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## Legal Implications of airport privatization in India

George, M.

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**Author:** George, Moses

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## **Chapter 3**

### **Topic – Economic Regulation**

#### **Research Paper 7**

#### **The Development Fee in India Airports– A Case Study**

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## Development Fee in India Airports—A Case Study

MOSES GEORGE<sup>1</sup>

### Abstract

Privatization of airports owned by the Airport Authority of India (AAI) was intended to bring in private capital and thereby improve airport standards and reduce high airport costs in India.

This article will analyze the post-privatization economic scenario, specifically with regards to a new category of airport levy, called the development fee (DF), in light of the Supreme Court of India's decision on the issue. This article discusses various legal and regulatory issues connected with this levy, especially as they relate to international and domestic guidelines regarding airport charges, including International Civil Aviation Organization (ICAO) documents, the Chicago Convention, the Constitution of India, and other relevant Indian aviation laws.

This article proposes that the new tax, the DF, is not in line with international guidelines. Also, if the airports are considered to be private airports, the tax may be an *ultra vires* tax.

### I. Introduction

In India, two brownfield airports in Delhi and Mumbai were privatized through a long-term lease. After privatization, a new levy, the DF, has been introduced at these airports. This levy was projected as a user charge. The DF was challenged in the Delhi High Court, which permitted the levy. However, the decision of the high court was challenged before the Supreme Court of India. This article analyzes the DF and the decision of the Supreme Court of India on the matter from international and national perspectives.

## II. International Framework and Experiences

### A. ICAO Framework

The international framework regarding airport charges basically consists of various provisions of the Chicago Convention.<sup>2</sup> Further, the ICAO has released several documents regarding its policies and recommendations on airport charges.<sup>3</sup> Airport charges are dealt with in Article 15 of the Chicago Convention.<sup>4</sup> Article 15 refers mainly to the charges applied to aircraft for airport use.<sup>5</sup> ICAO Doc. 9082 reiterates the cardinal principles governing airport charges as per the Chicago Convention: “non-discrimination, cost-relatedness, transparency, and consultation.”<sup>6</sup> The same principles are reiterated in the recommendation of the Conference on the Economics of Airports and Air Navigation Services (CEANS 2008), and they are endorsed by the ICAO Council.<sup>7</sup>

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<sup>1</sup> Moses George, B.Sc., LL.B., LL.M., Assistant General Manager, the Airports Authority of India (AAI). Currently, he is pursuing a Ph.D. in air law from Leiden University, The Netherlands. The views expressed in this article are the personal views of the author and not that of AAI.

<sup>2</sup> Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

<sup>3</sup> See, e.g., International Civil Aviation Org. [ICAO], ICAO's Policies on Charges for Airports and Air Navigation Services, ICAO Doc. 9082/9 (9th ed. 2012); ICAO, ICAO's Policies on Charges for Airports and Air Navigation Services, ICAO Doc. 9082/7 (7th ed. 2004).

<sup>4</sup> Chicago Convention, supra note 347, art. 15.

<sup>5</sup> See id.

<sup>6</sup> ICAO Doc. 9082/9, supra note 348, at vii.

<sup>7</sup> Id.

However, ICAO Doc. 9082 provides more specific policies and recommendations on airport charges.<sup>8</sup> The recommendations and advice of ICAO in this document are based on Article 15 of the Chicago Convention.<sup>9</sup> These recommendations are considered guiding principles, but on a “non-binding on the Contracting States” basis.<sup>10</sup> These guidelines are applicable for a “charge,” but not for a “tax,” which is distinguished in the document itself.<sup>11</sup> ICAO recommends contracting states impose a charge only for the use of facilities used by aircraft and airlines, which is expressed in clear terms in the introduction of ICAO’s policy document.<sup>12</sup>

### III. Taxes Levied by Different States

#### A. Maldives Airport Development Fee

The Maldives, a country neighboring India, was levying an Airport Development Fee (ADF) akin to that of the DF levied in Indian airports.<sup>13</sup> In June 2010, the (GMR) consortium won a bid to “build, operate, modernize, and expand” the Male International Airport for twenty-five years from the local Maldivian government.<sup>14</sup> The ADF was charged in addition to charges that were being levied as passenger service fees (PSF) of \$18.50, which were being collected by the government.<sup>15</sup>

In addition to the PSF, a charge, called the airport development charge (ADC), of \$25 per departing passenger<sup>16</sup> and a \$2 insurance charge were enacted beginning in January 2012 to offset the costs incurred in building the airport by the private operator, GMR Infrastructure.<sup>17</sup> In 2011, the local court ruled that the private operator would not be allowed to collect an ADC.<sup>18</sup> As per the decision of the local civil court, the “ADC and insurance charges were service charges under other names.”<sup>19</sup>

However, the airport operator did not appeal the decision and the local government promised to legalize the fee through legislation.<sup>20</sup> Subsequently, a change in government occurred. After

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Wouter Oude Alink, Angry Birds, Leiden Law Blog (July 9, 2013), <http://leidenlawblog.nl/articles/angry-birds>.

<sup>11</sup> ICAO Doc. 9082/9, supra note 348, at vii. The council distinguishes between a Charge and a Tax: “a charge is a levy that is designed and applied specifically to recover the costs of providing facilities and services for civil aviation, and a tax is a levy that is designed to raise national or local government revenues which are generally not applied to civil aviation in their entirety or on a cost specific basis.” Id. The same concept is reiterated in ICAO DOC 8632, which says, “Whereas ICAO, for the purpose of its policy objectives, makes a distinction between a charge and a tax, in that charges are levies to defray the costs of providing facilities and services for civil aviation while taxes are levies to raise general national and local government revenues that are applied for non-aviation purposes.” ICAO, ICAO’s Policies on Taxation in the Field of International Air Transport, ICAO Doc. 8632 (3d ed. 2000).

<sup>12</sup> ICAO Doc. 9082/9, supra note 348, at vii.

<sup>13</sup> Sindhu Bhattacharya, Maldives Airport Controversy: 10 Rebuttals by GMR, Firstbiz (Dec. 5, 2012), <http://firstbiz.firstpost.com/corporate/maldives-airport-controversy-10-rebuttals-by-gmr-34932.html>

<sup>14</sup> Maldives Civil Court Disallows GMR to Collect Airport Development Fee, Econ. Times (Dec. 10, 2011), [http://articles.economictimes.indiatimes.com/2011-12-10/news/30502168\\_1\\_male-airport-gmr-infrastructure-maldives-government](http://articles.economictimes.indiatimes.com/2011-12-10/news/30502168_1_male-airport-gmr-infrastructure-maldives-government).

<sup>15</sup> Bhattacharya, Maldives Airport Controversy, supra note 358.

<sup>16</sup> Sindhu Bhattacharya, Airport Development Fee is at the Crux of GMR, Maldives Tussle, Firstbiz (Nov. 29, 2012), <http://firstbiz.firstpost.com/corporate/airport-development-fee-is-at-the-crux-of-GMR-maldives-tussle-34505.html>.

<sup>17</sup> Maldives Civil Court Disallows GMR to Collect Airport Development Fee, supra note 349.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> See T.N. Ninan, The “Ugly Indian”?, Bus. Standard (Dec. 1, 2012), <http://www.business->

a Singapore High Court decision, the new government declared the entire airport concession agreement void,<sup>21</sup> and the private operator finally exited the Maldives after handing the airport back to the state entity, Maldives Airports Company Limited.<sup>22</sup> GMR Infrastructure elected arbitration for compensation for termination of the contract.<sup>23</sup> The arbitrator ruled in favor of GMR.<sup>24</sup> However, the ADF charge has been discontinued since the Male court decision.<sup>25</sup>

### **B. UK Air Passenger Duty**

In 1996, an Air Passenger Duty (APD) was imposed on every departing passenger in the United Kingdom (UK).<sup>26</sup> As the tariff was low, it did not invite wide opposition. By 2007, the duty had increased several times.<sup>27</sup> The duty was challenged before the UK High Court, which held that the APD did not violate the Chicago Convention.<sup>28</sup>

### **C. Dutch Ticket Tax**

The Dutch government introduced a ticket tax on aviation in 2008, which had a severe effect on its aviation industry.<sup>29</sup> The social cost of aviation to society in general, and the environmental cost in particular, were the reasons for the tax.<sup>30</sup> The Dutch government, however, quickly realized the impact of the new taxes. Even though the Dutch authorities collected €300 million, they had to suffer losses due to passengers moving to neighboring states' airports.<sup>31</sup> The main Dutch airport lost 18% of its passengers.<sup>32</sup> In the Netherlands, several courts assessed whether the tax was compliant with Article 15 of the Chicago Convention.<sup>33</sup> Though the Supreme Court concurred with the district court's decision, the Dutch government was smart enough to eliminate the ticket tax after one year.<sup>34</sup>

### **D. Belgian Levy**

In the 1990s, a levy was introduced to be paid by all passengers departing or arriving at the

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standard.com/article/opinion/t-n-ninan-the-ugly-indian-112120100100\_1.html.

<sup>21</sup> See id.

<sup>22</sup> GMR Says Maldives Government Aviation Agency Liable to Pay Damages, Econ. Times (June 9, 2014), [http://articles.economictimes.indiatimes.com/2014-6-19/news/50710829\\_1\\_maldives-airport-company-gmial-maldives-government](http://articles.economictimes.indiatimes.com/2014-6-19/news/50710829_1_maldives-airport-company-gmial-maldives-government).

<sup>23</sup> GMR Wins Arbitration Case Against Maldives Over Cancellation of Male Airport Contract, Times India (June 20, 2014), <http://timesofindia.indiatimes.com/business/india-business/GMR-wins-arbitration-case-against-Maldives-over-cancellation-of-male-airport-contract/articleshow/36858403.cms>.

<sup>24</sup> The tribunal ruled that “the concession agreement (between GMR and Maldives) was valid and binding and was not void for any mistake of law or discharged by frustration.” The tribunal ruled that the government of Maldives (GoM) and Maldives Airport Company Limited (MACL) are “jointly and severally liable in damages to GMR Male International Airport Limited (GMIAL) for loss caused by wrongful repudiation of the agreement as per the concession agreement.” See GMR Wins Arbitration Case Against Maldives Over Cancellation of Male Airport Contract, *supra* note 368.

<sup>25</sup> Arindam Mukherjee, Mayday in Maldives, Outlook India (Dec. 3, 2012), <http://www.outlookindia.com/article/Mayday-In-Maldives/283055>.

<sup>26</sup> The Air Passengers Duty (APD) was introduced by Section 28 of the Finance Act 1994. Finance Act, 1994, c. 4, § 28 (U.K.).

<sup>27</sup> The increase in APD was given effect by the Finance Act of 2007. Finance Act, 2007, c. 11, § 12 (U.K.).

<sup>28</sup> *Fed'n of Tour Operators v. HM Treasury*, [2007] EWHC (Admin) 2062, [71] (appeal taken from Eng.).

<sup>29</sup> See Prof. Brian F. Havel & Dr. Niels van Antwerpen, Dutch Ticket Tax and Article 15 of the Chicago Convention, 34 *Air & Space L.* 141–46, 447–51 (2009).

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

Brussels airport.<sup>35</sup> Several airlines challenged this levy in Belgium Courts, the Council of State, and the Belgium Supreme Court.<sup>36</sup> The courts held that the tax violated Article 15 of the Chicago Convention.<sup>37</sup> The courts ruled that the tax was charged on passengers “solely” for the right of entry into, or exit from, Belgian territory.<sup>38</sup>

### E. German Air Travel Tax

The German Air Travel Tax (ATT) is a state tax on aviation that came into effect in 2011.<sup>39</sup> This tax was attributed to the environmental cost of aviation, and has invited much discussion about its legality vis-a-vis the Chicago Convention.<sup>40</sup> Through ATT, the state expected to bring up the expected earnings from the EU Emissions Trading Scheme (ETS) in 2012 and onwards.<sup>41</sup> The expected revenues through ATT are €1 billion, and tax rates will be reduced in proportion to the earnings from the EU ETS.<sup>42</sup>

## IV. Aviation Taxes in India

In India, as per ICAO Doc. 8632, the only departure tax is the Foreign Travel Tax (FTT), which is applicable to Indian airports.<sup>43</sup> There is no tax on air cargo or on air tickets.<sup>44</sup> From this it is clear that India does not recognize any tax on aviation or air tickets other than the FTT, unlike many countries like Belgium, the UK, etc., which levy taxes on aviation as per ICAO Doc. 8632.<sup>45</sup>

<sup>35</sup> Pierre D. Frühling, Government Cancels Plans for Passenger Ticket Tax, Int'l L. Off. (Nov. 19, 2008), <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=2e2aabfe-fbb5-42be-b66d-968a6554ead4>.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Ulrich Steppler, German Air Travel Tax and Other Duties: A New European Trend?, 36 Air & Space L. 63, 63 (2011).

<sup>40</sup> German Air Passengers Departure Tax Linked to Environmental Performance Draws Airline Protests, Green Air Online (June 9, 2010), <http://www.greenaironline.com/news.php?viewStory=1128>.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Foreign Travel Tax (FTT) shall be levied on all passengers embarking on international journeys a tax—  
 (i) at the rate of (five hundred rupees) for every such journey to any place outside India other than a place in a neighbouring country;  
 (ii) at the rate of one hundred and fifty rupees for every such journey, where such journey is to any place in a neighbouring country.  
Explanation.—For the purpose s of this subs-section, “neighbouring country” means any country which the Central Government may, having regard to the classes of persons who generally perform journeys to such country, the distance between India and such country, the means of communications available for reaching such country and any other relevant circumstances, specify in this behalf by notification in the Official Gazette.

See Finance Act, 1979, No. 21, c. 2, § 35, available at <http://cbec.gov.in/ftt/ftt-acts.htm>.

<sup>44</sup> ICAO, Supplement to Doc. 8632, at 38, ICAO Doc. 8632 (3d ed. 2000).

Clause 1 The fuel and lubricants filled into receptacles forming part of any aircraft registered in any country (other than India) which is a party to the Convention on International Civil Aviation signed at Chicago on 7th December 1944 or which has entered into an Air Services Agreement with India and operating a scheduled or non-scheduled international air service to or from India, are exempt from the levy of all taxes and duties in India.

Clause 2 A list of countries with whom Double Taxation Avoidance Agreement has been concluded is attached.

Clause 3 There is no tax on air cargo shipments or on air tickets. But a departure tax called Foreign Travel Tax is levied on every passenger leaving India by flight.

<sup>45</sup> ICAO, Supplement (2009), at 68, ICAO Doc. 8632 (3d ed. 2000). However many countries, like Belgium, United Kingdom, etc., confirm levy of taxes.



In fact, in an earlier case in the state of Kerala, user fees were introduced in the first private international airport in India, Cochin International Airport.<sup>46</sup> The Kerala High Court ruled that the fee is not a charge for usage of any facility in the airport, hence it is a tax.<sup>47</sup> The decision was upheld by the Supreme Court, and subsequently airport operators withdrew the user fee.<sup>48</sup>

Keeping the above in mind, this article now turns to a DF introduced in India in the post-privatization era.

## V. Specific Case of the Development Fee

In 2004, through an amendment to the AAI Act, a levy, called the DF, was introduced.<sup>49</sup> Section 22A of the AAI Act's language shows that the provision was meant to augment capital for the Airports Authority of India (AAI) in order to upgrade existing airports, build new airports in lieu of existing airports, or invest in airport companies.<sup>50</sup> The DF was not envisaged as a charge for the usage of an airport.<sup>51</sup> It is also important to note that the same 2003 amendment introduced a new provision, Section 12A, to lease out some of the functions of the AAI to a lessee.<sup>52</sup> The Statement of Objects and Reasons for the amendment introducing Section 12A

<sup>46</sup> Cochin International Airport to Levy User's Fee of Rs 500 per Passenger, Rediff.com (Mar. 28, 2000), <http://www.rediff.com/business/2000/mar/28kochi.htm>.

<sup>47</sup> Id.

<sup>48</sup> Tharoor Writes to Praful Patel Against User Fee, New Indian Express (June 3, 2010, 12:48 AM), <http://www.newindianexpress.com/cities/thiruvananthapuram/article428204.ece>.

<sup>49</sup> The Airports Authority of India (Amendment) Act, No. 43 of 2003, India Code (2003), § 22A.Planning commission

22A. Power of Authority to levy development fees at airports.—The Authority may,—

(i) after the previous approval of the Central Government in this behalf, levy on, and collect from, the embarking passengers at an airport other than the major airports referred to in clause (h) of section 2 of the Airports Economic Regulatory Authority of India Act, 2008 the development fees at the rate as may be prescribed;

(ii) levy on, and collect from, the embarking passengers at major airports referred to in clause (h) of section 2 of the Airports Economic Regulatory Authority of India Act, 2008 the development fees at the rate as may be determined under clause (b) of sub-section (1) of Section 13 of the Airports Economic Regulatory Authority of India Act, 2008, and such fees shall be credited to the Authority and shall be regulated and utilized in the prescribed manner.

Id.

<sup>50</sup> Id.

<sup>51</sup> Sindhu Bhattacharya, How Indian Airports Fleece Airlines and Why Govt is Wary of Private Developers, Firstbiz (Sept. 24, 2014), <http://firstbiz.firstpost.com/corporate/how-indian-airports-fleece-airlines-and-why-govt-is-wary-of-pvt-developers-101353.html>.

<sup>52</sup> Section 12A of the AAI Act says:

(1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit:

Provided lease shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports and civil enclaves.

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

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

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

state that the objective was to encourage private capital in the airport infrastructure sector in order to improve the standards of the airports to international levels.<sup>53</sup> Accordingly, private airports were taken out of the scope of the AAI Act through this amendment.<sup>54</sup> The Statement of Objects and Reasons states that Section 22A was introduced to make “projects relating to Greenfield airports economically viable by development fee collections.”<sup>55</sup> Hence, Section 22A’s main objective was to ensure the necessary capital for the AAI to carry out Greenfield airport projects, and Section 12A’s objective was to infuse private capital into the airport infrastructure sector, by way of leasing the airport.<sup>56</sup> At the same time, private airports were taken out of the scope of the AAI Act so as to ensure that private investors would feel safe and secure about their investments.<sup>57</sup>

Until the Airport Economic Regulatory Authority (AERA) was formed in 2009, the AAI had to obtain approval from the Ministry of Civil Aviation (MoCA) to charge a DF.<sup>58</sup> During that era, the AAI never used this power to levy a DF.<sup>59</sup> The AAI apparently requested the authority to levy a DF and was turned down by the Task Force on Economic Affairs in 2006.<sup>60</sup> The report said that users should not be burdened with a DF/User Development Fee (UDF) for financing non-viable projects.<sup>61</sup> In the final recommendation the Task Force did not recommend any new

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The Airports Authority of India (Amendment) Act, No. 43 of 2003, India Code (2003), § 22A.

<sup>53</sup> *Res. of Aviation Redressal Ass’n v. UOI*, (2009) (Delhi H.C.), at 8–9, [available at](http://indiankanoon.org/doc/44315628) <http://indiankanoon.org/doc/44315628>.

<sup>54</sup> Section 1.3 AAI Act 1994 says it applies to:

- a. all airports whereat air transport services are operated or are intended to be operated other than airports and airfields belonging to or subject to the control of any red force of the Union:
  - aa) all private airports in so far as it relates to providing air traffic service, to issue directions under Section 37 to them and for the purposes of Chapter VA
- b. all civil enclaves;
- c. all aeronautical communication stations and
- d. all training stations establishments and workshops reliant to air transport services.

The Airport Authority of India (Amendment) Act, No. 55 of 1994, India Code (1994), c. 1, § 1.3.

<sup>55</sup> *Res. of Aviation Redressal Ass’n*, at 9–10.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 8–9.

<sup>58</sup> *Airports Authority of India to be Converted to a Company in 2010*, CAPA Centre for Aviation (Aug. 7, 2009), <http://centreforaviation.com/analysis/airports-authority-of-india-to-be-converted-to-a-company-in-2010-8959>.

<sup>59</sup> Planning Comm’n, Gov’t of India, Financing Plan for Airports §§ 7.6–7.7, [available at](http://www.infrastructure.gov.in/pdf/AirportReport.pdf) <http://www.infrastructure.gov.in/pdf/AirportReport.pdf> [hereinafter Financing Plan for Airports].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

7.6 It was suggested by AAI that most of the projects being contemplated under the non-Metro airports development initiative pertain to Airside and Terminal Buildings and the projects are likely to yield either negative IRR or an IRR below the PIB norm of 12%. As such, levy of ADF/UDF on passengers at these airports was proposed.

7.7 The Task Force felt that users should not be burdened with ADF/UDF for financing un-viable projects. This is particularly important in the context of the policy objective to make civil aviation a mass rather than an elitist mode of travel and to make air travel more affordable. *See* Report of the Task Force-Financing Plan for Airports, Published by The Secretariat for the Committee on Infrastructure, Planning Commission, Government of India, [www.infrastructure.gov.in](http://www.infrastructure.gov.in), July 2006. This was in response to the direction of the Committee on Infrastructure, chaired by the Prime Minister, to evolve a plan for creating world-class airport infrastructure. The Report was prepared by a Task Force chaired by Shri Anwarul Hoda, Member, Planning Commission, and including experts and representatives from the Ministry of Civil Aviation, the Airports Authority of India, Planning Commission and Ministry of Finance. It was considered and approved by the Committee on Infrastructure in June 2006.

charges, not even a DF or UDF.<sup>62</sup>

In 2007, the Planning Commission<sup>63</sup> objected to the concept of the DF and UDF introduced by the Ministry of Civil Aviation in the proposed AERA Bill 2006, which was supposed to be presented in the budget session of Parliament in 2007.<sup>64</sup> As per the proposal, such fees would be applicable to airports where annual passenger turnover (number of passengers) exceeds 15 lakh<sup>65</sup> and would be used for upkeep and development of such airports.<sup>66</sup> The commission objected to the concept, arguing that the airport is entitled to charge a Passenger Service Fee (PSF)<sup>67</sup> for providing facilities at the airport,<sup>68</sup> and further suggested collecting such charges from airlines instead of passengers.<sup>69</sup>

The first time a DF was implemented was in 2009, when MoCA permitted Delhi Airport, which was leased out to a private company named Delhi International Airport Ltd. (DIAL),<sup>70</sup> to charge domestic passengers 200 rupees and international passengers 1300 rupees to travel.<sup>71</sup>

The government of India (GoI) permitted the DF on the basis of a request made by DIAL in

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<sup>62</sup> Id. at 8.13.

ADF/UDF charges would add to travel costs unnecessarily and the Task Force did not, therefore, recommend any new charges. Secretary, Civil Aviation felt that the option should not be foreclosed. Finance Ministry (Department of Expenditure) also supported the same stand. The Planning Commission was of the view that costs should be kept low and available resources should be leveraged by AAI, if necessary, through PPP. The Task Force was of the view that recourse to ADF/UDF should be the last resort in individual cases after all efforts at implementation through PPP have not succeeded.

<sup>63</sup> The Planning Commission was set up by a Resolution of the Government of India in March 1950 in pursuance of declared objectives of the government to promote a rapid rise in the standard of living of the people by efficient exploitation of the resources of the country, increasing production, and offering opportunities to all for employment in the service of the community. The Planning Commission was charged with the responsibility of making assessments of all resources of the country, augmenting deficient resources, formulating plans for the most effective and balanced utilization of resources, and determining priorities. Jawaharlal Nehru was the first Chairman of the Planning Commission.

See History, Planning Commission,

<http://planningcommission.nic.in/aboutus/history/index.php?about=aboutbdy.htm> (last updated Nov. 5, 2014, 10:52 AM).

<sup>64</sup> The Airports Economic Regulatory Authority (AERA) of India Bill, No. 72 of 2007, India Code (2007). The bill was passed on October 22, 2008. Id.

<sup>65</sup> Robert Krulwich, Hey! Who Can Explain What India Does With Its Commas? (Not Commies. Commas.), NPR (Oct. 21, 2010, 10:03 AM), [www.npr.org/blogs/krulwich/2010/10/19/130674804/counting-millionaire-india](http://www.npr.org/blogs/krulwich/2010/10/19/130674804/counting-millionaire-india) (1 lakh = 100,000).

<sup>66</sup> Planning Commission Objects to Further Levies on Air Travelers, domain-b (Mar. 17, 2007), [http://www.domain-b.com/aero/20070317\\_planning\\_commission.htm](http://www.domain-b.com/aero/20070317_planning_commission.htm).

<sup>67</sup> The Aircraft Rules, 1937, § 88, available at [http://civilaviation.gov.in/cs/groups/public/documents/rule\(dg\)/moca\\_000947.pdf](http://civilaviation.gov.in/cs/groups/public/documents/rule(dg)/moca_000947.pdf).

<sup>68</sup> Planning Commission Objects to Further Levies on Air Travelers, supra note 411. According to government sources, “the Planning Commission has put a spoke in the ministry’s proposal by pointing out that the PSF, in any case, was meant to provide facilities at airports, and so there would appear to be no need to impose a separate” development fee (DF). Id.

<sup>69</sup> Id. (“[A]ccording to sources, the Commission has also suggested that such charges should form part of airport tariffs collected from airline companies rather than from as levies on air passengers.”).

<sup>70</sup> Id. Ministry of Civil Aviation, Report of the Comptroller and Auditor General of India for the Year Ended March 2012 on Implementation of Public Private Partnership 2.1 (2012–2013). Delhi Airport Management was handed over to DIAL in terms of the Operations Maintenance and Development Agreement (OMDA) on Mar. 5, 2006.

<sup>71</sup> Airport Econ. Regulatory Auth. of India, Review of Levy of Development Fee—IGI Airport, New Delhi (2011), available at <http://www.aera.gov.in/writereaddata/consultation/67.pdf>.

2008.<sup>72</sup> The reason for the request was the shortfall of Rs1,964 crore on account of the security deposits from real estate development for the airport.<sup>73</sup> Although the AERA had the power to determine the DF in the case of major airports as per the AERA Act, the provision of the AERA Act had not yet come into effect.<sup>74</sup> Hence, the MoCA approved the DF under section 22A of the AAI Act on February 9, 2009. However, the DF was in the form of a surcharge and the approval was purely on an ad-hoc basis.<sup>75</sup>

## VI. Supreme Court of India's Decision on the Development Fee

### A. Details of the Case

The levy of the DF was challenged before the Delhi High Court.<sup>76</sup> The grounds for the challenge were:

- (1) "[T]he law authorises only [AAI] to levy [DF]" and "the said power cannot be sub-delegated to any person" including a private airport operator.<sup>77</sup>
- (2) "[T]he [DF] is being levied although no additional service is being provided to the travelling public" (quid-pro-quo). "The [DF] is being appropriated by the [operator] for the purposes which have no nexus with any service, much less any additional service being provided to the travelling public."<sup>78</sup>
- (3) Section 22-A of the AAI Act of 1994 "empowers AAI to levy and collect a development fee 'at the rate as may be prescribed.' The term 'prescribed' is defined by section 2(n) of the Act as to mean 'prescribed by rules made under this Act. . . .' Rules have not been notified by the central government and in the absence of such rules, the levy and collection of development fee is illegal."<sup>79</sup>

The High Court of Delhi dismissed the petition and held that under Section 12A(1) of the AAI Act, the AAI is empowered to lease an airport for the performance of its functions and that such lease is a statutory lease which enables the lessee to perform the functions of the AAI detailed in Section 12.<sup>80</sup> The court further held that Section 12A of the Act provides that the

<sup>72</sup> Id. The order of MoCA dated Feb. 9, 2009, refers to various letters of DIAL and is available at <http://www.aera.gov.in/consultationcat.php?cat=50>.

<sup>73</sup> Id. In the case of the Mumbai airport, the MoCA was permitted to levy a DF via its letter dated Feb. 27, 2009.

<sup>74</sup> Id. AERA Act, 2007, Gazette of India, section II(3) (Aug. 31, 2009). The bill was passed on December 15, 2008, and the Act came into effect on January 1, 2009, except chapters III and IV. This is very crucial as these chapters cover the functional aspects of the AERA. These chapters came into force with effect on September 1, 2009.

<sup>75</sup> Letter from Ujjwal Dey, Sr. Exec. Officer, Fed'n of Indian Airlines, to Shri. Sandeep Prakash, Sec'y, AERA (May 13, 2011).

<sup>76</sup> Res. of Aviation Redressal Ass'n v. UOI, (2009) (Delhi H.C.), at 1, [available at](http://indiankanoon.org/doc/44315628/) <http://indiankanoon.org/doc/44315628/>. The levy of development fees by DIAL as the lessee of the Delhi Airport was challenged in Writ Petition No. 8918/2009 by Resources of Aviation Redressal Association. The levy of development fees by DIAL and MIAL as lessees of the Delhi and Mumbai Airports were challenged in Writ Petition No. 9316 of 2009 and Writ Petition No. 9307 of 2009 by Consumer Online Foundation. The permission given by MoCA for levy of Development Fee was challenged in these three public interest petitions before the Delhi High Court which were dismissed on Aug. 26, 2009. The High Court held that there is "no illegality attached to the imposition of development fees by the two lessees with the prior approval of the Central Government." Consumer Online Found. v. UOI, (2011) 5. S.C.R. 911, 927.

<sup>77</sup> Res. of Aviation Redressal Ass'n, at 2–3.

<sup>78</sup> Id. at 3.

<sup>79</sup> Id.

<sup>80</sup> See id.

lessee who has been assigned some of the AAI's functions shall "have all the powers of [AAI] necessary for the performance of such functions in terms of the lease," and such powers include the power under Section 22A to levy and collect a DF from embarking passengers.<sup>81</sup> The court determined that the DF, though described as a fee in Section 22A, is "more akin to a charge or tariff for the facilities provided" to the passengers and airlines.<sup>82</sup> The Court also held that the power to levy and collect the DF is not dependent on the existence of the rules and the power can be exercised even if the rules are not properly framed.<sup>83</sup>

This decision was challenged before the Supreme Court of India by the Consumer Online Foundation.<sup>84</sup> The petitioners argued:

- (1) the levy of a DF without the same determined by AERA is ultra vires;<sup>85</sup>
- (2) "[T]he conclusion of the High Court that the power under Section 22A [of the AAI Act] to levy and collect [DF] from the embarking passengers can be exercised without the rules is erroneous;<sup>86</sup>

AAI only has the power to levy and collect DF under Section 22A of AAI Act since "the power to levy development fees from the embarking passengers have in fact not been assigned by the [AAI]" to the operators through the agreements. State Support Agreement (SSA) and Operations Maintenance and Development Agreement (OMDA) shows that the power under Section 22A was not assigned to the operators.<sup>87</sup>

Whereas the Union of India contested that:

- (1) Section 12A permits a lease of some of the functions of AAI to the operator and to carry out such functions is necessary to have the power to levy, demand and collect DF from the passengers.<sup>88</sup>
- (2) Section 22A of AAI Act permits AAI to levy and charge DF with prior approval of the government of India. Accordingly, by two 2009 letters to the lessees DIAL and [Mumbai International Airport Limited (MIAL)], India has approved DF and hence the lessees can levy DF based on the letters of India.<sup>89</sup>
- (3) "[T]he absence of the rules prescribing the rate of development fees or the manner of regulation and utilization of development fees will not render Section 22A ineffective."<sup>90</sup>
- (4) "Section 2 (n) of the 2008 [AERA] Act defines 'service provider' as any person who provides aeronautical services 'and is eligible to levy and charge user development fees [(UDF)] from the embarking passengers at any airport and includes the authority

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<sup>81</sup> Id. at 20–21.

<sup>82</sup> Id. at 20–26.

<sup>83</sup> Id.

<sup>84</sup> Consumer Online Found., 5 S.C.R. at 911–57.

<sup>85</sup> Id. at 928.

<sup>86</sup> Id.

<sup>87</sup> Id. at 929.

<sup>88</sup> Id. at 930.

<sup>89</sup> Id.

<sup>90</sup> Id. at 931.

which manages the airport.” Hence, the lessees are eligible to levy and collect DF.<sup>91</sup>

The lessees, airport operators DIAL and MIAL, argued that:

- (1) “Development fees is not really a tax but charges levied and collected by the lessee for development of facilities for the use of the airport. The lessees, which are non-government companies, have established the utility in a public-private partnership, and do not require a statutory authorization or permission to recover such charges by way of development fee, from the passengers using the airport and the lessees do not require the support of the statutory provision of Section 22A for levy and collection of development fees.”<sup>92</sup>
- (2) “Section 22 of the 1994 Act identified the heads on which charges could be recovered. Section 22A, therefore, merely adds three more heads for which funds could be raised and this is akin to adding components of a tariff. Section 22A does not change the quality and character of the recovery of charges by the owners of the facilities from the users thereof.”<sup>93</sup>
- (3) Under “sub-section (4) of Section 12A of the Act, the lessee who has been assigned some functions of the Airports Authority under Section 12 of the 1994 Act has the power of the Airports Authority ‘necessary for the performance of such functions.’”<sup>94</sup> This includes the power under Section 22A also, to levy and charge DFs.<sup>95</sup>

In its rejoinder, Consumer Online Foundation (the appellant) refuted the arguments of both UoI and the operator, and argued that under the privatization agreement, OMDA, the lessee had agreed to arrange for financing and/or meeting all of the financial requirements.<sup>96</sup> Hence, there was no question that levy of the DF by the lessee was for the purposes of developing the airport, which has been leased out by the lessee.<sup>97</sup>

## **B. Supreme Court of India’s Decision**

The Supreme Court of India allowed an appeal and held that:

- (1) “The charges, fees and rent collected by the Airports Authority [under Section 22] are for the services and facilities provided by the [AAI] to the airlines, passengers, visitors and traders doing business at the airport.”<sup>98</sup> “The levy [under Section 22A] though described 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), and (c) of [Section] 22A” of the AAI Act.<sup>99</sup>
- (2) Since being a tax, a DF can be charged only on the basis of specific rules.<sup>100</sup>

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<sup>91</sup> Id. at 932.

<sup>92</sup> Id. at 933.

<sup>93</sup> Id. at 934.

<sup>94</sup> Id. at 934–35.

<sup>95</sup> Id. at 935.

<sup>96</sup> Id. at 937.

<sup>97</sup> Id.

<sup>98</sup> Id. at 916.

<sup>99</sup> Id. at 917.

<sup>100</sup> Id. at 918–20.

- (3) Since the AERA Act has come into force, a DF needs to be determined by AERA and the operators cannot charge DF on the basis of India's two letters. Hence, a DF cannot be charged and collected unless AERA determines a DF.<sup>101</sup>
- (4) DIAL and MIAL (private operators) will account to the Airports Authority the development fees collected until the decision and the same should be used utilized for the purposes mentioned in clause (a) of Section 22A of the 1994 Act.<sup>102</sup>
- (5) Development fees that may be levied and collected by DIAL and MIAL in accordance to the AERA decision "shall be credited to the [AAI] 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."<sup>103</sup>

### C. Analysis

The above decision is a landmark judgment and has relevance with regard to the introduction of new airport levies in the post-privatization era. If it is a tax, then it violates the principles laid down by ICAO in Doc. 9082. In this context, one should look at Section 22 of the AAI Act, which authorizes only the AAI to levy "charges and rent" from its users (passengers and airlines) for the facilities offered to them, including ATM/CNS.<sup>104</sup>

In accordance with the Rule 22 (i)(c) of the Aircraft Rules of 1937, levying a charge on air passengers for the facilities and security offered to them is called a Passenger Service Fee (PSF), which is levied on every passenger who uses the airport at the rate of 225 rupees.<sup>105</sup> Rule 88 of the Aircraft Rules of 1937 says that "Airport licensee may charge PSF from the passengers."<sup>106</sup>

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<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> The Airport Authority of India (Amendment) Act, No. 43 of 2003, India Code (2003), § 22A. Section 22 of AAI Act says:

22. Power of the Authority to charge fees, rent, etc.- The Authority may,

- (i) With the previous approval of the Central Government, charge fees or rent
  - (a) for the landing, housing or parking of aircraft or for any other service or facility offered in connection with aircraft operations at any airport, heliport or airstrip; Explanation. - In this sub-clause "aircraft" does not include an aircraft belonging to any armed force of the Union and "aircraft operations" does not include operations of any aircraft belonging to the said force;
  - (b) for providing air traffic services, ground safety services, aeronautical communications and navigational aids and meteorological services at any airports and at any aeronautical communication station;
  - (c) for the amenities given to the passengers and visitors at any airport, civil enclave, heliport or airstrip;
  - (d) for the use and employment by persons of facilities and other services provided by the Authority at any airport, civil enclave heliport or airstrip;
- (ii) with due regard to the instructions that the Central Government may give to the Authority, from time to time, charge fees or rent from persons who are given by the Authority any facility for carrying on any trade or business at any airport, heliport or airstrip.

<sup>105</sup> K. Srinivas Reddy, Airline Firms, GMR Lock Horns Over New Charges, Hindu (Jan. 17, 2009), <http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/airline-firms-gmr-lock-horns-over-new-charges/article376323.ece>.

<sup>106</sup> The Aircraft Rules, 1937, available at

Hence, it can be seen that there is a specific provision under which any licensee can levy a charge for the services or amenities provided to them under Rule 89, which is in line with the ICAO policies detailed in Doc. 9082.<sup>107</sup> Whereas the DF under Rule 22A is not a consideration for any services/facilities provided by AAI.<sup>108</sup> The Supreme Court has considered this aspect, while deciding if the DF is a tax, and did not agree with the High Court's decision that the DF is a charge for facilities in the form of a levy.<sup>109</sup>

Once it is decided that the DF is a tax, it should be backed by relevant rules made in that regard. The Supreme Court held that a DF can be charged only on the basis of specific rules.<sup>110</sup> On the request of private airports operators, the Indian government gave ad-hoc permission to charge a DF, although the AERA bill had already been passed and the Act had come into effect, except for the chapters that empowered the AERA to determine the charge.<sup>111</sup> Moreover, after AERA came into effect on January 1, 2009, AERA must determine the rates of the development fee to be charged.<sup>112</sup> Hence, the Supreme Court held that unless AERA determines the DF, DIAL, and MIAL cannot charge a DF.

Ultimately, AERA's decision to extend the validity of the MoCA letters permitting DIAL and MIAL to charge a DF itself was held ultra vires.<sup>113</sup> This is because AERA did not determine the charge, rather it just extended the letters validity.<sup>114</sup>

The AAI issued an advertisement on February 17, 2004 inviting proposals from interested parties for selection of competent and willing persons for undertaking the project.<sup>115</sup> The DF provision, Section 22A of the AAI Act came into effect on July 1, 2004.<sup>116</sup> Hence the project was conceived in a legal environment with no provision allowing a DF, even by the AAI. Thus, permitting a private operator to charge a DF is necessarily ad-hoc. This is more relevant in light

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[http://civilaviation.gov.in/cs/groups/public/documents/rule\(dg\)/moca\\_000947.pdf](http://civilaviation.gov.in/cs/groups/public/documents/rule(dg)/moca_000947.pdf).

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> ICAO Doc. 9082/9, supra note 348 at vii.

<sup>110</sup> Consumer Online Found. v. UOI, (2011) 5 S.C.R. 911, 919. "Once we hold that the development fees levied under Section 22A is really a cess or a tax for a special purpose, Article 265 of the Constitution which provides that no tax can be levied or collected except by authority of law gets attracted and the decisions of this Court . . . on the charges or tariff levied by a service or facility provided are of no assistance in interpreting Section 22A." Id. at 950.

<sup>111</sup> Id.

The Government of India, Ministry of Civil Aviation, sent a letter dated 09.02.2009 to DIAL conveying the approval of the Central Government under Section 22A of the 1994 Act for levy of Development Fee by DIAL at the Delhi Airport at the rate of Rs. 200/- per departing domestic passenger and at the rate of Rs. 1300/- per departing international passenger inclusive of all applicable taxes, purely on ad hoc basis, for a period of 36 months with effect from 01.03.2009. Similarly, the Government of India, Ministry of Civil Aviation, sent another letter dated 27.02.2009 to MIAL, conveying the approval of the Central Government under Section 22A of the 1994 Act for levy of Development Fee by MIAL at the Mumbai Airport at the rate of Rs. 100/- per departing domestic passenger and at the rate of Rs. 600/- per departing international passenger inclusive of all applicable taxes, purely on ad hoc basis, for a period of 48 months with effect from 01.04.2009.

Id. at 926.

<sup>112</sup> Id.

<sup>113</sup> Id. at 929.

<sup>114</sup> A.M. Jigeeesh, Airline Fares Shoot as Govt Rushes Decision on Airport Development Fees, business today (Dec. 2, 2011), available at <http://businesstoday.intoday.in/story/airport-development-fees-dial/1/20604.html>

<sup>115</sup> Airports Auth. of India, Mumbai International Airport Private Limited Shareholders Agreement (2006), available at [http://www.aai.aero/righttoinformation/SHA\\_MIAL.pdf](http://www.aai.aero/righttoinformation/SHA_MIAL.pdf). The project was for the operation, maintenance, and development of the Delhi and Mumbai airports owned by AAI. Id.

<sup>116</sup> Financing Plan for Airports, supra note 404, § 7.7.



of the comment of the planning commission that air passengers should not be burdened with a DF/UDF in addition to a PSF.<sup>117</sup>

#### **D. Economic Regulation of the DF in AAI Airports**

In the case of the Chennai and Kolkata airports, which modernized at the cost of 434 million rupees, AERA has returned the proposals of the AAI for instituting a DF with the direction to undertake user consultations and make fresh proposals indicating the views of the users.<sup>118</sup> It is quite interesting to note that this very procedural approach was applied in the case of a state entity, the AAI, whereas in the case of private airports, AERA permitted them to continue with the permission given by MoCA without any user consultation.<sup>119</sup>

Meanwhile, MoCA criticized the AAI's proposal to charge a DF in these two airports.<sup>120</sup> As per the instruction of the minister, the AAI has withdrawn the application filed before the regulator, AERA, regarding the DF.<sup>121</sup> The reason the MoCA opposed the DF in AAI airports is interesting.<sup>122</sup> "The spokesperson pointed out that the Minister's directive on ADF was in line with the stated objective of the government to make the air travel affordable, and to ensure that the passengers were not subjected to any extra burden."<sup>123</sup>

It can be seen that the position of the authorities is in line with the recommendation of the planning commission and the task force quoted above.<sup>124</sup> It is not clear whether a DF would make air travel costlier in the case of AAI airports, as it was when the private airports were permitted to charge a DF in 2009 by MoCA and in 2011 by AERA. The Minister is also reported to have instructed the private airports to end a DF on January 1, 2013, but the DF continued.<sup>125</sup> As DIAL could not infuse more funds, AERA permitted the private airports to charge the DF until April 2016 instead of 2013, at half the rate, which does not change the total amount of DFs collected in any way.<sup>126</sup> Hence, from the above developments, it is clear that DFs are not permitted by MoCA and AERA in the case of the AAI, which is actually permitted to charge a DF by section 22A of the AAI Act.

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<sup>117</sup> Kolkata Rising, Bus. Traveller (Mar. 31, 2013), [www.business traveller.asia/asia-pacific/archive/2013/april-2013/destinations/kolkata-rising](http://www.business traveller.asia/asia-pacific/archive/2013/april-2013/destinations/kolkata-rising).

<sup>118</sup> No Airport Development Fee at Kolkata and Chennai Airports, Bus. Standard (Oct. 13, 2012), [http://www.business-standard.com/article/companies/no-airport-development-fee-at-kolkata-and-chennai-airports-112101200184\\_1.html](http://www.business-standard.com/article/companies/no-airport-development-fee-at-kolkata-and-chennai-airports-112101200184_1.html).

<sup>119</sup> See Letter from Ujjwal Dey to Sandeep Prakash, *supra* note 420, at 5.

<sup>120</sup> Vinay Kumar, AAI Told Not to Impose ADF at Chennai, Kolkata, Hindu (Oct. 12, 2012), <http://www.thehindu.com/business/Economy/aii-told-not-to-impose-adf-at-chennai-kolkata/article3992150.ece>.

<sup>121</sup> Id.

<sup>122</sup> Id.

<sup>123</sup> Id.

<sup>124</sup> See *supra* notes 406–408.

<sup>125</sup> See Flying Out of Delhi to be Cheaper from Today, NDTV Profit (Jan. 1, 2013), <http://profit.ndtv.com/news/corporates/article-flying-out-of-delhi-to-be-cheaper-from-today-315389>; see also Tarun Shukla, AAI May Oppose GMR Buying Fraport's Delhi Airport Stake, Live Mint (Feb. 9, 2013), <http://www.livemint.com/Companies/jQsuVQk5P5rBSghe6YeWHN/AAI-plans-to-oppose-GMR-buying-Fraports-Delhi-airport-stake.html>. As per the instruction of the Minister, AAI has asked through a notice GMR-led DIAL in 2012 to infuse fresh funds into the \$3 billion facility instead of charging passengers extra fees for the airport's modernization. However GMR demonstrated its inability to adhere to the instruction, citing a shortage of funds as its shareholders expressed their inability to infuse more money. It was reported that the operator, GMR, is keen to buy 10% stakes from Fraport, operator of the Frankfurt airport, which has expressed its interest to sell its entire 10% stake in the airport at the end of its lock-in period in May 2013. See *id.*

<sup>126</sup> See Flying Out of Delhi to Be Cheaper from Today, *supra* note 470.

### E. DF and the OMDA Contract Regarding Privatization

The Supreme Court of India held that the AAI may use the DF collected for any of the purposes in Sections 22A: it “can assign” only the power to collect the DF for the purposes detailed in Section 22A to the private operators, but the court also held that subsection (b) and subsection (c) cannot be assigned to them.<sup>127</sup> The court did not feel it was necessary to refer to the provisions of the OMDA or the State Support Agreement to determine whether the right of levying and collecting a DF had been assigned to the lessees or not under subsections (b) and (c), since the court held that the statutory functions of the AAI, like establishing airports or assisting in establishing private airports, cannot be assigned to a lessee.<sup>128</sup>

To have more clarity on the purpose of a DF one may need to examine OMDA, which governs the process of privatization. The Comptroller and Auditor General (CAG) observed in its recent report that:

This decision to levy a DF after the effective date has vitiated the sanctity of the bidding process, as the draft OMDA, which was part of the bid documents, does not mention funding of the project cost of the airport through levy of development fees. In case the JV [joint venture] was to have been permitted to levy DF to finance the project after the signing of the OMDA, this important condition should have been known upfront to all the bidders at the time of bidding.<sup>129</sup>

Hence, this demonstrates that the concept of the DF was not known to all the bidders. Otherwise, the project parameters, including the bidding itself, would have been different. A DF was requested to bridge the shortfall in funding by the lessee.<sup>130</sup> As per CAG, OMDA is clear that the financing of the project requires the lessee to arrange financing and meet all the financial requirements of the project through debt or equity.<sup>131</sup> Article 13.1 of OMDA specifically provides that the “JVC shall arrange the financing and/or meet all financing requirements through suitable debt and equity contributions in order to comply with its obligations including development of [the] airport pursuant to the master plan and the major development plans.”<sup>132</sup>

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<sup>127</sup> Consumer Online Found. v. UOI, (2011) 5 S.C.R. 911, 929 (citing AAI Act § 22A: “(a) funding or financing the costs of upgradation, expansion or development of the airports at which the fees is collected, or (b) establishment or development of a new airport in lieu of the existing airport, or (c) investment in the equity in respect of shares to be subscribed by the Airports Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the existing airport or advancement of loans to such companies or other persons engaged in such activities.”).

<sup>128</sup> *Id.* at 948 (holding “[m]oreover, since we have held that the function of establishment and development of a new airport in lieu of an existing airport and the function of establishing a private airport are exclusive functions of the Airports Authority under the 2004 Act, and these statutory functions cannot be assigned by the Airports Authority under lease to a lessee under Section 12A of the Act, the lease agreements, namely, the OMDA and the State Support Agreement could not make a provision conferring the right on the lessee to levy and collect development fees for the purpose of discharging these statutory functions of the Airports Authority. We, therefore, do not think it necessary to refer to the clauses of the OMDA and the State Support Agreements executed in favour of the two lessees to find out whether the right of levying and collecting the development fees has been assigned to the lessees or not.”).

<sup>129</sup> Ministry of Civil Aviation, *supra* note 415, at para. 2.6.

<sup>130</sup> Letter from Ujjwal Dey to Sandeep Prakash, *supra* note 420, at 3 (“On 14.01.2009, DIAL wrote to MoCA seeking levy of Development Fee (DF) to fund for a claimed shortfall of Rs.1964 Crores in the Security Deposits from real estate development for the Airport under the OMDA.”).

<sup>131</sup> Ministry of Civil Aviation, *supra* note 415, at para. 2.6.

<sup>132</sup> *Id.*

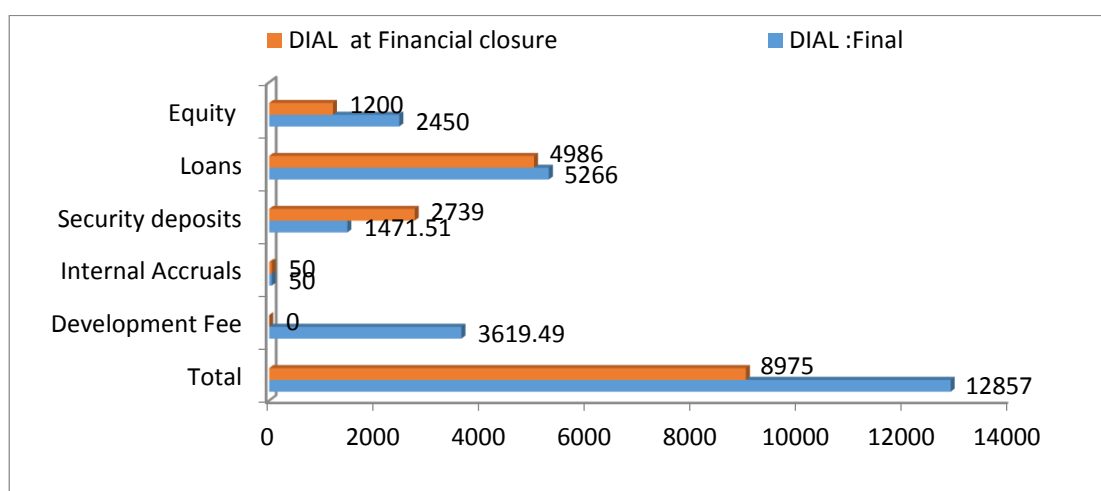
The CAG further states:

However, MOCA [consulted] their order dated 9th February 2009, [and] allowed DIAL to levy a development fee (DF) at Indira Gandhi International Airport for the purpose of funding or financing the cost of up-gradation, expansion or development of the Airport. This was clearly in contravention of the provisions of Article 13.1 of OMDA, provisions in the AAI Act and in AERA Act as later confirmed by Delhi High Court.<sup>133</sup>

From the above observations of CAG and the provisions of the OMDA, it is clear that a DF was not envisaged at the time of bidding for the project and the charging of a DF was in contravention of Article 13.1 of the OMDA.<sup>134</sup> The CAG report says that “Approval of Ministry and later of AERA for levy of a DF by DIAL (to bridge the funding gap) was a post-contractual benefit provided to DIAL which was neither envisaged in the RFP [Request for Proposals] nor included under any provision of OMDA or in the SSA.”<sup>135</sup>

The DF provision was inserted in the AAI Act after the tenders were invited.<sup>136</sup> So the question of providing a clause regarding the introduction of a DF in the tender documents did not arise.

#### DIAL’s Project Financing in Crores:<sup>137</sup>



Source : *Source – CAG report No 5, 2012-13*

The CAG provides:

Out of the total capital expenditure of Rs. 12857 crore claimed by DIAL, AERA has admitted Rs. 12502.86 crore as the total project cost. The funding gap to the tune of Rs. 3415.35 crore was permitted by AERA to be collected from the passengers through levy

<sup>133</sup> Id.

<sup>134</sup> Id.

<sup>135</sup> Id.

<sup>136</sup> See AERA, Order No. 08/2014-15: In the Matter of Determination of Aeronautical Tariffs in Respect of Kennpegowoa International Airport, (Earlier Bengaluru International Airport), Bengaluru, for the First Control Period (01.04.2011 to 31.03.2016) (June 10, 2014) (finding that “[a] formal notification of the amended Act [including Section 22A] was issued on 1st July 2004.”); see also Mumbai Int’l Airport, Shareholders Agreement by and Between Airports Authority of India and Mumbai International Airport Pvt. Ltd. and GVK Global Ltd. 4 (Apr. 4, 2006) (finding that “AAI issued an advertisement on February 17, 2004 inviting proposals from interested parties for reelection of competent and willing persons for undertaking the project.”).

<sup>137</sup> Ministry of Civil Aviation, supra note 415, at para. 2.8.

of DF which was not envisaged in OMDA and SSA.<sup>138</sup> That is to say, “[o]ut of the capital expenditure of Rs. 12857 crore, only 19% of the capital expenditure has been promoters contribution, 26.56% came from” the DF.<sup>139</sup>

These figures demonstrate that the provision of a DF was not envisaged until the financial closure of the project. Therefore, it cannot be said that this aspect was clear to all bidders at the bidding stage itself.

Once it is clear that the airport operator was expected to bring in the necessary capital, the question of pre-funding charges, as mentioned in ICAO Doc. 8062, was not envisaged at all. If pre-funding charges levied on passengers were envisaged for the airports before tendering, privatization itself was not necessary, as the capital shortage by the public sector entity AAI was one of the reasons for privatization.<sup>140</sup>

#### **F. AERA’s Decision to Levy a DF**

AERA accepted that the AAI has never assigned to DIAL the power to levy a DF. AERA observed:

The Authority noted that neither the OMDA nor the SSA have any provisions pertaining to the levy of a 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.<sup>141</sup>

But AERA, while considering DIAL’s request for the imposition of the DF reasoned that:

The Hon’ble Supreme Court in its judgment dated 26.04.2011 has, inter-alia, held that: 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.<sup>142</sup>

AERA further stated:

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

<sup>138</sup> Id.

<sup>139</sup> Id.

<sup>140</sup> See ICAO Doc. 9082/9, *supra* note 348, at 1–4; see also Manuj Ohri, Airport Privatization in India—A Study of Different Modes of Infrastructure Provisions 10 (2009).

<sup>141</sup> See AERA, Order No. 28/2011-12: In the Matter of Levy of Development Fee by Delhi International Airport Ltd. (DIAL) at IGI Airport, New Delhi 26 (Nov. 8, 2011) [hereinafter AERA Order No. 28/2011-12].

<sup>142</sup> Id. at 25.

of DIAL and as such, they are best placed to approach this Authority with their need for funding or financing through levy of DF.<sup>143</sup>

The Supreme Court of India held that the AAI “can assign” the power to levy a DF to private operators under section 22A(a), but not under Sections 22A(b) or (c).<sup>144</sup> But the court did not decide whether the AAI assigned the power to levy a DF to the lessee, probably because it was not a question before the court. But AERA examined the question whether AAI assigned the power to implement a DF to DIAL/MIAL and held in the negative.<sup>145</sup> Once AERA was convinced that the AAI never assigned the power to DIAL/MIAL, in the light of SC order, the issue should have been closed. But AERA held that DIAL can apply for a DF in spite of the absence of any assignment of such power by the AAI to DIAL, due to the fact that AERA interpreted that the Supreme Court decision suggests that DIAL stepped into the shoes of the AAI.<sup>146</sup> The Supreme Court’s decision does not support such a ruling. The Delhi High Court had ruled that DIAL stepped into the AAI’s shoes.<sup>147</sup> On the other hand, the Supreme Court held that the finding of the High Court that DIAL has all the powers of the AAI is contrary to legislative intent.<sup>148</sup> However, it looks like AERA relied on the Delhi High Court order to conclude that the private operators occupy the AAI’s shoes, in spite of the Supreme Court’s contrary position.

It is a well settled rule that taxation provisions should be strictly interpreted.<sup>149</sup> There cannot be an implied power of taxation, which the Supreme Court clarified again in the same decision.<sup>150</sup> But still, AERA interpreted the statute to provide an implied power for DIAL to implement a DF.<sup>151</sup> In support of its stance, AERA stated that otherwise contractual provisions gain primacy over the statutory provisions, i.e. AAI Act 22A, which permits a DF.<sup>152</sup> However, it may be noticed that AERA finally permitted DIAL, not AAI, to levy a DF.<sup>153</sup>

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<sup>143</sup> Id.

<sup>144</sup> Consumer Online Found. v. UOI, (2011) 5 S.C.R. 911, 927.

<sup>145</sup> Id.

<sup>146</sup> AERA Order No. 28/2011-12, supra note 486 (noting that “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 judgment 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 honorable Supreme Court, are not precluded from levying and collecting the same, merely on account of absence of the enabling covenants in the contractual arrangements.”).

<sup>147</sup> Consumer Online Found., 5 S.C.R. at 927.

<sup>148</sup> Id. at 914 (“The conclusion of the High Court in the impugned judgment that the lessee of the airport has the power of the Airports Authority under Section 22A to levy and collect development fees from the embarking passengers by virtue of sub-section (4) of Section 12A of the Act is contrary to the legislative intent of the Amendment Act of 2003.”).

<sup>149</sup> Id. at 950-51,

<sup>150</sup> Id.

<sup>151</sup> Id.

<sup>152</sup> AERA Order No. 28/2011-12, supra note 486.

<sup>153</sup> Id. at 486 (“The order says 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).”).

If AERA's position is considered, and we accept for the sake of argument that the contractual provisions cannot gain primacy over the statutory provisions, then AERA's earlier stated position that DIAL is in the shoes of the AAI for the purpose of levying a DF under Section 22A is wrong. This is because the only relationship between AAI and DIAL is the contract between the two, for the Operation, Management and Development of Delhi airport (OMDA).<sup>154</sup> And if by this contract DIAL steps into the shoes of the AAI, as far as the power to levy a DF under section 22A of the AAI Act, then the contract gains primacy over the statutory provisions of the AAI Act and the AAI Act would not be applicable to private airports.

While Rules 88 and 89 of the Aircraft Rules of 1937 state that an airport licensee can levy a PSF/UDF on passengers, Section 22A of the AAI Act gives only the AAI the power to levy a DF.<sup>155</sup> Therefore, the legislative intent is clear—only the AAI should levy a DF, not the licensee of an airport.

### **G. DF and the Applicability of the AAI Act to Private Airports**

The applicability of the AAI Act to private airports has not yet been discussed. This issue is relevant as the Supreme Court has said that any compulsory extraction of money by the government, such as a tax or a cess, must be construed strictly.<sup>156</sup> Further, the court has held that “whenever there is compulsory extraction of money, there should be specific provision for the same and there is no room for intendment and nothing is to be read or nothing is to be implied and one should look fairly to the language used.”<sup>157</sup> Therefore, it would be prudent to examine whether the AAI Act applies to DIAL and MIAL, which are private airports.

As per the AAI Act of 1994, private airports were not excluded from its scope.<sup>158</sup> Only military airports were originally exempted from the AAI Act until 2003.<sup>159</sup> In 2003, as privatization of Indian airports was initiated, the AAI Act was amended.<sup>160</sup> The Statement of Objectives and Reasons of the Amendment Act says:

This bill:

- Amends section 1 as well as section 2 of the Act to exclude the private airports from the purview of the AAI Act except for certain limited purposes and to provide for definition of a private airport; and
- Provides adequate comfort levels to enhance investors' confidence and to ensure a level playing field to the private sector greenfield airports by lifting control of the AAI except in certain respects.<sup>161</sup>

The term “private airport” was defined<sup>162</sup> and private airports were removed from the ambit of

<sup>154</sup> See generally Operation, Management and Development Agreement of India and Delhi International Airport Private Limited for Delhi International (Apr. 4, 2006).

<sup>155</sup> See The Aircraft Rules of 1937, No. V-26 of 2013; see also The Airports Authority of India (Amendment) Act, 1994, No. 55, Acts of Parliament, 2003.

<sup>156</sup> See Consumer Online Found. v. UOI, (2011) 5 S.C.R. 911, 950–51 (citing Ahmedabad Urban Dev. Auth. v. Pasawalla, (1992) 3 S.C.C. 285 (India)).

<sup>157</sup> Id.

<sup>158</sup> The Airports Authority of India (Amendment) Act, § 1(3)(d).

<sup>159</sup> Id.

<sup>160</sup> See generally The Airports Authority of India (Amendment) Act, No. 43 of 2003, Acts of Parliament, 2003.

<sup>161</sup> See Res. of Aviation Redressal Ass'n v UOI (2009) (Delhi H.C.), at 10 (citing the AAI Act, Statement of Objects and Reasons).

<sup>162</sup> See Airports Authority of India (Amendment) Act, § 2(nn) (providing that “‘private airport’ means an airport owned, developed or managed by: (i) Any person or agency other than the authority or any State Government; or (ii) Any person or agency jointly with the Authority or any State Government or both where the

the AAI Act, except for Section 37 and Chapter V.A.<sup>163</sup> Also, by the same Amendment Act, Section 12A was introduced to facilitate privatization of AAI airports through leasing.<sup>164</sup> Section 22A, regarding DFs, was also introduced by the 2003 amendment.<sup>165</sup> The Objects and Reasons portion of the Amendment Act, which reflects the intention of the legislature, further states, regarding Section 22A of the AAI Act, that “[t]his amendment will make projects, relating to greenfield airports, economically viable by such fee collections.”<sup>166</sup>

As Section 22A permits the AAI to levy and charge a DF, the Statement of Objects and Reasons makes it clear that the provision was introduced to generate revenue for greenfield airports. The Statement of Objects and Reasons does not say anything about the permissibility of a DF for brownfield airports, as brownfield airports were to be developed by private capital. DIAL and MIAL are no longer AAI airports nor are the greenfield airports.<sup>167</sup> Delhi and Mumbai airport licenses under the Aircraft Rules of 1937 are also not in the name of the AAI, rather they are in the name of the lessees.<sup>168</sup> Hence, if one strictly reads Section 28A, as opined by the Supreme Court, Section 22A cannot be applicable in the case of any entities other than the AAI.

If DIAL and MIAL are private airports, as per the definition of the term in the AAI Act, then the AAI Act is not applicable to these airports. In some cases relating to the applicability of the Transparency Act of India, namely the Right to Information Act, DIAL and MIAL have argued that they are private entities, and hence those Acts are not applicable.<sup>169</sup> The judgments of the Karnataka and Mumbai High Courts, finding that MIAL and Bangalore International Airport Limited (BIAL) are “state entities” under Article 226 of the Constitution, were challenged by the private operators, and the decisions were stayed by the Supreme Court and the matters have been pending since 2008<sup>170</sup> and 2009.<sup>171</sup> The decisions of the Information Commission, declaring DIAL/MIAL as public authorities under the RTI Act, were stayed by the Delhi High Court in 2011.<sup>172</sup> In these matters, MIAL and DIAL argue that they are private entities, not public entities. This exhibits that DIAL and MIAL are of the opinion that they cannot be considered the same as the AAI as they are private airport operators.

DIAL argued before the Supreme Court that DFs are not a tax but charges levied and collected by the lessee for development of facilities for the use of the airport.<sup>173</sup> “The lessees, which are non-government companies, have established the utility in a public-private partnership, and do not require a statutory authorization or permission to recover such charges by way of

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share of such person or agency as the case may be in the assets of the private airport is more than fifty percent.”).

<sup>163</sup> See Res. of Aviation Redressal Ass’n.

<sup>164</sup> See id.

<sup>165</sup> See id.

<sup>166</sup> See Res. of Aviation Redressal Ass’n, (citing the AAI Act Statement of Objects and Reasons).

<sup>167</sup> See Sumeer Kachwana, Speech at Dublin IBA Conference: Airport Capacity and the Modern Infrastructure Changes (Feb. 2, 2013) (noting that the New Delhi and Mumbai Airports are brownfield airports).

<sup>168</sup> See The Aircraft Rules of 1937, § 78(2)(b).

<sup>169</sup> See Shirodkar v. Ministry of Civil Aviation (2011), available at [http://www.rti.india.gov.in/cic\\_decisions/CIC\\_MA\\_C\\_2008\\_00195\\_SS\\_M\\_57922.pdf](http://www.rti.india.gov.in/cic_decisions/CIC_MA_C_2008_00195_SS_M_57922.pdf).

<sup>170</sup> See Flemingo Duty-Free Shop Pvt. Ltd. v UOI, at 168–71 (2008), available at <http://indiankanon.org/doc/1799553/>; see also Shonali Ghosal, Public Utilities Elude the RTI Net The Cloak of Privacy Protects Companies, Tehelka Mag. (July 16, 2011), <http://www.tehelka.com/public-utilities-elude-the-rti-net-the-cloak-of-privacy-protects-companies/>.

<sup>171</sup> Bangalore Int’l Airport v Karnataka Information Comm’n, at 5, 37–38 (2010); see also Ghosal, supra note 169.

<sup>172</sup> Ghosal, supra note 515

<sup>173</sup> Consumer Online Found. v. UOI, (2011) 5.S.C.R. 911, 933.

development fee, from the passengers using the airport and the lessees do not require the support of the statutory provision of Section 22A for levy and collection of development fees.”<sup>174</sup>

DIAL also argued that “Section 22 of the 1994 Act identified the heads on which charges could be recovered, Section 22A, therefore, merely adds three more heads for which funds could be raised and this is akin to adding components of a tariff.”<sup>175</sup> DIAL further argued that “Section 22A does not change the quality and character of the recovery of charges by the owners of the facilities from the users thereof.”<sup>176</sup>

DIAL never conceded that a DF is a tax, rather it argued that a DF is only a charge and that DIAL is a non-government entity.<sup>177</sup> The Indian government also has never taken the stance that the DF is a tax while defending its decision. DIAL never sought relief on the ground that DF is a tax, nor argued it can levy a tax. It is possible that DIAL and MIAL were aware that if the DF were to be considered a tax it may not be able to charge such a tax, as they are not government entities. However, the Supreme Court ruled that the DF is a tax.<sup>178</sup>

DIAL has never accepted that the AAI Act applies to it. DIAL has never argued that it occupies the shoes of the AAI in operating the Delhi Airport. In fact, it is AERA which considered DIAL to be in AAI’s shoes and permitted the DF.<sup>179</sup> Therefore, the AAI Act would not be applicable to DIAL and MIAL as they are private airports, and accordingly levy of the DF by these private airports could be considered ultravires.

## H. ICAO Policy and Pre-Funding Charges

ICAO Doc. 9082, which discusses prefunding methodology, refers to charges, not taxes.<sup>180</sup> ICAO Doc. 8632, which deals with taxation, does not refer to any prefunding taxes.<sup>181</sup> This clearly shows that, as per ICAO policy, prefunding, if permissible, can be implemented only by charges and not by taxation on aviation, whereas the DF charged by private airports in India is a tax as per the above-cited Supreme Court decision.<sup>182</sup> In addition, the ICAO Doc. 9082, which advocates that prefunding charges also come into effect only after privatization of airports, has become popular.<sup>183</sup> This provision, relating to prefunding charges, was not in the earlier editions of Doc. 9082. The first time this provision appeared was in the sixth edition published in 2001, i.e., well after privatization of airports had begun.<sup>184</sup> Hence, if such prefunding was not permissible before privatization under the Chicago Convention provisions, how has it become permissible since privatization? Therefore, this points to the allowance of a DF resulting from the post-privatization era effort to help privatization and not the original

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<sup>174</sup> Id.

<sup>175</sup> Id. at 934.

<sup>176</sup> Id.

<sup>177</sup> Id. at 933.

<sup>178</sup> Id. at 950.

<sup>179</sup> AERA Order No. 28/2011-12, supra note 486.

<sup>180</sup> ICAO Doc. 9082/9, supra note 348

<sup>181</sup> Id.

<sup>182</sup> Consumer Online Found. v. UOI, (2011) 5 S.C.R. 911, 950.

<sup>183</sup> See ICAO Doc. 9082/9, supra note 348; see also Ministry of Civil Aviation, Report of the Committee on a Road Map for the Civil Aviation Sector 18 (Nov. 30, 2001).

<sup>184</sup> Compare ICAO, Statements by the Council to Contracting States on Charges for Airports and Air Navigation Services, ICAO Doc. 9082/5 (5th ed. 1997), with ICAO, ICAO’s Policies on Charges for Airports and Air Navigation Services, ICAO Doc. 9082/6 (6th ed. 2001).



provisions of Article 15 of the Chicago Convention.

On the AAI's website, even after the Supreme Court decision, DFs are categorized as a "pre-funding charge."<sup>185</sup> This position of AAI is not in agreement with the Supreme Court decision which says a DF is a tax, not a charge.<sup>186</sup> Since a DF is a tax, their position is also not in agreement with ICAO's definition of "pre-funding charges" because ICAO Doc. 9082 deals with pre-funding charges, not "pre-funding taxes."<sup>187</sup>

Also, "charge" is defined as "a levy designed and applied specifically to recover the costs of providing facilities and services for civil aviation."<sup>188</sup> From this, it is clear that a charge cannot be used for raising capital for airport development. But, in the present case, a DF is used to raise capital for developing an airport, not for recovering costs. Hence, considering this definition, a DF may qualify as a "charge" as per ICAO policies, however, justifying the DF as a prefunding charge cannot be considered as per ICAO policies.

### **I. Lawmaking Process for Charging a DF**

In order to overcome the Supreme Court's decision, a new rule was proposed, namely the Airports Authority of India (Major Airports) Development Fees Rules, 2011, on August 2, 2011,<sup>189</sup> which has since created much uproar in parliament.<sup>190</sup> One source reported that a Member of Parliament (MP) moved for an amendment to the proposed rules.<sup>191</sup> The MP stated:

A provision to tax the public cannot be implemented through a Rule made by the Executive without the approval of Parliament. The present government seems to be very eager to allow its PPP partners and corporates to levy tax, bypassing Parliament. The sovereign function of the Legislature is put under question.<sup>192</sup>

Therefore, the issue becomes whether it is proper to bring a provision to tax the public by way of a new rule instead of amending the Act itself, since the power lays with the Executive to make rules, however, the power to make regulations, bylaws, schemes, or other statutory instruments is delegated to Parliament.<sup>193</sup>

To overcome the Consumer Online Foundation decision, amendments were introduced in the

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<sup>185</sup> See Frequently Asked Questions, Airport Authority India, [http://www.aai.aero/public\\_notices/aaisite\\_test/faq\\_Gen.jsp](http://www.aai.aero/public_notices/aaisite_test/faq_Gen.jsp) (last visited Mar. 26, 2015) (AAI website states: "What is Development Fee (DF) and why Development Fee is charged by Airport Operators? Development Fee is a levy made under section 22A of the AAI Act, 1994, inter-alia, for funding or financing the cost of upgradation, modernization or development of the airport. The levy is in the nature of a 'pre-funding' charge and is consistent with ICAO policies.").

<sup>186</sup> See Consumer Online Found., 5 S.C.R. at 950.

<sup>187</sup> ICAO Doc. 9082/9, supra note 348.

<sup>188</sup> Id.

<sup>189</sup> See True Airports Authority of India (Major Airports) Development Fee Rules, 2011, Gazette of India, section III(i) (Aug. 2, 2011).

<sup>190</sup> See Jigeesh, supra note 459.

<sup>191</sup> Id.

<sup>192</sup> M.P. Rajya Sabna, Why Airport User Fees are Illegal, Hindu Bus. Line (Aug. 29, 2012), <http://www.thehindubusinessline.com/opinion/why-airport-user-fees-are-illegal/article3367571.ece>.

<sup>193</sup> Jigeesh, supra note 459 ("According to the Opposition MPs, the government was using the route of rules to bypass Parliament and subvert the existing Acts. They alleged that the rules have been framed to help private airport developers and operators.").

Airports Authority of India (Major Airports) Development Fee Rules, 2011.<sup>194</sup> Rule 3 allows operators to “collect” a DF for airports, which attempted to overcome the Supreme Court’s decision.<sup>195</sup> But, Section 22A still says the AAI can “levy” a DF, and not the lessee under section 12A of the AAI Act.<sup>196</sup>

Rule 4 of the new Development Fee Rules allows the operator to handle the money that was charged before the Supreme Court’s April 2011 order.<sup>197</sup> This overcomes the difficulty created by the Supreme Court order:

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.<sup>198</sup>

Hence, though the Supreme Court held that the DF is an illegal charge because it is a tax, an effort has been undertaken to legalize it by way of an executive action, i.e., through the introduction of the Airports Authority of India (Major Airports) Development Fees Rules, 2011.

## **J. Article 15 of the Chicago Convention and DFs**

In India, DFs were not challenged on the basis of Article 15 of the Chicago Convention as in other states.<sup>199</sup> This may be due to the stance of India that it never discriminates against aircraft of other states when applying charges. However DFs are higher for international departing passengers compared to that of domestic departing passengers.<sup>200</sup> Nonetheless, the rates are the same for all passengers and airlines irrespective of nationality.<sup>201</sup>

Article 15 of the Chicago Convention says that “[n]o fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.”<sup>202</sup>

<sup>194</sup> K.N. Balagopal, UPA Subverting Role of Parliament, People’s Democracy, May 6, 2012, at 4.

<sup>195</sup> See Consumer Online Found. v. UOI, (2011) 5 S.C.R. 911, 917. The Supreme Court held that:

Those passengers who embark at the airport after the airport is upgraded, expanded or developed will only avail the facilities and services of the upgraded, expanded and developed airport. Similarly, there can be no contractual relationship between the Airports Authority and passengers embarking at an airport for establishment of a new airport in lieu of the existing airport or establishment of a private airport in lieu of the existing airport as mentioned in Clauses (b) and (c) of Section 22A of the 1994 Act. In the absence of such contractual relationship, the liability of the embarking passengers to pay development fees has to be based on a statutory provision and for this reason Section 22A has been enacted empowering the Airports Authority to levy and collect from the embarking passengers the development fees for the purposes mentioned in clauses (a), (b) and (c) of Section 22A of the Act.

<sup>196</sup> Id.

<sup>197</sup> The Airports Authority of India (Amendment) Act § 12A, 1994, No. 55, Acts of Parliament, 2003.

<sup>198</sup> Jigeeesh, supra note 459.

<sup>199</sup> See Consumer Online Found., 5 S.C.R. at 957.

<sup>200</sup> See International Air Passenger Adaptation Levy under International Law, Legal Response Initiative, July 16, 2013, at 3–4.

<sup>201</sup> See Airport Econ. Regulatory Auth. of India, supra note 416, at 1.

<sup>202</sup> Id.

<sup>203</sup> Chicago Convention, supra note 347, art. 15.

The question of whether DFs are a fee or a charge with regards to the right to exit from Delhi and Mumbai airport needs to be looked into. One can look at this issue from two angles. First, whether DFs are “fees.” Second, whether DFs are fees for the “right to exit” from these airports.

Until the Supreme Court decision, the AAI projected DFs as a charge.<sup>203</sup> But the Supreme Court has held that DFs are not a charge but a tax.<sup>204</sup> Considering the new legal nature of the DF as a tax, Article 15 may not be violated. But serious questions still arise. If a fee or charge cannot be imposed solely for the right to transit over, enter into, or exit from a state’s territory, but a tax can be imposed solely for the right to exit from a state, is Article 15 weakened? The answer to the second question would be in the affirmative, as a DF needs to be paid by all departing passengers of international flights from these airports.

The Supreme Court held that “[t]he levy under Section 22A though described as fees is really in the nature of a cess or tax for generating revenue for the specific purposes mentioned in clauses (a), (b) and (c) of Section 22A.”<sup>205</sup> In the given case, as per the AAI, DFs are used for funding or financing the cost of upgradation, modernization and/or development of airports.<sup>206</sup>

As per ICAO Doc. 9082 and 8632,

... a charge is a levy that is designed and applied specifically to recover the costs of providing facilities and services for civil aviation, and a tax is a levy that is designed to raise national or local government revenues which are generally not applied to civil aviation in their entirety or on a cost specific basis.<sup>207</sup>

Thus, DFs are not for “recovering the costs for providing any facilities or service for civil aviation,” but for “funding or financing the cost of up-gradation, modernization or development of the airport.”<sup>208</sup> Hence, it cannot be defined as a charge according to ICAO. At the same time, the Supreme Court considers DFs a tax for the specific purposes mentioned in clauses (a), (b), and (c) of Section 22A.<sup>209</sup> Considering the definitions of “charge” and “tax,” as well as the Supreme Court’s decision that DFs are taxes, DFs could be considered an “exit tax” applicable to all return flights from the Delhi and Mumbai airports.

From the foregoing, it can be determined that post-judgment, the category and the nature of DFs has changed from “charge” to “tax.” This provides much clarity, and it brings DFs into the purview of Article 15 of the Chicago Convention—that DFs are against the provisions of Article 15 of the Chicago Convention, because they are not a charge for usage of any facility.<sup>210</sup>

No international airline has challenged DFs on the basis of the Chicago Convention, nor on the ground that DFs are exit taxes from the Delhi and Mumbai airports. Since no competing airports are available in the vicinity of Delhi and Mumbai airports, airlines do not have any

<sup>203</sup> Frequently Asked Questions, *supra* note 530.

<sup>204</sup> See Consumer Online Found., 5 S.C.R. at 950.

<sup>205</sup> See id.

<sup>206</sup> See Frequently Asked Questions, *supra* note 530.

<sup>207</sup> ICAO Document 9082/9, *supra* note 2, at vii; see also ICAO, ICAO’s Policies on Taxation in the Field of International Air Transport, ICAO Doc. 8632 (3d ed. 2000) (“Whereas ICAO, for the purpose of its policy objectives, makes a distinction between a charge and a tax, in that charges are levies to defray the costs of providing facilities and services for civil aviation while taxes are levies to raise general national and local government revenues that are applied for non-aviation purposes.”).

<sup>208</sup> ICAO Doc. 9082/9, *supra* note 348.

<sup>209</sup> See Consumer Online Found., 5 S.C.R. at 950.

<sup>210</sup> Chicago Convention, *supra* note 347, art. 15.

option but to use them, unlike European airports where taxes were introduced. India, being a council member of ICAO from its inception, needs to examine the impact of such a tax on aviation, and whether DFs are barriers to achieving the Chicago Convention's aims of enhancing the safety and economic development of international civil aviation.<sup>211</sup>

## VII. Conclusion

The Supreme Court of India held that DFs are not charges but taxes. Post-Supreme Court decision actions—including proposing new rules and allowing private airports to retain DFs already collected—indicate efforts to legalize a private tax on aviation. The current legislation is against the spirit of the Supreme Court decision and the Chicago Convention.

Additionally, the AAI Act is not applicable to private airports. There is no provision in the AAI Act that permits the AAI to assign the power to levy/collect DFs to a private entity. The Supreme Court has not considered this limitation while deciding the legality of DFs.

Though a tax as per the Supreme Court decision, the ICAO documents do not consider DFs taxes. ICAO Doc. 9082 on Policies on Charges for Airports and Air Navigation Services does not allow taxation as a method for prefunding airport construction.

DFs are against the recommendation of the highest planning body of the state, the Planning Commission, which is in line with the Chicago Convention. The latest demand of MoCA that AAI not levy a DF in Chennai or Kolkata substantiates that India agrees that DFs are against the Chicago Convention.

Due to the privatization of airports, India as well as its independent regulatory agency, AERA, permit DFs by private airports but not by the state agency, AAI. Though privatization was expected to bring in private capital in order to modernize airports, instead the public is funding the project. One of the main reasons for privatization of India airports was high airport charges, but privatization has resulted in higher charges as well as taxes.

If private entities are allowed to levy taxes for financing development of airports, the state or AAI could also charge this tax and develop airports by itself. Either way only airlines or passengers will fund the development/modernization.

Section 22A was introduced to raise capital for AAI from the airports to develop greenfield airports but now the same law is used to generate private capital. Also the privatization of airports in India has been effectively carried out by public capital, not by private capital as envisaged.

India appears to consider DFs not charges but, in contrast, a tax. It could be in order to overcome ICAO guidelines and criticism. But from a national perspective, it has accepted the finding of the Supreme Court, though the judgment has been made redundant through the framing of the AAI (Major Airports) Development Fee Rules, 2011. Interestingly, if India maintains that Development Fees are charges, then it is against the findings of the Supreme Court, and if India accepts that Development Fees are taxes, then it is a violation of Article 15 of the Chicago Convention. Moreover, prefunding charges are permitted only as charges, not as a tax, like DFs.

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<sup>211</sup> See *id.*

