

Airports Economic Regulatory Authority Of India

Order No. 28/2011-12

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

**Date of Order: 8th November, 2011
Date of Issue: 14th November, 2011**

**In the matter of levy of Development Fee by Delhi International
Airport (P) Ltd. (DIAL) at IGI Airport, New Delhi**

The Central Government had, vide its Order No. AV. 24011/002/2008-AD dated 09.02.2009, granted approval for levy of DF @ Rs. 200/- per departing domestic passenger and @ Rs. 1300/- per departing international passenger, inclusive of all applicable taxes by M/s. Delhi International Airport Private Limited (DIAL), under section 22 A of the Airports Authority of India Act, 1994, purely on an ad hoc basis, for a period of 36 months w.e.f. 01.03.2009. One of the conditions of approval was that the final determination of the levy be made by the Government/Regulator upon compliance with the following two milestones:

- a) DIAL would submit final project cost estimates within 6 months of the commencement of levy, i.e., latest by 31.08.2009. The project costs so submitted, including amount of contingencies, and their utilization shall be audited by an independent technical auditor to be appointed by AAI or as the Regulator/ Government may decide.
- b) DIAL would undertake a review of the bidding process in respect of the hospitality district. They may approach the Government with the outcome of the review within 6 months of the commencement of levy, i.e., latest by 31.08.2009.

2. The approval was to be reviewed specifically upon the compliance with the above two milestones and at the stage of final determination, the Regulator/Central Government were to ensure adequate consultation with users. Further, the Government had also stipulated that the amount collected through DF would not exceed the ceiling of Rs.1827 crores (exclusive of taxes, if any). After establishment of this Authority, DIAL requested for extension of timeline for submission of



information at (a) & (b) above upto February 2010 instead of 31.08.2009. After due consideration and in consultation with the stakeholders, this Authority had extended the timeline upto 31.01.2010. DIAL submitted information in respect of (b) above on 31.01.2010 but did not submit the project cost information (i.e. (a) above) on the ground that the same will be submitted after audit and with the approval of the Board of DIAL. Authority took a serious note of the inability of DIAL in submitting the requisite information within the extended timeline specified by it. DIAL was advised to furnish the same immediately failing which the Authority would proceed to decide the matter on the basis of information available on record. As DIAL still did not submit the requisite information, the Authority considered the matter further and contemplated/proposed following action in default:

- (i) DIAL should submit the final project cost at the earliest. In case, the submission is so delayed that the Authority is not in a position to obtain final project cost, duly audited by the independent technical auditor, latest by 31.07.2010 the levy of DF shall not be permitted with effect from 01.08.2010. Therefore, keeping in view the indicative timelines, the final project cost information should be submitted by DIAL latest by 15.04.2010.
- (ii) In the meantime, DIAL may be permitted to continue levy of DF @ Rs.200/- per departing domestic passenger and @ Rs.1300/- per departing international passenger, with effect from 01.03.2009 to bridge an estimated funding gap of Rs. 1267.49 crores (NPV as on 01.03.2009), exclusive of taxes, on an 'ad-hoc' basis. Based on the above calculations and on the assumption that the final project cost would be restricted to the original estimate of Rs. 8975 crores, the period of this levy may need to be reduced to 24.5 months in the final determination.

3. Matter was, accordingly, circulated for stakeholder consultation vide Consultation Paper No. 04/2009-10 dated 23.03.2010. DIAL, thereafter, submitted the project cost estimates vide their letter dated 31.03.2010. Pursuant to the submission of the project cost estimates, the action contemplated in default (as indicated in the above referred Consultation Paper) became infructuous. Accordingly, the Authority decided to withdraw the Consultation Paper No.4/2009-10 dated 23.03.2010 and disseminated this decision for information of all concerned vide Public Notice No. 03/2010-11 dated 23.04.2010.

4. As per DIAL, the final project cost was revised to Rs.12857 cores as against Rs.8975 cores (as was projected to the Ministry in October, 2009). The total funding gap of Rs.3620 crores was, accordingly, projected. DIAL also requested the Authority to permit the continuation of levy of DF for an additional period of 2 years and 8 months over and above the period of 3 years approved by the Government, i.e., for a total period of 68 months. The project cost was submitted by DIAL, after audit by their internal auditors M/s.Brahmayya & Co. and with the approval of DIAL's Board.



5. As per the directions of the Authority, AAI (i.e. the lessor and owner of IGI airport) had appointed M/s. Engineers India Limited (EIL) and M/s. KPMG to undertake audit of the final project cost estimates submitted by the DIAL. The final audit reports of the auditors were made available by October, 2010.

6. Briefly stated, the Auditors have recommended cost elements, as under, to be excluded from the costs incurred by DIAL.

S. No.	Item	Sub-item	Proposed exclusion	
			EIL	KPMG
1	Costs yet not incurred as on 28.2.2010	(a) ATC tower (b) Provisions	(a)Rs. 350 crores (b) Rs. 297 crores <u>Rs. 647 crores</u>	(a)Rs. 350 crores (b) Rs. 297 crores <u>Rs. 647 crores</u>
2	Costs not as per fair value	(a) Apron (b) Escalation for reinforcement (c) Rehabilitation of Runway 10/28	(a) Rs. 23.82 crores (b) Rs. 35.67 crores (c) Rs. 20 crores <u>Rs. 79.49 crores</u>	(a) No recommendation (b) - do - (c) Rs. 37.50 crores (Rs.20 crores as recommended by EIL + Rs.17.50 crores towards O&M Expenditure)
3	Cost exclusions due to proposed reduction in area	--	Rs. 129.83 crores	--
4	Costs not allowed as per concession	Upfront Fee	Rs. 150 crores	Rs. 150 crores
		TOTAL	Rs. 1006.32 crores	Rs. 834.50 crores

The auditors also raised several issues relating to project implementation, monitoring and cost escalation.

7. The auditor's recommendations were examined by the Authority in consultation with the AAI and Ministry of Civil Aviation (MoCA). Views of DIAL were also obtained.

8. It was observed that:

(a) DIAL's final cost estimates, i.e., Rs. 12857 crores, represent an increase of Rs. 3882 crores over the estimated cost of Rs. 8975 crores projected to MoCA and that DIAL have projected enhanced financial resources of Rs.2089 crores.

(b) The costs mandated by or for the Government agencies account for Rs.893 crores out of the amount of increase.

(c) In respect of costs proposed to be excluded by the Auditors, as these had not been incurred by DIAL till 28.02.2010, it was noticed by the Authority



that another cost element, i.e., payment to Delhi Jal Board (DJB), amounting to Rs.54 crores, also falls in this category. DIAL presented auditor's certificate to the effect that out of the budgeted amount of Rs. 297 crores towards provisions, an amount of Rs. 285.34 crores had been spent, as on 31.07.2010. Similarly, a sum of Rs.31.50 crores had been paid to DJB by DIAL (out of total amount of Rs.54 crores), as on 28.2.2011. Further, AAI have confirmed the cost estimates of Rs.350 crores, as well as construction schedule in respect of ATC Tower and associated facilities (which are to be constructed by DIAL for AAI as per contractual requirement).

- (d) EIL have recommended the exclusion of an area of 10,566 sq. mt. from the total Gross Floor Area of 5,53,887 sq. mt. It was explained by EIL that the area of 1914 sq. mt. had been proposed for reduction on the grounds that based on built up drawings the actual area of the concerned segment is factually 38506 sq. mt. and not 40420 sq. mt. Therefore, it was a case of measurement error. EIL, subsequently, clarified to the Authority that this being a measurement error, cost reduction proposed on proportionate basis, in their report, was not applicable in as much as it was not a case that the area had been over built (than what was contemplated by design) and for which the cost has to be proportionately reduced. As regards, balance area of 8652 sq. mt. (proposed to be excluded by EIL), in EIL's judgment, the same ought not to have been built. On the other hand, AAI have supported inclusion of the subject area. MoCA vide its letter dated 1st April, 2011, inter alia, forwarded a copy of the letter containing the views of the AAI (wherein the inclusion of the subject area was supported). The Ministry's letter states in para 8 that: *"Further, in terms of the Article 8.5.8 of OMDA, AAI had appointed an Independent Engineer to perform such duties as specified in Schedule 21 of OMDA. This schedule inter alia mandates Independent Engineer to review all designs, drawings, specifications and procurement documents to assess compliance with Finalized Major Development Plan and Development Standards and requirements. AAI has already sent its comments on the subject matter directly to AERA, which may be considered since AAI is responsible to monitor the performance of Independent Engineers and also the development of the project"*. The Government thus requested the Authority to consider the comments of AAI in this matter, giving the Government's justification for such consideration by the Authority
- (e) The Auditor's have recommended that the amount of Rs. 150 crores paid by DIAL to the AAI, as Upfront Fee, at the stage of privatization may not be included in the project cost. DIAL have considered this to be a pre-operative expense and included the same in the project cost. The Authority had sought the opinion of the MoCA in the matter since the exclusion was proposed on the basis of the provisions of the State Support Agreement (SSA) entered into between the Central Government and DIAL. The Ministry initially stated that the cost (of Rs.150 crores upfront



fee) was included by it in arriving at the financing gap while granting ad-hoc approval vide letter dated 09.02.2009. In its final response (on 1.04.2011) the Ministry referred to its earlier letter dated 8.3.2011 wherein a further reference was made to its earlier letter dated 9.02.2009. As per the said letter dated 8.3.2011, the Ministry had, inter-alia, stated that

“.....the Upfront Fee was paid by DIAL to AAI in terms of Article 11.1.1 of OMDA and it has been booked in the account of the project cost. While determining the ad-hoc DF in the year 2009, this Ministry had taken an estimated project cost of Rs. 8975 crores, which included the upfront fee paid to AAI by DIAL.....”

Based on these submissions the Authority inferred that though the Ministry had not specifically stated that the inclusion of Upfront Fee would be in consonance with the provisions of SSA, the stand of the Ministry appeared to be in support of inclusion of Upfront Fee in the overall project cost.

9.1 After careful consideration of the views of MoCA, AAI and DIAL, the Authority had formulated its tentative views as under:

(a) The cost of the project may, at this first stage, may be taken as Rs.12059.91 crores (i.e., after exclusion of Rs.701 crores on account of costs not incurred as on 28.02.2010 and Rs.96.99 crores on account of costs being not as per fair value). Accordingly, corresponding additional funding gap (over and above the gap of Rs. 1827 crores identified by the Ministry in February 2009) to be bridged through DF is Rs.994.50 crores (NPV as on 01.03.2010). – **Stage 1**

(b) In case the total costs of Rs.701 crores, not incurred by DIAL as on 28.02.2010, are also incurred during the period of levy of DF, as per first stage, the total project cost would work out to Rs. 12760.01 crores with a further additional funding gap of Rs. 701 crores. – **Stage 2**

9.2 The tenure of levy of DF in case of Stage 1 and Stage 2 was worked out as about 51 months and 62 months, respectively, commencing 01.03.2009 on the basis of the various assumptions and observations while keeping the rate of levy as decided by the Central Government in February, 2009 unchanged.

9.3 The Authority was also of the opinion that the procedural and monitoring mechanism established vide para 2 (b), (c) and (d) of the Ministry of Civil Aviation's letter dated 09.02.2009 and other mechanisms in pursuance thereof by AAI should continue undisturbed.

9.4 The tenure of the levy was premised upon the traffic projections and other estimates/assumptions. Due to actual figures being different than those estimated/assumed, the collections during the levy period could exceed the amount



identified in para 9.1 above. Therefore, the Authority will review the matter on a periodic basis. In the unlikely event of DIAL collecting any amount in excess of that identified, despite such review, the excess amount so collected would not be utilized for any purpose whatsoever, without the prior approval of the Authority.

9.5 The above tentative decision of the Authority (as summarized in paras 9.1 to 9.4 above) was put up for stakeholders' consultations vide Consultation Paper No.02/2011-12 on 21.04.2011. The last date for receipt of comments was 13.05.2011.

10. A stakeholder consultation meeting was also held on 09.05.2011 at 1000 hrs. with the stakeholders to elicit their comments/views in person. The minutes of the meeting were uploaded on the Authority's website.

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

11.1 In the meantime, the Hon'ble Supreme Court in its judgement dated 26.04.2011 in Civil Appeal Nos. 3611 of 2011, 3612 of 2011, 3613 of 2011 and 3614 of 2011 (MANU/SC/0516/2011) has, inter-alia, held the letter dated 09.02.2009 of the Central Government (vide which the approval of the Government was conveyed for levy of DF by DIAL), as ultra-vires the AAI Act, 1994. Hon'ble Supreme Court has also held that w.e.f. 01.01.2009, no DF can be levied or collected from the embarking passengers at major airports under Section 22 A of the AAI Act, 1994, unless this Authority determines the rate of such DF.

11.2 The Hon'ble Supreme Court has, inter alia, further directed that:

"(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".

11.3 The Hon'ble Supreme Court had also given liberty to the appellants (before it) to challenge the Public Notice No.03/2010-11 dated 23.04.2010.

WRIT PETITIONS IN HON'BLE DELHI HIGH COURT:

12.1 It is understood that DIAL continued to levy and collect DF even after the aforesaid judgement of Hon'ble Supreme Court on the grounds of their claim that this Authority vide Public Notice dated 23.04.2010 had permitted them to do so.

12.2 Subsequently, Resources of Aviation Redressal Association (ROAR) filed Writ Petition (Civil) No. 3889/2011, before the Hon'ble Delhi High Court, challenging the validity of Public Notice No.3/2010-11 dated 23.04.2010. Another Writ Petition (Civil) No. 3893/2011 was filed by Consumer Online Foundation before the Hon'ble



Court. The Hon'ble High Court disposed off the said Writ Petitions vide judgement and order dated 01.06.2011. Hon'ble Court gave liberty to the petitioner to prefer appeal against the Public Notice before the Hon'ble AERA Appellate Tribunal and directed that till the application for stay was dealt with by the Tribunal, the Public Notice No.3/2010-11 dated 23.04.2010 shall not be given effect to.

12.3 Pursuant thereto, DIAL have letter ref. DIAL/2011-12/Fin.-ACC/451 dated 7.6.2011 confirmed that they had stopped levying DF w.e.f. 01.06.2011.

13. Subsequently, ROAR filed another Writ Petition (C) 5007/2011 and CM No. 10157 (for stay) before the Hon'ble Delhi High Court. The Hon'ble High Court vide Order dated 19.07.2011 had issued notice in the matter and also directed that ROAR would be given 10 days time to make its submissions in respect of the Consultation Paper No. 2/2011-12 dated 21.04.2011 issued by this Authority. DIAL would thereafter submit its comments on the submissions made by ROAR within a period of 5 days. In compliance thereof, ROAR have made their submissions on 29.07.2011 and DIAL (vide letter dated 03.08.2011) submitted their comments on the submissions made by ROAR. The submissions made by ROAR and the comments furnished by DIAL have been summarized in para 17 and 18 below. Hon'ble High Court has disposed off the Writ Petition vide Order dated 04.08.2011.

APPEAL FILED BEFORE THE HON'BLE AERA APPELLATE TRIBUNAL

14. Pursuant to the Hon'ble Supreme Court's Judgement dated 26.04.2011, giving liberty to the appellants to challenge the Public Notice No.03/2010-11 dated 23.04.2010 and Hon'ble Delhi High Court's judgment and Order dated 1.6.2011 (in WP(Civil) No. 3889 & 3893/2011) ROAR filed an appeal before the AERA Appellate Tribunal against the said Public Notice. The Hon'ble Tribunal has vide its Order dated 21.09.2011 disposed off the appeal and ordered as under:

" Without going into the contentions raised as to whether the appeal is maintainable and /or the collection of fee by Respondent No. 2 is legal, we dispose of the appeals with the following directions :-

- 1. Pursuant to the order of the High Court of Delhi in Writ Petition (Civil) Nos. 3889 of 2011 and 3893 of 2011, collection of Airport Development Fee has been discontinued. Undisputedly, the final decision in the matter has to be taken by the Authority. It would be in the interest of all concerned if the decision is taken by the said Authority early. That would clear the confusions and apprehensions in the minds of the parties to a great extent. The Authority would do well to take the final decision in accordance with law as early as practicable, preferably within two months.*
- 2. Till the final decision is taken, Respondent No. 2 shall not recover the fees, as is being presently done.*

We make it clear that no opinion as regards to the maintainability of the appeal or the locus standi of the appellant to file the appeal has been expressed by us. The appeal stands disposed of."



STAKEHOLDER COMMENTS AND DIAL's CLARIFICATIONS:

15. The Authority received several responses from the stakeholders in response to the Consultation Paper No.02/2011-12 dated 21.04.2011, which were uploaded on the website of the Authority vide Public Notice No.01/2011-12 dated 23.05.2011

16.1 AAI in their submission, vide letter No. AAI/MC/DIAL-06/DF/2011-12/1036 dated 12.05.2011, had reiterated that they have contributed Rs.637 crores (26%) till date out of Rs.2450 crore equity share capital of DIAL and that they were not in a position to make any further contribution towards equity due to their commitments in the ongoing projects for upgradation and development of Metro and Non Metro Airports. In view of the same, AAI have stated that, the JVC (DIAL) can still maintain the Trigger Debt Equity Ratio in terms of Clause 3.3.1 of the Share Holder Agreement by way of infusion of funds in such form and quantity by the Private Participants [without diluting AAI (along with AAI nominees) equity shareholding].

16.2 In respect of the commissioning of the ATC Control Tower, AAI clarified that the civil portion of the ATC Tower would be completed by November 2012 and the ATC Tower Equipments would be installed and commissioned by November 2013.

16.3 Airports Council International (ACI) have supported the proposal made in the Consultation Paper.

16.4 APAO (Association of Private Airport Operators) have stated that the DF is a capital receipt and hence tax shield should not be used for computing the discounting rate. APAO have also submitted that from the Consultation Paper it is seen that the efficacy of the spent has been audited and found to be satisfactory as there is no significant unreasonableness of the expenditure. APAO are of the opinion that the timely completion of such challenging projects with quality infrastructure needs to be rewarded and not penalized as otherwise it would send negative signals in the market and will discourage private operators in taking up PPP projects in future. In view of the same, APAO have requested the Authority to accept the proposal of DIAL.

16.5 DIAL, in their response, have requested for immediate relief and have specifically submitted their comments on the following issues:

- a. **Disallowances** – The Consultation Paper had proposed disallowances of Rs.96.99 crores towards additional apron area (Rs.23.82 crores); R/W Rehabilitation (Rs.37.50 crores); and Escalation for reinforcement (Rs.35.67 crores).

On the issue of Additional Apron Area, DIAL have submitted that the basis for the cost calculation provided by them for the increase in apron costs is the actual costs as per the packages awarded for these works and in a project of this nature and executed within critical timelines, bench marked costs from other unrelated projects should not be taken as the basis for evaluation of costs that had to be incurred.



As regards the disallowance of Rs.20 Crore for R/W Rehabilitation, the basis for the cost calculation provided by DIAL is the actual costs competitively determined as per the packages awarded and these works being executed in a busy operational airport area wherein substantial additional costs are required to be incurred due to extraneous factors like limited working time, access, security issues and many other contingencies and unforeseen issues, theoretical calculations made by auditors should not be considered as the basis for disallowing project cost. In respect of the disallowance of Rs.17.5 crore on the R/W rehabilitation, DIAL agree to the observations made by KPMG and shall be treating the same as operating expenditure in their tariff filing.

Escalation for reinforcement – DIAL have submitted that the basis for the cost calculation provided by them is the actual costs as per the packages awarded. The cost worked out by the auditors is based on the market rate for these works which is normally carried out through manual means with minimal mechanization. To meet the project time schedule, reinforcement steel of about 8000 MT / month was required. To achieve this required output by regular conventional (manual) process would have required large skilled labour force (scarce resource during that period due to huge development works in NCR mainly to gear up for the Commonwealth Games) which in turn would have required extensive coordination, for both design and fabrication. Hence, the only practical solution available was to set up automated reinforcement cutting, bending plant capable of producing the required quantities to be installed on site to meet the project deadlines.

DIAL have also submitted that the above amount has been actually spent by them and as such disallowance of this legitimate amount will adversely impact the financing of the airport.

Keeping in view the requirement to complete the project before Commonwealth Games and given the fact that all of the above activities were carried out in the busiest operational Airport of the country wherein costs always are high compared to a benchmark industry average, they have requested that the proposed deduction of Rs.79.49 crores should not be made. As regards the treatment of Rs.17.50 crores disallowed by KPMG, DIAL has agreed to treat the same as operating expenditure. However, DIAL have stated that in the eventuality Authority in their wisdom disallow the amount for DF determination, they have requested that the Authority may allow the above to be included as part of RAB for the purpose of tariff determination.

- b. **Discounting rate- tax shield on DF interest** – The Consultation Paper proposed that the discount rate should be determined with reference to the rate of interest of debt securitized against the DF after netting corporate tax rate so as to account for the tax shield due to interest payment. DIAL have claimed that the interest on DF Loan is not charged to Profit and Loss Account



and the Company is not entitled for any tax shield in the interest. A certificate dated 12.03.2011 from their statutory auditors confirming the compliance of above procedure and also confirming that the treatment being given in books is the correct accounting treatment has also been submitted. Hence, given the fact that DF is not an item of the Profit and Loss Account and has no bearing on the computation of income tax, the discounting of the DF must be done at the actual rate of interest and not on a rate derived net of tax.

- c. **Infusion of additional equity** – DIAL have submitted that the Trigger Debt Equity Ratio referred to in the SHA (clause 3.3.1) is in the context of raising further Equity Shares, the reference to Trigger Debt Equity Ratio is based on actual debt and equity raised and not quasi equity by way of deposits (which lenders may treat as quasi equity for funding purpose). Raising further debt is not possible. Even if the argument is stretched that quasi-equity is equity for SHA purposes, DIAL would thus be already in breach of the Trigger Debt Equity norm as the debt equity ratio after considering quasi-equity will be below 2:1 thereby impairing DIAL's ability to raise further equity shares. Further, as AAI have expressed inability to contribute further equity, it will not be possible to raise further equity without diluting them.
- d. **Timeline for ATC Tower** – Referring to the Consultation Paper (Para 13(k)) wherein it has been stated that the "AAI in their comments have stated that the ATC tower and associated facilities would be completed by November, 2012", DIAL have submitted that they are presently finalizing the tender documents for the construction of the tower and that the works are to be awarded by end June 2011 and that the timeline of November 2012 for the construction of ATC tower is not practically possible. As per the overall schedule the ATC tower including installation/ commissioning of equipment as finalized in consultation with AAI, the ATC tower is to be completed by November 2013. In view of above DIAL have requested that the timeline for completion of the project be revised to November 2013.
- e. **Duration of DF** – DIAL have requested that the Authority may review the duration of DF periodically and based on actual collection, finalize the final duration of levy of DF. They have stated that the Authority may cap the amount of DF as determined herein. However for the purpose of calculation of the initial estimate of the duration of DF, the following need to be given due weightage:
- i. Delay due to finalization of Rules
 - ii. Discounting rate: The duration of DF needs to be revised based on the submission being made by DIAL regarding rate of discounting and disallowances.
 - iii. Collection Charges payable to the airlines
 - iv. Exempt Passengers: DGCA vide above directive has a list of exempted class of passengers. In DIAL's estimation the chargeable passengers are 90% of the total travelling passengers which may be used for duration estimation purposes.



- f. DIAL have reiterated that the current DF is continuation of process of DF first approved by Ministry of Civil Aviation on 09.02.2009 and subsequently reviewed by this Authority. The finalized Project Cost was filed with AERA on 31.03.2010 and as on that date, after factoring in the security capex, the project cost had a funding gap of Rs.1793 crores which is continuing and needs to be bridged through DF. The funding gap, pending finalization of DF, has been temporarily bridged by raising short term loans and withholding project payments. Thus approving DF at this stage will be a pre-funding to regularize the project financing gap. Since the process of Project Cost finalization has taken more than a year and the financial position of the company is under stress, DIAL have requested for an immediate relief.

16.6 IATA have stated that, in principle, where facilities have already been built and are being used by passengers and airlines, it has no objection to the levying of a DF. Further, IATA have also agreed with Authority's position outlined in Clause 13 (n) of the Consultation Paper that the costs mentioned in Clauses 13 (k), (l) and (m) "should be capped at the presently estimated levels and in no case any escalation should be allowed in these cases". IATA's other observations are summarized in para 16.7 along with the observations made by the airlines and their associations.

16.7 The Airlines and their associations namely Federation of Indian Airlines (FIA) and IATA have made several observations on the proposal made in the Consultation Paper. The issues raised by the stakeholders were forwarded to DIAL vide letter dated 13.05.2011 for their comments. DIAL has vide letter No.DIAL/2011-12/Fin-Acc/480 dated 14.06.2011 submitted their comments on the same. The issues raised by the Airlines and their associations along with the comments of DIAL are summarized hereunder:

- (i) **Aviation Taxes** – Airlines are generally opposed to Aviation Taxes which put extra burden on the passengers. Continuation of high rate of fees leads to an increase in the cost of air travel and imposes a new barrier to the development of the aviation and tourism industries.

DIAL have, in response, submitted that in an infrastructure deficit country like India, creation of infrastructure needs to be remunerated and the viability of the PPP concessionaire kept in mind. While airlines have the flexibility of increasing ticket prices, charge varying ticket prices on different days and hours in an unregulated manner and also adjust capacity and business model in response to demand, the airports do not have such flexibility. Creation of world class infrastructure such as the T3 needs to be encouraged as this is to the advantage of airlines, since they bring various financial and operational benefits to airlines viz. low turnaround time, no hovering of aircraft due to capacity constraints resulting in savings in fuel costs to airlines, more opportunity to multiply business (HUB etc) and reduce expenses, and lower staff cost.(Integrated Terminal for Domestic and International).



- (ii) **Exploring alternate sources of funding** - Alternative economic sources of funds should be explored to bridge the financing gap instead of burdening the passengers through continuation of DF beyond the earlier approved 3 years. The financing gap envisaged by DIAL needs to be funded by the shareholders and the inability of the shareholders to incur such costs does not give the airport right to penalize the passengers with higher taxes and resultantly penalizing the airlines since their passenger traffic gets affected on account of higher outgo of the passengers.

DIAL have submitted that DF is a funding of the last resort after other sources have been explored. Further, DF will lead to a permanent reduction of RAB and lower airline tariffs in the long run. On the other hand if instead of DF, equity or debt is considered, this will lead to a significantly higher return on capital thus resulting in a significant increase in airline tariffs.

- (iii) **Escalation in Project Cost** : Handling of the project by DIAL by adopting a Design-Build approach has resulted in huge escalation of the cost, a substantial portion of which is being proposed to be passed on to the passengers. Unreasonable escalation in the project cost under the umbrella of time constraint in completion of project may not be acceptable. AERA may in fact levy a penalty on DIAL for such increase in project cost rather than accepting most of the cost incurred by DIAL for the purpose of arriving at the total project cost.

DIAL have submitted that the project cost issue has gone through a detailed review by Authority including through independent audits by EIL and KPMG. The request for levy of penalty is out of place and reflects lack of understanding of airport construction dynamics and highly comparable benchmark cost of T3.

- (iv) **EIL's report highlighting increase in area of Terminal Building.** Disallowance, inter alia, proposed for 8652 sq.mtrs. (for the food court and retail area at CIP, office and hotel level), which need not have been built as the food court and retail areas are already available on departure and arrival levels and the additional area at CIP, Office and Hotel levels may not be used by the passengers. This cost should not be included in the total cost of the project, especially in view of these additions being carried out without taking prior approval from either the Ministry or AAI.

DIAL have stated that the MDP submitted by DIAL envisaged adjustments to areas as the design was developed in coordination with various stake holders during the execution of the project. The additional areas for the food court & retail are part of this design development in line with meeting the passenger facility requirements and that the OMDA does not envisage any additional approvals. Further the overall retail/F&B area is about 10% while in major airports it is about 20% of the area. Furthermore, non aeronautical assets of above nature do not form part of the regulated asset base for the purpose of tariff calculation and in fact provide a cross subsidy from the revenue earned from such assets thereby lowering the charges for the airlines and passengers.



- (v) **Exclusion of costs related to provisions, ATC Tower and Upfront Fee** - Audit carried out by EIL and by KPMG needs to be taken into consideration and the exclusions suggested by them specially in regard to the Provisions, ATC Tower and Upfront Fee should be adhered to.

DIAL have submitted that the ATC is a mandated project and as such this should be included in the project cost for purpose of DF. The Authority is progressively allowing the amount not incurred. As such this issue already stands addressed.

On the issue of the Upfront Fee, DIAL have submitted that the issue has been suitably clarified and reviewed in-depth by the Authority and DIAL agree with the stand taken in the Consultation Paper.

On the issue of exclusion of cost related to provisions amounting to Rs.297 crores, which were not incurred as on 28.02.2010, DIAL have submitted that the issue has been suitably addressed in the Consultation Paper and the Auditors certificate for this has been submitted to the Authority.

- (vi) **Collection charges** - The collection charge for collecting/ accounting/remitting the DF, which is Rs.5/pax, is low. Incentive for timely payment is Rs.5/pax while penalty for delay is 18% pa.

DIAL have submitted that a Rs.5/- charge converts to approximately 1% on the weighted average DF of Rs. 530 (assuming 30% international and 70 % domestic). Given credit period of 15 days, this rate works out to 26% p.a. and that a penal rate of 18 % p.a. is reasonable for delayed payments to act as a deterrent. Further, a longer credit period and higher collection charges will impose further burden on passengers.

- (vii) The investment in setting up the airport and the lease is for a period of 60 years. The intention appears to be to recover the entire shortfall in a short time. It is opined that the DF, if approved, should be charged over a period of at least 30 years with lower charge per pax.

DIAL have submitted that the current ADF recovery is not a revenue collection but a capital receipt and funding for such long periods (as suggested by airlines) is not available. Moreover extending the levy to longer periods would mean a higher burden on the passengers as the levy is on NPV basis.

- (viii) **Difference in DF between domestic and international departing passengers** should be reviewed and full transparency provided as to the basis for the difference. Current ratio of 6.5 times of the DF for international passengers as compared to that for the domestic passengers is very high by international norms and should be moderated. The typical ratios observed internationally vary between parity and four times.

DIAL have submitted that the current split was as mandated by Ministry of Civil Aviation.



(ix) **Evaluation of the grant of additional DF in context of the following legal framework:** The Airlines have suggested that grant of DF should be evaluated in the context of the following legal framework:

- a. Section 13(1)(b), 13 (2) and 13 (4) of the AERA Act, 2008;
- b. Decision of the Authority to adopt the Single Till Approach with Price Cap Incentive Regulation;
- c. Relevant provisions of the OMDA dated 04.04.2006, Article 8.3.2, 8.3.5, 8.3.6, 8.3.7, 8.5.7 (pertaining to the Master Plan) and 12.1 to 12.4 (pertaining to Tariff and Regulation);
- d. Relevant provisions of the SSA dated 26.04.2006 Clauses 3.1.1 to 3.1.3, 3.5.1 and Schedule I pertaining to AERA, Master Plan Review and Principles of tariff fixation.

DIAL have stated that the current determination of DF is in compliance of Section 13 of AERA Act, 2008 which mandates AERA to determine amount of DF (Section 13(1)(b)) and in manner laid therein (Section 13(4)). Further, the Authority has not finalized Single Till approach for Delhi Airport and the issue of Till is not relevant for determination of the DF. Additionally, DIAL is bound by the terms of the SSA and OMDA which mandate a Hybrid Till approach with 30% cross subsidy.

(x) **DF, if any, should be levied as a cess/ tax** as held by the Hon'ble Supreme Court, to fund AAI/ Government to provide world-class airports in India. In this connection FIA have specifically referred to paragraph 9 of the judgment dated 26.04.2011 of the Hon'ble Supreme Court, which in their view state that:

- (a) Airlines and passengers must not be burdened with any airport development fee to be collected to fund the capital investments of a private operator.
- (b) Airport Development Fee should be levied uniformly across all metro and non metro airports in India. It should not be airport specific since people travel to destinations, not airports.

DIAL have referred to the provisions of Section 22A of the AAI Act, 1994 which provide that DF collected from the embarking passenger at an airport shall be utilized, inter alia, for the purpose of funding or financing the cost of up gradation expansion or development of the airport at which the fee is collected.

(xi) FIA have observed that **DF is a capital subsidy/contribution levied** and collected from airlines that in turn partly/fully pass it on to the passengers which is beyond the scope of OMDA and SSA; and that the private airport operators cannot seek re-negotiation of the tariff beyond those prescribed in OMDA and SSA. Therefore, the private operators should be barred from levying DF forthwith and sum collected till date be returned to the



Government/AAI to enable it to utilize the same for the development of other airports, which are under its control. Further, the Government cannot give viability gap funding to the private airport operators especially after the privatization has taken place and that an upfront capital grant will be unfair and the additional funding gap of Rs.1,793 crores should be bridged through debt financing, subsidy by Government, or additional equity.

DIAL have stated that the current levy of DF is under provisions of AAI Act and that the concession documents do not prohibit levy of DF. Further, the Supreme Court judgment dated 26.04.2010 permits levy of DF as determined by Authority.

- (xii) **Single Till Approach** adopted by the Authority warrants a comprehensive evaluation of the economic model and realities of the airport-both capital and revenue elements. The DF petition of DIAL must not be separately taken up but taken up as part of the overall tariff determination under Section 13(1) (a) and (b) of the AERA Act, 2008.

DIAL have stated that single till approach has not been adopted by the Authority for DIAL and the concession documents mandate a Hybrid Till Model.

- (xiii) FIA have raised several questions on the issue of legal efficacy and values of the initial master plan approved by MoCA, the extent to which such outlay be permitted to be revised without complying with the requirements of prudence check, objections and recommendations of the financial and technical audit reports of EIL and KPMG recommending disallowances of capital expenditure. FIA have also stated that if in a claimed capital/project outlay of Rs.12,857 crores, the airlines and indirectly/partly the passengers are to contribute Rs.3743 crores as capital infusion while the operator along with AAI brings in only Rs. 2,450 crores, why the operator not be reduced to a minority shareholder with a representative body of the airlines/passengers being issued the relevant equity and whether such an eventuality was contemplated in the competitive bidding process for PPP and airport development by the Government of India.

DIAL have stated that the process of implementation of the project has been in compliance with the provisions of the OMDA and SSA including that relating to master planning. AERA had appointed two independent auditors to undertake technical and financial audit of the project including prudence checks. The Authority has applied its mind and taken a considered view in the subject Consultation Paper No.2/2011-12 on the disallowance. The point made on equity to be allotted to a representative body of airlines/passengers is out of context and reflects lack of understanding of the privatization approach of the major airports. DIAL is of the view that the FIA's response is blind sighted by the request for DF and does appreciate that DF will lead to a permanent reduction of RAB and lower airlines tariffs in the long run. On the other hand



if instead of DF, equity or debt is considered, this will lead to a significantly higher return on capital thus resulting in a significant increase in airline tariffs.

COMMENTS IN PURSUANCE OF ORDER OF HON'BLE DELHI HIGH COURT IN WRIT PETITION (C) 5007/2011:

17.1 As indicated in para 14 above, Hon'ble Delhi High Court had in WP(C) 5007/2011, vide Order dated 19.07.2011, directed that ROAR would be given 10 days time to make its submissions in respect of the Consultation Paper. In pursuance thereof, ROAR have, vide letter dated 29.07.2011, made the submissions in the matter.

17.2.1 ROAR requested for being furnished with the copies of all the documents, papers and materials, referred to in the Consultation Paper which has been furnished to the other stakeholders for consideration. It has been stated that in the absence of access to aforesaid documents they would not be in a position to make any effective representation in consonance with Section 13(4) of the AERA Act.

17.2.2 It has been further submitted that the very foundation of the Consultation Paper is erroneous and unsustainable in law for the reasons mentioned below:

- a) It is only the Authority meaning the 'Airports Authority of India' which can perceive the specific need to levy DF for the purposes envisaged in terms of sub-clauses (a), (b) & (c) of Section 22 A of the AAI Act, 1994. It can accordingly seek the approval of AERA for determination of DF in respect of the major airports.
- b) The said right to apply to AERA thereby setting out the need to levy DF cannot be and is not assigned to any private operator and the AAI Act does not provide for any such assignment.
- c) The DF, if levied, in respect of any airport has to be mandatorily credited with AAI.
- d) The use of DF even if it is at the behest of a private operator is mandated to be strictly controlled by the AAI in the manner to be prescribed by rules, which are yet to be framed.
- e) In the light of the provisions of the Section 22 A of the AAI Act and the interpretation thereof by the Hon'ble Supreme Court, the legislative mandate was that if the private operator such as DIAL perceived the need for the levy of DF to meet the costs of "funding of financing the costs of upgradation, expansion or development of the airport at which the fee is collected", then it would have to petition the AAI and require the Authority (AAI) to approach the Central Government or the AERA, depending upon the status of the airport and seek specific permission for such levy.



- f) The process adopted in the present case being contrary to law is unsustainable and the Consultation Paper issued at the instance of DIAL, who had no right to approach AERA independently in the first place and Consultation Paper is based on the letter dated 09.02.2009 is required to be declared invalid and required to be withdrawn summarily.

17.2.3 Without prejudice to their contention that the entire process of seeking to determine the levy of DF at the direct instance of the private operator and based on the letter dated 09.02.2009, which is declared to be illegal by the Hon'ble Supreme Court, ROAR have given their further objections to the contemplated approval on the following grounds:-

- (i). The contemplation of formulating the levy of DF to bridge the funding gap for the development of the IGI Airport is itself illegal and dehors the Operation Management and Development Agreement, State Support Agreement and also the AAI Act. There exist absolutely no contractual provisions for passing off the burden of financing the development at IGI airport upon the passengers or for that matter on any other entity.
- (ii). The alleged huge cost overrun is another example of indirect method of profiteering at the cost of the public and recouping the capital inputs by DIAL. The cost overruns appear to be deliberately inflated and passengers or the airport users cannot be burdened with the same.
- (iii). The final project costs also include costs for facilities which are not even in existence, such as the ATC Tower. The authorities cannot burden the passengers for contributing towards the cost of the facility, which is not provided to the passengers for the same today, anytime in future.
- (iv). The Federation of Indian Airlines (FIA) have submitted their written comments on the Consultation Paper vide letter dated 13.05.2011. The contents thereof mirror their principal objections against the levy of DF. In order to avoid repetition they adopt the objections raised by FIA as contained in their letter dated 13.05.2011 and urge the Authority not to permit the levy of ADF at IGI Airport, more particularly, since DIAL has no authority to seek such levy in the first place.

17.2.4 In conclusion, ROAR have urged the Authority to discard the Consultation Paper as being been illegal and contrary to the law and refuse the levy of any DF at the instance of DIAL.

17.3 As regards the request of ROAR for being provided with the copies of all the documents, papers and materials, referred to in Consultation Paper No. 02/2011-12 dated 21.04.2011, the matter was examined. It was observed that all relevant documents and papers had already been annexed to the Consultation Paper and no other material had been furnished to other stakeholders for their consideration.



Since these documents were freely available on the website, ROAR were required to adhere to the directions given by the Hon'ble Delhi High Court vide which 10 days time was given to ROAR to make the representation. Hence, no "additional representations" may either be warranted nor would it be possible for the Authority to consider any such additional representations. This position was communicated to ROAR vide letter F. No AERA/20010/DIAL-DF/2009-10/Vol.V/786 dated 04.08.2011.

18.1 DIAL responded to ROAR's submissions vide letter no. nil dated 03.08.2011 and have contended that the representation made by ROAR is a blatant attempt to mislead the Authority by trying to make a case against the proposal contained in the Consultation Paper for levy of ADF at the IGI Airport, when they have none.

18.2.1 DIAL have submitted that issues raised in the representation are no longer res-integra in view of judgment dated 26.04.2011 rendered by the Hon'ble Supreme Court of India in case of Consumer Online Foundation vs. Union of India and Ors, Civil Appeal No. 3611 of 2011 which also disposed off the case of ROAR vs. UOI and Ors, Civil Appeal No. 3612 of 2011('ROAR Appeal') ['COF Judgment'] whereby all the issues raised in the present representation of ROAR have been considered and a detailed Judgment passed clarifying the specific role of the agencies, namely AERA, AAI and DIAL (Private Operators) involved in collection of ADF at the IGIA.

18.2.2 ROAR is nothing but a busybody which has been formed for the purposes of objecting to any and all actions of the private airport operators with the ulterior purpose/objective of choking/blocking funds and blackmailing these operators. It has also been alleged that the persons behind ROAR are Shri P. K. Aggarwal, Managing Director and Shri Sudhir Aggarwal, Director of M/s P K Hospitality, which was an erstwhile concessionaire at the IGI airport and who also unsuccessfully bid for new concessions in foods & beverage outlets at the new Terminal T3. Purported Memorandum of Association of ROAR clearly sets out the generic nature of their objectives and it is evident that ROAR has been set up by some vested interests as it is difficult to comprehend that a body with such generic objectives as are set out in its Memorandum of Association would incur such heavy legal costs claiming to be representing the air traveling public.

18.2.3 Besides the aforesaid preliminary comments, DIAL have submitted that ROAR has principally taken two objections:

- (i) That the very foundation of the Consultation Paper is erroneous and unsustainable in law as the authority to seek the levy of DF vests with the AAI and the same cannot be assigned to DIAL in the absence of any specific provision of law.
- (ii) That there exists absolutely no contractual provision for passing off the burden of financing the development of the IGIA upon the passengers or for that matter on any other entity

18.2.4 As regards (i), DIAL have submitted that same is nothing but a gross misrepresentation of the provisions of the AAI Act and the AERA Act, the judgment



dated 26.4.2011 rendered by the Hon'ble Supreme Court of India. It has been submitted that Section 1(3)(b) read with Section 2(n) and Section 13 (1) (b) of the AERA Act makes it amply clear that the authority which manages the airports ('private' as well as 'leased') can levy and collect DF. Further, Section 2 (n) of the AERA Act states that "*service provider' means any person who provides aeronautical services and is eligible to levy and charge user development fees from the embarking passengers at any airport and includes the authority which manages the airport*", which makes it clear that in order to be a 'service provider' a 'person' must fall under one of the two categories, namely:

- (i) must be any person who provides aeronautical services and is eligible to levy and charge user development fees from the embarking passengers at any airport; and
- (ii) includes the authority which manages the airport;

DIAL under both the categories and is a 'Service Provider' as defined under Section 2 (n) of the AERA Act and as such:

- (i) it provides aeronautical services at the IGIA pursuant to the exclusive rights granted for the same by AAI under the OMDA; and
- (ii) is eligible to levy and charge user development fees from the embarking passengers at the IGIA; and
- (iii) is also the authority which manages the IGIA again pursuant to the exclusive rights granted for the same by AAI under the OMDA and

18.2.5 The legislature, by including the eligibility to levy and charge user development fees from the embarking passengers at an airport as an essential attribute of service provider, which definition includes any person, has laid to rest any doubt that it is not only the AAI which is eligible to levy and charge user development fees from the embarking passengers at an airport but any person who satisfies the criteria of Section 2(n) of the AERA Act can do the same.

18.2.6 On the issue of whether DIAL can directly approach AERA seeking to collect Development Fee ("DF"), DIAL have stated that it is no longer relevant in the present case and for the present determination of DF for the IGI Airport in view of the ratio-decendi of the COF Judgment as set out by the Hon'ble Supreme Court in paragraphs 19 to 23 and summed up by the Hon'ble Supreme Court in Para 23 of the COF Judgment.

18.2.7 ROAR had challenged the permission dated 09.02.2009 granted by the Government of India, Ministry of Civil Aviation on the application made by DIAL. Although, vide the said COF Judgment, the Hon'ble Supreme Court quashed the permission granted by the Government of India on the ground that the rates have to be fixed by the Central Government only by way of the Rules framed under the AAI Act, at the same time, the Hon'ble Supreme Court has categorically held in Para 23 (v) of the judgment that henceforth any development fees that may be levied and collected by DIAL and MIAL, i.e. the lessees of Delhi and Mumbai Airports at the rates as may be determined by Airports Economic Regulatory Authority under Section 22A of the Airports Authority of India Act, 1994 as amended by the Airports Economic Regulatory Authority of India Act, 2008 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. The said direction has been issued by the Hon'ble Supreme Court despite the main ground taken by ROAR in their appeal that the authority to seek the levy of Development Fees vests with the AAI and the same cannot be assigned to DIAL in the absence of any specific provision of law. Thus, the said argument/ objection of ROAR have been rejected by the Hon'ble Supreme Court and as such are no longer available to ROAR.

18.2.8 DIAL have also submitted that it is clear from the COF Judgment that the Hon'ble Supreme Court, after interpreting the relevant provisions of the AAI Act as well as the AERA Act pertaining to the future levy, determination, collection, and utilization of DF has not ascribed any role to the AAI as sought to be granted by ROAR other than what is stated in Para 23(v) of the said judgment, i.e., any development fee that may be levied and collected by DIAL and MIAL under the authority of the orders passed by AERA shall be credited to the AAI and will be utilized for the purposes mentioned in clauses (a), (b) or (c) of Section 22 A of the AAI Act in the manner to be prescribed by the rules.

19.1 As regards the contention of ROAR that AAI is required to evaluate in the light of the contractual arrangement with DIAL and whether DIAL can be permitted to utilize any Development Fee raised through public means at IGI Airport, it has been submitted that:

- a. DIAL had submitted the proposal for levy of DF to MoCA. In Dec, 2008, MoCA had referred the matter to AAI, in order to examine the proposal.
- b. AAI had appointed KPMG to examine the request of DIAL and to make suitable recommendations. These recommendations of KPMG were then forwarded to MoCA
- c. Based on the recommendation of AAI, MoCA passed the Order dated 09.02.2009 for levy and collection of DF at IGI Airport with following emphasis :
 - (i) AAI and the Central Government would have supervening powers in respect of Escrow Account to ensure that all receipts are properly accounted for and utilized only for permitted purposes. These powers may include stoppage of withdrawal by DIAL.
 - (ii) All accounting and auditing practices, as would have been applicable to AAI, would be applicable to DF receipt and expenditure.
 - (iii) DIAL to report the collection and usage of DF on a monthly basis to Central Government / Regulator through AAI.
 - (iv) AAI was to appoint an independent technical auditor.
- d. The SOP for DF was issued by AAI and all the fund management of DF is done based on above SOP with continuous monitoring by AAI.
- e. In addition to the above, AAI have been active in the process of getting the final Project Cost of DIAL approved from AERA and have furnished the specific instances as under:



- (i) In compliance with the MoCA Order dated 09.02.2009, AAI had appointed the Independent Auditors (Technical and Financial) on the request of AERA, for getting the audit of the DIAL Project Cost.
- (ii) Independent Auditors had submitted their final report to AAI.
- (iii) AAI has also commented separately on the Consultation Paper No.2/2010-11 floated by AERA on the Levy of DF at IGI Airport.
- (iv) In addition to the above, AAI has requested for a New ATC Tower based on the Operational requirements. The cost of the same has been included in the overall Project Cost and AAI has also submitted that the funding of the ATC Capex be made from the DF.
- (v) AAI had participated in the consultation meeting held on 09.05.2011.
- (vi) AAI is part of Joint Venture and all the decision are taken through Board which has representation from AAI.

Thus, it is clear that AAI are very much involved in the process of determination of DF for the IGIA and have not been relegated to the role of a mere spectator as alleged by ROAR.

19.2. As regards the second objection of ROAR, DIAL have stated that this objection is a repetition of the ground taken by ROAR before the Hon'ble Supreme Court. Thus, the said argument/objection is no longer available to ROAR.

19.3. Without Prejudice to the above submissions, DIAL have also stated that the State Support Agreement states as under (relevant part):

Article 3.1.3 of the SSA: "GOI confirms that till such time as the Economic Regulatory Authority commences regulating Aeronautical Charges, the same shall be approved by GOI in accordance with the broad principles set out in Schedule 1 appended hereto" Schedule 1 of the SSA (relevant portion): "PRINCIPLES OF TARIFF FIXATION: Background - If despite all reasonable efforts of the GOI, AERA is not in place by the time required to commence the first regulatory review, the Ministry of Civil Aviation will continue to undertake the role of approving aero tariff, user charges, etc."

Section 13 (1) (b) of the AERA Act empowers AERA to determine the DF which is levied for funding the cost of development of an Airport. Further, the SSA provides that AERA would ultimately determine/ approve such tariffs/ charges, etc. Thus, on the application of DIAL, AERA has the power to determine and approve the rate of Development Fee at the IGIA. Further, the charges mentioned under the OMDA or the SSA are not exhaustive and list only those charges which were existing and were being levied at the IGI Airport on the date when the OMDA was executed and in any case, the levy of DF is a statutory levy as permitted by Section 22 A of the AAI Act and as such the said levy is not dependent upon the provisions of the OMDA or any other contract.



FURTHER SUBMISSIONS OF DIAL:

20.1 DIAL have vide their letter No. DIAL/2011-12/Fin-Acc/667 dated 11.07.2011 referred to the proceedings in the Civil Writ Petition No.3889 of 2011 and Civil Writ Petition No.3893 of 2011 wherein the Hon'ble High Court of Delhi has ordered that the Public Notice No.03/2010-11 dated 23.04.2010 shall not be given effect to till such time the stay application is adjudicated upon by Hon'ble AERA Appellate Tribunal. DIAL had issued instructions to stop the collection of the DF with effect from June 1, 2011 which has led to delays in servicing the loan already availed against the DF, thereby increasing the interest amount and the overall liability of DIAL to the DF lenders, thus effectively increasing the NPV amount of the Development Fees.

20.2 DIAL have requested that they may be permitted to recover the additional interest liability to the DF Lenders from the DF receipts and permitted to present the finalized amount towards this additional liability to DF Lenders, at an appropriate time. Further, DIAL have also requested that the delay in collection of the DF should be taken in to account while determining the tentative tenure of collection of DF.

20.3 DIAL, vide another letter No. DIAL/2011-12/Fin-Acc/670 dated 11.07.2011, have informed the Authority that they were in receipt of a show cause notice from the Commissioner of Service Tax raising a demand of Rs.141.54 crores towards service tax on the DF collected up to the month of May'2011. DIAL propose to challenge the aforesaid levy as per law. Depending on the outcome of the legal process, DIAL may be directed to pay an amount towards the service tax (including interest and penalty, if any). DIAL have further submitted that the collection of development fees is not against any services being provided by the airport operators to the passengers, therefore, as per their understanding the airport operators were not to charge and collect any service tax towards the DF amount. As such DIAL have not charged and collected from the embarking passengers any amount towards service tax on the DF till date. Payment of any amount by DIAL towards service tax (including interest and penalty, if any) shall lead to a significant gap in the project cost financing.

20.4 In light of the above submissions, DIAL have requested the Authority to:

- (i) approve the levy of DF, with the direction that the amount payable and paid at any time by DIAL towards service tax (including interest and penalty, if any) should be excluded from the net present value of the DF, and
- (ii) make suitable provision in the ensuing order to approve levy of DF, to enhance the net present value of DF whenever DIAL is directed to deposit any amounts (including interest and penalty, if any) against the service tax and other taxes in respect of /relation to the DF.

20.5 In addition to the above submissions, DIAL have vide an email dated 04.08.2011, forwarded the DF rules that were notified in the official gazette. DIAL



have submitted that they were in significant financial distress on account of stoppage of collection of DF and that the debt for the earlier DF tranche had not been serviced for over 3 months. DIAL have stated that the lenders had expressed major concerns and were on the verge of declaring the account as a NPA which had serious negative repercussions on DIAL and its operations apart from their Group. ICRA, DIAL's rating agency, have advised that they were considering downgrading DIAL below investment grade considering the issues on DF. In this background, DIAL have requested that the Authority may expedite the order in the matter.

20.6 Further, DIAL have submitted that:

- (i) the DF rules do not provide for collection charges levied by airlines and the discussions with MoCA/AAI indicate that the order on DF from this Authority would need to make provision for the same to ensure the ability of airlines to withhold collection charges and remit the DF net of collection charges.
- (ii) their request made vide letters nos. DIAL/2011-12/Fin-Acc/667 and 670, both dated July 11, 2011 on service tax on DF and implications, including interest on debt, of DF suspension period may be considered.

20.7 DIAL have, vide a further submission dated 20.09.2011, requested to expedite the final determination of DF. It has been stated that the airport project has already been completed and borrowings of Rs.1827 crores have been made against collection of DF which has been stopped from 01.06.2011.

20.8 Further, for want of tariff support, they were incurring substantial losses. DIAL have submitted that in the last FY 2010-11, they have incurred loss of Rs 450 crores and as per the AOP (Airport Operating Plan) approved by the Board, they were expected to incur loss of Rs 920 crores in the current FY 2011-12; and that cumulatively by end of current FY 2012 more than 50% of net worth would get eroded which is causing concern to DIAL's Management as well as lenders, as the company was incurring huge accounting and cash losses for want of need based tariff support according to its eligibility/entitlement under OMDA/SSA.

20.9 DIAL also highlighted the problem faced by them in not getting the dues from Air India for the last one year (current accumulated dues about Rs 300 crores). They have submitted that while on the one hand they are not receiving the payment from Air India on the other hand they are burdened with 45.99% revenue share to AAI which has further aggravated and worsened the liquidity position of DIAL. As a cumulative effect on account of the above, the liquidity position of the company is becoming extremely critical and precarious. DIAL also made a reference to a various meetings held at different levels.

20.10 Further, DIAL also referred to the Order of Hon'ble High Court dated 01.06.2011, wherein the Hon'ble Court had while disposing of W.P.No.3889 of 2011 categorically mentioned that the present order shall not be construed "as this Court has interdicted in the proceedings of the regulatory authority for final determination of the cess or tax as per law."



20.11 In view of the above and also since the Authority under Section 13(iv) has to take into consideration the economic and viable operations of major airports, DIAL has requested AERA to issue the final order. It has been highlighted that even after the Authority issues its order, it will take some time in view of the elaborate procedure involved with MoCA, DGCA, AAI, Airlines and IATA to implement and restart collection of DF.

EXAMINATION:

21.1 The Authority has carefully perused the comments received from the stakeholders in response to the Consultation Paper, the clarifications received thereon from DIAL, DIAL's additional submissions made in this regard and also the developments pursuant to the Judgment dated 26.4.2011 of the Hon'ble Supreme Court.

21.2 The Authority has considered the issues raised and examined the position in respect of each of them in terms of the provisions of AERA Act, 2008 read with the AAI Act, 1994 as under:

(i) **Effect of the Supreme Court judgment holding the letter dated 09.02.2009 ultra-vires the AAI Act,1994** – The Hon'ble Supreme Court has held that letter dated 09.02.2009 of the Central Government, vide which the levy of DF was approved, purely on an ad-hoc basis, is ultra-vires the AAI Act, 1994. It is the contention of some of the stakeholders, specifically ROAR, that the Consultation Paper No. 02/2011-12 dated 21.04.2011, having been issued in pursuance of the review contemplated under the letter dated 09.02.2009, is required to be declared invalid. It is noted that the letter dated 09.02.2009 specified a review by the regulator. However, such review was, inter-alia, specific to the determination of the final project cost. It is observed that as per the provisions of section 22A of the AAI Act 1994, the 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. Therefore, the determination of cost of upgradation, expansion or development is a pre-requisite for determination of the rate of DF. In other words, any determination of DF would, in the first instance, require determination of the cost of the project, which is to be funded or financed through the levy of DF. DIAL have submitted the final project cost estimates and based there upon proposed the levy of DF for bridging the specified funding gap in the upgradation, expansion and development of the IGI Airport, vide their letter dated 31.3.2010. In view of the fact that the Consultation Paper proceeds to consider the project cost estimates submitted by DIAL, as audited by the independent auditors, and consequential issues, it would be reasonable to state that the proposals in the Consultation Paper, primarily, arise out of the letter dated 31.03.2010 of DIAL. In this view of the matter, it is clear that even though the letter dated 09.02.2009 has been held ultra-vires, the proceedings resting with Consultation Paper No. 2/2011-12 dated 21.04.2011 could



be continued as the consideration therein is, primarily, arising out of the letter dated 31.03.2010 of DIAL and consequential issues.

(ii) Can DIAL apply for determination of DF directly or AAI has to do it? - It is the case of ROAR that in terms of Section 22A of the AAI Act, 1994, it is the Authority, i.e., AAI, which can perceive the need to levy DF for the purposes envisaged in terms of sub-clauses (a) (b) & (c) of the said section 22A. The right to apply to AERA for levy of DF cannot be and has not been assigned to any private operator and the AAI Act does not provide for any such assignment. In this regard, the Authority notes the following :

- (a) As per section 13(1) of AERA Act, it is one of the functions of the Authority to determine the amount of DF in respect of major airports. There is no guidance in the aforesaid provision as to who would apply for such determination.
- (b) Section 22A of the AAI Act, 1994, as amended vide section 54 read with Schedule of the AERA Act, 2008, provides that the Authority (i.e., the AAI) may levy and collect from the embarking passengers at major airports the development fees at the rates as may be determined under clause (b) and sub-section (1) of section 13 of the AERA Act. In this provision also, while there is an indication as to who may levy and collect, there is no guidance as to who can apply for the determination.
- (c) The Hon'ble Supreme Court in its judgment dated 26.04.2011 has, inter-alia, held that:

"11.....Though Airports Authority can utilize the fees levied by it, for all or any of these purposes mentioned in clauses (a), (b) and (c) of Section 22A, what can be assigned by the Airports Authority to a lessee under a lease entered into under Section 12A of the 1994 Act is the power to levy fees for the purposes mentioned in clause (a) of Section 22A of 1994 Act."

Therefore, it stands concluded that for the purposes of clause (a) of section 22A, DIAL have stepped into the shoes of the Authority, i.e., AAI.

- (d) DIAL are operating the IGI airport, Delhi and have been granted the functions of operating, maintaining, developing, designing, construction, up gradation, modernization, finance and management of airport in terms of article 2.1.1 of the Operation Management Development Agreement (OMDA) entered into between the AAI and DIAL on 04.04.2006. Thus, the costs of the project are incurred in the hands of DIAL and as such, they are best placed to approach this Authority with their need for funding or financing through levy of DF.
- (e) It is a normal regulatory practice that the service provider/operator makes the proposal for determination of tariff/charge unless there is a



statutory provision indicating otherwise. In the present case, as stated at sl. (a) and (b) above, there is no guidance in the provisions of Section 22A of the AAI Act, 1994 and the provisions of section 13(1) of AERA Act regarding the entity which should apply for determination of DF. As such, there is no need to deviate from the normal regulatory practice of the airport operator approaching for determination of a charge.

- (f) In case the submission of ROAR that DIAL should, in the first instance, approach AAI and justify the need for DF and thereafter AAI, if convinced with the same, should approach this Authority for determination is accepted, it would mean that the regulatory process will become a two stage process– in the first instance, AAI will assess requirements and only to the extent that it finds the proposal justified would place the same for the determination by AERA. AERA would, thereafter, further examine the requirement and pass the final order. This would tantamount to determination being done in the hands of two entities, i.e., AAI and AERA, which is not contemplated in law. In fact, as per Statement of Objects and Reasons of the AERA Act, one of the reasons for establishment of this Authority was to remove the conflicts, which were occurring in AAI performing the role of airport operator as well as the regulator.
- (g) DIAL have also stated that this issue was raised in appeal before the Hon'ble Supreme Court by ROAR and has not been accepted by the Hon'ble Court.

In view of the above observations, the Authority felt that submissions of ROAR to this effect are incorrect and DIAL is well within its right to approach it for determination of the DF in respect of IGI Airport, New Delhi.

(iii) Can DIAL levy and collect DF at IGI Airport, New Delhi even though none of the transaction documents contemplate the same?- It is the case of some stakeholders that neither the OMDA nor the SSA in terms whereof the IGI Airport, Delhi was leased to DIAL by the AAI contemplate levy of DF. Therefore, the levy of DF to bridge the funding gap in the development of IGI Airport is illegal and dehors the provisions of the OMDA and SSA as well as the AAI Act.

The Authority noted that neither the OMDA nor the SSA have any provisions pertaining to the levy of DF and that article 13.1 of OMDA specifically provides as under:

- “(a) It is expressly understood that the JVC shall arrange for financing and/or meeting all financing requirements through suitable debt and equity contributions in order to comply with its obligations hereunder including development of the Airport pursuant to the Master Plan and the Major Development Plans.”*



However, the levy is permitted in terms of section 22A of the AAI Act, 1994. As discussed in response to sl.(ii) above, it stands concluded by the judgement of the Hon'ble Supreme Court that DIAL have stepped into the shoes of AAI for the purposes of clause (a) of Section 22A. Therefore, the levy and collection of DF is a power statutorily conferred upon DIAL. It is trite to say that for exercise of a statutory power, the persons, so empowered, need not separately draw any authority by way of contractual agreements. Differently stated, in case the present contention of the stakeholders is accepted, it would tantamount to accepting a position where the contractual provisions would gain primacy over the statutory provisions, which cannot be contemplated in law. Therefore, the Authority is of the view that DIAL, having a power to levy and collect development fee in terms of section 22A of the AAI Act, as held by the Hon'ble Supreme Court, are not precluded from levying and collecting the same, merely on account of absence of the enabling covenants in the contractual arrangements .

21.3 Apart from the above legal issues, the Authority has also examined in detail the issues raised by the stakeholders as under:

- a) **Gross Floor Area (GFA)** – As per the Master Development Plan (MDP) prepared by M/s Matt McDonald, the GFA of the terminal T 3 was estimated to be 4,51,644 sq. mtrs. The Auditors have pointed out that this area was increased to 4,70,179 sq. mtrs thereafter on detailed designing pursuant to MDP. The area of 4,70,179 sq. mtrs was used for estimation of the cost of Rs. 8975 crores. KPMG in their report have pointed out that GFA of T3 exceeds the GFA as per master plan by nearly 84,000 sq. mtrs. The GFA per peak hour passenger of T3 is higher than most of the leading airports in the Asia Pacific region. However, KPMG have not quantified or proposed the amount for exclusion, if any, from the GFA actually built. They have, instead, proposed that the technical reasonableness of the increased GFA may be assessed by EIL. EIL has on the other hand, accepted a total GFA of 5,43,321 sq. mt. and proposed exclusion/disallowance of 10,566 sq. mt. from the GFA. The disallowance has been proposed on two counts – (i) 1914 sq. mt. at the mezzanine level; (ii) 8652 sq. mtrs. for the food court and retail area at CIP, office and hotel level. The reason for reduction of 1914 sq. mt. as per (i) was not clearly stated by the EIL whereas in respect of 8652 sq. mt. reason recorded for not accepting the same is as under:

“The additional area have been arrived at during the detailed design, so as to provide the required facilities, in order to meet the service quality requirements as set out in OMDA. As part of project cost, the facilities have been developed for passenger conveniences, though not specifically mentioned in the master plan. Hence cost towards this shall not form basis of determination of development fees.”

AAI, vide letter dated 17.1.2011, have stated that EIL have not specified the reasons for suggesting the disallowance and have pointed out that the area proposed to be disallowed by EIL is about 2% of the total gross floor area and suggested the acceptance of the same for the following reasons:



- (i) The Additional area of 8652 sq. mt. for food court and retail area at CIP, office and hotel level would increase the commercial activities in the terminal building, which will enhance passenger facilitation and also fetch additional revenue.
- (ii) The additional area at mezzanine level does not have any commercial potential. But still it should be accepted as it would enhance the operational efficiency and also for the convenience of transfer of passenger both domestic and international.

In the 35th and 36th meeting of the Authority, the EIL representatives, who were in attendance to assist the Authority, had explained that the area of 1914 sq. mt. was proposed for reduction on the grounds that based on the built up drawings the actual area of the concerned segment was factually 38506 sq. mt. and not 40420 sq. mt. as indicated by DIAL. Therefore, it was a case of measurement error. Upon specific enquiry by the Authority, EIL's representative clarified that this being a measurement error, cost reduction proposed on proportionate basis in their report was not applicable in as much as it was not a case that the area had been overbuilt (than what was contemplated by design) and for which the cost had to be proportionately reduced. It was actually a case where there was a measurement error and, therefore, the cost incurred would stand as such. As regards the area in respect of food court and retail at CIP, Office and Hotel level their view was that the area admeasuring 8652 sq.mt. need not have been built as the food court and retail areas are already available on departure and arrival levels and the additional area at CIP, Office and Hotel levels will not be used by the passengers. Upon specific enquiry by the Authority, EIL's representative stated that this was a judgement of EIL and not a case that the said area had either not been built or ought not to have been built on technical considerations.

The Authority had noted these explanations furnished by the representatives of EIL and the views of the AAI as well as the fact that the Central Government in the Ministry of Civil Aviation had stated that AAI's comments in the matter may be considered since AAI was responsible to monitor the performance of the Independent Engineers as also the development of the projects. Keeping in view the explanations furnished, stand of AAI and the Ministry, Authority had tentatively decided to not accept the recommendations of EIL for reduction of corresponding area of 10566 sq. mt. from the total gross floor area of T3. The stakeholders have not contested the issue to the extent of 1914 sq. mt. area which was ascribed to the measurement error. However, for the balance area of 8652 sq.mt. for food court and retail area at CIP, office and hotel level, some of the stakeholders have pointed out that the food court and retail areas are already available on departure and arrival levels. Therefore, the additional area at CIP, office and hotel levels may not be used by the passengers. DIAL, on the other hand, have supported the inclusion on the ground that the MDP submitted by DIAL



envisaged adjustment to areas as the design was developed in coordination with various stakeholders during the execution of the project and that the non aeronautical assets of above nature do not form part of the RAB for the purpose of tariff calculation and infact provide the cross subsidy from the revenue earned thereby lowering the charges for the airlines and the passenger.

The Authority has examined the matter further in view of the conflicting arguments and has observed that there has been a large increase in the gross floor area of T3 after the MDP stage – the increase is of the order of about 84000 sq. mt. The technical auditors have opined that the subject area of 8652 sq. mt. need not have been built. Further, the subject area is being used for food court and retail which are used directly by the airport users. None of the airport users have supported the inclusion of this area. In fact, it has been pointed out that sufficient food court and retail area are already available at departure and arrival levels. Further, a very limited number of passengers use CIP and Hotel level and that these passengers would be able to use the F&B facilities in the CIP Lounges and the Hotel. Therefore, on balance, the Authority feels that the area admeasuring 8652 sq. mt. may not be included in the GFA of T3 and consequently, the admissible project cost may be reduced by an amount of Rs. 107.15 crores (as per calculations in **Annexure - I**) on proportionate basis as recommended by the EIL.

- b) **Additional Apron Area**– DIAL have projected the cost increase of Rs. 96 crores due to additional apron area. However, EIL, on the basis of benchmarked costs, have assessed the total cost impact of this additional area as Rs.72.46 crores and proposed disallowance of balance Rs.23.82 crores. DIAL, at the draft audit report stage, had resisted the same on the grounds that the costs cannot be benchmarked to the Ministry of Road Transport & Highways estimates and requested for consideration of the total increased cost of Rs. 96 crores. In the final report, EIL have reiterated the position as above. KPMG had not made any estimate but have agreed to the reduction in cost as worked out by EIL. AAI have not specifically commented on this issue. After careful consideration, the Authority had tentatively felt that since cost increase had been worked out by EIL on the basis of the benchmarked cost, the reduction of Rs. 23.82 crores proposed by them may be accepted. DIAL have, now, submitted that the increase in apron cost is on actual basis as per the packages awarded for the work and in a project of this nature and executed within critical timelines, benchmarked costs from other unrelated project should not be taken as the basis for valuation. After careful consideration, the Authority is of the opinion that this contention of DIAL is not acceptable in as much as the fair value has been suggested by technical auditor who is also the independent engineer for the project. Therefore, it would only be reasonable to presume that EIL would have taken into consideration factors specific to the project and DIAL while benchmarking costs.

- c) **Rehabilitation of Runway 10-28**- DIAL have proposed an inclusion of Rs.110 crores in the project cost towards rehabilitation of R/W 10-28. EIL



had pointed out that the rehabilitation and strengthening works of runway 10-28 are not part of the Master Plan. In EIL's estimate, actual cost of the work should be Rs.90 crores. KPMG, while agreeing to the fair cost estimate of Rs.90 cores by EIL, pointed out that DIAL have classified entire cost as capital expenditure as per Accounting Standard 10. However, as per paragraph 12.1 of the said Accounting Standard, only expenditure that increases the future benefits from the existing assets beyond its previously assessed standard of performance is included in the gross book value. This implies that the incremental expenditure, over and above the cost of normal repairs, that leads to an increase in the runway's life or load bearing capacity beyond its original design specifications can be capitalized. It has been observed that the Pavement Classification Number (PCN) of R/W 10-28 had decreased from a design level of 106 to 99. Post rehabilitation, the PCN is estimated to increase to 135. EIL have estimated fair cost of rehabilitation for upgrading to PCN 135 as Rs.90 crores. Based on the same, KPMG have estimated Rs. 17.5 crores as proportionate amount spent on rehabilitation of runway to initial PCN value(i.e., 106) and balance Rs.72.5 (Rs.90 less 17.5 crores) be treated as fair project cost. Thus, KPMG have suggested that the project cost of this work may be taken as Rs.72.5 crores and an amount of Rs.17.5 crores may be allowed only as operating expense in the financial year in which it has been incurred. Authority had taken a tentative view that the recommendations of the KPMG in the matter were fair and, therefore, an amount of Rs. 37.50 crores may be excluded from the project cost. DIAL have accepted the disallowance of Rs. 17.50 crores on the runway rehabilitation and have stated they shall be treating the same as OPEX in their tariff filing. However, in respect of disallowance of Rs. 20 crores on the basis of fair valuation done by EIL, the specific factors, as in case of additional apron area, have been pleaded. After careful consideration, the Authority is of the opinion that for the reasons stated at sl. (b) in respect of additional apron area, the present submissions of DIAL in respect of disallowance of Rs.20 crores are not acceptable. DIAL have also stated that even if said amount is disallowed, it should be included in the RAB for tariff purposes. The Authority finds this contention totally unacceptable in as much as any excessive expenditure if included in the RAB would tantamount to allowing a return to DIAL on such expenditure which ought not to have been incurred. The exclusion on this account is, therefore, confirmed to be Rs. 37.50 crore.

(d) **Escalation for reinforcement** – EIL have pointed out that due to increase in area of passenger terminal building and piers and change in scope during detailed engineering, the reinforcement steel requirement increased from 59203 MT to 116847 MT. This increase is due to under estimation done by DIAL at the time of the financial closure. Further, DIAL, in the project cost report, have shown an increase in the cost of steel from Rs. 27000 per MT to Rs. 43143 per MT over the escalated cost during construction. However, as per the data provided in the project cost report, the average price of reinforcement steel during execution is found to be Rs.36660 per MT. Further, as stated by DIAL the original rate of Rs.27000 per MT included the labour component of



Rs.3000 per MT towards shifting, cutting, bending and placing of reinforcement. As per EIL, the maximum rate acceptable towards site shifting, cutting, bending and placing is Rs.4000 per MT. On this basis EIL have determined the fair price and suggested that the impact of price increase may be restricted to Rs. 174.33 crores as against the impact of Rs. 210 crores claimed by DIAL. Authority had taken a tentative view that this being a fair price estimate, the recommendations of the technical auditors EIL may be accepted implying an exclusion of Rs. 35.70 crores from the project cost. DIAL have contested the same on the ground that auditors have based their estimates on the market rate for these works, which are normally carried out through manual means with minimal mechanization. On the other hand, DIAL had to adopt an automated reinforcement cutting, bending plant capable of producing the required quantities to be installed on site to meet the project deadlines. The Authority feels that the technical auditors would have considered the factors specific to the project while recommending the fair valuation. Further, normally, the costs are expected to reduce with greater mechanization/automation. In the present case, the opposite has been pleaded. Therefore, the Authority is of the opinion that the contention of DIAL was not acceptable. The exclusion on this account is, therefore, confirmed to be Rs. 35.70 crore.

e) **Upfront Fee:** At the stage of privatization of the IGI Airport, Delhi, DIAL had paid an Upfront Fee of Rs. 150 crores to the AAI. DIAL have considered this to be a pre-operative expense and included the same in the project cost. Ministry of Civil Aviation had initially pointed out (letter dated 08.03.2011) that the Upfront Fee was paid by DIAL to AAI in terms of article 11.1.1 of OMDA and was booked in the account of the project cost. While determining the ad-hoc DF in the year 2009, the Ministry had taken an estimated project cost of Rs. 8975 crores which included Upfront Fee paid to AAI by DIAL. The Ministry in the letter dated 01.04.2011 (sent in response to this Authority's specific enquiry regarding the provisions of SSA and the Upfront Fee to be part of the project cost), reiterated its position communicated vide letter dated 08.03.2011.. Therefore, the Authority inferred that the Central Government was in favour of inclusion of Upfront Fee in the project cost. Upon careful consideration of the matter, the Authority had felt that it had two options before it:

- (i) it could either include or not include the Upfront Fee towards the project cost; or
- (ii) if the Authority decides to include the Upfront Fee in the project cost, appropriate treatment regards the return thereon would be given in accordance with the provisions of the SSA at tariff determination stage.

The Authority was tentatively of the view that latter approach would be reasonable and had, in the Consultation Paper, proposed inclusion of Upfront Fee in the total project cost at the stage of determination of funding gap and DF subject to certain observations. This view of the Authority has been strongly contested by the stakeholders on the basis of the provisions of the



SSA. MoCA have not furnished any further comments in response to the Consultation Paper. Matter has been further examined in this light. The Upfront Fee of Rs. 150 crores was paid by DIAL to AAI since OMDA required it to be paid. As far as SSA is concerned, it is observed that in terms of article 3.1.1. of the SSA, *"the upfront fee paid by the JVC to AAI under OMDA is not to be included as part of costs for provision of Aeronautical Services and no pass-through would be available in relation to the same"*. Presently, the Authority is determining the total project cost, which includes the cost of aeronautical as well as non aeronautical assets. Therefore, the subject provisions may not be on all fours in the present case. However, considering all aspects, there appears to be some merit in the arguments that if the Upfront Fee, which is not to be made part of the cost for provision of aeronautical services and thereby is not supposed to be recovered through aeronautical charges, is recovered through DF such recovery may not be entirely in line with, atleast the spirit, of the contractual provisions.

Further, during the stakeholders consultation meeting held on 09.05.2011, Shri Sidharath Kapoor, CFO, DIAL, inter-alia, stated as under:

"(i) As per SSA the upfront fee cannot be taken into account for tariff determination. There is no bar in SSA for it to be taken in to project cost for DF determination. In any case, Upfront Fee has been paid out of the equity fund at the time of taking over of the project. Therefore, if Upfront Fee is not to be taken as a part of the project cost, the equity contribution of promoters should be taken to have reduced from Rs.2450 crores to Rs.2300 crores. Consequently, the funding gap will remain the same."

The approach with reference to derating (in the Consultation Paper) would have ensured that the DIAL did not get any return in respect of Rs.150 crores included in the project cost. However, the stakeholders have asserted that this should be, ab-initio, excluded. As indicated above, DIAL have also fairly accepted that, in such a case, the Upfront Fee should be taken to be have been paid out of the equity and the equity contribution of promoters should then be taken to have been reduced from Rs.2450 crores to Rs. 2300 crores. Upon careful consideration, the Authority has further noted the following:

(i) The Clause 11.1.1 of the OMDA provides as under:

*"The JVC shall pay to the AAI an upfront fee (the **"Upfront Fee"**) of Rs 150 Crores (Rupees one hundred and fifty Crores only) on or before the Effective Date."*

Therefore, the Upfront Fee was to be paid by DIAL either before or on the date of taking over the project from the amounts as would have been available with them.

(ii) Further, as already brought out above, in terms of article 3.1.1. of the SSA, the upfront fee is not to *"be included as part of costs for provision of Aeronautical Services and no pass-through would be available in relation to the same"*.

(iii) It would appear from records that while considering the request of MIAL for approval of DF, in respect of CSI Airport, Mumbai the MoCA had not taken into account the upfront fee of (Rs.150 crores) paid for calculation of DF.

In view of the above, the Authority feels that, on balance, the Upfront Fee of Rs. 150 crores may not be included in the total project cost and the equity contribution of the promoters may be taken to have been reduced by Rs. 150 crores.

(f) **Resources from other means:** The project at the original estimated cost of Rs.8975 crores achieved a financial closure with estimated funding pattern of Rs.1250 crores equity including internal accruals; Rs.3650 crores domestic debt; Rs.1336 international debt; Rs.912 crores Refundable Security Deposit (RSD) from the development of Hospitality District; and Rs. 1827 crores as funding gap to be raised through DF. DIAL have stated that the lenders have refused to increase the debt portion, due to serviceability issues, to either fully or partly meet the cost escalation. They have also indicated their inability to bring in further equity, inter-alia, due to the inability of AAI to bring in more equity as well as due to the provisions of SHA which requires that a trigger debt equity ratio of at least 2:1 is to be maintained. As per DIAL, on the present funding pattern, the debt equity ratio is 2.151: 1. Therefore, apparently, there is hardly any scope to bring in additional equity. At any rate, if the present debt equity ratio of 2.151 is brought down to the trigger debt equity ratio of 2, additional equity amounting to about Rs.183 crores can be brought in by the shareholders. Considering the inability of AAI to bring in additional equity the private participants could contribute this additional equity. However, the same would lead to dilution of the share holding of AAI. Keeping in view this position, the Authority was tentatively of the opinion that it may not be possible to require the JV partners to bring in more equity to fully or partially fund the financing gap. Most of the stakeholders have stated that DIAL should have explored alternative sources of funds instead of burdening the passengers through DF. It has been stated that the need for DF has arisen mainly due to the stated cost overruns. Therefore, passengers should not be penalized for the same. DIAL 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, otherwise, it will lead to the dilution in equity of AAI. Furthermore, it has 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. Whereas if it is funded out of equity or debt, significantly higher reduction on capital would have to be allowed to DIAL. The Authority has noted that the clause 3.3.1 of Shareholders Agreement provides as under:

"Subject to the Initial Subscription as set out in Clause 3.2, the JVC, in order to meet its financial requirements may, from time to time, increase its authorized and/or paid up capital. Provided however, the JVC shall, prior to making any fresh issue of Equity Shares ensure that the Trigger Debt Equity



Ratio is maintained. If the Trigger Debt Equity Ratio is not so maintained, the JVC shall not issue any fresh Equity Shares till such time as the Trigger Debt Equity Ratio is in place. Towards this end, the Private Participants (without diluting AAI (alongwith AAI Nominees) equity shareholding) hereby covenant and agree to infuse funds in such form and quantity as may be necessary to ensure that the Trigger Debt Equity Ratio is maintained immediately prior to the time of any fresh issue of Equity Shares. Notwithstanding anything contained to the contrary in this Clause 3.3.1, where any financing documents prescribe that equity capital be infused in the JVC prior to any draw-down of debt, the JVC may, to the extent necessary, make such cash calls or issue such fresh equity to its shareholders, so as to ensure compliance with the requirements of such financing documents.”

The Authority has further noted that the clause 3.3.3.3 of the SHA provides as under:

“To the extent AAI (along with AAI nominees) chooses or is deemed to have not to exercised its Option, it shall be the obligation of the Private Participants to acquire the aforesaid Equity Shares, proportionately in accordance with their then, inter-se, respective shareholding in the JVC or such other proportion as may be mutually agreeable between the Private Participants, subject to such proportions complying with the Foreign Entity Equity Cap and Scheduled Airlines Equity Cap. Provided however, the Parties hereby agree that reasonable time shall be provided to the Private Participants to acquire such Equity Shares.”

The aforesaid clause 3.3.1 read with clause 3.3.3.3 of the SHA would seem to indicate that the private participants are obliged to acquire the equity shares, offered to AAI at the time of further capitalization and which it does not subscribe. However, irrespective of the position whether other promoters can bring in further equity or not, in case they are presumed to be able to bring such equity, the same will lead to reduction in equity stake of AAI below the current 26% level. Keeping in view the provisions of the Companies Act, it will fundamentally alter the special position of AAI in the JVC, i.e., DIAL. The Authority feels that such fundamental alteration, atleast 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 DIAL. 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.

(g)Traffic Forecast: For determining the tenure of levy at the ad hoc determination stage the Government had considered the growth figures as indicated at the Master Plan stage by DIAL (12% p.a. for FY 10, 14% p.a. for FY 11 and 12% for FY 12). On a careful consideration, the Authority felt that the traffic should be estimated on the basis of 10 year average in case of IGI Airport, New Delhi as this would be a more realistic estimate. On the basis of the figures available, the 10 year historical growth rate works out to 14.59%



p.a for domestic traffic and 8.28% p.a for international traffic. This position has not been disputed either by DIAL or by any other stakeholder during the consultation stage. The Authority has, accordingly, decided to continue with the above traffic growth rates for the purposes of present determination.

- (h) **Discount Rate:** DF is a pre funding levy. However, at the time of ad hoc determination, the Central Government had noticed that at the rates determined by it the tenure of the levy would extend beyond the project completion. It was, therefore, apparent that DF would be leveraged or securitized by DIAL to raise debt to bridge the financing gap during project period. In this background, the funding gap of Rs.1827 crores was determined on a NPV basis (as on 1.3.2009). For this purpose, a discount rate of 11% was considered by the Government. It was observed by the Authority that in normal course, the discount rate should be same as the rate of interest of debt securitized against the DF. Other way could be to take a standard (normative) lending rate such as SBIPLR and thereby decide the discount rate. The representatives of the KPMG had recommended that the discount rate should be determined with reference to the rate of interest of debt securitized against the DF already approved in their case. The final discount rate could then be ascertained by netting corporate tax rate from the interest rate (taken into account) so as to account for the tax shield due to interest payment. The representatives of the KPMG were also of the opinion that the tax shield should be considered at the normal corporate tax rate. The Authority tentatively decided to accept the recommendations of the Auditors. It has been ascertained from DIAL that the DF approved by the Central Government in February 2009, was securitized by them in March 2009 and a total debt of Rs.1827 crores (corresponding to the amount of Rs.1827 crores identified by the Government) has been raised by them from a consortium of seven public sector banks, with Canara Bank as lead bank. Further, Canara Bank has certified that, as on 31.03.2011, the weighted average cost of debt was 11.75%. Auditor's certificates have also been produced to the effect that during the period March 2009-March 2010, the weighted average cost of the debt was 10.72% whereas for the period April 2010 to March 2011, the same was 11.03%. Further, KPMG have advised that the Corporate Tax rate is 32.445%. DIAL have, in their response to the Consultation Paper, stated that the interest on DF loan is not charged to Profit & Loss A/C of the company and are not entitled for any tax shield on the interest. They have also enclosed a certificate from their statutory auditors confirming that the treatment given in books is the correct accounting treatment. Hence, given the fact that DF is not an item of the Profit & Loss A/C and has no bearing on the computation of income tax, the discounting of the DF must be done at the actual rate of interest and not on a rate derived net of tax. It was noted that while DIAL had securitized the DF, which was approved by the Central Government, on an ad hoc basis, after the Supreme Court judgement of 26.04.2011, the matter to that extent has been concluded. The Authority would, now, have to consider the funding gap after reckoning the amount of DF, which has been already recovered by DIAL and has been allowed to be retained by the Supreme Court



with them as a separate means of finance and would need to take a view about the project funding through DF on the balance amount. It may be so that DIAL may securitize the same with reference to the approval which the Authority may grant in the matter. However, even in the changed circumstances, it would be more appropriate to adopt the rate which was being actually charged by the Banks in respect of the earlier securitization at the relevant time. As regards the tax shield, the DF being a capital receipt, its non inclusion in the Profit & Loss A/C has been certified by the statutory auditors. Therefore, to the extent of tax shield, DIAL's averments appear to merit acceptance. The Authority is of the opinion that in absence of any material to the contrary on record and as the process had already been concluded, it would need to, presently, accept the submissions made by DIAL as regards discount rates and, if required, would review it based the standard accounting practices at subsequent review.

(i) **Provision of interest on debt securitization:**

In their additional submissions, DIAL have requested for provision of interest amount on the debt securitization by them on the basis of the ad-hoc approval granted based on which they had collected DF for the period upto 01.06.2011 and thereafter till the levy is restored in terms of the orders of this Authority. The Authority has deliberated in detail on this request of DIAL. It is noted that the present determination is primarily arising out of the letter dated 31-03-2010 of DIAL. The Authority, therefore, has not considered the earlier determination as a basis. It is also noted that the earlier ad-hoc determination has been held to be *ultra vires* by the Hon'ble Supreme Court. However, the Supreme Court has also ordered that the amount collected till the date of its order (26th April, 2011) be accounted for. The levy of DF was stopped with effect from 01-06-2011 in terms the orders of the Hon'ble Delhi High Court in the Writ Petition (Civil) Nos. 3889 and 3893 of 2011.

The Authority has noted that the DF calculations were made on NPV basis (to address the issue of securitization of funding gap) and that if the interest expense, as stated by DIAL has been actually incurred by it, such an expense, included in the collection of DF till 1.06.2011 is to be accounted for in accordance with the judgement of the Supreme Court. Further, the interest expense if incurred and accounted for during the interregnum from 01-06-2011 till the reimposition of DF in terms of the present fresh order of the Authority determining the DF, could conceivably be considered as an operational (interest) expense at the time of tariff determination. This would, however, require further examination in light of the provisions of law and covenants of various agreements, etc. The Authority, therefore, would consider interest paid/liability on both counts further at the stage of tariff determination and is not considering these interest components in the present DF determination at this stage.

(j) **Bidding for Hospitality District:** The issue of levy of DF initially arose as DIAL was unable to achieve financial closure on account of less than estimated receipts from refundable security deposits (RSD) arising out of the bidding for hospitality district. It appears from the papers that DIAL had



originally estimated to raise RSDs amounting to Rs.2739 crores from the hospitality district which was at the time of applying to the Ministry reduced to Rs.775 crores. Ministry after examination and on the advise of the consultants had considered a revised figure of Rs.912 crores. Simultaneously, the Ministry had also issued a communication to DIAL conveying certain observations in respect of the bidding process of the hospitality district. In its letter dated 08.03.2011 addressed to this Authority, the Ministry has drawn attention to the observations so made. In view of this, DIAL was specifically requested to confirm that while reviewing the bidding process for hospitality district it had appropriately considered the observations made by the Ministry. DIAL was also requested to furnish the details of compliance. In their response, DIAL have confirmed that the observations made by Ministry vide letter dated 09.02.2009 were appropriately considered while reviewing the bidding process of the hospitality district. They have stated that due to extensive pre-bid marketing, a healthy number of 58 bids were received. Multiple rounds of negotiations were undertaken with all the serious bidders. The bidders were asked to improve their offer beyond the highest quoted annual license fee for each particular asset area. Using this process, DIAL succeeded in getting increase in the annual license fee of 19% to 115% with an average increase of 46.68%. Thus, the aggregate amount of refundable deposits was significantly higher at Rs.1471.51 crores against the figure of Rs.912 crores considered while approving the original DF by the Ministry. DIAL have also replied to observations in respect of the lock-in period, not keeping a reserve price and have justified their stand in the matter. DIAL also drew attention to their earlier letter dated 31.01.2010 wherein they had given the details of the reviewed bidding process and had highlighted that pursuant to the reviewed bidding process an enhanced committed security deposits of Rs.559 crores over and above the earlier envisaged amount of Rs.912 crores has been obtained. The Authority had considered the submissions made by the DIAL and was tentatively of the opinion that in absence of any material to the contrary on record and as the process had already been concluded, it would need to, presently, accept the submissions made by DIAL. The Authority also felt that in any case, during the consultation process, the Ministry of Civil Aviation and other stakeholders will get a further opportunity to comment on this aspect. However, during the consultation process no substantive comments/issue has been raised by any of the stakeholders on the efficacy of the process employed by DIAL. Therefore, the Authority has decided that the position stated in the Consultation Paper may be finalized.

(k) **Costs not incurred as on 31.03.2010**

- (k.i) **ATC Tower Cost**– The ATC Tower and associated facilities have to be relocated in view of the expansion program of the project. The Ministry of Civil Aviation have informed that in terms of the CNS-ATM agreement DIAL is obligated to do so and would, therefore be bearing the cost. Therefore, the estimated cost of Rs.350 crores for this work becomes part of the total project cost. Since the addition of this cost to the total project cost would correspondingly increase the funding gap, the Authority was tentatively of a



view to factor the same towards determination of DF. Further, the AAI have submitted that the construction of the new ATC tower and associated facilities are to be necessary for this phase of the project itself. However, the cost has not yet been incurred. AAI in their comments had stated that the ATC tower and associated facilities would be completed by November, 2012. The Authority, was, therefore, tentatively of the opinion that since it was a mandated cost, the same should be included in the project cost subject to the condition that the cost as may be actually incurred by the time DF aggregating to the funding gap net of the addition for ATC tower and other associated facilities was collected, the tenure of levy would be proportionately extended to cover this cost. In response to the Consultation Paper, DIAL have drawn attention to the timelines of November 2012 stated hereinabove and have submitted that as per the overall schedule, the ATC tower including installations/commissioning of equipment is finalized in consultation with AAI the work was likely to be completed by November, 2013. AAI have also clarified that the only the civil portion of the ATC Tower would be completed by November, 2012 and the ATC equipment would be installed and commissioned by November, 2013.

The Authority has observed that the clarification furnished by AAI on the Commissioning of the ATC Tower is more of a sequential issue and needs to be accepted.

(k.2) **Provisions** – KPMG and EIL have suggested exclusion of costs related to provisions amounting to Rs. 297 crores, which were not incurred as on 28.02.2010. The provisions include Rs.100 crores towards contingencies, Rs.27 crores for operational requirements and Rs.170 crores for other pending works. At the time of ad-hoc determination, the AAI had specifically pointed out that the contingencies provisioned by DIAL appeared to be on a higher side when compared to provisions made by AAI in its projects (3% in AAI projects vs. 8% in DIAL project in the estimated project cost of Rs. 8975 crores). As per latest statutory auditor's certificate submitted by DIAL, as on 31.07.2010, out of the amount of Rs.297 crores an amount of Rs. 285.34 crores had already been spent. Further, neither of the auditors nor AAI has questioned the appropriateness of the amount at this stage. Auditors have recommended the exclusion only on the basis that the cost had not been incurred as on 28.02.2010. The Authority was of the opinion that since pre-dominant portion of the cost had already been incurred and the balance amount of Rs.11.66 crores would in probability had been spent thereafter, the cost of Rs. 297 crores towards provisions may tentatively be included in the project cost subject to the condition that DIAL produces evidence to this effect.

(k.3) **Payment to Delhi Jal Board**: DIAL is required to pay an amount of Rs. 54 crores to DJB towards creation of infrastructure for water requirements. The Central Government (in the Ministry of Civil Aviation) have supported inclusion of this cost in the project cost. Both the auditors have also suggested that this cost of providing water infrastructure should be included in the project cost. However, it was brought out that out of Rs.54 crores,



DIAL have, as on 22.03.2011, paid a sum of Rs. 31.50 crores only to DJB. It is likely that the amount paid as on 28.02.2010 would be even lower. Therefore, if the principle of not including the cost not incurred is to be applied, only cost as incurred on 28.2.2010 in respect of DJB should be included in the project cost. Alternatively, the cost could be included subject to the condition that in case entire cost is incurred during the tenure of the levy based on the project cost net of the cost towards DJB the tenure of the levy would be proportionately extended to cover the cost of DJB as well. The Authority was tentatively of the opinion that the latter view was a reasonable view.

Most of the stakeholders have stated that the passengers should not be burdened with the levy in respect of the facility which they may not use and have opposed the levy of DF to fund these costs. However, the Authority feels that this argument is misplaced in as much as DF is a prefunding levy. Therefore, it is imposed entirely on the premise that passengers pay for the facility, which is not in operation and may or may not be used by them in future. In fact, the issue has been concluded by the judgment of Hon'ble Supreme Court wherein the Hon'ble Court has held that levy under Section 22A of the AAI Act, 1994 though ascribed as fees is really in the nature of a cess or a tax for generating revenue for the specific purposes mentioned in clauses (a), (b) (c) of section 22A. As such, the contentions of the stakeholders to the contrary do not appear to be acceptable.

- (l) **Capping of Costs not incurred:** Keeping in view the past learnings, the Authority was of the opinion that the costs not incurred as on **31.03.2010**, namely the costs mentioned at (k.1), (k.2) and (k.3) above, should be capped at the presently estimated levels and in no case any escalation should be allowed in these cases. In case of any reduction in actual costs vis-à-vis the present estimates, the Authority may on review suitably reduce the funding gap to be bridged through DF and accordingly reduce the tenure. This approach has been supported by the stakeholders.
- (m) **Applicability of Service Tax:** DIAL have stated that they have, recently, received a show cause notice from the taxation authorities requiring them to pay service tax on the collections already made by them. It has been further stated that DIAL are of the opinion that the calculation of DF is not against any service being provided by them to the passengers and therefore the service tax is not leviable on the DF amount. Accordingly, they are proposing to challenge the move of the taxation authorities. However, DIAL should be safeguarded in case of any liability on this account. It is observed that the applicability of service tax or otherwise is a view to be taken by the relevant authorities under relevant tax jurisdiction. As such, it may be sufficient to provide at this stage that the total amount to be calculated through DF should be net of service tax, if any. As regards the past liability, if any, the issue would have to be decided at the relevant time keeping in view the final pronouncement in the matter.



- (n) **Collection Charges:** DIAL have stated that the DF Rules notified by the Central Government do not provide for collection charges to be levied by the airlines. Therefore, discussions with MoCA/AAI indicate that this Authority would need to make provisions for the same while approving the levy of DF.

The Authority has observed that in terms of section 22A of AAI Act, 1994 as well as section 13(1) (b) of the AERA Act, 2008, the function of the Authority is limited only to determining the rate/amount of DF and the manner of its collection and administration costs incurred thereupon is an issue, which has already been prescribed by way of rules by the Central Government. In view of the same the Authority is unable to accept DIAL's contention that the Authority needs to provide for collection charges to be levied by the airlines.

- (o) **Process Issues:** The Auditors have raised several process issues in the implementation, execution and monitoring of the project. The Authority had identified the following main issues at the consultation stage:

- (i) Uncapped design and build approach followed for project implementation – no sharing of risk with EPC Contractor;
- (ii) No check kept on cost overrun either by DIAL or PMC- risk mitigation steps not entirely compliant with international best practices;
- (iii) No detailed cost estimation of CWP by DIAL;
- (iv) No detailed estimation of SCP either by DIAL or L&T;
- (v) EPC Contractor had no incentive or penalties to enable cost control;
- (vi) Important stakeholders such as the MoCA and the AAI were not regularly updated on cost overrun- DIAL Board was apprised of the cost variation by way of the Project Cost Report in March, 2010. Prior approval of the Board was not taken for increase in GFA by nearly 84000 sq.mts (from that finalized at the Master Plan Stage).

It also noted that both the auditors have stated that these process issues have led to increase in the project cost. However, they have not ascribed any additional cost specifically to these items. In fact, KPMG had stated that *"it is difficult and subjective to assess the impact of the process related issues in rupee terms"*. The Authority had considered these issues along with submissions of DIAL. It was noted that DIAL is a board managed company with representations from AAI and MoCA at sufficiently senior levels. It was also noted that the project had already been implemented. Therefore, any corrections or remedial measures do not appear to be feasible at this completed stage of the project. Further, the auditors have also expressed inability to assess the monetary impact of the issues raised by them. In the circumstances, the Authority felt that in consonance with the mandate, it should proceed with the finalization of financing gap and DF matter. Several stakeholders have commented on this issue and have drawn attention to the fact that the costs have increased substantially. FIA supported by ROAR have contended that DIAL should be penalized for this cost overrun rather than the



cost being accepted towards the total project cost. As stated earlier, the auditors have expressed their inability in quantifying impact of the process issues in monetary terms. Perhaps, one way in which some quantification is possible is by taking a view that increase beyond the finalized master plan stage in the GFA of T3 amounting to about 84000 sq. mt. should not be accepted and cost on account thereof should be proportionately reduced from the total project cost. On the other hand, it is observed that in a project executed in design and build approach, exact quantification of the gross floor area to the last bit may not be possible until the project completion. Further, the Authority has, in respect of GFA, as indicated at point (a) above decided to exclude the cost proportionate to the area of 8652 sq.mts identified by EIL in their report. In view of the inability of the auditors to further quantify or identify losses in monetary terms due to process issues, the Authority finds itself unable to take any further action in the matter.

- (p) **Difference in DF between domestic and international departing passengers** - It is IATA's contention that current ratio of 6.5 times of DF for international passengers is very high and needs to be moderated. It has also been stated by IATA that the international precedents suggest parity or a difference upto 4 times. IATA has not suggested any economic basis for determination and has only cited international precedents, which also sharply vary in this regard. Further, the rates approved by the Ministry of Civil Aviation, i.e., Rs. 200 per embarking domestic passenger and Rs. 1300 per embarking international passenger were successfully implemented during the earlier levy period. Therefore, the Authority has decided to continue with the same rates. FIA have raised a related issue of reducing the rate of DF by increasing the tenure of levy. The Authority notes that the project has already been completed. In case the tenure of levy is increased, the interest component in the DF calculation (on NPV basis) would increase, which would not be in the interest of passengers. Therefore, in its judgment, the Authority feels that the proposed rates of Rs. 200/- per departing domestic passenger and Rs. 1300/- per departing international passenger are fair.

21.4 Apart from the above, the stakeholders have also raised issues such as regulatory till which are not germane to determination of DF. DIAL had also made some allegations as to the background of ROAR. The Authority, has already considered the submissions made by ROAR in compliance of the directions of the Hon'ble Delhi High Court, on whether ROAR can be considered as stakeholder under section 2 (o) of the AERA Act,2008, and an Order in the matter has already been issued on 30.09.2011.

22.1 The Authority has also noted that at the time of issue of the Consultation paper (No.02/2011-12, dated 21.04.2011), it had proposed that the corresponding additional funding gap required through levy of DF was based on the gap identified by the Ministry of Civil Aviation in February, 2009 (Rs.1827 crores). The tenure of the levy of DF in case of Stage 1 and Stage 2 was worked out as about 51 months and 62 months, respectively, commencing 01.03.2009 on the basis of assumptions and



observations (indicated in para 13 of the Consultation Paper) and while keeping the rate of levy as decided by the Central Government in February, 2009 unchanged.

22.2 In the present determination, the Authority has assumed that DIAL would be able to levy and collect the DF from both embarking Domestic and embarking International passenger's w.e.f 01.12.2011 and hence the NPV for Stage 1 has been considered accordingly. The mechanics of the calculation of DF in the Stage 1 is on NPV basis to address the issue of securitization of the funding gap. The tenure of the levy is premised upon the traffic projections [10 year historical passenger traffic growth rate of IGI Airport, New Delhi(Domestic @ 14.59%; International @ 8.28 %)] and other estimates/ assumptions. Since actual figures would be different than those estimated/assumed, the collections during the levy period could exceed the amount identified by the Authority. Therefore, the Authority will review the monthly collections on the basis of audited figures provided by the AAI and DIAL and make appropriate decisions as may be required, based on such review. The contingency of excess collection of DF has been adequately provided for in the Rules framed for this purpose.

23.1 In view of the observations and finding made above, the acceptable project cost and the consequential funding gap is identified as under:

Particulars	Rs in crores	
Final Project Costs as submitted in DIAL Application		12857.00
Items proposed to be excluded		
Apron	23.82	
R/W 10-28	37.50	
Escalation for reinforcement	35.67	
Upfront Fee	150.00	
Gross Floor Area (8652 sq. mt. (proposed to be excluded by EIL	107.15	
Total Exclusions	354.14	
Costs not incurred as on 31.03.2010		
ATC	350.00	
Delhi Jal Board	54.00	
Provisions	297.00	
	701.00	
Allowable Project Cost (A)		11801.86
Means of Finance		
Equity capital and Share Application Money less Upfront Amount (Rs.150 crores)	2300	
Rupee Term Loan	3650	
Foreign currency loan + ECB advantage	1616	
Internal Accruals	50	
Refundable Security Deposits	1471.51	



Particulars	Rs in crores	
Total Means of Finance (B)		9087.51
Funding Gap (C= A-B)		2714.35
Less amount collected upto 01.06.2011	1484.08	
Confirmed Funding Gap – Stage 1		1230.27
Funding Gap in case costs (not incurred as on 31.03.2010) are incurred - Stage 2		1931.27

23.2 It is assumed that DIAL would be able to levy and collect the DF w.e.f 01.12.2011. Further, the Authority has also determined the rate of levy of DF by DIAL at IGI Airport, New Delhi @ Rs.200/- per embarking domestic passenger and @ Rs.1300/- per embarking International passenger. Consequently, the total project cost and corresponding gap to be funded through levy of DF are determined under following stages:

Stage (Rs. in crore)	1 (Excluding costs not incurred as on 31.03.2010)	2 (Including costs not incurred as on 31.03.2010)
Project Cost	11801.66	12502.66
Less Means of Finance	9087.51	9087.51
Total Funding Gap	2691.67	3392.67
Less Amount Collected up to 01.06.2011	1484.08	1484.08
Balance Funding Gap	1230.27	1931.27
NPV as on	01.12.2011	The difference of Rs. 701 crores between stage 2 and stage 1 is currently computed on no NPV basis.
Estimated Period of Levy	18 months up to May'2013	9 months from June'2013 till, Feb'2014

The detailed workings of tenure of the levy of DF in case of Stage 1 and Stage 2 are at **(Annexure II)**.

23.3 The Authority has also observed that it is not required to consider the issues of accounting, collection and audit etc. of the DF amount as the same have been provided for in the AAI (Major Airports) DF Rules, 2011. However, in order to ensure that significant surplus/ deficit may not be generated due to the actual varying from the forecast/ estimates considered herein and other relevant factors, the Authority would undertake a periodical review as indicated in para 22.2 above.



24. Having perused the records and upon due consideration of all facts, circumstances and the submissions made by the stakeholders, the Authority hereby passes the following Order.

ORDER:

25. In exercise of powers conferred by Section 13(1)(b) of the AERA Act, 2008 read with Section 22A of the AAI Act, 1994, the rate of Development Fee to be levied by DIAL at IGI Airport, New Delhi is determined as Rs.200/- per embarking domestic passenger and Rs. 1300/- per embarking international passenger (exclusive of statutory levies, if any) to bridge the funding gap of Rs. 1230.27 crores (NPV as on 1.12.2011). The levy shall commence with effect from 01.12.2011 and at present, is estimated to continue for a period of 18 months upto May, 2013 (Stage -1). In respect of costs not incurred by DIAL as on 31.03.2010, the same shall be included in the project cost for the purposes of levy of DF subject to the condition that the costs as may be actually incurred by the time DF aggregating to the funding gap of Rs. 1230.27 crores (on NPV basis) was collected, the tenure of levy would be further extended to cover these costs as indicated in para 23.2 above. The Authority will review the monthly collections on the basis of audited figures provided by the AAI and DIAL and take appropriate decisions as may be required, based on such review.

**By the Order of and in the
Name of the Authority**


(Capt. Kapil Chaudhary)
Secretary

To

**Delhi International Airport Pvt. Ltd,
Uran Bhawan,
IGI Airport,
New Delhi - 110 037
(Through: Shri Kiran Kumar Grandhi, Managing Director)**



Reduction in cost due to exclusion from Gross Floor Area

Annexure - I

A Gross Floor Area of Terminal 3 as per DIAL	5,53,887 Sq mts
B Gross Floor Area of Terminal 3 as per Engineers India Limited (after correction of measurement error of 1914 sq mts)	5,51,973 Sq mts
C Total Cost of Construction of Terminal 3 as per DIAL	Rs. 6,836 crores
D Unit Cost of Construction - (C / B)	Rs. 1,23,846.64 per Sq mt
E Gross Floor Area of Terminal 3 proposed to be excluded	8,652 Sq mts
F Cost of Construction of 8652 Sq Mts decided to be excluded -D * E	Rs. 107.15 crores



With Delhi Traffic growth Rate

Year	
Month	
Domestic Traffic	Mn
International Traffic	Mn
Traffic Estimate	Mn

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
2011	2012	2012	2012	2012	2012	2012	2012	2012	2012	2012	2012	2012	2013	2013	2013
Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
1.88	1.91	1.93	1.95	1.97	1.99	2.02	2.04	2.06	2.09	2.11	2.13	2.16	2.18	2.21	2.23
0.80	0.80	0.81	0.81	0.82	0.82	0.83	0.83	0.84	0.85	0.85	0.86	0.86	0.87	0.87	0.88
2.68	2.71	2.73	2.76	2.79	2.82	2.85	2.87	2.90	2.93	2.96	2.99	3.02	3.05	3.08	3.11

Projected DF collection (from 01.12.2011)

70.60 71.16 71.72 72.29 72.87 73.44 74.03 74.62 75.21 75.81 76.41 77.02 77.63 78.25 78.88 79.51

PV of DF collection (PV as on 01.12.2011)	Rs. Cr.	70.27	70.18	70.08	69.99	69.89	69.80	69.70	69.61	69.52	69.43	69.33	69.24	69.15	69.06	68.97	68.88	
Actual DF collection (PV as on 01.12.2011)	Rs. Cr.	70.27	70.18	70.08	69.99	69.89	69.80	69.70	69.61	69.52	69.43	69.33	69.24	69.15	69.06	68.97	68.88	
Cumulative DF (PV as on 01.12.2011)	Rs. Cr.	70.27	140.45	210.53	280.52	350.41	420.21	489.91	559.53	629.04	698.47	767.80	837.04	906.20	975.26	1,044.22	1,113.10	
Total DF collection (PV as on 01.12.2011)	Rs. Cr.	1,230.27																
Interest Rate	% p.a.	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	
Interest Rate	% p.m.	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	
Discount rate (as on 01.12.2011) used	% p.m.	0.93%	0.9954	0.9862	0.9771	0.9681	0.9591	0.9504	0.9416	0.9329	0.9243	0.9158	0.9074	0.8990	0.8907	0.8825	0.8744	0.8663
NPV of total DF sanctioned as on 01.01.2011	Rs. Cr.	1,230.27																
Time required to service total DF sanctioned (since 01.12.2011)	Months	18																

DF Collection		
Collected upto 01/06/2011	Rs. Cr.	1484.08
Departing Passengers	%	50%
Domestic DF	Rs/ pax	200
International DF	Rs/ pax	1300
Collection charges	Rs/ pax	0

Traffic growth estimate (FY 13 onwards)

		p.a.	p.m.
Domestic	%	14.59%	1.14%
International	%	8.28%	0.67%

Source: 10 year historical average for Domestic Passenger Traffic at IGI Airport, New Delhi

Source: 10 year historical average for International Passenger Traffic at IGI Airport, New Delhi

Discount Rate for additional DF

Interest rate	% p.a.	11.75%
Corporate tax rate	%	0.000%
Effective discount rate	% p.a.	11.75%
Effective discount rate (monthly)	% p.m.	0.93%

Note - # Col-19 to 27 - In the eventuality that additional DF as indicated in Stage 2 kicks in from May 2013, the collection period would extend to



With Delhi Traffic growth Rate

Year	
Month	
Domestic Traffic	Mn
International Traffic	Mn
Traffic Estimate	Mn

17	18	19	20	21	22	23	24	25	26	27	28	29
2013	2013	# 2013	2013	2013	2013	2013	2013	2013	2014	2014	2014	2014
Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr
2.26	2.28	2.31	2.34	2.36	2.39	2.42	2.45	2.47	2.50	2.53	2.56	2.59
0.89	0.89	0.90	0.90	0.91	0.92	0.92	0.93	0.93	0.94	0.95	0.95	0.96
3.14	3.18	3.21	3.24	3.27	3.31	3.34	3.37	3.41	3.44	3.48	3.51	3.55

Projected DF collection (from 01.12.2011)

80.14 80.78 81.43 82.08 82.74 83.40 84.07 84.75 85.43 86.11 86.80 87.50 88.21

PV of DF collection (PV as on 01.12.2011)	Rs. Cr.		68.79	68.70	68.61	68.52	68.44	68.35	68.26	68.18	68.09	68.00	67.92	67.83	67.75
Actual DF collection (PV as on 01.12.2011)	Rs. Cr.		68.79	48.38	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Cumulative DF (PV as on 01.12.2011)	Rs. Cr.		1,181.89	1,230.27	1,230.27	1,230.27	1,230.27	1,230.27	1,230.27	1,230.27	1,230.27	1,230.27	1,230.27	1,230.27	1,230.27
Total DF collection (PV as on 01.12.2011)	Rs. Cr.	1,230.27													
Interest Rate	% p.a.		11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%	11.75%
Interest Rate	% p.m.		0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930	0.00930
Discount rate (as on 01.12.2011) used	% p.m.	0.93%	0.8583	0.8504	0.8426	0.8348	0.8271	0.8195	0.8120	0.8045	0.7971	0.7897	0.7824	0.7752	0.7681
NPV of total DF sanctioned as on 01.01.2011	Rs. Cr.	1,230.27													
Time required to service total DF sanctioned (since 01.12.2011)	Months	18													

DF Collection		
Collected upto 01/06/2011	Rs. Cr.	1484.08
Departing Passengers	%	50%
Domestic DF	Rs/ pax	200
International DF	Rs/ pax	1300
Collection charges	Rs/ pax	0

Traffic growth estimate (FY 13 onwards)

		p.a.
Domestic	%	14.59%
International	%	8.28%

Discount Rate for additional DF

Interest rate	% p.a.	11.75%
Corporate tax rate	%	0.000%
Effective discount rate	% p.a.	11.75%
Effective discount rate (monthly)	% p.m.	0.93%

Note - # Col-19 to 27 - In the eventuality that additional DF as indicated in Stage 2 kicks in from May 2013, the collection period would extend to

