

[F.No. AERA/20010/MIAL-DF/2009-10/Vol.III]

Airports Economic Regulatory Authority Of India

Order No. 02/2012-13

**AERA Building,
Administrative Complex,
Safdarjung Airport,
New Delhi -110 003.**

Date of Order: 16th April, 2012

Date of Issue: 18th April, 2012

**In the matter of determination of Development Fee in respect of
Chhatrapati Shivaji International Airport, Mumbai**

The Central Government, vide letter no. AV 24011/001/2009-AD dated 27 February 2009 granted approval for levy of Development Fee (DF) by Mumbai International Airport Pvt. Ltd., (MIAL) at Chhatrapati Shivaji International Airport (CSI Airport) Mumbai @ Rs.100 /-per departing domestic passenger and @ Rs. 600 /- per departing international passenger, inclusive of all applicable taxes, under Section 22A of the Airports Authority of India Act, 1994, purely on an 'ad-hoc' basis, for a period of 48 months, w.e.f. 01.04.2009. This 'ad-hoc' approval was subject to review, and, inter alia, subject to the following conditions:

“

(i) *The levy will be reviewed 6-months after commencement by the Regulator/Central Government and thereafter at such intervals as the Regulator/Central Government may decide.*

(ii) *The amount collected through DF would under no circumstances exceed the ceiling of Rs. 1,543 crores and in case of any cost escalation beyond Rs. 9,802 crores, the amount representing the escalation would have to be brought in by MIAL through other sources. The ceiling amount would be exclusive of taxes, if any.*

(iii) *Rate and tenure of levy are premised upon the traffic projections and other estimates. In case due to actual figures being different than those estimated, the collections during levy period exceed the amount of Rs.1543 crores, or any other amount which the Regulator/Government may determine, the excess amount so collected shall not be utilized, for any purpose whatsoever, without the prior approval of the Regulator/Central Govt.”*



2. Thus, the said approval was to be reviewed by the Regulator/Government after adequate consultation with users and the amount collected through DF was not to exceed the ceiling of Rs. 1543 cr (exclusive of taxes, if any). It was also stated in the approval that in case of any escalation beyond Rs 9802 cr, the amount representing the escalation would have to be brought in by MIAL through other sources. After establishment of this Authority, Ministry of Civil Aviation (MoCA) forwarded MIAL's request for bridging the funding gap of Rs. 2350 cr, as against that of Rs. 1543 cr (as permitted by MoCA), through DF. It was stated that while granting DF of Rs. 1543 cr MoCA had left some gap to be funded (Rs 2350 cr – Rs 1543 cr = Rs 807 cr), which was not possible to be met through any other means. MIAL had requested that this entire funding gap be fully met through levy of DF.

3. Accordingly, MIAL furnished the details of utilization of DF. It further submitted that:

3.1. While finalizing DF for CSI airport, Mumbai w.e.f. 01.04.2009 an amount of Rs 1,543 crores was sanctioned by MoCA against MIAL's request of Rs 2,350 crores by the Central Government.

3.2. At that time, the total project cost envisaged was Rs 9,802 crores and various means of finance were as follows:

Means of Finance	Proposed earlier (Rs Cr)	Revised (Rs Cr)
Equity	1,200	1,200
Internal Accruals	2,152	1,021
Debt	4,231	4,231
Deposits from Real Estate Development	2,219	1,000
Total	9,802	7,452

3.3. Thus there was a total funding gap of Rs 2,350 crores (i.e Rs 9802 crores -Rs 7452 crores =Rs 2350 crores) for which request was made to MoCA for Rs 375/- per domestic passenger and Rs 1000/- per international passenger. However, DF @ Rs. 100 per domestic embarking passenger and @ Rs. 600 per international embarking passenger for a period of 4 years was approved, on an adhoc basis, to bridge a funding gap of Rs. 1543 crores, exclusive of applicable taxes (which was apparently erroneously stated as "exclusive of applicable taxes" although as per MoCA's letter dated 27.02.2009, the approval was "inclusive of all applicable taxes").

3.4. Further to the said determination by MoCA, following developments have occurred that needed to be taken into consideration while determining DF:

3.4.1. Actual international traffic is much less than the projected traffic.

3.4.2. MoCA had asked MIAL to bear the cost of ATC tower and technical Block to the extent of Rs 150 crores vide MoCA's letter No AV.24011/002/2009-AD dated



19.11.2009. This would result in increase in project cost by Rs 150 crores i.e. Rs 9,952 crores.

3.4.3. As a result, the funding gap would be Rs 2,500 crores – including Rs 2,350 crores and Rs 150 crores on account of increase in cost of project.

3.5. MIAL had collected total DF amount of Rs 182 crores till 30.11.2009. Hence, there was a balance of Rs 2,318 crores (including Rs 150 crores increase in project cost) which needed to be collected by March 2013.

3.6. In view of above, the DF needed to be revised to Rs 200 per embarking domestic passenger and Rs 1000 per embarking international passenger.

3.7. MIAL also intimated that though it was ensuring time bound development of real estate, however, it will be a herculean task to realize Rs 1000 crores by 2012-13. Further, it was stated that taking over CSI Airport all revenue streams have substantially increased, in spite of fall in number of passengers in the year 2008-09 vis-a-vis 2007-08; and that because of extraordinary efforts undertaken by MIAL there was an increase of 23% in non-Aero revenue. The projections made while making the application for DF were quite aggressive, all-out efforts were being made to achieve higher revenue wherever possible. There was no possibility of any refundable short term advance from shareholders and that no additional funds in the form of equity/debt have been received. It was further stated that the passenger traffic for the period April'09 to November' 09 were as shown below:

Passenger millions)	(in	Projected	Actual
International		6.34	5.29
Domestic		10.70	11.23
Total		17.04	16.52

3.8. Shortfall of 17%, in international traffic, though supported by a nominal increase of about 5% in domestic traffic as compared to projected traffic, had resulted in short fall in collection of DF on this account over and above on account of lower amount sanctioned. There was a further shortfall due to large number of passengers under exempt categories. Actual collection of DF in the 8 months (April 09 to November 09) was Rs 147.91 crores against billed amount of Rs 181.69 crores and projected collection of Rs 244 crores. MIAL requested the Authority to review DF at CSI Airport in order to meet the gap of Rs 957 crores comprising of additional project cost of Rs 150 crores towards ATC tower and technical block and Rs 807 crores towards lower amount sanctioned, i.e., Rs 1,543 crores as against Rs 2,350 crores requested by MIAL.

4. Further, MoCA intimated the Authority that costs for shifting of ATC tower and its associated facilities, (Rs. 150 crore) and cost of parallel taxi track will also be considered in the project cost in respect of CSI Airport, Mumbai and captured in Regulatory Asset Base for purpose of determination of DF. These were to be capitalized by MIAL.



5. Thereafter, MIAL submitted that the project cost had escalated from Rs. 9802 cr to Rs. 10,453 cr owing to the mandated costs of Rs 651 cr.

JUDGMENT DATED 26.4.2011 OF HON'BLE SUPREME COURT OF INDIA:

6. The levy and collection of DF at CSI Airport, Mumbai was challenged in the Hon'ble Supreme Court, wherein the apex court in Civil Appeal Nos. 3611 of 2011, 3612 of 2011, 3613 of 2011 and 3614 of 2011 pronounced its judgment dated 26.04.2011 (MANU/SC/0516/2011). As per the judgment, the letter dated 27.02.2009 of the Central Government, approving levy and collection of DF by MIAL at CSI airport on ad hoc basis, as ultra-vires the AAI Act, 1994. It was also held that w.e.f. 01.01.2009, no DF could be levied or collected from the embarking passengers at major airports under Section 22A of the AAI Act, 1994, unless AERA determines the rate of such DF.

7. The Hon'ble Court had further observed that:

".....But no such public notice has been issued by the Regulatory Authority under the 2008 Act pertaining to levy and collection of development fees by MIAL. Hence, MIAL could not continue to levy and collect development fees at the major airport at Mumbai and cannot do so in future until the Regulatory Authority passes an appropriate order under Section 22A of the 1994 Act as amended by the 2008 Act..."

and had granted the following relief:

Relief

....
(iii) *We direct that MIAL will henceforth not levy and collect any development fee at the major airport at Mumbai until an appropriate order is passed by the Airports Economic Regulatory Authority under Section 22A of the 1994 Act as amended by the 2008 Act.*

(v) *We further direct that henceforth, any development fees that may be levied and collected by DIAL and MIAL under the authority of the orders passed by the Airports Economic Regulatory Authority under section 22A of the 1994 Act as amended by the 2008 Act shall be credited to the Airports Authority and will be utilized for the purposes mentioned in clauses (a), (b) or (c) of Section 22A of the 1994 Act in the manner to be prescribed by the rules which may be made as early as possible."*

8. After the aforesaid judgment, the Airports Authority of India (Major Airports) Development Fee Rules, 2011 (i.e., DF Rules) were notified vide Gazette Notification dated 02.08.2011.

9. Pursuant to the aforesaid judgment, MIAL, requested the Authority to determine DF in respect of CSI Airport, Mumbai as any delay in collection of DF would jeopardise project completion due to shortage of funds. They also informed that the levy and collection of DF at CSI Airport, Mumbai had been stopped pursuant to the Hon'ble Supreme Court's order. They requested the Authority to determine DF in respect of CSI airport, Mumbai @ Rs 200/- per departing domestic passenger and Rs.1300/- per departing International Passenger, for a period of 33 months, to bridge



an estimated funding gap of Rs 2,366 crores as the independent auditors (EIL) had accepted the project cost of Rs 9,802 crores which had escalated to Rs 10,453 crores due to mandated costs in respect of cost of ATC Tower and technical block, elevated access road, widening of Mithi River and relocation of Shivaji Maharaj Statue, which had been accepted by the Board of MIAL. Further, the means of finance for the project were as follows:

Particulars	Rs in crore
Equity	1,200
Internal Accruals	1,021
Deposits from Real Estate Development	1,000
Debt	4,231
DF* - already collected	635
Total	8,087
Gap proposed to be funded through levy of DF (= 10453 - 8087)	2,366

*Collected up to March, 2011 & estimated up to 27.04.2011.

10. MIAL also stated that there was no possibility of bridging this gap through infusion of equity or additional term loans.

11. The matter was considered by the Authority and AAI was requested to appoint independent auditor(s) to audit the process/approach, cost estimates and expenditure incurred till date etc, as per the scope of work approved by the Authority and to submit the audit report for further consideration of the Authority. In pursuance thereof AAI appointed M/s. Engineers India Limited (EIL) and M/s Ved Jain and Associates for the assignment. The audit is in progress and it would take some more time to complete.

12. Further, it was informed by MIAL that while the application of MIAL for DF of Rs. 2,366 crores to fund the gap in means of finance was under consideration of the Authority, there was no change in status of means of finance in respect of funding gap. However, after relocation of Chhatrapati Shivaji Maharaj statue and finalization of project cost, the same was estimated to be Rs. 12,380 crores (as against Rs 10453 cr submitted in earlier DF application) owing to increase in IDC, pre-operative expenses, escalations, contingency and change in scope / variation in estimates.

13. However, thereafter, MIAL requested the Authority for approving levy and collection of DF at this stage @ Rs. 100 per embarking domestic passenger and @ Rs. 600 per embarking International passenger plus statutory levies if any - based on project cost of Rs. 9,802 crores, as the same was duly assessed by Independent Engineer viz. Engineers India Ltd. and reviewed by MoCA while sanctioning DF in February 2009. Also, though there has been an escalation of project cost from Rs 9802 cr to Rs 10453 cr (due to mandated costs) and thereafter to Rs 12380 cr (after relocation of Chatrapati Shivaji Maharaj statue), the audit of the same is underway and would take some more time to get completed. Also, as per their MYTP for Control Period from FY2009-10 to FY2013-14, total of internal accruals and DF aggregating to



Rs. 5,949 crore had to come as a means of finance and the amount of DF was directly related to tariff, which is yet to be approved by the Authority. They stated that there was an urgent need of funds for the timely implementation of the project hence levy and collection of DF based on project cost of Rs. 9,802 crores may be approved so that funds could be infused urgently to ensure that there was no stoppage of ongoing project till finalization of MYTP and DF by the Authority based on the project cost of Rs. 12,380 crore. Regarding funding option of debt and equity, it was informed that out of total sanctioned loan of Rs. 4,231 crore, they had already drawn Rs. 3,748 crore and the balance Rs. 483 crore was also under disbursal and of total equity of Rs. 1,200 crores, Rs. 1,000 crore had already been called. Action was being taken to call balance equity also shortly.

14. As regards the funds from real estate development, MIAL stated that Rs.1,000 crore was envisaged to be raised by way of security deposit from Real Estate Development by 31st March, 2013 (and included in the means of finance) for which all efforts were being made. However, the same might get delayed due to overall bleak sentiment and liquidity crunch in the Real Estate Market and also, because of proposed changes in direct tax laws concerning taxability of long term deposits. It also requested that the DF may be reviewed in due course in light of project cost of Rs. 12,380 crores taking into account internal accruals based on level of tariff approved against pending MYTP. MIAL also enclosed a copy of letter dated 8th December 2011 of IDBI Bank wherein the Bank had raised concerns regarding frequent revision in the project cost and extension of the completion date causing a gap of Rs 2,578 crores in the means of finance with the now envisaged project cost of Rs.12,380 crores. IDBI had stated that delayed availability of said means of finance and non tying up of balance amount of Rs 2,578 crores could delay completion of the project and lead to further increase in project cost which would be highly undesirable.

15. The Authority considered the request of MIAL regarding approval of DF based on the project cost of Rs 9802 cr and decided to propose the following for stakeholder comments:

15.1. In terms of Section 13(1) (b) of the Act read with Section 22A of AAI Act, MIAL may be permitted to levy and collect DF at CSI airport, Mumbai @ Rs 100/- per embarking domestic passenger and @ Rs 600/- per embarking international passenger, exclusive of all applicable taxes, w.e.f. March, 2012 for a period of approx 24 months (i.e. up to February, 2014) to bridge a, presently, estimated funding gap of Rs 906 crores.

15.2. The issue of escalation in project cost to Rs 12,380 crores will be considered by the Authority after the audit commissioned by it is completed. The Authority would thereafter make further orders regarding rate and tenure of DF, as may be required.

15.3. The proposal made in para 15.1 above shall be operationalised only after MIAL shows to the Authority's satisfaction that the balance equity of Rs 200 crores has been raised by it.



15.4. Rate and tenure of levy are premised upon the traffic projections and other estimates. Further, the Authority will be undertaking a review of the rate of DF by July/August 2012, by which time the audit would also have been completed.

15.5. The Authority has also observed that it is not required to consider the issue of accounting, collecting and audit etc. of the DF amount as the same have been provided for in the AAI (Major Airport), DF rules, 2011 notified on 03.08.2011.

16. Accordingly, Consultation Paper No 33/2011-12 dated 06.01.2012(i.e., CP-33), was issued soliciting stakeholders comments on the above mentioned proposals. The last date of submission of comments for the same was 27.01.2012 and was extended up to 03.02.2012 upon request from various stakeholders. After issue of CP-33, a stakeholder consultation meeting was also held on 17.01.2012 at 1100 hrs. with the stakeholders to elicit their comments/views in person. The minutes of the stakeholders meeting were uploaded on the Authority's website.

Responses to the Consultation Paper No 33/2011-12

17. In response to the CP-33, the Authority received several responses from the stakeholders, which were uploaded on the website of the Authority vide Public Notice No. 04/2011-12 and 06/2011-12 dated 10.02.2012 and 24.02.2012 respectively. The comments were forwarded to MIAL for their views on the observations made by the stakeholders vide letter dated 08.02.2012 requesting them to furnish the same by 14.02.2012. MIAL vide their letter dated 15.02.2012 requested time up to 21.02.2012 to submit their comments. MIAL forwarded their responses vide their email dated 21.02.2012.

18. The views and observations made by the stakeholders along with the comments of MIAL are summarized hereunder:

18.1. MoCA opined that the Hon'ble Supreme Court in its judgment has held the levy and collection of DF by MIAL as ultra-vires. The Hon'ble Court had directed to frame relevant Rules and orders for levy to be passed by the Authority. In pursuance of the above directives of the Hon'ble Court, Government has since framed the Development Fee Rules. Necessary orders regarding levy of DF are required to be issued by the AERA.

18.2. AAI, in their submission, reiterated that the equity beyond Rs. 1200 crores by AAI is not possible due to AAI's commitment of modernising and expanding to metro as well as other non-metro airports. Inability to infuse equity beyond Rs. 1200 crores was not only expressed by AAI but also expressed by all the shareholders of MIAL i.e. GVK, South African Consortium), in the 28th Board Meeting of MIAL held on 27th April 2011. Further, on the considered project cost of Rs. 9802 cr, AAI submitted that this cost includes Rs. 28 cr on account of construction of a hotel (which is a Non-Aeronautical Asset). In response, MIAL have stated that the correct amount in this regard is Rs.26 cr instead of Rs 28 cr and that the said hotel is a transfer asset.



18.3. MIAL in their response to the Consultation Paper have stated that the proposed levy (exclusive of any statutory levy, if any) of Rs. 100 per departing domestic passenger and Rs. 600 per departing international passenger for a period of 24 months starting March 2012, will provide much needed funds for the ongoing project.

18.4. APAO and ASSOCHAM have supported the proposal made in the Consultation Paper. APAO stated that the audit process may be completed at the earliest to determine the revised project cost to Rs. 12,380 Crores and the rate and tenure of DF.

18.5. VOICE stated that they oppose levying of DF by GMR (*apparently referring to GVK*) without proper Audit and recommended investigation into disproportionate payments made by MIAL to interested parties in order to get contract benefits. They raised the issue of project cost escalation were to recover costs which were incurred because they awarded contracts to companies without proper financial prudence, referring to an article published in India Today magazine. They suggested that to get a clearer picture, bid cost and the costs incurred can be compared for Airports at 2 cities—namely Delhi and Istanbul – which were built at around the same time. They further proposed that AERA should mandate Airport Operators to submit the rate of ADF / UDF before undertaking the contract to ensure greater transparency in determination and levy of ADF / UDF.

MIAL responded that the Project Cost of Rs. 9802 crores, was based on Master Plan which was submitted by MIAL on 21st May, 2007 and Major Development Plan submitted on 8th November, 2007; that it had been approved by the Board of Directors of the company and was verified by Engineers India Limited (EIL), the Lenders' Engineer and also considered by MoCA, at the time of DF approval in February 2009. The plans acquired finality once all comments of MoCA/ AAI were duly addressed by MIAL as per requirement of State Support Agreement (SSA) and Operation, Management and Development Agreement (OMDA). Further, it clarified that MIAL has not awarded any construction contract to any GVK group Company or any interested party.

18.6. IATA stated that they agree with AERA that the DF proposed for CSIA is a pre-funding scheme that should be approved only as a measure of last resort. However they have submitted that the airport operator has not convincingly demonstrated that other financing options have been thoroughly explored and exhausted. It would seem that except for one minority shareholder, the remaining shareholders of Mumbai International Airport Limited had been prepared to inject more equity capital. As such IATA does not support the approval of the DF. They also stated that the six times difference in the proposed DF for international departing passenger (Rs. 600) and domestic departing passengers (Rs. 100) is unjustifiably high and that a reasonable and transparent basis for working out the appropriate fees for international and domestic departing passengers should be used, in the absence of which the fairest approach would be to set the same fee for both groups of passengers. They further stated that while the 'ad-hoc' approval by the Ministry of Civil Aviation in February 2009 used the same fee quantum, AERA is not obligated to follow that without proper justification.



In response, MIAL have replied that before approaching AERA for DF, MIAL had explored and exhausted all other financing options to raise balance means of finance. Further, there is no discrimination inter se a class of passengers. The proposed DF to be collected from departing domestic and international passengers is based on already prevalent practice which is working satisfactorily. Recently in case of DIAL, after extensive consultation, Authority has approved DF @ Rs 200/- per departing domestic passenger and Rs. 1300/- per departing international passenger. It is well understood that average ticket size in case of international travel is much higher than that of domestic sector. Even in case of CSI Airport, DF sanctioned by MoCA @ Rs.100 per departing domestic passenger and Rs. 600 per departing international passenger had been implemented successfully.

18.7. British Airways have stated that initial inaccurate business case on project costs, an over optimistic forecast on passenger growth, and no constructive consultation with the airlines at the planning stage created the necessity for a development fee. Levy of extra fee on airline passengers is likely to depress growth further. They also expressed concern that if the airlines will be forced to collect a development fee through an extra tax on the ticket, the airlines will be absorbing these costs for all tickets that have already been sold.

In response MIAL have stated that passenger growth is a function of various variables like prevalent economic conditions, penetration of aviation among population in a particular country, cost of fuel and available connectivity. Experience at CSI Airport does not support the presumption that DF is counter-productive for passenger growth. Further they have clarified that apprehension regarding airlines having to absorb DF for the tickets already sold is incorrect since earlier also when DF was levied, it was applicable only for the tickets to be sold /booked after a particular cutoff date and not for the tickets sold prior to such cutoff date.

18.8. Air India have stated that they are in general opposed to aviation taxes which puts extra burden on the passengers. Further they raised concerns regarding escalation in project cost, applicability of Service tax on DF, application of single till system for determination of tariffs for CSI airport, clubbing of determination of DF and tariffs for CSI airport and proper utilization of DF amount collected for the proper purposes. They also submitted that the levy of all future User Development Fees and Development Fees should be made with sufficient advance notice for implementation with specific notation that date of ticket issue will be the parameter for implementation date. It was stated that high rate of fees will lead to increase in air travel cost and introduce new barriers for development of travel industry and high airport tariffs may restrict growth. Competition between different airports in India, created by privatisation and deregulation is essentially restricted to competition between destinations. Hence, there is a strong case for airports to incentivise passengers and airlines to fly to their destinations and use their airports. AI further stated that exemptions granted to UDF and DF charging airports should be standardized to minimize confusion and pricing errors at the time of ticketing and



gave a model list of exemptions to uniformly apply at all UDF and DF charging airports in India.

Regarding additional equity, Air India have stated that MIAL airport could also consider sale of an equity stake in the business to augment its financial resources instead of taxing the airline industry which is already under a lot of strain. (There is already a news item for sale of 26% stake to Changi airport by MIAL).

MIAL in their response have stated that it is a myth that DF leads to higher airport tariffs as levy of DF leads to smoothening of annual increase in tariffs since the assets funded out of DF are not included in RAB. It may be noted that DF is not an additional cost to the airline but is a direct pass-through which will be collected by the Airlines from the passengers and will be deposited in Escrow accounts as per provisions of Airports Authority of India (Major Airports) Development Fee Rules, 2011. There is no evidence to establish that levy of DF is counter-productive to passenger growth. In fact at CSI, Mumbai, passenger growth during the period when DF was being levied was healthier than the current period when no DF is being levied. Further, they stated that the suggestion of Air India for airports to incentivise passengers and airlines to fly to their destination and use their airports are welcome suggestions and might be implemented by respective airports on need basis. However, the current proposal is for determination of DF in respect of CSI Airport, Mumbai. MIAL further commented that utilization of DF was being monitored regularly by MoCA and AAI and was subject to audit by Independent Auditors appointed by AAI. All reports of Auditors have been submitted to AAI, MoCA and also to AERA from time to time. Regarding exemptions from DF, MIAL stated that exemption to passengers from levy of DF is subject matter of DGCA. Needless to say, DF is proposed to be utilised for funding of project cost which ultimately result in creation of facilities and amenities for passengers. Further, regarding applicability of Service Tax on DF, MIAL referred to Central board of Excise & Customs (CBEC)'s letter F.No. 106/Commr (ST)/2009 dated July 8, 2011 wherein it has been opined that DF is subject to levy of service tax.

Responding to the contribution of profits to fund the project MIAL stated that contention of Air India that MIAL is generating profits, which should be utilised for funding the project are well accepted. They further remarked that the means of finance for project cost includes, as one of its components, internal accruals generated till completion of the project. Regarding the sale proceed from sale of MIAL equity shares by any shareholders, MIAL stated that such sale proceeds, if any, would be received by the concerned shareholder and would not accrue to MIAL. Hence the same is not available to MIAL as shareholders will have their own commitments to be made and therefore question of utilization the same by MIAL does not arise.

18.9. APAI, in its response raised concerns about the cost escalation in respect of the CSI Airport and stated that AERA should only look at the best international practices and not follow the cost of escalation projected by the Airport operator. They commented that funding gap does not have any meaning in a PPP project, as the Airport Developer has been given sufficient concessions and the consideration paid



was not based on any market value of the land or the assets at the time of handing over. Once a DF is fixed for a period of 24 months, there should be no charge in the same, based on any cost escalations whatever may be the compelling reasons for such escalation. They further stated that it is strange that as per the OMDA, Airport Operators are required to get a minimum guaranteed return on the total capital invested/equity. This can happen only when there is no transparency and one gets the blessings of Government in control of the affairs going on at that time.

In response MIAL referred to Section 22A of the AAI Act, 1994 whereunder levy and collection of Development Fee is allowed, for the purposes of, inter alia, funding or financing the costs of upgradation, expansion or development of the airport at which the fees is collected. They also referred to Section 13 (1) (b) of the AERA Act, 2008 which empowers the Authority to determine the amount of DF. They stated that thus, it is within the purview of the Authority to determine the amount of DF based on funding gap. There may be a need to review DF depending on various variables, which, inter alia, include change in project cost and means of finance. Further as per ICAO's Policies on Charges for Airports and Air Navigation Services, DF (pre-funding) for projects is permitted in specific circumstances as detailed therein. MIAL also stated that tariff determination for CSIA is to be governed by provisions under SSA read with OMDA and general philosophy adopted by the Authority. Tariff, consists of various building blocks which, inter alia, include cost of equity and cost of debt i.e. weighted average cost of capital applied on Regulatory Asset Base. Regarding allegations about lack of transparency MIAL stated that are unfounded.

18.10. IndiGo have not furnished any independent views/comments on the Consultation Paper and have instead endorsed the views expressed by FIA in response thereof.

18.11. FIA have stated that levy of DF should be examined after the audit exercise is complete and after carrying out prudence check on each claim of capex. Further, they raised concern regarding shareholders' not funding their own business ventures and instead the passengers being burdened towards the funding of the development of the airport. They urged that the proposal to levy DF undermines the efficacy and validity of bidding process and asked if DF was contemplated in the competitive bidding process – especially in view of escalation of project cost. They raised the issue that proposal for DF was non-justifiable under the 'Doctrine of Essential Facilities'. FIA commented that MIAL should explore alternate means of financing including divesting equity. They referred to the provision of the Competition Act, 2002 ("Competition Act") and stated that they would also be applicable to the airport services. They stated that Competition Act envisages "economic development of the country" by establishment of a Commission to, amongst other things, protect the interests of the consumers while levy of DF by MIAL is clearly against consumer interests, and thus, against the basic premise of competition law in India. They raised the issue that MIAL in the garb of delay of execution/completion of project is endeavouring to take undue advantage of its monopolistic position. Further, they also stated that DF is unfair to the passengers as they are made to pay for the facilities that are not available yet.



FIA have supported application of single till mechanism for tariff determination for CSI airport Mumbai and said that DF determination be taken up as part of tariff determination for the airport.

Referring to MIAL's financial results for the previous financial years, they stated that MIAL has already earned profit which is equivalent to 77% of capital infused i.e. profit of Rs 616 crore.

FIA further observed that fourteen days were inadequate to comment on the Consultation Paper and that 33 documents were not provided which amounts to denial of principles of natural justice and have also referred to some case laws.

FIA has raised the issue of jurisdiction of levy of DF on financial/economic basis as well as legal efficacy and values of project cost submitted by MIAL at the time of bidding. They have also asked about the financial model of MIAL at the time of execution of OMDA/SSA in February, 2009 and in January, 2011.

MIAL, in its response stated that levy of DF at CSIA has statutory sanction vide Section 22A of Airports Authority of India Act, 1994. Vide section 13 (1)(b) of the AERA Act, 2008, the Authority has been empowered to determine the amount of DF. OMDA and SSA are subject to Indian Laws and there is no prohibition for levy of DF at CSIA in any of the Project Agreements including SSA and OMDA. They stated that the Project Cost of Rs. 9802 Crores, based on which the Authority has proposed DF, had been verified by EIL, the Lenders' Engineer and also considered by MoCA, at the time of sanctioning DF in February 2009. They clarified that the current proposal is for determination of DF under section 13(1)(b) of AERA Act, 2008 and not the proposal for tariff under section 13(1)(a) of AERA Act, 2008. Amount of DF will not be eligible for any return as the same will be reduced from RAB. Therefore, question of windfall profits for airport does not arise. It will not be out of place to mention that DF is for pre-funding the ongoing project and utilisation of the same will be monitored by AERA. Actual capital expenditure incurred will be subject to audit by an Independent Auditor to be appointed by AAI from time to time. Regarding application of Single till, MIAL stated that tariff fixation at CSIA is governed by SSA read with OMDA. Levy of DF has statutory sanction vide Section 22A of the AAI Act, 1994 and is to be determined by the Authority vide Section 13(1)(b) of the AERA Act 2008. When MYTP of MIAL is considered by the Authority, DF amount shall be reduced from RAB resulting in lower tariff to that extent. Levy of DF at CSIA is typically a pre-funding for an ongoing project and needs to be reviewed from time to time based on cost of project and means of finance available along the implementation of the project. MIAL accepted that they had generated cash flows of Rs.380 Crores and Rs.570 Crores during FY 2009-10 and FY 2010-11 respectively and has accumulated reserves of Rs.616 Crores as on 31st March 2011. They confirmed that this amount has already been considered and included as means of finance.

Regarding balance equity, MIAL stated that they had already called balance equity of Rs.200 Crores and accordingly had sent notices to all the shareholders to contribute the same.



As regards project cost escalation, MIAL have submitted that the current proposal to levy DF is based on project cost of Rs. 9802 crores and available means of finance. Regarding the economic efficacy of proposal for levy of DF, they stated that DF has been recognised as one of the most appropriate methods of pre-funding long term and large scale infrastructure projects as it also helps in smoothening the annual increase in airport charges which otherwise may increase sharply and abruptly. Further, they stated that the apprehension of FIA that DF is to be borne by airlines is not correct, as it is a levy which is passed on by airlines to passengers. DF is a levy which is passed on by airlines to passengers. It leads to smoothening of annual increase in tariffs which otherwise may occur sharply and abruptly, since assets funded out of DF are not included in RAB and Pre-funding, such as Development Fee levy, is recognized as one of the most appropriate means of financing long term and large scale investments. Airports (assets) thus developed by the private airport operators go back to AAI at the end of the concession period and hence these national assets serve the larger public interest. Further, as far as justification for reinstatement of DF is concerned, the same is necessitated because of funding gap. As far as change in situation is concerned, in absence of any additional revenue stream available, situation remains the same as was prevalent in 2009.

Regarding applicability of Competition Act, 2002 it was stated that since the issue under consideration is levy of DF, permitted under statute, the issue raised by FIA was not relevant in current context. Referring to assumption about monopoly status of airport, they stated that it is not correct in view of the following:

18.11.1. Overlap in catchment area of various airports resulting in competition.

18.11.2. If it is assumed that airports have monopoly then it is implied that whatever efforts are made, there will be no improvement in traffic which is not correct position as invariably all airports have marketing setup to bring more airlines and more passengers to an airport.

18.11.3. Airports, even in India, have already started providing incentives to attract airlines.

18.11.4. There is always competition for making an airport a hub, e.g. Mumbai has to compete as a hub with Delhi, Singapore, Dubai and various other airports.

18.11.5. With liberalisation of bilateral resulting in airlines getting Sixth Freedom Rights, traffic from various Tier II Indian cities is picked up by airlines directly.

18.11.6. Because of competition from other airports, growth in traffic at Mumbai is lagging far behind overall growth in India and other cities e.g. New Delhi.

18.11.7. MIAL has stated that DF is fully justified on economic basis as it leads to smoothening of annual increase in tariffs as also the fact that prefunding is recognized as an appropriate means of financing long term and large scale investments.

18.12. MIAL finally submitted that its comments to stakeholders comments is without prejudice to its rights and contentions in other proceedings before AERA or other forums and any omission to deal with any specific contention or averment of the stakeholders should not be construed as an admission of the same.



EXAMINATION:

19. The Authority carefully examined the matter in the light of the judgment of the Hon'ble Supreme Court, stakeholders submissions on CP-33 and the clarifications/further submissions made by MIAL, the issues raised and examined position in respect of each of them are indicated below :

Supreme Court judgment dated 26.04.2011 –

19.1. In the judgment dated 26.04.2011, the Hon'ble Supreme Court held that development fees could not be levied and collected by the lessees of the two major airports namely, DIAL and MIAL, on the authority of the two letters dated 09.02.2009 and 27.02.2009 of the Central Government from the embarking passengers under the provisions of Section 22A of the 1994 Act. Thus, the letter dated 09.02.2009 of the Central Government, vide which the levy of DF was approved in respect of CSI airport was held to be ultra-vires the AAI Act, 1994. However, simultaneously it was also held by the apex court that *“But no such public notice has been issued by the Regulatory Authority under the 2008 Act pertaining to levy and collection of development fees by MIAL. Hence, MIAL could not continue to levy and collect development fees at the major airport at Mumbai and cannot do so in future until the Regulatory Authority passes an appropriate order under Section 22A of the 1994 Act as amended by the 2008 Act”*. Thus, the apex only held the letter dated 27.02.2009 issued by MoCA as ultra vires the AAI Act while upholding the provision related to levy and collection of DF at major airports as contained in Section 22A of the AAI Act. The Hon'ble court held that DF cannot be levied/collected unless and until the same has been determined by the Authority.

OMDA and SSA Provisions to be considered while determining DF:

19.2. FIA have referred to certain provisions of OMDA and SSA and has expressed its views that the same need to be considered while determining DF. They have specifically referred to Chapter XII and Chapter XIII of the OMDA and Pro 3.1.1 to 3.1.3, 3.5.1 & Schedule I of the SSA. In this regard the Authority noted that the paras of SSA and Chapter XII of OMDA, referred to by FIA, relate to the tariff determination in respect of CSI airport while chapter XIII of OMDA refers to financing arrangements and Security. It is observed that none of these references preclude any pre-financing arrangement that may be available under any law for the time being in force. Further, it is an established principle that the statutory provisions take primacy over any contractual provisions.

Thus, the Authority is required to determine the amount of Development Fee in respect of major airports under Section 13 (1) (b) of the AERA Act read with Section 22A of the AAI Act. As per the provisions of Section 22A of the AAI Act 1994, DF is granted specifically for the purposes of funding or financing the costs of up gradation, expansion or development of the airport at which the fee is collected, which is the case in the present matter under consideration.



Inclusion of Cost of Hotel in the Reckoned Project Cost

19.3. AAI have stated that the project cost of Rs 9802 Cr includes the cost of a Hotel (i.e. Rs 28 cr) – which is a non aeronautical asset. However, MIAL stated that the cost of the hotel is Rs 26 crore. As per the draft EIL report, the cost of the hotel was Rs 26 cr, hence, the submission by AAI may be factored in and accordingly, the cost of the Hotel i.e. Rs 26 crore be deducted from the funding gap presently being considered towards to be bridged through DF at CSI airport.

Resources from other means and Profits earned by MIAL

19.4. With the project at the estimated cost of Rs. 9802 crores, the funding gap was worked out to Rs 1543 cr. As per the audited figures in respect of DF collection at CSI airport, up to February, 2012, MIAL has collected Rs 640.73 cr towards DF. Thus, the funding gap now left to be bridged for the present is Rs 876.27 cr [Rs 1543 cr – Rs 26 cr (Cost of T1 C Hotel) – Rs 640.73 cr (DF already collected)]. Many stakeholders have stated that MIAL should have explored alternative sources of funds, including infusion of additional equity by entities other than AAI, instead of burdening the passengers through DF. It has also been stated by the stakeholders that the need for DF has arisen mainly due to the stated cost overruns. Therefore, passengers should not be penalized for the same. MIAL have, on the other hand, submitted that there is no possibility to raise further debts. Further, due to AAI's inability to contribute further equity, it will not be possible to raise equity from other promoters as well. Furthermore, it has also been stated that the project funding to the extent of DF would lead to a permanent reduction from RAB and lower airlines tariffs in the long run as this asset base will not be eligible for any return thereon for the airport operator. Whereas, if it is funded out of equity or debt, significantly higher reduction on capital would have to be allowed to MIAL. The Authority observed that any reduction in equity stake of AAI below the current 26% level, at this stage, does not appear to be in public interest in as much as AAI is lessor of the airport and ought to have a special position in MIAL. Further, being a public sector undertaking, AAI is expected to ensure greater support for passenger interest and even from this point of view its position should be safeguarded.

The issue of profits earned in previous financial years by MIAL has been raised by FIA who stated that in view of profits and accumulated reserves, MIAL does not require any DF. Instead they should apply these funds for the project. In this regard, it is observed that MIAL has included the accumulated reserves towards funding of the project.

Utilisation of amounts collected earlier

19.5. Stakeholders have stated that the funds collected earlier on account of Development Fee should be utilized for the purpose of providing additional passenger amenities or installing new technology for faster passenger processing and improved efficiency, with approval of AERA. In this regard, it was noted that the utilization of DF is being monitored regularly by MoCA as well as AAI and is subject to audit by



Independent Auditors appointed by AAI. Further, this issue has already been taken care of through the DF Rules.

Difference in the rate of DF for domestic and international passengers

19.6. IATA and FIA have stated that six times difference in the proposed DF for international (Rs. 600) and domestic (Rs. 100) is unjustifiably high. It is observed that neither IATA nor FIA have suggested any basis for determination of DF for the two groups of passengers. Further, the proposed rates of Rs. 100 per embarking domestic passenger and Rs. 600 per embarking international passenger were successfully implemented during the earlier levy period. Therefore, the Authority decided to continue with the same rates.

DF Determination after completion of Audit Process

19.7. Stakeholders have opined that DF should be determined only after completion of audit process in this regard. In this regard, the Authority noted that the Audit exercise in respect of the project, though has already commenced, but is expected to take some more time before completion. In the meantime, neither additional debt nor additional equity is forthcoming for funding the project. The project is ongoing and needs additional means of finance for completion. If the project does not get additional funds, the project may get further delayed. This may lead to further escalation of the project cost, which would not be in public interest. Hence, the Authority decided to consider the present proposal for determination of DF in respect of CSI Airport.

Project Cost Escalation:

19.8. The stakeholders have also raised issues regarding escalation of the project cost beyond Rs 9802 cr. In this regard, the Authority has already instituted an audit exercise to examine this aspect. However, considering the project status – i.e. being an ongoing project which may be adversely affected if additional funds were not made available for its completion, DF may be determined based on the project cost of Rs 9802 Cr – as was earlier audited by independent auditor. Thus, as the Authority is, presently, not considering any escalation in the project cost beyond Rs 9802 cr, the issue raised is not germane to the present determination process.

Levy of DF is unfair to the passengers as they are made to pay for the facilities that are not available yet.

19.9. It has been stated by FIA that levy of DF is unfair to the passengers as they are made to pay for the facilities that are not available yet. However it is observed that as per Section 22A of the AAI Act, DF is a prefunding levy and thus, by its very nature has to be paid by passengers even prior to the facilities being put in place.



Prescribed format for filing the 'Proposal for levy of Development Fee' not followed by MIAL

19.10. FIA has stated that MIAL has not followed the format prescribed by the Authority while filing its proposal to levy DF. In this regard, the Authority noted that no format has been prescribed till now for submitting proposal for levy of DF.

Principle of Natural justice

19.11. FIA have stated that the Authority, by denying their request for additional documents and extension of time for submission of comments beyond 03.02.2012, has violated the principle of natural justice. In this regard, the Authority observed that IndiGo and FIA requested for certain documents which were mentioned either in the Consultation Paper or in annexure thereto and requested for extension of period for responding to the Consultation Paper by three weeks. This request of the stakeholders was duly considered by the Authority wherein it was observed that, in the considered opinion of the Authority, the documents made available were adequate to make effective and meaningful representation by FIA and Indigo. Secondly, the majority of the documents requested by the stakeholders were not relevant to the present consultation process (e.g. the Multi Year Tariff Proposal filed by MIAL etc). Further, regarding extension of time for submission of comments on the Consultation Paper, it was observed that the last date for submission of comments / view on the consultation paper was 27.01.2012. Upon specific request of stakeholders, the last date was extended by the Authority up to 03.02.2012 and the request for further extension of the date beyond 03.02.2012 was not acceded to as it was felt that the time up to 03.02.2012 was reasonable and sufficient in respect of the proposal under consultation. Hence, there appears to be no violation of principle of natural justice.

Basis for Determination of Funding Gap of Rs 1543 Cr by MoCA

19.12. FIA has stated that the basis for determination of funding gap of Rs 1543 cr by MoCA has not been disclosed by the Authority for stakeholder consultation in the Consultation Paper. It was noted by the Authority that the current Consultation Paper is not in respect of consideration of the basis for funding gap determined by MoCA or to examine the validity or otherwise of such determination. Hence, the same is not found germane to the current consultation process.

Applicability of Service Tax:

19.13. Stakeholders commented that the issue regarding applicability of Service tax on DF is still not clear. The Authority observed that applicability of service tax on DF is a matter that is beyond the jurisdiction of the Authority. However, it is also observed that the Authority has proposed the rates of DF which are exclusive of applicable taxes.

19.14. Apart from the above, the stakeholders have also raised issues such as regulatory till, Airport Operators getting a minimum guaranteed return on the total capital invested/equity under OMDA, AERA to mandate Airport Operators to submit



the rate of ADF / UDF before undertaking the contract, standardization of exempted categories from DF, media reports regarding reduction in/withdrawal of airline operations, provisions of Competition Act 2002 etc which are not germane to the issue of determination of DF.

Equity Contribution from Shareholders:

20. Further as per the Consultation Paper, the proposal for levy of DF was to be decided to be operationalised only after MIAL shows to the Authority's satisfaction that the balance equity of Rs 200 crore has been raised by it. MIAL vide its e-mails dated 2.4.2012 and 3.4.2012 have informed that the balance equity has been received by them from GVK and AAI, respectively and that now they have received full equity contribution of Rs. 1200 crores from its shareholders.

Tenure of Levy of DF:

21. As per the CP-33, a funding gap of Rs 906 cr was proposed to be bridged through DF. However, as per the audited collection figures for DF at CSI airport, an amount of Rs 640.73 cr has been collected as DF up to February, 2012. Further, as decided above, the cost of Hotel (i.e., Rs. 26 crore) is being deducted for the present DF determination.

22. In view of the observations and finding made above, taking the project cost as Rs.9802 crore, the consequential funding gap is identified as under:

Particulars	Amount (Rs in Cr)
Total project cost	9,802
Funding Gap to be bridged through levy and collection of DF	1,543
less Cost of Hotel	26
Less DF collected	640.73
Funding GAP remaining to be bridged	876.27

23. As per CP-33, although it was proposed that the levy of DF may be approved w.e.f. 01.03.2012, that date is already passed, hence the levy and collection of DF can commence from 01.05.2012. Consequently, with the funding gap of Rs 876.27 cr, tenure of the levy will extend for 23 months, i.e. up to March 2014 based on the traffic projections considered by the Authority. Further, the actual DF collection may vary from the estimates now being considered by the Authority, hence the actual DF collections during the levy period could even exceed the amount worked out by the Authority. Therefore, the Authority decided to review the monthly collections on the basis of audited figures provided by the AAI and MIAL and make appropriate decisions as may be required, based on such review.



24. ORDER

After careful consideration of the facts narrated above, in exercise of powers conferred by Section 13(1)(b) of the Airports Economic Regulatory Authority of India Act, 2008 read with Section 22A of the Airports Authority of India Act, 1994, the Authority orders as under:

- (i) The amount of DF to be levied and collected at CSI airport, Mumbai is determined as Rs. 100/- per embarking domestic passenger and Rs.600/- per embarking international passenger, exclusive of all applicable taxes, w.e.f. 1st May, 2012 for a period of approx. 23 months (i.e., upto March, 2014) to bridge the present funding gap of Rs. 876.27 crores.
- (ii) The issue of escalation in project cost to Rs. 12,380 crores will be considered by the Authority after the audit commissioned by it is completed, after which the Authority may make further orders regarding rate and tenure of DF, as may be required.
- (iii) As rate and tenure of levy are premised upon the traffic projections and other estimates, the Authority will also undertake review of the rate and/or tenure of DF in due course based on the audited monthly DF collection figures received from MIAL and AAI.

By the Order of and in the
Name of the Authority


(Capt. Kapil Chaudhary)
Secretary

To

**Mumbai International Airport Pvt. Ltd,
CSI Airport,
1st Floor, Terminal 1B,
Santa Cruz (E),
Mumbai – 400059.
(Through: Shri G. V. Sanjay Reddy, Managing Director)**

