opinion that section 12(3)(r) must be considered as a 'residuary clause' and the words '*any other activity*' in the same must be read in light of the functions and powers specified under section 12(1) and (2). Essentially, section 12(3)(r) cannot be read to include activities that bear no nexus with development of aeronautical facilities or passenger facilities at an airport.

Section 12 does not empower the AAI to engage in building of golf courses, business parks, high tech parks, commercial offices, leisure facilities, commercial arcades, sports complexes, shopping complexes and convention centres etc. which are unconnected with the scope of development and management of airports and passenger facilities. Thus, the question of AAI assigning the right of undertaking such commercial development to any concessionaire does not arise and, if done, shall be considered *ultra vires*.

- b) Section 11 of the Act requires AAI to act on business principles in the discharge of its functions under the Act. As discussed in sub-para (a) above, the AAI is not authorized to undertake commercial development of the kind included in Schedule 19 of the draft OMDA and, hence, this section cannot be seen as conferring any new powers on the AAI. The AGI has also arrived at this conclusion by applying the principles related to *noscitur a sociis*, i.e., the meaning of a word must be ascertained with reference to the meaning of the words associated with it. He has observed that this section has to be read along with the other sections, especially Sections 12 and 12A.
- c) Section 20 provides that AAI is competent to enter into and perform any contract of lease and/or sale that is necessary for the discharge of its functions under the Act. The author is of the view that a lease cannot be granted by AAI in respect of any part of the airport premises for commercial use as proposed under Schedule 19 of the draft OMDA as this cannot qualify as one of the functions of AAI under Section 12, as discussed above.

- d) Moreover the fundamental difference between Sections 20 and 12A of the Act is that while the former is simply a transfer of title of immovable property of the AAI, the latter involves actual assignment of rights and powers conferred upon it under section 12. Hence, as the SGI opined that undertaking the proposed commercial development shall not be in conformity with Section 12A, once this is established, Section 20 may be regarded as immaterial in the present matter.

7.3 The AGI concluded that Sections 20 and 21 do not permit AAI to enter into sale/ lease of immovable property for any purpose as it may choose but can only do so for activities “necessary for the discharge” of its functions. It had already been established that the proposed commercial development is beyond the scope of AAI’s powers under the Act. Thus, if it was thought necessary that land should be leased out to the selected Concessionaire for commercial purposes which were not related to the airport or its passenger facilities, it could be done only by bringing in an appropriate amendment to the AAI Act, 1994.

## **8. Decision of the EGoM**

8.1 After considering the opinion of the AGI, the EGoM decided in its meeting held on 22<sup>nd</sup> June, 2005 that all commercial activities unrelated to the airport should be deleted from OMDA. It was **decided that AAI is not empowered** under the AAI Act, 1994 to lease land to the proposed Concessionaire for commercial activities listed in Schedule 19 of the draft OMDA Agreement like building of golf courses, business parks, high tech parks, commercial offices, leisure facilities, commercial arcades, sports complexes, shopping complexes and convention centres etc. unconnected with the scope of airport development and management. Thus, OMDA now includes only those activities which are intended primarily for the passengers and are in conformity with the AAI Act. Hence, the matter was finally resolved by the EGoM in favour of the view taken by the Planning Commission.

8.2 Following the decision of the EGoM, Schedule 19 which featured in the draft OMDA was omitted completely from the final bid document.

8.3 Incidentally, it is understood that following the EGoM decision, two major Indian real estate firms who were prominent bidders – DLF Limited and Hiranandini

Properties - despite having initially shown considerable interest in the proposed airport modernization projects, withdrew from the bidding process.

## **9. Conclusion**

9.1 In conclusion, the author is of the opinion that the learned SGI's legal advice was not free from ambiguity and was, therefore, open to ambivalent interpretation. The consequence was that both sides drew from that opinion interpretations to suit their viewpoints. As a result, the opinion of the SGI, rather than resolving the matter, delayed its settlement further and the AGI's opinion had to be sought for resolving the matter. In his opinion, the AGI categorically observed that commercial use of airport land for purposes unconnected to the airport and the passengers was not lawful. The final decision of the EGoM to abide by the opinion of the AGI ensured that provisions of the AAI Act, 1994 were not violated and the OMDA conformed to the public policy enunciated in the Act.