Airport Charges Regulation: A Private Law Approach

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Abstract

This thesis explores the regulation of airport charges, which is an important but marginalised topic. It particularly examines how private law instruments can play a role in the regulatory process. Airports used to be subject to traditional regulation, which operates in a command-and-control mode. As the airport industry becomes increasingly complicated, traditional regulation seems problematic. First, the method that is associated with traditional regulation to draw a line between regulated and unregulated airports has downsides. Second, the international regulatory framework on airport charges lacks binding rules. This suggests that traditional regulation is not the best niche for airport charges regulation. Third, good regulation needs independent regulatory bodies, which are hard to achieve in practice.

In this context, this thesis argues that a private law approach can serve as a more flexible and effective way to regulate airport charges. There are two instruments under this overarching approach. First, contracts can be adopted to incorporate airport charges regulations. Second, robust corporate governance generates the effect of good regulation.

This is an interdisciplinary work that has engaged air law, contract law, corporate law, competition law, and aviation business and management. It also employs the method of case studies. Chapter 4 examines the regulation of airport charges in the UK, Canada, and India. The three case studies demonstrate that private law instruments have been implicitly implemented to different degrees in these countries. These demonstrate the feasibility of applying private ordering in the regulatory process. I also look into the regulation of countries and regions including Australia, Ireland, the EU, and Germany throughout this thesis.

This study also examines a specific sector of airport charges, namely, charges for ground-handling services. This sector possesses a unique feature in that it is between aeronautical and non-aeronautical services. A private law approach can also be adopted in the regulation of charges relating to ground-handling services. Additionally, ICAO as an important international organisation governing international air transport can also contribute to a private law approach of airport charges through its soft-law making function.

This thesis aims to shed light on a private law approach, as an innovative regulatory mechanism, to airport charges. That said, regulation by this approach and traditional regulation are not contradictory but can cooperate to an extent, depending on how much power one wants to give to private ordering.

Résumé

Cette thèse explore la réglementation des redevances aéroportuaires, un sujet important mais marginalisé. Elle examine en particulier comment des instruments de droit privé peuvent jouer un rôle dans le processus réglementaire. Les aéroports étaient auparavant assujettis à une réglementation traditionnelle, caractérisée par un mode de commande-et-contrôle. Cependant, au fur et à mesure que l'industrie aéroportuaire devînt de plus en plus complexe, la réglementation traditionnelle est devenue problématique. Premièrement, la distinction ferme entre aéroports réglementés et non réglementés associée à la réglementation traditionnelle a des inconvénients. Deuxièmement, le cadre réglementaire international des redevances aéroportuaires ne comporte pas de règles contraignantes, ce qui nous indique que la méthode traditionnelle de règlementation n'est pas la meilleure pour règlementer les redevances aéroportuaires. Troisièmement, une bonne réglementation exige des organismes de réglementation indépendants, ce qui est difficile à réaliser dans la pratique.

Dans ce contexte, cette thèse soutient qu'une approche de droit privé serait plus souple et plus efficace pour réglementer les redevances aéroportuaires. Il y a deux instruments principaux qui pourraient accomplir cet objectif. Premièrement, des règlements sur les redevances pourraient être incorporés dans des contrats. Deuxièmement, une gouvernance robuste des entreprises produira une bonne réglementation.

Il s'agit ici d'un travail interdisciplinaire qui fait appel au droit du transport aérien, au droit des contrats, au droit des sociétés, au droit de la concurrence et aux affaires et la gestion de l'aviation. Il est également fait usage de l'étude de cas. Le chapitre 4 examine la réglementation des redevances aéroportuaires au Royaume-Uni, au Canada et en Inde, trois pays où des instruments de droit privé ont été implicitement mis en œuvre à différents degrés. Ces cas démontrent la faisabilité de l'application d'ordonnancements privés dans le processus réglementaire. L'auteur se penche également, tout au long de cette thèse, sur la réglementation de pays et de régions comme l'Australie, l'Irlande, l'Union européenne et l'Allemagne.

Cette étude examine également un secteur spécifique des redevances aéroportuaires, à savoir les redevances pour les services de manutention au sol. Ce secteur possède la caractéristique unique de se situer á l'intersection des services aéronautiques et non-aéronautiques. Une approche de droit privé peut également être adoptée dans la réglementation des redevances relatives aux services de manutention au sol. En outre, l'OACI, en tant qu'organisation internationale importante régissant le transport aérien international, peut également contribuer à une approche de droit privé des redevances aéroportuaires par sa fonction d'élaboration de normes non contraignantes.

Cette thèse vise à mettre en lumière une approche de droit privé en tant que méthode innovante de réglementation des redevances aéroportuaires. Cela dit, la règlementation de droit privé n'est pas contradictoire avec la réglementation traditionnelle; les deux méthodes peuvent coopérer en fonction des pouvoirs donnés aux ordonnancements privés.

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List of Abbreviations

AAI	Airports Authority of India
ACCC	Australian Competition and Consumer Commission
ACI	Airport Council International
ADR	alternative dispute resolution
AERA	Airports Economic Regulatory Authority
AERAAT	Airports Economic Regulatory Authority Appellate Tribunal
AIF	airport improvement fee
BAA	British Airports Authority
CAA	Canadian Airport Authority
CAC	Canadian Airports Council
CAR	Commission for Aviation Regulation
CEANS	Conference on the Economics of Airports and Air Navigation Services
CED	charges elasticity of demand
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CMA	Competition and Markets Authority
CoU	Conditions of Use
CRTC	Canadian Radio-television and Telecommunications Commission
CSR	corporate social responsibility

CTA	Canadian Transportation Agency
DIAL	Delhi International Airport Limited
Doc 9082	ICAO's Policies on Charges for Airports and Air Navigation Services
EU	European Union
GATT	General Agreement on Tariffs and Trade
HHI	Herfindahl-Hirschman Index
IASTA	International Air Services Transit Agreement
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ISA	independent supervisory authority
LCC	low-cost carrier
MFN treatment	most-favoured-nation treatment
NAS	National Airports System
NPCA	Canada Not-for-profit Corporations Act
OECD	Organisation for Economic Co-operation and Development
OMDA	Operation, Management and Development Agreement
PANS	procedures for air navigation service
PC	Productivity Commission
PFC	Passenger Facility Charge
PPP	public-private partnership
SARP	standards and recommended practice
SGHA	Standard Ground Handling Agreement
TASA	Template Air Services Agreement
TDSAT	Telecom Disputes Settlement and Appellate Tribunal

UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTO	World Trade Organization

Introduction

I Background

Along with the general trend of growth of the aviation economy at a global level,[1] the air transport industry generates increasing profits. The industry consists of multiple sectors, with the airline sector and the airport sector being two major ones. In 2017, the International Air Transport Association (IATA) revealed that the average cost of a ticket has remained the same for the past ten years, and the revenue portion going to the airlines in such a ticket dropped from 90% to 79%. Contrastingly, the revenue proportion of the airport services sector doubled.[2] We may use a scenario to vividly understand these figures: a flight passenger would need to pay 20% of the total fare of a ticket to an airport vis-à-vis 10% ten years ago. The recent increases of the Airport Improvement Fee in Canada's top three airports by passenger numbers, i.e., Toronto Pearson International Airport,[3] Vancouver International Airport,[4] and Montréal–Trudeau International Airport,[5] resonate with the growing demand for money by the airport sector. The increase of airport charges matters not only because these are fees passed on to airlines, which increase their operational costs, but also because any such increases finally pass to passengers. We pay the bill.

However, it may be premature to argue that airport economic issues, particularly charge issues, should be subject to tight regulation. Many factors have increased competition among airports, challenging the necessity of tight airport regulation.[6] To put the two controversial phenomena together, namely, growing competition (which is supposed to decrease charges) and the still-

[1] Notwithstanding this general tendency, the COVID-19 pandemic heavily frustrated air transport, particularly international air transport as of 2020. This introduction later addresses this event.
[2] IATA, "Passenger Airport Charges Double in 10 Years: Tighter Regulation Needed", (27 September 2017), online: <https://www.iata.org/en/pressroom/pr/2017-09-27-01/>.
[3] As of 1 January 2021, The AIF increased from $25 Canadian dollars (CAD) to $30 CAD per departing passenger. See The Greater Toronto Airports Authority, "GTAA Issues Notification Regarding Changes to Rates and Charges", online: *Pearson Airport* <https://www.torontopearson.com/en/corporate/media/press-releases/2020-09-30>.
[4] From 1 January 2020, The AIF increased from $20 CAD to 25 $ CAD per passenger to fly out of the province of British Columbia. See Vancouver Airport Authority, "YVR Increases Airport Improvement Fee to Meet Future Growth", online: *YVR* <http://www.yvr.ca/en/media/news-releases/2019/yvr-increases-airport-improvement-fee-to-meet-future-growth>.
[5] From 1 February 2021, The AIF increased from $30 CAD to $35 CAD. See Aéroports de Montréal, "Increase in Airport Improvement Fees at YUL", (22 October 2020), online: <https://www.admtl.com/en/node/18166>.
[6] For these factors that bring in competitive constraints, see Chapter 1.1.

increasing charges, one may find it difficult to figure out if and how airport charges should be regulated.

The story is made even more interesting from an organisational perspective. IATA suggests that tight regulation should apply to airport charge setting, while the Airport Council International (ACI) embraces deregulation. The ceaseless argument between these two agencies on behalf of airlines and airports, respectively, fertilises the soil of divergence when it comes to how airport user fees should be governed.[7]

Selected economic and empirical literature theoretically underpins the necessity that lawyers rethink the regulation and governance of airport economic matters. The analytical review of these works recurs throughout the thesis. Apart from the traditional understanding that airports are "natural monopolies", which justifies tight regulation, many studies have begun to acknowledge competition between airports, which removes the philosophical basis undergirding tight command-and-control regulation. This means that, if legislators and policymakers do not timely revisit the status-quo of airport competition with these economic and empirical studies as important evidence, they could make outdated decisions. Sadly, the minds of rule-makers and economists do not always match.

To determine whether we still need airport economic regulation and, if so, which form it should take in an evolving air transport market, this thesis revisits the issue of airport regulation with the regulation of airport charges as a specific focus. A general objective is to find new (or forgotten) instruments to tackle the developing situation and to reconcile the fierce controversy between the airports and airport users as reflected by the opposing attitudes of IATA and the ACI.

II The Research Argument

This thesis builds on the central argument that private law instruments, specifically contractual clauses and robust corporate governance of airport operators, can play an important role in the process of airport charges regulation. I will define the concept of "airport charges" in this section. The definition of "a private law approach", another important concept that encompasses both dimensions of contracts and corporate governance, will follow in the methodology section.

[7] See Chapter 7.4.

Airport charges are usually divided according to the category of activities from which a charge is levied. Generally, fees that occur for using an airport can be divided into two sections, namely, charges from aeronautical activities and revenues from non-aeronautical activities. The former charges refer to levies due to airport services that directly relate to air transport operation.[8] A landing charge and an aircraft parking charge are two typical examples. The latter revenue comes from services that do not directly contribute to the operation of air transport. Many non-aeronautical activities are "in relation to the granting of concessions, the rental or leasing of premises and land, and 'free-zone' operations".[9] Vivid examples are duty-free shops, restaurants, and hotels.

This thesis is based on a generally-accepted condition from competition law that non-aeronautical activities are subject to sufficient market competition. Thus, there is no need to impose regulation upon this sector. By contrast, aeronautical activities may be exposed to the abuse of market power by an airport, thereby exposing users to the risks of overcharging. Accordingly, I think that it is meaningful to build a dialogue addressing airport economic regulation of aeronautical activities.

Following this dichotomy, the discussed "airport charges" throughout the thesis mainly deal with charges from aeronautical activities. This thesis is not structured to systematically move from discussions of one type of charge to another. Yet it may specifically discuss given types of aeronautical charges when necessary. For example, the Airport Improvement Fee is discussed in Chapter 5.6.3 when the thesis talks about how basic principles can be used in a contract between an airport and passengers. Notably, Chapter 6 focuses on ground handling fees, a category of fees that seems to occupy a position between aeronautical and non-aeronautical charges.

III Methodology

III.A A Private Law Approach

The central method adopted in this study is a private law approach, which is discussed in comparison to the public law approach (or traditional regulation characterised by command-and-

[8] For a distinction between the two concepts, see Vincenzo Fasone & Pasquale Maggiore, "'Non-Aviation' Activities and the Introduction of New Thinking and Ideas in the Airport Business: Empirical Evidence from an Italian Case Study" (2012) 2:1 Journal of Airline and Airport Management 34–50 at 36–39 (a literature review section focusing on non-aeronautical activities).

[9] ICAO, *ICAO's Policies on Charges for Airports and Air Navigation Services*, 9th ed, Doc 9082 (2012) at appendix 3.

control regulation) that I criticise. To clarify, I look into contracts and robust corporate governance and see if these two instruments can serve a regulatory purpose in the airport context. Due to the tension between the airport and airline sectors as to what regulatory measures should be imposed upon the setting of airport charges, this approach may serve as a middle ground to facilitate reconciliation between the two sectors. While a detailed discussion on both instruments will be presented in Chapter 5, this section offers a brief overview.

The discussion of airport charges regulation is useful particularly after the deregulation, or liberalisation, of air transport. This reform commenced in the late 1970s in the U.S. and the 1990s in the EU, and many other regions followed the trend afterwards. As deregulation signalises the removal of commercial restrictions in the air transport market, a consequence is the boost of air transport in both regions.[10] However, deregulation occurred mostly among airlines, leaving airports remained in a regulatory manner. The airline industry's exposure to fierce competition and removal of commercial restrictions introduced a challenge to airports as to how they should act to respond to airline deregulation. Among others, increased demand for the airport infrastructure makes new runways and airports necessary, but the vast investment required for construction usually calls for the participation of private capital, in other words, the privatisation of airports to some extent. As revealed by the three case studies in Chapter 4, privatisation can lead to more liberalised means of regulation of airport charges. Although this chapter does not intend to discuss the relationship between airline deregulation and airport regulation, it still would be interesting to examine that after decades of airline deregulation, whether a more "deregulated way of regulation" can be adopted in the airport sector, one remaining fortress to the traditional air transport regime.

III.A.1 Contracts

The overarching concept of "a private law approach" first encompasses contracts as a regulatory path that can embrace an agreement between two private parties, as well as an agreement between a private party and a public actor, such as a government. With respect to a contractual approach, I

[10] Isabelle Lelieur & Schlumberger Charles, "Airport Business and Regulation" in *Routledge Handbook of Public Aviation Law* (Routledge, 2016) at 117. Air transport developed significantly in the aspects of, for example, the lift of restrictions on routes, fares, and the number of flights. Another impact is the fast development of low-cost carriers. See *Ibid* at 117–118.

hold firmly to the saying that "consent makes the law".[11] Agreements, built upon consent, have the potential to form regulatory control of airport charges.

As will be discussed later, an important advantage associated with the private law approach is flexibility. Especially when airport charges are "governed" by an airport-airline agreement, the advantage of flexibility is important as both parties, particularly the airline party, should have a say in determining charge matters. However, one might question the advantage if an airport-airline agreement is an adhesion contract because the weaker party will have no negotiating power and will have to accept the standard-form contract provided by another stronger party.[12] To respond to this concern, this thesis offers proof that one should not view all airline-airport contracts as adhesion contracts in a one-approach-fits-all manner. The airline-airport power balance could vary from one situation to another, hence, a case-by-case analysis is more appropriate.

An adhesion contract is preconditioned by the considerable power imbalance in contracting between the airport and the airline sector. Chapter 1 argues that not all airports have significant market power, and the airline sector may not be a weak party, unlike the situation with contracts of adhesion. Among others, Chapter 1.1.2 discusses many emerging factors that have increased competition among airports. For example, the development of low-cost carriers could shape more balanced negotiating powers between low-cost carriers and secondary airports.

In some cases, although the countervailing power of the airline party is not strong enough to pose a threat to switch to another airport, it has the ability to enter into meaningful negotiation during the making or modification of an airport-airline contract. This is even more the case when a contract approach is combined with a certain level of governmental regulation. The discussion of Gatwick Airport as part of the case study of the United Kingdom (the UK) will demonstrate that the disagreement of the airline party in contractual negotiation will lead to the modification of Gatwick Airport's licence clauses, which will then be used as airport-airline contractual clauses (see Chapter 4.1.2.2).

[11] Also known as "Consensus facit legem", this maxim suggests that "[a] contract is law between the parties agreeing to be bound by it". John Bouvier, *Bouvier's Law Dictionary and Concise Encyclopedia* (Vernon law book Company, 1914) **sub verbo** "Consensus facit legem".

[12] According to Black's Law Dictionary, an adhesion contract is defined as "[a] standard-form contract prepared by one party, to be signed by another party in a weaker position, usu. a consumer, who adheres to the contract with little choice about the terms". Bryan A. Garner, *Black's Law Dictionary* (2019) **sub verbo** "adhesion contract".

Furthermore, this study will offer solutions to balance the powers between airports and airlines for a more effective negotiation environment. These solutions could help to lower the chance that airlines have no say in contractual templates prepared by airports. One solution is to have proper associations to represent airlines' interests and to negotiate contracts between the association of airlines and an airport. Chapter 5.6.4 will offer a detailed discussion. Moreover, Chapter 7.4.1 also provides some relevant suggestions from an international perspective under the auspices of ICAO. Another solution is to effectively implement the consultation mechanism before the determination of charges. When charges are fixed in the form of contractual clauses, a consultation mechanism has parallels with contractual negotiation. A consultation mechanism is likely to achieve more effective implementation when it is mandated and monitored by an authority. Chapter 2.6.2 and Chapter 2.7.2 will examine the mechanism of consultation.

III.A.2 Corporate governance

Corporate governance, another path under a private law approach, refers to "[o]verseeing the running of a company or an entity by its management and its accountability to shareholders and other interested parties".[13] This method becomes feasible thanks to the trend that airports are increasingly run as corporatized entities, rather than as governmental authorities (see Chapter 5.5.1). As such, airports can be corporations.[14] In light of this, my argument proceeds as follows: if airports are companies, why do not we take advantage of available mechanisms in corporate governance that are undergirded by corporate laws and regulations? When we see issues concerning charge setting as decisions to be made at a company level, corporate governance may function as a solution herein. To discuss effective corporate governance, this thesis proceeds with two perspectives: the decision-makers of a company and the rules in governing a company. More specifically, decision-makers mainly refer to the board of directors in a company (or in a similar entity), commissions, and other high-level executives, such as the chief executive officer (CEO) and the chief financial officer (CFO). The rules of a company include at minimum a corporate charter and bylaws.

III.B Case Studies

[13] ICAO, *supra* note 9 at appendix 3.
[14] This thesis interchangeably uses "corporations", "companies", and "entities" without distinguishing them.

This thesis has small case studies throughout the text to refer to the practices or legislation in certain countries as evidence of my arguments. For example, when discussing the evaluation of airport market power, Chapter 1 particularly examines Australia, the EU, and Ireland (as a specific case in the EU) to review the relationship between market power assessment of an airport and airport charges regulation. When discussing the four basic principles in airport charges regulation, Chapter 2 examines the regional legislation in the EU, i.e., the 2009 Directive on airport charges of the EU.

More importantly, throughout the thesis the term "case study" means an examination of how airports and their charges are regulated in a jurisdiction. First, in Chapter 4, I conduct three case studies specific to the UK, Canada, and India to examine how airport charges are regulated in each jurisdiction. These cases include a description of the regulatory frameworks in these countries. Notably, they are examined through the lens of private law to reveal to what extent the instruments of contracts and corporate governance have functioned as regulatory tools. The theoretical discussion in Chapter 5 on what a private law approach is and how to adopt it is also based on these case studies.

I chose the three jurisdictions for several reasons. The UK and Canada represent developed countries, while India represents developing countries. These choices form a balanced combination, revealing whether countries from these two divided groups would be likely to choose different approaches. Particularly, the UK is worth discussing as a forerunner of airport privatisation. It offers useful regulatory experience on charge regulation of airports that are transferred to private actors, particularly when some of the hub airports still own significant market power, which was traditionally seen as a reason to introduce stringent regulatory measures. Canada largely supports the private law approach by allowing not-for-profit corporations to run major airports. I see the not-for-profit corporation as an effective way of corporate governance to avoid overpricing airport services. When it comes to India, the incorporation of charge-setting clauses by concession contracts under airport privatisation/ public-private partnership paves the way for using contracts as regulatory substitutes. Also, the problems that India faces in regulating airport charges provide an important lesson for other states. Regarding the feasibility of choosing the three jurisdictions, language is another consideration. The use of English in these jurisdictions enables the case studies to refer to concise information without errors due to incorrect translation.

III.C Literature Review, Interdisciplinary Study, and Legal Fields

First, this study is interdisciplinary. While the legal field is the primary basis for the work, many arguments on the feasibility and assumptions of the thesis are built upon economic, policy, and management literature, particularly those studies that focus on the aviation sector.

Second, the thesis bridges different branches of the law. While the core research question involves air law, the adoption of a private law approach means that the thesis engages with contract and corporate law. Moreover, when examining the market power of an airport as a classic condition to the imposition of regulatory measures, the thesis refers to the literature on competition law.

As there are few studies that encompass this thesis' research question, I review literature in an analytical way – relevant literature is spread throughout different chapters where it is reviewed and cited while analysing the question that the chapter addresses. This thesis widely refers to primary and secondary sources. Primary sources encompass both international and domestic dimensions. The international dimension covers international conventions, treaties, agreements, and other kinds of accords, policies, guidance materials, and working papers of international organisations. The domestic dimension includes domestic legislative acts, regulations, and policies. Secondary resources refer to journal articles, monographs, book chapters, reports, and news.

IV The Purpose of the Thesis

This thesis argues that traditional regulation, which features up-down and command-and-control characteristics, may not be the best solution to the governance of airport charges. Instead, a more flexible and bottom-up approach, which I call "a private law approach", can provide another regulatory option. Traditional regulation is no longer appealing when it comes to the governance of airport charges, where the feature of natural monopoly is no longer the single note, and the market power varies among different airports. This emerging character of airports results in different levels of the risk of overcharging users, thus calling for a more flexible regulatory approach.

The first three chapters discuss why traditional regulation is not appealing in the context of airport charges. Chapter 1 finds that traditional regulation is neither accurate nor cost-effective vis-à-vis

complicated situations of market power of different airports. Chapter 2 adopts an international perspective and finds that, except for Article 15 of the Chicago Convention, the majority of norms on airport charges regulation made under the auspices of International Civil Aviation Organization (ICAO) are not binding. On the one hand, this non-bindingness impedes the implementation of these regulations on airport charges. On the other hand, the reluctance of contracting states of ICAO to make binding norms implies that the use of more flexible and autonomous methods in the regulation of airport charges align with the willingness of states. Chapter 3 continues to argue that good regulation calls for a good regulator. A key character of a good regulator is to be independent. Yet, it is hard to establish an independent regulator. To avoid the failure of establishing an independent regulator, one should consider a private law approach that does not rely on a regulator as much as traditional regulation does.

That said, it is not the purpose of this thesis to argue that traditional regulation is a wrong option and that a bottom-up private ordering is the only right choice. I argue that the proposed private law approach is an alternative that policy-makers can consider to combine with traditional regulation to different extents. As such, the proposed solution offers more options for innovative regulation.

V The Contributions of the Thesis

V.A Theoretical Discourse on a Practical Issue

Airport charge issues are practical issues. These specialised fields attract more attention from practitioners than from scholars. Due to the dearth of discussions about this topic in the academic sphere, this thesis aims to fill this void and build a connection between practice and academia. The contributions made by this thesis include the documentation of current literature and a comprehensive explanation of the international regulatory regime on airport charges. Also, these findings through a private law lens form an original contribution. One goal of this project was to be a resource for countries that must make regulatory decisions in the future. I hope that they will be inspired by some ideas from this thesis.

V.B Flexibility in Employing a Private Law Approach

This thesis reminds states, airports, as well as other private parties to be more aware of the regulatory function associated with private law instruments. As the case studies from the UK, Canada, and India suggest, contracts and corporate governance have already been employed in the

regulatory process, even if they have not been so named. As such, I hope to interpret these existing practices in an explicit and accurate way by putting the adopted regulatory strategies in their proper categories, even though these states have more or less relied on these approaches without being fully conscious of doing so. An advantage to identifying these practices is that it will help parties make more-informed decisions by understanding the nature of their measures, the laws underpinning their decisions, and the effects herein.

More importantly, this thesis aims to provide states with more flexibility when choosing how to (de)regulate airport charges. Such flexibility would enable a state to freely decide how to allocate regulatory power between the power usually wielded by traditional regulation and that given in a private law context. Yet, this thesis in no way seeks to convince a state that it should abandon traditional regulation and rely on private ordering as the only option, though it embraces an increased use of the latter. Rather, a private law approach gives a state at least one more advantage. Here are two possible scenarios of flexibly using this approach: when a state is not fully convinced that it should discard sector-specific governmental scrutiny and solely rely on regulation via contracts and corporate governance, a private law approach can co-exist with traditional regulation.[15] Put differently, the former can enhance and complete the latter. The second scenario applies when a state prefers unregulated airport charges but is still concerned about airports overcharging users when they obtain complete power to set charges. In this situation, using contracts and/or robust internal governance of an airport entity as surrogates for traditional regulation may function as a compromise between regulation and no-regulation.

V.C A Solution in the Time of the COVID-19 Pandemic

Air transport should have continued to increase, but the COVID-19 pandemic heavily hit the industry. This illustrates the industry's vulnerability in the face of unpredicted public safety events. These recent events have reduced airlines' need for airport services and, thus, reduced airports', as well as airlines', profits. The application of laws and regulations on airport charges without adequate changes to such unpredictability could be detrimental.

[15] For example, a regulator can only prescribe rules on how charges should come into being, leaving the calculation of exact charge rates to be determined by contracts or the corporate governance process. Besides, such private law instruments can even re-state traditional regulation to improve implementation, although this thesis does not recommend this red-tape regulation approach.

Accordingly, the current pandemic and other possible unpredicted events are motivators to implement more flexible governance for a quick response. A private law approach uses mechanisms that can reach that end: parties can incorporate a force majeure clause in a contract, offering adjusted-charge schemes in case an event like the COVID-19 pandemic should take place.[16] At a corporate governance level, an airport operator may quickly respond to such challenges in a bottom-up way, by making corporate decisions.

V.D Extension to a Broader Scope

This thesis provides key takeaways for a broader scope. First, airport charges regulation is a small picture of a broader theme of airport economic regulation. The discussions and methodology in this study can be referred to for other aspects of airport economic regulation. Second, airports and other infrastructures share similar natures, and I hope that this thesis may shed light on regulation in other infrastructures.

VI Outline of the Thesis

Chapters 1, 2, and 3 criticise traditional airport charges regulation, setting a general rationale as to why it can be problematic to airport charges and the need to think creatively to find more possibilities. Chapter 1 focuses on the assessment of market power as a preliminary step in order to draw a line between airports that are to be regulated with significant market power and those that are not. I argue that no matter where one draws the line, it can be problematic. Chapter 2 examines the international regulatory regime championed by Article 15 of the Chicago Convention on airport charges. On the one hand, this regime is short of binding norms. On the other hand, from the four basic principles on airport charges emanate substantive values that should be widely relied on in the regulatory process. Chapter 3 turns to a key actor in traditional command-and-control regulation, namely, a regulator. This chapter argues that good regulation requires an independent regulator, while people usually understand such independence in an incomplete way.

Chapters 4 and 5 discuss how a private law approach can serve as an alternative to traditional regulation. Chapter 4 uses three case studies, the UK, Canada, and India, to show how corporate governance and contracts have been adopted in airport charges regulation. Some lessons have also

[16] See Chapter 5.6.5.

been drawn from these jurisdictions. These case studies offer readers vivid demonstrations of a private law approach and prove that this approach is feasible in practice. Based on these case studies, Chapter 5 systematically articulates what the private law approach is, why we need it, and how to apply it. This chapter is the core and the methodological part of the thesis.

Chapter 6 focuses on ground handling services, a category of charges that is unique in nature. These services sit between aeronautical services, which are traditionally subject to regulation, and non-aeronautical activities, which are considered to be regulation free. It is thus worth discussing whether ground handling services should be regulated and how private law could be involved. This chapter will examine how a private law approach, particularly a contractual approach under the overarching "private law approach" label, can avoid the risk of overcharging.

Finally, from an international perspective through ICAO, Chapter 7 explores how this specialised agency of the United Nations in the regime of civil aviation governance can contribute to airport charges regulation. This chapter particularly examines the soft-law making function of ICAO and how this function can be adopted in facilitating a private law approach of airport charges regulation.

1 Understanding Airport Market Power and Defining Regulated Airports

This chapter covers two issues, namely whether airports have market power and how selected jurisdictions define which airports should be subject to regulations as to charges they impose. The former issue serves as a basis for the second issue. The first part of this chapter discusses the first issue by exploring why market power is the premise of price regulation and examines several significant factors that can increase airport competition to assess if they suffice to create a market without regulation. The second, third, and fourth parts discuss the second issue, exploring how Australia, the EU, and Ireland (as a specific jurisdiction in the EU) evaluate the market power of airports and consequently determine which airports are subject to charge regulation.[17] Although the regulatory approaches adopted by these countries or regions have their own particular values, they have different limits in practice, leading to unwanted regulatory results. Accordingly, the fifth part of the chapter concludes that traditional regulation may not serve as the best solution. We may need to find another approach.

1.1 Market Power

1.1.1 Market Power as the Rationale for Regulation

Airport regulation is an issue of competition law. Generally, it is market power, which may not be subject to effective market competition and may be abused, that requires regulation.[18] The need

[17] The choices of these countries are based on the consideration that the EU, on the one hand, represents an important aviation market where competition is fierce. I choose Ireland to examine how it implements European law. On the other, different from the market dynamic in Europe, the Australian aviation market has a relatively small population and Australian cities are isolated.

[18] See David Starkie, "Airport Regulation and Competition" (2002) 8:1 Journal of Air Transport Management 63–72 at 63. Such market power in the airport context has been argued as a natural monopoly. See Mark Smyth & Brian Pearce, *IATA Economics Briefing No 6: Economic Regulation* (Montreal, Quebec: IATA, 2007). The natural monopoly of airports has also been demonstrated from both pragmatic and theoretical aspects. The pragmatic aspect points out that airports hardly have substitutes, while the theoretical reason is proved by the theory of market failure applied to public utilities and airports. See OECD, *Airport Regulation Investment and Development of Aviation* (Paris, 2010) at 20; Peter Forsyth, "The Impacts of Emerging Aviation Trends on Airport Infrastructure" (2007) 13:1 Journal of Air Transport Management 45–52 at 45.

for airport charges regulation is justified by the possibility that airports abuse their market dominance. How to restrain market power is an important debate on airport charges regulation.[19]

It has been suggested that regulation should only step in when a relevant market has no sufficient competition. Thus, recognising the degree of market power should precede regulatory activities.[20] The imposition of charge regulation on airports that reach certain market-power benchmarks would safeguard welfare, even though this is not necessarily the *status quo* in some countries.[21]

Conventionally, the notion of a natural monopoly explains the origin of market power, thereby triggering regulation.[22] A natural monopoly exists where essential natural resources for the public are highly centralised. In other words, the sunk cost in these areas is too high to enable competition among many suppliers. In this situation, the market will perform at its optimum only when one supplier provides products.[23] Baumol considers natural monopoly as calculative work to figure out the number of producers to reach the most efficient productivity.[24] Particularly, when a "single firm production will be most economical – that we are dealing with a natural monopoly".[25] Carlton and Perloff opine that if total production costs increase when two or more firms get involved in a market, the single firm in that market suffices to make a natural monopoly.[26]

Airports and their networks are able to accumulate significant market power, having embraced this natural monopoly notion a long time ago.[27] Like other infrastructural sectors including gas, water,

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[19] See D N M Starkie, *Aviation Markets: Studies in Competition and Regulatory Reform* (Aldershot, England; Burlington, VT: Ashgate, 2008) at 135.

[20] Varsamos observes that market power assessment became increasingly significant in order to decide if regulation should be made upon airport charges. See Stamatis Varsamos, "Single Till V. Dual Till and the Paradox of Airport Competition" (2019) 44:4 Air and Space Law 409–423 n 63; Andreas Polk & Volodymyr Bilotkach, "The Assessment of Market Power of Hub Airports" (2013) 29 Transport Policy 29–37 at 29.

[21] In many cases, airport charge setting needs governmental approval, regardless of their market power. See Sven Maertens, "Estimating the Market Power of Airports in Their Catchment Areas–A Europe-Wide Approach" (2012) 22 Journal of Transport Geography 10–18 at 11.

[22] For a general introduction of a natural monopoly, see Richard A Posner, "Natural Monopoly and Its Regulation" (1969) Stanford Law Review 548–643 at 548.

[23] See *Ibid*; William J Baumol & Robert D Willig, "Fixed Costs, Sunk Costs, Entry Barriers, and Sustainability of Monopoly" (1981) 96:3 The Quarterly Journal of Economics 405–431 at 409.

[24] See J Baumol William, "Contestable Markets: An Uprising in the Theory of Industry Structure" (1982) 72:1 The American Economic Review 1–15 at 6.

[25] *Ibid*.

[26] Dennis W Carlton & Jeffrey M Perloff, *Modern Industrial Organization*, 4th ed (Pearson Education, 2015) at 128.

[27] Jon Stern summarises that many economic studies on utility regulation started from natural monopolies. See Jon Stern, "What Makes an Independent Regulator Independent" (1997) 8:2 Business Strategy Review 67–74 at 69. Peter Forsyth suggests that in contrast with the countervailing power in negotiation, airports have a great natural monopolistic power, for example. Britain, Japan, New Zealand, and Australia. See Peter Forsyth, "Price Regulation

and electricity, a traditional view holds that the airport industry is naturally monopolistic as a whole.[28] The rationale seems simple: it is ineffective to build another competing airport in close proximity to the first airport. IATA, on behalf of the airlines' interests, persists in arguing that many airports have in the past and may continue to be exploiting their natural monopolistic power,[29] observing that airports are capital-intensive and to have many airports operate in one catchment is uneconomical.[30] Theoretically, the notion of market failure underpinned by the character of a natural monopoly for airports demonstrates the importance of introducing regulation and regulators, accordingly, especially when the ownership of an airport is in private hands.[31]

However, many factors can enhance the competition between airports. The traditional stereotype of a natural monopoly becomes inappropriate to define the industry without detailed analysis of the market power of airports on a case-by-case basis.[32] In line with the emergence of these factors that reshape the competition among airports, critics have emerged to challenge with empirical evidence the assumption that airports are natural monopolies.[33] Similar views particularly arise from airports and their interest groups. A typical example is the Airport Council International (ACI), which represents the interests of airports worldwide.[34] Despite the critiques of the observation that airports are all natural monopolies, substantial market power can still be realistic

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of Airports: Principles with Australian Applications" (1997) 33:4 Transportation Research Part E: Logistics and Transportation Review 297–309 at 300. Peter Gerber justified the regulatory measures before privatising an airport with the pre-assumption of a natural monopoly. See Peter Gerber, "Success Factors for the Privatisation of Airports—An Airline Perspective" (2002) 8:1 Journal of Air Transport Management 29–36.

[28] See Franziska Kupfer et al, "Economic Regulation of Airports: The Case of Brussels Airport Company" (2013) 1:1–2 Case Studies on Transport Policy 27–34 at 30.

[29] See IATA, "Economic Regulation of Airports and Air Navigation Services Providers", online (pdf): < https://www.iata.org/contentassets/4eae6e82b7b948b58370eb6413bd8d88/economic-regulation.pdf>.

[30] Mark Smyth & Brian Pearce, *supra* note 18 at 17. IATA also inspiringly denotes that competition between hub airports for transfer passengers is largely due to the competition among airlines regarding their fares, routes, and service quality. See *Ibid* at 4.

[31] Hans-Martin Niemeier, *Regulation of Large Airports: Status Quo and Options for Reform* (OECD/ITF Joint Transport Research Centre Discussion Paper, 2009) at 11.

[32] Starkie, *supra* note 18 at 68.

[33] A case study on the Brussels Airport Company contests that it is not a natural monopoly. See generally Kupfer et al, *supra* note 28. Another study argues that European airports have fierce competition, and we should reconsider the prevalent theory of airport natural monopoly. See generally Martin H Thelle & Mie la Cour Sonne, "Airport Competition in Europe" (2018) 67 Journal of Air Transport Management 232–240.

[34] Some data reveals competition between airports in Europe, which is intense, and many airports, instead of increasing charges, have decreased them. See ACI Europe, *The Competitive Edge: Airports in Europe* (2017) at 33. Niemeier notices the tension between IATA and the ACI regarding the natural monopolistic position of airports. However, he seems to have misunderstood the ACI's position, as the ACI did not claim that airports should be completely free from being regulated. It instead suggested economic oversight, which is consistent with the level of competition in the market. See Niemeier, *supra* note 31 at 14; ACI, *ACI Policy Handbook* (2018) at 18.

for some airports, even if it is not monopolistic power. Accordingly, certain levels of regulation are still needed.[35] Those against the presumption of a natural monopoly do not deny that many airports still have significant market power. They also admit that the degree of market power varies from one airport to another, particularly in Europe.[36] It has, nevertheless, been accepted that, regardless of the countervailing power from airlines, the market power of airports is too enormous to be offset.[37]

1.1.2 Increasing Competition Among Airports – Does Market Power Still Exist?

1.1.2.1 The Development of Low-Cost Carriers as Countervailing Power

Countervailing power refers to the counterbalance, mainly from airlines, to the exercise of airport market power. When the threat of airlines to switch airports is considerable enough to cause airports to change their behaviour, regulation would appear burdensome.[38]

A recent report observed that between 2010 and 2016, low-cost carriers (LCCs) contributed 76% of capacity growth at European airports.[39] The development of LCCs reshapes the competitive landscape among airports for the following reasons. Due to the low-price strategy of LCCs, they are sensitive to any factors that may influence their operational costs, including charges levied by airports.[40] As airports exercise market power, even a slightly unreasonable increase in charges may force LCCs to switch airports. This is more likely to happen considering that most LCCs tend to

[35] Kupfer et al, *supra* note 28 at 33.
[36] Thelle & la Cour Sonne, *supra* note 33 at 240.
[37] Dan Elliot suggests that the strong buyer power of airlines functions downstream in the process. To put it another way, it does not substantially mitigate the market power of airports, but only determines which airlines survive in the market, and then negotiate with airports at the next level. See Dan Elliott, "Airport market power: Is Inter-Airline Competition Relevant?", (2016), online: *Frontier Economics* <https://www.frontier-economics.com/media/2441/airport-market-power.pdf>. In New Zealand, the Commerce Commission addresses that the countervailing power of airlines alone, precisely Air New Zealand, is unlikely to balance the market power of airports. See Offices of the Ministers of Transport and Commerce, *Commerce Act Review: Airports*, Cabinet Paper (2007) at 23.
[38] Many countries use countervailing power as an indicator to assess an airport's market power, for instance, the UK evaluates airlines' countervailing power in its airport market power assessment. See Civil Aviation Authority, *Market Power Test Guidance*, CAP 1433 (2016) at para 4.35. Australia is another example. See Productivity Commission, *Economic Regulation of Airports: Inquiry Report (Overview & Recommendations)*, No 92 (2019) at 8.
[39] See ACI Europe, *supra* note 34 at 5.
[40] See AIRLIVE, "The Rapid Rise of Low-Cost Carriers in Europe", (29 June 2017), online: *AIRLIVE* <https://www.airlive.net/news-the-rapid-rise-of-low-cost-carriers-in-europe/>.

operate among regional or secondary airports, which have less market power than hub airports.[41] Due to the high sensitivity to cost control and charge increase by airports, LCCs do not rely on certain hubs as some major airlines do. As a consequence, they can switch airports easily. Also, LCCs do not tend to operate using a network strategy, and this characteristic makes it easier for them to change airports than traditional legacy airlines.[42] A related argument is that smaller airports may be more dependent on LCCs.[43] LCCs may dominate the negotiation process regarding charges and services with airports, with a threat to switch to other airports should their preferences not be satisfied.[44] As Forsyth notes, LCCs introduce price-sensitive passengers to secondary airports and spare slots of major airports; they reduce the demand for major airports.[45]

When LCCs are more engaged in long-haul flights that are provided in secondary airports, the significance of major airports may be mitigated, although long-haul flights are conventionally provided by major airports.[46] Simply put, LCCs accelerate competition between major and secondary airports.

Nevertheless, LCCs are unlikely to completely prevent airports from exercising market power, especially for major airports. First, the price-sensitive feature determines that LCCs do not have much impact on major airports because these airports are already congested. Second, even though LCCs develop the potential capacity of secondary and regional airports for lower charges, they still hope to extend business at major airports, even at the cost of higher charges.[47] This indicates a lasting market power for major airports. Competition brought by LCCs at major airports is also

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[41] See ICAO, *Definition and Identification of Low-Cost Carriers*, Working Paper (STA/10-WP/9) (Montréal, 2009) at para 3.4; Charles E Schlumberger & Nora Weisskopf, "The Transferability of the Low-Cost Carrier Business Model to Developing Countries Section I: Leading Articles: Air Law" (2013) Annals Air & Space L 1–54 at 5.
[42] See Starkie, *supra* note 18 at 67.
[43] A mutually dependent relationship is built between both sectors, for example, London Luton Airport. See Graham Francis, Ian Humphreys & Stephen Ison, "Airports' Perspectives on the Growth of Low-Cost Airlines and the Remodeling of the Airport–Airline Relationship" (2004) 25:4 Tourism Management 507–514 at 513.
[44] *Ibid*.
[45] See Forsyth, *supra* note 18 at 49.
[46] *Ibid*.
[47] *Ibid* at 50. Kapetanovic noticed the blurred border between LCCs and legacy airlines, because LCCs are moving towards hub airports to attract business travellers, in the meantime, legacy airlines increasingly cut frills of their services to save costs. This undermines the chance of benign operation for small airports. See Ana Kapetanovic, "Opening of Airport Services' Market: Regulatory Framework and Problems with Its Application" (2016) 66 Zbornik PFZ 269 at 285. For an empirical study on how LCCs show a tendency to compete with legacy airlines for slots at major airports, see generally Frédéric Dobruszkes, Moshe Givoni & Timothy Vowles, "Hello Major Airports, Goodbye Regional Airports? Recent Changes in European and US Low-Cost Airline Airport Choice" (2017) 59 Journal of Air Transport Management 50–62.

very likely to offer these airports an additional competitive edge. People have argued that some LCCs operate at major airports because other LCCs have reserved slots in secondary airports.[48] If so, it implies that these fully-loaded secondary airports may not have a crisis of a shortage of users. In a word, competition among LCCs may consolidate the market power of secondary airports. However, one should note that it is the subsidies that permit many secondary airports to offer lower charges to LCCs, considering these airports can hardly achieve economies of scale.[49] Subsidies are not sustainable as a long-term solution.[50]

1.1.2.2 Countervailing Power from Concentrated Airlines

If one regards airports as upstream players,[51] airlines should accordingly be seen as downstream players.[52] Competition also exists among airlines. When an airline market is highly concentrated, a few airlines occupy a considerable market share; these dominant airlines may have established strong bargaining power to negotiate lower charges with airports. Notably, numerous small airports only serve a few airlines.[53] In this situation, airports can be highly dependent on airlines.[54]

Countervailing power from airlines can be restricted by many elements. One restriction lies in the capacity of nearby airports and other substitutive airports to serve an airline, as was noticed during the assessment process of Amsterdam Schiphol Airport.[55] Another limit is that, if an airport serves

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[48] For example, Southwest Airlines dominated in Chicago Midway Airport so that some other LCCs, say, Frontier and Spirit, were pushed to O'Hare Airport, which is the major airport in Chicago. See Dobruszkes, Givoni & Vowles, *supra* note 47 at 59.
[49] Forsyth, *supra* note 18 at 49.
[50] *Ibid* at 50.
[51] Airports stay upstream as they are infrastructure services providers.
[52] In this upstream (airports)–downstream (airlines) relationship, airports provide services that airlines can purchase and use. For discussions on examples that adopt this model, see generally Jonathan Haskel, Alberto Iozzi & Tommaso Valletti, "Market Structure, Countervailing Power and Price Discrimination: The Case of Airports" (2013) 74 Journal of Urban Economics 12–26; Anna Bottasso et al, "Competition, Vertical Relationship and Countervailing Power in the UK Airport Industry" (2017) 52:1 Journal of Regulatory Economics 37–62.
[53] When assessing the market power of regional airports in Australia, the Productivity Commission noticed that more than half of 103 regional airports have only one regular airline user, effectively mitigating airport market power. See Productivity Commission, *supra* note 38 at 12. Another empirical study suggests that a higher market share of LCCs and other airlines are related to a greater level of negotiating power in front of airports. See Germà Bel & Xavier Fageda, "Privatization, Regulation and Airport Pricing: An Empirical Analysis for Europe" (2010) 37:2 J Regul Econ Journal of Regulatory Economics 142–161 at 158.
[54] In the U.S., many airlines have gained control over airport gates through long-term agreements. See Xiaowen Fu, Winai Homsombat & Tae H Oum, "Airport–Airline Vertical Relationships, Their Effects and Regulatory Policy Implications" (2011) 17:6 Journal of Air Transport Management 347–353 at 348.
[55] See Oxera, "Market Power Assessments in the European Airports Sector", (2017) at 9, online (pdf): <https://www.oxera.com/wp-content/uploads/2019/01/Market-power-assessments-in-the-European-airports-sector-1.pdf>.

a catchment area that contains irreplaceable resources – e.g., culture, business, tourism – these destinations cannot be substituted.[56] Thus, countervailing power may not function effectively.[57] Moreover, when the internal airline market is competitive, the possibility to exercise countervailing power is likely to be weakened.[58]

Hence, countervailing power from airlines is unlikely to thoroughly offset the market power of airports. Nevertheless, it is important to understand these restrictive elements on airlines' countervailing power before carefully assessing airport market power for proportionate governance.

1.1.2.3 Increasing Needs for Vacation Flights

For passengers looking for a sun-and-beach vacation, airports that serve catchment areas with leisure resources may compete. A primary reason is that, for the vacation flight market, passengers are more price- than route-sensitive.[59] Passengers will not fix their choices as they only look for a place for vacation. Airports located in qualified destinations generate fierce competition.[60] Such competition can occur at two ends – an origin dimension[61] and a destination dimension.[62] In the origin dimension, in the case *KLM/ Martinair*, the European Commission concluded that, to a degree, airports in Düsseldorf and Brussels are substitutes for Schiphol Airport for long-haul flights.[63] For the destination dimension, competition exists among airports serving different

[56] This does not deny that destinations with a similar nature, for example, cities with sun and beaches, may substitute each other. A detailed discussion is in the next section.
[57] This opinion was raised when Australia suggested that Sydney, Brisbane, Perth, and Melbourne airports have significant market power. See Productivity Commission, *supra* note 38 at 11.
[58] See *Ibid*.
[59] See EC, *Commission Decision of 17/12/2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.5141 – KLM/ Martinair)* [2008] at 135.
[60] Steer Davies Gleave, "Support Study to the Ex-Post Evaluation of Directive 2009/12/EC on Airport Charges", (2017) at 22, online (pdf): European Commission <https://op.europa.eu/en/publication-detail/-/publication/8e6db69a-e601-11e7-9749-01aa75ed71a1>.
[61] Soames and Goeteyn argue that the airports in the origin dimension can be categorised in two ways, namely, substitutive airports that serve the same city, and those that are not located in the same city but serve the same catchment area. See Trevor Soames & Geert Goeteyn, "Competition and Regulatory Issues in the Aviation Sector Post September 11th: Overview of the Main 2002 Developments" (2003) Bus L Int'l 137 at 141.
[62] See Una McLaughlin, "Head in the Clouds? Is the European Commission's Analysis of the "Relevant Market" in Airline Mergers Appropriate?" (2014) Annals Air & Space L 595–622 at 615.
[63] See EC, *supra* note 59 at para 132. Information from travel agencies reveals that a ratio between 5% and 25% of leisure passengers in the Netherlands would change to airports in Düsseldorf and Brussels should Amsterdam increase charges by 5–10%, meanwhile substitutive routes are available. This finding has also been justified by another survey from the perspective of customers, pointing out that almost half of the total investigated customers will make this airport-change decision. See *Ibid* at paras 130–131.

destinations that all have the capacity to meet the passengers' requirements. These airports may be exchangeable and, thus, consist of a relevant market. A survey based on five "sun and beach" destinations in the Caribbean area supports this claim.[64]

Yet, the prosperity of vacation flights in both dimensions is unlikely to establish a fully competitive airport market. The passengers that may choose to change to another airport for lower prices are usually not in short-haul flights because the extra time involved in switching to a further airport adds too much in total travel time.[65] Even for long-haul flights, a study reveals that only a small proportion of Frankfurt passengers are willing to fly from Amsterdam, Zurich, or Brussels for long-haul flights, especially, transatlantic flights. In this case, they need to take cross-border land transport first.[66]

In addition to the consideration of competition among airports, the market power of airlines as downstream actors is also crucial.[67] When the downstream market lacks effective competition, airlines may not pass on benefits, the result of competition between airports, to passengers.[68]

1.1.2.4 Connecting Flights Reshaping Competition Among Hub Airports

An increasing number of connecting flights accelerates competition among transfer airports, especially global hub airports.[69] As more hubs are built with better capacity, passengers have access to higher frequency connecting services.[70] In recent years, four Middle Eastern airports –

[64] As noted, the proportions of customers who would change their destinations to Punta Cana, Cancun, Aruba, Curacao, and Havana as prices increase are, respectively, 34%, 25%, 17%, 14%, and 13%. The European Commission sees these numbers as an indicator to show that price elasticity is high among these destinations. See EC, *supra* note 59 at para 139.

[65] For short-haul flights, passengers are usually unwilling to switch airports even if there is a price difference, demonstrating that although substitutive flights are available, the first-choice airport has a competitive edge over other close airports. See EC, *Commission Decision of 11/08/1999 declaring a concentration to be compatible with the common market*, [1999] OJ, C 096 at para 28.

[66] Soames & Goeteyn, *supra* note 61 at 141.

[67] See M Pilar Socorro, Ofelia Betancor & Ginés de Rus, "Feasibility and Desirability of Airport Competition: The Role of Product Substitutability and Airlines' Nationality" (2018) 67 Journal of Air Transport Management 224–231 at 231.

[68] *Ibid* at 229.

[69] Hubs compete with each other to cooperate with more airline users and operate diverse services. See Kapetanovic, *supra* note 47 at 283. Taking the YUL-PEK itinerary, from Montreal to Beijing by a connecting flight, as an example, at least Toronto Pearson Airport, Vancouver International Airport, LaGuardia Airport in New York, Chicago O'Hare International Airport, Dulles International Airport, and Guangzhou Baiyun International Airport will compete against each other as intermediate hubs.

[70] Copenhagen Economics, *Airport Competition in Europe* (Copenhagen, 2012) at 60.

Doha, Dubai, Abu-Dhabi, and Istanbul – have rocketed in global airport competition.[71] These hubs have imposed immense pressure on traditional European hubs in the connecting-flights market. Passengers that originally adhered to European hubs are gradually shifting to Middle Eastern ones, especially Dubai Airport.[72]

Nevertheless, transfer passengers, a target group that brings increasingly fierce competition among global hubs, only form part of total passengers. In addition to them, one should still take a holistic view to understanding market power with the consideration of other types of passengers. Full competition among hubs has yet to come.

1.1.2.5 Competition Among Airports in Close Proximity

This issue partly overlaps with the previous discussion on LCCs concerning competition among neighbouring departure airports. This is even more so the case in Europe, as cross-border airports are within a reasonable surface-transport distance to each other.[73] The Civil Aviation Authority of the UK found that 71% of surveyed passengers deem the convenience of surface transport to an airport the main reason to choose a departure airport.[74] IATA further notes that passengers are inclined to use local airports, despite the fact that neighbouring airports offer substitutive flights.[75]

As many major cities own two or more airports, one may question whether airports in the same city establish a fully competitive dynamic. While competition exists between multiple airports serving the same city, different airports often target different groups, for instance, time-sensitive and non-sensitive groups. Hence, they may not belong to the same relevant market to a degree and thus do not generate enough competition in that market.[76] The major airport in a city is likely to have a competitive edge over other smaller airports in terms of flight frequencies and the number

[71] Adam Seredynski, *Competition for Connecting Traffic Between Europe and Asia Among European and Middle Eastern Hubs*, Working Paper (Johannes Gutenberg-University Mainz, 2016) at 13.
[72] *Ibid*.
[73] See Chapter 1.3.2 that criticises the EU Airport Charges Directive's threshold to regulate the biggest airport in each member state regardless of its annual passenger numbers.
[74] Civil Aviation Authority, *Consumer Research for the UK Aviation Sector*, CAP 1303 (2015) fig 15.
[75] James Wiltshire, *Airport Competition: Myth or Reality?*, IATA Economics Briefing (IATA, 2017) at 12.
[76] In assessing whether the airports in London are substitutive for each other, the European Commission did not see the route between London Stansted Airport and Frankfurt–Hahn Airport as one in the same market with other routes between London and Frankfurt, particularly for time-sensitive passengers. See Joos Stragier, *Airline Alliances and Mergers: The Emerging Commission Policy* (2001) at 6.

of connecting cities. This advantage is significant against a business-travelling background. A typical case is London Heathrow Airport.[77]

Another factor restricting competition among airports operating in the same city falls in the ownership and management sphere. If these airports are owned and managed by the same entity, they could be strategically governed and operated in a monopolistic manner in light of a lack of competition between different actors.[78]

1.1.2.6 Competition from Other Modes of Transportation

Air transport faces challenges from land and maritime transport; however, two factors may influence their capability. One factor is distance. Land transport may compete with short-haul air transport, as the aforementioned situation in Europe vividly illustrates.[79] Yet, long-haul and transnational travel are more reliant on air transport for their speed and capacity to save time. Land transport is only possible when infrastructure, such as railways, that calls for huge capital investments is in place. Another factor is a location's geography. Some small island countries cannot connect to other regions via land transport. Similarly, landlocked countries cannot use maritime transport. This restrictive factor is partly why ICAO began the initiative "No Country Left Behind".[80]

1.1.3 Revisit the Public Good Character of Airports Against a Global Pandemic Background

[77] *Ibid* n 19.
[78] Shanghai, a populous city in China, has Pudong and Hongqiao airports. Shanghai International Airport Co., Ltd., which is a listed company owned by a wholly state-owned company, operates Pudong Airport. This state-owned company also substantially controls Hongqiao Airport. This means that both airports are substantially controlled by one state-owned company. See Shanghai International Airport Co, Ltd, "Shanghai International Airport Co., Ltd. 2019 Annual Report", (2020) at 43, online (pdf): <http://www.shanghaiairport.com:8081/uploadfiles/2020/04/20200401092702272.pdf> [translated by author].
[79] See *Luxembourg v Parliament and Council*, C-176/09, [2011] ECR I-03727 at para 19.
[80] Nevertheless, a more important reason to adopt this initiative is that many states have difficulties implementing ICAO's standards and recommended practices (SARPs), as revealed by ICAO's Universal Safety Oversight Audit Programme (USOAP) and the Universal Security Audit Programme (USAP). See *No Country Left Behind (NCLB) Initiative*, ICAO Assembly Res A39-23, 6 October 2016, ICAO Doc 10075 at I-118 *[ICAO Res A39-23]*

Since the end of 2019, the globally disruptive COVID-19 pandemic has heavily hampered the aviation industry.[81] Consequently, airlines are in great danger of being bankrupt.[82] Legacy airlines are more likely to survive thanks to state and industrial aids[83] compared with small airlines, which are vulnerable due to insufficient capital reserve.[84]

However, the scenario for airports may be different, although the risk of airport bankruptcy is valid. First, as essential infrastructure, airports are too important to close and, thus, will remain operational.[85] The government can often perform a "deus ex machina" and take over an airport when its operator leaves the market.[86] Second, an emergency, such as the COVID-19 pandemic, indicates a temporary refocus on an airport's essential role. During the pandemic, for example, some commercial airports were strategically transformed into evacuation airports to transport

[81] For figures showing how COVID-19 has hampered the industry, see generally ICAO, "Economic Impacts of COVID-19 on Civil Aviation", online: <https://www.icao.int/sustainability/Pages/Economic-Impacts-of-COVID-19.aspx>.

[82] In spite of many bailout plans, some airlines filed for bankruptcy. Virgin Australia looked for bankruptcy protection after the Australian government rejected to offer them a 1.4 billion Australian dollars loan. See The Associated Press, "AP Explains: What Virgin Australia's Bankruptcy Move Means", *The New York Times* (23 April 2020), online: <https://www.nytimes.com/aponline/2020/04/23/business/bc-as-australia-virgin-ap-explains.html>.
Regarding the precarious situation of airlines, a consultancy found that but for governmental and industrial coordination, the majority of all airlines would go bankrupt by May 2020. See CAPA, "COVID-19. By the end of May, most world airlines will be bankrupt", (17 March 2020), online: <https://centreforaviation.com/analysis/reports/covid-19-by-the-end-of-may-most-world-airlines-will-be-bankrupt-517512>.

[83] See Sascha Albers & Volker Rundshagen, "European Airlines' Strategic Responses to the COVID-19 Pandemic (January-May, 2020)" (2020) 87:101863 Journal of Air Transport Management at 5. However, state aid can be associated with governmental intervention on the operation and management of routes, and even airline company management. This is even more so the case for legacy airlines. See *Ibid*.

[84] See The Associated Press, *supra* note 82. Some airlines and their affiliated companies, such as Flybe and four subsidiaries of Norwegian, all declared bankrupt. See William Hogarth, "Norwegian Subsidiaries Declare Bankruptcy", (20 April 2020), online: *UK Aviation News* <https://ukaviation.news/norwegian-subsidiaries-declare-bankruptcy/>.

[85] Following the trend of privatisation, airports are widely operated via concessions. Under a concession, the government usually holds the ownership of the land of an airport, while transferring the right of operation to a concessionaire, which is an airport operator. As an operator becomes bankrupt, a government may choose to take over an airport's operation, according to the concession agreement. Furthermore, it can call for eligible bidders to take over the concession. Aeroportos Brasil Viracopos, which was the operator of Brazilian Viracopos Airport, filed for bankruptcy in 2018. After the approval of the debt restructuring plan, the Brazilian government can offer the concession to Aeroportos Brasil Viracopos again. Interestingly, some concession clauses of Viracopos Airport regard airports as essential services. See Bnamericas, "Spotlight: What's next for Brazil's Viracopo airport?", online: *Bnamericas* <https://www.bnamericas.com/en/analysis/spotlight-whats-next-for-brazils-viracopos-airport>.

[86] In addition to the solution of taking over an airport's operation, the government also saves airports by loans or grants for urgent situations. To fight the COVID-19 virus, the U.S. government passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which gave airports a 10 billion dollars aid. See *Coronavirus Aid, Relief, and Economic Security Act*, Pub L No 116–136, 134 Stat 281 at 596 (2020) [CARES Act].

patients, e.g., Paris Orly Airport.[87] A refocus also occurred when cargo flights increased due to the growing need to deliver medical supplies.[88] Airports, especially those in remote communities, are even recognised as "lifeline services".[89]

Therefore, although both airlines and airports are in a dire situation, airports seem to be more stable and too essential to fall as public goods. The COVID-19 pandemic crisis illustrates the relatively strong power of airports, whose commercial risks are less emergent than those associated with airlines, at least in terms of bankruptcy. In response to the robust situation of airports, a lack of regulatory measures may allow airports to abuse their market power, particularly in an emergency when airport services are necessary.

To conclude, significant market power requires airport regulation. The above-discussed competition restraints are not strong enough to entirely offset the market power of airports. Thus, a certain degree of competition among airports exists, but not enough to completely preclude the imposition of regulation. This is even more the case when the public-good characteristic of airports is made even more significant during a public health crisis. Major airports, vis-à-vis small or regional airports, are more likely to hold significant market power and, thus, give rise to a more pressing need for regulation. The degree of market power varies from one airport to another, depending on their specific situations.[90] Thus, it is necessary to employ proportionate regulatory measures rather than an all-or-nothing approach for proportionate governance. An ideal practice is to respect the principle of proportionality in defining market power and accordingly determine the measures of regulation.

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[87] Aviation Pros, "WFS Keeps Orly Flying for Vital Air Cargo Supplies", (30 April 2020), online: <https://www.aviationpros.com/ground-handling/ground-handlers-service-providers/press-release/21136227/worldwide-flight-services-wfs-keeps-orly-flying-for-vital-air-cargo-supplies>.

[88] The prosperity of cargo flights shows the vital role of airports in spite of the frozen passenger flight market. See Federal Aviation Administration, "Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations", (29 May 2020) at 4, online (pdf): <https://www.faa.gov/airports/airport_compliance/media/Information-for-Airport-Sponsors-COVID-19-Updated-29May2020.pdf>.

[89] Natasha Frost, "Coronavirus-hit airports are on the brink of failure", online: *Quartz* <https://qz.com/1824619/coronavirus-hit-airports-are-on-the-brink-of-failure/>.

[90] An airport's size, its relationship with airlines, and its potential growth mutually determine its market power. A "nuanced approach" is necessary to recognise market power. See Matthias Finger, "How to Find an Agreement on the Future of Airport Charges Regulation", (28 May 2018) at 2, online (pdf): *European University Institute* <https://fsr.eui.eu/wp-content/uploads/Matthias-Finger.pdf>.

This chapter next examines how Australia, the EU, and Ireland assess airport market power and define the scope of airports under regulation.

1.2 Australia

1.2.1 The Productivity Commission and the Australian Competition and Consumer Commission

The Productivity Commission (PC) and the Australian Competition and Consumer Commission (ACCC) co-regulate. The PC assumes more responsibilities than the ACCC in making an initial judgement regarding which airports should be subject to regulation.[91] It analyses airport market power and makes recommendations to the government.[92] The government values the PC's opinions and usually accepts these recommendations,[93] despite the fact that the PC functions on an advisory basis. In 2002, 2006, and 2011, the PC successfully brought reforms onto the regulatory map, gradually loosening regulation and shortening the airport list encompassing those with the most significant market power.[94]

Unlike the PC, the priority of the ACCC is to implement regulatory measures issued by the Australian government, which it derives from the PC's recommendations. In this context, the ACCC monitors the prices and service quality of four airports that are currently regulated on an annual basis.[95] The authority to monitor comes from Part VIIA of the Competition and Consumer

[91] The PC makes public inquiries based on the collected information to review airports' market power and regulatory effectiveness roughly every five years. See Productivity Commission, *Economic Regulation of Airports: Inquiry Report*, No 92 (2019) at 4–5 & 48.
[92] See Australian Competition and Consumer Commission, *Productivity Commission Inquiry into the Economic Regulation of Airports: ACCC Submission in Response to the Issues Paper* (2018) at 16.
[93] See Productivity Commission, *supra* note 91 at 6.
[94] In 2002, the PC recommended that only regional air services at Sydney Airport should remain in a stringent regulatory regime, which is featured by price notification and price cap regulation. Meanwhile, charges at Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth, and Sydney airports shifted to ACCC's monitoring on a five-year basis. After five years, whether this regulation should be changed depends on an updated review. Since 2006, Canberra and Darwin airports were removed from the monitoring regime, because the PC reckoned that both had less market power. In 2012, the PC found that the current monitoring regulation was still effective, and no airports had abused their market power. To secure that the relatively strong market power is not misused by Sydney, Melbourne, Perth, and Brisbane airports, these airports were still under the monitoring regime, which means that Adelaide Airport was excluded from the monitoring regime. See Australian Competition and Consumer Commission, *Australia Airport Monitoring Report 2018-2019* (2020) at 180.
[95] Brisbane, Melbourne, Perth, and Sydney airports, see Australian Competition and Consumer Commission, *supra* note 92 at 7.

Act 2010 (CCA) and Part 8 of the Airports Act 1996 (Airports Act).[96] The only exception regarding airport price regulation[97] of the monitoring regime are the charges for regional services provided by Sydney Airport.[98] This exception is *ex ante* in nature, requiring pre-approval by an authority when Sydney Airport proposes to increase charges.

1.2.2 The Evaluation Process

Generally, Australia adopts a light-handed and case-by-case approach to monitor the market power of each airport. To assess market power,[99] the PC refers to a central concept, i.e., competitive constraint, which indicates the extent of competition an airport operator may face and determines the ability of an airport operator to unreasonably fix charges.[100] This concept can be further divided into several indicators including "barriers to entry or exit, competition from nearby airports, opportunities for airlines to switch to another airport, and the nature of passenger demand for air travel".[101]

Next, when airports are proved to have significant market power, the PC examines if these airports have been exercising market power before recommending regulation to intervene. The PC refers to indicators of countervailing power, airline bargaining power, and the demand for airport services.[102] The threat of additional regulation has a deterrent effect on airports with market power against exercising it.[103] Different treatments of airports with market power and those exercising market power denote Australian "light-handed"[104] and reactive[105] regulation on airport charges.

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[96] *Ibid*.
[97] Air traffic control in Australia is subject to price notification, which is more stringent than monitoring regulation. See Australian Competition and Consumer Commission, "Airports & aviation price notifications", online: *Australian Competition and Consumer Commission* <https://www.accc.gov.au/regulated-infrastructure/airports-aviation/airports-aviation-price-notifications>.
[98] See *Competition and Consumer (Price Notifications—Aeronautical Services to NSW Regional Airlines) Declaration 2019* (2019), s 7.
[99] See Productivity Commission, *supra* note 91 at 91.
[100] See *Ibid* at 89.
[101] *Ibid*. The passenger demand indicator can also be understood as modal substitutes.
[102] *Ibid*.
[103] See Paul Lindwall, *Economic Regulation of Airports – the Commission's Draft Report* (2019).
[104] Light-handed regulation possesses two characteristics – a preference for monitoring and a threat to impose additional regulation. See Productivity Commission, *supra* note 91 at xvii.
[105] Additional regulation applies only when the exercise of market power is observed, rather than when such exercise is likely to happen. See *Ibid* at 7.

These standards that are referred to when evaluating the market power of airports imply that the PC looks closely into the airline side to predict the chance for airports to practise market power.

1.2.3 Airports in Three Tiers[106]

As a result of evaluating the market power of Australian airports, the airports are categorised into three tiers indicating three levels of market power. These tiers are airports that have exercised market power, those with market power but that do not exercise it, and those without significant market power.[107] Accordingly, different regulatory processes, namely price notification (pre-approval), mandatory price monitoring, and voluntary self-reporting regulations apply, respectively.[108] This section next discusses the logic of the PC in defining airport market power under each tier.

1.2.3.1 The First Tier: An Exceptional Price Notification Regime

This tier only contains partial services at Sydney Airport, with respect to its charge-setting activities for regional air services. These services are subject to a type of stringent regulation called price notification. This regulation requires an airport to notify the regulator of the increase in airport charges. The regulator will determine whether to approve the price increase. This regulation is more stringent than monitoring[109] and is supposed to be a solution consistent with the existing exercise of market power.[110] Moreover, this solution also appears to be largely out of concern for public interest to ensure regional air services – to facilitate flights between Sydney Airport and other destinations in New South Wales.[111]

1.2.3.2 The Second Tier: A Mandatory Monitoring Regime

The second tier has four airports, which are considered to have significant market power, but are unlikely to abuse it. They are Sydney,[112] Melbourne, Brisbane, and Perth airports. Their charging activities are monitored without any *ex ante* regulatory intervention. Although the PC recognises

[106] This chapter adopts a type of airport categorisation different from the PC's approach for a clear discussion.
[107] See Productivity Commission, *supra* note 91 at 5.
[108] See *Ibid*.
[109] See supra note 94.
[110] Australian Competition and Consumer Commission, *supra* note 92 at 42.
[111] See Productivity Commission, *supra* note 38 at 28.
[112] It excludes pricing for regional air services which are subject to harsher regulation.

that these four airports have significant market power, an empirical study focusing on the light-handed regulation in Australia found that airlines estimate that most airports in Australia have significant market power, making this tier one with real significance.[113] The results of the market power of the four airports are as follows:

(1) Sydney Airport is monopolistic regarding geography. As a destination, this airport has no substitute and few alternatives from other transport;[114]

(2) Melbourne Airport is a hub without substitutes or competition from other modal transport. Avalon Airport cannot compete with it;[115]

(3) Brisbane Airport faces competition regarding tourism from Gold Coast and Sunshine Coast airports. But, these competitors' flight schedules, travel time, and facilities are inadequate for them to serve as substitutes to Brisbane Airport;[116]

(4) Perth Airport is likely to be monopolistic at least in Western Australia, particularly for interstate flights, though it is less strategically central than the other three monitored airports.[117]

Even though these indicators are mostly applied in a domestic dimension, the PC examines the market power of these airports at an international level adopting a similar logic: they are hubs for cultural, commercial, and tourism purposes. Also, fierce competition between international flights reduces airlines' countervailing power.[118]

1.2.3.3 The Third Tier: A Voluntary Reporting Regime

The third tier has two subsets. The first subset encompasses the other hub airports except for the four ones in the monitoring regime, namely Adelaide, Cairns, Canberra, Darwin, Gold Coast, and Hobart airports. The PC does not recognise their market power.[119] For example, Adelaide and Canberra airports do not have market power due to the preference of passengers or competition

[113] See Gui Lohmann & Jakob Trischler, "Licence to Build, Licence to Charge? Market Power, Pricing and the Financing of Airport Infrastructure Development in Australia" (2017) 59 Transport Policy 28–37 at 32. For more details from the empirical study on the market power of Australian airports, see *Ibid* at 31–33.
[114] See Productivity Commission, *supra* note 91 at 11.
[115] See *Ibid*.
[116] See *Ibid*.
[117] See *Ibid*.
[118] See *Ibid*.
[119] See *Ibid* at 11–12.

from other transport modes.[120] Accordingly, airports in this tier are subject to a self-reporting, but voluntary, regime. They voluntarily publish information regarding the charge setting of aeronautical services.[121]

Notably, regional airports constitute the second subset and are subject to "voluntary, web-based reporting".[122] However, this reporting requirement is short of regulation.[123]

1.2.4 Problems with the Australian Approach

1.2.4.1 Shortcomings in the Monitoring Regime

First, this threat-based strategy lacks precautionary effects. Although the monitoring regime is backed by the idea of deterrence to impose a price control and notification regime, any transition to a more stringent regime is likely to be delayed: a price control applies after the exercise of market power, the regime's involvement will come only after until damage has happened. This is even more the case considering that the PC will update its regulatory measures when it relaunches the next round of regulatory review, which is around five years after a previous one.[124] Consequently, the shift to a price notification regime would only be based on a situation where some users have already suffered through the misuse of market power. Therefore, under Australia's regulatory logic, the introduction of a price-control regime inevitably means that some user harm has already occurred.

[120] Adelaide Airport has a larger proportion of passengers for the tourism purpose than the four monitored airports, but it has no market power as this type of passengers are sensitive to charges. Adelaide Airport is unlikely to unreasonably raise charges. In comparison, Canberra Airport serves a different group that includes less tourists. This airport faces competition from other modal substitutes, including land transport via the Canberra-Sydney route; and this transport method serves one-third of passengers at Canberra Airport. See Productivity Commission, *supra* note 38 at 12.
[121] See *Ibid* at 6.
[122] *Ibid* at 5.
[123] There are two reasons. First, the PC is not convinced that regional airports will exercise or even have market power. Consequently, no mandatory regulatory mechanism is likely to apply to them as a homogenous group. See *Ibid* at 12. Second, the 2019 inquiry report of the PC shows that besides a single note indicating that regional airports are subject to "voluntary, web-based reporting", there is no more explanation on what this reporting regime entails and the voluntary reporting's differences between third-tier and regional airports.
[124] See *Ibid* at 6.

The ACCC also doubts whether the monitoring regime effectively prevents airports from abusing market power.[125] Littlechild adds that a retreat to a harsher price-control regime is unlikely.[126] It is thus doubtful that effective remedies exist to address possible exercises of market power.

Second, the monitoring regime is hard to implement. The ACCC finds that, during this process, making an accurate evaluation is challenging due to the restrictions of the approach, which include insufficiently collected information in evaluating appropriate pricing levels,[127] insensitivity to price increases,[128] and incomparability due to airports' varying approaches.[129]

1.2.4.2 Logic Inconsistence for Voluntary Reporting

The voluntary reporting regime as applied to the third tier and other regional airports is also flawed for two reasons. First, it is doubtful if the voluntary reporting regime can be recognised as real regulation when no mandatory obligations are imposed on airport operators.[130] Since no regulation is underpinning the voluntary reporting regime, which is only addressed as a statement of policy,[131] these requirements are arguably non-binding. Even the PC does not find the voluntary reporting regime useful because the information reported by airports has not been consulted in practice by industrial parties, government agencies, and other stakeholders.[132] The PC thus suggests abolishing this voluntary reporting regime that applies to the third-tier airports.[133] Although light-handed, this regime is redundant.

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[125] See Australian Competition and Consumer Commission, *supra* note 94 at 3.
[126] Stephen C Littlechild, "Australian Airport Regulation: Exploring the Frontier" (2012) 21 Journal of Air Transport Management 50–62 at 62.
[127] The collected information is unable to evaluate what is an appropriate price level because the benchmark – necessary to determine efficient long-run costs – has not been found. See Australian Competition and Consumer Commission, *Australia Airport Monitoring Report 2016-2017* (2018) at 189.
[128] Airports can strategically report a gradual increase of charges, such that the government cannot accurately capture their misuse or the high risk of the misuse of market power. See *Ibid* at 189–190.
[129] Detailed monitoring requirements regarding specific assets are not reasonable. A terminal that is leased to an airline would not be included in the monitoring regime. Both Perth and Melbourne airports have domestic terminals that are leased to Qantas Airways. As a consequence, a level playing field does not exist between airports that include the assets of terminals in monitoring and those that do not. See *Ibid* at 190.
[130] Australian small airports are not subject to "regulatory oversight". See Dominic Schuster, "Australia's Approach to Airport Charges: The Sydney Airport Experience" (2009) 15:3 Journal of Air Transport Management 121–126 at 121.
[131] See Productivity Commission, *supra* note 38 at 6.
[132] Productivity Commission, *supra* note 91 at 12.
[133] See *Ibid* at 41.

Second, the voluntary regime that applies to regional airports is also problematic. The first two tiers show that airports with market power will at least be subject to a monitoring regime. The PC deems that some regional airports are profitable[134] and may have market power.[135] To maintain a consistent approach throughout all different tiers of regimes, these regional airports with market power should at least be subject to the same monitoring regime as those hubs in the first two tiers, rather than the currently adopted regime of voluntary reporting. It is unreasonable to adopt a lighter approach to airports with market power just because they are regional airports. This approach is unlikely to impose effective control on regional airports with market power just as with other major airports. In a word, the one-size-fits-all voluntary regime for regional airports fails to respond to the fact that some of those airports have significant market power.

1.3 The EU

1.3.1 Two Thresholds Under the European Regulatory Regime

In comparison with Australia, the EU adopts a more integrated and straightforward approach to define airports that should be subject to the 2009 Directive on airport charges of the EU (the EU Airport Charges Directive).[136] Airports that meet either of the two listed requirements will be regulated, which is to say that they have market power. These are airports: (1) with more than 5-million passenger movements or (2) with the biggest number of passengers in each member state.[137] These two clear-cut thresholds appear to be both holistic, as the 5-million threshold considers the European market as an entirety, and state-tailored, as each member country is at the same time identified as an independent market.

Although the two thresholds are easy to implement, both face severe challenges from the Directive drafting stage to the implementation stage. This section discusses these complexities.

1.3.2 Concerns About Taking the Domestically Biggest Airports Onboard

[134] The PC discusses regional airports by dividing them into two groups – profitable and non-profitable airports. Non-profitable regional airports, due to their difficulty in earning enough revenue to maintain operation, are not considered to have the market power to unreasonably set prices. See *Ibid* at 12–13.
[135] See *Ibid* at 12.
[136] EC, *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, [2009] OJ, L 70/11.
[137] *Ibid*, art 1(2).

Keeping in mind that many neighbouring countries in Europe are small in area, the airports that fall into the above criteria may still be interchangeable from a passenger's perspective. That is to say, airports that are subject to European regulation on airport charges may be in effective competition and lack enough market power.

One such example is Luxembourg.[138] With 1.9 million passenger movements annually in 2009, Luxembourg Airport has the largest passenger volume in Luxembourg.[139] Despite falling under the threshold of 5 million annual passengers, the airport was required to be regulated under the EU Airport Charges Directive. Among other claims, Luxembourg challenged the Directive's application for a lack of legitimacy due to disproportionate results when compared with other airports. These results are "infringement of the principle of equal treatment".[140] Luxembourg pleaded that some airports in other states that have more passengers and are in competition with Luxembourg Airport are not regulated by the EU Airport Charges Directive. For example, the airport of Hahn in Germany and Charleroi Airport in Belgium had 4 million and 2.9 million annual passenger movements respectively, but neither fell under the remit of the EU Airport Charges Directive.[141] Competition among them, however, still exists as they all serve the same catchment, with a distance of fewer than 200 kilometres by land transport.[142]

Luxembourg's concern can be summarised as follows: an airport (usually the one in the capital of a country) that falls in the remit of the EU Airport Charges Directive needs to compete with other airports that serve the same catchment, with a larger number of passengers, but are outside this Directive.[143] Many other European countries face similar issues. Slovakia raised the same concern by supporting Luxembourg as an intervener in this case. Its capital airport, Bratislava Airport, is close to Vienna Airport in Austria.[144] Brno Airport in the Czech Republic also serves as a competitor to Bratislava Airport.[145] As these two airports are presumably interchangeable for

[138] For a discussion on the claims raised by Luxembourg against the application of the EU Airport Charges Directive to Luxembourg Airport, see Wouter Oude Alink, "The Establishment of Airport Charges: Recent Developments in the EU" (2012) 11 Issues Aviation L & Pol'y 457.
[139] See *Luxembourg v Parliament and Council*, *supra* note 79 at para 19.
[140] *Ibid*.
[141] *Ibid*.
[142] *Ibid*.
[143] Alink, *supra* note 138 at 472.
[144] See *Luxembourg v Parliament and Council*, *supra* note 79 at para 26.
[145] Brno, which had 0.6 million passenger movements in 2011, is located only 140 kilometres away from Bratislava Airport. See Alink, *supra* note 138 at 472.

tourists, Slovakia questions the assumption associated with the Directive that the largest airport of a member state would gain its market power by being the state's entry point.[146]

Ljubljana Airport, the capital airport in Slovenia, also faces competition from nearby foreign airports, such as Trieste Airport in Italy and Klagenfurt Airport in Austria. Both are small airports regarding passenger numbers and are close to Ljubljana Airport.[147] These airports compete on routes with common destinations.

A cost-benefit analysis also challenges this threshold's reasonableness because some airports that fall within the Directive's scope allege that they are unreasonably burdened.[148] For example, Tallinn Airport in Estonia claims that their expenses upon implementing the Directive is disproportionate to the gained benefits.[149] An empirical study examining the effectiveness of the EU Airport Charges Directive proves the proportionality concern of this threshold that is raised by Luxembourg and Slovakia.[150] It may not be worth it for small airports to comply with the Directive because implementing the regulations for these small airports may cost more than the benefits they get from complying.[151]

1.3.3 Concerns About the 5-Million Passenger Threshold

1.3.3.1 Lack of Rationale

While the "5-million" passenger threshold as a standard is simple, it is neither an accurate nor definitive method to reflect the market power of an airport.[152] Questions arise as to whether this threshold can reasonably distinguish airports with market power and those without it. The threshold has been criticised for overly regulating airports that are already in competition with or in benign relationships with users, leading to extra burdens and costs.[153] Thus, many airport

[146] See *Luxembourg v Parliament and Council*, *supra* note 79 at para 26.
[147] See Alink, *supra* note 138 at 472.
[148] See Maarten Peeters, "Recent EU Legislative Action on Airports" (2009) 34:3 Air and Space Law 189–213 at 204–205.
[149] See European Commission, *Evaluation of the Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, Commission Staff Working Document (Brussels, 2019) at 40.
[150] This study argues that some capital airports in small European countries are regulated, meanwhile, some other airports with doubled passenger movements are not regulated. See Steer Davies Gleave, *supra* note 60 at 289.
[151] See *Ibid*.
[152] See *Ibid*.
[153] See Stephen C Littlechild, "German Airport Regulation: Framework Agreements, Civil Law and the EU Directive" (2012) 21 Journal of Air Transport Management 63–75 at 73–74.

stakeholders, especially in Ireland and the Netherlands, disagree with this threshold. Instead, they suggest a more scientific approach to evaluating competition among airports or to test market power.[154] Athens Airport and Warsaw Chopin Airport, the only two airports in their respective countries that must comply with the EU Airport Charges Directive, claim to have lost competitive edges in their national markets as a result.[155]

Considering the opinions from different parties about what constitutes a reasonable threshold, one may recognise that the 5-million standard, which is in itself a compromise, is not sufficiently justifiable. Some states advocate for a lower threshold, while Cyprus prefers the regulations apply to all airports, which the European Regions Airline Association supports.[156] The ACI Europe on behalf of airports insists on the current threshold.[157] The European Commission initially suggested a scope that included airports with over one million passenger movements or 25,000 tonnes of cargo, annually,[158] while the European Low Fares Airline Association proposes compromise at a threshold of three million.[159]

Case studies of European airports[160] and guiding instruments[161] justify the suggested threshold of 1-million-passengers. The European Commission believes that this threshold keeps various European regulatory measures compatible. Indeed, an evaluation working paper prepared by the Commission in 2019 criticised the 5-million threshold, arguing that no rationale could support it[162]

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[154] See Steer Davies Gleave, "Evaluation of Directive 2009/12/EC on Airport Charges", (2013) at 104–105, online (pdf): <https://ec.europa.eu/transport/sites/transport/files/modes/air/studies/doc/airports/2013-09-evaluation-of-directive-2009-12-ec-on-airport-charges.pdf>.
[155] See *Ibid* at 105.
[156] *Ibid* at 104.
[157] See *Ibid*.
[158] See European Commission, *Proposal for a Directive of the European Parliament and of Council on Airport Charges* (2007) at 11.
[159] Steer Davies Gleave, *supra* note 154 at 105.
[160] A 1997 Spanish case study categorised Spanish airports into four groups by passenger number. Airports that cannot pass the one-million-passengers threshold were considered medium and small airports; those that pass this threshold were large and largest airports. See Commission of the European Communities, *Accompanying Document to the Proposal for a Directive of the European Parliament and of the Council on Airport Charges: Full Impact Assessment*, SEC(2006)1688 (Brussels, 2007) at 11.
[161] Community guidelines define four categories of airports. Airports below one million passenger movements annually are considered small regional airports, leaving the other three categories containing larger airports categorised as large community airports, national airports and large regional airports. See EC, *Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports*, [2005] OJ, C 312 at 3.
[162] European Commission, *supra* note 149 at 43.

nor was it created from a precise calculation.[163] The Commission also expressed a concern that such a high threshold may curb the objectives in the then-proposed EU Airport Charges Directive because the number of regulated airports would reduce.[164] In summary, although the 5-million threshold is clear and straightforward to follow, it is only a "crude proxy".[165]

The Commission finally accepted the result that makes the largest airport in each member state as another threshold and this demonstrates the importance of justifying a threshold.[166] Also, putting the busiest airport in each member state under regulation may, to some extent, fill the gap between the 5-million and the 1-million thresholds.[167] Although the Commission accepted this threshold based on the "common position" of the majority, it still challenged the reasonableness of the 5-million passenger threshold due to the lack of justification.[168]

1.3.3.2 Difficulty in Updating the Threshold Following Market Development

Another issue is whether this static threshold continues to be accurate in evaluating market power over time without periodical revision. The dynamics of air transport are constantly changing. Will this unchanged threshold reflect the changing dynamic of air transport in a timely way? [169] When

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[163] *Ibid* at 40.

[164] See Commission of the European Communities, *Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and the Council on airport charges*, COM(2008) 455 final (Brussels, 2008), s 4.

[165] European Commission, *supra* note 149 at 85.

[166] The European Commission accepts the amendment to incorporate the largest airport in each member state because the Directive justifies this amendment – the final version of the Directive states that the largest airport in each member state enjoys a "privileged position" as it serves as the entry to a member state. See Commission of the European Communities, *Opinion of the Commission pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty, on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council on airport charges amending the proposal of the Commission pursuant to Article 250 (2) of the EC Treaty*, COM(2009) 86 final (Brussels, 2009) at 3.. See EC, *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, recital 4.

[167] This is even more so for the scope, which is revised by the European Parliament in its first reading, to put a 5-million threshold plus airports accountable for "15% of the passenger movements in the Member State in which they are located". See Peeters, *supra* note 148 n 130.

[168] For the common position regarding the amendments of the thresholds, see Council of the European Communities, *Common Position (EC) No 23/2008 of 15 September 2008 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to the adoption of a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time*, [2008] OJ, C 254E at 23; Commission of the European Communities, *supra* note 164 at 2–3.

[169] Interestingly, many international air law instruments keep being revitalised thanks to a revision mechanism. For instance, the Montreal Convention 1999, which builds unified rules on liabilities regarding international carriages,

the transport market grows, one would assume that more airports will pass the 5-million threshold and thus be newly subject to regulation, and when they decrease in size, they will no longer be subject to the regulation. However, in a comparison, this assumption only reflects the absolute increase or decrease of the passenger number without noticing a relative change in the market power of an airport when competing with other airports.[170]

One impact of such a high threshold of 5-million passengers is that the regulator can keep airports' economic matters at arm's length distance by dismissing less populous airports. However, if the number of passengers continues to increase across European airports, this effect will likely be reduced.

In summary, the simplified European threshold to capture regulated airports needs revising.[171] This approach is easy, but inaccurate, and contradicts the objective of the European Commission, namely, to accurately define the extent of an airport's market power in a nuanced manner. This chapter will now examine Ireland's approach, as an example of adopting a detailed market power assessment.

1.4 Ireland[172]

1.4.1 Finding a Relevant Market

In Ireland, Indecon International Economic Consultants (Indecon) on behalf of the Department of Transport, Tourism and Sport conducts the assessment review of market power as an independent review.[173] This review first defines a relevant market, which is a necessary premise to further

contains a "review of limits" article, requiring to revise its limits of liabilities every five years, so that these limits reflect the real price level. See Montreal Convention, article 24.

[170] Assuming that all European airports meet the 5-million threshold, they all need to be regulated, which means that they all have significant market power. But this is not true because the market power of airports should be evaluated in comparison with their competitors in the whole picture.

[171] See Matthias Finger, *supra* note 90 at 2.

[172] The discussion of Ireland is useful in an EU's background to show how individual states implement the EU Airport Charges Directive.

[173] Indecon International Economic Consultants, "Review of the Regulatory Regime for Airport Charges in Ireland" (2016) 106 at i. This review gains official recognition by forming a section of the Department of Transport Tourism and Sport's Review of the Regulatory Regime for Airport Charges in Ireland. See Commission for Aviation Regulation, "Submission to the Public Consultation on the Review of Airport Charges Regulation in Ireland" (2016) at 2, online (pdf): <https://www.aviationreg.ie/_fileupload/2016/2016-09-16%20CAR%20response%20to%20dept%20consultation.pdf>.

assess the market power of airports.[174] There are two dimensions to the review: a product market and a geographical market. Some other jurisdictions outside of Ireland also analyse these two modes of relevant markets.[175] In defining a product market, Indecon sets forth a standard of "service bundle approach", by which necessary products are considered as those that airport users should purchase to operate air transport services at an airport.[176] These services include runways, taxiways, ground handling services at both airside and landside, check-in facilities, baggage-handling services, and screening services for security reasons.[177] And these products should be regulated. Notably, this scope of services, which includes security services, differs from the rest of Europe because the EU Airport Charges Directive does not regulate security services that take up about 35%[178] of total operational costs.[179]

A geographical market is generally determined by the catchment area that an airport potentially serves. Nevertheless, the notion of a catchment is not discussed in a geographic sense, but to indicate the scope of passengers that will use an airport.[180] A geographical market can be understood as which airports/competitors should be counted in. Indecon examines two geographic markets, i.e., the Republic of Ireland and the island of Ireland. The former defines the Irish market as a sovereign state in a political sense, and the latter sees the entire island as a market in a geographic sense. International airports outside of Ireland are not considered in a relevant market, except for the transfer traffic that accounts for 4% of the total traffic volume brought by Dublin Airport.[181]

1.4.2 Market Concentration Analysis

[174] Indecon International Economic Consultants, *supra* note 173 at 11.
[175] The Competition Bureau of Canada uses this approach to review the acquisition case between Air Canada and Transat A.T. Inc. See Innovation Government of Canada, "Report to the Minister of Transport and the Parties to the Transaction Pursuant to Subsection 53.2(2) of the Canada Transportation Act —Proposed Acquisition by Air Canada of Transat A.T. Inc.", (27 March 2020), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04522.html> Last Modified: 2020-03-27.
[176] Indecon International Economic Consultants, *supra* note 173 at 11.
[177] *Ibid*.
[178] See Commission of the European Communities, *Report from the Commission on Financing Aviation Security*, COM(2009) 30 final (2009) at 2.
[179] See Peeters, *supra* note 148 at 203.
[180] Indecon International Economic Consultants, *supra* note 173 at 12.
[181] *Ibid* at 13. The exclusion of international traffic justifies the assessment, which restrains the geographic market on an all-island basis.

Ireland adopts the Herfindahl-Hirschman Index (HHI) as a quantitative instrument to evaluate a company's market share, which factor indicates the level of market concentration, or in other words, market power. The scope of the HHI ranges from 0 to 10,000. When there is only one company in a market, the HHI would be 10,000, indicating a total monopoly.[182] Notwithstanding variations of thresholds in defining market power adopted in different countries,[183] the Competition and Consumer Protection Commission of Ireland proposes a post-merger HHI of the value of 2,000 as a benchmark.[184]

Indecon distinguishes three types of airports: airports with market power, airports with significant market power, and those with a dominant position.[185] The latter two situations call for more regulation, and the state of holding a significant market power does not necessarily amount to having a dominant position.[186] A sufficiently concentrated market, where a company has a large market share, stands as proof of significant market power or a dominant position.[187] One may find that Australia adopts a similar approach because it puts airports with significant market power in a monitoring regime, while taking airports that have exercised market power to a more stringent price-notification regime. Hence, the Irish and the Australian approaches are similar at assessing different degrees of market power.

1.4.3 A Quantitative Approach with a Focus on Dublin Airport

The relevant markets of the island of Ireland[188] and the Republic of Ireland have HHI values of over 4,000 and 6,000, respectively. In 2014, the market share of Dublin Airport in both markets

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[182] See Adam Hayes, "Herfindahl-Hirschman Index (HHI)", (11 February 2020), online: *Investopedia* <https://www.investopedia.com/terms/h/hhi.asp>.

[183] For example, the U.S. sets guidelines to acknowledge that a highly concentrated market has a higher than 2500 HHI, and a "moderately concentrated" market has an HHI volume between 1500 and 2500. See United States Department of Justice, "Herfindahl-Hirschman Index", (31 July 2018), online: <https://www.justice.gov/atr/herfindahl-hirschman-index>.

[184] This benchmark distinguishes a concentrated market and a highly concentrated market. When the HHI is between 1000 and 2000, a market is concentrated. When the HHI is higher than 2000, a market is highly concentrated. See Competition and Consumer Protection Commission, "Guidelines for Merger Analysis", (2014) at 13, online (pdf): <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/CCPC-Merger-Guidelines.pdf>.

[185] Indecon International Economic Consultants, *supra* note 173 at 14.

[186] *Ibid.*

[187] The case of Hoffmann-La Roche v Commission suggests that large market shares generally indicate a dominant position. See *Hoffmann-La Roche & Co AG v Commission*, Case 85/76, [1979] ECR 1979 -00461 at para 41.

[188] To define a market as such implies that two relevant airports, George Best Belfast City Airport and Belfast International Airport, are added to the competition map.

was 64.9% and 81.9%, accordingly.[189] These figures demonstrate that no matter if a relevant market is defined as the Republic of Ireland or, in a broader sense, the island of Ireland, it is highly concentrated. Dublin Airport has significant market power in both scenarios.[190]

The assessment review carefully examines the incentives of Dublin Airport to reduce or increase charges through a group of factors,[191] among which, the charges elasticity of demand (CED) is a focus. The CED predicts how passengers will react to charge changes.[192] Briefly, the methodology of this analysis follows two lines. The first predicts what the implications will be when charges are reduced.[193] Another foresees the results due to an increase in charges. The core assumption can be construed as a question: will Dublin Airport still have incentives to increase charges should regulation be removed?[194] After this modelling analysis, a general suggestion indicates that the reduction of charges that are shaped by the dynamics of a competitive market is unlikely to occur without regulation.[195]

Like the Australian approach, the Irish assessment also examines the countervailing power of airlines and their ability to switch, with both aspects focusing on a balancing effect from airports' opposite actors. The assessment uses the HHI again to test the market concentration of major airlines against Dublin Airport as a relevant market. It finds that the airline market is also highly concentrated with an HHI value of over 4,000.[196] Notwithstanding this, two constraints frustrate airlines in their ability to implement countervailing power, namely "the level of revealed consumer preferences" and "the strength of demand at Dublin".[197]

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[189] Indecon International Economic Consultants, *supra* note 173 at 15–16 & 18.
[190] *Ibid* at 17.
[191] These are the relevant initial price, the airport charges elasticity of demand, the extent to which airlines pass on any charges to passengers, the extent to which airlines switch capacity on routes, airports costs elasticity, and the impact of passenger numbers on non-aeronautical revenues. See *Ibid* at 22.
[192] *Ibid* at 32.
[193] The assessment widely analyses the impact of charge reduction from €10.13 to €8.68, implications when charges are reduced in the condition of alternative CED and fixed costs, and implications when charges are reduced in terms of different CED values and variable costs. See *Ibid* at 23–24, tables 3.4-3.6. This series of analyses indicate that only as the value of CED is no lower than 0.6 will Dublin Airport increase its revenue. *Ibid* at 25.
[194] Assumptions similar to the analysis along the first line are adopted to examine incentives to increase charges. A conclusion is that when the CED is between 0.55 and 0.6, or when it is higher, a charge increase will make Dublin Airport unprofitable. See Indecon International Economic Consultants, *supra* note 173 at 27.
[195] *Ibid* at 32.
[196] *Ibid* at 29.
[197] *Ibid* at 30.

To further examine the effects of these two aspects, the assessment studies the power of airlines to shift airports. After examining this issue in both reactive[198] and proactive[199] dimensions, the report reckons that some degree of possibility to switch an airport exists. Nevertheless, this potential may not fully offset the effects of factors like sunk costs and capacity limits. This indicates that, for now, the market power of Dublin Airport cannot be removed.[200]

After examining all these above matters, this assessment concludes that Dublin Airport is the only airport in Ireland that holds significant market power, and it should be subject to pricing regulation.

1.4.4 Remarks: A Double-Edged Sword

1.4.4.1 Limits of the Irish Approach

Compared with the general approach adopted by the EU, the Irish tactic is more carefully constructed with rationale analysis. Yet, the following concerns are a hurdle to its implementation.

To begin with, the careful analysis may not be cost-effective. The market power assessment took about one year to finish,[201] partly due to the complexity of the assessment process,[202] which can be demonstrated by the methodology of the assessment report. In addition to economic modelling, which requires data collection and calculation, Indecon's assessment review also examined how different stakeholders have shaped the market power of airports.[203] Consultation was used to collect opinions, and airlines were asked about their experience with the market power degree of Dublin, Shannon, Cork, and Belfast airports.[204] Airports and airlines were also consulted about their views regarding the catchment scope of airports in order to define a geographic market.[205] These methods, done on a case-by-case basis that require enormous information, are time-consuming.

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[198] In the past five years, no airport-shifting case happened. See *Ibid*.
[199] The air carrier Ryanair can threaten to shift its routes between Dublin Airport and another Irish airport. Another air carrier, Aer Lingus, which was just purchased by IAG, may shift to other airports to enhance its ability. See *Ibid*.
[200] *Ibid*.
[201] European Commission, *supra* note 149 at 38.
[202] *Ibid*.
[203] From airports' perspective, although Dublin Airport is the focus, other airports on the Irish island are also evaluated regarding their market power when considering their market shares. In terms of airlines, a major type of airport users, each airline's countervailing power is examined in combination with their respective situations. For example, the examination of the threat of switching routes by Aer Lingus is conducted in the background of IAG's acquisition.
[204] For these survey results, see Indecon International Economic Consultants, *supra* note 173 at 20.
[205] *Ibid* at 11.

Moreover, the assessment process is uncertain. The conclusion of the assessment depends on assumptions made throughout the process, which are essentially related to the adopted method of economic modelling. However, these assumptions are uncertain and potentially depend on how the evaluator defines them. Even Indecon itself admits that it is difficult to avoid such uncertainty.[206]

Furthermore, Ireland's air transport market features a high market concentration in both territorial (the Republic of Ireland) and geopolitical (the island of Ireland) senses. This particular situation simplifies the assessment, but may not be replicated in other countries. The large market share of Dublin Airport makes it possible to avoid some evaluation steps, e.g., the definition of a market narrower than the Republic of Ireland.[207] These steps may be required in other countries where the evaluation result may change.[208] The examination of competition for transfer traffic is also not given much weight as it only constitutes 3%–4% of the total volume.[209] International airports, which especially relate to transfer passengers, are excluded from the scope of a relevant market.[210]

1.4.4.2 Merits of the Irish Approach

Overall, the Irish method to make tailored market power assessment has some merits that the general European approach lacks.[211] Looking at the island of Ireland as a relevant market reveals more findings that may be neglected if one only considers the country of Ireland as a relevant market. This method also improves the mutual understanding between airports and airlines.[212] Consultation with airlines not only enriches information sources but also enhances the interactivity of the evaluation approach. This method stays consistent with ICAO's iteration of consultation as a basic principle in the regulation of airport charges.

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[206] When analysing the economic model to examine whether Dublin Airport will abuse its power of charging in the absence of regulation, Indecon considers it impossible to make a certain estimate on the CED of Dublin Airport, which is an important factor to make a justifiable evaluation. See *Ibid* at 24, 32.

[207] As the Republic of Ireland has a very high concentration level, one would not need to examine the market concentration level in a narrower market, although such a smaller relevant market should exist. See *Ibid* at 32.

[208] Assuming that a relevant market does not has a concentration level as high as Ireland, one would further explore a narrower relevant market, which may lead to a different judgement.

[209] See Indecon International Economic Consultants, *supra* note 173 at 13.

[210] *Ibid*.

[211] Although it is significant to examine market power in a case-by-case approach, such practices are rare. See Polk & Bilotkach, *supra* note 20 at 29.

[212] The lack of a nuanced approach, at least regarding the assessment of market power, largely results in the disagreement between airports and airlines. Some European countries considered revising the EU Airport Charges Directive. See Matthias Finger, *supra* note 90 at 2.

Notably, Indecon as an independent institution plays a central part in the evaluation process, taking over a duty that was conventionally performed by the government. This paves the way to outsourcing some regulatory activities that rely on professional knowledge to independent experts. This strategy matters particularly for small countries, in which governments may not have regulatory expertise and resources to fully conduct an evaluation.

1.5 Conclusion

1.5.1 Varying Market Power Degrees Among Airports

Although it may no longer be apt to call airports "natural monopolies", concerns about market power remain real. To prove this, this section explored whether some key competitive constraints, which introduce competition to the market, can effectively offset the strong market power of airports. Despite their impacts on reshaping market power in the airport industry, some airports' strong market power still exists. Notably, the COVID-19 pandemic crisis reveals that airports face fewer risks vis-à-vis airlines. It is easier for airports to survive unexpected and unprecedented emergencies than airlines. Airports' public good value is made even more obvious against the pandemic background.

The degree of market power varies among airports, depending on their specific situations. Major airports are more likely to hold market power than smaller airports. Airports in regions with strong competitive constraints, such as Europe, may be exposed to fiercer competition than in other places. To discover the accurate extent of an airport's market power, one must adopt a nuanced approach and be able to engage in proportionate regulation.

1.5.2 Imperfect Practices in Australia, the EU, and Ireland

How Australia, the EU, and Ireland (as one case under the EU legal regime) define regulated airports reveals their methods in evaluating an airport's market power. Australia assesses airports through the concept of competitive constraints. The EU adopts two simple thresholds to define the jurisdiction of the EU Airport Charges Directive. The Irish approach is more complex and scientific by using a test, starting from defining the relevant market and then analysing market concentration using the HHI method. All three cases show collaboration between general competition law (when assessing market power) and sector-specific regulation in air transport.

The three approaches have some findings in common, most importantly that a major airport usually has significant market power. The Australian and Irish approaches have both considered the countervailing power from airlines – whether the negotiating power of airlines is strong enough to balance the market power of an airport.

However, none of these approaches are perfect. The Australian evaluation lacks enough deterrence and may not be performed in a timely manner, a concern which is also raised by the Australian government. The voluntary reporting regime is also illogical.

For the EU, both thresholds seem problematic, too. By putting the busiest airport of each member state under regulation, an airport that has met this threshold may unreasonably compete with neighbouring airports, which have more passengers, but are not subject to regulation. Also, the five-million threshold is a "crude proxy" and not supported by reliable calculation. This threshold may also lack the flexibility to enact revisions in a timely way reflecting the market power change.

The Irish assessment, though the most accurate, faces challenges in its implementation. First, the method is not cost-efficient. Second, its reliance on several assumptions makes the assessment subjective. Third, the special market in Ireland makes its experience difficult to transplant to other countries, especially when another country's market is more complicated. Because the calculation of the market power of Dublin Airport needs a lot of time and labour as it is, to transpose the method to another country with a more complicated market would be challenging. Nevertheless, the Irish approach sheds light on other states in terms of its flexibility, its proper use of consultation, and its regulatory technique for outsourcing the assessment to an independent institute. In summary, when a country's airport market is different from that of Ireland, it should not copy the Ireland's method without any modifications tailored for this country's market.

After examining national practice on defining airports to be regulated, the next chapter discusses the regulatory framework of airport charges at an international level.

2 The International Regulatory Framework for Airport Charges: Towards More Effective Implementation

2.1 Article 15 of the Chicago Convention as the Fundamental Norm on Airport Charges

The Convention on International Civil Aviation, commonly known as the Chicago Convention, functions as the constitution of international air transport.[213] Article 15[214] serves as a basic rule on airport charges[215] and is the standard used when considering the regulatory compliance of airport charges in international air transport, as long as the states are contracting members of the Chicago Convention.[216] Article 15 imposes four requirements in regulating airport charges discussed below.

2.1.1 Uniform Conditions

[213] The preamble of the Chicago Convention urges that "[…] international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity that and operated soundly and economically". *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295 at 297 (entered into force 4 April 1947) [Chicago Convention].

[214] Article 15 of the Chicago Convention reads:

> Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.
>
> Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,
>
> (a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and
>
> (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.
>
> All such charges shall be published and communicated to the International Civil Aviation Organization: provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned. No 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.

One can see that besides airport charges, Article 15 also applies to the charges for air navigation services.

[215] Article 15 is in the chapter Flight over Territory of Contracting State. This categorisation implies that when drafting this article, contracting states regarded internationality as an intrinsic factor of this rule.

[216] See Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* (Cham: Springer, 2014) at 232.

Article 15 begins by requiring airports, which are open to the public in a contracting state, to be "under uniform conditions to the aircraft of all the other contracting [s]tates".[217] These uniform conditions "shall apply to the use […] of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation".[218]

The imposition of airport charges should be based on these uniform conditions. When charges are reduced, the quality of air navigation facilities should not be compromised. Therefore, the uniform conditions that appear in the first paragraph of Article 15 sets out a service quality standard when regulating charges.

2.1.2 Non-Discrimination

The second requirement addresses non-discriminatory charges. A contracting state cannot set charges to aircraft from other contracting states higher than the charges collected from their national aircraft. National aircraft and aircraft from other states should receive equal treatment.

As provided in Article 15, non-discrimination must be discussed when a state offers airport services under the "uniform conditions" noted above to its national aircraft and aircraft from other contracting states. For non-scheduled international services, the criterion to compare charges is based on the same class of aircraft.[219] For scheduled international services, the compared criterion is based on similar international air services.[220] Hence, the discussion of non-discrimination among different users will only be necessary when these users receive the same level of airport services.

2.1.3 States' Obligation to Publish and Communicate Charges and the Council's Power to Review Them

The second part of Article 15 sets out two requirements. The first is procedural, requiring contracting states to publish and communicate airport charges to ICAO. This condition is reiterated

[217] *Chicago Convention*, *supra* note 213, art 15.
[218] *Ibid.*
[219] *Ibid.*
[220] *Ibid.*

in ICAO's documents.[221] Second, if an interested state requests it, the Council of ICAO should review disputed charges and consequently make recommendations for states to consider.[222] This power of the Council is also iterated in the International Air Services Transit Agreement (IASTA).[223] Nevertheless, the wording "to consider" shows that the decisions of the Council are only advisory and have no binding effect.

2.1.4 Free Use of Airspace

Notably, the third part of Article 15 points out an important rule known as the free use of airspace. "No fees, dues or other charges shall be imposed by any contracting [s]tate in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting [s]tate or persons or property thereon".[224] The interpretation of this requirement has been controversial and raised many disputes.

This requirement distinguishes the use of airport services and the right of entry into the airspace of another contracting state of the Chicago Convention. Charges based on the former's use are permissible to recover the costs for the provided services. It is legitimate to collect charges to recover occurred costs. Reasonable charges with a certain rate of return also incentivise the development of airports. Unlike airport services, the mere appearance in another state's airspace does not provide a basis for the imposition of charges, as there are no actual services provided and no costs occur thereby. Entry into the airspace above a state's territory, which possesses the attribute of a natural resource, does not constitute a reason for charges.

IASTA also indicates differentiated treatment between the use of airport services and mere entry into the airspace of another country. This instrument sets out that contracting states can designate routes and airports for foreign aircraft.[225] Nevertheless, immediately following this sentence, it

[221] At ICAO Assembly's 37th session, a statement urged states to implement the charge publication and communication duty. See *Consolidated statement of continuing ICAO policies in the air transport field*, ICAO Assembly Res A37-20, ICAO Doc 9958 at III–13, art 4 [*ICAO Res A37-20*].
[222] See *Chicago Convention*, *supra* note 213, art 15.
[223] See *International Air Services Transit Agreement*, 7 December 1944, 84 UNTS 389, art 1, s 4(2) (entered into force 30 January 1945) [*IASTA*].
[224] *Chicago Convention*, *supra* note 213, art 15.
[225] See *IASTA*, *supra* note 223, art 1, s 4(1).

emphasizes that contracting states can impose "just and reasonable" charges only for the use of airports and other facilities.[226]

The understanding of the free use of airspace should be contextualised in the sovereignty of a state's airspace, a principle recognised by Article 1 of the Chicago Convention, as well as IASTA. This principle requires that all contracting states should have exclusive sovereignty over the airspace above their territories.[227] Whether a state allows other states to enter their airspace depends on that state.[228] States may designate given routes for other contracting states' aircraft to follow.[229]

The free-of-charge use of airspace above a state's territory as provided in Article 15 can be dismantled into three elements: (1) "Fees, dues or other charges" are forbidden pecuniary burdens. (2) Free use is only effective in terms solely of the right to transit, to enter into or exit from the airspace of a contracting state. (3) A contracting state's aircraft, their onboard persons, and property are all exempt from any charges for the mere use of airspace. I will discuss the first element that triggers many disputes in the third section of this chapter.

2.2 Non-Discrimination: A Comparative Discussion Between Article 15 and the GATT/WTO Regime

2.2.1 Non-Discrimination in the GATT/WTO Regime: Most-Favoured-Nation and National Treatment

Air transport and international trade share similarities, but are also different.[230] The General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO) regime only covers three ancillary air transport services – aircraft repair and maintenance services, the selling and marketing of air transport services, and computer reservation system (CRS) services – which are

[226] See *Ibid*, art 1, s 4(2).
[227] See *Chicago Convention*, *supra* note 213, art 1.
[228] See *IASTA*, *supra* note 223, art 1, s 1.
[229] See *Ibid*, art 1, s 4.
[230] States have free will to decide what extent they apply rules in the general trade sector to air transport. For how states deal with the relationship between air transport services and the WTO, see generally Wolfgang Hubner, "Liberalization Scenarios for International Air Transport" (2001) 35:5 Journal of World Trade at 973–976.

regarded as soft rights.[231] Both the GATT/WTO and the international air transport regimes regard non-discrimination as a basic objective. In the field of air law, the canon of non-discrimination is crucial as it formulates globally open and standard-based air transport. It is also fundamental in the field of trade law, particularly the GATT/WTO regime.[232] We can thus claim that, in this respect, both fields align.

This non-discrimination principle from Article 15 has a single dimension: equal treatment between domestic and foreign flights. However, the GATT/WTO regime notes two dimensions. They are the most-favoured-nation treatment (MFN treatment) and national treatment. The former underscores equal treatment given by one state to all other states, i.e., equality among all foreign states.[233] National treatment emphasises equal treatment between foreign states and a home state.[234] These two types of treatment are essential and listed among the four core principles in GATT 1947.[235] Non-discrimination obligations are two of the four core principles in a fair-trade environment.

2.2.2 Non-Discrimination in Article 15: MFN Treatment Missing

After comparing the principle of non-discrimination in the fields of both air law and trade law, one finds that Article 15 only covers national treatment; there is no MFN treatment. Is it necessary to include MFN treatment of charges in international air transport? According to the ICAO, the answer is "yes". ICAO's Policies on Charges for Airports and Air Navigation Services (Doc 9082) interprets and offers further guidance on Article 15. Doc 9082 recognises the principle of non-discrimination as being both between a national state and a foreign state and between two foreign states.[236] In addition to this guidance, a more detailed manual, the Airport Economics Manual, implements Doc 9082. The manual adheres to the dual understanding of

[231] These rights do not include airport charges See *Annex on air transport services*, General Agreement on Trade in Services, 15 April 1994, 1869 UNTS 208, art 3.
[232] One main objective of the WTO is to mitigate trade discrimination. The non-discrimination principle in WTO law behaves in two dimensions, which will be discussed later. See Michael J Trebilcock & Shiva K Giri, "The National Treatment Principle in International Trade Law" in *Handbook of International Trade Volume II* (2004) 185 at 186.
[233] See *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 196 [*GATT*].
[234] See *Ibid* at 205, art. III.
[235] See Brett Frischmann, "A Comparative Analysis of compliance Institutions in International Trade Law and International Environmental Law" in *Handbook of International Trade Volume II* (2005) 134 at 153–154.
[236] "The charges must be non-discriminatory both between foreign users and those having the nationality of the State in which the airport is located and engaged in similar international operations, and between two or more foreign users". ICAO, *supra* note 9, s II at para 3(4).

non-discrimination of charges in Doc 9082, paraphrasing the requirement: "all categories of users meeting the same criteria and offering the same or similar air services should be treated equally".[237] Thus, ICAO upholds an interpretation of non-discrimination in line with the GATT/WTO regime.

An inconsistent understanding of non-discrimination between Article 15 and Doc 9082 with the Airport Economics Manual may raise implementation concerns. Doc 9082 and the Airport Economics Manual are only guidance materials. Unlike the Chicago Convention, they are not legally binding to member states of ICAO. Generally, these guidance materials offer recommendations in the form of consolidated resolutions following international conferences that are not legal commitments by states.[238] These recommendations, therefore, do not establish any legally binding effect.[239]

2.3 Free Use of Airspace: Distinguishing Taxes and Charges

Whether a levy is regarded as a tax or a charge will determine its legality under the Chicago Convention as Article 15 regulates charges, not taxes. To label a levy as a tax triggers the risk that such a levy will not be recognised as a charge that is prohibited under Article 15. The following three cases reveal this issue.

2.3.1 Dutch Aviation Ticket Tax Case

In 2008, the Netherlands began to levy a tax on airlines departing from its airports on a per-passenger basis. Two rates applied: EUR 11.25 for each passenger for intra-EU flights of less than 3,500 km and flights out of the EU of less than 2,500 km; EUR 45 for each passenger for other flights. Transfer flight passengers using Dutch airports only as transit stops are exempted from the tax.[240] Four plaintiffs filed lawsuits in front of the court in the Netherlands over this levy. Among other debates,[241] the interlocutory court, the court of appeal, and the Dutch Supreme Court

[237] ICAO, *Airport Economics Manual*, 3rd ed, Doc 9562 (2013), s 4.139(a).
[238] *Ibid*, ss 1.6, 1.9.
[239] Some studies also identify these resolutions promulgated by international organizations as "non-legal soft law". Christine M Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38:4 International & Comparative Law Quarterly 850–866 at 851.
[240] Brian F Havel & Niels van Antwerpen, "The Dutch Ticket Tax and Article 15 of the Chicago Convention" (2009) 34:2 Air and Space Law 141–146 at 141.
[241] For example, the debate whether this tax constitutes unlawful state aid. See Jasper Faber & Thomas Huigen, "A Study on Aviation Ticket Taxes", (November 2018) at 14, online: *CE Delft* <https://www.ce.nl/en/publications/2208/a-study-on-aviation-ticket-taxes>.

all highlighted the nature of the tax. All the three levels of courts decided that the tax should be recognised as such due to its name, rather than as a charge, because the "fees, dues or other charges" in Article 15 should only be interpreted as charges, and should not be extended to cover taxes.[242] Charges and taxes, as two separate terms, are used in a strict context and are not interchangeable. Moreover, the Dutch Supreme Court also supported the decision by the court of appeal that the Dutch aviation ticket tax is not necessarily in conflict with the Chicago Convention in that a tax levied for reasons other than the provision of services *can* be compatible with this Article 15.[243]

2.3.2 Belgian Ticket Tax Case

Contrary to the Dutch tax case, a case regarding an aviation ticket tax levied by Zaventem, a municipality of Belgium, was deemed to have violated the Chicago Convention. Between 1996 and 2000, Zaventem initiated a ticket tax on passengers departing from Brussels Airport in the value of 12 Belgian francs for each passenger. In 2005, three plaintiffs – the B.A.R. Belgium, Sabena, and Lufthansa – complained that this taxation was a violation of Article 15 of the Chicago Convention.[244] The Belgian court adopted a passenger-friendly approach to interpreting Article 15, construing the "dues, fees and other charges" in a broad sense and placing the disputed tax under the Article's remit. The court determined that any levies collected on foreign airlines that only fly over, land in, or depart from another contracting state's airspace can be defined as a forbidden charge in Article 15, even if these levies are designed as taxes.[245] Accordingly, a tax that does not trigger the application of Article 15, as in the previously-mentioned Dutch case, can otherwise be under the remit of Article 15 in Belgium.

The user-friendly interpretation by the Belgian court is backed by its functionalist reasoning. When Article 15 prohibits charges for the mere "transit over, entry into or exit from" a state's airspace, an underlying assumption seems to be that these charges should be forbidden because airports have not provided any services to airlines and passengers. The dispute can be understood more readily through the lens of whether actual airport services have been provided to users in these circumstances. Following this standard, the disputed tax, which is not linked to any provision of

[242] Brian F. Havel & Niels van Antwerpen, *supra* note 240 at 144.
[243] Brian F Havel & Niels van Antwerpen, "Dutch Ticket Tax and Article 15 of the Chicago Convention (Continued)" (2009) 34:6 Air and Space Law 447–451 at 451.
[244] Jasper Faber & Thomas Huigen, *supra* note 241 at 11.
[245] *Ibid* at 12.

airport services or facilities to foreign airlines in accordance with the value of the tax, thus violates Article 15. Therefore, from a functionalist perspective, the Belgian decision provides a possibility to define widely-levied aviation taxes in a different but insightful way.

2.3.3 Air Passenger Duty: Case of the UK

In 2006, the Chancellor of the Exchequer doubled the existing Air Passenger Duty on flights taking off from all airports in the UK. Since tour operators were not legally permitted to pass the costs caused by the duty to passengers in the way that airlines can, they would have suffered heavily from the increased duty.[246] The Federation of Tour Operators, on behalf of tour operators, filed a lawsuit before the administrative court.[247] The claimant stated that the imposition of the increased duty violated Article 15. A premise of the claimant's request was that taxes, which include the disputed Air Passenger Duty, belong to the category of forbidden charges in Article 15. The court saw the differences between charges and taxes as a key to resolving the dispute. The court primarily referred to ICAO's resolutions for its definition of charges and taxes.[248] In line with Article 33 of the Vienna Convention on the Law of Treaties, the court then referred to the English, French, Spanish, and Russian texts of Article 15 to understand the relationship between taxes and charges.[249] The claimant argued that the word "taxe" used in the French version referred to the financing of a specific kind of public service and was levied on users who consumed the service. Moreover, in the French language, the equivalent to the English word "tax" should be "impôt" instead of "taxe".[250] The Spanish and Russian versions carried the same meaning as the English text.[251]

Failing to find a harmonised interpretation among the French, Spanish, and Russian texts, the court followed the suggestion of one party to prioritise the English version. This approach found favour because the *travaux préparatoires* were delivered in English and other versions of the Convention

[246] See *R (Federation of Tour Operators and Others) v HMRC and Others*, [2007] EWHC 2062 at para 1.
[247] See *Ibid* at para 2.
[248] See *Ibid* at para 45.
[249] "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail". *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 33 (entered into force 27 January 1980).
[250] See *R (Federation of Tour Operators and Others) v HMRC and Others*, *supra* note 246 at para 52.
[251] See *Ibid*.

also derived from the English text.[252] The English text thus reflects the original intention more accurately.

Despite the fact that, in a literal sense, the word "dues" by itself may include taxes, the court held that these "dues" should not be construed in this way as it appears in Article 15. First, the title of Article 15, namely, "airport and similar charges", suggests that taxes are not included under this Article. Second, the composite phrase "fees, dues or other charges" treats the first two – fees and dues – as two important examples of charges; otherwise, this phrase would not use "other charges". To conclude, the court, via a literal textual analysis, concluded that taxes are not governed by Article 15.[253]

Notably, the court felt that the literal textual analysis was not convincing enough to tell the difference between taxes and charges. As a result, they attempted to circumvent this question but legitimise the Air Passenger Duty by reasoning that this levy does not violate the non-discrimination principle prescribed in Article 15. The court reasoned that the forbidden charges, solely for the transit, entry into, or exit from the airspace of a state, constitutes extra costs to foreign airlines that national airlines do not have to bear, leading to a violation of the non-discrimination principle in Article 15. The court, nevertheless, found that the Air Passenger Duty is imposed upon flights without considering their destinations, which means that this levy does not discriminate between international flights and domestic flights. Thus, regardless of the name of tax vs. charge, the court found that it does not violate the principle of non-discrimination as provided in Article 15.[254]

2.3.4 Differentiation of Taxes and Charges in ICAO's Policies

After examining how the Dutch, Belgian, and UK courts recognised the relationship between taxes and charges, we will now explore the position of ICAO, which represents the voice of the international community. ICAO's Council Resolution on Taxation of International Air Transport defines charges as "levies to defray the costs of providing facilities and services for civil aviation," while taxes are seen as "levies to raise general national and local government revenues that are

[252] See *Ibid* at para 80.
[253] See *Ibid* at para 55.
[254] See *Ibid* at 56.

applied for non-aviation".[255] ICAO has reiterated these definitions in later policies and resolutions.[256]

In the environmental context, ICAO also shows a clear tendency in the working paper to distinguish between taxes and charges, seeing taxes as unreasonable. It opines that states should designate environment-related levies as charges but not taxes. Possible places to use the charges include places suffering from environmental harms due to emissions, scientific research on environmental impact and possible solutions.[257] One important reason to call these charges instead taxes is that taxes are not tied to costs and give no guarantee to the payees, which can lead to abuses by countries and "inequity between states" on how they implement the emissions levies.[258] The collected charges should be used to mitigate any negative impacts of air travel on the environment.[259]

ICAO's understanding of airport charges may be construed by the concept of a sales contract. Airport users who pay for charges are analogous to consumers who pay prices for goods.[260] The shared rationale connecting the airport charge example and the sales contract example is that users pay to receive goods/services. In other words, both are transactions on a *quid pro quo* basis. In Article 15, the commodity is airport facilities and services. It is thus unreasonable if an airport user does not receive airport facilities and services after paying charges.

Nevertheless, taxes have a strategic significance for countries. Taxes levied in one field can be reallocated to another field without having to provide taxpayers with services, as is the case for charges. In other words, cross-subsidisation is permissible when using tax revenue.[261] Airports are likely to become cash cows from which a government collects revenues and redistributes them

[255] ICAO, *ICAO's Policies on Taxation in the Field of International Air Transport*, 3rd ed, Doc 8632 (2000) at 3.
[256] For example, in the Assembly Resolutions of the 38th Generally Assembly, ICAO recommends that states should ensure that airport charges are applied to defray the costs of facilities and services. See *Consolidated statement of continuing ICAO policies in the air transport field*, ICAO Assembly Res A38-14, 4 October 2013, ICAO Doc 10022 at III-12 [*ICAO Res A38-14*].
[257] See ICAO, Executive Committee, *Report on Environmental Charges and Taxes*, A32-WP35 (1998) at B-2, online (pdf): <https://www.icao.int/Meetings/AMC/MA/Assembly%2032nd%20Session/035.pdf>.
[258] *Ibid* at para 3.5.3.
[259] See *Ibid* at para 3.5.4.
[260] The consideration, which is a necessary element to validate a contract in the common law regime, can explain charges for airport services. The airport operator agrees to make a promise to provide airport services, and the user, who can be recognised as another contractual party, agrees to pay for charges as a consideration under a contract for using airport services. See Nicola Monaghan & Chris Monaghan, *Beginning Contract Law* (Routledge, 2013) at 25–26.
[261] See ICAO, *supra* note 9 at vii.

elsewhere. From this aspect, charges seem to be a more stringent concept as to the provision of airport facilities and services as *quid pro quo* and to limit state flexibility in imposing taxes. Accordingly, recognising the disputed levies as charges rather than taxes consolidates the accountability of airport operators and, thus, is ultimately favourable to airport users. This standpoint is also in line with ICAO's preference for using charges over taxes in the context of environmental emissions.

2.3.5 Issues in ICAO's Regulatory Framework

2.3.5.1 Inconsistent Adjudications on Differentiating Charges and Taxes

The three discussed cases illustrate that the inconsistent understanding of the relationship between taxes and charges leads to contrasting adjudicatory decisions. A levy that is considered to be allowed under the Chicago Convention in one country may be prohibited under the Chicago Convention by another.

One reason for this is the non-binding effect of ICAO's policies, which distinguish taxes and charges. Countries are not required to adhere to these policy instruments. Bearing in mind how the Dutch, Belgian and UK cases highlight Article 15, one can expect that countries will be more consistent in future in differentiating taxes and charges if both concepts are clearly defined by the Chicago Convention or other binding instruments.

2.3.5.2 Unwanted Results from ICAO's Approach

ICAO's view is clear that charges are based on the provision of services and taxes are not. ICAO's resistance to imposing taxes is also obvious in its discussions on environmental charges.[262] However, as noted, taxes are excluded from the governance of the free-use-of-airspace requirement in Article 15. Countries can use the distinction between taxes and charges when interpreting Article 15, giving them the opportunity to abuse the power of taxation without regulation.

Notably, ICAO's Policies on Taxation in the Field of International Air Transport (Doc 8632) provides important recommendations that states should reduce the taxes applied to international

[262] See ICAO, Executive Committee, *supra* note 257, s 5.1.

air transport. Clause 3 regarding "taxes on the sale and use of international air transport" could be construed as a suggestion that states should refrain from levying the taxes in question.[263] However, this instrument, such as Doc 9082, has no binding effect upon member states.

The contrasting results of the three previously discussed judgements illustrates this bizarre result. In the Dutch case, the judges refused to accept the aviation ticket tax as a charge because no services accompanied the levy, an interpretation in line with the ICAO. This tax was deemed as not prohibited by Article 15. The Belgian case deviated from the approach of ICAO and the Dutch judgement. This case reached a user-supportive outcome by broadly interpreting Article 15 and prohibiting taxes. In the UK case, the judgement lingered between the Belgian and Dutch approaches without a concrete answer.[264]

This lacuna suggests that when ICAO differentiates charges and other taxes, a hard law channel akin to Article 15 of the Chicago Convention to forbid the abuse of taxes is also necessary. An effective solution to the abuse of power of imposing taxes could be that ICAO issue some kind of binding norms to restrict countries' power to issue taxes without providing airlines and passengers with relevant services. However, reaching agreement on this issue among all contracting states of ICAO is challenging.

2.4 ICAO's Policy Materials: Rulemaking Supplements Rather Than Mere Interpretations to Article 15

2.4.1 Doc 9082

Besides Article 15, ICAO has produced several interpretive documents regarding airport charges. Since 1974, it has published nine versions, with the most recent released in 2012; Doc 9082 provides general guidance on charge governance in both the airport and air navigation sectors.[265]

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[263] Clause 3 states that states should make efforts to reduce taxes "levied directly on passengers or shippers". Ticket taxes or passenger duties levied by the Dutch, Belgian, and British authorities fit in this concept. ICAO, *supra* note 255 at 5.

[264] After discussing four authentic translations of the Chicago Convention, in which the French version stands out from the other three, the judge still relied more on the English version which supports the exclusiveness of taxes from charges. Notably, the judge finally sought a solution through the interpretation of non-discrimination bypassing the issue of telling the difference between taxes and charges.

[265] For all the versions of Doc 9082, see ICAO, "Doc Series", online: <https://www.icao.int/publications/pages/publication.aspx?docnum=9082>. In the ninth and newest edition, which

Doc 9082 substantially extends Article 15's rulemaking rather than only serving as an interpretation because Doc 9082 adds substantial content that is not directly generated from Article 15. For example, Doc 9082 adds an MFN treatment dimension to the non-discrimination principle, which is missing in Article 15.[266] Also, Doc 9082 covers many aspects that Article 15 does not mention, establishing new recommendations to guide contracting states.[267] It is more appropriate to consider Doc 9082 as a rulemaking instrument to substantively extend the scope of non-discrimination as provided in Article 15, rather than to merely regard it as an interpretative supplement to Article 15. However, this rulemaking activity is still non-binding because Doc 9082 is only a guiding policy without any mandatory effect. As it is a recommendation, states have no legal obligation to comply.

In terms of the relationship between Article 15 and Doc 9082, the latter clearly expresses the intent to be compliant with Article 15. The foreword to Doc 9082 generally summarises that "ICAO's commitment in the field of airport and air navigation services charges has its principal origin in Article 15".[268] Doc 9082 also requires that charges should be based on or reflect certain sound accounting or economic principles. These economic principles should be consistent with Article 15. [269] I hold the opinion that Doc 9082 only extends the dimension of the non-discrimination principle but not so far as to issue rules that contradict Article 15. Therefore, Doc 9082 neither distorts nor contradicts Article 15 and is, accordingly, in compliance with the Article.

It is interesting to note that the wording of Doc 9082 in the section on international general aviation slightly changed after the first three editions. The first three editions of Doc 9082 state that

was released in 2012, Doc 9082 first set out a series of general suggestions to be applied to both sectors of airports and air navigation services. These suggestions cover the aspects of autonomy and privatisation of airport operations, economic oversight of airports, and consultation with users. The second part covers some specific issues regarding airport charges, which include the cost basis for charges, directions about charging systems, and some particular aspects of charges (landing, parking, passenger service, security, and environmental charges, etc.) See ICAO, *supra* note 9 at I-1-II–6.

[266] See ICAO, *supra* note 9, s II, art 3(iv).

[267] The author deems that as these provisions carry substantive rules that are not covered by Article 15, they are more than supplementary to Article 15.

[268] ICAO, *supra* note 9 at vii.

[269] See *Ibid*, s II, art 3(iii).

> […] airport charges levied on international general aviation, although needing to respect Article 15 of the Chicago Convention, should be assessed in a reasonable manner, having regard to the cost of the facilities needed and used and the goal of encouraging the growth of international general aviation.[270]

This paragraph implies that a strict interpretation of Article 15 is unreasonable and suggests a flexibly interpretation in a so-called "reasonable manner" to allow for minor inconsistencies in these interpretations of Article 15.[271] Otherwise, there would be no need to intentionally state that Article 15 should be respected by including a clause introduced by the conjunction "although".

When it comes to the fourth and later versions of Doc 9082, the phrase "although needing to respect Article 15 of the Chicago Convention" is deleted.[272] This change seems to suggest that ICAO changed its mind about revisiting Article 15 and reckoned that the Article in itself does not exclude reasonableness. Respecting Article 15 becomes necessary without exception.

2.4.1.1 Disclosure of State Compliance with Doc 9082: A Soft Implementation Approach

To promote state implementation of Doc 9082, ICAO has conducted questionnaire surveys among member states. Through these surveys, ICAO collected information about how states have implemented Doc 9082 via national legislation and regulation. ICAO targets two issues: the cost basis and charging systems for airport and air navigation services.[273] Survey results are accessible as supplements to Doc 9082 as well as reports on implementing recommendations made by conferences that are under the auspices of ICAO.[274] These supplemental documents have two parts:

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[270] ICAO, *Statements by the Council to Contracting States on Charges for Airports and Route Air Navigation Facilities*, 1st ed, Doc 9082-C/1015 (1974), s 9(viii); ICAO, *Statements by the Council to Contracting States on Charges for Airports and Route Air Navigation Facilities*, 2nd ed, Doc 9082/2 (1981), s 14(xii); ICAO, *Statements by the Council to Contracting States on Charges for Airports and Route Air Navigation Facilities*, 3rd ed (1986), s 14(xii).

[271] This reasonable manner considers two elements – the costs of facilities and the growth of international general aviation.

[272] In the ninth edition, this article is expressed as "[a]irport charges levied on international general aviation, including business aviation, should be assessed in a reasonable manner, having regard to the cost of the facilities needed and used and the goal of promoting the sound development of international civil aviation as a whole". ICAO, *supra* note 9, s II, art 3(ix).

[273] See ICAO, *Supplement No. 6 to Doc 9082: ICAO's Policies on Charges for Airports and Air Navigation Services*, Supp No 6 (2010) at the foreword part.

[274] There are six supplements to Doc 9082. The 2010 Supplement No. 6 supersedes previous versions. For all the supplements, see ICAO, *supra* note 265. The 2016 survey followed the recommendation of the Sixth Worldwide Air Transport Conference (ATConf/6). The 2020 survey was triggered by the recommendation of ICAO's 40th Generally Assembly in 2019 to implement ICAO's policies on airport charges. For the two reports, see ICAO Secretariat, "Survey on States' Implementation of ICAO's Policies on Charges for Airports and Air Navigation Services", (23

Part A provides detailed country lists that reveal different levels of adherence by states through their own laws and regulations.[275] Part B publishes responses from contracting states on how their policies adhere to Doc 9082.

The country lists indicate that, although many states answered that they adhered their adherence to Doc 9082, numerous states still have not met ICAO's policies or have failed to respond to their national laws, regulations, and governmental practices. This list reveals that we are far from achieving global adherence to ICAO's recommendations on airport charge governance.

The disclosure of these survey results is a soft approach to implementing ICAO's policies and recommendations by making states' adherence levels transparent to the public. This disclosure generates a deterrence effect, which pushes states to achieve a higher level of adherence recommendations, particularly when a state's under-adherence is compared with other states that closely respect ICAO's recommendations and guidelines in Doc 9082.

2.4.2 Conference on the Economics of Airports and Air Navigation Services (CEANS): A Periodical Revisiting of Doc 9082

As a recurring conference, the main purpose of CEANS is to encourage states to revise and implement ICAO's policies on charges for air transport infrastructures in an attempt to reinforce

October 2020), online (pdf): < www.icao.int/sustainability/Documents/Report_of_Survey_ICAO-policies-on-charges.pdf>; ICAO Secretariat, "Survey on States' Implementation of ICAO's Policies on Charges for Airports and Air Navigation Services", (10 August 2016), online (pdf): < www.icao.int/Meetings/a39/Documents/Survey%20on%20States%20%20Implementation%20of%20ICAOs%20Policies%20on%20Charges%20for%20Airports%20and%20Air%20Navigation%20Services.pdf>.

[275] The supplemental document provides four lists: states who have claimed to have complied with Doc 9082, states that do not or do not fully adhere to Doc 9082, states that do not or partly respond and give no clear indication whether or not they adhere to Doc 9082, and states that fail to respond to the questionnaires at all. Notably, in the second edition of the supplemental document, which was published in 2007, more than half of ICAO's contracting states did not provide any feedback. See ICAO, Secretariat, *Agenda Item 4: Implementation of ICAO's Policies on Charges*, Working Paper No 17 (CEANS-WP/17) (2008), s 2.2. All these questionnaires focus on two essential issues on airport charges – the costs basis and the adopted system of airport charges.

state accountability in the governance of airport charges.[276] At the most recent conference, in 2008, three out of four conference agenda items related to the regulation of airport charges.[277]

In the first agenda item regarding the relationship between states, airports, and users, the conference brought in states as an important actor to facilitate the economic oversight of airport charges. The conference's report, based on suggestions by different stakeholders,[278] made a formal recommendation that economic oversight of airport charges should be a state responsibility because there is a risk that airports may abuse their dominant position if they are responsible.[279]

Among others, the conference in 2008 discussed the implementation of ICAO's policies on airport charges. The participating states made two unanimous observations, setting boundaries and shed light on ICAO's future regulatory solutions towards airport charges. The first observation was that the mandatory requirement for contracting states to notify ICAO their deviations in implementing norms from ICAO's relevant policies, as has been adopted in ICAO's Standards and Recommended Practices,[280] does not apply to airport charges. This is because airport charges by its nature are an economic matter,[281] but the ICAO's Standards and Recommended Practices usually apply to safety and security aspects. A proper alternative would be voluntary surveys, through which states can choose to notify ICAO of their compliance with ICAO's policies and guidance materials.[282] This recommendation is in line with ICAO's continuous practice.

The second observation was that air services agreements can be adopted to set out some basic rules regarding airport charges. The use of air services agreements to incorporate airport charges

[276] See Ruwantissa Abeyratne, "The ICAO Conference on the Economics of Airports and Air Navigation Services" (2009) 34:1 Air and Space Law 39–47 at 47; Conference on the Economics of Airports and Air Navigation Services, *Report of the Conference on the Economics of Airports and Air Navigation Services (CEANS)*, Doc 9908 (2008), s 1.1.1.
[277] The three relevant agenda items are "issues involving interaction between states, providers and users", "specific issues related to airport economics and management", and "implementation of ICAO's policies on charges". For all the detailed discussions, lists of participants, working papers, and addresses, see Conference on the Economics of Airports and Air Navigation Services, *supra* note 276.
[278] Stakeholders that addressed their opinions regarding this matter include Uganda, the U.S., 53 African states, UNWTO, IAC, ACI, IATA, ITF, Mali, the Republic of Korea, and the Secretariat of ICAO. See *Ibid*, s 1.1.1.
[279] See *Ibid*, s 1.1.3.1.
[280] SARPs will be discussed in Chapter 7.
[281] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276, s 4.2.4.
[282] See *Ibid*.

regulation means that ICAO is open to a contractual approach in airport charges regulation because these air services agreements are contracts in nature.

2.4.3 ICAO's Consolidated Statement of Continuing ICAO Policies in the Air Transport Field

At every Assembly, ICAO revises their Resolution entitled the "Consolidated Statement of Continuing ICAO Policies in the Air Transport Field".[283] Appendix C of this Resolution, "Airports and Air Navigation Services Economics", delivers two important messages. It first points out the fundamental status of Article 15 of the Chicago Convention and Doc 9082. Article 15 serves as "the basis for the application and disclosure of charges for airports and air navigation services;"[284] therefore this Article should be fully respected.[285] Moreover, states are urged to follow the principles in both Article 15 and Doc 9082 as the basis for recovering costs.[286] This Appendix encourages states to adopt the four fundamental principles, i.e., transparency, cost-relatedness, non-discrimination, and consultation, as prescribed in Doc 9082, in national legislation, regulation, and policies, as well as air services agreements.[287]

Second, it illustrates ICAO's suggestion that states should consider contracts as an effective tool in regulation. For regulatory forms, in addition to the traditional regulatory instruments like laws, regulations, and policies, contracts can play a role. One possible channel of contracts is in an air services agreement.[288] This agreement embraces ICAO's emphasis on establishing "sound cooperation" between airport users and providers.[289]

2.4.4 ICAO's Airport Economics Manual

Similar to the Consolidated Statement of Continuing ICAO Policies in the Air Transport Field, the Airport Economics Manual has a similar function to clarify Article 15 and Doc 9082. This purpose

[283] The most recent version of this resolution supersedes previous ones. Until 2021, the up-to-date version of this Resolution is incorporated in ICAO's 40th Assembly Resolution, see *Consolidated statement of continuing ICAO policies in the air transport field*, ICAO Assembly Res A40-9, 4 October 2019, ICAO Doc 10140 at III-1 [*ICAO Res A40-9*].
[284] *Ibid* at Appendix C, s I.
[285] See *Ibid* at Appendix C, s I(1).
[286] See *Ibid* at Appendix C, s I(2).
[287] See *Ibid* at Appendix C, s I(5).
[288] See *Ibid* at Appendix C, s I(5).
[289] See *Ibid* at Appendix C, s I(8).

is visible according to the objective,[290] the scope,[291] and sources[292] of the manual. This manual clarifies these two documents strategically. Rather than restating the provisions of Article 15 and Doc 9082 verbatim, this manual picks the parts that are current major concerns, pointing out ICAO's analytical and timely response. I will now look at two important aspects in detail.

2.4.4.1 State Responsibility in Preventing Airports from Abusing Market Power

Following the 2008 CEANS, the Airport Economics Manual further demonstrates states' responsibility in protecting airport users against airports' abuse of market power.[293] In addition to Article 15, Article 28 of the Chicago Convention, which address states' responsibility to offer airport services, is also introduced to justify states' responsibility in preventing the abuse of airport market power.[294] The rationale behind referencing this Article could be that reasonable charges are a reflection of reasonable services. If so, the responsibility to provide reasonable services implies that charges should remain at a relevant and reasonable level.

Additionally, in regard to a contractual approach, this manual sees air services agreements as an important channel to incorporate state responsibility.[295]

The notion of state responsibility refers to a ground for states to conduct the economic oversight of airports.[296] This Airport Economics Manual discusses many forms of regulation, i.e., by competition law, fallback regulation, institutional requirements, price cap regulation, and rate of return regulation.[297] These approaches are discussed in the Manual as specific paths for a state to assume responsibility in preventing the abuse of an airport monopoly in charge setting.

2.4.4.2 Consultation and First-Resort to Achieve Balanced Interests

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[290] The objective is to provide guidance to states, airport services providers, and their users to implement Doc 9082. See ICAO, *supra* note 237 at foreword, s 2.
[291] The principles and policies, which serve as the basis of the manual in its beginning, are set out in Article 15. Doc 9082 provides extensive guidance to them. See *Ibid* at foreword, s 3.
[292] The main references of this manual are Doc 9082, the second edition of this manual, the Report of the Conference on the Economics of Airports, Air Navigation Services, and the Manual on Air Navigation Services Economics (Doc 9161). See *Ibid* at foreword, s 6.
[293] See *Ibid*, ss 1.19-1.22.
[294] "Each contracting [s]tate undertakes … to: (a) [p]rovide, in its territory, airports… services…to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention…" *Chicago Convention*, *supra* note 213, art 28.
[295] See ICAO, *supra* note 237, s 1.22.
[296] See *Ibid*, ss 1.23-1.57.
[297] See *Ibid*.

To share benefits among all stakeholders in the air transport industry, ICAO aims to balance the interests between airports and their users.[298] The Airport Economics Manual proposes two procedural mechanisms to reach this goal: consultation and a possible first-resort.[299]

Consultation helps an airport operator and airport users reach an agreement before the decisions of airport charges are made. This mechanism usually "starts with advance notice of proposals".[300] An agreement between different parties can well respond to this pursuit in that an agreement indicates how negotiating parties consent on the distribution of interests. Accordingly, one can assume that concluding an agreement is a realistic way to meet all parties' needs. Although the result of a responsive consultation process does not necessarily behave as an agreement, consultation does function similarly to an agreement as both aim to get the parties to exchange information in order to reach information symmetry. That is, a consultation is a way for both parties to express what they want and need, similar to how they would proceed with an agreement.[301]

The Airport Economics Manual describes the first-resort mechanism as an "expeditious national treatment of complaints", which "pre-empt and resolve disputes before they enter the international arena" at the national level.[302] In order to be credible, a first-resort mechanism needs to be independent from the airport sector[303] and can be used "for the fact-finding investigation, including determination of the substance of the dispute or for providing a recommendation to remedy the dispute".[304] Doc 9082, at section I(22), already recommended that states should introduce a first-resort mechanism, which should be modelled on conciliation and mediation rather than arbitration. It should be noted that, although the Airport Economics Manual adds some extra guidelines to Doc 9082, it does not provide detailed suggestions on how states can establish and implement a first-resort mechanism.

[298] See *Ibid*, s 1.72.
[299] These mechanisms are written in part D of this manual's first chapter, see ICAO, *supra* note 237, ss 1.58-1.73.
[300] *Ibid*, s 1.64.
[301] "The key purpose of consultation with users is to ensure that the needs and wishes of users are considered in the context of the airport's plans to meet them". *Ibid*, s 1.59.
[302] See *Ibid*, s 1.72.
[303] See *Ibid*, s 1.71.
[304] See *Ibid*, s 1.54.

2.5 The Three-Tier Structure of the International Regulatory Framework on Airport Charges

After exploring various levels of norms on airport charges in an international dimension, I find that this regulatory framework has a three-tier structure. The first tier is Article 15, which is legally binding and, therefore, is the most important rule. This Article serves as the foundation of the framework. It is legally binding and, thus, is the most important rule.[305]

However, Article 15 is still too vague. First, it leaves the MFN dimension of non-discrimination unexpressed. Second, it lacks a binding conceptual distinction between taxes and charges, and thereby, as discussed previously, the absence of restriction on adopting taxation as a revenue stream in airports generates unwanted results.

Doc 9082 is in the second tier. Despite the lack of a binding effect, Doc 9082 is a key instrument and at the centre of the framework because it makes Article 15 more practical and the CEANS and the Airport Economics Manual are based on Doc 9082. It possesses the nature of rulemaking for several reasons. First, it sets out many substantial new rules, rather than only repeating Article 15. Specifically, in response to the partial understanding of non-discrimination in Article 15, Doc 9082 extends the understanding to also cover the MFN dimension. Doc 9082 also fills the loophole left by Article 15 regarding the conceptual distinction between charges and taxes. However, in terms of restricting the proliferation of taxation abuse on airports, Doc 9082 fails to make any explicit recommendation.

Second, ICAO makes efforts to implement Doc 9082 though this guidance material does not have any legally binding effect. ICAO imposes pressure on contracting states to adhere to Doc 9082 by collecting feedback from states regarding how they have adhered to Doc 9082 and then reporting it to the public.[306] Since the ICAO has no binding effect[307] from its policies, their strategy of sharing information enhances states' transparency regarding ICAO's policies on airport charges

[305] Although Article 28 does not regulate airport charges, this article is relevant because it requires that airport services should not be below the standards designated by ICAO. See *Chicago Convention*, *supra* note 213, art 28.
[306] ICAO continuously conducted six questionnaires between 2004 and 2010, indicating its close attention to the regulation of airport charges. This activity has the effect of monitoring the adherence of national laws and regulations to ICAO's policies and urging these states to modify inconsistent provisions.
[307] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276, s 4.2.1.

regulation. The attempt to implement Doc 9082 reveals ICAO's expectation that this guidance material functions as *de facto* binding norms.

The CEANS and the Airport Economics Manual sit in the third tier. Both instruments clarify and elaborate on some significant aspects of Doc 9082.

One downside of this ICAO-led international framework is the lack of binding effect. Except for Article 15 of the Chicago Convention, this framework is voluntary, and, therefore, does not guarantee state adherence.[308] Bilateral and multilateral air services agreements concluded between states may offer a solution. ICAO's Consolidated Statement of Continuing ICAO Policies in the Air Transport Field, the CEANS in 2008, and the Airport Economics Manual all embrace the employment of air services agreements in incorporating basic principles of airport charges as reflected in Doc 9082. Agreements thereby can serve as a flexible regulatory approach with wide support from different states. The 2008 CEANS refers to relevant provisions in the 2007 U.S.-EU Air Transport Agreement as models of regulation by agreements.[309] Article 1 of this agreement defines user charges as an exchangeable reference to airport charges.[310] Article 12 sets four basic principles in regulating airport charges emanating from Article 15 and Doc 9082: non-discrimination, cost-relatedness, transparency, and consultation.[311] That said, as noted, a part of this is on a suggestive footing.

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[308] These policies can impose lasting influence over contracting states or even non-contracting states in terms of their modelling function. States can create new laws, regulations, and policies based on these existing templates.

[309] See France et al, *Agenda Item 4: Implementation of ICAO's Policies on Charges*, Working Paper No 87 (CEANS-WP/87) (2008), Appendix.

[310] See *Ibid* at Appendix, art 1.

[311] Article 12 stipulates:

> 1. User charges that may be imposed by the competent charging authorities or bodies of each Party on the airlines of the other Party shall be just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users. In any event, any such user charges shall be assessed on the airlines of the other Party on terms not less favorable than the most favorable terms available to any other airline at the time the charges are assessed.
>
> 2. User charges imposed on the airlines of the other Party may reflect, but shall not exceed, the full cost to the competent charging authorities or bodies of providing the appropriate airport, airport environmental, air navigation, and aviation security facilities and services at the airport or within the airport system. Such charges may include a reasonable return on assets, after depreciation. Facilities and services for which charges are made shall be provided on an efficient and economic basis.
>
> 3. Each Party shall encourage consultations between the competent charging authorities or bodies in its territory and the airlines using the services and facilities, and shall encourage the competent charging authorities or bodies and the airlines to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles of paragraphs 1 and 2 of this Article. Each Party shall encourage the competent charging authorities to provide users with reasonable

2.6 Unveiling the Four Basic Principles

Basic principles provide general guidelines in the regulatory process. For aviation infrastructure, basic principles on airport charges incorporated by laws and regulations enhance certainty and lessen abusive discretion.[312] Basic principles embrace natural law, and they can play a role in the regulatory process in at least three aspects.[313] First, they serve as rules to regulate charges. Second, they also serve as standards in evaluating laws and regulations. For example, we can evaluate if particular laws and regulations are consistent with the requirements of the principles. Third, they help evaluate the implementation of airport regulation in practice.

The four basic principles are non-discrimination, cost-relatedness, transparency, and user consultation. They were officially recognised for the first time by the 2008 ICAO CEANS conference,[314] but some had already appeared in ICAO's early-stage documents, e.g., some initial versions of Doc 9082.[315] Following the 2008 CEANS conference, as an endorsement, ICAO later

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notice of any proposal for changes in user charges to enable users to express their views before changes are made.

4. Neither Party shall be held, in dispute resolution procedures pursuant to Article 19, to be in breach of a provision of this Article, unless (a) it fails to undertake a review of the charge or practice that is the subject of complaint by the other Party within a reasonable amount of time; or (b) following such a review it fails to take all steps within its power to remedy any charge or practice that is inconsistent with this Article.

Ibid, Appendix, art 12.

[312] See Brenda Marshall, "Pricing Third Party Access to Essential Infrastructure: Principles and Practice" (2005) 24 Australian Resources & Energy LJ 172 at 175.

[313] The natural law theory has a long history. It dates back to great philosophers including Plato, Aristotle, Cicero, Aquinas, and others. Recent jurists, including Ronald Dworkin, hold a natural law perception of law. In spite of the variations of the legal law theory, a common understanding is that law and morals are relevant. It has been observed that the modern natural law theory tends to criticize legal positivism, which generally believes that laws are rules enacted by legislators. See generally Brian Bix, "Natural Law Theory" in *A Companion to Philosophy of Law and Legal Theory*, 2nd ed (Wiley Online Library, 2010) 211. Although regulatory practices vary among jurisdictions, the relatively universal feature of principles, underpinned by the natural law theory, points out merits that various jurisdictions should have in common. These principles thus provide a general direction to regulation that can be widely applied by states and non-state actors.

[314] These are initially recognised as four basic principles in the final report of the 2008 CEANS conference. The conference made formal recommendations that ICAO should encourage states to incorporate the four principles mentioned above. See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276, s 4.3.1. The EU, the European Civil Aviation Conference (ECAC), and the U.S. jointly put forward the proposal to give more weight to these principles by implementing them as legal obligations. See generally France et al, *supra* note 309.

[315] For example, the first edition of Doc 9082 recommends an ideal mode that a reasonable margin exceeding all direct and indirect costs may sustain the long-term management of airports. This reasonable margin beyond all costs implies a requirement to relate to costs. See ICAO, *supra* note 270, s 9(v).

This document also recognises non-discrimination of charges between foreign users, and between foreign and domestic users. See *Ibid*, s 10(iii).

reformulated Doc 9082 (the ninth edition), addressing the four basic principles and encouraging states to incorporate them in their laws, regulations, policies, and agreements.[316]

2.6.1 Non-Discrimination

2.6.1.1 Non-Discrimination and Differential Charges

This chapter has already addressed the significance of non-discrimination in Article 15 of the Chicago Convention.[317] Thus, non-discrimination was recognised as a pillar to airport charges regulation earlier than the other three principles. Arguments among airport stakeholders indicate that most issues in applying non-discrimination relate to differential charges, especially when it comes to state-aids.[318] In practice, differentiated charges usually take the form of a discount for introductory services established by airlines (which are also recognised as the start-up aid), charges by different time slots (peak/off-peak), rebate by volumes, and lower prices that are offered in terminals targeted at low-cost carriers.[319]

2.6.1.2 Justifying Non-Discriminatory but Differential Charges

Though discrimination may be found in the form of differential charges, they do not necessarily violate the principle of non-discrimination. On the contrary, differential charges can benefit airport economics.[320] ICAO, represented by its secretariat, neutrally views differential charges as a whole and does not prohibit charges that are outside a unified system in a one-size-fits-all manner. One can consider differential charges as a double-edged sword, in that they can both enhance the economy or distort the competition depending on how they are applied.[321]

To align with non-discrimination, differentiated prices should be restricted under certain conditions rather than prohibited. To do so, the costs connected with differential charges should

[316] See ICAO, *supra* note 9, Foreword at para 1.
[317] See Section 2.1.2.
[318] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276, s 2.4.
[319] See ICAO Secretariat, *Agenda Item 2: Specific issues Related to Airport Economics and Management*, Working Paper No 10 (CEANS-WP/10) (2008), s 2.1.
[320] An example is peak/off-peak pricing. To charge different fees at different time slots can improve airport capacity efficiency. See *Ibid*, s 2.2. Some economic-political studies on airport management also support this conclusion. See e.g. David Gillen & Hans-Martin Niemeier, "The European Union: Evolution of Privatization, Regulation, and Slot Reform" in *Aviation Infrastructure Performance: A Study in Comparative Political Economy* (2008).
[321] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276, s 2.4.

not be transferred to other users who do not enjoy the benefit of a discounted charge.[322] Incentive charging plans that are aimed at attracting and maintaining new air services, namely start-up aids or incentive schemes, should only be available for a temporary period.[323] This time limit also functions as a catalyst to benefit the airport sector.[324] Competent authorities should screen differential charges on a case-by-case approach.[325]

Two significant grounds that justify differential but non-discriminatory charges are the public interest and user equality. Start-up aid provided for airlines to establish new routes in remote areas under the EU Guidelines on State Aid to Airports and Airlines demonstrates this well.[326] A legitimate start-up aid under the Guidelines must demonstrate a "well-defined objective of common interest" by fulfilling one of the two requirements: "(a) increases the mobility of Union citizens and the connectivity of the regions by opening new routes; or (b) facilitates regional development of remote regions".[327] Both have a robust social welfare character, and the required "common interest" herein can be recognised as public interest. Because this common/public interest directly benefits the whole European community,[328] such aid will serve as a common good for all, rather than for any individual airport user.

Another justifying ground is user equality. All users should be subject to the same set of standards and compete equally for the chance to establish new routes and receive aid. This requirement

[322] See ICAO, *supra* note 9, s II at para 3(v).
[323] See *Ibid*; Conference on the Economics of Airports and Air Navigation Services, *supra* note 276, s 2.7; ICAO, *supra* note 237, Chapter 2, s 4.139(d). This time limit can be exempted when airports are "essential air services of a public or social service nature that a [s]tate may consider needs to be provided and where the market may not have sufficient incentive to do so, for example, lifeline air services for remote or peripheral destinations". ICAO, *supra* note 237, Chapter 2, s 4.139(d).
[324] It incentivises an airport operator to enhance management for a stable and prosperous market.
[325] See ICAO, *supra* note 9, s II at para 3(v). Regarding the above-discussed restrictions, the Airport Economics Manual summarises four safeguarding standards to combat negative effects by imposing differential charges, namely, non-discrimination, transparency, no cross-subsidisation, and time-limitation. Some of these standards overlap with the four principles discussed in this section. See ICAO, *supra* note 237, s 4.139.
As non-discrimination is listed as a standard to evaluate differential charges, policymakers will not equalise differential and discriminatory charges, which violate national treatment or MFN treatment. Some differential charges, for example, an incentive plan, give favourable conditions to services that develop the common interest of a community.
[326] An airline-focused aid is in the form of deduction to up to 50% of airport charges of a route for at most three years. This aid has an incentive feature. See European Commission, *Communication from the Commission — Guidelines on State aid to airports and airlines*, [2014] OJ, C 99/3 at para 150.
[327] *Ibid* at para 139.
[328] Once new routes are established or remote areas are connected, all European presidents, including non-European citizens, who can legally move across borders, can benefit from the air services.

resonates with how participating states of the 2008 CEANS Conference interpreted the non-discrimination requirement in Article 15. A working paper on differential charges for the CEANS conference elaborates that non-discrimination is implemented in a way that "all categories of users meeting the same criteria and offering the same or similar air services should be treated equally".[329] In short, if the opportunity for all subjects to potentially benefit from aid would be equal, a star-up aid would not be discriminatory. The Guidelines on State Aid to Airports and Airlines demonstrates this point by restricting the implementation of start-up aid that "in order to limit further the distortions of competition, the airport must be open to all potential users and not be dedicated to one specific user".[330]

In sum, a differential charge, which is usually a sign of violating non-discrimination, remains insufficient by itself as a behaviour to violate this principle. Differential charges should not be prohibited completely. Some necessary restrictions, like time-limitation, case-by-case review, no burden transferred to other airport users, and no cross-subsidisation can provide legitimacy. States can consider using public interest and user equality as two justifications for differential but non-discriminatory charges in legislation or policy-making.

2.6.2 Consultation

As a procedural requirement, consultation enables mutual understanding and consensus on service performance objectives, levels, and detailed schemes.[331] It primarily aims at thorough information exchange between airports and users. In this process, the demand side will well receive the proposals from the supply side, and the supply side in turn will understand the considerations of the demand side.[332] To implement this principle effectively, one should make clear two issues, namely: which actors should participate in the consultation and at which level a consulting result should be reached.

2.6.2.1 Parties Participating in Consultation

The two core participants in a consultation should be decision-makers and the users. Decision-makers should be involved as they will have an ultimate say in charge setting. However,

[329] ICAO Secretariat, *supra* note 319, s 2.5. The Airport Economics Manual endorses this definition. See ICAO, *supra* note 237, s 4.139(a).
[330] *Communication from the Commission — Guidelines on State aid to airports and airlines*, *supra* note 326 at 133.
[331] See ICAO, *supra* note 9, s I at para 16.
[332] See *Ibid*, s I at para 18.

they are not necessarily airport operators. It is vital to identify which party is in command in the process. This chapter suggests reformulating the issue in two different situations. When airport operators have the power of charge setting, consultation should start with a bi-party modality. Whereas, if it is an external regulator or a regulatory agency that has the mandate to set charges, the consultation process should have at least a tri-party structure, including this decision-maker, the airport operator, and users.

ICAO's guidance materials fail to address both situations properly, but especially for the tri-party situation. Its policies are clear that governmental regulators, as a party different from airport operators, should be involved in the consultation process, but these policies fail to establish detailed rules in a tri-party situation. They only address a bi-party structure.[333]

2.6.2.2 Including Passengers (End-Users) as Users

Another issue is who are users. Current policies, which guide potential legislation, fail to address passengers as end-users in consultation. As early as 2008, some states at the CEANS conference proposed to add passengers and other possible end-users to the consultation process.[334] States at the CEANS proposed that parties only put the word "users" in the consultation part of the CEANS report. However, the CEANS proposed a soft approach, only considering the interest of passengers and other end-users in a general public policy context, but not in the consultation context.[335]

Consistent with this limited scope of users, ICAO, in the latest version of Doc 9082 in 2012, only addresses that "users" are to be consulted, without clarifying that users include passengers and other end-users.[336] The observation that the word "users" adopted in Doc 9082 excludes passengers is consolidated by the Airport Economics Manual, which purports to interpret and implement Doc 9082.[337] The manual divides users and end-users into two different concepts, in which the former refers to aircraft operators, while the latter refers to "ultimate consumers in general".[338] Assuming that this series of referred policies do not contradict each other, it is arguable

[333] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276, s 1.3; ICAO, *supra* note 237, ss 1.62-1.69.
[334] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276, s 1.3.2.3.
[335] See *Ibid*.
[336] For the consultation part, see ICAO, *supra* note 9, s I at paras 17-22.
[337] See ICAO, *supra* note 237, s 2.
[338] *Ibid* at xv.

that ICAO recommends that passengers be excluded from the consultation process, making the participants incomplete.

2.6.2.3 Responsibility for Effective Response as a Standard of Consultation

There is no mandatory result that the consultation procedure should reach. Consultation is voluntary, so that when parties fail to reach agreement, the party entitled to set charges can determine charges unilaterally.[339] A downside herein is that the opinions of stakeholders may be virtually ignored, and the consultation process may lack the power to reach a substantive outcome. Hence, ECJ cases have confirmed that consultation should be "genuine",[340] even if participating parties fail to reach any agreement. One way to ensure that consultation is "genuine", as addressed in the case Deutsche Lufthansa AG v Land Berlin on charges consultation, could be that the decision-maker be obliged to "justify its decision with regard to the views of the airport users in the event that no agreement on the proposed changes is reached between the airport managing body and the airport users".[341]

The requirement to offer justification is important. It can be seen as an obligation for decision-makers to respond to users' opinions in a transparent (publicly accessible) way. This solution furthers the provision of substantive feedback subject to public supervision. In comparison, Doc 9082 only addresses the responsibility of decision-makers to respond less effectively, opining that decision-makers should provide the rationale for decisions.[342] As the rationale behind decisions is not direct responses to concerns raised by users, these concerns that require addressing may be disregarded.

2.6.3 Transparency

2.6.3.1 Transparency in a Wider Context

[339] See ICAO, *supra* note 9, s I at para 18.
[340] IATA, "Why an ECJ airport charges judgement could be a game-changer", (22 November 2019), online: <https://www.airlines.iata.org/blog/2019/11/why-an-ecj-airport-charges-judgement-could-be-a-game-changer>.
[341] *Deutsche Lufthansa AG v Land Berlin*, C-379/18, [2019] ECLI:EU:C:2019:1000 at para 7.2.
[342] See ICAO, *supra* note 9, s I, para 21(iv).

Many areas other than the aviation field embrace the principle of transparency.[343] By understanding the meaning of transparency in these regimes, one can understand this principle in the big picture. As Andrea Bianchi put it, the pursuit of transparency comes from an intrinsic desire of beings and is "part and parcel of our perennial quest for truth, the quest for the Holy Grail of good governance and democratic rule, legitimacy and accountability, justice and fairness to all".[344]

Accordingly, transparency – the right to information – contributes to the public interest component. The renewed discussion of confidentiality in arbitration serves as an example with twofold illustrations. First, the Mauritius Convention on Transparency and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration collegially provide instrumental support to transparency in investment arbitration.[345] Second, the "national interest exception," based on the consideration of externalities in economics, can be upheld even in commercial arbitration.[346] Ralf Michaels calls such access to information a public good within arbitration.[347]

Another instance is the regulation of the financial market, particularly the regulation of standardised over-the-counter derivatives contracts. The G20 leaders, right after the 2008 economic recession, proposed that market actors trade derivatives contracts through organized platforms, such as exchanges or electronic platforms, to enhance trading transparency.

[343] Transparency is a common pursuit in many fields, for example, international environmental law, in the form of emerging transparent instruments adopted by international environmental institutions, and international economic law, in the form of the transparency principle in WTO law that allows states to see how the trade agreements are implemented. See generally Robert Wolfe, "Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life" (2013) World Trade Organization, Staff Working Paper No ERSD-2013-03. Transparency also exists in international human rights law, where the right to courts, particularly to judicial reasoning, increasingly has a human rights characteristic, which can be found in some cutting-edge issues like transparency in adjudication and international law-making. See generally Andrea Bianchi & Anne Peters, *Transparency in International Law* (Cambridge University Press, 2013).

[344] Andrea Bianchi, "On Power and Illusion: The Concept of Transparency in International Law" in *Transparency in International Law* (Cambridge University Press, 2013) at 19.

[345] See *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, 10 December 2014, I-54749 at art 1 (entered into force 18 October 2017) [*Mauritius Convention on Transparency*]; UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (entered into force 1 April 2014), online: <https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency>.

[346] Andrew Tweeddale, "Confidentiality in Arbitration and the Public Interest Exception" (2005) 21:1 Arbitration International 59–70 at 59; Ralf Michaels, "International Arbitration as Private or Public Good" (2017) (Duke Law School Public Law & Legal Theory Series No. 2017-57) at 21.

[347] Michaels, *supra* note 346 at 20–22.

Transparency, as expected, mitigates information asymmetry, by which the dealer banks may generate "market abuse".[348]

2.6.3.2 Transparency in Airport Charges Regulation

ICAO outlines the implications of transparency by contextualising it in the arguments over the other three principles, which implies interdependence amongst them. A similar mode of comprehension is also reflected by some studies.[349] In discussing the requirement of consultation, ICAO recognises transparency as a premise for effective consultation. It ensures that users are provided with "transparent and appropriate financial, operational and other relevant information to allow them to make informed comments" when a revision of charges or an imposition of new charges will take place.[350] When recommending restrictions to secure differential charges on a non-discriminatory basis, three suggested factors in materializing transparency are the creation, the purpose, and the criteria on which the charges are determined.[351] Also, the transparency of the allocation of charges undeniably enables the supervision of cost-relatedness, at least to the users' end. Transparency on charges partly reflects on transparent accountancy regarding airport finance. Specifically, costs, revenues, and possible (cross-)subsidies should be explicit.[352]

Airport charges and the above-discussed regimes have a public-interest attribute in common. Some may challenge this conclusion by arguing that the affected users, airlines and passengers, are a limited group. However, users can extend to the entire public. Any potential airline may become a new user of an airport, and any uncertain individuals may become passengers using the airport. Consequently, the public interest standpoint, as adopted in many fields, likewise justifies the need for transparency in the governance of airport charges.

Transparency reinforces the other three principles. By disclosing the cost structure and other necessary information, transparency functions as an instrumental guarantee and a concrete way to strengthen the principles of cost-relatedness, non-discrimination, and informed consultation.

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[348] Eric Helleiner, Stefano Pagliari & Irene Spagna, *Governing the World's Biggest Market: The Politics of Derivatives Regulation After the 2008 Crisis* (Oxford University Press, 2018) at 4.
[349] Christian Koenig & Franziska Schramm, "The Regulation of Airport Charges" (2014) 2:3 Eur Networks L & Reg Q 220 at 221.
[350] See ICAO, *supra* note 9, s I at para 21(ii).
[351] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276, s 2.4.3.1(b).
[352] Ruwantissa Abeyratne, *Law and Regulation of Aerodromes* (Springer, 2014) at 127.

2.6.4 Cost-Relatedness

2.6.4.1 Meaning

Doc 9082 addresses the concept of cost-relatedness as follows:

> The cost to be allocated is the full cost of providing the airport and its essential ancillary services, including appropriate amounts for cost of capital and depreciation of assets, as well as the costs of maintenance, operation, management and administration. Consistent with the form of economic oversight adopted, these costs may be offset by non-aeronautical revenues.[353]

Some scholars read this as saying that charges are a result of enough, but not excessive revenues that can cover total costs.[354] Doc 9082 suggests levying charges based on services and functions that are "directly related to, or ultimately beneficial for, civil aviation operations".[355]

As this principle requires that charges should reflect incurred costs,[356] a consequent question is: what is the scope of charges? In addition to the above-listed items categorised in Doc 9082, a reasonable rate of return on capital should also be considered as a part of costs.[357] Since revenues should not overly exceed costs, this rate of return should remain at a due and minimum level.

A structural choice between a single-till mode [358] and a dual-till mode [359] can affect the implementation of this principle. Under the single-till mode, non-aeronautical revenues are counted as part of the overall airport income, leading to the subsidisation of aeronautical costs. Consequently, the charges under a single-till mode may not reflect real costs. By contrast, the dual-till mode stays more consistent with cost-relatedness, albeit with possible deviant situations.[360]

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[353] ICAO, *supra* note 9, s II at para 2(i). This definition is also stated in ICAO, *supra* note 237, s 2.37.
[354] Uwe Kratzsch & Gernot Sieg, "Non-Aviation Revenues and Their Implications for Airport Regulation" (2011) 47:5 Transportation Research Part E: Logistics and Transportation Review 755–763 at 759.
[355] ICAO, *supra* note 9, s I at para 2(i). If the charges are related to airport operation, it is reasonable to conclude that charges are also related to the costs derived from such operation. The expression "ultimately beneficial" is also constructive as it provides legitimacy for airport pre-funding under the cost-relatedness principle. In other words, when a charge is for future benefits, it is still related to costs.
[356] See Gillen & Niemeier, *supra* note 320 at 46.
[357] See *Ibid* at 45.
[358] In a single-till mode, revenues from non-aeronautical activities will be considered when calculating the rate of airport charges. See generally Varsamos, *supra* note 20.
[359] A dual-till mode requires the consideration of aeronautical charges and non-aeronautical revenues to be separate with no subsidisation between both sectors. See *Ibid*.
[360] Stamatis Varsamos, *Airport Competition Regulation in Europe* (Den Haag: Kluwer Law International, 2016) at 69.

Some studies that examine cost-based regulation observe two issues in implementation: (1) the lack of an incentive to cut down costs may cause suboptimal decisions about inputs;[361] (2) the price-structure could lose efficiency.[362]

2.6.4.2 Insufficient Funding as a Challenge

Non-compliance often happens in the wake of insufficient funding, which is a key factor for airport operation. Represented by Brazil, some states report that the application of this principle is inadequate to generate sufficient funding.[363] This reason particularly explains the situation for developing countries that require massive capital investment.[364] The UK incorporates this principle by still making it defeasible that other objective justifications may prevail over it.[365]

To solve the problem of insufficient funding, some states may choose an airport management structure on a collective basis. As observed by the Airport Economics Manual, there are three methods using this structure at a national level, namely, airport system basis, airport network basis, and a combination of both.[366] An airport system basis means that two or more airports that serve the same metropolitan area are owned or controlled by one entity.[367] An airport network basis means that all or some airports nationally are owned or controlled by one entity.[368] At an international level, a similar ownership or control structure can happen among several airports located in different countries.[369]

From a cost-relatedness perspective, the application of the above strategies could mean an explanation of the principle of cost-relatedness on an airport network basis that is different from that on an individual airport basis. One in favour of a collective airport basis can argue that cost-

[361] The charges are set to only cover any increase in costs; profits will not be involved as a motivating factor in optimising operation. See Gillen & Niemeier, *supra* note 320 at 46.
[362] Cost-based regulation may calculate charges based on average costs, but this practice ignores the strategic importance of peak and congesting pricing. As a substitute, weight-related charges, which mean that charges will be calculated according to the aircraft weight, will apply, for example, four busy airports in Europe, i.e. Düsseldorf, Frankfurt, Madrid, and Paris Orly airports. *Ibid*.
[363] See ICAO Secretariat, *supra* note 274, s 6.2.
[364] See *Ibid*, s 4.2.
[365] See *Ibid*, s 3.4.
[366] See ICAO, *supra* note 237, s 2.35.
[367] See *Ibid*.
[368] See *Ibid*.
[369] See *Ibid*, s 2.38.

relatedness could mean that costs could be accounted collectively among all airports in the same system, network, or group. And airport charges can be related to costs calculated as such.

Some advantages of a collective airport basis include benefits brought by the economies of scale and those brought to small airports.[370] Opponents against this basis primarily criticise that profit shifting from profitable to non-profitable airports forms cross-subsidisation, which violates cost-relatedness when interpreted on an individual airport basis.[371] Brazil's response to the legal survey regarding the adherence of domestic legislation to ICAO's materials on airport charges holds this position.[372]

This argument reveals tension between the interpretation of cost-relatedness on an individual airport basis and the management of airports on a collective basis. ICAO also notes this controversy. However, ICAO does not show a clear position to support or stand against a collective basis, but suggests that interests between airports and users should be balanced.[373] On the one hand, ICAO recognises that cross-subsidisation between airports in a national network could be detrimental to the interests of airport users.[374] On the other hand, they seem to legitimise this scenario with the assumption that the principle of transparency is respected.[375]

Although there is no fixed answer to this question, one should be cautious when choosing a collective airport basis for the risk of non-compliance with the cost-relatedness principle. Financial sustainability is a significant condition of effective implementation of the principle of cost-relatedness. Future research may focus on how to reconcile compliance with the cost-relatedness principle and the requirement for sufficient capital.

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[370] See *Ibid*, s 2.36.
[371] See *Ibid*, s 2.37. When one considers operating and managing airports under the same network as a solution to insufficient funding, airlines criticise that airport operation in a network violates the cost-relatedness requirement, because it may generate cross-subsidy between airports, making it impossible to make a clear break-down of costs on an individual airport basis. See Varsamos, *supra* note 360 at 70. People that are against cross-subsidy between airports argue that if the subsidy is for national planning, it is states rather than other airports that should pay for the costs. See ICAO, *supra* note 237, s 2.37.
[372] In answering the survey on states' adherence to ICAO's policies on airport charges, Brazil identified itself as non-compliant with cost-relatedness for the cross-subsidy among airports to levy insufficient charges to cover operational costs. In other words, Brazil interpreted the cost-relatedness principle in an opposite position of cross-subsidisation. See ICAO Secretariat, *supra* note 274 at Appendix B, s 1.3(b).
[373] See ICAO, *supra* note 237, s 2.39.
[374] See *Ibid*.
[375] See *Ibid*.

2.7 The EU Airport Charges Directive: Incorporating Basic Principles in Legislation

With explicit reference to Doc 9082, the EU Airport Charges Directive serves as an important regional legislative instrument indicating the extent to which EU legislation reflects the four basic principles.[376] This part explains how this Directive incorporates these principles.

2.7.1 Non-Discrimination

The Directive requires equal treatment among all airport users without further conditions.[377] This general reference should be seen as a thorough understanding of non-discrimination between foreign airport users, as well as between foreign and domestic airport users. It also recognises the legitimacy of differential charges regarding their compliance with non-discrimination. However, charges differentiation should build on a public and general or environmental justification[378] and should be equally accessible to all carriers.[379] These two restrictions are consistent with the general defence of differential charges that was discussed previously and with the EU's Guidelines on State Aid to Airports and Airlines (2014/C 99/03).

The EU encourages differential charges be based on individually tailored services and facilities to meet the needs of the market in line with ICAO.[380] Different charges are permissible as long as they are justified by cost-related or other transparent and objective reasons[381] and are provided on an equal basis among users.[382]

2.7.2 Consultation

[376] See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 135 at recital 9; ICAO, Air Transport Bureau, Economic Analysis and Policy (EAP) Section, "Case Study on Commercialization, Privatization and Economic Oversight of Airports and Air Navigation Services Provider: Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on Airport Charges", (28 January 2013), online (pdf): <https://www.icao.int/sustainability/CaseStudies/EU-Directive_AirportCharges.pdf>.
[377] See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, art 3.
[378] See *Ibid*, art 3.
[379] See *Ibid* at recital 15.
[380] See *Ibid*, art 10(1).
[381] See *Ibid*.
[382] See *Ibid*, art 10(2).

The Directive designs consultation as a mandatory procedure,[383] where the airport managing body[384] and airport users are consultation participants.[385] While the Directive provides detailed provisions on the implementation of consultation as initially suggested by ICAO, the Directive nevertheless awaits further revision.

However, this scope seems incomplete. On the one hand, airport users only refer to "any natural or legal person responsible for the carriage of passengers, mail and/or freight by air to or from the airport concerned" as defined in Article 1, which talks about the subject matter.[386] This means that passengers are excluded from the scope of "airport users". Consequently, passengers will not have a statutory path to participate in the consultation process. Moreover, passengers will also not be entitled to other rights that airport users should have under the EU Airport Charges Directive.[387] On the other hand, the EU Airport Charges Directive fails to include a regulator, mostly the independent supervisory authority in question, in consultation if it determines or approves charge-related decisions. If the real decision-maker does not participate in a consultation, it will not effectively collect information and data from other stakeholders in order to make correct decisions.

Second, subjects that require consultation cover the operation of the system of charges, the level of airport charges and, when applicable, the level of services.[388] Notably, an agreement on the level of services facilitates transparency regarding the relationships between charges and corresponding services, thus indirectly implementing cost-relatedness.

Third, regarding the time procedure, parties should consult at least once a year, unless otherwise agreed in the most recent consultation.[389] In case of any proposal modifying the system or the level of charges, an airport managing body should submit a proposal to airport users at least four months before the changes enter into force with justified exceptions applicable. Following this submission,

[383] See *Ibid*, art 6(1).
[384] This concept and airports, or airport operators, in this thesis are interchangeable.
[385] See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, art 6(1).
[386] *Ibid* at art 1(3).
[387] Either the airport managing body or the airport users can seek the recourse of the ISA according to Article 6(3) of the EU Airport Charges Directive. Passengers outside of this scope are not entitled to seek the recourse.
[388] See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, art 6(1).
[389] See *Ibid*.

the airport managing body should organise a consultation before making the decision.[390] Moreover, as a general principle, a decision should be published no less than two months before it becomes effective.[391] One can still find flexible space when the Directive provides several time limitations.[392]

Fourth, a remedy mechanism following consultation is in place. The consultation process is not the final stage. Instead, the decision made by the airport managing body after consultation is subject to a review process. Either party is entitled to initiate the process, in which the competent independent supervisory authority will examine whether the modification of the system or the change of charges can be justified.[393] Regarding the limit of time, even if the independent supervisory authority is not able to make a final decision, the independent supervisory authority should make a provisional decision no more than four weeks after a dispute is brought to it.[394]

Nevertheless, the Directive does not mandate the activating of the remedial mechanism in two circumstances. One is when the independent supervisory authority itself assumes the final responsibility to determine charges.[395] The other is, when premised on the examination of an airport's market power, if an outcome indicates that an airport managing body will not set the charges correctly, an independent airport authority will determine or prove the modification of charges.[396]

2.7.3 Transparency

Transparency is addressed as a condition for effective consultation. In regard to what should be transparent, two reciprocal aspects between an airport managing body and airport users should be considered. On the supply side, the airport managing body must disclose information regarding both the current and future situations.[397] On the demand side, airport users are only required to

[390] See *Ibid*, art 6(2).
[391] See *Ibid*.
[392] As stated in the text, the once-a-year frequency of consultation will be superseded by the parties' agreement. The four months mandate to submit a modification proposal also accepts exceptions unstated in the Directive.
[393] See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, art 6(3).
[394] See *Ibid*, art 6(4).
[395] See *Ibid*, art 6(5)(a).
[396] Both circumstances have a common feature – the legislation of a state allocates the mandate of determining the charges to a regulator, no matter if a premised market power evaluation is needed. See *Ibid*, art 6(5)(b).
[397] The information includes:

provide a narrower range of information, usually with a proactive focus, for the airport managing body to make accurate decisions.[398]

As civil aviation is increasingly commercial, it is very likely to entangle itself with confidential business information as has been realised by the Directive.[399] Hence, in implementing transparency, states need to find a balance between the accessibility of disclosed information, on the one hand, and the effective protection of confidential information, on the other. The EU leaves this issue to its member states. However, available legal regimes that have an interface with airport regulation, e.g., mechanisms on information disclosure for listed companies, will nevertheless facilitate the implementation of transparency.[400]

In general, the requirement of transparency permeates the Directive. The charges system should be transparent.[401] Airport users should be informed regularly regarding how the charges are calculated.[402] Differentiation of charges, particularly when the justification is reasons other than differentiated services, should be not only transparent, but also give transparent and objective justification.[403] Environmental or public interest-related modulation of charges is considered consistent with non-discrimination but should be transparent.[404] Different airports that consist of a

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(a) a list of the various services and infrastructure provided in return for the airport charge levied;
(b) the methodology used for setting airport charges;
(c) the overall cost structure with regard to the facilities and services which airport charges relate to;
(d) the revenue of the different charges and the total cost of the services covered by them;
(e) any financing from public authorities of the facilities and services which airport charges relate to;
(f) forecasts of the situation at the airport as regards the charges, traffic growth and proposed investments;
(g) the actual use of airport infrastructure and equipment over a given period; and
(h) the predicted outcome of any major proposed investments in terms of their effects on airport capacity.

Ibid, art 7(1).

[398] The information includes:
(a) forecasts as regards traffic;
(b) forecasts as to the composition and envisaged use of their fleet;
(c) their development projects at the airport concerned; and
(d) their requirements at the airport concerned.

Ibid, art 7(2).

[399] See *Ibid*, art 7(3).

[400] See *Ibid*.

[401] See *Ibid* at recital 6.

[402] See *Ibid*, recital 13.

[403] See *Ibid* recital 15, art 10(1). Moreover, when the provision of capacity regarding certain services is on a competitive basis, the criteria for selecting airport users who can be offered such services should be transparent. See *Ibid*, art 10(2).

[404] See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, art 3.

network[405] or serve one city or conurbation[406] can adopt a common and transparent charging system. Transparency also stands as an expectation for institutional activities because the independent supervisory authorities should exercise their authority transparently.[407]

These findings suggest that the fabric of the Directive is to a great extent built upon the spirit of transparency, and its interplay with other principles makes the EU regime holistic.

2.7.4 Cost-Relatedness

At a descriptive level, unlike the other three principles, the Directive does not make it explicit that charges should reflect costs; neither does it even suggest that member states should levy charges with reference to costs. It only mentions the principle of cost-relatedness in the recital as a reference to ICAO's policies in the airport charge regime.[408] And it also mentions that one main attribute distinguishing charges as covered by the Directive from taxes is that charges reflect and recover costs.[409]

Though the Directive does not directly recognise the requirement of cost-relatedness as a principle in the main text, it requires that an airport managing body should make the cost of its services transparent during the consultation process.[410] The requirement of cost-relatedness thereby is key to the fairness of charges.

However, being cost-related is widely borrowed by airports to defend their differential charges. As regards member states' implementation of this Directive, an evaluative report observes that nearly half of airports under its discussion have applied differential charges. All of these airports, having applied differential charges, defend themselves on the ground of cost-relatedness, which further relates to differentiated levels of services.[411] Even though all of these cases report their

[405] See *Ibid*, art 4.
[406] See *Ibid*, art 5.
[407] See *Ibid*, art 11(3). For example, the procedures, conditions, and criteria in relation to the remedial mechanism after consultation without an agreement should be made transparent by an independent supervisory authority. See *Ibid*, art 11(6).
[408] See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136 at recital 9.
[409] See *Ibid* at recital 10.
[410] See *Ibid*, art 7(1)(c)-(d).
[411] 27 out of 56 investigated airports have applied differential charges. Reasons for some states to apply differential but cost-relevant charges include (1) differential services on varying levels of facilities or terminals, peak/off-peak, or seasoning pricing as a result of different requirements of staff; (2) Schengen/ Non-Schengen passengers since different

compliance with non-discrimination only on the cost-relatedness basis, one should keep in mind that the Directive also allows other objective and transparent justifications besides cost-relatedness.[412] Still, most countries simply refer to cost-relatedness. States can be expected to consider cost-relatedness as a major legitimate ground to demonstrate the reasonableness of differential charges. Hence, empirically, cost-relatedness has a fundamental status as mutually endorsed by many states in implementing the Directive, albeit without a clear definition of cost-relatedness as a basic principle in the governance of airport charges in the Directive. The primary status of cost-relatedness is more recognised than imposed.

2.7.5 The Directive as a Restatement of Basic Principles

In sum, the Directive is a refined statement of the basic principles on charge regulation suggested by ICAO. Consequently, member states will establish their national legislation in compliance with and under the regional framework of basic principles.

Although cost-relatedness is not explicitly addressed as a principle, it plays an important role in the Directive for two reasons. First, it sets a significant standard for charges evaluation during the consultation process. Second, a shared belief exists among airports in many states that cost-relatedness justifies the reasonableness of differential charges in practice. This second aspect also suggests that these principles mutually reinforce and serve as conditions for each other.[413]

2.8 Conclusion

The international regulatory framework on airport charges, led by ICAO, stands in a three-tier structure. Article 15 of the Chicago Convention is the first tier and is the most fundamental rule for all other policies on airport charges. However, this article remains incomplete. The principle of non-discrimination imposed lacks the dimension of non-discrimination among foreign users. Moreover, a missing provision to clarify the relationship between charges and taxes in the Chicago Convention, and more importantly, the absence of a written restriction on states' taxation activity

immigration and border control costs may occur; (3) costs resulting from different punctuality and turnaround performances of airlines. See Steer Davies Gleave, *supra* note 60, ss 4.43, 4.45.

[412] See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, art 10(1).

[413] Two lessons from this phenomenon are (1) if consultation is conducted without a transparent procedure, it may be partial; (2) if differential charges fail to prove their relevance to costs, they are likely to be considered discriminatory.

when airport services are not provided have severe implications. Airport users may be overcharged without being awarded any services.

Doc 9082 belongs to the second tier. The Conference on the Economics of Airports and Air Navigation Services (CEANS), ICAO's Consolidated Statement of Continuing ICAO Policies in the Air Transport Field, and the Airport Economics Manual constitute the third tier of the regulatory framework. Particularly, Doc 9082 is a central vis-à-vis the other materials and is a key instrument in the framework. It clarifies some under-discussed issues in Article 15 and makes specific regulatory recommendations. It is rulemaking rather than only interpretative in terms of Article 15. Doc 9082 adopts a soft approach to promote implementation by publishing states' adherence status. Nevertheless, global adherence to Doc 9082 has yet to come. This regulatory framework is non-binding except for Article 15 of the Chicago Convention, derogating implementation.

Notably, the existing regulatory framework emanates from important substantive norms that have constructive significance for airport charges regulation, i.e., the four basic principles. From a regulatory perspective, they serve as standards for reasonable and fair charges. Non-discrimination results from differential charges, but differential charges may not necessarily constitute a non-discrimination violation. The public interest and user-equality are two justifications for non-discriminatory but differential charges. Regarding consultation, two parties, namely, the final decision-maker on charge issues and passengers as end-users which are not reflected well in ICAO's policies, should both be thoroughly represented. Transparency is a mutually accepted pursuit in many regulatory regimes, in which the public interest is a common concern. It avoids information asymmetry and thus mitigates market abuse by one dominant party. Transparency, in particular, will facilitate the other three principles in airport charges regulation. Cost-relatedness is construed as an opposing standpoint to cross-subsidisation, further indicating that insufficient funding remains a challenge to meet this goal.

It is also interesting to find that the EU Airport Charges Directive, a foundation of airport charges regulation in the EU, largely remains a restatement of these principles. Notwithstanding the finding that incorporation is incomplete in respect to cost-relatedness, many EU states respect this principle in practice when they legitimise their application of differential charges. Chapter 5 will further discuss how to incorporate these principles through the suggested private law lens.

3 An Independent Regulator as a Good Regulator

The pursuit of a good regulator is key to good regulation. This chapter asks what is a good regulator in airport charges regulation. This chapter particularly focuses on the quality of regulatory independence, which is widely discussed as a core value of a good regulator.

3.1 The Need for a Good Regulator in the Increasingly Competitive Airport Industry

The first chapter discussed that recognising airports as natural monopolies is no longer a panacea. It does not deny that the market power for some airports remains a concern. The status quo of the airport industry is properly understood as a regime where market power still exists, varying as to each airport depending on its capacity, which is usually evaluated by the number of passengers.[414] This situation calls for the relocation, rather than rescission, of the duties of a regulator. It is possible – even desirable – that these duties be distributed to more than one regulator, i.e., concurrent regulators. For example, one regulator assesses the market power of airports whilst another regulator determines and implements the regulatory measures on the setting of airport charges, as in Australia.

Responsible regulators may need to bear the responsibility of assessing market power as a preliminary step to making regulatory decisions to ensure that they can fit each airport with different market power. In other words, a regulator will have to first determine the threshold of an airport to be regulated.[415] Whether a regulator sets its hand to this preliminary phase on evaluating market power or to the stage of making coercive regulatory measures, it still may be authorised to determine whether it will regulate airport charges, although some airports may have a risk to abuse

[414] The annual passenger number of an airport indicates how busy it is, and whether it is dominant in a relevant market. Usually, when a large number of passengers rely on one airport, this airport has substantial power. Moreover, one airport's distance from another also affects its capacity.

[415] The match-up relationships between regulatory agencies and the regulated industries are twofold. On the one hand, the powers of ascertaining regulatory thresholds and implementing regulations may be distributed to separate authorities. On the other, various agencies can be responsible for one industry at the same time. Estache and de Rus summarised three approaches regarding a regulator's authority scope: the industry-specific approach, where separate regulators altogether regulate; the sector-specific approach, where each regulator is responsible for several regulated industries; and the multi-sectoral approach, where a single regulator regulates all regulated industries. See Antonio Estache & Ginés De Rus, *Privatization and Regulation of Transport Infrastructure: Guidelines for Policymakers and Regulators* (World Bank Publications, 2000) at 45.

market power.[416] Thus a regulator can function not only in determining how to regulate, but also in determining whether the regulation is needed.

Increasing levels of competition complicate the challenges to regulators. Careful evaluation of market power becomes crucial. When we discuss airport charges regulation, we may account for this topic from the perspective of a regulator with three tasks: the evaluation of market power of each airport, the decision about whether to regulate charges, and the question of how to execute the regulation, if it is to be imposed.

3.2 Theoretical Analysis of Regulatory Independence

3.2.1 Why Regulator Independence

We live in an era with a rise of regulatory states. Gaining momentum in the United States (the U.S.), regulation as an administrative tool implies our confidence in the development of governance.[417] This preference to deploy regulatory measures points out a "command and control" logic.[418] It also accounts for reliance on legislation because a lawmaker releases its burden by outsourcing the rulemaking authority.[419] Whether we see regulation as a process of governance or as a set of regulations, it distinguishes the regulated fields from the completely liberal market economy. One can thus understand why regulation is necessary from the perspective of market failure in some special fields. According to existing discussions, one of the fields in which the market may not function properly are public utilities. These resources pose a significant concern for the public interest and, at the same time, are usually run by operators with huge market power.[420] However, if the regulator itself is biased, it will distort the regulated fields. We thus need impartial regulators to implement regulatory measures.

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[416] The decision to regulate or deregulate the economic activities of airports (or other utilities) largely depends on the policy of a government. Countries in favour of a laissez-faire policy tend to loosely regulate airport charges setting. For example, Australia and New Zealand adopted a price monitoring and regulatory disclosure approach.

[417] Michael Moran, "Understanding the Regulatory State" (2002) 32:2 Br J Political Sci 391–413 at 392.

[418] *Ibid*.

[419] Roderick Macdonald calls this reliance "the addiction to delegated legislation". Roderick A Macdonald, "Understanding Regulation by Regulations" in *Regulations, Crown Corporations and Administrative Tribunals* (1985) 81 at 81.

[420] Traditionally, this market power in the public utility sector behaves as a monopoly. Although this chapter discusses that in the airport sector, increasing competition lowers the chance of completely monopolistic airports, it is true that significant market power still exists in some airports. Without regulatory measures, they may abuse their market power.

A good regulator has many merits, among which independence is a crucial one, and the OECD embraces regulatory independence. It believes that this character maximises the effect of regulation by tackling several issues, namely, "lack of commitment, time inconsistency, and political uncertainty";[421] "lack of competitive neutrality ensuring a level playing field for all operators";[422] "information and expertise asymmetries";[423] and "regulatory capture".[424] Relevant discussions on the independence of a regulator focus on the fields of energy, environment, securities, and public utilities. These areas have a greater risk that competition may not function thoroughly. As the airport sector arguably falls into the category of public utilities, it is worth studying what independent regulators on airport charges should be like.

The independence of a regulator can also be understood as institutional autonomy, which means that a regulator can make decisions free from intervention. A regulator, however, faces potential interference from multiple parties. They range from political powers to the regulated sector itself and other interest-related entities.[425] When these pressures disturb regulatory activities, a proper institutional designation can shield the regulator against such outside intervention. Hence, the independence of a regulator means the avoidance of intervention.

Independence is important because it ensures that regulatory activities are impartial. Such impartiality has two facets, depending on the party, from which a regulator needs to keep at arm's length. The OECD addresses both levels of independence: "[i]ndependence from the regulated enterprises is clearly essential to containing opportunistic behaviour. Independence from the government of the day is similarly important, especially when the government is a shareholder in one or more of the regulated enterprises".[426] The two facets are as follows.

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[421] An independent regulator makes decisions according to its independent expertise. A durably-termed independent regulator, unlike the ministerial staff who may regulate inconsistently due to a fixed term to hold office, is more likely to regulate in a consistent manner. OECD, *Being an Independent Regulator*, The Governance of Regulators (Paris: OECD Publication, 2016) at 21.

[422] The government may intervene in the activities and decisions of a regulator if the regulator relies on the governmental sector. *Ibid*.

[423] A regulator's independence is a precondition of independent expertise of the professionals. *Ibid* at 22.

[424] Financial autonomy, a feature of regulatory independence, indicates a smaller chance that the regulator will be captured by the regulated entities and the government. *Ibid* at 21.

[425] *Ibid* at 34.

[426] OECD, *Better Economic Regulation: The Role of the Regulator*, ITF Round Tables No 150 (OECD Publishing, 2011) at 11.

First, a regulatory agency should be independent from the regulated sectors. If the regulated airports can interrupt or even impose control over the regulatory process, they become self-regulated. Consequently, outside regulatory measures become unneutral. The saying of *Nemo Judex in Causa Sua*, which reads "No One Should Judge in His Own Case", carries a similar meaning.

Second, a regulator should be free from political intervention, which is usually construed as independence from the political or executive branch of the government.[427] This chapter conceptualises independence from the political actors as independence from the executive branch. A qualified regulator should be "non-ideological, non-dogmatic, and without agenda or parochial motive".[428] Although regulatory agencies in nature wield powers delegated from a government, the political power in charge of regulation may use the regulatory power to gain votes to win an election. This political manipulation can behave as decisions that are deficient in long-lasting considerations due to electoral cycles.[429] A similar argument suggests that a certain electoral cycle should denote that politicians do not have enough incentive to focus on long-term goals.[430] Intervention from political power may influence the impartiality of a utility regulator, giving rise to regulatory capture.[431] In addition, OECD observes that regulatory independence from political intervention consolidates confidence.[432] Moreover, in the scenario that both governmental and non-governmental parties are subject to the governance of a regulator, the fairness of competition between these parties depends on whether the regulator is independent from the political intervention – to treat all parties equally.[433]

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[427] See Joanna Bird, "Regulating the Regulators: Accountability of Australian Regulators" (2011) 35 Melb UL Rev 739 at 743–744; Frank Naert & Bart Defloor, "How Independent Are Belgian Regulators?" (2009) 10:4 Competition and Regulation in Network Industries 355–384 at 357–360.

[428] Janice A Beecher, "The Prudent Regulatory: Politics, Independence, Ethics, and the Public Interest" (2008) 29 Energy LJ 577 at 579.

[429] See Mariana Mota Prado, "The Challenges and Risks of Creating Independent Regulatory Agencies: A Cautionary Tale from Brazil" (2008) 41 Vand J Transnat'l L 435 at 438.

[430] See Bird, *supra* note 427 at 743–744.

[431] See Stern, *supra* note 27 at 69. Ponti also argues that the existence of a regulatory mechanism is the premise for the need for an independent regulator. See Marco Ponti, "Transport Regulation from Theory to Practice: General Observations and a Case Study" (2010) OECD/ITF Joint Transport Research Centre Discussion Paper No 2010-19 at 5, online:< http://hdl.handle.net/10419/68755 >.

[432] OECD, *The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy* (Paris: OECD Publishing, 2014) at 46.

[433] *Ibid*.

This dimension of regulatory independence led to a heated discussion in the U.S. in the 1980s and the 1990s undergirded by political arguments. Following that, scholars made their arguments from the perspective of constitutionality. They discussed from which branch of the government the authority of a regulator comes.[434] Following this line, one way to guarantee independence appears to be setting up regulators directly under the legislative branch, instead of under the executive branch, so that a regulator is not held accountable for the executive branch.[435]

3.2.2 Literature on Regulatory Independence from the Government

Many studies advocate the importance of a regulator independent from the executive branch. Some scholars argue that discretion in utility regulation may be misused.[436] When a regulator is controlled by an elected government, meanwhile the government is in charge of state-owned entities, the regulator may abuse its regulatory power. In this circumstance, the border between a regulator and a regulated entity may be blurred, causing a conflict of interests.[437] Furthermore, a governmental regulator is likely to be influenced by political pressure from the governmental side; and regulatory measures will also seem to be volatile due to the change of politicians.[438] Independence enables a regulator to gain four attributes: consistency; stability and predictability; neutrality; and non-discrimination.[439] Another profound, but under-discussed, argument in favour of regulatory independence lies in the enhancement of market confidence.[440]

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[434] In this context, an independent regulator is referred to as an opposite concept to an executive branch regulator. See Geoffrey P Miller, "Introduction: The Debate Over Independent Agencies in Light of Empirical Evidence" (1988) Duke LJ 215 at 217. There has been an argument of which institutional branch should control an administrative agency among the four options of the President, the Congress, both the President and the Congress, or neither of them. See *Ibid* at 216.

[435] Five decades ago, based on the inter-supervisory relationship between the three governmental branches of a country, Janisch proposed that the legislative supervision over regulatory agencies may shed light on Canada's independent regulators. One option to achieve this goal is giving the legislature veto rights on regulatory rules, rather than only enhancing the authority of the governmental branch to issue directions of regulatory agencies. See Hudson Noel Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada" (1979) 17 Osgoode Hall LJ 46 at 103–104.

[436] Discretion provides a regulator with flexibility, but it also introduces some space to be abused. An instance of charges regulatory discretion is the criteria "just and reasonable" in the U.S. See Warrick Smith, "Utility Regulators: The Independence Debate", (1997) at 2, online (pdf): *World Bank Group* <http://hdl.handle.net/10986/11570>.

[437] See OECD, *supra* note 432.

[438] See *Ibid*.

[439] See OECD, *supra* note 426 at 18–19.

[440] Independence means predictability and credibility of regulatory behaviours, which guarantee the regulated entities to run their businesses with the lowest risk of regulatory abuse. See House of Lords, "The Regulatory State: Ensuring its Accountability" by Select Committee on the Constitution (2004) 6th Report of Session 2003–04, Vol I Report at para 113.

Tom Winsor argues for the independence of a regulator by offering the reason why a regulator exists.[441] To insulate a regulator from the government avoids intervention from politicians. This endeavour not only benefits airport users, but also protects non-governmental investors in airport assets. Any regulatory behaviour may, in fact, form as an expropriation, which is harmful to both investors and consumers.[442] In response, Winsor advocates regulatory independence by referring to the saying by the World Bank that independence serves as a "credible commitment" granted by the government for investment security.[443] Notably, a practical concern can be that the statutory independence guaranteed by legislation is not enough. Politicians may put their improper intervention to the regulatory activities of an agency, depriving a regulator of its "behavioural independence", even if legal guarantees are still in place.[444]

However, regulatory independence does not mean unlimited autonomy for the regulator to exploit. On the contrary, it should have boundaries as provided by legislation that grants and specifies the duties of a regulator. Norms, including "lawful exercise of powers, reasonableness, and proportionality, consistency of decision-making and compliance with procedural rules" limit regulatory independence within a certain spectrum.[445]

3.2.3 Institutional Guarantees of Independence

3.2.3.1 Personnel Independence

Officers make an institution, and the decisions of an institution thus are made by its decision-makers. Under the veil of an agency, the independence of a regulator relies on the ability of its officers to behave autonomously.

Personnel independence is based upon freedom from being unreasonably dismissed. When an officer of a regulator needs to make a living by keeping his job, he is threatened and intimidated

[441] A regulator is not a puppet of politicians. Its duty is to work on professional regulation that the executive branch cannot do. In his opinion, people should recognise a regulator as a party different from the executive branch, even though both belong to the government. He argues that the independent status of a regulator is granted by legislation, instead of the governmental executive branch. See Tom Winsor, "Effective Regulatory Institutions: The Regulator's Role in the Policy Process, Including Issues of Regulatory Independence" (2010) OECD/ITF Joint Transport Research Centre Discussion Paper, No 2010-21 at 19.
[442] See Dean Girdis, "Power and Gas Regulation—Issues and International Experience" (2001) cited by Winsor, *supra* note 441 at 16.
[443] Winsor, *supra* note 441 at 7.
[444] *Ibid* at 17.
[445] *Ibid* at 18.

by a superior to dismiss him. Hence, removal power appears to be an important part of a supervisor's position.[446] Given this power of the employer/supervisor, one way to secure personnel's independence is to protect them from unreasonable discharge. An example of this type of power is the removal power of the President of the U.S. The President is entitled to discharge officers in executive departments at his complete discretion, whereas, when it comes to officers in independent agencies, the removal must meet certain criteria.[447] Niemeier argues that officers in a regulatory agency should be protected against unjust unemployment by politicians; at the same time, they should not receive personal benefits from politicians.[448]

The power to appoint a principal of regulatory agency also matters, as a principal under the head of the Executive Branch may be influenced by his or her superior.[449] Thereby, those who can nominate key decision-makers in an agency may have a *de facto* impact on the decisions that these officers make. Hence, the power to appoint a leader of an agency by the Executive Branch should be treated with caution.

Tenure provides personnel independence. Organisational protection ensures that members in a regulatory agency can have a long period of employment or can make decisions without the fear of unfair treatment after a working contract expires. An example is the tenure of U.S. judges. The U.S. Constitution ensures lifetime tenure for judges of the Supreme Court and inferior courts so long as they perform with "good behaviour".[450] The long-term or tenured position in the judicial system enhances stability to solve the problem of political uncertainty.[451] Though a regulator's role in this thesis is not equal to a U.S. Supreme Court judge, the rationale and approaches

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[446] Miller, *supra* note 434 at 216.
[447] *Ibid* at 2017.
[448] Hans-Martin Niemeier, "Effective Regulatory Institutions for Air Transport: A European Perspective" (2010) No 2010-20 (OECD/ITF Joint Transport Research Centre Discussion Paper) at 8.
[449] Prado, *supra* note 429 at 468.
[450] Art III, Section 1 of the U.S. Constitution sets out:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

The tenure during "good behaviour" is understood as a tenure for life, with violation of a "good behaviour" as the only impeachment reason. See Philip B Kurland, "The Constitution and the Tenure of Federal Judges: Some Notes from History" (1968) 36 U Chi L Rev 665 at 676–677.
[451] See Lee Epstein, Jack Knight & Olga Shvetsova, "Selecting Selection Systems" in *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (2002) 191 at 195.

regarding employment independence are similar. Thus, judges' tenure may shed light on the role of personnel independence in a regulatory agency.

Decision-makers in a regulatory agency should be experts to resist intervention from outside of it. A proper designation to preclude improper intervention also improves the professional level of officers.[452] The officers' professionalism and proper institutional protection for independence reinforce each other. The OECD suggests building up the reputation of the regulator and securing employment conditions for recruited expertise.[453] In some Latin American countries, independent regulators in the airport sector are those who are "technical and non-political" members.[454] The requirement of expertise is the core of independent regulator. One study demonstrates that 75% of the investigated agencies mandate expertise as a criterion in employing senior decision-makers. However, this proportion decreases to 45% in terms of non-independent regulatory agencies.[455] This distinction may be due to differing levels of organisational quality, which is higher in independent regulators than in other government branches.[456]

3.2.3.2 Financial Independence

Funding influences institutional independence.[457] Human resource autonomy is influenced by the agency's budget, which, in turn, shapes the working environment and influences personnel's incentives. One argument is that when a government has the power to determine the budget of a regulator, this regulator will be controlled by the government.[458] Hence, an alternative source of funding secures institutional autonomy.[459]

In addition to budget independence, autonomy in allocating the budget also matters. The Brazilian independent regulatory agencies are funded by their regulated entities, illustrating a certain level of independence from the government's budget allocation.[460] Despite this, the use of the budget is

[452] Smith, *supra* note 436 at 2–3.
[453] See OECD, *supra* note 426 at 29.
[454] Tomás Serebrisky, *Airport Economics in Latin America and the Caribbean: Benchmarking, Regulation, and Pricing* (The World Bank, 2011) at 138.
[455] *Ibid* at 151.
[456] *Ibid* at 162.
[457] Niemeier, *supra* note 448 at 8.
[458] An Australian study suggests that the executive government uses tight funding to control regulators, ensuring that the regulators conduct projects for governmental will. See Bird, *supra* note 427 at 763,772.
[459] Prado, *supra* note 429 at 468.
[460] *Ibid* at 490.

subject to *ex ante* authorisation, namely governmental appropriations.[461] It implies that the government still can interfere with these agencies by determining the appropriation for a regulatory agency. Therefore, one may not see these agencies as complete independent regulators.

However, the EU's approach ensures a regulator's discretionary use of budgets in the internal electricity and natural gas markets. The EU's requirement that member states guarantee a regulator's autonomy in using allocated budgets shows their awareness of the causal link between finance autonomy and independence of a regulator.[462]

3.3 IATA Versus the ACI

3.3.1 IATA

IATA is an association that acts on behalf of airlines and is, accordingly, a strong supporter of independent regulation on airport charges with the recognition that economic regulation is a state responsibility.[463] It is interesting to note that airlines insist that airports have authority that the state needs to harness.[464] IATA sees independence as a key standard of a good regulator, suggesting that "[e]conomic regulation should be independent from direct control by governments or airport authorities".[465] One solution to reach this independence is to establish statutory duties and objectives for a regulator.[466] Another is to provide regulators with independent authority over resources and operation.[467]

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[461] *Ibid* at 491.

[462] The EU sets out:

> In order to protect the independence of the regulatory authority, Member States shall in particular ensure that: (a) the regulatory authority can take autonomous decisions, independently from any political body; (b) the regulatory authority has all the necessary human and financial resources it needs to carry out its duties and exercise its powers in an effective and efficient manner; (c) the regulatory authority has a separate annual budget allocation and autonomy in the implementation of the allocated budget ...

EC, *Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU*, [2019] OJ, L 158/54, art 57(5).

For a similar statement regarding regulators in the natural gas market, see EC, *Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC*, [2009] OJ, L 211/94, art 39(5)(a).

[463] IATA, *supra* note 29.

[464] IATA does not identify all as airports monopolistic. It regards airports as "natural monopolies" or having "monopoly-like characteristics". IATA, "The Infrastructure Challenge", (29 October 2014), online: <https://www.iata.org/pressroom/pr/pages/2014-10-29-02.aspx>.

[465] Mark Smyth & Brian Pearce, *supra* note 18 at 6.

[466] *Ibid* at 2.

[467] *Ibid*.

When it comes to a regulator's independence from the regulated airport operators, IATA articulates this issue against the background of state-owned airports.[468] They fear that a regulator may be affiliated with the same government department that owns an airport, causing the airport's interference in the regulator.[469] Consequently, the regulator would no longer be independent from the regulated sector. Furthermore, the lack of independence may result in a conflict of interest when the government wants to sell an airport to a private party because the government cannot set stringent regulations on charges otherwise the private party cannot see the potential to make a profit by the over-regulated charges.[470]

3.3.2 The ACI

Representing airports, the ACI does not make suggestions on the establishment of an independent regulator based on several major policy documents.[471] ACI's position, unsurprising, is that the airport industry is reluctant to be subject to economic regulation. The ACI has suggested keeping regulation to a minimum, preferably light-handed to no regulation at all.[472] They argue that airports, as a natural monopoly, as is generally accepted, do not necessitate regulation.[473] As regulations can be restrictions to airports' managerial activities, the ACI advocates for reducing regulation for airports' interests. If airport operators do now want regulation, the ACI, as its delegation, will accordingly avoid relevant discussions.

To sum up, the standpoints of IATA and the ACI contradict each other. This is understandable since both institutions represent two different interest groups. ACI's choice to not discuss the establishment of an independent regulator may not be necessary. The airports' interests will not be hampered by an independent regulator, which does not have to mean the application of tight regulation. It can be an *ex post* supervisory mechanism embracing light-handed regulatory measures. Moreover, regulation aims at reasonable charges, rather than fewer charges. So,

[468] IATA, *supra* note 29.
[469] Section 1.47, ICAO, *supra* note 237.
[470] IATA, *Airport Privatization Fact Sheet* (2018) at 2.
[471] After examining the 2018 ACI Policy Handbook (9th edition), Policy Brief: Creating Fertile Grounds for Private Investment in Airports in 2018, and Policy Brief: Airport Ownership, Economic Regulation and Financial Performance in 2017, I did not find a statement on an independent regulator concerning airport charges. Also, there is no claim about regulatory independence according to my search on the ACI's official website.
[472] ACI, *Policy Brief: Creating Fertile Grounds for Private Investment in Airports* (2018) at 19.
[473] ACI, *Policy Brief: Airport Ownership, Economic Regulation and Financial Performance* (2017) at 12.

regulation does not only lead to a decrease in charges, but when charges are set lower than they should be, regulation can mean an increase.

3.4 The EU Efforts in Consolidating Regulatory Independence

3.4.1 Airport Operators, Users, and Regulators

This part examines the EU Airport Charges Directive to assess what an independent regulator looks like in the EU. Under this Directive, three types of actors come into play, namely an airport managing body, airport users, and independent supervisory authorities (ISAs). An airport managing body is normally known as an airport operator, and an ISA is an independent regulator. The EU has a supportive attitude towards the incorporation of an airport managing body under a privatisation mode or using flexible approaches to establish an airport managing body because the Directive has observed that this body can be established as a result of national law, regulations, or contracts.[474]

An ISA is an agency to "ensure the correct application of the measures taken to comply with this Directive".[475] To reach this end, the major and also bottom-line responsibilities of an ISA are to supervise the implementation of consultation and serve as an appellate body to resolve disputes on charge decisions made by an airport managing body as provided by Article 6 of the EU Airport Charges Directive.[476] The Directive allows an ISA to assume pre-approval regulatory powers that are associated with traditional *ex ante* regulation, including approving airport charging levels and systems.[477] Airport users refer to "any natural or legal person responsible for the carriage of passengers, mail and/or freight by air to or from the airport concerned".[478] Airport users can resort to an ISA, and its final decision replaces the charge decisions by an airport managing body.

3.4.2 Independent Supervisory Authority

[474] See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, art 2(2).
[475] *Ibid*, art 11(1).
[476] See *Ibid*.
[477] *Ibid*.
[478] *Ibid*, art 2(3).

The Directive requires that each member state establish an independent supervisory authority that will keep a distance from airport managing bodies and airlines.[479] A truly independent authority with expertise and enough officers is crucial as these are basic elements for an ISA to be "a first step of remedies" regarding airport charge disputes.[480] The recitals of the Directive recognises the importance of personnel and financial independence, stating that "[t]he authority should be in possession of all the necessary resources in terms of staffing, expertise, and financial means for the performance of its tasks".[481] Some particular measures are also enumerated. First, each ISA should be "legally distinct from and functionally independent from any airport managing body and air carrier".[482] Second, the functions concerning state ownership or control of bodies, which are considered to be an ISA's stakeholders, including airports, the airport managing body as well as airport users, should not be granted to an ISA.[483] Third, "member states shall ensure that the independent supervisory authority exercises its powers impartially and transparently".[484]

Moreover, regarding the funding of an ISA, the Directive proposes that "member states may establish a funding mechanism for the independent supervisory authority, which may include levying a charge on airport users and airport managing bodies".[485] This financial suggestion indicates that the EU is aware that to achieve financial autonomy, an ISA should be able to gain its budgets from its own sources rather than from general governmental appropriations.

3.4.3 Evaluation

3.4.3.1 Dimensions of Independence

[479] See *Ibid*, art 11(3).
[480] Steer Davies Gleave, *supra* note 60, s 4.5.
[481] *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136 at recital 12. One may argue that the recital part of a Directive is not as legally binding as the operative provisions. Nevertheless, recitals interpret vague provisions, in which sense these recitals spell out the factors of "regulatory independence". See Tadas Klimas & Jurate Vaiciukaite, "The Law of Recitals in European Community Legislation" (2008) 15 ILSA J Int'l & Comp L 61 at 92–93. For the application of recitals in judgement, see e.g. *František Ryneš v Úřad pro ochranu osobních údajů*, C-212/13, [2014] ECLI:EU:C:2014:2428 at para 24. If one interprets the requirement of "legally distinct and functionally independent" in article 11(3) using this recital 12 in a restrained and cautious manner, it would be rational to conclude that independence from the lens of the EU encompasses independent staff, expertise, and finance.
[482] *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, art 11(3).
[483] See *Ibid*.
[484] *Ibid*.
[485] *Ibid*, art 11(5).

The Directive does not specify the economic parties that an ISA should be independent from in a political intervention dimension; it only requires that an ISA should be "legally distinct from and functionally independent" from the regulated airports and airlines particularly when it functions to exercises the pre-approval power regarding charge levels or systems.[486]

In terms of the legal effect of a Directive as a specific form of European legislation, a Directive may not be the optimal approach to achieve a high level of adherence to establishing ISAs by member states.[487] Regulations and Directives are both binding. However, a Regulation "shall be binding in its entirety and directly applicable in all Member States"; a Directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".[488] As the EU Airport Charges Directive is open to member states with discretion in implementation, variations may occur when member states incorporate the Directive into national law.

3.4.3.2 Possible Downsides of the Financial Mechanism

ISAs may collect their funding by levying charges from airport operators, and airport users may discourage independence if not applied appropriately. An ISA may become financially dependent on its supervised body and regulated entities. If one assumes that an ISA's budget depends on how much profit the regulated airports generate, a problem arises as a regulator can permit airports to overcharge to achieve more profits. The more an airport can charge, the larger the budget a regulator will potentially receive. Agencies may see their regulated entities as cash cows.

3.4.3.3 *Ex Post* Assessment on ISAs in the EU Member States

Overall, no member state has established a specialised regulatory agency.[489] On the contrary, most states have applied a cost-effective approach by taking advantage of their existing national civil

[486] See *Ibid*, art 11(1).
[487] It is not novel from within the EU to use a Regulation rather than a Directive as a more effective instrument to revise existing Directives in the airport sector. See e.g. EC, *Proposal for a Regulation of the European Parliament and of the Council on Groundhandling Services at Union Airports and Repealing Council Directive 96/67/EC* (2011).
[488] See EC, *Consolidated Version of the Treaty on the Functioning of the European Union*, [2012] OJ, C 326/47, art 288 [*TFEU*].
[489] See Steer Davies Gleave, *supra* note 154, s 3.160.

aviation authorities,[490] while countries like Germany[491] and Scandinavian countries[492] authorise their transportation agencies to function as ISAs. In Germany's case, a concern over independence accordingly arises as Ministries of Transportation are at the same time owners of airports, just as the BDF, a German airline association, has indeed challenged.[493] Regarding the degree of independence of ISAs, many airlines and their associations have raised a concern that some ISAs are not independent from airport operators.[494]

Based on the feedback from member states, measures for safeguarding agency independence vary in form and efficacy. Only the UK, Slovakia, Luxembourg, Ireland, Estonia, and France have reported that their regulators on airport charge issues are independent from the government, the ministry, or certain departments of the government.[495] Most member states claim to have taken measures to isolate an authority from airports and carriers, including Hungary and Romania, and their civil aviation authorities undertake ISA functions. Meanwhile, these countries prohibit these authorities to hold shares of airports or air carriers.[496] Some member states like Austria, Finland, and the Netherlands responded that their domestic laws or policies ensured independence.[497]

Despite these state practices, some airports and carriers have still challenged the independence of regulators. In both Belgium and Sweden, airlines were unconvinced of the ability of ISAs to substantially challenge airports' cost bases.[498] Airlines in Germany thought that a conflict of interest may occur when ISAs, which are a part of the federal government, take on dual roles and are shareholders of airports at the same time.[499] Greek airports argued that the Greek ISA was affiliated with the Hellenic Civil Aviation Authority (HCAA), which is the operator of all Greek

[490] *Ibid.*
[491] In Germany, the duties of ISAs are entitled to different Ministries of Transportation in 16 federal states. See European Commission, *supra* note 149 at 44.
[492] See Steer Davies Gleave, *supra* note 60, s 2.25.
[493] European Commission, *supra* note 149 at 44.
[494] *Ibid.*
[495] Steer Davies Gleave, *supra* note 154 at table 3.21. France claimed that representatives of the Ministry of Economy and Finance cannot interfere with regulation. Estonia designated its ISA as a separate institution from the Ministry of Economic Affairs and Communications. Considering that the EU Airport Charges Directive does not request EU member states to strip governmental influence from the supervisory authorities, member states, which failed to insulate authorities from the government, are compliant with EU legislation.
[496] *Ibid.*
[497] *Ibid.*
[498] *Ibid.*
[499] *Ibid.*

airports except Airports in Athens. This can be recognised from the fact that employees of the ISA are those of the HCAA.[500] Hungarian airlines suspected the existence of possible interference from airport managing bodies towards the ISA.[501] Though the ISA of Ireland claimed not to be subordinate to the Ministry, its airlines also posed the concern that the Irish government could influence the ISA through statutory directions by the Minister of Transport.[502] In Italy, by 2013 when the report was published, both airports and airlines expressed concerns about the absence of a formal ISA and questioned the then provisional regulatory agency.[503] Spanish airlines and their associations felt dissatisfaction towards the ISA in their country, too.[504]

As to staff resources, most member states have only hired one full-time employee to work for each of their ISAs, involving other professionals with expertise in law or economics on an as needed basis.[505] Most member states are funded by state budgets, while some states, including Belgium, Denmark, Finland, Luxembourg, Portugal, and the UK, are additionally funded by revenues from airports and users. Some states like Latvia, Lithuania, Ireland, and Romania receive a hybrid of funding and fees.[506]

3.5 A Closer Look at Ireland

3.5.1 Overview

This part continues the conversation about Ireland from Chapter 1 to strategically examine the establishment of its ISA under the EU legal framework. This choice makes sense in two aspects: for one thing, we can better understand different aspects of airport economic regulation under a single jurisdiction. For another, the choice of Ireland as an EU member state provides people with a closer look at the implementation of EU legislation at the national level.

[500] *Ibid*.
[501] *Ibid*.
[502] *Ibid*.
[503] See *Ibid*, ss 3.144, 3.154, 3.159.
[504] *Ibid* at Table 3.21.
[505] *Ibid*, s 3.159.
[506] See *Ibid*, s 3.161.

The EU Airport Charges Directive serves as an overarching instrument for the Irish institutional setting.[507] The Commission for Aviation Regulation (CAR) functions as an ISA in the sense of this Directive. Its primary duty is to regulate the level of airport charges and charges on aviation terminal services.[508] The Dublin Airport Authority is the operator of both Dublin and Cork airports.[509] As only Dublin Airport has reached the threshold of 5 million passengers, it is the only airport under charge regulation according to the EU Airport Charges Directive.[510] Generally speaking, the approach of Ireland to regulate airport charges is more stringent than the proposed framework as provided in the EU Airport Charges Directive. Particularly, Ireland entitles CAR to use a price-cap method to pre-determine the limit of aeronautical charges at Dublin Airport.[511] Should collected revenues exceed the limit, the Dublin Airport Authority is mandated to rebate users for the over-charged fees.[512] This part focuses on the constitution of CAR – the ISA in Ireland – to examine its independence.

3.5.2 Institutional Setting of the Commission for Aviation Regulation

The 2001 Irish Aviation Regulation Act provides a general framework on how CAR should exercise its economic regulation duties. It reinforces the independence requirement in the EU Airport Charges Directive by requiring that CAR should be independent when practising its functions.[513] First, regarding the relationship with the government, CAR assumes its duties under the directions of the Minister as he or she considers appropriate.[514] Procedurally, the commission shall report to the Minister regarding CAR's functions and activities when required to do so.[515]

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[507] Ireland became an EU member state in 1973. See European Union, "Ireland", (5 July 2016), online: *European Union* <https://europa.eu/european-union/about-eu/countries/member-countries/ireland_en>.
[508] See *The Aviation Regulation Act, 2001* (Ireland), s 7.
[509] See *The European Communities (Dublin Airport Charges) Regulations 2011* (Ireland), s 5.
[510] In 2017, Dublin Airport served 29.6 million passengers, but Cork Airport had only 2.3 million passengers. DAA, "Annual Report 2017", (2017) at 17, online (pdf): <https://issuu.com/daapublishing/docs/daa_annual_report_2017?e=5056106/60531841>. The 2014 Determination, which sets maximum charges between 2015 and 2019, only regulates the Dublin Airport. See Commission for Aviation Regulation, "2014 Determination", online: <http://www.aviationreg.ie/regulation-of-airport-charges-dublin-airport/2014-determination.576.html>.
[511] See Commission for Aviation Regulation, "Maximum Level of Airport Charges at Dublin Airport: 2014 Determination", (7 October 2014) at 6, online (pdf): <https://www.aviationreg.ie/_fileupload/2014-05-29%20Draft%20Determination%20Airport%20Charges.pdf>.
[512] See *Ibid*.
[513] See *supra* note 508, s 6.
[514] See *Ibid*, s 10.
[515] See *Ibid*, s 27(1).

Second, CAR consists of at least one and no more than three commissioners.[516] As the decision-makers inside the ISA, we must explore their independence using the standards discussed previously. These commissioners are subject to selection by the Minister and the Civil Service Commissioners. First, the commissioners and the chairperson, when there are two or three commissioners, shall be appointed by the Minister for Public Enterprise with agreement by the Minister of Finance.[517] The same process applies to the decision over a commissioner's remuneration.[518] To be eligible as nominees, candidates must be selected for appointment after going through a competition process organised by the Civil Service Commissioners.[519] Each commissioner serves in a full-time capacity, and he or she is allowed to serve for, at most, two terms. The first term lasts between three to five years, with the renewed term ending within ten years.[520] To avoid a conflict of interest, a commissioner cannot be employed in other positions in which the emoluments are payable.[521] Also, in the first 12 months after resignation, removal, or retirement, a commissioner is not allowed to conduct other work where his expertise obtained as a commissioner may be disclosed.[522]

Despite the fact that the Minister has the power to remove a commissioner, this power is limited. The Minister can act as such in cases where a commissioner, in their opinion, is incapable of performing duties for health reasons and stated misbehaviour.[523] Another procedural requirement is that the Minister should submit a statement to each House of the Oireachtas (Ireland's National Parliament).[524]

A notable mechanism to ensure the commissioners' independence to make free decisions is found in the fact that they are free from any types of proceedings that challenge their failures in acting in line with the functions provided in the Act.[525]

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[516] See *Ibid*, s 11(1).
[517] See *Ibid*, ss 11(1), (3).
[518] See *Ibid*.
[519] See *Ibid*, s 11(4).
[520] See *Ibid*, ss 11(3), (5), (6).
[521] See *Ibid*, s 11(11).
[522] See *Ibid*, s 11(12).
[523] See *Ibid*, s 11(7)(b).
[524] See *Ibid*, s 7.
[525] See *Ibid*, s 11(13).

Besides the commissioners, three other major categories of staff enable the operation of CAR. The first category are members appointed by CAR to assist in its performance of functions. Their appointment is subject to the consent of the Minister and the Minister for Finance.[526] Second, a deputy commissioner can be appointed by CAR from its staff to perform as the authority of the commissioners in the absence or vacancy of the commissioners, excluding specific exceptions.[527] Third, consultants or advisers are engaged to help with most functions of CAR; their remuneration comes from CAR's expenses.[528] This channel of expertise that is introduced from the outside on an advisory basis can consolidate CAR's level of profession, which is a key factor for it independently assuming duties.

The remuneration of officers in CAR is two-fold. On the one hand, the Minister and the Minister for Finance have final say on the remuneration of full-time officers, namely the commissioners and the members of the staff of the commission.[529] On the other hand, consultant and advisor fees are at the discretion of CAR.[530]

It is important to note that CAR has the authority to impose a levy in order to finance its expenses.[531] This authority is a safeguard of CAR's financial independence. The condition is to keep the levies to the minimum level that can satisfy the CAR's need to function.[532] To facilitate the enforcement of charges collection from a legal point of view, the levies can be characterised as a simple contract debt, such that they can be recovered in front of any court with jurisdiction.[533] Each House of the Oireachtas, which functions as the Parliament body, has the power to withdraw the levy-imposing regulations made by CAR.[534]

3.5.2.1 Declaration and Disclosure of Interests

[526] See *Ibid*, s 12(1).
[527] See *Ibid*, s 13.
[528] See *Ibid*, s 14.
[529] The methods to determine remuneration between the commissioners and the commission's staff are different. For the commissioners, remuneration is determined by the Minister with the consent of the Minister for Finance. The payment to the commission's staff is proposed by CAR and subject to the approval of both Ministers. See *Ibid*, ss 11(1), 12(1).
[530] See *Ibid*, s 14.
[531] See *Ibid*, s 23.
[532] See *Ibid*, s 23(1).
[533] See *Ibid*, s 23(5).
[534] See *Ibid*, s 23(6).

The 2001 Aviation Regulation Act employs an interest declaration and disclosure method to sustain independence, especially the independence from the regulated industry and airport users. The officers who are obligated to make declarations and disclosure consist of commissioners, advisers, consultants, and members of staff of the commission at certain levels or grades.[535] In particular, this method has two requirements, i.e., a declaration requirement and a disclosure requirement. The former requires that these four types of "interests" should be declared: (1) employment "by or on behalf of" certain aviation-related entities[536]; (2) investments, for instances shares and bonds, in the aforementioned entities over £10,000; (3) directorship and shadow directorship in the aforementioned entities from the previous two years; (4) benefits, for instance gifts of travel and holiday, more than £500 in or connected with the aforementioned entities in the past two years by the person being appointed or his or her spouse.[537]

For smooth implementation, failure to make a declaration can trigger action by the Minister or by CAR as they deem appropriate.[538] In particular, under the third category, one will need to look into the Companies Acts to recognise directorship and shadow directorship.[539] It illustrates that laws on corporate governance have paved the way for monitoring the independent operation of a regulator.

The commissioners, members of staff, advisors, consultants, and other commission employees should disclose any monetary or beneficial interests and materials they have received in relation to the activities of CAR.[540] This interest disclosure requirement seems to be more stringent as there is no threshold below which the obligation of disclosure can be exempted;[541] the person that has an interest should play no role, seek no influence, and avoid to discuss or vote in these matters;[542] interests of officers and their household members are all recognised as interests of officers themselves.[543] The strictness of this disclosure requirement may be because these interests and

[535] See *Ibid*, ss 17(1), (2).
[536] They have seven types: "(i) an airline, (ii) an airport authority, (iii) an aviation terminal services provider, (iv) an aviation terminal services provider, (v) a provider of groundhandling services, (vi) an organiser, (vii) a coordinator under Article 4 of the Council Regulation (EEC) No. 95/93". *Ibid*, s 17(7).
[537] See *Ibid*. Also, Pounds were used in the 2001 Aviation Regulation Act before the circulation of euros in 2002.
[538] The action towards commissioners is removal from office. The actions towards other actors include the removal from office or the termination of a contract. See *Ibid*, ss 17(5), (6).
[539] See *Ibid*, s 17(7).
[540] See *Ibid*, s 18.
[541] See *Ibid*, s 18(1).
[542] See *Ibid*, ss 18(1)(b), (c), (d).
[543] See *Ibid*, s 18(2).

materials that are subject to disclosure are directly tied to the discussed regulatory matters in CAR. As such, they pose a significant risk to CAR's independence.

3.5.3 Reflections

When defining what interests may trigger a threat to CAR's independence under the declaration and disclosure method, it draws upon existing norms on corporate governance. This mechanism enables transparency of the connection between the employees of the commission and the regulated entities. This disclosure and declaration requirements are taken seriously as the Minister and CAR are authorised to remove a commissioner and other officers, respectively, if they fail to fulfil the obligation of declaration[544] or disclosure[545].

An *ex post* study in 2017 also suggests that CAR as the Irish ISA is independent of the Dublin Airport Authority.[546] Yet, airlines hold the view that directions from the government may infringe on CAR's independence.[547] The high skills level of CAR staff can reinforce independence.[548]

3.6 Conclusion

Good regulation calls for an independent regulator. To examine what an independent regulator should look like, this chapter reviews interdisciplinary research to find the interface between politics[549] and law, though only at a surface level given the constraints of this thesis.

After discussing the need to have a regulator in place, this chapter moved to a theoretical and general discourse on why a regulator should be independent in two dimensions, namely independence from political intervention and independence from the regulated parties. The former dimension has been overshadowed by the latter one. One should pay special attention to two practical aspects, e.g., personnel and finance independence. Personnel independence argues that officers, particularly the commissioners or their counterparts in a regulator, are free to make regulatory decisions without fear of losing their livelihood. Financial independence allows a regulator to have their own resources and free decisions regarding the distribution of funding.

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[544] See *Ibid*, ss 17(5), (6).
[545] See *Ibid*, ss 18(6), (7).
[546] See Steer Davies Gleave, *supra* note 60, s E.270.
[547] See *Ibid*.
[548] See *Ibid*, s E.267.
[549] It refers to those political discussions on the rationales of an independent agency and the relationship between a regulator and other governmental branches.

IATA and the ACI represent airlines and airports, respectively, as two opposing interest groups. For the ACI, the establishment of an independent regulator does not necessarily contradict the interests of airport operators.

The EU requires member states to set up ISAs as independent regulators, whose primary duty is to serve as first step in dispute resolution. In addition to concerns about political independence and the financial mechanism, some severe problems are likely to occur in the implementation phase by member states.

The study of Irish regulation as a particular example of the EU regime demonstrates the shortage of consideration of possible intervention from executive power. I still see the Irish attempt as a success story, albeit with certain limitations. Despite the fact that the Minister may impose intervention by its leadership to CAR, provisions that restrict the power of the Minister enables CAR to function independently. These provisions include the stringent removal of commissioners, the provision of expertise resources, and the mechanisms of interest declaration and disclosure.

No absolute independence exists. As the discussions in the U.S. context demonstrate, the creation of an absolute "headless fourth branch" of the government may erode constitutionality.[550] Accountability can also be sacrificed for independence. Even if it is seen as a "fourth branch", it should be under the scrutiny of the Executive or Legislative Branch. In other words, there should be a balance between accountability and independence. It thus would not be feasible to establish an independent regulator with absolute authority. The Executive Branch generally oversees activities by different institutions concerning public services. Bearing in mind that the regulation of airport charges remains an activity in relation to the public service, it is reasonable to say that the Executive Branch plays a supervisory role to a regulator. That said, this supervisory function cannot be arbitrary and must be exercised with clear restrictions to ensure a regulator to maintain necessary independence.

[550] For discussions on a "fourth branch", see Steven A Ramirez, "Depoliticizing Financial Regulation" (2000) 41 Wm & Mary L Rev 503 at 512–513. For concerns on the hazard from a headless fourth branch, see the President's Committee on Administrative Management, *Report of the President's Committee on Administrative Management* (Washington: U.S. Govt. Print. Off., 1937) at 40; Janisch, *supra* note 435 at 58; Giandomenico Majone, "The Transformations of the Regulatory State" in *The New Regulatory State* (Springer, 2011) 31 at 34; Alden Abbott, "White House Review of Independent Agency Rulemaking: An Essential Element of Badly Needed Regulatory Reform", online: *The Heritage Foundation* <https://www.heritage.org/government-regulation/report/white-house-review-independent-agency-rulemaking-essential-element>.

Therefore, a fair and reasonable expectation of an independent regulator may be to look forward to "effective independence", as opposed to absolute independence from the Executive or Legislative Branches of the government. It targets achievable independence that insulates forces that threaten a regulator.[551] On the one hand, effective independence should be free from the unreasonable intervention of executive power to make just decisions. On the other hand, it embraces *reasonable* governmental supervision.

[551] Scott Hempling, "Effective Regulation: Do Today's Regulators Have What It Takes?" Energy Law & Policy at 546.

4 Case Studies of the UK, Canada, and India

This chapter discusses three case studies – the UK, Canada, and India – to examine how a private law approach has been implemented in airport charges regulatory activities in each country. While I have discussed the justification for these three cases in my Introduction, this chapter gives concrete examples of how a private law approach has been differently implemented as background for a more theoretical discussion about a private law approach in Chapter 5. These cases reveal the feasibility of this approach as well as areas that can be improved.

Each case study has its own conclusion, but there is a parallel among the three cases: a private law approach is always contextualised in a reform of airports' public ownership. The UK privatised its airports, Canada's major airports are operated by not-for-profit corporations, and India transferred the operation of hub airports to private companies. When a country proposes to privatise the management and/or ownership of its airports, it may consider giving more regulatory power to the private operator as a reform that is compatible with airport privatisation. The fact that a "private law approach" has been implicitly applied, though these countries do not use this name, suggests that it is feasible.

4.1 The UK

4.1.1 An Economic Regulatory Framework in a Privatisation Context

The UK is a pioneer in transferring airport ownership to private hands in as early as the 1980s.[552] This reform reflects a broader policy context that favoured infrastructure privatisation during Margaret Thatcher's government.[553] Unlike India, which privatises airports by transferring the

[552] Before the 1960s, the British government owned and controlled all airports. Alongside the added difficulty to operate airports, major airports in the UK, including their ownership, were transferred to the British Airports Authority (BAA). After the Airports Act 1986, the BAA was transferred again into a public listed corporation. This reform signals the privatisation of the BAA. As a result, those airports in the package of the BAA were privatised. After that, the BAA sold many airports, including Gatwick (2009), Edinburgh (2012), and Stansted (2013). To better reflect its main business, the BAA was renamed Heathrow Airport Holdings Limited, indicating that Heathrow Airport is its core asset. See ICAO, "Case Study on Commercialization, Privatization and Economic Oversight of Airports and Air Navigation Services Providers- United Kingdom", (2013), online (pdf): <https://www.icao.int/sustainability/CaseStudies/UnitedKingdom.pdf>.

[553] See Kumar V Pratap & Rajesh Chakrabarti, "Public-Private Partnerships in Infrastructure" (2017) India Studies in Business and Economics at 2; Pekka Leviäkangas et al, "Ownership and Governance of Finnish Infrastructure

right of operation via concessions or PPPs, the UK privatises airports more thoroughly: the ownership of airports is divested to private operators, too. Notwithstanding this seemingly adventurous attempt, the story of British airports has been widely reviewed as a success story.[554]

Against this background, this case study aims to discover how the UK regulates charges in these privatised airports, especially given the assumption that privatisation necessitates regulation.

4.1.1.1 From a Permission Regime to a Licensing Regime

The 2012 Civil Aviation Act (the 2012 Act) is a major component in the UK's aviation legal framework of airport economic regulation. It evolved from the previous regulatory regime championed by the 1986 Airports Act and Part IV of the 1994 Airports (Northern Ireland) Order.[555] Before the commencement of the 2012 Act, airport charges were regulated by a permission regime enforced by the Civil Aviation Authority – all charges imposed by airports were subject to the permission of the Authority before they were allowed to be levied on users.[556] This provision applies to two categories of airports: designated and non-designated.[557]

The 2012 Act changed the Civil Aviation Authority's permission regime into a licensing one. The Authority's core power in economic regulation is now to issue a licence that imposes conditions on price control measures. These conditions are called "price control conditions".[558] The licence is the only way in which the Authority can impose price control conditions upon an airport operator. It is issued as a result of the market power test, and the Civil Aviation Authority can only exercise its power to impose charge conditions when an airport operator passes the assessment test.

Networks", (2011) at 28, online (pdf): <https://www.vttresearch.com/sites/default/files/pdf/publications/2011/P777.pdf> .

[554] Bennett considers the privatisation of UK hub airports as a success in terms of their growth and the ability to operate at a reasonable charge level. Notwithstanding the fear that privatisation may raise charges, Heathrow managed to keep charges one third lower than those imposed by comparable airports in New York City. Meanwhile, Heathrow Airport expanded important infrastructure, e.g., the rail link from the airport to London. Bennett thus regards the UK model as one better than other states, and Canada could learn. See Mary-Jane Bennett, "Airport Policy in Canada", (2012) at 21, online (pdf): Frontier Centre for Public Policy <https://fcpp.org/files/1/PS139_Airport12_AG28F3.pdf>. However, price-cap regulation plays a role in keeping Heathrow's charges stable.

[555] Civil Aviation Authority, *Transition of the Framework for the Economic Regulation of Airports in the UK*, CAP1017 (2013) at para 1.1.

[556] See Louise Butcher, "Aviation: Airport Regulation", (19 June 2014) at 4, online (pdf): <http://researchbriefings.files.parliament.uk/documents/SN05333/SN05333.pdf>.

[557] *Ibid*.

[558] See *Civil Aviation Act 2012* (UK), s 19 [the 2012 Act].

Section 1 of the 2012 Act outlines general duties of the Authority that cover economic duties and some other important aspects.[559] Among others, the Authority should follow the principles of being "transparent, accountable, proportionate and consistent",[560] and "regulatory activities should be targeted only at cases in which action is needed".[561] The Authority also publishes policies to elaborate on its regulatory principles and their implementation. Regarding the conflict of interests between different air transport users, no matter if they are from different classes or related to different matters, the Authority should pursue the interests that it deems to be the most worthwhile at its own discretion.[562]

4.1.1.2 Market Power Test as Pre-Condition of the Licensing Regime

The power of conducting a market power test is in essence the authority to apply competition law.[563] A complete market power test consists of three steps. In the first step, Test A assesses if an operator "has, or is likely to acquire, substantial market power in a market, either alone or taken with such other persons as the Civil Aviation Authority considers appropriate".[564] When defining the scope of a market, akin to the Irish approach,[565] the 2012 Act examines a market both in a product sense and in a geographical sense.[566] Then, Test B checks if competition law could provide sufficient protection to stop an operator from abusing its substantial market power.[567] If competition law fails to achieve this end, the condition of Test B is satisfied. The final step is Test C, which conducts a cost-benefit analysis. This step examines whether regulation through a licence will bring in more benefits than costs to airport users who suffer from market power abuse of an

[559] Section 1(3) sets out that when the Authority assumes its duties, it should "reduce, control or mitigate the adverse environmental effects of the airport", and take care of "any international obligation of the United Kingdom notified to the CAA by the Secretary of State for the purposes of this Chapter". *Ibid*, ss 1(3)(d), (f).
[560] *Ibid*, s 1(4)(a).
[561] *Ibid*, s 1(4)(b). This principle explains why the current regulatory regime only imposes regulatory restrictions on the targeted airport operators, whose market power could only be addressed by price control activities, after a market power test.
[562] *Ibid*, s 1(5).
[563] The market power test answers a competition law problem – Whether a tested subject has significant market power and may abuse it. If the test is met, a licence is issued as follows to specify the economic regulatory measures imposed upon an airport operator. Another explanation for the opinion that the market power test is a duty under competition law is that the Authority is required to refer to competition law when it conducts the three steps of a market power test. See *Ibid*, s 6(10). Competition law consists of three parts, namely, "(a) Articles 101 and 102 of the TFEU, (b) Part 1 of the Competition Act 1998, and (c) Part 4 of the Enterprise Act 2002 (market investigations)". *Ibid*, s 6(9).
[564] *Supra* note 558, s 6(3).
[565] For the Irish approach, see Chapter 1.4.
[566] See the 2012 Act, *supra* note 558, s 6(6).
[567] See *Ibid*, s 6(4).

airport operator.[568] When these tests are met, and a corresponding notice of determination has been made, one can identify an airport operator as a dominant airport.[569]

The UK is cautious to impose regulatory measures because under its approach extra regulation on airport charges should come only after the exhaustion of competition law measures. This prudence reveals the British government's mentality on airport charges: that the recognition of substantial market power cannot be used to identify an airport as dominant without other conditions. Moreover, the requirement to issue a notice shows the importance of due process. Regarding Test C, although a cost-benefit analysis appears reasonable for showing that regulation does not invoke unnecessary adverse impact, it is questionable how the risk of overcharging brought by the abuse of dominant power by an airport should be addressed when the harm is not severe enough to pass Test C.

4.1.1.3 Price Control Conditions in a Licence

The 2012 Act offers two alternatives that the Civil Aviation Authority may choose to impose as a price control condition. The licence can either specify the amount or the maximum level of the amount of charges[570] or require that the amount, or the maximum level of the amount, be subject to the approval of the Authority.[571]

In addition, the Authority has the power to impose conditions that "[deprive] the holder of the licence of an amount not exceeding the amount which the [Authority] considers was earned from the abuse during that period".[572] This condition applies when the Authority considers that an airport operator collects "unfairly high charges" directly or indirectly.[573] Moreover, a price control condition can also be imposed by referring to "the amount charged for particular goods or services",[574] or "the overall amount charged for a range of goods or services".[575] A licence must specify the period when these price control conditions will be in effect.[576] The licensing regime is

[568] See *Ibid*, s 6(5).
[569] See *Ibid*, s 5(1).
[570] See *Ibid*, s 19(1)(a).
[571] See *Ibid*, s 19(1)(b).
[572] *Ibid*, s 19(5).
[573] See *Ibid*, s 19(4).
[574] *Ibid*, s 19(6)(a).
[575] *Ibid*, s 19(6)(b).
[576] See *Ibid*, s 19(7).

flexible, not only because of these alternatives, but because the Civil Aviation Authority has the power to modify a licence, its conditions, or the region where a licence has been granted.[577]

The 2012 Act also entitles the Authority the power to enforce these conditions. Possible enforcement measures include a contravention notice,[578] an enforcement order,[579] an urgent enforcement order,[580] or a penalty, which is imposed upon the breach of a condition or an order.[581]

In terms of the sequence between the application of general power under competition law and the discussed enforcement power under the 2012 Act, the Authority is required to be restrained from exercising enforcement power if competition law suffices.[582]

Arguably, the Authority enforces a price control condition in a manner that is both cautious and flexible. The cautiousness behaves twofold. For one thing, a preliminary contravention notice should be issued before enforcing more stringent measures. For another, the resort to competition law precedes the exercise of the enforcement power that the Civil Aviation Authority is granted under the 2012 Act. The condition is enforced flexibly because the Authority has the option to issue an urgent enforcement order for a preventative purpose such that it can circumvent the contravention-notice condition. While this urgent design may be effective, such a "super-power" that voids necessary notices beforehand should draw one's attention to its potential abuse. This power should be restricted.

4.1.1.4 Appeal Mechanism

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[577] See *Ibid*, s 22(1).

[578] A contravention notice is issued when the Authority "has reasonable grounds for believing that [a] person is contravening, or has contravened, a licence condition". *Ibid*, s 31(1). This notice should specify "the action that the Authority may take under this Chapter in connection with the contravention […]" *Ibid*, s 31(2)(b). The contravention notice serves as a preliminary warning. This enforcement measurement has a deterrent function.

[579] See the 2012 Act, *supra* note 558, ss 33–34. One of the conditions to issue an enforcement order is that a contravention notice has been issued. This condition illustrates the preliminary warning feature of a contravention notice. See *Ibid*, s 33(1)(a).

[580] For the Authority to make an urgent enforcement order, the results of serious economic or operational problems do not have to have happened. This order can be based on "an immediate risk" of these results in order to prevent them. See the 2012 Act, *supra* note 558, s 35(2). Likewise, an urgent enforcement order can be based on the observation that a licence condition is likely to be contravened. See *Ibid*, s 35(3)(a).

[581] A penalty can be imposed on an operator either in the case of the contravention of a licence condition, namely, in the case of a contravention notice, or the contravention of an enforcement order or urgent enforcement order. For more provisions on a penalty, see the 2012 Act, *supra* note 558, ss 39–45.

[582] See *Ibid*, s 46.

In the UK, the Competition and Markets Authority (CMA) functions as an appellate body, which hears any appeal against the conditions or their modification in a licence.[583] One might argue that competition law and economic regulation sectors are not necessarily the same matter.[584] Gavin Knott, a member of the CMA, is confident about the competence of the CMA as an appellate tribunal because it is well equipped with economic expertise in relation to the market.[585] As empirical proof, many recent appeals brought in front of the CMA are competition law issues in nature: the puzzle the CMA must solve is what implications regulatory measures will have for the market and competition environment.[586] Accordingly, it is the rich experience of the CMA on competition law that is an indispensable asset when solving these appeals.[587]

Test B reveals the UK's regulatory strategy to restrain sector-specific regulation. Competition law otherwise serves as the first option. This trend reflects a bigger picture of economic regulation in the UK – to mitigate sector-specific regulatory power and to embrace existing regulatory mechanisms.[588]

The CMA and the Competition Appeal Tribunal are concurrent appellate courts. While appeals against price control conditions are made to the CMA, appeals against market power determinations are made to the Tribunal.[589] To avoid conflicts between parallel appeals made to

[583] See *Ibid*, ss 24–25. The power was originally allocated to the Competition Commission, whose functions were transferred to the CMA as of 1 April 2014. See Competition and Markets Authority, "Competition: Regulatory Appeals and References", online: <https://www.gov.uk/topic/competition/regulatory-appeals-references>.
Moreover, there are three grounds for the CMA to allow an appeal: "(a)[…] the decision was based on an error of fact; (b)[…] the decision was wrong in law; (c)[…] an error was made in the exercise of a discretion". The 2012 Act, *supra* note 558, s 26.

[584] The Civil Aviation Authority identifies three powers of a statutory regulator: consumer protection, competition, and economic regulation powers. This categorisation indicates that the Authority distinguishes market power assessment (competition) and the imposition of charge restrictions (economic regulation). See Civil Aviation Authority, *Prioritisation Principles for the CAA's Consumer Protection, Competition Law and Economic Regulation Work*, CAP 1233 (2015) at paras 2.2-2.15.

[585] Gavin Knott, "Regulatory Appeals: Do UK's Appeal Regimes Stand up to Review?", (March 2018), online: *Oxera* <https://www.oxera.com/agenda/regulatory-appeals-critical-review/>.

[586] See *Ibid*. Although the Authority distinguishes a general practice of competition law (the market power test) and economic regulation towards airports (the imposition of price control conditions in a licence), it maintains a holistic view towards the two regimes.

[587] *Ibid*.

[588] As demonstrated by the CMA, it was established under the Enterprise and Regulatory Reform Act 2013 to cope with competition concerns for the whole economy countrywide. Competition Commission, *Airport Licence Condition Appeal Rules: Competition Commission Guide*, CC20 (2014) n 1.

[589] For a complete list of the powers of the Tribunal to hear appeals under the 2012 Act, see Competition Appeal Tribunal, "About the Tribunal", online: <https://www.catribunal.org.uk/about>.

the CMA and the Tribunal, the CMA has various options to decide how it will proceed with its appeals to mitigate conflicts.[590]

4.1.1.5 2011 Airport Charges Regulations

To meet the EU's requirements imposed by the EU Airport Charges Directive, the 2011 Airport Charges Regulations (the 2011 Regulations) defines responsibilities for airports subject to charges regulation. In particular, the 2011 Regulations follow the threshold imposed by the EU Airport Charges Directive, requiring that airports with over 5-million-passenger movements should be regulated.[591]

The Civil Aviation Authority published an important guide – Guidance on the Application of the CAA's Powers Under the Airport Charges Regulations 2011(CAP 1343) – to interpret how the Authority should implement the 2011 Regulations. In the UK, the Civil Aviation Authority is the Independent Supervisory Authority, which is required to be in compliance with the EU Airport Charges Directive.[592]

Unlike the licensing regime introduced by the 2012 Act, which imposes direct charge restrictions on dominant airports, the 2011 Regulations underline the procedural requirements that an airport should respect during the formulation of charges. These requirements encompass consultation between airports and airlines and its time limits,[593] with the responsibility imposed on both airports and users such that they should provide information to each other for meaningful consultation.[594] Regarding the basis for setting charges, the 2011 Regulations ban discriminatory charges between

[590] The CMA can decide to proceed with an appeal, meanwhile another appeal is pending before the Tribunal. It can suspend an appeal until the Tribunal completes its appeal. The CMA can even choose other flexible options, for example, to only proceed with some elements of an appeal and to complete the rest after the appeal made to the Tribunal is finished. See Competition Commission, *supra* note 588 at 7–8. Although the powers of the Competition Commission have been transferred to the CMA, this guide applies to the CMA because it has been adopted by the CMA.
[591] *Airport Charges Regulations 2011* (UK), s 4(1).
[592] See Civil Aviation Authority, *Guidance on the Application of the CAA's Powers Under the Airport Charges Regulations 2011*, CAP 1343 (2015) at para 1.9.
[593] See *supra* note 591, ss 1–3.
[594] This responsibility is imposed in the same part as the consultation requirements. The Authority is empowered to enforce non-compliance with information provision responsibilities. See *Ibid*, ss 16–22.

different airport users.[595] That being said, the Regulations allow differentiated charges that are "relevant, objective and transparent" in light of differentiated services and their costs.[596]

As for the implementation effect of the 2011 Regulations, the UK government conducted a post-implementation review, concluding that the 2011 Regulations have been functioning well and reaching their objectives.[597] Yet, to fully achieve the goal of the EU Airport Charges Directive, effective implementation of this Directive in other states, preferably in the form of domestic legislation, is still necessary.[598]

Notably, following Brexit, amendments to laws and regulations took place as some provisions that refer to the EU became inapplicable.[599] The 2011 Regulations have accordingly been amended as the UK will no longer use data from the EU in setting the threshold of the UK's airports under airport charges regulation because the UK exited the EU.[600] Amendments also were made to the Airports (Groundhandling) Regulations 1997, which was for transposition of the EU Directive 96/67/EC on the ground handling market at European Community airports.[601]

4.1.2 A Private Law Approach in the Practice of Airport Charges Regulation

In the control period[602] from 2014 to 2020, only the operators of Heathrow and Gatwick airports passed the market power test.[603] This means that price control conditions should be imposed via

[595] See *Ibid*, s 14(1).
[596] See *Ibid*, ss 14(2), (4).
[597] See Department for Transport, *Post Implementation Review of the Airport Charges Regulations 2011* (2017) at 6.
[598] See *Ibid*.
[599] When I drafted the thesis, Brexit was just completed; no substantive legislative reform occurred to the aviation sector to be discussed. Also, UK's aviation law based on the retained EU law will largely apply until further revision. Hence, the aviation legal framework that was built since the EU era is still important; this UK case study is contextualised in a legal framework when the UK was a member state of the EU.
[600] See Stephenson Harwood LLP, "Brexit Has Landed: What are the Consequences for the Aviation Industry?", (22 December 2020), online (pdf): <https://www.shlegal.com/docs/default-source/news-insights-documents/bd1124-aviation-brexit-flyer-v1.pdf?sfvrsn=62f7ed5b_0>.
[601] See *Ibid*.
[602] Information regarding the current round of market power access was updated until the end of December 2020.
[603] See Civil Aviation Authority, "Economic Licensing and Price Control", online: <https://www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Licensing-and-price-control/Economic-licensing-and-price-control/>.

licence conditions for both Heathrow[604] and Gatwick[605] airports.[606] In this section, I examine how the UK has adopted a private law approach under a tight licensing regime at both airports. I then examine Edinburgh Airport as an example of other unregulated airports.

4.1.2.1 Heathrow Airport

Price control conditions do not preclude the freedom of negotiating contracts in relation to charges between an airport operator and airline users. Charge regulation by contracts is still a solution at Heathrow Airport as allowed by its license. Some examples are as follows. The licence sets out that price control conditions do not prevent a licensee from making commercial agreements with airline users.[607] Agreements as such are allowed to include clauses on the payment of rebates regarding charges.[608] Notably, the licensee needs to comply with the non-discrimination requirement between contractual parties and non-parties.[609] When a licensee enters into any commercial contracts with airlines, the licence requires that the licensee provide alternative arrangements to guarantee that it does not "unduly discriminate" against non-signatory airlines.[610] Thus, the exercise of party autonomy regarding charge setting should not go against the price control conditions.[611]

Arguably, space to negotiate charge-setting provisions between an airport and its users seems narrow under the licence authorised to Heathrow Airport, though it exists. The practice of party

[604] For price control conditions imposed in the revised version of Heathrow Airport's licence, see Civil Aviation Authority, "Licence Granted to Heathrow Airport Limited by the Civil Aviation Authority Under Section 15 of the Civil Aviation Act 2012 on 13 February 2014", (2020) at part C, online (pdf): <https://www.caa.co.uk/WorkArea/DownloadAsset.aspx?id=4294975875>.

[605] For price control conditions imposed in Gatwick Airport's licence, see Civil Aviation Authority, "Licence Granted to Gatwick Airport Limited by the Civil Aviation Authority Under Section 15 of the Civil Aviation Act 2012 on 13 February 2014", (2014) at Appendix (Conditions of Use), ss 3, 5, online (pdf): <https://www.caa.co.uk/WorkArea/DownloadAsset.aspx?id=4294975946>.

[606] For Heathrow Airport, the price control conditions have been extended twice, so these conditions that were prescribed in its licence during the control period as of 2014 were effective until 31 December 2021. See Civil Aviation Authority, *supra* note 604 at 1.
For Gatwick Airport, the then price control was valid by 31 March 2021. See Civil Aviation Authority, *supra* note 605 at Appendix (Conditions of Use), s 2.1.3.

[607] See Civil Aviation Authority, *supra* note 604, s C1.13.

[608] See *Ibid*, s C1.16(d).

[609] See *Ibid*, s C1.14.

[610] See *Ibid*, s C1.14(a).

[611] Section C1.15 of the conditions stipulates that the commercial agreements should be "without prejudice to [l]icensee's obligations under Conditions C1.1 and C1.2, and the Airport Charges Regulations 2011 (2011 No. 2491)". C1.1 and C1.2 are conditions regarding the methodology to calculate the permitted maximal revenue.

autonomy could only be exercised under the conditions, which are imposed in the licence as a ceiling.

4.1.2.2 Gatwick Airport

Regarding contractual regulation, Gatwick Airport differs from Heathrow Airport. The regulatory boundary between a licence and a contract at Gatwick Airport is blurred. The licensing regime imposed on Gatwick Airport largely supports charge setting through a contractual process between it and its users. Specifically, Gatwick Airport makes commitments, including price-related ones, which are recognised and named as conditions.[612] These commitments are further enforced through detailed Conditions of Use (CoU), which form an appendix to the licence. The CoU amounts to an agreement in nature that provides contractual obligations offered by the licensee to airport users.[613] Price control conditions are subsequently implemented through a contractual mechanism.

The commitments set out in the CoU function akin to primary "regulations". The Civil Aviation Authority regards these commitments as "licence-backed commitments",[614] illustrating a two-layered regulatory structure. If the rules in the first layer, namely the commitments, are not strictly complied with, the Authority may trigger the second layer of regulation – imposing additional conditions by modifying the licence, which has stronger coercive power.[615] Previously-discussed enforcement and urgent enforcement orders can help tackle possible incompliance with Gatwick's commitments.

The Gatwick Airport's license also imposes some prohibitions on the commitments to give them some characteristics of traditional regulation. First, to prevent external effects on third parties, commitments that impose obligations on third-parties are not to be recognised as conditions in the licence.[616] Second, the licence restricts contracting renegotiation (the modification of

[612] See Civil Aviation Authority, *supra* note 605, s C1.1.
[613] See *Ibid*, s C1.11(a).
[614] Civil Aviation Authority, *Economic Regulation at Gatwick from April 2014: Notice Granting the Licence*, CAP 1152 (2014) at 7–8.
[615] See *Ibid* at 91.
[616] See *Ibid*, s C1.2. This demonstrates that these provisions are only contractual clauses without any regulatory feature. However, Gatwick Airport can enforce those clauses by contracts with airline signatories. See *Ibid* at 31. Another conclusion is that these commitments are composed of both conditions as regulations and contractual terms in a private law sense.

commitments).[617] The trigger of price commitment modification is limited to explicit grounds, which are addressed in the licence as well.[618] The licensing of Gatwick Airport, its commitments being a unique attribute, represents a hybrid mode between norms backed by coercive power and a light-handed monitoring regime.

At Gatwick Airport, regulation by contracts brings multiple advantages. On the one hand, it enables extra options to modify conditions under a licence, adding flexibility to traditional licensing regulation. Besides the statutory process under the 2012 Act, conditions can also be modified by launching a "self-modification process", by which Gatwick Airport can agree to new commitments with its airline users.[619] Second, as the Civil Aviation Authority reckons, bilateral contracts "allow service quality, capital investments, operational practice, volume commitments and price to be better tailored on an integrated basis to the needs of individual airlines and their passengers".[620]

Besides incorporating commitments as licence conditions, interactions between contractual and traditional regulation also takes place in the opposite direction: from traditional regulation to contractual clauses. Regulations can be converted to contracts. Gatwick Airport assumes the responsibility to incorporate any modification of conditions by the Civil Aviation Authority into its CoU as Gatwick's commitments.[621] That being said, the licensee still has a defence against making corresponding commitments by arguing that these conditions may not be "reasonably practicable" or by making an appeal under sections 25–30 of the 2012 Act.[622]

In addition to providing remedies for the regulated airport operator, the two grounds can also serve as standards when the Authority makes conditions under a licence. The requirement of being "reasonably practicable" will remind the Authority to make conditions exercisable for Gatwick Airport. To avoid appeals, the Authority will try to make the conditions as acceptable as possible.

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[617] "The [l]icensee shall not modify the Commitments otherwise than in the circumstances set out in the modification provisions of the Commitments". Civil Aviation Authority, *supra* note 605, s C1.4.
[618] Two situations can activate the modification process for price commitments – (1) airlines, which represent no less than 50% of the total airlines or carry no less than 67% of passengers, give consent; and (2) the need for the finance of a second runway. See Civil Aviation Authority, *supra* note 605 at Conditions of Use, Schedule 2, paras 6.1-6.2.
[619] Civil Aviation Authority, "Economic Licensing of Gatwick Airport", online: <https://www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Licensing-and-price-control/Economic-licensing-of-Gatwick-Airport/>.
[620] Civil Aviation Authority, *supra* note 614 at 7.
[621] See Civil Aviation Authority, *supra* note 605, s C1.7.
[622] See *Ibid*.

This regulatory mode, in my view, is a result of negotiation between the regulator and the regulated airport when it comes to how the current licence-backed commitments are entrenched. Gatwick Airport originally drafted these commitments as self-imposed regulation and proposed that the Authority should set free Gatwick Airport without imposing extra regulatory measures in the form of licence conditions.[623] Yet, the Authority disagreed and focused on Test C of the market power test series, concluding that incorporating the commitments in a licence would bring more benefits than costs to airport users.[624] Among others, the Authority was convinced that a licence to monitor Gatwick's commitments will do good, particularly when the pure "commitments" are not enforceable by non-airline users of Gatwick Airport, which means commitments may ignore passenger interests.[625]A licence thus functions as regulatory oversight and as a backstop to protect passengers' interests.[626]

Therefore, Gatwick's licence-backed commitments serve to reconcile its proposal of no regulation and a traditional command-and-control measure. The Authority highly respects Gatwick's current self-regulatory regime and only attempts to add necessary restrictions when it comes to blind spots associated with contracts like third-party effects or the protection of passenger rights. That said, the flexible licensing mode at Gatwick is still largely based on its own commitments.

As some commitments on charges in the CoU set out the power of the key decision-makers in Gatwick Airport Limited as a corporation, the Gatwick mode also tells how charges can be regulated from a corporate governance perspective. The CoU provides the CEO of Gatwick Airport with a power of discretion to offer reduction or exemption of many categories of charges.[627] To assist the CEO, particularly regarding parking charges, the CFO assumes the obligation[628] to provide detailed provisions on these benefit programs.[629] In addition to the

[623] Civil Aviation Authority, *Market Power Determination in Relation to Gatwick Airport – Statement of Reasons*, CAP 1134 (2013) at para 3.19. Gatwick came into commercial agreements with airlines subject to these commitments. *Ibid*.
[624] Civil Aviation Authority, *supra* note 623 at para 6.6. For more analysis of Test C, see *Ibid* at paras 6.6-6.33.
[625] See Civil Aviation Authority, *supra* note 623 at para 6.6. For more analysis of Test C, see *Ibid* at paras 6.13-6.15.
[626] Civil Aviation Authority, *supra* note 623 at para 6.15. The reasoning of the Authority in this market power determination often relates to passenger protection, e.g., *Ibid* at paras 1.3, 2.13, 5.28.
[627] These may include parking charges (s 3.3.8), landing and take-off charges (s 4.3.1), and special rates for flying training programs (s 4.1.1).
[628] As the CoU can be incorporated as contractual clauses between Gatwick Airport and airlines, these provisions in the CoU on the charge-setting powers of corporate staff are given the effect of contractual obligations.
[629] See Civil Aviation Authority, *supra* note 605 at Appendix (Conditions of Use), s 3.3.8.

discretion of providing reduced charges, the CoU entitles the CEO the power to modify charges to passengers with reduced mobility following consultation as a due-procedure condition.[630]

These commitments, in my point of view, should not be recognised as contracts of adhesion. First, despite the fact that the airlines are not likely to exercise their countervailing buyer power to switch to other airports,[631] they have proved able to disagree with airports in certain issues in the commitments, which were accordingly modified by the authority. During the 2014–2021 regulatory period, airlines showed their disagreement with Gatwick's measures in delivering services in many cases. Among others, airlines argued that airports should improve on-time performance to reduce congestion while airports insisted that it is the airline part that should build a resilient schedule.[632] This concern has been discussed throughout the 2018 consultation report. Following that, the Civil Aviation Authority modified the licence and the affiliated commitments of Gatwick Airport. The modified licence adds a section "On Time Performance", which provides that "[Gatwick Airport] will provide leadership and focus in the drive for on-time performance".[633]

Second, the application of these commitments is mandatory under the power of the airport licence issued to Gatwick Airport. As such, these commitments are no longer mere contractual clauses between two private parties. Third, these commitments are subject to periodical review by the Authority before they are incorporated as licence conditions in order to align with passenger interests. In other words, Gatwick Airport is unlikely to abuse its market power by arbitrarily imposing unreasonable clauses upon its users. Fourth, these commitments are restrictions for charges and standards of services that Gatwick Airport sets for itself in nature. This kind of self-regulation does good for its users. Even if they perform as being applied between airports and airport users as contracts of adhesion, they do not raise the concern that contracts of adhesion usually does, namely, unfair but unnegotiable clauses.

4.1.2.3 The Implications of Investment Decisions for Charge Regulation

[630] See *Ibid* at Appendix (Conditions of Use), s 3.4.5.
[631] Civil Aviation Authority, *supra* note 623 at para 5.29.
[632] Civil Aviation Authority, *Future Economic Regulation of Gatwick Airport Limited: Initial Consultation*, CAP 1684 (2018) at para 3.9.
[633] Civil Aviation Authority, *Economic Regulation of Gatwick Airport Limited: Notice of Licence Modifications*, CAP 2144 (2021) at 36.

Both the Heathrow and Gatwick Airport cases reveal the impact of infrastructure investments on the level of airport charges, and, as we will see, the Indian case study will reveal a similar observation. For Heathrow Airport, the proposal for a third runway has been under heated discussion since 2016.[634] However, new capacity calls for intense capital expenditures. Positions from the Authority and the airline community are inconsistent as per funding to finance new infrastructure: the Authority embraces pre-construction funding, with the accumulation of funds over a period of time such that the increase of charges will remain moderate and stable, which it deems to be a consumer-friendly approach.[635] The airlines, however, oppose the Authority's proposal due to insufficient evidence. The airlines are willing to pay the airport only when they actually use the newly established services.[636] Even though the COVID-19 pandemic makes the third runway plan impossible in the short term,[637] arguably a similar debate will re-emerge in future once the economy has recovered and Heathrow revisits their capacity expansion plans.

A proposed new runway could lead to a change of regulation. When designing the licence conditions, the Authority emphasised preventing Gatwick Airport from passing through costs of building a second runway to passengers without reasonable restrictions.[638] It inserted a condition into the licence, setting out that the maximum amount of costs regarding the second runway to be passed on to passengers should be under £10 million per year.[639] Extra costs to be transferred to passengers must follow the modification procedure of the licence.[640] These exceptional *ex ante* and price-capping restrictions imposed by the Authority mainly aim at the protection of passenger users, although the regulated airport sector disagrees with the imposition of this licence condition that limits their power to levy fees for infrastructure extension.[641]

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[634] The runway plan began to gain the support of Theresa May's Government in October 2016. An evaluation of the budget is £16 billion. See The Independent, "Heathrow Airport Launches Public Consultation on Third Runway amid Environmental Concerns", online: <http://www.independent.co.uk/news/business/news/heathrow-airport-third-runway-london-flights-environment-expansion-flights-a8109151.html>.

[635] See "Economic Regulation of New Runway Capacity: Airline Response" at 9 online (pdf): <https://www.caa.co.uk/WorkArea/DownloadAsset.aspx?id=4294974418>.

[636] See *Ibid* at 3–4.

[637] See Civil Aviation Authority, *Economic Regulation of Heathrow: Programme Update*, CAP 1914 (2020) at paras 3–5.

[638] See Civil Aviation Authority, *supra* note 614 at 5.

[639] See *Ibid*, s C1.8.

[640] See *Ibid*.

[641] See *Ibid* at 41.

4.1.2.4 Other Airports

Other airports fall outside the licensing regime. For those, commercial contracts dominate in terms of charge setting. As mentioned previously, although the 2011 Regulations impose some procedural rights on airports with passenger numbers above the five-million threshold, they do not confirm the specific rate or the amount of charges. Still less do they set any charges for those airports out of the scope of the 2011 Regulations.

One can use the CoU of Edinburgh Airport since 1 January 2020 as an example of the liberal sphere of charge regulation that applies to airports outside the licensing regime.[642] First, because the CoU is a commercial agreement in nature, it is also subject to other private law mandates that protect users.[643] This CoU specifies that terms restricting or excluding both parties' liability are subject to the provisions of the Unfair Contract Terms Act 1977.[644] This means that the contractual clauses utilised to regulate charges are simultaneously under the scrutiny of other private laws, particularly those from the contract law field.

Second, the overarching CoU does not prohibit tailored agreements that Edinburgh Airport concludes separately with individual airlines. The CoU provides that "[t]he [a]irport may consider entering into separate agreements with [o]perators on [a]irport [c]harges to incentivise material growth through increased passenger numbers".[645] When signing these separate agreements, Edinburgh Airport ought to avoid a concern of discriminatory charges that it charges towards different airline parties.

Third, regarding the freedom on charge setting from a corporate governance perspective, the CEO has the discretion to give rebates and other rewards to users, albeit within a limited and narrow scope.[646] This arrangement is akin to the scenario at Gatwick Airport.

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[642] For the CoU and other contractual documents regarding ancillary charges, see Edinburgh Airport, "Conditions of Use", (2020), online (pdf): <https://edinburghairport.s3-eu-west-1.amazonaws.com/files/2019/12/EDI_Conditions_of_Use_2020.pdf>.

[643] This benefit reflects the author's argument on the advantages of regulation by the private law approach to be discussed in the next chapter – private law can be employed to make contracts and corporate governance enforceable when they function to regulate charges.

[644] See Edinburgh Airport, *supra* note 642 at preface, para 3.

[645] See *Ibid* at para 5.1.

[646] The discretionary power aggregates around certain ancillary activities at Edinburgh Airport. Taking paragraph 6.1 of the CoU as an example, "[t]he Chief Executive Officer of the Airport may negotiate agreements for reducing take-

4.1.3 Experience to Draw on

The UK welcomes an increasingly liberal approach to economic regulation of the airport in a privatisation context. Although the only section in the regulatory framework that imposes an *ex ante* licensing regime with a price-cap condition on Heathrow and Gatwick airports remains stringent, it has been limited to a very narrow space in both prescriptive and implementation dimensions. This liberal regulatory regime is consistent with academic arguments that regulation should only step in when market competition fails to function effectively.[647] Having examined the basic framework of airport economic regulation in the UK, this section observes several scenarios that other countries may refer to when they encounter similar regulatory tasks.

4.1.3.1 Relying More on General Competition Law Than Sector-Specific Regulation

The regulatory regime counts more on competition law than sector-specific regulation. This preference can be construed as accepting that, if existing regulation proves effective, additional regulatory interruption should be restrained. On the one hand, the Civil Aviation Authority, as the economic regulator of airports, enforces competition law to a large degree: It conducts market power tests. Test B examines the efficacy of applying competition law without issuing a licence.[648] In taking this step, the Authority is in fact interpreting competition law. As such, the Authority is more like a concurrent agency with the CMA than a mere sector-specific regulator. On the other hand, the Competition Appeal Tribunal, one of the two appellate bodies, handles appeals that challenge a market power determination.

4.1.3.2 Cooperation Between Traditional and Private Law Regulation

Although both Heathrow and Gatwick airports are subject to the licensing regime and price conditions, the strength of regulatory control at each differs. In line with the principle of proportionality, the Authority treats both airports differently according to the risks of overcharging. Unlike the licence imposed on Heathrow Airport, the licence on Gatwick Airport can be interpreted

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off charges for [f]lights made for the purpose of the clubs at the Airport but not [f]lights made for hire or reward outside the normal range or scope of club activities".

[647] Although regulation should be restrained, some scholars acknowledge its backstop role. An empirical study suggests that the regulatory decision to remove Manchester Airport from the list of price-cap regulation aligns with the impact of this airport's catchment area on the concentration level. Meanwhile, the regulation that was later imposed on Heathrow, Gatwick, and Stansted airports can be justified. See Bottasso et al, *supra* note 52 at 60.

[648] Only by understanding the competition law sector completely can the Authority accurately conduct Test B.

as a hybrid mode consisting of commitments in the form of the CoU (contractual regulation) and a licence that enforces the CoU and imposes more stringent conditions when necessary. Contractual norms (the commitments in the CoU) are recognised and authorised by the regulator. The latter part makes the former commitments "licence-backed commitments". Therefore, even under the category of a licensing regime, the Authority still tries to regulate as lightly and flexibly as possible.

Specifically, the regulatory regime prioritises the setting of charges by contracts. The CoU that carries the commitments of Gatwick Airport is a set of contractual terms in nature. When adopting a contractual framework in a licence, the Authority has largely built the regulation of Gatwick on a private law basis. Rather than stepping in with intruding measures, the Authority favours monitoring the performance of Gatwick Airport, instead. When it comes to airports that pose fewer risks regarding charges and are not subject to the licensing regime, one can expect that commercial contracts would play a more significant role than they do at Gatwick Airport. The case of Edinburgh Airport suggests this.

The choice of contractual regulation is chosen by the market, rather than being artificially imposed. It is not an unprecedented solution. For Gatwick Airport, the commitments were already adopted as a framework, and, subject to this framework, Gatwick Airport signed agreements with airlines before the licensing regime incorporated these commitments.[649] Moreover, there are concerns in light of price regulation that harsh control discourages investments and compromises service quality due to the difficulty to set a fair level of services. [650] In response, long-term vertical supply contracts signed by the UK's unregulated airports with airline users offer an effective solution.[651] The long term of a vertical supply contract makes an airport feel secure about the sunk costs that may occur for future development.[652]

4.1.3.3 Contracts Undergirding Corporate Governance

Gatwick's and Edinburgh's CoUs authorise key corporate actors to make decisions on airport charges, albeit only to a limited extent. The CEO and the CFO are key in the governance process.

[649] Civil Aviation Authority, *supra* note 623 at para 5.29.
[650] See David Starkie, "The Airport Industry in a Competitive Environment: A United Kingdom Perspective", (July 2008) at 16, online (pdf): <https://www.itf-oecd.org/sites/default/files/docs/dp200815.pdf>.
[651] *Ibid.*
[652] *Ibid.*

As such, the CoUs of both airports spell out how charge regulation can otherwise be administered through the mechanism of corporate governance. Also, in both cases, the authorisation of key corporate actors occurs via contracts, suggesting that a corporate governance approach and a contractual approach may collaborate.

4.1.3.4 Prioritising Passenger Protection

If a regulator decides to step in, the protection of consumers, in other words, passengers, should be the main purpose. When explaining Gatwick's licence, the Authority spells out that passenger interests will be in danger without the Authority imposing licence conditions.[653] While an airline can obtain favourable charge rates in light of its strong bargaining power when negotiating contractual clauses with an airport, such benefits do not necessarily flow through to passengers.[654] This consumer-prioritised reasoning provides an approach for airport regulators in other jurisdictions when they need to choose between harsh price controls or lighter measures.

4.1.3.5 Understanding the Importance of Investments

When calculating operation costs, the scale of investments in airport development remains an important factor. Constructive expense is financed by airport investors and ultimately paid by airport users through charges.[655] Accordingly, when a regulator considers taking regulatory measures against abusing the power of charge setting, it may strategically scrutinise investments by ensuring that the investment scale is reasonable.

4.1.3.6 The Need for a Timely Solution

The lacuna left by the market power test illustrates why it is important to refer to private bottom-up instruments in regulation. First, assuming that Test A and Test B are both met, but Test C is not

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[653] The CAA argues:

> The CAA considered that the requirement to comply with the licence in the interests of passengers was an essential element of the licence condition that allowed the CAA to intervene on passengers' behalf if the airlines choose not to do so. Without this obligation, the terms of the commitments would only be enforceable as a contractual arrangement between GAL and the airlines through the dispute mechanisms in the COU and through the courts. This obligation was therefore necessary to provide a direct route of enforcement by the CAA, including through the use of its powers to modify, impose interim relief and penalties in order to add value in terms of enforcement in the interests of passengers.

Civil Aviation Authority, *supra* note 614 at para 2.35.

[654] See Bottasso et al, *supra* note 52 at 61.

[655] Civil Aviation Authority, *In Focus: What is the CAA's Economic Regulation Role in New Airport Capacity?* (2016) at 2.

met, a licence will not be issued. However, a decision not to issue a licence may be taken in light of the recognition that the costs are heavier than the benefits of the proposed regulatory charge regulation.[656] The risk of unreasonable charges by an airport with market power is still real.

Furthermore, the time needed to finish the market power assessment is long, and the COVID-19 crisis added an extra impact on this process.[657] As a result, traditional regulation that follows an assessment process of market power is likely to be too slow to respond in a timely way to over-charges that threaten passenger interests. A general market power determination may take 18 months from start to finish, let alone any other unexpected situations like stakeholders' unsatisfactory cooperation that may prolong an already delayed agenda.[658]

The market power test proposal to Manchester Airport vividly demonstrates how slow this process can be. Starting in early January 2020, the Civil Aviation Authority initiated it following a request by a relevant third party. The Authority is statutorily obligated to make market power investigations subject to the 2012 Act if a third party requests it.[659] However, due to the COVID-19 pandemic and at the third party's request, the Authority decided to delay the start of the whole process until August 2021.[660] One can arguably predict that the determination of the market power test will only be released 18 months from August 2021 at the earliest.

[656] In a guiding document by the Authority introducing how to implement the market power test, Test C is seen as a "balancing exercise between the benefits of a licence imposed on the relevant airport operator and a situation where there is no licence". Civil Aviation Authority, *supra* note 38 at para 6.4. For detailed explanations of the Test C step, see *Ibid* c 6.

[657] In August 2020, the Authority posted a notice that market power assessment would be postponed until no earlier than August 2021 due to the impact of the COVID-19 pandemic. Civil Aviation Authority, "Airport Market Power Assessment", online: <https://www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Licensing-and-price-control/Airport-market-power-assessment/>.

[658] See Civil Aviation Authority, *supra* note 38 at para 3.21. The market power test has four stages: evidence collection, consultation, review, and determination. Each of the stages follows separate procedures and legal requirements. For instance, when gathering evidence, relevant evidence requires care for confidentiality. These due procedure requirements slow the process. See *Ibid* at paras 3.23-3.47.

[659] See the 2012 Act, *supra* note 558, s 7(2), (3).

[660] Civil Aviation Authority, *supra* note 657.

4.2 Canada

4.2.1 Airports in the National Airports System

4.2.1.1 Separation of Ownership and Operation

Although Canada has about 570 certified airports, only a dozen of them serve more than one million passengers each year.[661] According to the National Airports Policy, Canada's airports are categorised mainly according to their traffic levels and location. The most frequently used airports constitute the National Airports System (NAS), which encompasses airports that satisfy either of two standards – to reach 200,000 annual passengers or to serve a national, provincial or territorial capital.[662] NAS consists of 26 airports nationwide, responsible for 94% of scheduled passenger and cargo traffic in Canada.[663] The other airports outside of NAS are divided into two categories, namely, regional and local airports[664] and small airports[665].

Regarding ownership, Canada applies different policies to the different categories of airports mentioned above. Most importantly, Canada stays cautious about NAS airports, which are closely associated with national interests. The federal government separates ownership and operation of these NAS airports by maintaining ownership while transferring their operation to not-for-profit

[661] See Canadian Airports Council, "Canada's Regional Airports Getting the Funding Balance Right", online (pdf): <http://cyqm.ca/wp-content/uploads/2016/10/CAC-Canadas_Regional_Airports_FINAL_EN.pdf>.
[662] Airports that have reached the 200,000-passenger threshold for three continuous years are eligible to enter NAS. Airports that fail to reach this traffic level but serve national, provincial, and territorial capitals are also qualified as parts of NAS. See Government of Canada, "List of airports owned by Transport Canada", (3 February 2010), online: <https://tc.canada.ca/en/aviation/operating-airports-aerodromes/list-airports-owned-transport-canada#National_Airports_System>.
[663] *Ibid.*
[664] These airports also operate scheduling services, so they are important for the regions that they serve. There are 71 airports in this category. See Canadian Airports Council, "Canadian Airport Model", online: <https://canadasairports.ca/advocacy/industry-priorities/canadian-airport-model/>.
[665] These airports do not provide regular scheduling services and only serve on a local basis. There are 31 small airports in Canada.

entities. An airport operator is formally known as a Canadian airport authority (CAA),[666] and in most cases, the owner of a NAS airport is the federal government, with its operator being a CAA.[667]

4.2.1.2 Advantages for the Government to Hold Ownership

To maintain ownership while leasing out the operation of NAS airports is a wise move that brings multiple advantages for the federal government. First, by transferring the operation duty to CAAs, the government eliminates the risk that it is unable to profitably run these important assets. Second, these airports avoid financial constraints that may occur when operated at a federal level.[668] Third, by controlling ownership, the government exercises a power of supervision and maintains a final say over these airports, which are associated with national security.[669] Fourth, as the landlord of NAS airports, the government collects rents for ground leases it signs with each CAA. These rents count as a considerable amount that can be reallocated to other fiscal plans. Hence, rather than subsidising airports, the government benefits from them without having to operate them.

Notably, ownership of NAS airports seems especially important during a crisis of air transport, for example, the lockdown resulting from the COVID-19 pandemic. One can learn from the difficulties that the Canadian government has encountered as a result of airline privatisation. Although they were privatised decades ago, the government of Canada is now contemplating retrieving part of the shares of the airline companies so that the government can facilitate aid to them in light of the struggles amid the COVID-19 pandemic.[670] This change highlights that complete divestment of ownership by the government of an NAS airport may be suboptimal.

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[666] Notably, not all the 26 airports have been transferred to CAAs in terms of operation and management. A Canadian Airports Council's report finds that 22 airports are run by CAAs. One can understand the ownership from the dimension of the property of land that an airport occupies. The NAS airports are built on federally owned land. See Canadian Airports Council, *supra* note 661. Institute for Governance of Private and Public Organizations, "The Governance of Canadian Airports: Issues and Recommendations", (2014) at 8, online (pdf): <http://igopp.org/wp-content/uploads/2014/04/igopp_gouvernanceaeroport_en_web_lowres.pdf>.

[667] The exceptions are: three arctic airports that are owned and operated by territorial governments and the Kelowna Airport, which is owned and operated by the city of Kelowna.

[668] See Michael W Tretheway & Robert Andriulaitis, "Airport Policy in Canada: Limitations of the Not-For-Profit Governance Model" in *Aviation Infrastructure Performance: A Study in Comparative Political Economy* (Brookings Institution Press, 2008) 136 at 138.

[669] See Kevin F Quigley & Bryan Mills, *Analysis of Transportation Security Risk Regulation Regimes: Canadian Airports, Seaports, Rail, Trucking and Bridges* (Dalhousie University, 2014) at 37.

[670] See Rachel Gilmore, "Canada isn't Ruling out Taking a Stake in Canadian Airlines: Leblanc", (18 October 2020), online: *CTVNews* <https://www.ctvnews.ca/politics/canada-isn-t-ruling-out-taking-a-stake-in-canadian-airlines-leblanc-1.5148841>.

In contrast to the NAS airports, local and regional airports have neither a large number of passenger movements nor serve the capital of a provincial region.[671] Consequently, they are governed in a more locally autonomous way: the government of Canada offers both their ownership and operation to operators encompassing provincial and local governments, airport commissions, private companies, and other entities.[672] As such, how those airports are managed is subject to the local need of each community.[673] For small airports, the federal government also plans to transfer their ownership and lands to local interests in the future, as is the case for Oshawa Executive Airport that has been done.[674] Canada also has eleven arctic airports, three of which are owned and operated by territorial governments and form part of the NAS airports.[675]

Additionally, some other small airports serve as satellite airports to hub airports in the NAS category. In terms of these special satellite airports, the Canadian government adopts a functional and holistic approach, regarding them as a composition of the hub international airport they serve. They are thus affiliated with respective CAAs.

After examining a full profile on the distribution of ownership and operation of Canadian airports that belong to different categories, this case study focuses on NAS airports, considering the large population and the strategically significant capitals they serve. I interpret Canada's approach as a mode that supports the emerging roles of robust corporate governance and effective contractual clauses for the governance of charges as surrogates of traditional laws and regulations. Among other factors, the not-for-profit attribute of CAAs plays a crucial role in governing airport charges.

4.2.2 Corporate Governance of CAAs as a Surrogate for Traditional Regulation

[671] Airports serving provincial capitals, regardless of their passenger levels, are included. This implies that geopolitical importance is a standard to incorporate an airport in NAS. See Mary R Brooks & B Prentice, *Airport Devolution: The Canadian Experience* (Citeseer, 2001) at 15.

[672] See Canadian Airports Council, *supra* note 664.

[673] See *Ibid*. For example, the John C. Munro Hamilton International Airport is owned by the city of Hamilton and leased to TradePort International Corporation (Hamilton International Airport Limited). This company is a private company completely owned by the Vantage Airport Group, which is a transnational airport investor. See John C Munro Hamilton International Airport, "Corporate Governance", online: <https://flyhamilton.ca/governance/>.

[674] This airport is owned by the city of Oshawa and managed by Total Aviation & Airport Solutions. See Oshawa Executive Airport, "About the Oshawa Executive Airport", (25 July 2019), online: <https://www.oshawa.ca/en/business-and-investment/Airport.asp>.

[675] They are the Yellowknife Airport (YZF), the Iqaluit Airport (YFB), and the Eric Nielson Whitehorse International Airport (YXY), which are respectively owned by Northwest Territories, Nunavut, and Yukon governments. See Transport Canada, "List of Airports Owned by Transport Canada", (14 August 2017), online: <https://www.tc.gc.ca/en/services/aviation/operating-airports-aerodromes/list-airports-owned.html#_National_Airport_System_Territorial>.

4.2.2.1 Market Power of Canadian Airports

While the first chapter of this thesis argued that substantial market power may lead to power abuse and, therefore, to unreasonable charges, I will now examine whether the airports in NAS may raise a competition concern that calls for particular regulatory measures. For Canada, the threat from airports to abuse market power is still realistic. Geographically, Canada covers a large territory, but with a relatively small and dispersed population. This situation makes air transport irreplaceable by other means of transportation to maintain connectivity among and within different areas and people in a time-efficient manner. Also, the airports in NAS are unlikely to substitute for each other. The potential dominance of the market position by particular airports has always been a major concern for the Canadian government. A report by the Canada Transportation Act Review Panel published in 2001 considers that air infrastructure is closely related to public interests. When airport services providers try to collect charges, airport services users have no alternatives and accordingly face a risk of being charged unreasonably following the abuse of airports' market position.[676] Fourteen years later, the 2015 version of the report series observed the enduring concern that airports might manipulate their dominance in the market.[677]

One may argue that Canadian airports near the Canada-U.S. border face competition from nearby airports in the U.S. Many travellers from Canada move across the border to fly using these airports. Indeed, on the U.S. side, Buffalo accommodates about 1.7 million passengers from Canada who travel one way and depart or arrive at an airport in the U.S. The second-highest number, 712,000 passengers, happens in Detroit.[678] Canadian passengers from Vancouver, Montreal, and Toronto may alternatively fly from the Bellingham Airport in Washington, the Burlington Airport in Vermont, and the Niagara Falls Airport in New York, respectively.[679] About 60% of passengers are capable of choosing between different airports.[680] In some specific cases observed in 2011, the competition is even fiercer: About 94% of Canadians in Windsor choose to fly in the U.S.

[676] See Canada Transportation Act Review Panel, *Vision and Balance: Report of the Canada Transportation Act Review Panel* (2001) at 149.
[677] David Emerson, *Pathways: Connecting Canada's Transportation System to the World*, Canada Transportation Act Review (2015) at 193.
[678] Institute for Governance of Private and Public Organizations, *supra* note 666 at 18.
[679] *Ibid* at 17.
[680] *Ibid*.

Following Windsor, this percentage is 90%, 42% and 42% for citizens in Abbotsford, Saint John, and Thunder Bay, respectively.[681]

Nevertheless, airports in the U.S. do not introduce enough competition to Canadian airports to alleviate concerns about abuse of market power. First, applying a lower charge provided by a U.S. airport triggers other costs including the time to travel and cross-border costs. Based on empirical studies in relation to these costs, the Competition Bureau of Canada finds that only when the airport charge gap is significant enough will a large number of Canadian travellers choose to fly from the U.S.[682]

Second, the airports in Canada that face competition are those located in cities near the Canada-U.S. border. In other cities that do not satisfy this condition, say, Winnipeg, Halifax and Calgary, passengers are not inclined to shift airports.[683]

Third, although passengers' choice to fly from different airports may be driven by price, one should note that a flight ticket fare consists of several components. Besides charges in relation to the use of an airport, there are also important fractions including the fuel cost, the maintenance cost, taxes, and the security cost. Thereby, the difference in the levy for using an airport is only one of many contributing factors to U.S.-Canada airport competition.[684]

Fourth, the competitive edge of the U.S. airports that compete with those in Canada is particularly contextualised when we assume the destination is in the U.S., where the U.S. set lower levels of airport user fees and does not impose heavy taxation and rent burdens on airport operators vis-à-vis Canada.[685] The scenario might change if the comparison is based on a Canadian domestic flight

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[681] *Ibid* at 18.
[682] See Government of Canada, *supra* note 175, s 7.1.2.
[683] In 2011, the percentages of passenger outflow to nearby U.S. airports of these three cities are 8%, 4%, and 1%, respectively. See Institute for Governance of Private and Public Organizations, *supra* note 666 at 18.
[684] The ICAO Secretariat conducted a case study to examine the breakdown of the total ticket price for three different airlines operating the same international route. This study shows that airport taxes and charges take up about 12% of the total ticket value. See ICAO Secretariat, *Price Transparency in International Air Transport*, Working Paper No 15 to the Sixth Worldwide Air Transport Conference (ATConf/6-WP/15) (2012) at Appendix.
[685] Different levels of AIF levied at airports from the U.S. and Canada serve as a vivid example. The introductory part of the thesis mentioned that three hub airports in Canada have raised their AIFs to between 30 CAD and 35 CAD. By contrast, airports in the U.S. levy a Passenger Facility Charge of up to 4.5 U.S. dollars. Considering the currency exchange, Canada's airports still charge more than their U.S. counterparts. Airlines For America, "U.S. Government-Imposed Taxes on Air Transportation", online: <https://www.airlines.org/dataset/government-imposed-taxes-on-air-transportation/>. See also Mary-Jane Bennett, *supra* note 554 at 27.

or an international flight out of North America. When these factors are in play, competition from airports in the U.S. will not play as a sufficient condition to liberalise Canadian airports free from any regulatory measures if these airports are not in the hand of the government.

4.2.2.2 The Not-for-Profit Nature of CAAs

Despite the justification for the regulation of airport charges in Canada, Canada has no direct laws or regulations that set restrictions on NAS airport charges. CAAs have autonomy in making determinations regarding charges.[686] Canada's feedback on the ICAO's survey as to their compliance with ICAO's policies also proves this autonomy[687] and can be found in the supplement document to Doc 9082. The authorisation to CAAs is provided in the Airport Transfer (Miscellaneous Matters) Act. While it protects the autonomy of authorities in setting airport charges, this Act contains no rules to regulate these authorities' activities when they set charges.[688]

One should note that the Air Services Charges Regulations impose at the federal level the criteria for charges at non-NAS airports that are owned and operated by Transport Canada.[689] As the operation and management of NAS airports are leased to local CAAs, these regulations thereby do not apply to these NAS airports in question. Moreover, one may regard these regulations as the charter and bylaws that govern Transport Canada, which is the operator of these non-NAS airports. This is because the Air Services Charges Regulations, as issued by the Minister of Transport, set

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[686] For instance, Calgary Airport Authority operates the Calgary International Airport and the Springbank Airport. This authority maintains a decisive right to set any airport fees and charges. In the 2021 version of the Calgary Airport Authority Tariff of Aviation Fees, Section 20(a) addresses:

> The Airports are subject to the Authority's overall control, management and operation and the Authority has the unfettered right to operate the Airports in such manner as it may, in its sole discretion, determine. Accordingly, the Authority reserves the unfettered right from time to time to adopt, promulgate, issue, reissue, amend, cancel, impose and enforce any rules, regulations, policies, procedures, restrictions, fees, charges, incentives or disincentives designed to control or restrict activities of airport users including the movement, use, parking, storage, repair or operations of aircraft at the Airports by any Person, including the Customer, any Customer-Related Entity and any other user of the Airports.

Calgary Airport Authority, "Tariff of Aviation Fees", (2021), s 20(a), online (pdf): <https://www.yyc.com/Portals/0/2021%20Aviation%20Tariff.pdf>.

[687] See ICAO, *supra* note 273 at 17.

[688] This Act authorises authorities to seize and detain aircraft when charges are not paid. See *Airport Transfer (Miscellaneous Matters) Act*, SC 1992, c 5, s 9.

[689] See *Air Services Charges Regulations*, SOR/85-414, s 3(1). See also *Regulations Amending the Air Services Charges Regulations (Miscellaneous Program),* SOR/2012-3 (2012), C Gaz II, 239. These airports are listed in the schedules attached to these regulations.

out rules on how the government operator should manage an airport.[690] As such, the Air Services Charges Regulations are unlike traditional regulations that are imposed on regulated actors by another regulator higher in the hierarchy.

The not-for-profit attribute of the CAAs plays a central role to prohibit unreasonable charges when there is no charge regulation on NAS airports.[691] As not-for-profit companies do not aim to make profits, the need for regulating their charging activities becomes less pressing than it is for a for-profit company.[692] It has also been accurately observed that directors sitting on the board of a CAA focus on public interest and community.[693] An outcome of their not-for-profit nature is that a CAA must allocate all revenues to airport operation and development.[694] Also, the characteristics of not-for-profit authority restrict a CAA's financial authority; they are prohibited from issuing equity. The collection of the airport improvement fee is thus the main path to finance airport investment.[695] Notably, Canadian ports also operate in a similar not-for-profit mode as a tactic to promote "community responsiveness".[696]

The adoption of the not-for-profit model also brings financial and competitive advantages. First, as previously discussed, the government no longer needs to be financially responsible for these NAS airports as the CAAs bear the obligation of maintaining effective operation.[697] Second, regarding competition, the decision to adopt this governing model was made after evaluating airport governance in the U.S., where airports are publicly operated by authorities with strong administrative functions. These airports widely issue revenue bonds, some of which are guaranteed by airlines with the effect of restraining competition among airlines.[698] In light of this, Canada

[690] "The Governor in Council may make regulations, or may, by order, subject to and in accordance with such terms and conditions as may be specified in the order, authorise the Minister to make regulations, imposing charges (a) for the use of … any other facility or service provided by or on behalf of the Minister at any aerodrome..." *Aeronautics Act*, RSC 1985, c A-2, s 4.4(2).
[691] Unlike a not-for-profit corporation, a for-profit one will decrease involvement by different communities and stakeholders, adding the chance of red-tape regulation. See Sidney Valo, "The Continuing Evolution in Canadian Airport Privatization" (2001) 26 Annals of Air and Space Law 225–236 at 236.
[692] Tretheway & Andriulaitis, *supra* note 668 at 148, 153.
[693] See Barry J Reiter, *Directors' Duties in Canada*, 3rd ed (CCH Canadian Limited, 2006) at 475.
[694] Institute for Governance of Private and Public Organizations, *supra* note 666 at 8.
[695] Steven F Robins, "A Better Flight Path: How Ottawa can Cash in on Airports and Benefit Travellers", (2017) at 2, online (pdf): <https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/E-Brief_253_0.pdf>.
[696] Ramon Baltazar & Mary R Brooks, The Governance of Port Devolution: A Tale of Two Countries (paper delivered at the World Conference on Transport Research, Seoul, Korea, 2001) at 12.
[697] Robins, *supra* note 695 at 4.
[698] Tretheway & Andriulaitis, *supra* note 668 at 137–138.

adopts the not-for-profit model as a way to promote the competitive environment between airlines and airports.

The CAAs are incorporated under the Canada Not-for-profit Corporations Act (the NPCA).[699] Before the enactment of this comprehensive Act, not-for-profit corporations were regulated under a fragmented regime, where governmental discretion and policy had a substantial role.[700] The NPCA signalled a step for not-for-profit corporations towards efficient corporate operation, which has already benefited business corporations via the Canada Business Corporations Act.[701] Some significant organs in a not-for-profit corporation – its members, the board of directors, and committees affiliated with the board – may inform important corporate decisions, among which the formation of charges is significant. One thus can consider governing charges via theses bodies' governance and imposing duties on them. The NPCA offers relevant provisions.[702] In short, the NPCA serves as a legal safeguard on the governance of the CAAs to operate as effectively as other for-profit corporations, while maintaining the nature of a non-profit organization.

Canada's regulatory logic on airport charges behaves as non-regulation plus the divestiture of airport operation from the government to not-for-profit corporations. This not-for-profit nature is adopted as a substitute for direct charge control regulation. The Canadian government seems to favour liberalisation activities concerning charges and makes charge regulation a built-in duty of the CAAs during their corporate operation and management. CAAs are akin to outsourced agencies that assume the regulation duty, even if the CAAs are not designed to be exclusively controlled by the government.[703] Although Canada does not impose traditional charge regulation, the CAA's not-for-profit nature has a similar regulatory function.

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[699] Two exceptions are the CAAs that operate Calgary and Edmonton airports. Both airports are incorporated under Alberta Law. Robins, *supra* note 695 n 1.

[700] M Elena Hoffstein, Lynne Golding, & Elena Zhitomirsky, "Summary of the New Canada Not-for-Profit Corporations Act", online: *Fasken Martineau DuMoulin LLP* <https://www.fasken.com/-/media/f29bbd9a24044d65a7c5a4f15063e179.ashx>.

[701] This Act mirrors the Canada Business Corporations Act in many fundamental concepts like "affiliate", "holding body", and members' rights on disputes and remedies when the board acts against the interests of a corporation. See *Ibid*; Robert T Booth & John Lawless, "Summary of the Canada Not-for-profit Corporations Act", (16 November 2011), online: *Bennett Jones* <https://www.bennettjones.com:443/Publications-Section/Updates/Summary-of-the-Canada-Not-for-profit-Corporations-Act>.

[702] For guidelines on the new provisions regarding directors and their duties, see generally Richard Bridge, "Making Sense of the New Canada Not-For-Profit Corporations Act: A Guide for Association Staff and Volunteers", (2011) at 18-22, online (pdf): <http://www.wavepointconsulting.ca/wp-content/uploads/2013/02/Making-Sense-of-the-New-Canad-Not-for-Profit-Corpt-Act-CSAEbook.pdf>.

[703] It relates to the governance structure of the CAAs, which will be discussed later.

A CAA has the authority to determine airport charges, and it conducts business following the process of corporate governance, which is undergirded by the NPCA. Considering these, a follow-up question is, what mechanisms "regulate" the formation of charges in practice? The CAAs have the capability of employing a corporate governance approach in making decisions, although some of them may not be aware of the fact that they have done so. This case study hopes to reveal that corporate governance as a non-regulatory approach may reach the same end as traditional regulatory measures do.

The next section looks at a CAA's board members, a crucial decision-making body during its operative activities, to explore the corporate governance approach to charge regulation.

4.2.2.3 Board Composition as Accountability Towards Airport Users

The NPCA states that the directors and, accordingly, the board of directors function as the most important decision-makers of a CAA to monitor its management and operation activities.[704] Assuming that matters with implications for the setting of charges can be screened by directors and that these directors can also speak for airport users, their decisions on charges can be in line with their interests. To reach this end, directors can come from at least three groups.

The first and most important group is the airline community. The rationale is similar to that of consultation between airports and their users. The involvement of airlines in an airport operator's decision-making procedure is the solution to prohibiting unreasonable charges imposed on airlines per se.[705] Particularly, consultation requires that the stakeholders whose interests are involved should be consulted about their opinions as to the proposals that have implications for them before they get passed.

The engagement of airlines in the governing body of a corporation is more complete than the consultation process because airlines can vote. By contrast, consultation is a soft approach such

[704] "Subject to this Act, the articles and any unanimous member agreement, the directors shall manage or supervise the management of the activities and affairs of a corporation". *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 124 [NPCA].

[705] Effective consultation with airlines, whose interests will be affected by an airport's charge decisions, provides airlines with substantive power in the charge-setting process. See IATA, *supra* note 340. Also, in a judgement made by the Court of Justice of the European Union in 2019, the court thought that consultation primarily aims at a "consensual approach" – airlines should not only be asked about their opinions, but also actively take part in the making of airport charges decisions. Similarly, airline directors on a CAA's board help achieve similar effects in active decision-making. See *Deutsche Lufthansa AG v Land Berlin*, *supra* note 341 at para 46.

that the voice of airlines to be consulted are only on advisory footing, although concluding an agreement is a favoured option.[706] Accordingly, the composition of the board of directors can fairly represent the interests of diverse groups, especially the airport users who pay the charges.

The second group is governments from the federal, provincial, and municipal levels. By nominating enough directors to enable the government to obtain a certain level of control over a CAA, the governmental sector can achieve effective governance. This strategy can be recognised as an innovative surrogate for traditional regulation by which the government would impose direct control. Regulation by corporate governance may avoid some of the drawbacks associated with traditional regulation, for example, bureaucracy. In this sense, the number of nominated directors reserved to different levels of the government can reach a considerable number.

Moreover, various professional communities can be regarded as the third group of directors that improve board skills in governing a CAA. As will be discussed in the next section, some CAAs have appointed lawyers, engineers, chartered accountants, geoscientists, and commercial association representatives as board directors.

Charge-relevant matters are not the only category of issues that impact the rate of user fees. Investment decisions will influence how much capital an airport needs for infrastructure construction. To meet the financial need for infrastructure, a CAA may increase airport improvement fees (AIF). The increase of AIF at Montréal-Trudeau International Airport from $25 CAD to $30 CAD in 2018, and then from $30 CAD to $35 CAD as of 1 February 2021 provides a vivid example.[707] Moreover, the plans to increase AIF of both Toronto Pearson Airport and Ottawa International Airport as of 2020 reveal a pressing need for cash flow that can be used to offset the intense loss of revenue due to the COVID-19 pandemic, though the budgets for both airports have already been sharply reduced due to the sudden loss of passengers.[708]

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[706] Under the EU legislative regime, an airport operator only needs to give explanations when agreement cannot be reached following the consultation process. See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, art 6(2).

[707] See Montreal Gazette, "Montreal's Trudeau Airport to Increase 'Improvement Fee' to $30", (30 January 2018), online: <https://montrealgazette.com/news/local-news/montreals-trudeau-airport-to-increase-improvement-fee-to-30>.

[708] See Ottawa International Airport Authority, "Airport Improvement Fee Increase", (26 June 2020), online: <https://yow.ca/en/corporate/media-centre/press-releases/airport-improvement-fee-increase>; The Greater Toronto Airports Authority, *supra* note 3.

4.2.2.4 Board Composition in Select CAAs

Generally, the directors of the board are nominated as follows: two by the federal government, one by the provincial government, one by each of the business, labour, and consumer groups, and more than half of the directors by the local government.[709] The board itself can also appoint, at most, three directors.[710] The government calls the governance of these CAAs "shared governance", through which the federal government can appoint one or more members in the governing body, meanwhile other levels of governments, associations, and a CAA itself share the governance by nominating directors.[711] This arrangement implies that the power of the government is balanced by other interest groups.[712] The section then reviews the board composition of three CAAs to see how their boards are constituted and if their directors include the three groups that were visited previously.

Aéroports de Montréal is the CAA that operates both the Montréal-Trudeau International Airport and Mirabel International Airport. It is governed by a board consisting of, at most, 15 members. Its composition is as follows:

(1) two positions from the Government of Canada;
(2) one position from the Government of Quebec;
(3) five positions from the Montreal Metropolitan Community;
(4) three positions from the Chamber of Commerce of Metropolitan Montréal;
(5) two positions from main carriers operating at the Montréal-Trudeau International Airport;
(6) the President and CEO;
(7) the board may appoint one more member.[713]

The board composition is diverse with its directors ranging from federal, provincial, and the Greater Montreal governments, to the local business community as well as airlines. More than half of the directors, adding up the nominees from section (1) to (3), represents the voice of different

[709] Tretheway & Andriulaitis, *supra* note 668 at 140.
[710] *Ibid*.
[711] Transport Canada, "The Transport Canada Portfolio", (25 November 2009), online: <https://www.tc.gc.ca/eng/aboutus-abouttc.html>.
[712] Besides these CAAs, the shared governance organisation model also occurs in other infrastructure fields, for example, Canada Port Authorities, Buffalo and Fort Erie Public Bridge Authority, St. Lawrence Seaway Management Corporation, and NAV CANADA.
[713] See Aéroports de Montréal (ADM), *Annual Report 2018* (2018) at 41.

levels of public authorities. Hence, Aéroports de Montréal as a not-for-profit and private entity is still collectively controlled by the government sector. The local government particularly has the most influence with 5 representatives nominated by the Montreal Metropolitan Community. Airlines also have two positions on the board, and this designation may help to formulate decisions on charges and investments on users' behalf.

A board can delegate some duties to special committees according to the NPCA.[714] Aéroports de Montréal accordingly has established committees to assist the governing activities of the board.[715] Among these committees, the Community Advisory Committee consists of members from diverse groups. Notwithstanding the non-binding feature, this committee ensures procedural justice, i.e., a mandatory consultation process before major plans are made; some of these plans are significant capital expenditure plans.[716]

The Greater Toronto Airports Authority, the operator of Toronto Pearson Airport, has a different board composition compared with Aéroports de Montréal. Its composition is as follows:

(1) five positions, each representing one of the five municipalities: York, Halton, Peel and Durham, and the City of Toronto;
(2) one position nominated by the Province of Ontario;
(3) two positions from the Government of Canada;
(4) seven positions, selected on a cyclical basis, from six groups, namely, the Law Society of Ontario, Professional Engineers Ontario, the Institute of Chartered Accountants of Ontario, the Toronto Region Board of Trade, the Board of Trade of the City of Mississauga, and the Board of Trade of the City of Brampton.[717]

Although the Greater Toronto Airports Authority estimates that this board composition is a result of skill-based selection,[718] it does not have any airlines or passenger representation.

[714] See *NPCA*, *supra* note 704, s 138.
[715] They are the Audit Committee, the Capital Investment Projects and Environmental Committee, the Governance and Human Resources Committee, Oversight Committee–Cityside Program, and the Community Advisory Committee. See Aéroports de Montréal (ADM), *Annual Report 2019* (2019) at 62–65.
[716] See *Ibid* at 64.
[717] See Greater Toronto Airports Authority, *GTAA Annual Report 2018: Count on Pearson* (2018) at 76.
[718] See *Ibid*.

As the operator of Vancouver Airport, Vancouver Airport Authority's board of directors consists of up to fifteen members according to its bylaws. They are selected on the following basis:

(1) one position from the Chartered Professional Accountants of British Columbia;
(2) one position from the City of Richmond;
(3) one position from the City of Vancouver;
(4) one position from Engineers and Geoscientists British Columbia;
(5) two positions from the Government of Canada;
(6) one position from the Greater Vancouver Board of Trade;
(7) one position from the Law Society of British Columbia;
(8) one position from Metro Vancouver;
(9) the President & CEO takes one position;
(10) five positions are at-large directors from the community, who are selected concurrently by the board and the governance committee. The selection of these at-large directors follows the standard of diversity.[719]

The three boards are similar in two aspects. First, they are represented by the government at federal, provincial, and municipal levels to a large extent. Both the CAAs governing Montreal and Toronto airports assign more than half of the directors to different levels of the government, indicating a control power from the government. Less than half of the directors at the board of the Vancouver Airport Authority are guaranteed to be nominated by the government, and technically, directors nominated by governments can only take up to one-third of it all. This ratio denotes a slight chance for the government to lose absolute control, albeit with the effect of authorising more decision-making power to non-governmental parties.

Second, in addition to the highly influential governmental sector, the local commercial community is also well represented. Although the CAAs are not-for-profit entities, the strong voice of the commercial community can help operate CAAs in line with commercial principles, making the corporate management of these CAAs as effective as their for-profit counterparts.

[719] See Vancouver Airport Authority, "Governance Rules & Practices: Terms of Reference for the Board Chair (Tab 2)", s 19, online (pdf): <http://www.yvr.ca/-/media/yvr/documents/bod-documents/t02-board-of-directors-administrative-guidelines.pdf?la=en>; Vancouver Airport Authority, "Board Diversity Policy" at 7, online (pdf): <https://www.yvr.ca/-/media/yvr/documents/bod-documents/2021/t02c-board-diversity-and-inclusion-policy-feb-2021.pdf>.

On the other hand, the three boards differ as to the extent of diversity and, as a result, to the parties whose interests are represented. The board of Aéroports de Montréal shows a relatively simple structure, without a mandatory nomination from the legal, accounting, and engineering sectors, which Toronto Pearson Airport sees as a key factor in forming a skill-based board. Because of its focus on these sectors, the board of Toronto Pearson Airport can theoretically be better equipped to tackle the lack of expertise thanks to various groups of professionals on board. By contrast, the Vancouver Airport Authority has a high level of diversity in the parties that can nominate directors, particularly in terms of nominating at-large directors. Nevertheless, the government's power can be dissolved.

Notably, the CAA of Aéroports de Montréal reserves two seats for airlines. This designation serves as a good example in corporate governance. To mandate air carriers as directors of a board enhances the strength of airlines' voice on the board.

Note that when we discuss the influences of decisions made by directors on charges, it is expected that charge decisions will be formed by the directors. Nevertheless, deviations may occur in practice regarding which governing body is entitled to the power to formulate charge rates. A possible scenario is that such power lies in the authority of the CEO and/or the CFO in a CAA. In this situation, it is necessary to impose in articles, bylaws, or other governance provisions of a CAA on how these actors should exercise this power to ensure the reasonableness of the charges. Differently put, the question is not necessarily tied to the board of directors, but is about whoever is supposed to have a say. It might also be necessary to build an effective monitoring relationship between directors and managerial staff.

4.2.2.5 The Canada Airports Act (Bill C-20)

The Canada Airports Act was initially introduced in 2003 to consolidate a robust governance structure and to further clarify the roles and duties of CAAs based on the foundation of the National

Airports Policy.[720] After being abandoned due to a change of the government, this Act was again proposed under Bill C-20 in 2006 and failed to pass again due to political reasons in 2007.[721]

Notwithstanding that, it is still worth looking at how this Act envisages accountable corporate governance of the CAAs for two reasons. First, many CAAs have already adopted provisions from this pending Act in establishing their governing structures.[722] Therefore, provisions in this Act give us a sense of what good corporate governance looks like for these CAAs. Second, it reflects the issues regarding CAA corporate governance that arise when they are implementing the National Airports Policy. It mirrors the attitudes and "state-of-the-art" legislative techniques of the government when dealing with these issues when this Act was proposed in 2006.

Regarding the composition of a board, this Act mandates the groups that can nominate directors and the number of directors that these groups can nominate. They are as follows: (1) two by the Minister;[723] (2) one by the provincial government;[724] (3) two to five from candidates nominated by regional authorities or municipalities; [725] and (4) two to five from non-governmental organisations which can be economic, community, lawyers, notaries, engineers, accountants, labour, and airline associations.[726] Another salient requirement is mandatory appointment of directors from the airline industry for airports passing certain passenger thresholds. Airports that have more than two million but less than ten million passengers per annum must reserve one director to be nominated by the national association of domestic air carriers.[727] An airport having passed the ten-million-passenger threshold must allow the national association of domestic air carriers to nominate two directors.[728]

One can understand the rationale behind this composition, which properly corresponds to the three groups of directors that the chapter previously points out are key to the interests of airport users

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[720] See Transport Canada, "Transport Minister Introduces Canada Airports Act", (20 March 2003), online: <https://www.canada.ca/en/news/archive/2003/03/transport-minister-introduces-canada-airports-act.html>; Valo, *supra* note 691 at 235; Tretheway & Andriulaitis, *supra* note 668 at 145.
[721] See Tretheway & Andriulaitis, *supra* note 668 at 146. For the full text and the status of this Bill, see Parliament of Canada, "House Government Bill", online: <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=2277307>.
[722] Institute for Governance of Private and Public Organizations, *supra* note 666 at 10.
[723] Bill C-20, *Canada Airports Act*, 1st Sess, 39th Parl, 2006 (first reading June 15, 2006), s 87.
[724] *Ibid*, s 88.
[725] *Ibid*, s 89.
[726] *Ibid*, s 90.
[727] *Ibid*, s 92(1).
[728] *Ibid*, s 92(2).

and are also used as benchmarks to review board composition. First, the three levels of government maintain substantial power of scrutiny by appointing directors. Second, professional groups are represented by being pooled as one part of a collective nominating entity. It nevertheless denotes that the expertise representation may be "compressed" when their nominating power is dissolved against other counterpart groups. Third, this Act mandates directors from the airline community based on the passenger number of the airport that a CAA operates. Interestingly, using the "national association of domestic air carriers" as a nominating group of airlines may reasonably prevent legacy carriers from dominating director positions, a situation in which the interests of small airlines may be ignored.

Provisions in this Act on the duties of the board also seek to govern charge issues by internal governance of a CAA. Section 83 lists a series of central duties that the board of a CAA cannot delegate to other organs, such as a committee. Two of them are duties directly relating to charge issues, namely, the duties to approve "the methodology for determining fees";[729] and "the establishing or revising of fees"[730]. By prohibiting the board from delegating the duties of determining charges to other departments, this Act has an effect of building a direct governing regime on charges by the board as the senior decision-making body. It can be expected that if this Act is enacted, the CAAs that allocate the power to determine charge levels to a corporate organ other than the board may revisit their corporate power allocation in order to follow the structures of the Act.

Further to the exact rates of charges and their methodology, this Act actively sets out some standards that the board should meet when it announces the rates of charges.[731] Among others, the board must make clear that the methodology and the rates are in line with charging principles,[732] and it should justify their decisions if they deviate from opinions, which are called representations in this Act, from air carriers and passengers.[733]

Although some scholars criticise that no real methodology has been provided in this Act and the entire Act looks too "intrusive" into CAAs' internal governance,[734] I hold a different opinion. As

[729] *Ibid*, s 83(h).
[730] *Ibid*, s 83(j).
[731] *Ibid*, ss 152, 153.
[732] *Ibid*, ss 152(b), 153(b).
[733] *Ibid*, ss 152(c), 153(c).
[734] See Tretheway & Andriulaitis, *supra* note 668 at 147, 155.

long as charge decisions respect the charging principles set out in Section 140 and properly reply to opinions from other stakeholders, a charge decision can be expected to be justifiable. Although this Act imposes more requirements on the process of a CAA's corporate governance than a general business corporation, these requirements enhance the accountability of directors.

More importantly, more stringent requirements on corporate governance and the requirements on the formation of charges justify the reduction of other more intrusive and sector-specific regulation imposed on airports. To be more specific, the autonomy of a CAA to choose a methodology and consequent rates is based on the premise that a robust legal regime supervising its corporate governance and requirements on the methodology and rates of fees are in place. These detailed corporate governance provisions enable a light-handed regulatory regime.

4.2.3 A Ground Lease as a Surrogate for Traditional Regulation

4.2.3.1 Contractual Regulation in the Name of a Ground Lease

Another instrument adopted by the government that can innovatively function as a way of regulation is the ground lease, which is signed between the federal government and a CAA. When no laws or regulations impose direct control on airport economic activities, a ground lease can serve as a substitute.

In the ground lease signed between the Greater Toronto Airports Authority and the Canadian government, the autonomy to set charges is contractually assigned to the Greater Toronto Airports Authority.[735] To be competent, the Greater Toronto Airports Authority must warrant to the federal government, who is the landlord, that the Authority has sufficient corporate capacity to "impose" all types of user charges.[736]

[735] "Nothing in this Lease precludes the [t]enant and its successors and permitted assigns from charging and taking whatever lawful action the Tenant deems appropriate in order to charge and collect any landing fees, general terminal fees and other user charges, including a Passenger Facility Charge". *Ground Lease* (1996) [Between the Greater Toronto Airports Authority and the Federal Government of Canada], s 41.01.02.
[736] *Ibid,* s 1.14.01.

Transport Canada also enhances the accountability of a CAA towards its nominating parties by incorporating accountability principles in a ground lease. A CAA must respect these principles that have been entrenched by a ground lease.[737]

A ground lease also steers the composition of a board. Taking the Victoria Airport Authority as an example, its ground lease sets out the requirements for its board members.[738] Specifically, expertise, experience, and gender balance are three core standards in the selection of board members.[739] Also, in terms of the nominating groups, the lease guarantees a broad range of stakeholders, more precisely, the involvement of the community.[740]

Canada's approach to the regulation of airports by ground leases under CAAs can be construed as "outsourcing the law", a phrase used to denote situations where governments effectively delegate law-making authority to non-government entities.[741] By this approach, the outsourcing party only describes an outcome that it hopes to reach, i.e., "the what", while delegating implementation procedure, i.e., "the how", to an outsourced party.[742] Law-outsourcing as a solution is in line with the assumption that local matters would be best understood and managed by local actors.[743] In this discussion, the federal government outsourced the regulation of airport charges to local airport authorities by the overall guidance of the National Airports Policy and authorisation under the 1992 Airport Transfer (Miscellaneous Matters) Act. Detailed provisions are prescribed in each ground lease as outsourced law. Additionally, other documents which encompass the charter of a CAA, its bylaws, and manuals also perform as more specific outsourced regulations at an internal level during corporate governance. These specific rules further implement a ground lease.

Hence, Canada's regulation of the NAS airports employs contractual regulation by tactically outsourcing regulation to contractual clauses, albeit without using that label as such. There is a

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[737] See Vancouver Airport Authority, "Governance Rules & Practices: Accountability and Transparency (Tab 12)", s 1.3, online (pdf): <http://www.yvr.ca/-/media/yvr/documents/bod-documents/t12-accountability.pdf?la=en>.
[738] See Rideau Consultants Inc, "Victoria Airport Authority Ground Lease Performance Report", (2017) at 24, online (pdf): <https://www.victoriaairport.com/pdfs/library/5YearPerformance/2017%20-%205%20Year%20Performance%20Review.pdf>.
[739] *Ibid*.
[740] *Ibid* at 26.
[741] See generally Pauline Westerman, *Outsourcing the Law: A Philosophical Perspective on Regulation* (Edward Elgar Publishing, 2018).
[742] *Ibid* at 5.
[743] *Ibid* at 7. One can also understand this statement as information and expertise become increasingly decisive in governance.

three-layer hierarchy, i.e., traditional laws and regulations imposed by the public authority, ground leases, and specific provisions on corporate governance (the charter, bylaws, and other manuals and policies, etc.) The extent to which a ground lease functions as regulation varies among CAAs.

4.2.3.2 Downsides to Include Rents in a Ground Lease

To lease and operate an airport, a CAA needs to pay back a certain proportion of its revenues to Transport Canada, the department that acts as the landlord on behalf of the Canadian government. The amount of the rent, particularly in terms of major airports, constitutes a considerable proportion of its revenue.[744]

Some studies have challenged the reasonableness of rents collected by the federal government via a ground lease with three focused discussions. First, the calculation of rents is not justified by an economic methodology.[745] Second, the rents will finally be passed onto carriers and passengers, leading to an increase in user charges.[746] Third, these rents heavily reduce the competitiveness of Canadian NAS airports, and, consequently, they lose passengers.[747] Consider Canadian airports that compete with those in the U.S., which pay neither rent nor property tax to the government.[748] One may also note the fact that some countries even subsidise their airports.[749] The following two aspects should particularly draw one's attention.

For one thing, rent collection erodes the not-for-profit nature of a CAA. Since the rent creates a profit incentive for the government from the revenue of a CAA, the government is unlikely to remain independent from a CAA. The pursuit of money builds the link: The more charges a CAA

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[744] A report recounts that in 2009, eight major NAS airports paid $268 million in total, equal to 11 % of their revenue amount. See John C. Munro Hamilton International Airport, *supra* note 673 at 14. Between 1996 and 2004, before the introduction of the 2005 new formula of calculating the rent amount, Toronto Pearson Airport paid $982.7 million in total, equal to 24% of the revenue. Vancouver International Airport paid a $38.8 million rent to the federal government. See Mary-Jane Bennett, *supra* note 554 at 14. According to the 2018 financial statements of Vancouver Airport Authority, the rent in 2018 is $ 59.530 million out of the gross revenue of $ 565.144 million. See Vancouver Airport Authority, *Consolidated Financial Statements* (2018) at table "Consolidated statement of operations".

[745] The calculation of rent is not "based on fair market values of surrounding land". Tretheway & Andriulaitis, *supra* note 668 at 144.

[746] See Benjamin Dachis, "Full Throttle: Reforming Canada's Aviation Policy", (2014) at 8, online (pdf): *C.D. Howe Institute* <https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary_398_0.pdf>.

[747] See Institute for Governance of Private and Public Organizations, *supra* note 666 at 21. The Surrey Board of Trade sees the rent as a reason for passenger loss of Vancouver International Airport between their competition with Abbotsford Airport in the U.S. See Mary-Jane Bennett, *supra* note 554 at 14.

[748] See Tretheway & Andriulaitis, *supra* note 668 at 139,144.

[749] See David Emerson, *supra* note 677 at 190.

can collect, the more rent the government receives. There thus arises a question, can regulatory activities imposed by the government upon a CAA remain neutral? Assuming that the government allows overcharging just in order to reap more revenue, a CAA will consequently function as a cash cow in the eyes of the government.[750]

A not-for-profit corporation should be a non-share capital one, and its revenue should be put back into the operation of an airport.[751] Yet, in the case of Canada, the federal government functions as a *de facto* shareholder, who at the same time is the landlord. On the one hand, by analogy with a business corporation, whose directors are accountable for its shareholders, a CAA's directors should be accountable for its nominating parties. And the federal government stands as one nominating entity. In this sense, the federal government, in terms of a CAA, is a counterpart of a shareholder in a for-business corporation. Directors nominated by the federal government should, in turn, be accountable for the federal government.

Second, by virtue of a ground lease, the federal government enjoys a certain proportion of the revenue, which is similar to dividends derived from shares. Hence, not all revenue goes back to the operation of an airport, and users ultimately pay extra fees to close the investment gap that amounts to the rent.

For another, the collection of rents may lead to a deviation from the cost-relatedness principle. According to this principle, user charges should be "directly related to" the provided airport services.[752] Airport users should only be charged for the services that have occurred.[753] Even if pre-funding is allowed, ICAO suggests that the pre-funding level should not exceed the funding requirement based on costs.[754] However, a charge of rent may fall outside a reasonable scope of costs as it is not generated by any actual services that have been provided by the airport operator.

The pursuit of cost-relatedness is associated with the user-pays principle because this principle calls for the investment of fees paid by users back to the operation of an airport. Notwithstanding

[750] More discussions relating to this point can be developed around the notion of regulatory capture.
[751] Unlike share capital corporations, which are based on shares and controlled by shareholders, non-share capital corporations are controlled by members. Article 4 of the Canada Not-for-profit Corporations Act defines not-for-profit corporations as corporations "without share capital".
[752] ICAO, *supra* note 9, s I(2)(i).
[753] See ICAO, *supra* note 237 at appendix 4, s 1.
[754] See *Ibid* at appendix 4, s 12.

this, rent payment implies that part of charges cross-subsidises other sectors. The remaining revenue invested in the operation of an airport, subtracting the rent, will be less than what users have paid. If we follow the proposition, as suggested by some studies, that the user-pay principle is unfair, the rent system in Canada may be considered a more unfair one.[755]

4.2.4 Canadian Transportation Agency and Canada Airports Council

The Canadian Transportation Agency and the Canada Airports Council are two key air transport institutions that may actively engage in disputes resolution and self-regulation, respectively.

4.2.4.1 Canadian Transportation Agency

The Canadian Transportation Agency (CTA) performs three regulatory functions – an information provider, rule-maker, and a quasi-judiciary tribunal providing dispute resolution.[756] Each of these functions can be further employed to facilitate economic regulation at airports. The role of being a quasi-judiciary tribunal is especially meaningful when there is no Canadian law or regulation that impose any stringent *ex ante* requirements on airport charges. When regulation is deficient, an effective dispute resolution mechanism will matter to serve as an *ex post* guarantee. The CTA, as an administrative tribunal, is fit to serve this end. Also, its duty of consumer protection justifies the CTA as a tribunal that will not be biased against airport users.[757]

Nevertheless, the CTA remains dormant in resolving airline-airport disputes on charges.[758] The practice of the CTA indicates its reluctance to encourage airport users to make appeals against airport authorities regarding charge-setting disputes. Previous disputes have mostly happened between an individual passenger and an airline.

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[755] Prentice argues that applying the user-pays principle to the collection of security charges in Canada is due to the lack of careful analysis of policies. See generally Barry E Prentice, "Canadian Airport Security: The Privatization of a Public Good" (2015) 48 Journal of Air Transport Management 52–59.

[756] See Canadian Transportation Agency, "Organization and Mandate", (3 June 2013), online: <https://www.otc-cta.gc.ca/eng/organization-and-mandate>.

[757] The CTA has three mandates: national transportation system sustainability, facilitating the disabilities, and protecting air passengers as consumers. The third mandate relates to charge regulation the most. The author thinks the scope deviation between passengers and airport users will not restrict the CTA from functioning as a tribunal to fulfil its passenger protection mandate. This is because, as generally understood, charges are divided into two parts; the airport improvement fee is directly imposed on passengers, so the CTA is justified in terms of resolving disputes regarding this type of charges. Although another part of the fees is nominally imposed on airlines, passengers finally pay for them because they purchase tickets from airlines.

[758] A search on the CTA official website suggests that the CTA has not heard any airport charge complaints.

A reason to support the CTA in resolving airport charge disputes is its competence to resolve charge disputes related to air navigation services, considering that airport and air navigation services are homogenous due to the fact that both sectors provide infrastructure services. The CTA welcomes charge disputes regarding NAV CANADA, the corporation running Canada's air navigation service, despite its inactivity regarding similar disputes in the airport sector. The CTA is competent in dealing with charges-related appeals between NAV CANADA and its users.[759] There are already three cases that have been brought before the CTA against NAV CANDA.[760] One reason for such differentiated treatment might be that the remit of dispute-resolving against NAV CANADA on charge issues is entrenched in the Civil Air Navigation Services Commercialization Act. By contrast, no similar provisions are available regarding airport charge disputes. There is no denying that NAV CANADA and CAAs have different levels of market power, and regulatory measures against NAV CANADA can be justifiably more stringent. [761] But this does not mean that the CTA is incapable of hearing appeals on charge disputes between an airport and its users.

4.2.4.2 Canadian Airports Council

The general regulatory picture of Canadian airports shows self-regulation, which means that airports self-determine. The Canadian Airports Council (CAC) could be a key institution to promote self-regulation for the government in future regulatory reform. Unlike the CTA, the CAC is a self-regulatory association in light of its representation of all the NAS airports.[762] Thus, there is a basis for the CAC to represent NAS airports. The CAC also self-identifies as an industrial association that bridges airport operators and the federal government.[763] Given that, the federal

[759] According to the Civil Air Navigation Services Commercialization Act, only users, groups of users, and representative organizations of users can make an appeal. See *Civil Air Navigation Services Commercialization Act*, SC 1996, c 20, art 44. This Act defines users as aircraft operators. See *Ibid*, art 2(1). Hence, no natural passenger can file an appeal against NAV CANADA regarding charges setting.

[760] They are cases brought by JetPro Consultants Inc. (Decision No. 222-A-2015), the Canadian Owners and Pilots Association and the Helicopter Association of Canada (Decision No. 393-NC-A-2006), and Air Canada (Decision No. 650-NC-A-2003).

[761] Unlike airport services, air navigation services are only provided by NAV CANADA as the only provider, which makes it in a position of more market power than airports.

[762] It has over 50 members that represent more than 100 airports across Canada. See Canadian Airports Council, "Membership", online: <https://canadasairports.ca/about/membership/>.

[763] This council purports to "[lobby] the federal government on issues that affect the business interests of Canada's airports". Canadian Airports Council, "Purpose, Vision and Mission", online: <https://canadasairports.ca/about/purpose-vision-and-mission/>.

government may consider introducing the CAC as a regulator, taking advantage of its self-regulation capacity. Self-regulation is also in line with governmental preference to avoid over-regulation. One bottleneck is that the CAC mostly acts in a soft manner – disseminating opinions by public media without a regulatory mandate.[764] Enhancing the connection between the CAC and its airports can serve as a solution.

4.2.5 Conclusion

This case study highlights NAS airports, which carry the majority of passengers and are strategically essential for Canada's air transport. This study also explores how in a light regulatory regime, ground leases and corporate governance in a CAA may assume most of the responsibility of airport charges regulation. First, I find that Canada strategically allocates ownership and operation of NAS airports. The federal government maintains the ownership of CAAs to maintain final control, and this is a proactive measure against unpredicted risks. The divestiture of airport operation to CAAs wins the federal government many benefits.

Though NAS airports trigger market power concerns, there is no direct regulation to determine charge rates or to impose other requirements on charge setting. In response, two private law approaches have been adopted as substitutes. The first regulatory surrogate is the mechanism of corporate governance for a CAA. For one thing, the government designs a CAA as a not-for-profit entity to prohibit the abuse of charges due to the incentive of profit-making. The statute of NCPA serves as the legal foundation. For another, directors nominated by groups that can reasonably speak for the interests of airport users have the potential to oversee important decisions for an airport, including those corporate decisions that have implications for airport charges. These directors can come from airlines, governments, and professional communities. The three select CAAs operating Montreal, Toronto, and Vancouver airports compose their boards with directors from at least one of these categories. Moreover, the proposed Canada Airports Act reveals an optimal corporate governance model for a CAA.

A ground lease signed between the federal government and a CAA serves as a contractual surrogate for traditional regulation because the government may flexibly outsource laws and

[764] This council's four instruments are newsletters, press releases, speeches, and presentations, and Op-Eds. See Canadian Airports Council, "News & Views", online: *Canadian Airports Council* <https://canadasairports.ca/news-views/>.

regulations via these leases and specify the requirements a CAA should meet when determining charges. Notably, a rent that a CAA pays under a ground lease may bring difficulties for the formation of reasonable airport charges. The federal government needs to revisit the rent system to improve the protection of users' economic rights and the competitiveness of Canadian airports. Finally, the CTA and the Canada Airports Council are two regulatory options to enhance charge dispute resolution and self-regulation, respectively.

4.3 India

This case study examines the regulation of airport charges in India in the context of privatisation. In line with the Canada and the UK case studies, this case study continues to explore to what extent private law tools – contracts and corporate governance of airport companies – have contributed to the regulatory process. Inter alia, significant support provided by the Indian government in the process of airport privatisation is to authorise a private party to determine development fees through a bidding agreement following a privatisation project.[765] Although India still maintains a restrictive attitude towards airport charges by attributing the power of charge setting to the 2008 Airports Economic Regulatory Authority of India Act in terms of major airports and AAI in terms of other airports, it gradually has given more and more space for airports in a privatisation or PPP scenario to govern airport charges in a liberal manner.

4.3.1 Policy, Legislative, and Institutional Setting

4.3.1.1 Policy: An Airport Privatisation Context Following the Naresh Chandra Committee Report

The contemporary political map of Indian airport regulation is based upon a milestone report, which is commonly known as the Naresh Chandra Committee Report.[766] This report proposed the privatisation of Indian airports to the Ministry of Civil Aviation in 2003. It reported that the capacity of 62 of over 400 Indian airports is effectively utilised, with the rest being underused.[767] To enhance operational efficiency and attract investments, the report suggested airport privatisation (private participation) in India.[768] The privatisation project specifically divides airports into three categories: existing airports to be improved through privatisation, especially New Delhi and Mumbai airports; greenfield airports, namely, newly built airports; and other

[765] See *Airports Economic Regulatory Authority of India Act, 2008* (India), s 13(1A) [The AERA Act].
[766] See Alan Khee-Jin Tan, "India's Evolving Policy on International Civil Aviation" (2013) 38:6 Air and Space Law 439–462 at 440. For the text of the report, see Ministry of Civil Aviation, "Report of the Committee on a Road Map for the Civil Aviation Sector", (2003), online (pdf): <https://www.civilaviation.gov.in/sites/default/files/moca_000740.pdf>.
[767] Ministry of Civil Aviation, *supra* note 766 at 38.
[768] See *Ibid* at 44. For the discussion on a whole spectrum of privatisation options, see *Ibid* at 39–44.

uneconomical airports that provide essential services without enough commercial potential. Each of these categories applies to different privatisation modes.[769]

4.3.1.2 Legislation

Overall, the legislative framework governing Indian airport charges mainly consists of the 1994 Airports Authority of India Act (the AAI Act) and the 2008 Airports Economic Regulatory Authority of India Act (the AERA Act).[770] The AAI Act, as was amended by the 2003 AAI Amendment Act, provides a wide definition of a private airport as follows:

> 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 share of such person or agency as the case may be in the assets of the private airport is more than fifty per cent.[771]

The AAI Act also established the Airports Authority of India (the AAI). The AERA Act created the Airports Economic Regulatory Authority (AERA) and appointed an appellate tribunal to resolve disputes.[772] The Naresh Chandra Committee Report is the foundation of these institutes.[773] According to this report, the risk of a private actor to abuse the monopolistic position of an airport to maximise profits necessitates a separate economic regulator.[774] AERA accordingly needed to be established. That said, the report suggests only one simply constituted authority in which seats only one member, and this member will be assisted by other technical experts.[775] AERA is also supposed to adopt light-handed regulation.[776]

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[769] Ministry of Civil Aviation, *supra* note 766 at 45–49.
[770] Both Acts have been amended to support charge setting in more flexible manners like contractual clauses.
[771] *Airports Authority of India Act, 1994* (India), s 3(3)(nn) [The AAI Act]. The Act adopts a wide interpretation of airport privatisation because a transfer of airport ownership is not necessary and the situation that a private party only participates in management is also considered privatisation. At the same time, the 50% ownership requirement indicates the requirement of absolute control in either management or ownership is a condition to recognise private airports.
[772] See *Telecom Regulatory Authority of India Act, 1997* (India), s 14 [The Telecom Act].
[773] This report proposes AERA for the first time and nurtures a later institutional reform of the AAI to assist privatised airports demonstrated in the 2003 Airports Authority of India (Amendment) Act.
[774] This suggestion reflects the argument that private participation in Indian airports justifies economic regulation. See e.g. Ruwantissa Abeyratne, "Air Transport in India: Some Legal, Regulatory and Economic Issues" (2018) 43 Air and Space Law at 557.
[775] Ministry of Civil Aviation, *supra* note 766 at 61.
[776] *Ibid* at 70.

This section then explores these institutes as the core provisions of both Acts.

4.3.1.3 AAI: Excluding Economic Regulation of Private Airports

The AAI is an overarching agency that supervises both national and international airports, which were, respectively, governed by the National Airport Authority and the International Airport Authority.[777] The AAI is closely controlled by the central government of India, from perspectives of both staff and finance.[778] Before the introduction of AERA, the AAI exclusively exercised the power of charging aircraft "for the landing, housing or parking of aircraft or for any other service or facility offered" at airports.[779] The 2003 AAI Amendment Act further authorised the AAI to collect a development fee from embarking passengers in order to fund the development of existing and newly planned airports or to inject as equities to airport operator companies.[780] To charge both fees, the AAI had to get pre-approval from the central government.[781]

At the same time, this Amendment Act has also liberalised airport charges regulation for private airports. The 2003 AAI Amendment Act acknowledges the category of private airports by adding that the AAI Act also applies to "all private airports insofar as it relates to providing air traffic service, to issue directions under Section 37 to them and for the purposes of Chapter VA".[782] This jurisdictional scope can be arguably understood as meaning that charge regulation is out of the reach of the AAI Act because the matters specified in their remit only refer to the provision of air traffic services and the issuance of orders according to Section 37, for the goals in Chapter VA. None of these matters relate to the determination of charges.

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[777] ICAO, Air Transport Bureau, Economic Analysis and Policy (EAP) Section, "Case Study on Commercialization, Privatization and Economic Oversight of Airports and Air Navigation Services Providers: India", (31 January 2013) at 1, online (pdf): <https://www.icao.int/sustainability/CaseStudies/India.pdf>. For more provisions on the transfer of assets from the two authorities to the AAI, see generally The AAI Act, *supra* note 771 c IV.

[778] The Chairperson of the AAI is selected by the government. Other officers include the Director General of Civil Aviation and 8-14 members who are also appointed by the central government. See The AAI Act, *supra* note 771, s 3(3). The central government remains limited discretion when deciding to remove an AAI member. *Ibid*, ss 4(e), 6(d). Regarding finance, the AAI needs the pre-approval of the central government before levying charges to aircraft at airports, and the central government may offer funds to the AAI via due legislative processes to support the function of the AAI. *Ibid*, ss 22, 22A, 23.

[779] The AAI Act, *supra* note 771, s 22(i)(a).

[780] *Ibid*, s 22A. This fee aims to raise money for developing existing airports and building new greenfield airports, especially when these projects are involved by private actors. See *Resources of Aviation Redressal Assn v Union of India and Others*, [2009] WP(C) 8918/2009 at para 12.

[781] The AAI Act, *supra* note 771, ss 22, 22A.

[782] *Ibid*, s 1(3)(aa).

Moreover, the 2003 AAI Amendment also introduces Section 12A, allowing the AAI to lease out an airport, and the lessee can exercise some functions of the AAI in terms of operating that airport.[783] Pre-approval of the central government is needed.[784] Nevertheless, functions regarding air traffic services, watching and warding at airports are not permitted to be assigned to airport lessees.[785] This reform arguably attracts private capital and improves the competence of Indian airports on a global basis by increasing the operation level.[786] Overall, these deregulatory measures provide private parties with security and the interest to run airports by enabling their "operational and managerial independence".[787]

4.3.1.4 AERA: Deregulating Development Fees by Contractual Regulation

In terms of composition, AERA has a chairperson and two other members, all of whom are appointed by the central government.[788] The selection of candidates is based on a recommendation from a selection committee, which is composed of members from the Cabinet, the Ministry of Civil Aviation, the Ministry of Law and Justice, the Ministry of Defence, and an expert.[789] The selection period goes through a series of stringent procedures.[790] The AERA members are subject to a non-renewable five-year term.[791] The grounds to remove AERA members as prescribed in this Act resemble those applying to AAI members according to the AAI Act.[792] For both authorities, the central government has decisive power in determining the removal of a member, and the central government can exercise its discretion on some of the grounds to make such a decision.[793] Therefore, AERA is still highly dependent on the central government for member removal.

AERA only exercises its power to regulate charge issues at "major airports", which are defined as airports that "[have], or [are] designated to have, annual passenger throughput in excess of three

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[783] *Ibid*, s 12A.
[784] *Ibid*, s 12A(2).
[785] *Ibid*, s 12A(1).
[786] See *Resources of Aviation Redressal Assn v Union of India and Others*, *supra* note 780 at para 6.
[787] *Ibid* at para 7.
[788] The AERA Act, *supra* note 765, s 4(1).
[789] *Ibid*, s 5(1).
[790] For a detailed selection process, see *Ibid*, s 5.
[791] *Ibid*, s 6(1).
[792] See The AAI Act, *supra* note 765, s 6; The AERA Act, *supra* note 759, s 8.
[793] A member of AERA can be removed if this member "has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude". The AERA Act, *supra* note 765, s 8(b). A member of the AAI can be removed if this person "in the opinion of the Central Government, has so abused his position as to render his continuance in office detrimental to the public interest […]" note 771, s 6(d).

and a half million or any other airport as the Central Government may, by notification, specify as such[…]" as a result of an amendment of this Act in 2019.[794] Before that, the original threshold was 1.5 million passengers.[795] For major airports, AERA regulates three categories of fees: (1) charges for aeronautical services at major airports,[796] (2) the amount of the development fee,[797] and (3) the amount of the passenger service fee.[798] Without pressing needs, AERA will revise charges in a five-year cycle.[799]

To determine charges for aeronautical services, AERA should consider several factors that reveal the logic of Indian airport regulation. First, the factors of capital expenditure, the services provided and their quality, and operation of economy and viability denote that cost-relatedness serves as a major ground to determine charges.[800] Second, the factors of the "timely investment in improvement of airport facilities" and "the cost for improving efficiency" mean that investment for development can be included as costs for charge calculation. Third, "revenue received from services other than the aeronautical services" points out that AERA adopts a methodology in line with the single-till approach. In other words, non-aeronautical revenue from commercial activities like duty-free shopping, hotels, and restaurants, may deduct the costs of aeronautical services with an outcome of reduced aeronautical charges.[801] However, as the Naresh Chandra Committee Report suggests, a risk of "price-gouging" or "cross-subsidisation" relating to non-aeronautical activities may accordingly arise if an airport applies the single-till mode.[802] Fourth, concessions offered by the government in the forms of agreements, memoranda of understanding, or others respect conditions entrenched in a contractual instrument. These concessions reflect a private law approach, which will be discussed in the next chapter.[803]

Regarding a development fee, AERA can determine its rate for embarking passengers at major airports.[804] The AAI still reserves the power to determine the rate of the development fee at other

[794] *Airports Economic Regulatory Authority of India (Amendment) Act, 2019* (India), s 2.
[795] See *Ibid*.
[796] See The AERA Act, *supra* note 765, s 13(1)(a).
[797] See *Ibid*, s 13(1)(b).
[798] See *Ibid*, s 13(1)(c).
[799] See *Ibid*, s 13(2).
[800] See *Ibid*, ss 13(1)(a)(i), (ii), (iv).
[801] See Ministry of Civil Aviation, *supra* note 766 at 50.
[802] *Ibid*.
[803] See The AERA Act, *supra* note 765, s 13(1)(a)(vi).
[804] See *Airports Authority of India (Amendment) Act, 2003* (India), s 1(i).

airports.[805] Another type of fee that AERA determines is the passenger service fee. It targets security at airports and passenger facilities.[806] Certain other complementary power conferred on AERA also aims to assist it to successfully achieve the task of reasonably determining the above-discussed charges.[807]

Notably, the regulatory power of AERA is designated to support regulation by contracts. The 2019 Airports Economic Regulatory Authority of India (Amendment) Act adds that if the aeronautical charge (and its structure) and the amount of the development fee have been specified in bidding documents which serve as the grounds of airport operation, these bidding instruments will take over AERA to govern these particular types of charges.[808] This provision nevertheless does not mention the passenger service fee, denoting that this fee is still regulated by AERA and cannot be determined via a bidding document. Rather than functioning as a regulator, AERA will participate in charge consultation when such contractual regulation applies.[809] A concession contract forms part of the bidding documents.[810] The priority of these bidding documents reflects and underpins reliance on contractual approaches for the regulation of fees at airports. This reform also enhances the predictability of charges during operation afterwards. AERA should, nevertheless, ensure transparency during the consultation process in light of the observation that transparency enables effective consultation.[811]

One may see the power allocation between the AAI and AERA. The AAI transfers power to determine aeronautical charges, development fees, and passenger services fees at major airports to AERA, indicating that most regulatory powers related to charges have been reallocated to AERA. Though other airports are still supposed to be regulated by the AAI in terms of charge issues, as of 2003, AAI also derived the jurisdiction to private airports out of its reach. Even if we look at AERA, we should note that aeronautical charges and development fees are excluded from its

[805] See *Ibid*.
[806] Airports Authority of India, "Whether Passenger Service Fees is Levied to Passengers to Fund Development of New Airports?", online: <https://www.aai.aero/en/content/whether-passenger-service-fees-levied-passengers-fund-development-new-airports>.
[807] The complementary power includes monitoring the set performance standards of services and requesting information as the basis for making tariff determinations. See The AERA Act, *supra* note 765, s 13(1)(d)-13(1)(f).
[808] *Ibid*, s 13(1A).
[809] *Ibid*.
[810] See Airports Authority of India, *Request for Proposal (RFP) for Concession to Design, Fit-Out, Finance, Develop, Market, Operate, Maintain and Manage the Retail Outlets at Visakhapatnam Airport* (2021) at 9.
[811] See Chapter 2.6.3.2.

regulation as long as bidding documents as a way of contractual regulation exist. As such, Indian regulation shows a deregulatory attribute to private airports. In essence, it applies a two-tier system to both private and public airports.

4.3.1.5 A Trans-Sector and Quasi-Judicial Appellate Tribunal

The AERA Act originally established the Airports Economic Regulatory Authority Appellate Tribunal, which was then merged into the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) according to the 2017 Finance Act.[812] Its jurisdiction encompasses two categories: disputes arising from the activities of service providers and disputes arising from the regulatory activities of AERA.[813] The former type contains two situations – disputes "between two or more service providers" and disputes "between a service provider and a group of [consumers]".[814] For the latter, regulatory activities that can be challenged before the tribunal include directions, decisions, or orders that AERA has made according to this Act.[815] This jurisdiction indicates the tribunal's hybrid authority. It can hear cases between private actors in the role of a civil tribunal; it is also entitled to function as an administrative tribunal that has the power to review the economic regulatory power of AERA.

The TDSAT is also a trans-sectoral tribunal. It was originally designated to adjudicate complaints in the telecom sector, as its name reveals.[816] The function to cope with disputes on airport charges was only added by the Finance Act, 2017.[817] As alluded to previously, the UK adopts a similar approach by naming a non-aviation regulatory body as the appellate tribunal. Although some other tribunals that hear cases of similar nature were merged into the Finance Act, 2017,[818] it seems unclear as to why airport tariff disputes are heard by the TDSAT as a telecom tribunal.[819] Some scholars challenge the reasonableness of mixing airport economic matters and telecom matters,

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[812] *The Finance Act, 2017* (India), s 169.
[813] The AERA Act, *supra* note 765, s 17(a).
[814] See *Ibid*, ss 17(a)(i)-(ii).
[815] See *Ibid*, s 17(b).
[816] It was established under the 1997 Telecom Regulatory Authority of India Act.
[817] See *supra* note 812, ss 160, 163.
[818] The Railway Rates Tribunal was substituted by the Railway Claims Tribunal; the Copyright Board was substituted by the Intellectual Property Appellate Board. In both cases, tribunal merges occurred between two tribunals that target similar subject matters. See *Ibid*, s 160.
[819] Ran Chakrabarti, Anubha Sital & Shringarika Priyadarshini, "India: The Finance Act, 2017 - Implications & Constitutionality?", (26 April 2017), online: *Mondaq* <https://www.mondaq.com/india/fiscal-monetary-policy/589176/the-finance-act-2017--implications-constitutionality>.

which do not belong to the same regulatory category.[820] It is interesting to recall the appellate tribunal of the UK. Unlike the Indian TDSAT, the reason for the UK's choice is clear.[821] Despite such a concern, a possible rationale is that airport tariff and telecom disputes are alike from a competition law perspective. The abuse of a service provider's dominant position remains a major concern in both sectors.

Moreover, the TDSAT possesses a quasi-judicial attribute, as per provisions in the 1997 Telecom Regulatory Authority of India Act, for four reasons. First, the tribunal consists of one chairperson and at most two other members appointed by the central government.[822] The Chief Justice of India has a say by consultation with the government regarding the choice of nominees.[823]

Second, the chairperson must be or have been "a [j]udge of the Supreme Court or the [c]hief [j]ustice of a High Court".[824] Nevertheless, this is not a requirement for other members.[825]

Third, there are five grounds to remove a tribunal member.[826] Particularly, two of these grounds, namely, prejudicial performance due to corruption and position abuse, are relatively more subjective than the other three grounds. The two grounds also apply to the removal of members in AERA and the AAI. Yet, they are strictly restricted when applied to the tribunal.[827] The government is not permitted to solely exercise this power; such power should be exercised only after the Supreme Court has confirmed the disqualification of a member on these grounds by a report.[828] As a result, this tribunal gains personnel independence by allocating the power of personnel removal to the judicial branch.

Fourth, the TDSAT is authorised with the same power as is granted to a civil court, but the TDSAT has more flexibility. This tribunal has exclusive jurisdiction that cannot be exercised by civil

[820] *Ibid*.
[821] See the first part of this chapter.
[822] The Telecom Act, *supra* note 772, s 14B(1).
[823] *Ibid*, s 14B(2).
[824] *Ibid*, s 14C(a).
[825] A member other than the chairperson is eligible if this person has at least two years of experience serving as a secretary of the government or has expertise in "technology, telecommunication, industry, commerce or administration". *Ibid*, s 14C(b).
[826] These grounds are: (1) a member, which is insolvent, (2) convicted of an offence, (3) physically or mentally ill, (4) prejudicial due to having received financial or other interest, and (5) having abused his or her position. *Ibid*, s 14G(1).
[827] The other three grounds of removal – being insolvent, convicted of an offence, and physically or mentally ill, are on a more objective basis. See *Ibid*, ss 14G(1)(a)-(c).
[828] *Ibid*, s 14G(2).

courts.[829] Regarding procedures, the Code of Civil Procedure, 1908 does not apply to this tribunal. Rather, the tribunal adopts principles of natural justice and can regulate its own procedures.[830] The tribunal's decisions can be appealed to the Supreme Court. However, party autonomy to decide will be respected.[831] Also, this tribunal has the same enforcement power as a civil court.[832]

4.3.2 Contractual Regulation Through the Privatisation of Delhi Airport

This section further examines how airport charges can be determined through contractual clauses as part of the process of airport privatisation and public-private partnership (PPP) by the example of Delhi Airport. As a significant hub in India, Delhi Airport is operated under a PPP model by a joint venture named Delhi International Airport Limited (DIAL). DIAL is the operator of Delhi Airport. More than half of DIAL's equity is owned by a private investor: the GMR Group. Although the AERA Act has set out that the determination of charges via bidding documents will pre-empt AERA regulation, the privatisation of Delhi Airport occurred before the AERA Act came into effect. Therefore, one may read the 2019 amendment as a post-acknowledgement to the existing practice that contracts associated with an airport privatisation project function as an intrinsically important regulatory instrument.[833]

4.3.2.1 The Operation, Management, and Development Agreement

Two key bidding documents that set out provisions on charges are the Operation, Management and Development Agreement (OMDA)[834] and the State Support Agreement[835]. The two

[829] *Ibid*, s 15.
[830] *Ibid*, s 16(1).
[831] *Ibid*, s 18.
[832] The tribunal has the power to proceed with the suit. For a list of its power regarding discovering evidence, ensuring party attendance, etc., see *Ibid*, s 16(2). The "adjudications" made by the tribunal have the same effect as decrees made by a civil court. See *Ibid*, s 19.
[833] The Request for Proposal issued by AERA in 2020 implies that AERA has exercised its regulatory authority in different contexts for different airports. For Delhi Airport and Mumbai Airport, AERA's decisions are based on two important bidding documents, i.e., Operation, Management and Development Agreements and State Support Agreements. See Airports Economic Regulatory Authority of India, *Request for Proposal: Engagement of Consultants to Assist the Airports Economic Regulatory Authority of India (AERA)*, 05/2019-20 (2020), s 2.5.
[834] See *Operation, Management and Development Agreement Between Airports Authority of India and Delhi International Airport Private Limited for Delhi Airport* (4 April 2006), online (pdf): <https://www.civilaviation.gov.in/sites/default/files/moca_000971.pdf> [OMDA].
[835] See *State Support Agreement in Relation to the Modernisation and Restructuring of the Delhi Airport Between the President of India on Behalf of the Government of India and Delhi International Airport Private Ltd.* (26 April 2006), online (pdf): <https://www.civilaviation.gov.in/sites/default/files/moca_000972.pdf> [The State Support Agreement].

documents can be recognised as contracts in nature. OMDA clarifies fees[836] that are to be submitted by the airport operator to the AAI and charges the operator can levy from airport users.

Notably, with regard to charges levied from users, OMDA uses a dichotomy method to differentiate aeronautical and non-aeronautical charges by regulating aeronautical charges while leaving non-aeronautical charges unregulated. As such, DIAL can freely determine the rate of a charge in relation to non-aeronautical services.[837] Section 12 also provides that DIAL should not designate the penalties (or damages) that may happen under any of the PPP contractual terms as aeronautical charges. As such, these monetary burdens incurred by DIAL will not pass to airport users.[838] This provision is also in line with the cost-relatedness principle, considering that these penalties do not happen as a result of aeronautical services such that they should not stand as costs.[839]

4.3.2.2 The State Support Agreement

The State Support Agreement stands as another key vessel to conduct contractual regulation. OMDA refers to this agreement for more specific regulatory provisions regarding aeronautical charges and the passenger service fee. The government of India offers three types of support to Delhi Airport in this agreement. First, it specifies how the government and its regulatory agencies can coordinate with DIAL in terms of operational matters on governmental services, such as, customs, immigration, security, meteorology, etc.[840] This agreement also clarifies principles regarding military use of Delhi Airport both at both emergent and non-emergent occasions.[841] Second, the government offers DIAL a right to propose to amend OMDA if legislative changes will cause DIAL additional loss with a value of over Rupees ten crores in a year.[842]

The third and most relevant aspect to airport charges goes to the approach that the State Support Agreement adopts to determine charges. Interestingly, this agreement makes pre-arrangement to

[836] Fees to be submitted to the AAI have two parts: an upfront fee of Rupees 150 Crores paid in advance to the PPP project, and an annual fee that is equal to 45.99% of projected revenue each year. See *Ibid*, ss 11.1.1-11.1.2.
[837] *Ibid*, ss 12.1-12.2.
[838] *Ibid*, s 12.1.2.
[839] The definition of aeronautical charges in the State Support Agreement proves this argument by addressing that aeronautical charges are for the use of aeronautical services and the "consequent recovery of costs relating to [a]eronautical [a]ssets". *Ibid*, s 1.1.
[840] A joint coordination committee is established with representatives on behalf of these sectors. See *Ibid*, s 5.
[841] See *Ibid*, s 4.
[842] See *Ibid*, s 10.

future regulatory modifications by setting out measures if regulations will be changed in the future. Although the State Support Agreement to privatise Delhi Airport was concluded in 2006, before the establishment of AERA, DIAL agrees with regulation by the incoming AERA in this agreement.[843] Schedule 1 in this agreement sets out a detailed regulatory methodology and principles[844] that are expected to be followed by the incoming AERA.[845] Even if AERA is not in place, the Indian government also agrees to act per these principles when temporarily delegating the regulatory function.[846]

The State Support Agreement will enhance legislative predictability by setting a prototype for future legislation. The governmental party discloses its rulemaking proposals for the private bidder to gain reasonable expectations and to prepare accordingly for the airport operation. Countries, which may encounter regulatory reforms, can refer to this practice if they intend to regulate airport operation via contractual instruments that at least encompass concessions, bidding documents, and other public-private partnership agreements. That said, this innovative approach should still be held accountable, preferably by clear provisions in an agreement, if an incoming AERA does not follow these provisions as to the regulation of charges in the State Support Agreement. The guarantee made by the government of India to "make reasonable endeavours" appears too vague to be predictable.

In addition, Schedule 1 only requires DIAL to consult the opinions of major airport users concerning major airport development.[847] Small airlines, particularly emerging LCCs, and passengers may be excluded from a consultative process.

4.3.3 The Effectiveness of the Indian Approach to Airport Charges Regulation at Delhi Airport

[843] See *Ibid*, s 3.1.1.
[844] Schedule 1 sets out the price cap methodology in charge calculation, followed by formula and examples to calculate charges. A general regulatory principle is the protection of economic efficiency because regulation only applies to aeronautical services, which raise a concern of possible monopoly. This schedule also lists some core principles that have been discussed before like transparency and cost-relatedness. See *ibid* at schedule 1 (Principles of Tariff Fixation).
[845] "GOI further confirms that, subject to [a]pplicable [l]aw, it shall make reasonable endeavours to procure that the Economic Regulatory Authority shall regulate and set/ re-set [a]eronautical [c]harges, in accordance with the broad principles set out in Schedule 1 appended hereto". *Ibid*, s 3.1.1.
[846] See *Ibid*, s 3.1.3.
[847] See *Ibid* at schedule 1, s 9.

4.3.3.1 The Passenger Development Fee

Among the three types of levies listed in Section 13 of the AERA Act, a development fee is strategically important to the future development of an airport. The development fee levied by DIAL as of 2009 triggers two questions: which party has the power to collect it? and is it a tax or a charge? The Ministry of Civil Aviation approved DIAL's request to levy a development fee prior to the AERA Act coming into effect.[848] Its approval is based on Section 22A of the AAI Act.[849] However, the Supreme Court finally made its judgement to answer the two questions more strictly, albeit with flawed reasoning when answering the former question.[850]

First, the Court's judgement indicates that the power of a private airport operator to levy a development fee backed by contractual clauses should be strictly interpreted by law. In this case, the Court noticed that Section 22A identifies three grounds on which the AAI can levy a development fee:

> (a) funding or financing the costs of upgradation, expansion or development of the airport at which the fee is collected; or (b) establishment or development of a new airport in lieu of the airport referred to in clause (a); or (c) investment in the equity in respect of shares to be subscribed by the Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in clause (a) or advancement of loans to such companies or other persons engaged in such activities. [851]

Although Section 12A of the AAI Act permits the AAI to transfer some of its power to lessees, the power to levy a development fee on the grounds of (b) and (c) remains untransferable.[852] This is because these two grounds are "statutory functions" inherent to the AAI as a regulatory agency and thus cannot be undertaken by an airport lessee.[853]

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[848] Moses George, "Development Fee in India Airports-A Case Study" (2015) 80 J Air L & Com 17 at 28.
[849] *Ibid*.
[850] This case is appealed by the Consumer Online Foundation to challenge a judgement made by the High Court, which supported DIAL to levy the development fee.
[851] The AAI Act, *supra* note 771, s 22A.
[852] See *Consumer Online Foundation v Union of India & Others*, [2011] Civil Appeal No 3611 of 2011 at paras 11–12.
[853] See *Ibid* at para 13.

However, the Court's decision seems flawed to conclude that the power of levying or collecting a development fee cannot transfer to a lessee of an airport subject to Section 12A.[854] Its subsequent decision that the Court will not consider whether OMDA and the State Support Agreement contain any clauses on DIAL's power to levy the development fee[855] is also problematic. This is because the Court only managed to prove that the above-mentioned grounds (b) and (c) are naturally associated with the AAI, thus being untransferable. The Court failed to make an explicit response to an important concern, namely, if a transfer of the AAI's power to levy a development fee based on the ground (a), i.e., to fund the update and development of an existing airport, can be allocated to DIAL. The Court seemed to support this claim at the beginning of the judgement,[856] but then left it unsolved and concluded that the power of levying a development fee is untransferable.

In terms of the second question, the Court recognised that the development fee is a tax in nature. It goes a step further to void the power of the AAI to levy the development fee without further specifying the rate of a tax. When addressing the reason that embarking passengers do not receive corresponding services for the development fee that they have paid, the Court once again adopted contractual analysis, reasoning that no contractual relationship exists between passengers and the "up-gradation, expansion or development of the airport".[857] Therefore, the Court's judgement paves the way to interpret "cost-relatedness" in a private law context. As the development fee is identified as a tax, the Court deemed it necessary to refer to Article 265 of the Constitution, which writes that "no tax can be levied or collected except by authority of law […]".[858] The law that grants such a tax should prescribe in great details, including its rate.[859] The Court concluded that even Section 22A of the AAI Act, as it was at the time the case was judged, cannot serve as a legal basis to levy such a tax unless it specifies the rate of the fee.[860]

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[854] See *Ibid*.
[855] See *Ibid*.
[856] "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 22 A of the 1994 Act". *Ibid* at para 11.
[857] *Ibid* at para 14.
[858] *Ibid* at para 15.
[859] "Looking strictly at the plain language of Section 22A of 1994 Act before its amendment by the 2008 Act, the development fee was to be levied on and collected from the embarking passengers 'at the rate as may be prescribed'". *Ibid*.
[860] *Ibid*. As the AERA Act came into effect in 2008, the Court upheld AERA's authority to determine the rate of the development fee at the airports in question. See *Ibid* at para 23(ii).

Besides the previously-discussed two questions, contractual predictability should also attract one's attention. When drafting agreements under an airport privatisation or a PPP model, parties, particularly the state party, should closely look at how much capital the private operator is to distribute and if there is a clause on the levy of a development fee to finance capital need. Otherwise, a private operator may request permission to levy a development fee from users using an airport with the purpose to fill in an investment gap unexpected or unaddressed by agreements during the bidding process. Differently put, a private party may enter into an airport privatisation project and then count on the levy of a development fee in the middle of the project, as long as the government allows such a levy.

For DIAL, the private equity occupies less than 20% of total expenditure, and the development fee collected from passengers takes up about 27% of the amount.[861] However, the need to fill in the capital cap of the DIAL privatisation project by a development fee was neither predicted in OMDA nor the State Support Agreement. In light of this, the Comptroller and Auditor General of India comments in a report that the development fee is a "post-contractual benefit" that was not predicted during the negotiating of any bidding documents.[862] In other words, the DIAL privatisation project may have been abandoned if the government could realise that investments from the private actor do not make a major contribution, such that the project cannot introduce the expected effect of financial release for the government.[863]

A key takeaway here is to avoid a post-contractual dispute about whether a development fee should be levied to fund an airport development project. Contractual parties should clarify the proportion of private capital and the development fee, respectively, explicitly in all the privatisation or PPP agreements. These specifications should be in place at the bidding stage. An alternative method can be to incorporate a clause to introduce the method of levying a development fee if the need exists only after the commencement of an airport privatisation project.[864]

Furthermore, in response to the discussion in Chapter 2 as to the distinction between a charge and a tax, the decision to recognise a development fee as a tax may be inconsistent with the aim of

[861] George, *supra* note 848 at 39.
[862] *Ibid* at 38.
[863] *Ibid* at 39.
[864] Though AERA has the power to determine the development fee at major airports, contractual regulation by bidding documents is free from this power. So clear contractual design is still necessary.

ICAO. It implies that this development fee may fall out of the remit of Article 15 of the Chicago Convention. As this Article prohibits discrimination between domestic and foreign airport users, the opt-out from this Article thus triggers the potential for discriminatory treatment. Moreover, the development fee aims to prefund airport development. ICAO, in its policies on airport economic regulation, advocates a broader concept of charges to include pre-funding levies into the spectrum of charges, but subject to strict interpretation.[865] The development fee is more in line with a charge, rather than a tax. For further regulatory activities regarding a development fee, the Court offers an excuse not to refer to ICAO's policies, even though they are not binding in nature.[866]

The exclusion of the provision from Article 15 of the Chicago Convention and ICAO's policies spells out the importance of relying on other regulatory tools to govern airport charges. To incorporate clauses for the governance of a development fee in privatisation or PPP agreements could thus serve as a feasible approach.

4.3.3.2 The Appointment Impasse of the TDSAT

There was a bumpy road for India to appoint the Chairperson and other members of the TDSAT. The appointment procedure met difficulty and the successive Chairperson and members had not yet been chosen when the incumbent Bench was going to expire.[867] In order to accelerate the appointment process, the Supreme Court extended the tenure of the Chairperson by three months, although this means his tenure would exceed the statutory limit of three years.[868] However, three months later, when the extension was to end and the tenure of other members had already ended, the appointment procedure still had not been completed. So, the Supreme Court again extended the tenures of the Chairperson and members by another three months.[869] This appointment impasse,

[865] For ICAO's suggestions on the restrictions of reasonable pre-funding, see ICAO, *supra* note 9, s I(23).
[866] George observes that the Indian approach to overcoming ICAO's policies concerning airport charges aims to avoid these guidelines and criticisms. See George, *supra* note 848 at 52.
[867] The Economic Times, "Supreme Court Extends Tenure of TDSAT Chairperson, Expresses Concern over Delay in Appointment of Members", (7 April 2020), online: <https://economictimes.indiatimes.com/industry/telecom/telecom-news/supreme-court-extends-tenure-of-tdsat-chairperson-expresses-concern-over-delay-in-appointment-of-members/articleshow/75031743.cms>.
[868] See The Telecom Act, *supra* note 772, s 14D.
[869] "Supreme Court Extends Tenure of TDSAT Chairperson", *The Hindu* (17 July 2020), online: <https://www.thehindu.com/news/national/supreme-court-extends-tenure-of-tdsat-chairperson/article32114856.ece>.

the repeated tenure renewal for the Chairperson and members of the TDSAT, miniatures the disfunction of member appointment procedures for many tribunals in India.[870]

A possible reason is that the tribunal is not fully independent from the governmental branch. It leads to the appointment procedure being influenced by the governmental inability. Even if the opinion of the Chief Justice of India should be consulted when appointing these persons, the central government will make the decision, according to the 1997 Telecom Regulatory Authority of India Act.[871] Hence, even if the tribunal is independent vis-à-vis the AAI and AERA,[872] it should be set more independent, particularly in terms of personnel appointment.

4.3.3.3 Delay of Effective *Ex Ante* Regulation

AERA has failed to prove its capability to make charge determinations on time as the regulator with the authority to pre-approve the rate of charges at major airports. As the regulatory activities of AERA are usually pending results of appeals made by the appellate tribunal, the ineffectiveness of AERA, in combination with the previously demonstrated dysfunction of the appellate tribunal, could lead to severe dysfunction of the airport economic regulatory system.

A dispute between DIAL and AERA in 2014 demonstrates the risk of a serious disfunction of the regime. The AERAAT, a tribunal preceding the TDSAT, received many appeals challenging the charge determinations by AERA. These pending appeals made to the tribunal against a charge order made by AERA for the first period will influence whether AERA has applied the regulatory norms correctly.[873] AERA may need to refer to the results of these appeals for future decisions. Thus, the AERAAT's failure to timely resolve these appeals makes it difficult for AERA to resume its charge regulatory function for the second control period from 2014 to 2019.[874] In other words,

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[870] *Ibid*.
[871] See The Telecom Act, *supra* note 772, s 14B(2).
[872] The thesis has discussed that the Chairperson of this tribunal is free from removal by the sole determination of the government based on some discretionary reasons. Yet, this is not the case for the AAI or AERA.
[873] See *Delhi International Airport Private Limited v Union of India & Others*, [2015] No 16370/2014 at para 23.
[874] In a petition submitted by DIAL against AERA before the Delhi High Court in 2014, DIAL argued that it appealed the charge order by AERA before the AERAAT for the first control period. Before the AERAAT could make a timely decision on this appeal, the second period was to come and AERA initiated a plan to review charge rates for the second control period from 2014 to 2019. Because the result of this appeal would influence the charge rate for the second control period, DIAL made this petition to apply to extend the rate order made for the first period until the AERAAT would release the decision of the appeal. Yet, the judgement avoided directly answering the question of whether AERA is entitled to make the new round of charge order as of 2014. Rather, the Court extended the current rate

only when these appeals are resolved can AERA make substantially reasonable charge determinations by applying laws correctly.[875] Additionally, as the consultation process statutorily requires considering all stakeholders' submissions, it may take AERA at least three months to make a charge determination for the second period.[876] The Standard & Poor's (the S&P), a rating agency, estimated that the time would be between six to nine months.[877]

AERA's decisions on the rate of the charge regarding Delhi Airport between the first and the second control periods seem to be inconsistent. For the first control period, DIAL proposed a 775% rise in charges between 2009 and 2014, while AERA only approved a raise of 346%. This increase still has been criticised as unreasonably high by the Federation of India Airlines, Lufthansa, and IATA.[878] This rate had extended as a result of the previously discussed judgement by the Delhi High Court.[879] Actually, the rate of the first period is high enough that DIAL should be able to collect more than its revenue target for both control periods.[880] Later on, AERA proposed a new rate with a 78% decrease in an over five-hundred-page decision in 2015.[881] This new rate was only officially permitted as of July 2017, following the judgement of the Supreme Court.[882] Passengers would pay less due to this huge cut in airport charges.[883]

4.3.4 Conclusion

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pending the decision by the appeal as it saw no injustice if the old charge order was to be extended temporarily to all stakeholders. See OMDA, *supra* note 834 at paras 6–7, 28–30.
Airport users' interests cannot be protected if the appeal mechanism is not operational. Three other appeals challenging AERA's charge rates by Federation of India Airlines, Lufthansa, and IATA before the AERAAT were still pending.

[875] See *Delhi International Airport Private Limited v Union of India & Others*, *supra* note 873 at paras 6–7, 28–30.

[876] See *Ibid* at para 12. Delhi High Court clarified in the judgement that AERA is not restrained to exercise its statutory power to determine rates for the second period: a postponed charge order by AERA can attribute to its own reasons. See *Ibid* at para 26.

[877] P R Sanjai, "Regulator Proposes 78% Reduction in Delhi Airport Charges", (4 February 2015), online: *Livemint* <https://www.livemint.com/Politics/nSS9l7FoopZ9rFoikXbGWN/Airport-regulator-proposes-78-reduction-in-Delhi-airport-ch.html>.

[878] See *Delhi International Airport Private Limited v Union of India & Others*, *supra* note 873 at para 7.

[879] See *supra* note 874.

[880] DIAL had collected Rs 188 crore more than its revenue goal for the first period by the end of this period. If this rate remains, DIAL would have levied about Rs 9,000 crore by the end of the second period in 2009. See "Delhi Airport Charges to be cut by 89%", *The Hindu* (7 July 2017), online: <https://www.thehindu.com/business/Economy/delhi-airport-charges-to-be-cut-by-89/article19235169.ece>. The Standard & Poor's (the S&P) also predicted that notwithstanding the proposal to reduce rates significantly, DIAL can take advantage of the suspension of AERA's order by extending the high rate after expiry. See Sanjai, *supra* note 877.

[881] See Airports Economic Regulatory Authority, "Order", online: <http://www.aera.gov.in/aera/content/order-3.html?page=4&>.

[882] See generally *Air India Limited v Delhi International Airport Private Limited*, [2017] 6996/2017.

[883] See *supra* note 880.

One can see the support from the Indian government to airport charge deregulation in a tight regulatory environment. Such support particularly aims at airports operated under a privatisation or a PPP model. One angle to observe such support is the power transfer from the AAI to AERA, and then to deregulation. Although the AAI was originally authorised to levy and collect aeronautical charges,[884] it was deprived of such economic regulatory authority towards private airports subject to its amendment in 2003. Then, the newly established AERA assumed the power of charge setting at major airports in India from AAI. Furthermore, the 2019 amendment again liberalised private airports, allowing aeronautical charges and development fees to be set through bidding documents. The development fee levied by DIAL since 2009 illustrates that the government of India may have long been keen on the idea to allocate more power to self-determine a fee to an airport operator in a privatisation context. And the judgement of the Supreme Court, which frustrated that power transfer under a lease agreement, has pushed the government to legitimise it in the form of the 2019 amendment of the AERA Act.

Despite such hospitability to private actors in airport operation, concerns may emerge for both the regulators and the regulated private airport operator. First, AERA as a special economic regulator is short of necessary resources to fulfil all statutory procedures before it makes a charge-related determination at Delhi Airport.[885] Consequently, the regulatory process may be far behind the timetable.[886] However, this determination is only in relation to Delhi Airport. AERA is also in charge of other major airports regarding charge setting. Given that, AERA is likely to make more delays in future regarding other major airports, given its duty to finish consultation, which is time consuming. Such a delay can be detrimental particularly when its determination calls for revision because if a previous charge determination generates excessive charges, the suspension of a new

[884] The 2003 amendment extends the AAI's authority to levy and collect a development fee. See The AAI Act, *supra* note 771, s 22A.

[885] As discussed, AERA's lack of regulatory resources is demonstrated by a rise in the threshold to define major airports. This reduces the airports that AERA regulates. Abeyratne also observes that the lack of skilled human resources is the main bottleneck to Indian air transport development, and one main lacking resource is the airport sector's expertise. See Abeyratne, *supra* note 774 at 556.

[886] The new rate order, which should have started in April 2014, was made in December 2015, meaning that over one and a half years' delay, let alone the fact that this new order was only upheld by the Court's judgement in 2017. See "User Fee Reduced by 89% at Delhi Airport but Implementation Stayed", *Business Standard India* (15 December 2015), online: <https://www.business-standard.com/article/economy-policy/user-development-fees-at-delhi-airport-slashed-115121400849_1.html>.

determination means the old one cannot be revised in time, leading to "unjust enrichment" for the new regulatory round.

Second, the appellate tribunal, which is supposed to behave as a final gatekeeper to rectify mistaken determinations by AERA, is not functioning properly, largely due to appointment incapability. This problem exists for both the previous tribunal (the AERAAT) and its new version (the TDSAT). In the big picture, this "appellate deficiency" remains a general issue embedded in the general soil of the Indian regulatory environment as many Indian tribunals experience this. However, in the current situation, it is questionable if the TDSAT, which originally targeted telecom disputes, is adequately equipped to deal with airport charge disputes, and if a lack of expertise will slow down the already irresponsible TDSAT.

Third, in terms of cooperation between AERA and its appellate tribunal, the pending appeals that are not addressed in a timely way in front of the tribunal hinder the regulatory activities of AERA, considering that AERA has extended its charge determination largely due to the pending appeals that may later substantially reverse its earlier determinations. One may take a holistic approach to both AERA and its tribunal because of their interdependence.

Fourth, regarding the regulated airport operator, the level of charges at Delhi Airport is so high for the first control period that DIAL collected more than its planned revenue. The 89% reduction of the charge rate as of the second control period adjusts the excess charges from the first period.[887] A sharp rate decrease between two periods "on a roller coaster" is neither a fair nor stable way of recovery. For passengers, the reduced airport charges only benefit the passengers flying in the second period, but not the ones who already paid for the excessive part of charges in the first period. This recovery mechanism by modifying the rate of a fee in a five-year cycle does not achieve fairness in terms of individual passengers. A similar concern applies to airlines. It is doubtful if the airlines that paid high charges for the first period will have a remedy to be refunded the excessive charges they paid. Additionally, airline companies need to collect capital for operation. If the charge rate changes rapidly, particularly when it increases, airlines may find it challenging to make an investment plan and to collect enough capital.

[887] See *Ibid*.

This recovery method also harms airports. Airport operators that manage major airports are likely to be huge entities; their credit, which helps determine their financial ability to raise money for airport operation, can reduce due to a low rate by a rating agency. The regulatory decision to modify the rate downward rapidly may harm an airport operator's rating.[888]

[888] See Sanjai, *supra* note 877.

5 Adopting a Private Law Approach in Regulating Airport Charges

Having analysed how corporate governance and contracts have been applied in regulating airport charges in three case studies in Chapter 4, I will now take a step further to systematically discuss this regulated-party-involved regulation, which I call a private law approach. This approach can serve as an alternative to traditional regulation or as a complement to it. First, this chapter provides a conceptual discussion of the private law approach. The second section examines various other approaches, in addition to traditional regulation, to explain why a private law approach is the focus of this study. Section 3 investigates why we should embrace a private law approach to regulate airport charges, and Section 4 explores the boundary between public and private regulation. Conditions that enable us to consider this approach follow in the fifth section. Sections 6 and 7 unpack the implementation of this approach in two dimensions, namely a contractual dimension and a corporate governance dimension, though the two are sometimes intertwined. Finally, the eighth section responds to the four basic principles discussed in Chapter 2, arguing that these principles can be incorporated through private law.

5.1 What is a Private Law Approach?

Traditional command-and-control regulation, which features the coercion of state power, should not be the exclusive path to reasonable airport charges.[889] By adopting the label of "a private law approach", I suggest that private law instruments can serve as regulatory alternatives. The use of this approach aims at regulatory effects that can be achieved through contracts and robust corporate governance of airport operation entities and encourages the regulated parties themselves to be actively engaged in the regulatory process.

5.1.1 Two Dimensions of a Private Law Approach

[889] To follow the rapidly changing dynamic, many states have shifted their focus from the traditional command-and-control mode to a new decentralised mode. In this new mode, more non-state actors play a part in making rules. See Tony Porter, "Why International Institutions Matter in the Global Credit Crisis" (2009) 15:1 Global Governance 3–8 at 3. This transition period is regarded as "regulatory capitalism". See generally David Levi-Faur & Jacint Jordana, "The Rise of Regulatory Capitalism: The Global Diffusion of a New Order" (2005) 598:1 The Annals of the American Academy of Political and Social Science 200–217. These diverse participants include NGOs, interest groups, transnational clubs, and think tanks. See Friedl Weiss, "The Device of Soft Law: Some Theoretical Underpinnings" in *The Changing Landscape of Global Financial Governance and the Role of Soft Law* (Brill Nijhoff, 2015) 47 at 51.

This chapter focuses on two specific private law tools: contracts and corporate governance.[890] Using a contractual approach, one may incorporate provisions governing airport charges in contractual clauses between an airport operator and an airline, between an airport operator and the government, or between two or more states. Although contracts in a private law sense prevail in this part, international agreements signed between states can also be categorised herein.[891] Regarding corporate governance, airport operators will perform as regulators that govern themselves. They will benefit from corporatisation that many airports have adopted. For example, the board of directors, executive managers, corporate charters, bylaws, and mechanisms of protecting stakeholders all can function as internal supervisory processes that monitor reasonable charge setting and other contractual matters as well.

Although contracts and corporate governance are listed separately as two parallel solutions for this discussion, they are inseparable in practice. Once a corporation signs an agreement with other parties, enforcement falls under the operation and management process of a corporation, in other words, for our purposes, the process of corporate governance of an airport per se. An airport operates by signing contracts with airlines, vendors, as well as other parties. Even the relationships between different organs, e.g., between shareholders and managers, can be viewed as contractual.[892] Therefore, charters and bylaws are contracts.[893] In other words, corporate governance is a series of contracts.[894]

5.1.2 Reasons for the Name of this Approach

I choose the name "a private law approach" for several reasons. First, it serves as an overarching label to refer to the two particular methods of innovative regulation that this thesis focuses on, namely a contractual method and a corporate governance method. Both methods are based on the

[890] Even though the term "private law" covers many private law branches, this study focuses on two dimensions, which have been transnationally recognised and adopted.
[891] Many features that are associated with contracts between private actors similarly apply to international agreements, under which states are signatories: states negotiate clauses that are suitable for their interests, and the violation of provisions triggers liability and enforcement mechanisms.
[892] See Jill E Fisch, "Governance by Contract: The Implications for Corporate Bylaws" (2018) 106 Calif L Rev 373 at 377.
[893] See *Ibid*.
[894] Jensen and Meckling view a corporation as "a nexus of contractual relationships". Michael C Jensen & William H Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3:4 Journal of Financial Economics 305–360 at 311. Using the contractual theory, Butler argues that a corporation is a "nexus of contracts". Henry N Butler, "The Contractual Theory of the Corporation" (1988) 11 Geo Mason UL Rev 99 at 99.

concept of private law: a contractual method relies on contractual law and a corporate governance method relies on corporate law. Therefore, the term private law approach conveys a brief reference to the two methods it incorporates.

Second, this name encourages the adoption of the approach. The word "private" indicates a resort to private parties, which in this thesis can be interpreted as the regulated parties and a broad set of other stakeholders vis-à-vis public authorities. Moreover, "private law" is indicated as the legal basis of this approach. This name encourages states to carefully look into existing private law instruments to find methods of regulation. In this way, states do not have to bother designing additional regulatory approaches that lead to extra costs for and burdens on the regulated sectors. This name also attracts attention to the potential function of autonomy of private parties, which in the context of this thesis are the airport operators, in the regulatory process.

5.2 Other Regulatory Approaches

One might ask that why this thesis only offers a private law approach as a solution without mentioning other approaches. To answer this question, it is necessary to position the private law approach in the full spectrum of various regulatory approaches. This thesis recognises two opposite types of power that regulation can use. Traditional regulation, which resorts to public power, is seated at one end of the spectrum of regulation. The criticism of traditional regulation encouraged me to think about the opposite of public power, which led me to examine the possibilities of regulation with the engagement of private parties, here, regulated airport operators.

In a regulatory mode, where private power is fully relied on, the government completely liberalises the private parties to regulate themselves. This mode of regulation lies at the other end of the regulatory spectrum.[895] Therefore, at the ends of the regulatory spectrum are a complete resort to public power and a complete resort to private power.

[895] Steven L. Schwarcz similarly observes two ends of a broad regulatory spectrum. His study focuses on private ordering, which is similar to the private law approach and referred to "[t]he sharing of regulatory authority with private actors". He argues:

> Private ordering can be viewed as part of a broad spectrum within which rulemaking is classified by the amount of governmental participation involved. At one end of the spectrum are rules of law originated and put into force by sovereign governments. At the other end are rules that are adopted entirely by private actors. Between these extremes, private ordering involves a continuum of government participation.

Steven L Schwarcz, "Private Ordering" (2002) 97 Nw UL Rev 319 at 319, 324.

Therefore, a combination of the private law approach and traditional regulation generates more types of regulation that lie in the middle of the regulatory spectrum. The government can choose from different regulatory possibilities that vary according to the levels of participation by public and private power.

A metaphor to help understand the significance of the two ends of power is the three primary colours, which stands for red, yellow, and blue.[896] The mixing of these colours generates other colours. Similarly, the combination of public power, an attribute of traditional regulation, and private power, an attribute of the private law approach, generates other approaches to regulation. One thus can see that the discussion of a private law approach is more than the discussion of one type of regulation, under which private parties are authorised as regulators. This method also shows that core elements of different types of regulation are needed in order to create collaborative regulation, as the three primary colours can be combined to make many.

The idea to resort to the power of private parties and their relationships in the regulatory process is not new.[897] How much regulatory flexibility a private party can obtain varies among different jurisdictions.[898] As discussed in the UK, Canada, and India case studies in Chapter 4, the private law approach and traditional regulation have collaborated in different ways with different results. Discussion of a private law approach reveals varying approaches to regulation where the regulated party has a role.

Given the importance of a private law approach, this thesis chooses it as its focus. I will briefly discuss the other types of regulation in a limited capacity because they can be generated by mixing traditional regulation and a private law approach. The following regulatory examples are not

[896] "Primary color", (8 March 2022), online: *Wikipedia* <https://en.wikipedia.org/wiki/Primary_color>.
[897] In the 18th century, some British coffeehouses were transformed into private clubs by brokers, and irreputable brokers who broke the rules established by these clubs would lose their credit and be kicked out. Jonathan's Coffeehouse, which was such a club entrenching the proverb "my word is my bond", was later developed as the London Stock Exchange. See Edward Peter Stringham, *Private Governance: Creating Order in Economic and Social Life* (Oxford University Press, USA, 2015) at 3.
[898] The state has the decision-making power through government involvement and legislative endorsement. See Glen Hepburn, "Alternatives to Traditional Regulation", at para 1.12, online (pdf): <https://www.oecd.org/gov/regulatory-policy/42245468.pdf>.

exhaustive.[899] They are listed in a sequence according to the extent of participation of private power from the least to the most.

5.2.1 Market-Based Regulation

Market-based regulation is usually employed in carbon trading systems as an environment protection instrument. There are two options under this regulation, e.g., a transferable permit system and a tax/subsidy-based system. [900] Regardless of which mode is chosen, the command-and-control character still dominates. For example, in the carbon trading system, although market subjects are allowed to negotiate with each other and arrange their emissions flexibly, they do not establish rules. What they do, in essence, is act with more freedom than in a tight common-and-control regime, all under a carbon-amount-cap set by a regulator.

5.2.2 Co-Regulation

Co-regulation provides private parties with more discretion to set rules than market-based regulation. It should be noted that here the concept of co-regulation refers to a certain type of regulation by which private parties and public authority share power. It is not used as a general reference to all kinds of regulation in which private and public power collaborate. Linda Senden observes that in the European context, co-regulation denotes collaboration between private parties and directive governmental involvement in the regulatory process.[901] However, this collaboration does not regard private regulation as a complete and independent substitute for traditional regulation. Rather, it is complementary to state law.[902] Co-regulation may also be considered a

[899] There are also other suggested forms of private-participation regulation, which may overlap. For example, Edward Peter Stringham underlines the ignored notion of "private governance", which deals with the rules of a group (club) and is close to self-regulation. But when self-regulation is understood as private regulation is possible because the law allows it, this concept contrasts with "private governance", because, in this sense, self-regulation is still legal centralism. Edward Peter Stringham sees "private governance" as a notion contrary to legal centralism. See Stringham, *supra* note 897 at 5.

[900] The former system allows parties to trade allocated emission amounts under a fixed cap, while the latter parties pay extra fees above a certain level of emissions. See Toni Anderson, "When Traditional Regulation Fails: Using Market-Based Instruments to Improve Environmental Management", (27 June 2016), online: *Silvacom* <https://www.silvacom.com/market-based-instruments/>.

[901] Linda Senden, "Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?" (2005) 9:1 Electronic Journal of Comparative Law 1–27 at 12.

[902] *Ibid*. For a general conceptual discussion of co-regulation, see European Economic and Social Committee, "Definitions, Concepts and Examples", (25 January 2010), online: <https://www.eesc.europa.eu/en/definitions-concepts-and-examples>.

way to implement a piece of existing legislation.[903] Thus, the European approach to co-regulation looks at non-governmental actors as outsourced rule-makers, within the scope provided by legislation. OECD illustrates that co-regulation can happen when an industrial group employs regulatory power, particularly, the power of drafting, overseeing, or implementing rules, with a government sector or other parties.[904] Co-regulation relies on the direct interruption from another party, mostly from the government.[905]

5.2.3 Self-Regulation

Self-regulation serves as another form of smart regulation. It embraces having an industrial group make its own rules of conduct.[906] In comparison with co-regulation, self-regulation is more self-sustained and usually handed over to an industry agent or association, who acts under the name of a regulator. Self-regulation may perform as accreditation arrangements based on industry, voluntary standards, and codes of practice.[907] Dennis D. Hirsch views self-regulation as existing where the power of defining and implementing standards of a given field rests with its industrial representatives and where governmental interruption which is kept to a minimum. [908] Self-regulation is enabled by a core consensus among companies in a sector that they are to be subject to the order of an association.[909] Hence, private parties take part in the regulatory process to be regulated by another party, which is superior, non-governmental, and comes from the regulated parties themselves. The border between self-regulation and co-regulation is blurred; the degree of government involvement impacts which form to employ.[910] By contrast, the suggested

[903] Linda Senden, *supra* note 901 at 12.
[904] The OECD holds a broad view to define co-regulation by recognising co-regulation between self-regulation and traditional regulation. They recognise co-regulation no matter if it happens between a private party and a government, or between two non-governmental actors. See OECD, *Industry Self-Regulation: Role and Use in Supporting Consumer Interests*, OECD Digital Economy Papers, No 247 (Paris: OECD Publishing, 2015) at 11.
[905] See Hepburn, *supra* note 898 at para 0.12.
[906] Neil Gunningham and others see self-regulation and co-regulation as smart regulation due to the introduction of commercial interests and non-governmental parties. See Neil Gunningham & Darren Sinclair, "Smart Regulation" in *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 133 at 133.
[907] See Hepburn, *supra* note 898 at para 0.12.
[908] Dennis D Hirsch, "The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation" (2011) 34 Seattle UL Rev 439 at 458.
[909] Some scholars define self-regulation in a broader sense that any "regulatory" activities within an individual company are included. See Cary Coglianese & Evan Mendelson, "Meta-Regulation and Self-Regulation" in *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 146 at 150. However, this term is mostly referred to as collective regulation by an industrial representative; the author also holds this view.
[910] Hepburn, *supra* note 898 at para 155.

private law approach in question does not necessarily relate to a supervisory industry association. Regulation can be self-imposed by individual entities.

5.2.4 Transnational Private Authority

Similar to self-regulation, some concepts, which partly overlap with it, also embrace the independence of a high level of private actors in the rulemaking process. One such concept is transnational private authority. This term mostly refers to endeavours to set norms by transnational private actors in a cooperative manner,[911] though its implications may have been far extended. For example, some scholars have discussed three features of transnational private authority in an intersection with corporate governance: the regulatory nature of credit rating agencies, voluntary codes of good corporate governance, and the harmonisation of international accounting standards.[912] This reveals, especially through the first attribute, that transnational private authority as regulation can happen by a single company and affect a third company in a different field.[913]

5.2.5 The Relationship Between the Private Law Approach and Public Power

A bottom-up private law approach restrains the use of coercive power and sector-specific regulation, but does not exclude public power.[914] When necessary, a private law approach can be undergirded by public power from several aspects. First, private law regulation will take advantage of available enforcement mechanisms that are established by public authority, and this chapter recommends using contracts and corporate governance because both instruments can be implemented by existing legislation. Accordingly, when an airport operator does not perform contractual terms on airport charge matters, or the board of directors in an airport operator company do not assume their duties as established as part of the corporate governance instruments, remedies that are available from contractual and corporate laws will ensure smooth implementation.

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[911] Andreas Nölke, "Transnational Private Authority and Corporate Governance" in *New Rules for Global Markets* (Springer, 2004) 155 at 155.
[912] *Ibid* at 156–157.
[913] Rating agencies evaluate the quality of debts of other companies. As corporate governance is one indicator of evaluation, rating agencies may impose a monitoring effect on the corporate governance of companies under evaluation. See *Ibid* at 167.
[914] Although this chapter suggests that government intervention can improve private regulation's effectiveness, some authors hold a negative view of government intrusion. For a discussion on the tension between public and private governance, see Stringham, *supra* note 897 at 204–205.

The enforcement function by public power can put extra effort by establishing a specialised mechanism to monitor the implementation of the private law approach, in addition to existing contractual and corporate legislation. At this point, private law regulation resembles self-regulation and co-regulation for the collaborative dynamic between private actors and the government. For example, the Canadian Bankers Association, which in nature is an industrial association, has established a set of minimum standards when Canadian banks process applications for loans and credits from small and medium businesses.[915] The Financial Consumer Agency of Canada is responsible for monitoring compliance with these rules.[916]

Second, public power is a backstop when regulation by private law instruments is absent or incompliant with mandates.[917] Private law instruments are built on consent, in other words, party autonomy. If such negotiation fails, regulation by a private law approach would not come into place, which means that a lacuna of law may occur if public power is also absent. A backstop of public power can avoid this situation.[918] The following scenario demonstrates the necessity of public power: in case contractual clauses and corporate governance mechanisms cannot be set up as regulatory surrogates on airport charges, a governmental regulator should take over and assume regulatory responsibility.

Third, public power provides methods to deal with charge disputes. Several resolutions are based on public power. Litigation is the traditional method. Alternative dispute resolution (ADR), which usually encompasses arbitration and mediation, has become increasingly popular. Some states

[915] See Canadian Bankers Association, "Model Code of Conduct for Bank Relations with Small- and Medium Sized Businesses", online (pdf): <http://cba.ca/Assets/CBA/Documents/Files/Article%20Category/PDF/vol_20090403_bankrelationssmes_en.pdf>.
[916] See Financial Consumer Agency of Canada, "Codes of Conduct", (31 October 2019), online: *Government of Canada* <https://www.canada.ca/en/financial-consumer-agency/services/industry/laws-regulations/voluntary-codes-conduct.html>.
[917] This co-regulatory feature is where self-regulation, co-regulation, and other forms of private regulation meet. It thus makes the borders between these forms of regulation blurred. In Canada, telecommunications and broadcasting used to be dealt with as complete monopolies. Now, consumer-related problems in this industry are solved using industry codes of conduct in a complementary manner. The Canadian Radio-television and Telecommunications Commission and the Competition Bureau are entitled to review these codes of conduct to ensure their compliance with legislation. See Government of Canada, "CRTC/Competition Bureau Interface", (5 November 2015), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01598.html>.
[918] An opposite example is private governance; it has a voluntary feature, which may reduce the effectiveness of governance.

have also built independent regulators, which handle dispute resolution exclusively in the airport charge sector. These resolutions share one thing – the underpinning of public power.[919]

5.3 Why a Private Law Approach?

This section offers seven non-exclusive reasons to advocate the application of a private law approach in airport charges regulation.

5.3.1 Governments are not Omniscient

Traditional regulation conducted by governmental authorities has its limits. One of them is the shortage of expertise in regulatory fields that call for sophisticated techniques and standards.[920] Airport charges regulation is one such field. The initial phase of airport charges regulation, namely market power evaluation, relies on information and expertise.[921] In Chapter 1, the discussion of Ireland outsourcing market power evaluation to an independent institution with expertise demonstrates this. Moreover, Australia dividing the duties of market power evaluation and implementation to two separate governmental authorities also shows evidence of this phenomenon. The OECD attributes information asymmetry, which is a characteristic of market failure, to the fact that regulators do not have required sector-specific information.[922] Hence, the OECD proposes to introduce independent regulators to reduce information asymmetry and raise the level of professional knowledge.[923] As such, Chapter 3 of the thesis on independent regulators also proves a traditional government's shortage of knowledge.

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[919] ADR operates within a framework of state legislation and international treaties that permit recognition and enforcement of awards and mediated settlements. See generally *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) [New York Convention]; *United Nations Convention on International Settlement Agreements Resulting from Mediation*, 20 December 2018 (entered into force 12 September 2020) [Singapore Convention on Mediation].

[920] To enable sound price-cap regulation, a regulator must have enough skills like the analysis of information regarding the regulated entities. See Margaret Arblaster & Paul Hooper, "Light Handed Regulation–Can It Play a Role in the Developing World?" (2015) 43 Transport Policy 32–41 at 33.

[921] Thessaloniki Forum of Airport Charges Regulators, "The Use of Selective Criteria in the Economic Regulation of Airports", (November 2018) at para 3.4, online (pdf): <https://www.cnmc.es/file/183441/download>.

[922] The behaviour of information asymmetry can be multi-dimensional. The regulator has difficulty knowing the actual costs and profits of regulated companies. Hence, it may not set charges reasonably. Even if a regulator can get this information, the regulated companies may better know information regarding cost reduction than a regulator, leading to a risk of under-level services. See OECD, *supra* note 421 at 36–37.

[923] The reasons are twofold. On the one hand, independent regulators secure an independent staff selection process. As a result, the merit of regulatory staff will be focused on. On the other hand, an independent regulator is in favour of consulting opinions from various groups, making its decisions informed. See *Ibid* at 22.

At an international level, governmental organizations still need to turn to professionals. ICAO revised its Airport Economic Manual, which offers detailed guidelines for states to regulate the economic matters of airports, by consulting a group of experts.[924] The European Commission also established a permanent professional group, which is officially called the Thessaloniki Forum of Airport Charges Regulators.[925]

It thus seems that the government may not be in a better position in terms of industry knowledge than the regulated airport operators, and their inclusion in the regulatory process may be a solution.

When governments are not omniscient, traditional regulation is likely to be deficient. Traditional legal centralism per se, in the form of ordering as state law, does not prove to be an effective instrument, as it can be inaccurate in proactively capturing the need for regulation.[926] As suggested, one may maintain a plural perception of governance by being aware of other forms of instruments having the effect of regulation and their interactivity with traditional laws and regulations.[927] All these forms of regulation, innovative or traditional, can cooperate and allocate authority among them.

5.3.2 Limits in Defining Regulated Airports

As discussed in the first chapter, traditional regulation is used to separate regulated airports and others. However, Australia, the EU, and Ireland as a specific case under the EU regime all demonstrate that their methods to tackle this issue leave some questions unanswered. The use of a fixed threshold is clear and easy to follow but it requires concrete proof.[928] Also, the European practice suggests that a double-threshold may undermine the goal of proportionality and flexibility. A tailored assessment of market power would have to be airport-specific, but is not cost-effective.

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[924] They form the Airport Economics Panel. See ICAO, *supra* note 237 at v.

[925] This group assists the European Commission in the implementation of legislative pieces and policies on airport charges. It also advises on legislation and policymaking, facilitates inter-state communication. See Europe Commission, "Register of Commission expert groups and other similar entities", (14 May 2014), online: <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3084>.

[926] The concept of legal centralism is usually discussed in comparison with legal pluralism. See generally John Griffiths, "What is Legal Pluralism?" (1986) 18:24 Journal of Legal Pluralism and Unofficial Law 1–55; Sally Engle Merry, "Legal Pluralism" (1988) 22 Law & Soc'y Rev 869.

[927] Merry, *supra* note 926 at 889.

[928] Thessaloniki Forum of Airport Charges Regulators, *supra* note 921 at para 4.2. Controversy seems to exist at the European level because the European Commission challenged whether the 5-million threshold, which was adopted by the Parliament and the Council in the final version of the EU Airport Charges Directive, is based on compelling evidence. See European Commission, *supra* note 149 at 40.

Considering the complexity of market power assessment, it can be conducted inaccurately, leading to inaccurate conclusions.[929]

A private law approach can serve as a solution. If private law instruments are introduced in the regulatory process, the prerequisite issue of "drawing the line" between two categories of airports, namely airports with significant market power and ones without, will appear less important. This is because both categories of airport operators can incorporate regulatory clauses in their contracts with airlines or the government and enhance the decision-making process in corporate governance to ensure that charges are made reasonably. These bottom-up approaches will add some additional secure effects to provide a wider assurance than traditional regulation.

5.3.3 Limits and Trends Revealed by the Current International Regulatory Framework

Chapter 2 discussed that the international regulatory framework on airport charges has two restrictions. First, most contents of the three-tier regulatory structure, except for Article 15 in the Chicago Convention, lack a binding effect. Second, prohibitions on non-discrimination and provisions to differentiate taxes and charges are incomplete. That said, it is unlikely and also impractical for ICAO to revise Article 15. These limits suggest that we should look for a new approach, and a private law approach stands as a possible choice.

Some provisions in this regulatory framework also call for regulation using contracts and corporate governance. The second chapter also noted that some policies explicitly point out that air services agreements can be a possible vessel for states to regulate airport charges.[930] In the Policy and Guidance Material on the Economic Regulation of International Air Transport, ICAO has created a template agreement that incorporates a "user charges" clause.[931] These policies, practices, and template clauses highlight to some extent the idea of making more use of contractual regulation in airport charges regulation. These instruments shed light on and uphold the solution of private contracts as a regulatory measure.

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[929] Thessaloniki Forum of Airport Charges Regulators, *supra* note 914 at paras 3.5-3.6.
[930] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276, s 4.3.1(e); ICAO, *supra* note 237, s 1.9; ICAO, *Assembly Resolutions in Force*, Doc 10075 (2016) 39th Session at A39-15, Appendix C, s 1, para 5.
[931] See ICAO, *Policy and Guidance Material on the Economic Regulation of International Air Transport*, 4th (provisional) ed, Doc 9587 (2016) at Appendix 1, art 12.

5.3.4 Enhancing Implementation

In addition to the liability arising from statutes, contracts introduce contractual liability, and provisions governing a corporation also trigger liability when these provisions are violated. Particularly regarding contracts, an airport operator and users (or their association) can conclude remedial clauses setting out liability when charge-setting clauses are breached. Provisions on a private level consequently grow teeth in the form of a contract.[932] Generally, contractual law is a fundamental legal regime for a jurisdiction, and the provisions are relatively mature vis-à-vis other legal fields. These available norms, in civil law and common law regimes, undergird the implementation of regulatory measures as prescribed in contracts.

5.3.5 Distinguishing Economic Regulation from Safety and Security Regulation

Economic regulation is suitable to be regulated by private ordering, and the regulation of airport charges is a part of economic regulation.[933] Although all regulatory aspects somehow relate to the public interest and deserve careful discussion, they may possess different features and are consequently subject to different types and priorities of regulation. These features include the possibility of damages in the event of injury to offset damage and the essence of a value that regulation aims to protect. Specifically, economic matters have a pecuniary feature, and the infringement of these matters can be remedied in the same monetary form of compensation. However, this may not apply to matters of safety, security, and the environment: even though body injury and death can be compensated in the form of money,[934] one would hardly assess the true value of, and fairly compensate, lives and bodily injury.[935] It is also hard to restore damage to the

[932] A PPP concession changes the liability mode to a new one different from traditional administrative regulation because a concession binds both parties of the concession: the concessionaire and the government. Under administrative regulation, the government is the only party that enacts these regulatory norms. See Gonzalo Ruiz Diaz, "The Contractual and Administrative Regulation of Public-Private Partnership" (2017) 48 Utilities Policy 109–121 at 110.

[933] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276, s 4.2.4.

[934] It is a common practice to hold carriers liable for bodily injury or death using compensation, which started to be recognised internationally before the 1944 Chicago Convention. The Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), which was signed in 1929, marks this significant moment. In 1999, the Unification of Certain Rules for International Carriage by Air (Montreal Convention) was signed. Notwithstanding many creative measures in this convention, monetary compensation with higher standards than those in the Warsaw Convention is still applied as a central remedy for bodily injury and death.

[935] The reasons are twofold. On the one hand, the death of one victim may be subject to different compensational standards when different laws apply. For example, if a U.S. citizen is killed on a domestic flight, this person may be compensated more than the amount that he or she will receive on an international flight. This contradictory outcome

environment.[936] While air transport is safe compared to other modes of transport,[937] a flight tragedy is usually fatal when it happens.

It is interesting to note how ICAO focused on the public law sphere of financial leasing as an economic matter when making Article 83bis in the Chicago Convention. This Article highlights safety and security oversight rather than specific rules in a transaction involving financial leasing.[938] Particularly, it clarifies the transfer of responsibility of states.[939] This designation illustrates the purpose of ensuring safety and security from a public law aspect, although this provision intends to address issues in and arising from a commercial arrangement.[940]

Hence, tight and *ex ante* regulation is more appropriate for issues of safety and security in nature. This stringent approach has been widely adopted worldwide.[941] At the level of global governance, ICAO has also recognised safety and security as priorities.[942] Michael Milde notes that ICAO is authorised to perform an "executive" role in setting technical issues[943], but its power in economic

means it would be appropriate to consider the compensated standard as the real price of a life. On the other hand, compensation is limited for many practical factors in addition to the calculation of loss due to the death of passengers. These factors range from the protection of the airline industry to the facilitation of the insurers for air carriers. See Randi Lynne Rubin, "The Warsaw Convention: Capping the Value of Life" (1998) 12 Temp Int'l & Comp LJ 189 at 194, 227.

[936] In the case regarding the Gabčíkovo-Nagymaros Project between Hungary and Slovakia, judges consider that "vigilance and prevention are required on account of the often irreversible character of damage to the environment". *Case Concerning Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 at para 140.

[937] A chart of IATA shows that air transport is by far the safest among all popular transport modes. See IATA, "IATA Economics' Chart of the Week", (23 February 2018), online (pdf): <https://www.iata.org/en/iata-repository/publications/economic-reports/flying-is-by-far-the-safest-form-of-transport/>.

[938] See *Chicago Convention*, *supra* note 213, art 83 bis.

[939] The transfer of responsibility lies in the aspects of general oversight, aircraft radio equipment, certificates of airworthiness, and licenses of personnel. See *Ibid*, arts 12, 30, 31, 32(a).

[940] See ICAO, *Manual on the Implementation of Article 83 Bis of the Convention on International Civil Aviation*, 1st ed, Doc 10059 (2017), s 2.3.2.

[941] See George Leloudas, *Risk and Liability in Air Law* (Taylor & Francis, 2013) at 91. States assume ultimate responsibility for the safety and security of air transport. See Roberto Kobeh González, "Address" (Address delivered at the Opening Session of the Conference on the Economics of Airports and Air Navigation Services, 2008), (2008) Report of the Conference on the Economics of Airports and Air Navigation Services (CEANS) (Doc 9908) at Appendix A.

[942] See Ruwantissa Abeyratne, "The Regulatory Management of Safety in Air Transport" (1998) 4:1 Journal of Air Transport Management 25–37 at 25. The Chicago Convention delivers major reasons for this treaty in the preamble part, including "general security" and "a safe and orderly manner" of international air transport.

[943] These technical standards are prescribed as Standards and Recommended Practices (SARPs) in the annexes of the Chicago Convention. Article 37 lists issues that are appropriate to be regulated by SARPs. These issues put safety as a major concern. Thus, ICAO tends to apply stringent regulation on safety concerns.

matters is only advisory.[944] The technical rulemaking power regarding safety and security is ICAO's strength.[945] For environmental issues, *ex ante* measures may also be necessary.[946]

Airport economic matters show a different dynamic. Governmental scrutiny is better in a restrained and advisory manner vis-à-vis its role in safety and security regulation. When regulatory resources are limited, this attitude towards economic regulation would contribute more regulatory resources to be allocated to safety, security, and environmental sectors.

5.3.6 Passenger Engagement

Flight passengers are significant users of airports at two levels. First, when passengers pay a passenger facility fee (interchangeably a passenger improvement fee) to an airport, they are in a direct payer-payee relationship with an airport. Moreover, passengers are the ultimate users of airports, albeit with most other airport charges taking place between airlines and airports. However, passengers have not been effectively engaged in the charge-setting process so far, and the consultation process, as an example, mostly occurs between airlines and airports. Individual passengers are not well represented, and, hence, passenger engagement remains a missing piece.

Corporate law instruments, particularly those mechanisms in corporate governance that help engage stakeholders, serve as possible paths to re-emphasise passengers by viewing them as stakeholders. An important debate about good corporate governance relates to the participation of stakeholders[947] who may not be the corporation's shareholders.[948] Many studies observe that

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[944] See Michael Milde, "The Chicago Convention - After Forty Years" (1984) 9 Annals Air Space L 119–132 at 122.
[945] See *Ibid* at 130.
[946] See *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina* (2020) Inter-Am Ct HR at para 208.
[947] Freeman defines stakeholders of a corporation as "any group or individual who can affect or is affected by the achievement of the firm's objectives". He specifies customers as stakeholder group. R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge: Cambridge University Press, 2010) at 25. See also Andrew J MacDougall & Josh Pekarsky, "Director Briefing - Stakeholder Engagement", (2018) at 3, online (pdf): *Chartered Professional Accountants of Canada* <https://www.cpacanada.ca/-/media/site/operational/rg-research-guidance-and-support/docs/01867-rg-director-briefing-stakeholder-engagement-september-2018.pdf?la=en&hash=8B4FAF85577E3427688509546B2B7E991E5DA6FD>.
[948] Regarding what is good corporate governance, some countries see the relationship between a corporation and stakeholders' interests as a significant perspective. The UK published its updated Corporate Governance Code in 2018, addressing that the interests of a community, broader than shareholders, is one aim of corporate governance, and stakeholder participation functions as a manner to assume a corporation's responsibility to them. See Financial Reporting Council, "The UK Corporate Governance Code", (2018) at 4-5, online (pdf): <https://www.frc.org.uk/document-library/corporate-governance/2018/uk-corporate-governance-code-2018>.

legislation and policymaking focus on this broader sense of stakeholders for long-term corporate governance.[949] Airport passengers fall within the scope of this definition of stakeholders.[950]

To implement passenger participation in charge regulation at a corporate level, an airport could take advantage of two channels, namely the leadership structure in a corporation and instruments on rulemaking: the former focuses on the board of directors, which is the decision-maker in the governance structure of a corporation.[951] The latter embraces the belief that a corporation can set principles and specific procedures to encourage passengers' involvement.[952]

5.3.7 Air Navigation Services Regulation as a Benchmark

Similar to the airport sector, air navigation also provides infrastructure services in the field of air transport. Interestingly, air navigation providers have stronger market power than the airport industry, and some recognise them as true monopolies particularly in the commercialisation context.[953] Given that monopolistic failure, to achieve proportionate regulation in comparison to the air navigation sector, airport charges should be relatively more lightly regulated. Since the private law approach means light-handed regulation, a country could thus consider adopting it in the airport sector and, meanwhile, regulate charges for air navigation more tightly.

Canada, a case study discussed in Chapter 4, shows this regulatory preference. The Civil Air Navigation Services Commercialization Act sets certain principles regarding how NAV CANADA

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[949] See International Finance Corporation, "Stakeholder Engagement and the Board: Integrating Best Governance Practices", (2009) at 4, online (pdf): <http://documents.worldbank.org/curated/en/791711468330347261/Stakeholder-engagement-and-the-board-integrating-best-governance-practices>.

[950] Charge decisions have implications for passengers as to how much money they pay. Generally, passengers are only consumers of an airport's services and do not hold its shares.

[951] Four main solutions in this channel are: (1) the board of directors can improve their communication with passengers; (2) a board director on behalf of the viewpoint of passengers can bring their interest to the table; (3) a professional committee that functions as an agency to assume the responsibility of the board can undertake to oversee passenger participation; (4) a corporation can create an external advisory forum as a communicative approach between a corporation and representatives of passengers. See International Finance Corporation, *supra* note 949 at 37–39; Andrew J. MacDougall & Josh Pekarsky, *supra* note 947 at 11–12.

[952] Freeman, *supra* note 947 at 145–146.

[953] In 2005, the United States Government Accountability Office published a report, in which they evaluated five commercial air navigation service providers in Australia, New Zealand, Germany, Canada, and the UK, finding that they are all monopolies and impose control power in charge setting and other economic aspects. See United States Government Accountability Office, "Air Traffic Control: Characteristics and Performance of Selected International Air Navigation Service Providers and Lessons Learned from Their Commercialization", (2005) at 4, online (pdf): <https://www.gao.gov/assets/gao-05-769.pdf>.

should establish its charge structure.[954] The charge decisions are also appealable.[955] In comparison, public power is less involved in charge setting for major airports in Canada. No regulation, even at the principle level, exists regarding airport charges, and the Canadian Transportation Agency does not encourage appealing the rates at which airport charges are set.[956]

5.4 The Boundary Between a Private Law Approach and Public Power

5.4.1 Solutions from Within the Private Law Approach

As alluded to previously, a private law approach does not contradict traditional regulation. On the contrary, they collaborate in many ways.[957] A key element in their cooperation is power distribution, which aims to find a boundary that can tell in which situations traditional regulation should give way to with the private law approach, and alternatively when it should intervene.[958]

When regulation by a private law approach may raise public concerns, traditional regulation should step in. In other words, traditional regulation serves as a solution when a private law approach fails to protect the values that private ordering cannot efficiently safeguard. As Steven L. Schwarcz put it, there are many goals other than efficiency that regulation should achieve, e.g., safety to maintain legitimacy.[959] The government should exercise control to safeguard these goals and these control measures should be cost-effective.[960] In his claim, the safeguarded goals, other than efficiency, can be construed as public concerns; the suggested governmental control can be understood as red flags to identify the situations when traditional regulation needs to step into the regulatory fiefdom where a private law approach originally functioned. It is important to find a cost-effective way for the public power to step in: if the intrusion is too much, the private law approach will be useless; if the governmental control is too weak, the private law approach lacks legitimacy.[961]

It is thus important to discuss how public power can make cost-effective intervention in a regulatory process that is mainly regulated by the regulated parties. One solution is that the

[954] See *supra* note 759 at Part III.
[955] See *Ibid*, s 42.
[956] See Chapter 4.2.
[957] See John D Donahue & Richard J Zeckhauser, "Public-Private Collaboration" in *The Oxford Handbook of Public Policy* (London: Oxford University Press, 2008) 496 at 500.
[958] Some scholars demonstrate the allocation of authority between public and private actors by using a similar phrase "shared discretion". *Ibid* at 497.
[959] See Schwarcz, *supra* note 895 at 322.
[960] See *Ibid* at 349.
[961] See *Ibid* at 337.

government can directly engage in the private law approach. The government, or a public authority with the power to regulate the regulated sector, can mitigate public concerns, which may arise due to the lack of traditional regulation, by making sure that effective solutions to tackle these public concerns are incorporated in the charter, bylaws, and other governing rules of a regulated company. Similarly, one can incorporate these solutions in contractual clauses that a company signs in relation to the exercise of its regulatory power, and other possible private law approach instruments. A suggestion from Steven L Schwarcz in relation to scrutiny from the government on the private ordering of ICANN (the Internet Corporation for Assigned Names and Numbers), a non-profit corporation that undertakes the responsibility to assign internet protocol numbers, serves as an example.[962]

5.4.2 Solutions with Competition Law as the Bedrock: Canada's Regulation to Telecommunications

In addition to the previously mentioned solution, constraints from general competition law provide safeguards against the abuse of the "regulatory power" entrusted to the regulated parties. Regulatory forbearance in the field of telecommunications in Canada serves as a useful analogy. Two regulators in this field, namely (1) the Canadian Radio-television and Telecommunications Commission (CRTC) as authorised by the Telecommunications Act and the Broadcasting Act and (2) the Competition Bureau, which is authorised by the Competition Act. Canada wants to develop the regulation of telecommunications as a competitive market from which the CRTC can forbear from regulation and, instead, let the Competition Bureau exercise the Competition Act, which is "a law with general application".[963] The criterion for this abstention is that a Canadian carrier under evaluation be "subject to competition sufficient to protect the interests of users".[964] To promote competition is also an important objective of Canada's telecommunications policy.[965] Both

[962] He recognises these public concerns that require protection as goals in addition to efficiency. He argues that

> By acknowledging these goals in ICANN's articles of incorporation, requiring ICANN's management to take these goals into account in decisionmaking, and requiring periodic reporting of how these goals are being protected—the public would obtain the transparency needed to alleviate their concern over ICANN's being a private, nongovernmental actor, thereby enhancing ICANN's legitimacy.

Ibid at 346.

[963] Government of Canada, *supra* note 917.

[964] *Telecommunications Act*, 1993, art 34(2).

[965] An order issued in 2019 confirmed that when implementing the Telecommunications Act, the CRTC must consider "how its decisions can promote competition, affordability, consumer interests and innovation". Government of Canada,

agencies have partially concurrent powers of regulation, but the regulatory powers regarding price-fixing, bid-rigging and price maintenance are exclusively exercised by the Competition Bureau.[966] As such, Canada tries to avoid sector-specific regulation and leaves the regulatory power to the Competition Act and the Competition Bureau, which implements it.

However, the CRTC continues to exercise a monitoring role despite the exemption from direct regulatory activities. Forbearance orders issued by the CRTC can have conditions, can be modified, and can be withdrawn. Regarding the distribution of authority between the CRTC and the Competition Bureau, i.e., the distribution of jurisdiction between the Telecommunications Act, the Broadcasting Act, and the Competition Act, the Competition Bureau will exercise its regulatory power in the matters that are exempted from regulation by the CRTC. These conditions and activities to change a forbearance order legitimise the CRTC's re-imposition of sector-specific regulation in addition to Canada's already-established competition law. The major goal of the CRTC, in my opinion, changes from "directing" the regulated industry" to "watching the market".

In conclusion, the adoption of a private law approach in pricing regulation does not have to mean the loss of control by the public power. Public concerns still can be addressed by effective cooperation between the private law approach and public power. Pricing matters are by nature market matters. When an established competition law regime and a corresponding regulator to implement the general competition law exist, a sector-specific regulator can refrain from direct regulation and let the regulated parties take the charge. The regulator can shift to monitor the industry and re-enter when it finds serious market competition impairment. This strategy of adding extra regulatory measures serves as a threat to regulated parties. This is also the practice in Australia, which regulates airport charges with significant market power as discussed in Chapter 1.

After discussing the significant role that a private law approach could play in airport economic regulation, the next section explains the context that enables us to employ this approach.

"Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation", (18 June 2019), online: <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11524.html>.

[966] For individual and overlapping powers of both institutions, see Government of Canada, *supra* note 917.

5.5 The Feasibility of Applying a Private Law Approach

5.5.1 Airport Corporatisation

Corporatisation is usually understood as a management method to conduct corporate operations in an entity established in line with corporate law.[967] It allows an airport operator to function as a corporation. Corporatisation is not equal to privatisation. Rather, state-owned assets usually take advantage of the corporate form for effective and modern governance. McDonald argues that corporatisation provides governmental ownership management autonomy.[968] A legal reflection on this autonomy is a corporate legal status separate from other governmental branches.[969] Other benefits of corporatisation are an independent responsibility system and a dynamic to be friendly to the market.[970] In terms of airport governance, ICAO states that corporatisation usually implies establishing "legal entities outside the government" in order to create autonomy.[971]

As corporatisation does not have to happen alongside privatisation, an airport operator can be in the form of a state-owned company when a country is not ready to transfer airport ownership to a private hand.[972]

The corporatisation of an airport facilitates a private law approach because corporatisation enables a level playing field when contracts are employed as vehicles of regulation. First, an airport company should be viewed as a different entity from a governmental agency if the airport is managed by an autonomous entity, which the government keeps at arm's length. It implies that, in contractual negotiation, an airport user negotiates with an independent airport company rather than directly with the government, in which case it is more possible to reach a power balance between both parties. Second, the separate legal status of an airport company creates a separate legal personality of an airport company to enter into agreements with their users, as well as the

[967] See Frank W Paton, "Legal Issues of Corporatisation and Privatisation" (1994) 1 Deakin L Rev 15 at 16.
[968] See David A McDonald, *Rethinking Corporatization and Public Services in the Global South* (Zed Books Ltd., 2014) at 1. Fischman and Nagle also see corporatisation as a method to run state-owned assets with management authority in a regulatory background of forest in New Zealand. See Robert L Fischman & Richard L Nagle, "Corporatisation: Implementing Forest Management Reform in New Zealand" (1989) 16 Ecology LQ 719 at 720.
[969] See McDonald, *supra* note 968 at 1.
[970] See *Ibid* at 2.
[971] ICAO, *supra* note 237, s 2.10.
[972] Notwithstanding the independence between corporatisation and privatisation, corporatisation provides convenience for privatisation. Fischman and Nagle observe the potential of corporatisation to be a preliminary form that will facilitate the privatisation of public utilities. See Fischman & Nagle, *supra* note 968 at 753.

government. This legal personality ensures an airport to take responsibilities entrenched in contractual clauses.[973] Additionally, a corporate structure behaves as corporate rules, the charter and bylaws, and decision-makers. These rules and decision-makers enable private ordering.

5.5.2 Airport Commercialisation

Commercialisation in airport operation means "an approach to the management of facilities and services in which business principles are applied or emphasis is placed on the development of commercial activities".[974] This concept may be construed as viewing an airport operator as a private party in the market and encouraging it to make deals with other parties liberally. In this context, charge regulation seems to be better conducted as a private deal between two private market subjects. In this fashion, the employment of private law instruments as regulatory vehicles comes as a result of commercialisation.

Moreover, "commercial activities" target profit-making. However, without effective control, a commercialised entity may only target profit maximisation by abusing its power.[975] This wrongly placed aim, in the context of airport charges, arguably leads to a risk of unreasonably high charges. Corporate governance as a means of corporate control offers a solution.

Regarding profit-making, airport commercialisation and airport privatisation overlap because a private operator usually aims to make a profit, but they are not the same. In nature, it is the character of profit-making, i.e., commercialisation, that poses a hazard of overcharging. Privatisation is usually one popular form of commercialising an airport, but commercialisation is not bound by private ownership. So robust corporate governance is not limited to privatised airports.[976]

5.6 Contractual Dimension in a Private Law Approach

5.6.1 Airport-Government Contracts

[973] Some scholars comment that a corporation's assets that are separate from those of its owners bond a corporation's "contractual commitments", making these commitments credible. John Armour et al, "What is Corporate Law?" in *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2017) at 6.
[974] ICAO, *supra* note 9 at A3-1.
[975] See ICAO, *supra* note 237, s 2.41.
[976] See *Ibid*, s 2.43.

The government can impose regulatory norms that used to appear only in traditional laws and regulations on how an airport should set charges in an agreement. Some crucial regulatory aspects to be incorporated in contracts include the formula of charges, principles that an airport operator need to apply to determine the level of charges, procedure during the charging process, levels of services, and the authority of an airport regulator. Nevertheless, how much regulatory space is left to the means of a contract should depend on to what extent a state is willing to regulate using contracts as surrogates for traditional legislation or regulation.

Such contractual regulation between a government and an airport has the effect of preventing unjust political intervention.[977] First, rather than being subject to coercive rules imposed by state power, clauses that have regulatory effects are negotiable. Thus, the airport party has a say when prescribing these "regulations". By screening out problematic clauses, which an airport might not have a chance to object under traditional command-and-control regulation, it will play an active role in self-protection.

Second, contractual regulation helps to build thoroughness and certainty. Parties can prescribe all the details that they can expect in contracts.[978] This explains why contracts can be lengthy.[979] Surely, certainty means costs in contractual negotiation to avoid the omission of important aspects.[980] Yet, laws and regulations often are obscure and require further interpretation, due to

[977] Levy and Spiller argue that this intervention has a feature of "manipulation" or "expropriation". See Brian Levy & Pablo T Spiller, "The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation" (1994) 10:2 The Journal of Law, Economics, and Organization 201–246 at 201. For a discussion on political intervention to administrative regulation, see Diaz, *supra* note 932 at 116.

[978] There is a concern that a contract will never be certain enough and can be incomplete because parties may not regulate every issue clearly in a contract. See Rui Cunha Marques & Sanford Berg, "Revisiting the Strengths and Limitations of Regulatory Contracts in Infrastructure Industries" (2010) 16:4 Journal of Infrastructure Systems 334–342 at 337. For the incomplete theory of contracts, see generally Oliver Hart, "Incomplete Contracts and Public Ownership: Remarks, and an Application to Public-Private Partnerships" (2003) 113:486 The Economic Journal C69–C76. Notwithstanding this concern, contracts can be more specific than regulations. Also, contractual renegotiation can be used to achieve regulatory flexibility.

[979] See Stephen Littlechild, "Competitive Bidding for a Long-Term Electricity Distribution Contract" (2002) 1:1 Review of Network Economics at 20, n 57.

[980] Marques and Berg recognise the quality of contractual designation as a major issue associated with contractual regulation. The costs to design detailed contractual clauses occur at two stages: the original contractual preparation stage and the renegotiation stage. The former deals with contractual incompleteness, and the latter relates to transaction costs. See Marques & Berg, *supra* note 978 at 336. In Buenos Aires, Argentina, a concession of water services costs about 4 million U.S. dollars for the government to prepare and assess the tender, and also costs each bidder 5 million U.S. dollars to prepare for the bid. See Andrei Jouravlev, "Water Utility Regulation: Issues and Options for Latin America and the Caribbean" (2000) Economic Commission for Latin America and Caribbean Working Paper LC/R 2032 at 20, online (pdf): <https://repositorio.cepal.org/bitstream/handle/11362/31553/S0010870_en.pdf?sequence=1&isAllowed=y>. During

their limits in terms of space and the need to be all-inclusive. Some countries support the stability of contractual regulation by specific legislation. For instance, the legal frameworks in these countries protect investors' rights by restricting the discretion of the government, when it as a party to a contract, to modify clauses herein.[981]

The third argument furthers the second one, that contractual clauses have the potential to pre-empt all other contradictory administrative regulations when different forms of regulation conflict.[982] As administrative regulation has been widely criticised for uncertainty due to political intervention,[983] the priority of contractual regulation reinforces regulatory independence.

In the regulatory practice of airport charges, contractual regulation between a government and an airport operator is usually associated with private party participation, namely, privatisation or public-private partnership (PPP) of an airport.[984] Though the private actor plays an increasingly important role under a PPP or privatisation mode, the government does not lose its control. On the contrary, this management model can serve as a vehicle for the public sector to continue a still important, but transformed role of supervision to the private operator of an airport.[985] One empirical study examined four case studies of PPPs in the airport sector, finding that they all adopted contracts as charge regulation.[986] As most privatised airports or airports adopting PPPs employ a concession pattern,[987] the government party and the airport operator party can carefully design terms regarding airport charges in these concession contracts.

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the PPP of a London underground project, which was later terminated, the PPP contract took three years and 15 million British pounds, and the contract has 2,500 pages. See Littlechild, *supra* note 979 at 8, 20–21.

[981] Diaz, *supra* note 932 at 110.

[982] For example, Article 62 of the Peruvian Political Constitution (1993) addresses that legislative acts or regulations cannot change contractual clauses. See *Ibid* at 112.

[983] See *Ibid* at 116.

[984] See *Ibid* at 110.

[985] For a seminal study in support of this argument, see Charles E Schlumberger & Shruti Vijayakumar, "Public-Private Partnerships in Airports: Imperatives for Governments" (2015) 40 Annals of Air and Space Law 490–510 at 508–509. This study also undergirds the statement of this thesis regarding the feasibility to govern airport charges through contracts.

[986] These cases all use contractual regulation to distribute the power of setting charges between the contractual clauses and a regulator. In some of these cases, the first-year charges are set in an agreement and a regulator is authorised to review the following renewal of the charges. Some other cases, though still based on the same power-distribution dynamic, specify the method that a regulator should adopt when renewing charges. See Diaz, *supra* note 932 at 113, 115.

[987] Philippe Villard, "COVID-19: Waiving airport concession fees to relieve airports' financial stress in a time of crisis", (26 March 2020), online: *Airports Council International* <https://blog.aci.aero/covid-19-waiving-airport-concession-fees-to-relieve-airports-financial-stress-in-a-time-of-crisis/>.

Contractual regulation enables the power to act in emergent situations like the COVID-19 pandemic. The scope of power of a regulator, or other competent regulatory agencies, is usually carefully defined by legislation.[988] It guarantees that their intervention into economic matters in airport charges can be restrained. In spite of that, it is still feasible to authorise a regulator to step in in the wake of emergent circumstances. This contractual control is a way to assume a state's obligation of regulatory oversight over airport charges. Hence, a contractual approach does not mean that a state will lose regulatory control as a consequence.

5.6.2 Airport-Airline Contracts

In a liberalised regulatory context where the government does not pre-determine charges, an airport-airline agreement can "regulate" charges. This contractual approach is in nature about reallocating regulatory power between the government on behalf of administrative regulation and private market subjects. This regulatory power, in a conservative scenario, is more likely to stay in governmental hands, which means such an agreement is not allowed. Employing an airport-airline agreement as a regulatory tool provides an approach to implement light-handed governance.

This is also called a vertical agreement as airports and airlines come from different stages of the market in a competition law sense.[989] When an airport is publicly owned by a governmental agency, a vertical contract may be signed between an airline and a municipal government on behalf of the airport that it owns.[990] When airport-airline agreements have concerns about commercial secrets, there may be an issue as some information should not be disclosed.[991] Still, some agreements in Europe that are made public indicate that these vertical agreements have been mostly about setting charges for using airport services.[992] An airport-airline agreement is usually used to negotiate discounted rates in comparison with the general charge standards published by an airport operator.

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[988] Diaz, *supra* note 932 at 112.

[989] These contracts are usually discussed in terms of vertical airport-airline relationships.

[990] For example, Broward County owned Fort Lauderdale-Hollywood International Airport and signed a lease and use agreement with Spirit Airlines regarding the settlement of user fees. See *Airline-Airport Lease and Use Agreement Between Broward County and Spirit Airlines, Inc.* (2008), arts VII, VIII, online: <https://www.sec.gov/Archives/edgar/data/1498710/000119312510265039/dex1014.htm>. In countries where airport privatisation is not a common option like the U.S., vertical contracts between an airline and a local government are more popular.

[991] See Cristina Barbot, "Vertical Contracts Between Airports and Airlines: Is There a Trade-off Between Welfare and Competitiveness?" (2011) 45:2 Journal of Transport Economics and Policy (JTEP) 277–302 at 283.

[992] See *Ibid*.

The adoption of a vertical agreement to specify more beneficial charges for airlines is widespread. They are found in Europe (e.g., Belgium, Finland, and Portugal), the U.S., and Australia.[993]

However, contracts that contain discounted charges only apply to the airlines that are parties to an agreement. They may raise a concern of discriminatory charges, namely, services of the same level are provided to airlines at different charges. Violations of the non-discrimination principle are a real concern. Accordingly, they attract the government to regulate.[994] In the U.S., many airports distinguish airlines that come into charge-setting agreements with them from those airlines that did not sign such agreements. These airlines that have a contractual relationship with an airport are called signatory airlines, which enjoy more discounted charges on aeronautical services vis-à-vis the non-signatory airlines.[995]

Also, negotiated charges concluded by an airport-airline agreement may constitute an illegal subsidy, when these low charges benefit signatory airlines and are lower than the costs of airport operation. This situation may be construed as having non-signatory airlines, which pay more fees, subsidise signatory airports, particularly when they are provided with the same level of services. In 2001, Charleroi Airport began to grant Ryanair discounted charges by a contract.[996] In 2004, the European Commission made a decision, demonstrating that the discounts on charges are state aid incompliant with Belgian legislation and required a refund from Ryanair to Charleroi Airport.[997] Notably, the European Commission embraced two central principles, namely, non-discrimination and transparency, to make its decision.[998] But at the same time, the European

[993] See *Ibid* at 283–284.
[994] See *Ibid* at 298.
[995] Denver International Airport and Pittsburgh International Airport both charge signatory airlines 20% less rental fees than those levied on non-signatory airlines. Pittsburgh International Airport sees such charge differentiation as a general industry standard. See John Sabel, "Airline-Airport Facilities Agreements: An Overview" (2004) 69 J Air L & Com 769 at 790.
[996] This contract offered Ryanair discounted landing charges at the level of 1 Euro per passenger at Charleroi Airport. This rate was only half of the general rate applied to all other airlines. Charleroi Airport agreed to fund 4 Euro per passenger for promotion, for a long term of 15 years and the frequency of 26 flights per day at most, as one of several promotional advantages to Ryanair. See European Commission, "The Commission's decision on Charleroi airport promotes the activities of low-cost airlines and regional development", (3 February 2004), online: <https://ec.europa.eu/commission/presscorner/detail/en/IP_04_157>.
[997] See *Ibid*.
[998] The two principles serve as the basis for the legitimacy of these contractual charge discounts. Moreover, the European Commission proactively suggests that future airport charge discounts and incentive projects should follow these rules to avoid incompliance with legislation. See *Ibid*.

Commission encourages the use of private-law agreements for an airline to use an airport.[999] The decision that Ryanair, an LLC that is sensitive to prices, should return some subsidies that it received to Charleroi Airport may imply a slight increase in charges. That being said, both the European Commission and some experts expect healthier competition from this decision, in the long run benefitting passengers.[1000]

One conservative form of airport-airline agreement adopted in practice is a charge schedule prepared by an airport in advance. Take the UK for example; many of its hub airports, including Heathrow Airport and Gatwick Airport, annually determine the standards of charges by "Conditions of Use", in which rates, the method of setting charges, will be clearly identified. These determinations are made subject to regulatory requirements as prescribed in the Civil Aviation Act 2012.[1001] Once an airline user determines to accept services of an airport, provisions of charges as provided in these "Conditions of Use" will apply.[1002]

As these "Conditions of Use" are prepared in advance and are not negotiated between an airport and an airline on a case-by-case basis, they may be recognised as a standard form contract.[1003] To follow the consultation principle entrenched in ICAO's policies, it would be crucial to ensure that "Conditions of Use" are prepared with substantial participation of airlines. Heathrow Airport, as

[999] See *Ibid* at Appendix, s 8.

[1000] See *Ibid* at Appendix, s 9; Eric Pfanner, "Ryanair's battle on airport fees sets tone for a sector", *The New York Times* (29 January 2004), online: <https://www.nytimes.com/2004/01/29/business/worldbusiness/IHT-ryanairs-battle-on-airport-fees-sets-tone-for-a.html>.

[1001] The Civil Aviation Authority of the UK is entitled to grant a licence to set restrictions on charges for an airport with market power. In 2014, the Civil Aviation Authority granted licences to Heathrow Airport and Gatwick Airport as they have passed a market power test, demonstrating that they have significant market power. When determining the rates and methods of charges, both airports must comply with the licence conditions. See Civil Aviation Authority, *supra* note 603.

[1002] "These are the terms and conditions under which you use our Facilities and Services at the Airport (the "Conditions"). If you use our Facilities and Services in any way (including taking off and landing) you agree to be bound by these Conditions […]" Heathrow Airport Limited, "Conditions of Use including Airport Charges from 1 January 2020", (31 October 2019), s 1.1, online (pdf): <https://www.heathrow.com/content/dam/heathrow/web/common/documents/company/doing-business-with-heathrow/flights-condition-of-use/conditions-of-use-documents/Heathrow_Conditions_of_Use_2020.pdf>.

[1003] See Yeşim M Atamer & Pascal Pichonnaz, "Control of Price Related Terms in Standard Form Contracts: General Report" in *Control of Price Related Terms in Standard Form Contracts* (Springer, 2020) 3 at 14.

an example, has made endeavours to consult airline users regarding charge setting.[1004] Still, an airport-airline contract can regulate charges in a more customised way than a fixed "Terms of Use".

5.6.3 Airport-Passenger Contracts

5.6.3.1 Airport Improvement Fee

An Airport Improvement Fee (AIF), or Passenger Facility Charge (PFC) as it is called in the U.S., is collected to fund the development of airports.[1005] The targeted development projects can serve various purposes, including "safety, security, or capacity; reduc[ing] noise; or increas[ing] air carrier competition".[1006] Unlike landing and parking fees, which are major components of aeronautical charges, AIFs or PFCs are collected on the basis of each enplaned passenger. The name "head tax"[1007] responds to the fact that passengers are the targets of this charge.

In line with this name, some people recognise AIFs or PFCs as hidden taxes that passengers may not be fully aware of; however, many others still consider them to be charges, rather than taxes.[1008] Specifically, the American Association of Airport Executives considers PFCs as user fees that passengers pay to enable airport maintenance in the long run.[1009] In Canada, Toronto Pearson Airport also includes AIFs in the aeronautical charges.[1010] If a fee is categorised as a charge, the best practice would be to respect basic principles on airport charges entrenched in ICAO's policies, particularly the principle of consultation with users. As the AIFs, which are imposed on passengers, indicate a more direct relationship between airports and passengers than between airports and airlines, the targeted group of consultation should be passengers.

[1004] Heathrow Airport and airline users conducted annual consultations as a basis for charge renewal. For the annual consultation documents, see "Flight Conditions of Use", online: *Heathrow Airport* <https://www.heathrow.com/company/doing-business-with-heathrow/flight-conditions-of-use>.

[1005] According to the Aviation Safety and Capacity Expansion Act of 1990, which firstly introduced PFCs, these charges aim to "finance eligible airport-related projects […]" US, Bill HR 5170, *Aviation Safety and Capacity Expansion Act of 1990*, 101st Cong, 1990, s 109.

[1006] Federal Aviation Administration, "Passenger Facility Charge (PFC) Program", online: <https://www.faa.gov/airports/pfc/>.

[1007] Suzanne Imes, "Airline Passenger Facility Charges: What Do They Mean for an Ailing Industry" (1994) 60 J Air L & Com 1039 at 1041.

[1008] Shih-Hsien Chuang, "Do We Need a Passenger Facility Charge" (2019) 42:4 Regulation 34–37 at 34.

[1009] American Association of Airport Executives, "Passenger Facility Charges", online: <https://www.aaae.org/AAAE/AAAEMemberResponsive/Advocacy/Briefs/Passenger_Facility_Charges_Issues.aspx>.

[1010] Toronto Pearson International Airport, "Aeronautical Charges and Fees", online: <https://www.torontopearson.com/en/corporate/partnering-with-us/air-services/aeronautical-charges-and-fees>.

However, passengers remain at a low level of participation in the AIF consultation process. In Canada, only the suggestions of the airlines are consulted by the airport party prior to the collection of AIFs, leaving passengers, who finally pay them, absent from the negotiating table as they do not "see the bill". [1011] In the U.S., the PFC is also said to exist in a bureaucratic dynamic: when airports require finance, they ask for help from the government who will enable it by regulation without considering passenger experience too much.[1012]

5.6.3.2 Contractual Response to Formulating the Airport Improvement Fee

AIFs should be negotiated in a contractual approach between passengers and the party that has the power to impose them. Although the UK, as an example, has incorporated AIFs in their "Terms of Use" to be signed with its airline users, it does not mean that passengers have been consulted. The party with the power to impose AIFs is expected to negotiate with passengers and to confirm the level of AIFs by contract. To hold the airport party accountable for the fund collected from passengers, contracts can specify how much investment is needed in a transparent way,[1013] and how to enable public (passenger) scrutiny regarding the use of money and project progress. As such, a contractual approach, in which passengers can participate, would offer a monitoring mechanism.

The factors that restrict fair contractual negotiation between airports and passengers will be discussed in the next section.

5.6.4 Balancing Bargaining Power Between Contractual Parties

As the proposed private law approach aims to achieve fair charges, a concern may arise due to the possible inequality of bargaining power between two contractual parties. If the airport operator, who is entitled to set charges through contracts with airport users, still dominates the contractual process, a private law approach may not serve as an effective tool to fair negotiation. Thus, it would not lead to reasonable charge clauses as expected. This is a reasonable concern, and this line of inquiry can be discussed through adhesion contracts, which are contracts that are readily

[1011] Institute for Governance of Private and Public Organizations, *supra* note 666 at 49.
[1012] Ike Brannon, "Increasing the Passenger Facility Charge Makes Little Sense", (8 July 2019), online: *Forbes* <https://www.forbes.com/sites/ikebrannon/2019/07/08/increasing-the-passenger-facilities-charge-makes-little-sense/>.
[1013] Institute for Governance of Private and Public Organizations, *supra* note 666 at 51.

prepared by a big and even monopolistic company and presented to the public; and the adhering parties will not have a chance to bargain.[1014] The buyer will have no other option but to accept the clauses presented by the supplier who has little competition.[1015] As Duncan put it, an adhesion contract is a "take it or leave it" standard form agreement.[1016] Adhesion contracts are usually prepared by a commercial entity and presented to consumers.[1017] If we do not solve the problem of unequal bargaining power, contractual clauses could be manoeuvred as another platform for the airport sector to continue exercising its market power.

5.6.4.1 Bargaining Between Airports and Airlines

Bargaining power can be examined in two contractual relationships, namely, a contractual relationship between an airport and an airline and a contractual relationship between an airport and an individual passenger. Both categories of airlines and passengers are airport users but hold different levels of bargaining power when negotiating agreements with an airport operator. In respect of a contractual relationship between an airport and an airline, I hold the idea that the dynamics of bargaining power between both parties vary from case to case. Airlines may not necessarily be the weak party; as such clauses on airport charges may not be a result of negotiation between parties with a huge bargaining power gap. In other words, an airport-airline contract does not have to be an adhesion contract. Among others, one may consider examining both sides of airports[1018] and airlines[1019] to analyse their bargaining power.

[1014] See Nora K Duncan, "Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code" (1973) 34 La L Rev 1081 at 1081. For a general overview of adhesion contracts, see generally Vera Bolgar, "The Contract of Adhesion: A Comparison of Theory and Practice" (1972) 20:1 The American Journal of Comparative Law 53–78.
[1015] See Duncan, *supra* note 1014 at 1081.
[1016] *Ibid*.
[1017] See Andrew A Schwartz, "Consumer Contract Exchanges and the Problem of Adhesion" (2011) 28 Yale J on Reg 313 at 346.
[1018] A hub airport, such as London Heathrow Airport, faces little competition. It is more possible to have significant market power and an airline user will have little chance to use change airports. In this scenario, the inequity of bargaining power can occur. A regional airport, which aims to attract airlines to build new routes, may expect to offer attractive charge rates. The buyer power is likely to be bigger in the case of a regional airport than a hub airport.
[1019] Small airlines may lack enough bargaining power vis-à-vis an airport. Many legacy airlines occupy a larger proportion of slots at an airport, enabling these airlines to sit at a negotiation table in a relatively fair role with the airport. See David Starkie, "European Airports and Airlines: Evolving Relationships and the Regulatory Implications" (2012) 21 Journal of Air Transport Management 40–49 at 48 (arguing that a dominant airline vis-à-vis an airport with significant market power may lead to "double marginalisation"). The airport-airline relationship in the U.S. is a good example: airlines control a large number of airport gates through long-term contracts. See Fu, Homsombat & Oum, *supra* note 54 at 348. In this case, it would be reluctant to call charge clauses, signed between an airport and an airline, part of an adhesion contract.

When the bargaining power difference between an airport and an airline is obvious, a contract signed between them can be recognised as an adhesion contract. In this circumstance, collective bargaining may help. Associations of airlines serve as suitable agencies to represent individual airlines in negotiating with airports when the negotiating power of airlines is too weak. Such airline associations can be either national entities or international organizations.

In relation to airline associations in the form of national entities, an example is the Board of Airline Representatives of Australia (BARA), which represents the interests of international airlines that serve Australia.[1020] BARA can represent its airline members to negotiate the prices for the use of the infrastructure with major international airports in Australia, while airlines do not have to be bound by the reached conditions of use.[1021] It is interesting to note that as air transport has a public interest character and the exceedingly strong power of aligned airlines may also exercise anti-competitive efforts, the collective negotiation activity is required to be pre-authorised by the Australian Competition and Consumer Commission.[1022]

At the international level, the International Air Transport Association (IATA) serves as a suitable agency to represent the interests of airlines. In the face of the strong bargaining power of an airport, IATA has experience delegating individual airlines to seek possible remedies. Since 2012, the ANA company has been the operator of ten Portuguese airports under a fifty-year long concession. This contract calculated airport charges using a formula that is challenged by airlines on the basis of cost-relatedness. Accordingly, IATA, in cooperation with Airlines for Europe, urged the Portuguese government to re-negotiate the charge clause in the concession contract.[1023] Both associations also submitted a joint complaint to the Directorate General for Competition of the

[1020] Many of BARA's airline members are foreign airlines, for example, Air Canada and Qatar Airways. See The Board of Airline Representatives of Australia, "Our Members", online: <https://bara.org.au/our-memebrs/>.
[1021] BARA also represents member airlines to negotiate with other infrastructure services providers including Australian air traffic control service provider (Airservices Australia), a provider of mandatory baggage security services (Unisys Australia), and other infrastructure services providers. See The Board of Airline Representatives of Australia, "About BARA", online: <http://bara.org.au/about-bara/>.
[1022] For the latest determination, which allows a ten-year length of BARA's collective negotiation since 2015, see Australian Competition and Consumer Commission, "Board of Airline Representatives of Australia Inc - Revocation and Substitution - A91466", (25 March 2015), online: *Australian Competition and Consumer Commission* <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/board-of-airline-representatives-of-australia-inc-revocation-and-substitution-a91466>.
[1023] See IATA, "Call for a Better Deal for Airlines and Passengers in Portugal", (4 October 2018), online: <https://www.iata.org/en/pressroom/pr/2018-10-04-03/>.

European Commission claiming the existence of a violation of State Aid law.[1024] In a word, IATA or other international associations of airlines can aggregate the power of individual airlines so that they can negotiate fair airport charge clauses with airports.

5.6.4.2 Bargaining Between Airports and Passengers

Passengers are another group of airport users. As passengers are consumers without bargaining power as strong as airlines, it is more acceptable to recognise them as the weak party and thus to recognise airport-passenger contracts as adhesion contracts.[1025] Airport and passengers can come into direct relationships for the levying of AIFs (PFCs) because these fees are charges on a per-passenger basis.[1026] However, few flight passengers have the experience of being consulted on how much AIF one would like to be charged. As passengers, we accept the charges, or we do not buy a ticket. The involvement of passengers in a private law approach requires a strong delegation to speak for passengers and make even bargaining power between them and airports. In addition to the lack of negotiating power for passengers, a strong delegation makes practical sense for another two reasons. For one thing, there lacks a standard to choose appropriate passengers, if any, to speak for all other passengers. For another, even if such a representative exists, this passenger is short of incentives to speak for the interests of all passengers.

Since passengers can be recognised as consumers, groups or associations incorporated to protect consumer rights can serve as proper representatives. Because AIFs are usually pre-determined by an airport and then apply to all passengers at the same rate, a consumer association can participate at a stage when an airport considers modifying the AIFs, for example, at the consultation stage. The government can mandate a consultation process and the engagement of a consumer association on behalf of individual passengers who are the affected group by any AIF changes.[1027]

5.6.4.3 Some Practical Responses

[1024] See *Ibid*.

[1025] See Schwartz, *supra* note 1017 at 348. He argues that in practice, adhesion contracts may only refer to consumer contracts, and non-negotiability is a key factor.

[1026] Regarding other aeronautical charges, e.g., landing charges, although these levies will finally be borne by passengers, they are directly levied on airlines. It would thus be far-fetched to build a direct contractual relationship between an airport and the passengers regarding aeronautical charges.

[1027] The methods of mandating a negotiation process at least include legislation by the parliament body, regulation by the government, and incorporation of a concession clause on the consultation process if airport privatisation results in the private management of an airport.

In many cases, airports publish a table of charges and apply rates set in this table when concluding contracts with airport users.[1028] As alluded to previously, collective bargaining should take place when an airport plans its table of airport charges because this is the time when specific rates of airport charges are determined. Consultation, one of the four principles for good airport regulation as discussed in Chapter 2, serves as an important channel to exercise collective bargaining. At the consultation stage, when charge rates are discussed before they are officially determined, the representatives of airport users should be invited to take an active role in the formulation of these charge rates. The participation of these delegations (or representatives) of airport users can be made mandatory by law to ensure their presence. That said, consultation still differs from the contractual process if the opinions of airport users are only on an advisory footing in consultation.[1029] This is because the absence of consent will have no contractual significance and the charge rates will be passed even if delegations of airport users are not satisfied with these rates. Considering this difference, one way to strengthen the consultation process in the future would be to ensure the airport has to take into account users' opinions.

Moreover, two approaches help achieve fair bargaining. The first approach is to kick off the contractual negotiation by using a standard form contract that was drafted neutrally. Many industrial organisations have published standard form contracts for parties to use as "a basis for negotiations".[1030] Airport and airline associations can also cooperate to draft a standard form contract that specifies charges for parties to adopt in individual cases. If these template contracts can be drafted by parties with equal bargaining power (as if they were both neutral third parties) without bias, the adoption of these contracts, to some extent, will equalise the bargaining power between parties. Second, the four basic principles discussed in Chapter 2 should be used as standards to justify the fairness of a contract. To closely follow these principles can at least to some extent ensure that the airport sector will not deviate too far away from fair bargaining.

[1028] This practice is widely accepted and aligns with the non-discrimination principle considering the outcome that the same set of tariffs applies to different airlines.

[1029] Contractual provisions specifying the charge rates will not be concluded if either party does not agree with them. The airport party can unilaterally determine the charge rates when airport users express different opinions in the consultation process. This is the case in the EU's Airport Charges Directive. See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, art 6(2).

[1030] Schwartz, *supra* note 1017 at 349. Taking the U.S. as an example, the American Institute of Architects, the American Bar Association, and the International Swap Dealers Association have published standard form contracts for parties to adopt as a negotiation basis. See *Ibid*.

5.6.5 Tackling Emergencies: An Example of Indian Delhi Airport

5.6.5.1 COVID-19 as a Context

Due to the COVID-19 pandemic, many flights were cancelled, and some airlines are now faced with the risk of bankruptcy.[1031] The air transport industry is among the fields that suffered the most, largely because many countries have restricted international transportation to prevent virus transmission. Airlines and airports are symbiotic.[1032] Due to a steep reduction in users, airports needed to close part of their capacity to control costs. Despite this, they still saw a heavy income loss from charges because airport fixed costs are too high to be offset in the same proportion as the reduction of users.[1033] Consequently, an airport operator has financial difficulty recovering capital costs. This is particularly the case when the government privatises the operation of an airport to a third party as the capital investment obligation often lies on the private operator side.[1034] This situation will apply to an entity even if it is a not-for-profit.[1035]

Contractual clauses provide a possible solution for the government and an airport operator to make arrangements for flexible re-negotiations in the wake of these emergencies without having to go through stringent legislative or regulatory processes.[1036] A contract can also include a mechanism to authorise the governmental party to intervene in the operation of an airport if the airport operator fails to manage the airport properly.

5.6.5.2 Step-in Clause and Force Majeure Clause

[1031] See IATA, "Deep Losses Continue Into 2021", (24 November 2020), online: <https://www.iata.org/en/pressroom/pr/2020-11-24-01/>.

[1032] See David Starkie, "The Airport Industry in a Competitive Environment: A United Kingdom Perspective", (July 2008) at 5, online (pdf): <https://www.itf-oecd.org/sites/default/files/docs/dp200815.pdf>.

[1033] See Airports Council International, *Policy Brief: Path to the Airport Industry Recovery — Restoring a Sustainable Economic Equilibrium*, 3 (2020) at 28.

[1034] *Ibid* at 23.

[1035] When a profit-making entity fails to realise its aim – to make profits by operating an airport – it can stop operations at an airport, leaving the public need of airport infrastructure at stake. When airport operators are not for profit, taking Canadian major airports as an example, they still undertake to pay the rent to the Canadian government. The revenue that is used to pay this rent still comes from user charges. When the total amount of revenue is reduced due to a reduction in the number of airline users, and an airport operator still needs to pay for the rent as a duty to the government, there will be not enough money allocated to airport operation. The hazard that an airport is paralysed still exists.

[1036] See Airports Council International, *supra* note 1033 at 28.

Further to the case study of India in Chapter 4, particular attention should be paid to two clauses in the Delhi Airport PPP contract because they offer mechanisms to deal with emergencies like the COVID-19 pandemic. On the one hand, the Airports Authority of India, the regulator of airports in India, and Delhi International Airport Private Limited as the operator of Delhi Airport, prescribe step-in rights in their PPP contract, allowing the Airports Authority of India to take over control of the airport in the wake of an emergency.[1037] These step-in rights function as timely solutions to a short-period crisis, namely an emergency, which will not last long.[1038] These situations should include hard times due to a shortage of income from charges.[1039]

On the other hand, if a situation is considered to be long-lasting, it may be recognised as a force majeure as prescribed in the concession contract.[1040] The conditions prescribed in the concession contract in order to recognise an event as a force majeure are stringent.[1041] Even though this concession contract lists many examples that may be defined as a force majeure, the situation still needs to satisfy these conditions.[1042] Notably, when an emergency in which the Airports Authority of India can assume its step-in rights lasts over three months, it can also be regarded as a force majeure, even if it is not on the enumerated list.[1043]

[1037] The Indian government has a significant power to recognise what is an emergency. It can exercise the power of recognition in communication with the Airports Authority of India or at its discretion. See OMDA, *supra* note 827, s 14.1(a).

[1038] The aim of the step-in rights in an emergency is on a temporary basis. A general step-in limit is seven days. After the temporary interruption, the Airports Authority of India is expected to return the control to the operator. See OMDA, *supra* note 834. In addition, Section 14.2(a) of this concession states that both parties should meet to discuss a plan if the substantial ceases of airport operation exceed 12 hours.

[1039] This is the case of the OMDA agreement signed between Airports Authority of India and Delhi International Airport Private Limited for Delhi Airport. Under Section 14 of this contract, the Airports Authority of India is entitled with step-in power to take over the control of Delhi Airport, including any issues as to charges prescribed in this contract.

[1040] See OMDA, *supra* note 834, s 16.

[1041] A force majeure to meet the following conditions:

> (a) materially and adversely affects the performance of an obligation;
> (b) are beyond the reasonable control of the affected Party;
> (c) such Party could not have prevented or reasonably overcome with the exercise of Good Industry Practice or reasonable skill and care;
> (d) do not result from the negligence or misconduct of such Party or the failure of such Party to perform its obligations hereunder; and
> (e) (or any consequence of which), have an effect described in Article 16.1.1.

Ibid, s 16.1.2.

[1042] For this event list, see *Ibid*, s 16.1.3.

[1043] See *Ibid*, s 14.1(d).

Among all the listed events that constitute force majeure, the item "epidemic or plague within India" can apply to the COVID-19 pandemic.[1044] Under a force majeure, the affected party can claim relief[1045] and suspend or excuse the non-performance of its obligations.[1046] Particularly, a claim for relief serves as a solution to realise certain remedies proposed by the airport industry, for instance, a waiver of landing rent and the provision of a non-interest loan. This is because these remedies, as entrenched by contractual clauses, can be justified as a relief claim due to a force majeure.

One can see that the concession contract of Delhi Airport offers two solutions, one for immediate emergencies and another for long-lasting and severe force majeure, to ensure the sustainability of airport operations. These two channels are also convertible as a long step-in event can be recognised as a force majeure. These mechanisms protect both parties. Not only can the government party be assured to control an airport when a private operator may not function properly, but also the private operator can justify its own non-performance of obligations or request remedies. This set of mechanisms seems especially useful in the context of a shortage of airport charges because airports are capital intensive.

Some other airports that have applied contractual regulation also incorporate similar mechanisms in contracts for a government to step in the operation of an airport in the wake of unusual situations. One such instance is a ground lease between the Government of Canada and Toronto Pearson Airport. This lease stipulates a force majeure clause, allowing either party to suspend its obligation of performance when the affected party cannot perform it on a bona fide basis.[1047] Nevertheless, the provision of force majeure in this ground lease is not specified like the concession contract for Delhi Airport of India. A situation like COVID-19 is also not listed as an event of force majeure in the ground lease.[1048] Even if the affected party can prove that the COVID-19 pandemic meets the conditions of a force majeure, when concluding similar contracts in the future, parties should

[1044] *Ibid*, s 16.1.3(vii).
[1045] See *Ibid*, s 16.1.5(a).
[1046] See *Ibid*, s 16.1.5(b). The PPP agreement of an airport in South Africa includes a similar clause that enables reliefs in light of force majeure. See *Skukuza Airport PPP Agreement: Public Private Partnership Agreement for the Management and Operation of the Skukuza Airport in the Kruger National Park*, October 2008, s 23.1.
[1047] See *Ground Lease*, Greater Toronto Airports Authority and the Federal Government of Canada, 2007, s 26.01.01.
[1048] Force majeure includes "strike, lockout, riot, insurrection, war, fire, tempest, Act of God […]" *Ibid*, s 1.01.

still consider adding such a clause because it would reduce the burden of proof for a party seeking the application of the force majeure mechanism if a pandemic were explicitly listed.

5.7 A Corporate Governance Dimension in a Private Law Approach

5.7.1 Defining Corporate Governance

When an airport is operated in the form of a corporation, one can take advantage of the mechanisms that are made possible by this and by corporate law when solving issues regarding airport operation. Corporate governance speaks about these available mechanisms and sheds some light on how an airport can set internal procedures to ensure charge decisions are made reasonably. The structure of a corporation varies from one type of corporation to another and from one country to another.[1049] That said, variants of effective corporate governance share some similarities.[1050] Accordingly, our discussion on corporate governance can be largely built upon these merits that are widely accepted. Relevant discussions will proceed in the context of a common understanding of the instruments that govern a corporation.

The method of calculating airport charges is one decision made through the corporate governance process. Therefore, besides observing charging activities as a regulatory matter from the top down, one can consider these as matters relating to corporate governance from a bottom-up perspective. The decision-makers (actors) and provisions of a corporation, which are the structures of a corporation, enable this corporate governance approach.

"Corporate governance" is a rich and varied topic. For purpose of this thesis, I explore two core perspectives, i.e., the decision-makers (actors) that play an important part in the corporate structure and the core provisions that govern a corporation, though both perspectives do not have a clear

[1049] One major difference between various corporate models is the board structure. A unitary board system indicates that a board of directors are supervised by an internal auditor group. In a two-tier system, the board refers to the "supervisory board", which aims to oversee the activities of the "management board" as the key executive body of a corporation. See OECD, *G20/OECD Principles of Corporate Governance* (Paris: OECD Publishing, 2015) at 10. These two systems are not exclusive. For more discussions about one-tier and two-tier systems, see generally Carsten Jungmann, "The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board Systems—Evidence from the UK and Germany" (2006) 3:4 European Company and Financial Law Review 426–474. For an introduction on other divergent dimensions of corporations in different countries, see Ronald J Gilson, "Globalizing Corporate Governance: Convergence of Form or Function" (2001) 49:2 The American Journal of Comparative Law 329–358.

[1050] "Business corporations have a fundamentally similar set of legal characteristics—and face a fundamentally similar set of legal problems—in all jurisdictions". Armour et al, *supra* note 973 at 1. See also OECD, *supra* note 1049 at 10.

boundary and interact with each other.[1051] These discussions, however, will pave the way for revisiting the regulatory potential of corporate governance in association with airport charges. More broadly, this approach may also function in seeking innovative governance towards economic matters in various infrastructures besides the airport industry.

5.7.2 The Decision-Maker Perspective

5.7.2.1 Board Composition

A corporation's board of directors is usually its decision-making body.[1052] When the government allocates part of its regulatory power to an airport operator, which is organised as a corporation, the airport operator's board usually has a final say on matters relating to charge setting. Arguably, even if the charge approval power is allocated to the governmental side, a duly represented board of directors can still pre-screen charge schemes that are unreasonably calculated.[1053]

[1051] The actor aspect relates to how different bodies in a corporation should act when making charge decisions. The provision perspective argues how the rules that govern a corporation should reflect the process that enables reasonable charge-setting requirements. Both are entangled when the duties of corporate actors are incorporated as governing provisions for a corporation.

[1052] See OECD, *supra* note 1049 at 45.

[1053] In Germany, airport charges are subject to approval by local administrative bodies. As a competent economic regulator should have both expertise and independence, there is a risk as to whether the approval body can overcome possible information asymmetry due to the lack of expertise and political interruption to make sure all its decisions regarding charges are reasonable. One solution regarding this regulatory risk is to assure that the charge proposals sent for approval have gone through reasonable screening procedures at the internal level of an airport company. Taking Frankfurt Airport as an example, its charges are subject to approval by the Ministry of Economics, Energy, Transport and Housing of the State of Hesse. As Frankfurt Airport is operated by Fraport AG, a multi-national airport investment company, charge proposals are subject to the internal decision-making process at Fraport AG first. As Germany adopts a two-tier board system, Fraport AG has a supervisory board to oversee activities from the executive board, which means the supervisory board is the "decision-making board" in question.
Also, Section 11(4) of the Articles of Association of Fraport AG sets out the power of the supervisory board regarding "business transactions and activities which substantially change the structure or strategy of the company or which lead to a substantial change in the company's development […]" Charge decisions fall in this definition. In terms of board composition, Section 6 in the Articles of Association of Fraport AG sets out that its supervisory board is made of 20 members, half of them are elected by employees, and the other half are shareholders. Shareholders of a company aim to make profits and this goal may lead to over-charges. This goal is temporarily beneficial but unsustainable for an airline-airport relationship in the long run. However, the board composition of Fraport AG implies an equal counterbalance between the interests of shareholders and employees. The voting power of employee representatives in a supervisory board has an effect to vote for proposals that are consistent with employees' interests, which fight against unreasonable charge decisions.
For the Articles of Association of Fraport AG, see "Articles of Association of Fraport AG", (8 September 2020), online (pdf): *Fraport* <https://www.fraport.com/content/dam/fraport-company/documents/konzern/eng/2020%2009%2008%20Satzung%20ENGLISCH%20final.pdf/_jcr_content/renditions/original.media_file.download_attachment.file/2020%2009%2008%20Satzung%20ENGLISCH%20final.pdf>.

When venture capital or an institutional investor invests in an airport corporation, it favours making a profit over other aims without caring much about the airport's continued development after it quits. To address this concern, a voting system might be needed to prevent venture capital from abusing its control power in an airport company. Again, legislation or a company's articles of association can be used as vessels to solve this problem by mandating the composition of a board.[1054] Hence, it would be important to hold the key executives accountable for making reasonable decisions about setting charge rates. An airport company can achieve the goal of accountability by nominating representatives from airlines, passengers, and the government to the board. A diverse board composition can generate a monitoring effect that used to be exclusively exercised by traditional regulation upon issues that may have an impact on the rights of an airport company's stakeholders.

To diversify the board of directors may be easier in a not-for-profit corporation than in a for-profit corporation. The diversity of board members in Canada's major airports demonstrates this. The case of Canada's not-for-profit airport operators will be discussed in the second section of Chapter 4. Contrarily, a mainstream view sees the first goal of a for-profit corporation as maximising the profits of its shareholders,[1055] so board members are primarily held accountable for this aim. Put differently, a diverse board composition, particularly to reflect the voices of airlines and passengers, may not occur without legislative support. In this situation, general corporate law, or the aviation sector-specific laws with a focus on airport corporate governance, may need to mandate how a board of an airport corporation should be constituted. German corporate legislation on the protection of employees serves as a model.[1056]

Investment decisions are a key aspect of airport economic oversight.[1057] In the managerial process of a corporation, investments are also events with high-level importance such that they need to be

[1054] Gilson has pointed out that German corporate law adds difficulty for a venture capital investor to gain control of a German company under its two-tier system because once the threshold of employee numbers is reached, a labour representative requirement in the supervisory board will be mandatory: half of the board members should represent employees as in the case of Fraport AG. At the level of the management board, members are all employees independent with the protection of fixed tenure. See Gilson, *supra* note 1049 at 352–353.
[1055] See Ian B Lee, "Corporate Law, Profit Maximization, and the Responsible Shareholder" (2004) 10 Stan JL Bus & Fin 31 at 32.
[1056] Subject to German corporate law, the supervisory board of Fraport AG consists of twenty directors, ten of which come from employees. See *supra* note 1053, s 6(1).
[1057] One of the central objectives for economic oversight that ICAO highlights is to "[a]scertain that investments in capacity meet current and future demand in a cost-effective manner […]" ICAO, *supra* note 9, s I at para 13(iii).

decided by the board or shareholder meetings. Moreover, investment decisions have a huge impact on the charge level for at least two reasons. First, as debated as one of the four core principles in airport charges regulation, reasonable charges should be cost-related. Capital investments are used to improve an airport's operation and can thereby be identified as costs.[1058] In consequence, they affect charges that are based on these costs. Second, the already-discussed AIFs (or PFCs) constitute a considerable proportion of fees levied by the airport side, and are directly collected from passengers. These fees particularly aim at funding future airport development. Hence, investment decisions will have a direct influence on the rate of AIFs. Therefore, holding the board accountable for investment decisions can produce a regulatory effect on airport charges.[1059]

5.7.2.2 Board Committees

Board committees can be useful to proceed with effective consultation on charges between the airport and its users. This consultation is a procedural requirement that ensures the reasonableness of charge setting. It can be driven by different actors at different levels.[1060] For private regulation of airport charges at the corporate level, a robust mechanism to enforce and supervise airport-airline consultation would be necessary.

A company's board will usually set up several professional committees to delegate different aspects of its duties. Committees are intrinsically special agencies of the board. They implement the board's obligations as prescribed in a corporate charter and bylaws with reference to their expertise.[1061] Thus, coordinating consultation can be allocated to the committee that is particularly responsible for materialising the board's consultative duties, as has been widely practised at many

[1058] See ICAO, *supra* note 237 at Appendix 4, s 12.

[1059] Core principles on airport charges apply to this charge item. Transparency deals with how the invested money has been spent and how the project has progressed. Consultation is about understanding users' needs to make necessary investments.

[1060] If one regards consultation led by an airport operator as a private-level dialogue, a consultation forum organised by a governmental body can function as a public-level dialogue. The Canada Border Services Agency established an Air Consultative Committee for the government and aviation stakeholders to discuss policy issues. This committee is composed of big Canadian airlines, airports, and their associations. Though this committee covers a much broader range of agendas than charges, it provides a solution to address charge regulation and good corporate governance on charge setting at the airport operator level that can be shaped under the mutual witness of the government, airports, and airlines. For the Air Consultative Committee, see Canada Border Services Agency, "Air Consultative Committee", online: <https://www.cbsa-asfc.gc.ca/agency-agence/consult/acc-ccta/menu-eng.html>.

[1061] Gilson discusses that no matter how complex the responsibilities of a board are, the board usually delegates the responsibilities to the committees to enforce them. See Ronald J Gilson, "From Corporate Law to Corporate Governance" in *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press, 2016) at 8.

airports.[1062] Since a consultative committee is responsible for various matters associated with the interests of stakeholders, charge-related issues should also fall in the scope of the committee. As the relationship between stakeholders, especially airlines as the main users of airports, is a key to airport management, it would be cost-effective to establish a special committee to monitor and conduct a consultation before charge formulation.

5.7.2.3 Head Executives

Notably, the head executives, which include the CEO and the CFO, play a major role in the decision-making process regarding charges in an airport operator because they prepare decisions for the board. Accordingly, effective regulation can be achieved by ensuring that these key executives, even though they are not directors on a board, act in good faith when making charge decisions. When necessary, a corporate charter, bylaws, and other norms may fix rules to govern or guide their activities.

Generally, shareholders are owners of a business corporation, a form usually adopted by a privatised airport. When corporate law entitles shareholders a vote to elect key executives in an airport company, shareholders can use their voting power to select the persons on behalf of their interests. Assuming that an airline can acquire a considerable proportion of shares of an airport, according to the law in a country, such airlines as major stockholders of an airport company take advantage of their voting power to choose the proper delegates on their behalf.

5.7.2.4 The Incentives of Engagement

It is reasonable to be concerned about whether airport user representation in the corporate governing process will be well accepted by an airport corporation. Introducing airlines and even passenger delegates to serve as key decision-makers of an airport entity may dilute the power of an airport corporation and restrain it from making decisions as it wants. Accordingly, this proposal may not sound attractive to airports.

[1062] Both Toronto Pearson Airport and Ottawa International Airport have established consultative committees. See Greater Toronto Airports Authority, "GTAA Annual Report 2020: Healthy Airport" at 63, online (pdf): <https://cdn.torontopearson.com/-/media/project/pearson/content/corporate/who-we-are/pdfs/annual-reports/2020-annual-report-healthy-airport.pdf?modified=20210428201852&la=en>; Ottawa International Airport Authority, "2019 Annual Report: Ottawa International Airport Authority" at 14, online (pdf): <https://yow.ca/sites/yow.ca/files/site-specific/yow_annual_report_en_2019-v03.pdf>.

However, when applied properly, this corporate governance mechanism still can generate incentives for an airport to adopt it. We can first draw on the organisation of CAAs as discussed in the Canada case study. CAAs are not-for-profit and non-share capital corporations, characteristics are secured by the Canada Not-for-profit Corporations Act. The goals of CAAs are no longer profit-making, but to serve the catchment areas of airports that the CAAs operate. To achieve this goal, the CAAs ensure that airport users can access the airport infrastructure at reasonable prices. These CAAs will thus operate following this goal for which they have been established. This case indicates that a profit-making company is not the only possible way to organise a corporation. When a corporation is organised to pursue goals that are consistent with the interests of airport users, this corporation will have incentives to behave in a user-friendly way in corporate governance.

Another solution is to strategically set conditions that trigger stricter regulation on airport charges. These conditions could evaluate whether existing measures offer effective protection against the risk of abusing the significant market power of an airport. One of those measures could be the level of user engagement in the decision-making process of an airport, the corporate governance structure of an airport operator. That is to say, if airport users are appointed to important roles in the corporate structure of an airport and have substantial decision-making power, the risk of an airport overcharging its users can be mitigated. These conditions could be set in two ways. They can first be entrenched bylaws, e.g., competition law. Second, laws may not specify everything. A regulator could implement a condition at its discretion, if allowed, by interpreting airport user engagement in an airport's corporate governance as one approach to satisfy such a condition.

This solution gives rise to incentives for an airport operator to enhance user engagement because the airport will have to make a "trade-off" between harsh regulation and corporate governance with a strong user voice. In other words, if an airport corporation fails to convince a regulator that effective user involvement in its corporate governance is in place to protect users against the risk of market power abuse, harsher regulation will be enacted.

Regulatory measures adopted by the UK and Australia emanate similar logic. As concluded in the UK case study, the UK applies a three-step test to determine whether the charges imposed by an airport should be subject to regulation. Test B, as the second step, examines whether competition

law can provide sufficient protection against the abuse of an airport's market power.[1063] If so, additional regulation will not be triggered. This step looks into the risk of market power abuse. The proposed airport user engagement in corporate governance can be interpreted as a solution to mitigate this risk.

Australia, as demonstrated in Chapter 1, adopts a monitoring regime without direct regulation in the second tier of the regulatory regime. Airports under regulation in this tier are those with significant market power but without the possibility to abuse it. A threat to impose direct regulation is in place should there be signs that airports exercise their significant market power.[1064] User engagement in airport governance could be relied on as a measure to avoid the abuse of market power, thus avoiding the imposition of direct regulation. Both cases imply that airports, particularly those with market power, can be motivated to enhance user engagement in corporate governance and then use this as important evidence to prove that they are not abusing market power.

5.7.3 The Rulemaking Perspective of Corporate Governance

The articles of association (charter) and the bylaws compose the provision matrix governing a company. They spell out how a company should operate.[1065] Some scholars observe these provisions as contracts of a company.[1066] As these provisions provide channels to confirm the promises made by the executives on how to govern a company, they can be adopted in setting rules regarding charges.

These provisions can incorporate the four basic principles on airport charges. A detailed discussion follows in the next section of this chapter.

[1063] See Chapter 4.1.1.2.
[1064] See Chapter 1.2.3.
[1065] See Stuart Gillan, Jay C Hartzell & Laura T Starks, "Explaining Corporate Governance: Boards, Bylaws, and Charter Provisions" (2003) 2003–03 Weinberg Center for Corporate Governance Working Paper at 13.
[1066] The contractarian theory of corporate law considers the relationship between executives and shareholders as a contractual relationship. The contractual provisions are written in the articles of association of a company and the corporate laws of a place where a company incorporates. Some consider that because bylaws can be unilaterally modified by the board or shareholders, they are not regarded as a section of the set of contracts. See Petri Mäntysaari, *Organising the Firm: Theories of Commercial Law, Corporate Governance and Corporate Law* (Dordrecht: Springer, 2012) at 69; Michael Klausner, "The Contractarian Theory of Corporate Law: A Generation Later" 31 J Corp L 779 at 782–783. Some debates attempt to challenge the effectiveness of this theory in terms of the governance of a company. See generally Michael Klausner, "The 'Corporate Contract' Today" in *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press, 2016).

The rulemaking dimension of corporate governance supports the dimension of decision-makers by fixing their duties in charter and bylaws. As discussed previously, airlines can hold shares of an airport and perform voting power in the name of shareholders. However, when this is not the case, the path of protection associated with shareholders' rights will not work. Instead, one needs to find solutions that protect an airport user under other labels.

Among others, the label of stakeholders serves as one solution. Provisions in a corporate charter and bylaws can be designed to protect users (stakeholders). Specifically, these provisions can impose duties of the board of directors towards stakeholders by clearly identifying the scope of the stakeholders that an airport should consider.

The concept of corporate social responsibility (CSR) may also provide a suitable niche to protect the rights of stakeholders. The CSR pursues the prevalence of social welfare vis-à-vis mere profit-making.[1067] Notably, individual passengers may fit better in the CSR paradigm than airlines. Passengers lack both suitable channels and bargaining power with an airport company. Duties from CSR can undergird passengers' rights. Addressing individual claims through the lens of the CSR in the airport sector is not new. Neighbourhood residents suffering from airport noise pollution can make a claim, for instance, by filing a class action lawsuit.[1068] The potential of the CSR in addressing charge concerns for more active passenger engagement should not be neglected.

5.7.4 External Effects on Monitoring Corporate Governance

On top of corporate laws and regulations, some external factors facilitate or monitor if an airport company has established a robust system to make pricing decisions reasonably. The following part talks about two implications from a private actor and public regulations on a listed company.

5.7.4.1 Implications for Corporate Governance Between a Group of Companies

[1067] In 2011, the UN's Guiding Principles for Business and Human Rights introduced "the Ruggie Principles" to better explain the CSR. "The Ruggie Principles" cover three parts: the state duty to protect human rights, the corporate responsibility to respect human rights, and access to remedy. See generally United Nations, "Guiding Principles for Business and Human Rights", (2011), online (pdf): <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf>.
The fact that airports are operated as not-for-profit entities in countries like Canada implies that they acknowledge the public goods characteristic of airports. It also justifies the appropriateness of borrowing the idea of CSR in question.
[1068] See CBC News, "Class action lawsuit to fight Montreal airport noise pollution gets go-ahead", (11 April 2008), online: *CBC* <https://www.cbc.ca/news/canada/montreal/class-action-airplane-noise-1.4614458>.

When privatisation is greenlighted, many different airport operators may be controlled by the same parent company, and, therefore, good corporate governance practice can be shared among different airport companies, particularly when these airport companies belong to the same group. Such governing experience can include charge issues, as long as the government allows these matters to be determined at the corporate level. Such experience-sharing may occur in three directions: from the hub airport operated by the parent company to other airports that are operated by the host company's subsidiaries, from other airports to the hub airport, and between any such secondary airports. Particularly, in terms of the first direction, the parent company can impose a monitoring power upon its subsidiaries' corporate governance by means of its ownership. The airports managed by the subsidiary companies will then enhance charge governance by learning from the parent company.

Between a group of multinational companies, corporate governance strategies can be shared and may generate extraterritorial effects. Practices of corporate governance of a corporation as a result of laws, culture, and policy in one territory can be transplanted to another overseas corporation that belongs to the same multinational corporation group. A typical example is Fraport AG, a multinational company owning many airports worldwide, whose hub airport is Frankfurt Airport.[1069]

5.7.4.2 Rules Imposed on Listed Companies

Mandates imposed by legislation on listed companies, particularly those regarding information disclosure, add additional supervision to ensure effective and accountable charge governance. Considering that airport companies, especially those that operate hub airports, may be listed companies; legal requirements upon listed companies apply to these airport operators.

Notably, when a foreign company applies to trade its securities in a foreign country, an extraterritorial effect on the company's governance similar to the above-discussed situation will

[1069] Fraport has imposed a group-wide Management Compliance System to govern the activities of its global employees. It also builds a risk management system on a group basis. See Fraport AG, "Joint Statement on Corporate Governance", (2020) at 21, 27, online (pdf): <https://www.fraport.com/content/dam/fraport-company/documents/investoren/eng/corporate-governance/Joint%20Statement%20on%20Corporate%20Governance%202020.pdf/_jcr_content/renditions/original.media_file.download_attachment.file/Joint%20Statement%20on%20Corporate%20Governance%202020.pdf>.

happen via signing listing agreements.[1070] Although a foreign company does not have to be subject to corporate law of the U.S., it has to assume obligations on corporate governance that are prescribed in the listing agreements provided by various U.S. stock markets.[1071] In this case, a company's governance may also be under surveillance by foreign regulations.

In conclusion, by complying with legislative and regulatory requirements, and even contractual clauses to listed companies in another jurisdiction, a listed airport company may enhance its corporate governance, and then, accordingly, help the company to build a stringent internal governing mechanism through which charges will be formulated.

5.8 Enabling a Private Law Approach to Implement the Four Basic Principles

The basic principles discussed in Chapter 2 offer content in implementing the contractual and corporate governance approaches. This part continues elaborating on this idea.

5.8.1 Reasons to Incorporate Principles

First, traditional laws and regulations may address the basic principles incompletely, derogating their values. That the EU failed to articulate cost-relatedness serves as proof. Consequently, member states became neither legally obliged to follow cost-relatedness as a general rule, nor to further reflect this principle in their domestic laws pursuant to a directive under EU legislation.[1072] Though states have empirically obeyed this principle, it is not secured in the long run. Hence, fully incorporating the four principles calls for a more inclusive instrument.

This is more so the case for countries that do not have particular laws and regulations incorporating these principles. For example, the U.S. generally liberalises airport economic regulation, only

[1070] See John C Coffee Jr, "Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications" (1999) 93 Nw UL Rev 641 at 663.
[1071] The New York Stock Exchange, the American Stock Exchange, and NASDAQ all require a foreign issuer to sign a listing agreement. For a discussion on the differences between the agreements provided by these markets, see *Ibid* at 687–688.
[1072] Regulations are binding and directly apply to member states. Directives allow member states to choose their methods and forms to implement them as long as the objectives of Directives are achieved. Hence, EU member states do not need to recognise cost-relatedness in their domestic laws as it is not inconsistent with the objective and result of the directive. The leeway left for states to materialise a directive further dissolves the essence of the already-understated standard of cost-relatedness. See Alink, *supra* note 138 at 466.

leaving a flexible standard of being "reasonable".[1073] The FAA consolidates the reasonableness requirement in the form of policy.[1074]

These principles are measurable and neutral such that they fit in contractual clauses or corporate governing provisions, which purport to be easily implemented. When talking about the measurement of services in a service level agreement, IATA makes the point that quantitative standards are preferable to qualitative standards, based on passenger perception.[1075] This means that standards should be neutral and impartial. As the *quid pro quo* of services, charges should also be subject to measurable standards. The four basic principles can serve as measurable standards: Cost-relatedness and non-discrimination can be achieved by data analysis; transparency and consultation are also measurable procedures that are achievable by procedural requirements. Hence, the incorporation of these four principles can help to make rules on charge setting measurable.

5.8.2 A Contractual Approach to Incorporate Principles

5.8.2.1 Airport-Airline Contracts

In practice, an agreement concluded between an airport and airlines may be in the form of a service level agreement, which focus on "addressing a clear understanding of the levels of service and outcome required in order to meet users' (typically the airline community) expectations, in return

[1073] See 49 USC § 40116 (2012); Dafang Wu, "United States Airport Rates and Charges Regulations", online: *DWU Consulting* <https://dwuconsulting.com/airport-finance/articles/airport-rate-regulation>.
[1074] See Federal Aviation Administration, "Policy Regarding Airport Rates and Charges", (9 October 2013), online (pdf): <https://www.govinfo.gov/content/pkg/FR-2013-09-10/pdf/2013-21905.pdf>.
[1075] See IATA, "Airport Service Level Agreement (SLA) – Best Practice", (July 2019) at 2, online (pdf): <https://www.iata.org/contentassets/4eae6e82b7b948b58370eb6413bd8d88/airport-service-level-agreement.pdf>.

for the airport charges they pay".[1076] ICAO policies[1077] and EU law[1078] both endorse this solution. A service level agreement has also been named an airport facilities agreement, encompassing a series of factors including the location of facilities, duration and exclusivity, fees and their calculation methods, and revenue/cost-sharing formulas.[1079] These agreements can be classified as exclusive and non-exclusive leases.[1080]

These agreements set out direct provisions on the distribution of rights and duties between an airport and an airline. They provide a path to achieving the principles by incorporating them. Besides setting detailed rules on rates of fees under various items of services and their calculation methods, an agreement can include precise provisions requiring that fees and their calculation reflect costs, not discriminate between users, be transparent, and be subject to established consultation procedures. Even though an agreement may not incorporate all these principles due to realistic limitations, for instance, the imbalance of negotiating power between parties, incorporation of them even to a limited extent will pave the way for the establishment of fair charges. This is even more the case when one notes that these principles mutually enhance each other.

Note the example of the template agreement of Manchester Airport.[1081] This agreement forbids Manchester Airport from signing agreements that contain more favourable terms than those in this

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[1076] *Ibid* at 1. Yet, the term "service level agreement" has been widely adopted in two contexts, making this term easily misunderstood. The scenario discussed in this text refers to one understanding. When referred to by both IATA and the ACI, it can also mean a contract between an airport operator and its providers to fix requirements in constructing the facilities of an airport. For detailed provisions on a service level agreement of the latter meaning, see Airports Council International, "Best Practice Guidelines – Airport Service Levels Agreement Framework", (26 March 2014), online (pdf): <https://aci.aero/Media/959b4661-f368-4c78-9ccc-4ea7123c929c/wIemJQ/About%20ACI/Priorities/Facilitation/20140326%20Airport%20Service%20Level%20Agreement%20Guidelines%20v1.pdf>; Airports Council International & IATA, *Airport Development Reference Manual*, 11th ed (2019).

[1077] To implement the recommendations made at the 2008 CEANS conference, Doc 9082 and the Airport Economics Manual reiterate that "[s]tates are encouraged to incorporate the four key charging principles […] in their national legislation, regulations or policies, as well as in their air services agreements [...]" ICAO, *supra* note 9, Foreword at para 1; ICAO, *supra* note 237, s 1.9.

[1078] Article 6(2) of the EU Airport Charges Directive sets out that "[m]ember [s]tates shall ensure that, wherever possible, changes to the system or the level of airport charges are made in agreement between the airport managing body and the airport users". Article 9 addresses that airport managing bodies and representatives of airport users should make all endeavours to conclude a service level agreement, which reflects the level of services and corresponding charges that are paid for these services.

[1079] Sabel, *supra* note 995 at 785.

[1080] *Ibid*.

[1081] See generally "Airline Operating Agreement and Terminal Building Lease Between City of Manchester, New Hampshire Department of Aviation and Airline", (1 July 2005), online (pdf):

agreement with airlines.[1082] This provision promotes the non-discrimination principle and will apply to airport charges. Hence, it can be construed as an implicit path to elaborating the non-discrimination principle.

Regarding consultation, it can be a prima facie tricky situation to include this principle in an agreement, because consultation should be a premise to reaching an agreement as well as rules on charges herein. It thus would not be causally logical to conclude a consultation clause and fees in the same agreement. The former causes the latter. Nevertheless, fees are subject to periodical adjustment. Given that, a consultation clause may still work in the long run to set a due procedure when a fee revision occurs.

5.8.2.2 Airport-Government Contracts

A government or its agencies may conclude agreements with an airport operator to stipulate governing rules as to airport charges facilitated by private participation and privatisation of airports, particularly when parties will need to sign concession agreements. In a concession agreement, the governmental sector and a corporation agree that the corporation runs an airport and has the right to charge tariffs from its users to pay a concession fee to the government, which to an extent acts as a landlord. An airport-government agreement can incorporate detailed clauses and schedules as annexes that prescribe the fee standards for various categories of services and facilities and, as discussed, can include the core principles of airport charges regulation.

The incorporation of basic principles on airport charges in contracts is necessary no matter whether charges are decided freely by an airport operator or require the government to pre-approve. In the former situation, the government can regulate the implementation of the "charge-setting power" of an airport operator via the incorporated principles, which means that an agreement directly serves as a new regulatory instrument to a particular airport. In the latter situation where the government still steps in on airport economic regulation, clauses incorporating basic principles

<https://mk0flymanchestevtsp6.kinstacdn.com/wp-content/uploads/2018/08/Attachment-1-Airline-Operating-Agreement-Generic-7-1-05.pdf>.

[1082] A provision titled "Granting of More Favorable Terms" sets out:

> [Manchester Airport] shall not enter into any agreement with any other Air Transportation Company containing substantially more favorable terms than this Agreement or grant to any scheduled Air Transportation Company rights or privileges with respect to the Airport that are not accorded [the airline party] in this Agreement unless the same rights, terms, and privileges are concurrently made available to [this airline].

Ibid, art 14.05.

imply a self-restrained promise to limit public power as to how the government will implement its approval authority. These principles will make the standard of governmental approval transparent, providing the airport operator predictability as to what charges will be considered reasonable. They also serve as a ground of defence for the airport party when it considers the government fails to comply with principle clauses when making charge decisions.

There have been practices that a government and an airport operator incorporate basic principles on airport charges in a concession agreement. In India, the State Support Agreement[1083] between the government and Delhi International Airport Private Ltd. prescribes ten principles to fix airport charges.[1084] These principles reflect all four basic principles, although some of them are not fully elaborated.[1085] The other principles addressed in the agreement set out standards for good airport charges regulation from the perspective of the Indian governmental sector.[1086]

The regulatory approach adopted by India, namely the incorporation of these principles in the State Support Agreement, resonates with the functions in both situations discussed above, in which charges require governmental pre-approval or depend on an airport operator itself. As the Airports

[1083] Chapter 4 has elaborated more on the State Support Agreement as part of the Indian approach to airport charges regulation that emanates a private law feature. For a detailed discussion as to the privatisation reform of Indian airports, see generally Moses George, "Public Monopoly to Private Monopoly – A Case Study of Greenfield Airport Privatization in India – Part I" (2009) 1:9 Issues in Aviation Law and Policy 173–202; Moses George, "Public Monopoly to Private Monopoly – A Case Study of Greenfield Airport Privatization in India – Part II" (2010) 2:9 Issues in Aviation Law and Policy 307–340.

[1084] See "State Support Agreement in Relation to the Modernisation and Restructuring of the Delhi Airport Between the President of India on Behalf of the Government of India and Delhi International Airport Private Ltd.", (26 April 2006) at 25-26, online (pdf): <https://www.civilaviation.gov.in/sites/default/files/moca_000972.pdf>.

[1085] Regarding transparency, the agreement requires fully documenting and publishing the economic regulation approach to all stakeholders; a regulator should also fully document its decisions with explanations. See *Ibid* at Schedule 1, s 3.

Regarding consultation, the agreement only requires the airport to "result and have reasonable regard to the views of relevant major airport users". *Ibid* at Schedule 1, s 9. The curbs of "reasonable regard" and "major airport users" hereof may have an effect on mitigating the substantive result of consultation by subjective reasoning and the definition of users in a narrow scope.

Cost-relatedness and non-discrimination are both categorised under the "pricing responsibility" clause because the price cap is determined by the governmental sector and the airport is allowed to determine charges under this cap. This clause is mainly concluded in terms of this limited charge-decision power of the airport. Cost-reflectivity is called "cost reflectivity" herein, requiring charges to be fully cost-reflective and to only relate to the facilities and services used by users. See *Ibid* at Schedule 1, s 10(i).

For non-discrimination, the agreement requires charges to be non-discriminatory within the same class of users. See *Ibid* at Schedule 1, s 10(ii).

[1086] Many of the other principles limit the regulatory power of the regulators. For example, the principle of economic efficiency requires applying price regulation only when airports exercise market power. See *supra* note 835 at Schedule 1, s 5. The independence principle requires the Indian AERA to practise their regulatory powers independently and autonomously. See *Ibid* at Schedule 1, s 6.

Economic Regulatory Authority of India (AERA) regulates charges using a price-cap methodology, the principles primarily function as a self-restrained clarification of the regulatory mandate of AERA. Moreover, as the airport is still free to determine the exact charges within the scope of the determined price cap, the specific principles under the section of pricing responsibility hence function as regulations imposed by AERA to the airport sector by a contractual approach.

5.8.2.3 German Practice as an Example

The basic principles can be adopted in a collegial way using the contractual approach. The latter may choose to only set these principles as regulations and leave more regulatory discretion, including procedures and particular charge amounts, to the regulated parties. In this situation, these principles become standards against which a monitoring agency oversees private law regulation.

An example of this regulatory type is airport charges regulation in Germany. According to Article 19b of the Luftverkehrsgesetz (Air Traffic Act), proposals for airport charges are subject to approval by a competent authority.[1087] Even though Germany adopts such *ex ante* regulation, in which pre-approval is required, its monitoring standards point to the basic principles of airport charges.[1088]

Subject to these criteria, the Air Traffic Act encourages the use of agreements between an airport operator and an airport user in two ways. On the one hand, the Act encourages operators of airports that have over five million passengers per year to conclude agreements with airport users as to the performance level and corresponding charges.[1089] An airport operator should also send a draft of such agreements to airport users six months prior to the supposed effect date at the latest.[1090] Views of airport users must be provided when an airport operator applies for an agency to approve the

[1087] See *Air Traffic Act of Germany*, art 19b(1).
[1088] Article 19b(1) of the Air Traffic Act states that a regulatory agency will examine the charge plan of an airport operator according to four standards: suitability, objectivity, transparency, and non-discrimination. To explain these criteria, this Article specifies that charges should be relevant to costs and ready beforehand. Notwithstanding the absence of consultation in this list of general criteria, this Article addresses that airports with over five million passengers per year, which is one threshold of airport charges regulation at the EU level, should go through a detailed consultation process before a charge scheme is prepared. The scope of adoption for principles of cost-relatedness, transparency, and non-discrimination extends to cover all airport operators, vis-à-vis the scope of major airports, to which the EU Airport Charges Directive applies.
[1089] See *Air Traffic Act of Germany*, *supra* note 1087, art 19b(4).
[1090] See *Ibid*, art 19b(3)1.

charge plan.[1091] On the other hand, when an agreement that deviates from the basic principles of criteria for charge approval is concluded, an agency will respect party autonomy, and accordingly, an agreement prevails these criteria.[1092]

Through the lens of a private law approach, the German mode of airport charges regulation emanates a character of the co-existence between public authority and the regulated parties. Public authority exercises traditional *ex ante* regulation, which stands in a higher regime and adopts the discussed basic principles as norms.[1093] The regulated parties are self-regulated by contracts. These contractual instruments prevail over the basic principles of airport charges regulation. The interplay between Fraport AG, which is the operator of Frankfurt Airport, and the Ministry of Economics, Energy, Transport and Housing of the State of Hesse serves as a specific example of this German approach.

5.8.3 A Corporate Governance Approach to Incorporate Principles

5.8.3.1 Feasibility

As discussed previously, airport corporatisation makes bottom-up regulation feasible by enabling the form of corporation, introducing efficient and safe management. Two sub-paths under a corporate governance approach are decision-makers and corporate provisions. The former may consist of the board of directors, shareholders, specialised committees affiliated to the board of directors, the CEO, and even stakeholders to some extent. The latter encompasses at least the corporate charter and bylaws, which avail more space for detailed ruling than charters, can serve as vehicles to address the basic principles of airport charges regulation.

With respect to the incorporation of basic principles, the provision dimension is more relevant.[1094] This part thus pays more attention to the dimension of corporate provisions.

[1091] See *Ibid*, art 19b(3)2.
[1092] See *Ibid*, art 19b9(3)3.
[1093] Nevertheless, contractual regulation is incomplete in this Act due to its limited application scope.
[1094] These provisions set rules for the board: the charter regulates the board of directors, and the board committee charter regulates a specialised sub-committee working under the board of directors. Thus, provisions and actors, as two different channels, are two sides of the same coin.

Corporations are being increasingly governed by corporate charters and other bylaws, which are customised and flexible.[1095] The charter of a committee can be employed to set out rules that are more specific than corporate charters. All these provisions are agreements among parties. Some jurisdictions, such as the state of Delaware in the U.S., which is keen on an outright contractual approach to corporate governance, they accord a lot of weight to these provisions so that they even override the power of shareholders.[1096]

5.8.3.2 Application Envisaged: Corporate Provisions in Three Tiers

A corporate charter (interchangeably called articles of association) is the constitutional instrument [1097] of a company, including such basic information as its name, address, and shareholders. It sets out the most important relationships, including those between shareholders and between shareholders and directors or other executives.[1098] It thus provides a venue of primary importance to list the principles. Nevertheless, a charter may only be a suboptimal option for two reasons. For one thing, a concern remains whether basic principles, in respect of airport charges, is fundamental enough to be included in a charter. For another, even if included, they may not be articulated due to the limit of space and the constitutional attribute of a charter, thereby lacking effectiveness and losing the values of measurability and neutrality. Accordingly, if these principles are to be written into a corporate charter, one possible way is to define them as objectives without articulating more details, which can be articulated in bylaws.

In response to the lack of details of a corporate charter, bylaws are more proper to be used as a regulatory instrument. A bylaw, according to Black's Law Dictionary, refers to "[a] rule or administrative provision adopted by an organization for its internal governance and its external dealings," and it "[subordinates] to a charter or articles of incorporation or association or to a constitution".[1099] To supplement a corporate charter, bylaws set out detailed rules that can also relate to the responsibility of the board of directors as well as other actors including

[1095] See Jill E Fisch, "Boilermakers and the Contractual Approach to Litigation Bylaws" in *The Corporate Contract in Changing Times: Is the Law Keeping Up?* (2019) 244 at 244.
[1096] See generally Fisch, *supra* note 1095.
[1097] See John Armour, Henry Hansmann & Reinier H Kraakman, "Essential Elements of Corporate Law" (2009) The Harvard John M Olin Discussion Paper Series (Discussion Paper No 643) at 17.
[1098] *Ibid*.
[1099] Bryan A. Garner, *Black's Law Dictionary* (2019) **sub verbo** "bylaw".

shareholders.[1100] As the board of directors directly monitors a corporation and transfers the general idea of shareholders into solid resolutions, it can be regarded as the core decision-maker in corporate management. When designing the bylaws, specifically the responsibility of the board in charge-related matters, the drafters can incorporate the four basic principles as standards. These principles thus shift from "soft law" to "hard bylaws" such that the directors must obey these principles if they are authorised with the power to formulate charges.

Charters of board committees are the provisions in the third tier. Committees assume duties in fields that require professional knowledge; they thus can be counted as extended and specialised delegates of an overall board of directors for professional aspects of corporate governance.[1101] Board committees are widely established to address issues on audition, remuneration, and risk management, but not limited to these.[1102] Within an internal governance context of airports, the use of committees is also pertinent.[1103]

Corporate matters regarding airport charges belong to a professional field that requires data collection, analysis, and calculation. A board committee with competent expertise, can assume these duties. Board committees can be helpful, even if they do not have decision-making authority. Their suggestions and proposals, which are made as a result of their expertise, will serve as a valuable reference for the board of directors.

A board committee charter is a constitution for the committee.[1104] A corporation may consider fully incorporating basic principles in a board committee charter. The committee has sufficient expertise to ensure the implementation of these principles.

5.9 Conclusion

[1100] See Henry duPont Ridgely, "The Emerging Role of Bylaws in Corporate Governance" (2015) 68 SMUL Rev 317 at 319; Armour, Hansmann & Kraakman, *supra* note 1097 n 49.
[1101] See Laura F Spira & Ruth Bender, "Compare and Contrast: Perspectives on Board Committees" (2004) 12:4 Corporate Governance: An International Review 489–499 at 489; OECD, *supra* note 1049 at 52.
[1102] See OECD, *supra* note 1049 at 52.
[1103] In the context of Canada, committees under a board of directors are adopted. Vancouver Airport Authority established four committees: the Finance and Audit Committee, the Governance Committee, the Human Resources and Compensation Committee, and the Planning and Development Committee. See The Governance Rules and Practices Manual at tab 2, s 9 (2018).
[1104] A charter specifies the committee's missions, authority, responsibility, composition, meeting procedures, and other reporting requirements. See Nicholas J Price, "What Is a Board Committee Charter?", (2019), online: *Diligent Insights* <https://insights.diligent.com/board-committee/what-is-a-board-committee-charter>.

This chapter proposes a private law approach as an alternative to traditional regulation in the field of airport charges. A private law approach does not have to be exclusively adopted, but can be combined to any extent with traditional regulation. The private power associated with the private law approach and the public power associated with traditional regulation can collaborate and thus generate other forms of regulation. In this sense, the discussion of a private law approach is more than the discussion of a specific regulatory type. It indicates a foundation of varying regulatory approaches where the regulated parties can be involved.

Hence, this approach has flexibility and its adoption does not necessarily mean that a state must give away all its regulatory power to the regulated sector. For countries that hope to maintain traditional regulatory measures, they can use this approach only as a supplement when necessary. For countries that pursue a complete private law approach, they can use this approach as a substitute for traditional regulation. In co-operative situations between traditional regulation and regulation using a private law approach, the government may consider having a regulator in place to oversee and ensure the availability of effective corporate governance and contractual mechanisms when adopted.

A private law approach can further be dismantled into two dimensions – a contractual dimension and a corporate governance dimension. They embrace light regulation by adopting contractual clauses on charge setting and robust governance of an airport company. Although this approach does not recommend *ex ante* interruption by state power, it can be upheld by public power in many ways. This chapter illustrated seven reasons why a private law approach is necessary in the context of airport charge setting. The employment of this approach is even made possible against the context of the global trend of airport corporatisation and commercialisation.

When using contracts as vehicles for regulation, private law regulation may happen between different contracting parties. First, the government can introduce regulations via contracts signed with the regulated party, i.e., an airport operator. A typical scenario for this type of contractual regulation is privatisation or PPP. Second, contracts concluded between an airport operator and airport users can also serve as regulatory instruments. Airport-airline agreements can take various forms. A general charge schedule stands as a standard contract that airlines users will agree with if they intend to use an airport. Individually-negotiated terms between an airport and a certain airline can also introduce standards on airport charges, but these contracts should not be

discriminatory or generate illegal subsidies. Third, considering that the AIF stands as a fee of considerable value collected from passengers directly and an effective consultation process may not be guaranteed in terms of individual passengers, this chapter suggests introducing a consumer association as a delegation of passengers and to negotiate AIF standards by contracts between an airport operator and the association.

Notably, the step-in and the force majeure clauses shed light on how the government can make urgent actions that can be legitimised by contracts in case of emergencies like the COVID-19 pandemic. These provisions can be found in the PPP agreement of Delhi Airport and other airport contractual regulation cases.

The core argument in the corporate governance dimension is that regulatory norms can be enforced through the governance of a corporation in two correlated channels: decision-makers and rulemaking (corporate provisions). Although the two dimensions are discussed separately, they are entangled in many ways. In the former channel, the board of directors draws the most attention. This chapter thus suggests assuming the board duties to proceed with charge decisions reasonably and diversifying the composition of directors to enlarge the voice on behalf of airport users. Other bodies including professional committees, the chief executive and financial officers, and shareholders can also participate in monitoring the formation of charges inside a company. The key point is, whoever is the decision-maker in question, their activities relating to airport economic issues should be bound by effective rules of duties. As to the rulemaking dimension, the articles of association, bylaws, and articles governing special committees are surrogates or complements for traditional regulatory instruments.

A private law approach can also pave the way to incorporating the four basic principles emanating from the international regulatory framework of the airport charges regulation. It enables the legal effect that contractual liability and corporate law liability can improve implementation. In the dimension of the contractual approach, agreements between airport operators and airport users and agreements between airport operators and the government are two possible options for incorporation. Such practices by airports already exist. In the corporate governance dimension, a corporate charter, bylaws, and charters of specialised board committees stand as instruments in three tiers. They each respond to three levels of actors in a corporation: shareholders, the board of directors, and the board's committees. Among them, bylaws and committees' charters are more

possible and effective than a corporate charter to incorporate principles on airport charges regulation.

6 Charges for Ground Handling Services

6.1 Introduction

Ground handling services are their own specific sector because they overlap aeronautical and non-aeronautical services, and therefore, the discussion of the regulation of those charges makes practical sense. The Introduction noted that aeronautical charges are generally accepted to be subject to regulation, while revenues from non-aeronautical activities are freely adjusted by market competition.[1105] Yet, both sectors are interdependent.[1106] Thus, this clear regulatory line is blurred when it comes to ground handling services so that they lie in the middle between aeronautical charges and non-aeronautical revenues, which makes for an interesting discussion.[1107]

Charges from ground handling services can be considered as a sub-section of airport charges. The provision of ground handling services and the charges therefrom is a result of using airport infrastructure. The provision of these services thus originates from Article 15 of the Chicago Convention that requires a contracting state to provide uniform conditions to all aircraft users for the use of airports in a given state.[1108] Moreover, costs from the ground handling sector may be "hidden" behind airport charges.[1109] Airports are increasingly shifting their operation modes to a more commercialised path, by which they sub-contract businesses to third parties.[1110] Airlines are thus increasingly outsourcing their ground handling activities to third-party providers to reduce costs.[1111] Among others, this mode benefits an airport or airline that needs to provide ground

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[1105] Polk and Bilotkach observe that no global hub airport is permitted to deregulate aeronautical charges. See Polk & Bilotkach, *supra* note 20 at 36.

[1106] Fecri Karanki, Siew Hoon Lim & Bong Jin Choi, "The Determinants of Aeronautical Charges of US Airports: A Spatial Analysis" (2020) 86 Journal of Air Transport Management 101825 at 1.

[1107] Although a unified understanding to define ground handling services does not exist, they may be construed by the 2019 preliminary version of the Airport Economics Manual as follows:

> Activities necessary to support the servicing of aircraft and processing of passengers (excepting government inspection services) and can include passenger check in, boarding, apron handling of aircraft, cleaning, and can also include catering, fuelling, and some maintenance activities. Generally undertaken by independent contractors or airline employees, in some cases airport operators provide ground handling services.

ICAO, *Airport Economics Manual*, 4th (preliminary) ed, Doc 9562 (2019), s 2.52.

In addition to the ground handling services, services including fuel and oil concessions, and in-flight catering are of a similar nature. See ICAO, *supra* note 9, s II at para 10. This chapter focuses on ground handling services.

[1108] Ruwantissa Abeyratne, "Ground Handling Services at Airports as a Trade Barrier" (2008) 42 J World Trade 261 at 261.

[1109] *Ibid*.

[1110] See *Ibid* at 270.

[1111] IATA, "Ground Handling - Hole in the Ground", (1 April 2010), online: <https://airlines.iata.org/analysis/ground-handling-hole-in-the-ground>.

handling services to save time, money, and labour.[1112] Given this background, we must examine if unreasonable charges will occur in the ground handling sector, particularly due to increased outsourcing.

6.1.1 Ground Handling Services: From Aeronautical to Non-Aeronautical Activities

Notwithstanding the recognition that ground handling services are still associated with the operation of air transport services, giving them an aeronautical character, these services deviate from the traditional aeronautical services that are exclusively provided by an airport operator, for instance, landing and parking of aircraft. In other words, ground handling services can also become commercialised. Rather than have an airport per se operate ground handling services, other alternatives are also popular: such as by airlines, by independent third-party providers, or jointly by them with an airport operator.[1113]

Unlike traditional aeronautical activities that are exclusively provided by an airport operator, the market for ground handling services is competitive.[1114] Airports and airlines tend to outsource ground handling services to third-party providers.[1115] Consequently, there is a proliferation of third party-providers.[1116] These professional ground handling companies also compete on a global basis thanks to gradually unrestricted market access, although the services these providers offer relate to the operation of core air transport services. Along with this competitive dynamic ground handling services are widely awarded by concessions, a typical form that non-aeronautical activities at airports, e.g., duty-free shops, hotels, etc., usually implement. Thereby, ground

[1112] See Bhadra International, "Outsourcing Ground Handling Services is the Most Preferred Option", (25 October 2016), online: *Medium* <https://medium.com/@BhadraIndia/outsourcing-ground-handling-services-is-the-most-preferred-option-ba292cb4b1d>; Elsa Anderson, "Aviation Starts on the Ground", (17 November 2016), online: *International Airport Review* <https://www.internationalairportreview.com/article/25863/aviation-starts-ground/>.
[1113] Abeyratne, *supra* note 1108 at 264; ICAO, *supra* note 237, s 4.118.
[1114] European Commission, "Groundhandling", (27 September 2020), online: <https://ec.europa.eu/transport/modes/air/airports/ground_handling_market_en>.
[1115] Brian Pearce, "Profitability and the Air Transport Value Chain", (2013) at 34, online (pdf): *IATA* <https://www.iata.org/en/iata-repository/publications/economic-reports/profitability-and-the-air-transport-value-chain/>.
[1116] Airport Research Center, *Study on the Impact of Directive 96/67/EC on Ground Handling Services 1996-2007* (Germany, 2009) at 17.

handling services increasingly are managed as non-aeronautical activities, even though they are arguably aeronautical in nature.

6.1.2 ICAO's Dual Attitude Towards Ground Handling Services

While ICAO recognizes the dual nature of ground handling services, it tends to see the services as non-aeronautical activities. This is because the Airport Economic Manual clarifies that as concessions, these services are not subject to the recommended guidelines on air traffic charges.[1117] At the same time, ICAO acknowledges that these activities have an aeronautical nature,[1118] and some states also define these services as aeronautical activities.[1119] One may acquire a better understanding of this dual attitude from an accounting point of view, regardless of the character of ground handling services: revenues generated in the form of concessions are viewed as forming part of non-aeronautical revenues.

If one follows that logic and concludes that ground handling services should follow the rules applicable to non-aeronautical services, a corollary could be that ground handling services should be market- and profit-based. However, this conclusion might be premature. An additional suggestion made by ICAO makes the treatment of ground handling services more complex. It has also suggested viewing ground handling as an exception to non-aeronautical services by restraining the development of revenues from ground handling services.[1120] Notwithstanding this exceptional status, the Airport Economic Manual clarifies that, as these services are concessions, they are not subject to the recommended guidelines on air traffic charges.[1121]

The above-mentioned suggestions look controversial. On the one hand, ICAO's policies stick to the general differentiation between regulatory measures on aeronautical and non-aeronautical charges, implying revenues from the non-aeronautical sector are excluded from regulatory measures and are freely developed by parties. Revenues from ground handling services would follow this line as non-aeronautical services. On the other hand, ICAO tries to add exceptional rules to this dichotomy by recommending that charges on ground handling services be restricted

[1117] ICAO, *supra* note 1107, s 5.33.
[1118] "Where fuel 'throughput' charges are imposed, they should be recognised by airport entities as being concession charges of an aeronautical nature". ICAO, *supra* note 9, s II(11).
[1119] See ICAO, *supra* note 237, s 5.5.
[1120] ICAO, *supra* note 9, s II(10).
[1121] ICAO, *supra* note 1107, s 5.33.

and not be developed in a straightforward market manner. Accordingly, a concern arises regarding to what extent parties will obey these seemingly controversial guidelines when there is no mandatory restriction on the charge setting of services provided via concessions.

Despite the inconsistency of suggestions by ICAO, one can crystallise the mentality that ICAO uses when reckoning airport charges regulation: as long as a service is associated with air transport operation that has an aeronautical character, even though it is not exclusive to be provided by an airport operator and subject to competition, the economic aspect of these services is still a public interest concern. Therefore, it will be necessary to seek a safeguard to prevent excessive charges on these air transport services, given that aeronautical charges regulation does not apply. This current dilemma indicates that a contractual mechanism under the overarching resolution of a private law approach can be adopted. This is particularly meaningful when ground handling services, which have a public interest concern, are increasingly competitive, commercial, and not subject to regulation.

In the rest of the chapter, section 2 introduces three situations of varying competition. I identify the risk in each situation that airport users will pay charges for ground handling services that are unreasonably set. After that, the third section argues that three specific factors might trigger unreasonable charges, each corresponding to one of the three categories in section 2. Next, the fourth section proposes the use of an air services agreement between states as a method to incorporate standards for ground handling services fees by introducing three typical air services agreements signed by the U.S. with the EU and the UK. The last section concludes previous discussions and, finally, recommends employing a contractual mechanism to deal with the three concerns in section three.

6.2 Locating Risks of Unreasonable Charges in Three Competition Modes

Drawing upon the typology in Directive 96/67/EC on Ground Handling Services ("1996 Directive"), ground handling services may be subject to different competition depending on the mode in which they operate: (1) restricted ground handling services that are limited to a given number of providers; (2) centralised infrastructure provided exclusively by an airport operator or a third party; other ground handlers may need this centralised infrastructure to provide other ground handling services; and (3) ground-handling services unlimited by regulation or restrictions.

This typology is not the only possible approach to recognise different competition risks that ground handling services may be faced with, particularly from a non-EU perspective.[1122] Nevertheless, organising this chapter around the three situations still speaks volumes because they strategically capture a basic and holistic overview of the different types of services in a ground-handling market, regardless of which country it is in. Therefore, to theoretically visit the three sections offers countries a roadmap to proactively locate risks that may arise in setting charges when they intend to build ground handling services, whenever such services may fit into any one of the situations.

6.2.1 Restricted Ground Handling Services

Due to the restriction of capacity or space, airports often limit the number of providers in certain ground handling service categories relating to airside activities.[1123] The 1996 Directive defines four such categories, namely, "baggage handling, ramp handling, fuel and oil handling, and freight and mail handling".[1124] Member states should not limit the number of providers of these services to less than two in respective situations of self-handling and third-party handling. The exact number of categories of services that restrictions are imposed on and the allowed providers under each category may differ among countries.[1125] This practice of restricting the market access of ground handling services providers is not exclusive to Europe. In the U.S., McCarran International Airport in Las Vegas restricts the number of ground handlers by asking them to proceed with a request for quotation (RFQ) process.[1126]

Although airport operators may adopt a tender process to select providers who will be authorised as licensees that operate these restricted services, competition is still lacking. As such, the fairness

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[1122] Trevor Soames, "Ground Handling Liberalization" (1997) 3:2 Journal of Air Transport Management 83–94 at 86.
[1123] Steer Davies Gleave, *Study on Airport Ownership and Management and the Ground Handling Market in Selected Non-EU Countries* (2016) at para 16.13.
[1124] *Council Directive 96/67/EC of 15 October 1996 on Access to the Groundhandling Market at Community Airports*, [1996] OJ, L 272/36 [*Groundhandling Directive*], arts 6(2), 7(2).
[1125] Austria reported that it has set a restrictive regime for three categories: baggage, ramp, and freight and mail handling. Austria allows two providers under each of the limited categories. See Airport Research Center, *supra* note 1116 at 45. France, in addition to fully liberalising all other airports, imposed this restrictive regime on Paris-CDG, Paris-ORY, and Nice Airports. For Paris-CDG Airport, three providers for each sector of self-handling and third-party handling were allowed to provide airside ground handling services. See *Ibid* at 49. The UK fully liberalised these services without setting limits on the number of providers for airports that have met the threshold of two million passengers annually. See *Ibid* at 59.
[1126] Jen Bradley, "When is it Best to Outsource Ground Handling?", (16 February 2017), online: *Aviation Pros* <https://www.aviationpros.com/ground-handling/ground-handlers-service-providers/article/12299847/when-is-it-best-to-outsource-ground-handling>.

in provider selection will largely depend on the tender process. If this process is flawed, bidders may not compete on a level playing field, leading to overcharging risks.

Since airport users do not have many choices among the limited number of ground handlers, they may be unable to have enough bargaining power regarding the rate of charges in a ground handling market that is not competitive. Assuming only two providers receive licenses, the market will run in a duopolistic manner.[1127] Although competition can exist between both providers, it may not be efficient in practice. Dusseldorf Airport allowed two ground handling operators to provide services in 2014.[1128] One operator was the airport and the other was a third-party provider. However, the third-party provider occupied 85% of the market, arising competition concerns.[1129] In response, the airport authority permitted another two licensed providers to enter the market.[1130] Even though the renewal of licences introduces the possibility of external competition to this limited market, the market is still closed to competition before the next round of licensing starts.[1131]

6.2.2 Centralised Infrastructure

Centralised infrastructure leads to a more restrictive sector. The provision of ground handling services needs this centralised infrastructure, which is usually exclusively operated by the airport operator or a third party.[1132] The 1996 Directive defines centralised infrastructure as services "whose complexity, cost or environmental impact does not allow of division or duplication, such as baggage sorting, de-icing, water purification and fuel-distribution systems".[1133] Moreover, airport installations, which are necessary infrastructure for ground handling service providers to provide services, can also be regarded as part of centralised infrastructures.[1134] The rationale for this limitation imposed on centralised infrastructure is clear: as a public utility, they are in nature cost-effective to be offered by one provider.[1135]

[1127] Abeyratne, *supra* note 1108 at 267. See also Soames, *supra* note 1122 at 94.
[1128] Steer Davies Gleave, *supra* note 1123 at para 16.25.
[1129] *Ibid* at para 16.22.
[1130] *Ibid*.
[1131] Airport Research Center, *supra* note 1116 at 87.
[1132] *Groundhandling Directive*, *supra* note 1124, art 8(1).
[1133] *Ibid* at art 8(1).
[1134] See *Ibid* at art 16. See also Steer Davies Gleave, *Possible Revision of Directive 96/67/EC on Access to the Groundhandling Market at Community Airports* (2010) at appendix (table A1.3).
[1135] See *Groundhandling Directive*, *supra* note 1124, art 8(1).

The risk of abusing market power related to centralised infrastructure can be greater than that associated with restricted ground handling services.[1136] Arguably, there is not enough competition when only one provider is appointed. Furthermore, the concern about the level of competition may be more serious when an airport or an authorised third-party company that manages centralised infrastructure at the same time functions as a ground handler and competes with other ground handlers.[1137] When an airport operator runs centralised infrastructure, this situation may not have any difference from aeronautical activities that are usually not outsourced to a third-party operator.[1138] If it is an authorised third party, whether an independent supplier or an airline self-handler, that holds the concession to run the centralised infrastructure, there is still a concern that this third-party will distort competition and unjustifiably increase the fees for other ground handlers to use this centralised infrastructure.[1139] The European Commission in 2011 proposed a regulation in which it particularly addresses this issue by requiring the tariff rate for access to centralised infrastructure to be subject to the principles of relevance, objectivity, transparency and non-discrimination.[1140] That said, this regulation proposal was abolished in 2015 due to a lack of mutual agreement.[1141]

6.2.3 Fully Liberalised Services

For ground handling services without any market access restrictions, concerns of overcharging may not be likely to happen in the wake of insufficient competitors. Some empirical studies regarding the implementation of the 1996 Directive support this conclusion.[1142] Without restrictions to limit the number of authorised services providers, ground handling services, like

[1136] See Kapetanovic, *supra* note 47 at 282.
[1137] *Ibid*.
[1138] The reason is that the airport operator still can confer its market power on this centralised infrastructure, where the airport is the sole service provider. The 1996 Directive attempts to address this issue by setting separate accounts of ground handling services and other activities. See *Groundhandling Directive*, *supra* note 1124, art 4. Airlines complained that accounting separation is not enough; cross-synergy between an airport, as an infrastructure provider, and the airport, as a ground handling service provider, still exists. A more effective solution is setting up an entity that is legally separate from an airport operator. See Gleave, *supra* note 1134 at 28; EC, *supra* note 487 at 6.
[1139] EC, *supra* note 487 at 7; Gleave, *supra* note 1134 at 9.
[1140] EC, *supra* note 487, art 28.
[1141] Geert Goeteyn, "In brief: Airport Operations in European Union", (14 August 2020), online: *Lexology* <https://www.lexology.com/library/detail.aspx?g=3c627f0c-32ac-4c0a-99a6-4643b08c6f7a>.
[1142] Generally, as the number of providers increases, ground handling charges decrease. See Airport Research Center, *supra* note 1116 at 165; Gleave, *supra* note 1134 at 90–91; EC, *supra* note 487 at 3.

other commercial non-aeronautical activities, will develop a competitive environment to set charges without the need for interruptive regulation.

6.2.4 Remarks

The revision of the three modes, through the lens of competition, illustrates that the risk of over-charging can be evaluated by the open degree of the market. The number of ground handlers can be limited on a legalised basis for restricted services and centralised infrastructure at an airport that other ground handling service providers may need when they provide services. Subsequently, possible competition distortion may trigger charge issues. For other ground handling services that are not imposed with restrictions on market access, competition distortion is much less of a concern. Nevertheless, if a third-party ground handler develops significant market power, this concern remains pressing. Section 6.3.3 below will discuss this point.

These three modes with different competition levels can theoretically serve as benchmarks for a country if its ground handling market fits into any of these modes. Notwithstanding some jurisdictions, e.g., the UK, which adopt full liberalisation in all categories, some countries, such as Germany, still advocate a conservative path to impose limitations in parts of the ground handling market.[1143] It is thus unlikely that the need to address charge-setting issues will disappear in the near future.

6.3 Factors with Implications for Ground Handling Prices

6.3.1 The Period of a Licence

In the situation of restricted ground handling services, the adoption of a licensing regime is recommended so that an airport operator can select providers through a fair process.[1144]

[1143] For ramp handling services, only two service providers are allowed to operate at many German airports. One provider is the airport operator itself, which may impose dominating power. See Gleave, *supra* note 1134 at para 6.49.
[1144] The licensing requirement could be imposed in many situations. It can unanimously apply to all kinds of ground handling services if an airport imposes a full-scaled licensing regime. It can only occur to restricted categories as the 1996 Directive requires, because the restrictiveness of these categories necessitates a constrained market. However, in light of the priority of safety and security issues, the licencing regime is prevalent. The ACI prioritises conditions of safety and security in a licensing regime by stating that "[a] typical licence agreement will embody conditions that contribute towards improving safety, security and regularity of operations whilst ensuring quality services are provided to aircraft operators by the GHSP in an equitable, sustainable and competitive environment". Airports Council International, "ACI Ground Handling Policy Paper", (2016) at 12, online (pdf):

Nevertheless, the duration of this licence period affects charges. If the period during which a supplier is allowed to run ground handling services at an airport is too short, it will have difficulty fully recovering its capital expenditure costs.[1145] A direct result is that a long-term relationship will be hard to develop between an airport and a supplier, leading to an increasing reliance on renting equipment.[1146] If so, suppliers will not sustainably develop by investing in equipment; their plans to provide service for a relatively short period can become sub-optimal.[1147]

The 1996 Directive mandates the length of a licence to be seven years. But this provision has received wide criticisms for its insufficient length, especially from airline and government stakeholders.[1148] The European Commission suggested a ten-year term to replace the current provision.[1149] The majority of the EU member states have observed that the current seven-year term is short and thus increases administrative costs.[1150] It would be reasonable to assume that the charges agreed in a service agreement will increase if users ultimately bear these costs.

In the case of the operation of the fuelling system at Oakland Airport in the U.S., Oakland Airport concluded a twenty-year lease with the Oakland Fuel Facilities Corporation (OFFC), an airline consortium that operates the fuel facilities owned by the operator of Oakland Airport.[1151] According to this lease, the OFFC constructs and operates a new fuel farm, reserving its ownership to the airport side.[1152] This lease is set with a long term of twenty years such that the OFFC can be encouraged to invest extensive capital and can have enough time to recover these costs.[1153] Interestingly, this long term is a renegotiated result after the original five-year proposal by the airport party.[1154] Although strictly speaking this lease is not a licence, they are similar concerning the implications of a contractual period on ground handling charges to users.

<https://aci.aero/Media/b03d37a5-4dc2-49f2-82b1-e061d3ce58cd/4_x2QA/Safety/10-24-2016/ACI_Ground_Handling_%20Policy_Paper.pdf>.

[1145] Soames, *supra* note 1122 at 89. See also EC, *supra* note 487 at 8.

[1146] Gleave, *supra* note 1134 at para 5.86.

[1147] *Ibid* at para 5.90.

[1148] *Ibid* at paras 5.86, 5.88-5.89.

[1149] EC, *supra* note 487 at 8.

[1150] Gleave, *supra* note 1134 at para 5.86.

[1151] For the Oakland Airport case study, see generally William Lahey & Patricia Heilbron, "Aviation Fueling at Large Airports: Negotiating Workable Agreements Between Airlines and Airport Proprietors" (2008) 35 Transp LJ 245 at 252–261.

[1152] *Ibid* at 253–254.

[1153] *Ibid* at 254.

[1154] *Ibid*.

6.3.2 Access Fees Imposed by an Airport Operator

An airport operator may charge an access fee to a ground handler that applies to provide ground handling services at an airport.[1155] This fee, interchangeably called a concession fee or a consideration, will eventually pass to passengers. When an airport operator imposes a high level of access fee to any ground handlers providing services at the airport, these charges may be accounted as the actual expenditure of the ground handler, which will then pass to users. IATA has also specified the same concern, referring to ICAO's policy requirement that concession fees related to air transport services should be restricted.[1156]

Many templates for ground handling contracts contain a provision levying this access fee. These templates reflect long-time practices and, thus, can demonstrate how an access fee is implemented in practice. The ACI published a template, the Ground Handling Service Provider Agreement (version 1.0) in 2018, which is supposed to be concluded between an airport operator and a service provider.[1157] Section 4 in this template contract recognises an access fee as a "consideration" paid by a ground handler to an airport operator.[1158] Two alternative methods to calculate a consideration are a basic fee plus a certain proportion of a gross monthly turnover, and a certain proportion of a certain period of the gross turnover.[1159]

Recalling that the ACI-proposed template favours airport operators, both optional clauses raise concerns about reasonableness. If examined by the standards entrenched by the proposed regulation by the European Commission, i.e., relevance, objectivity, transparency and non-discrimination, both methods might not pass the criteria of "relevance and objectivity".[1160] These two criteria can be construed by another iteration of the same article, which suggests calculating a consideration on a "cost-recovery plus a reasonable return on assets" basis.[1161] For

[1155] This fee does not amount to a tariff charged for the use of centralised infrastructure as discussed in the second section of this chapter, though the latter can form one situation of the former fee. Theoretically, as long as a ground handling services provider applies to run a business at an airport, that airport could require the provider to pay an access fee, for example, by a consideration clause in an agreement signed between them.
[1156] IATA, "Ground Handling Charges at Monopoly Locations", (2019), online (pdf): <https://www.iata.org/contentassets/4eae6e82b7b948b58370eb6413bd8d88/ground-handling-charges.pdf>.
[1157] For the template, see ACI, "Guidance to Members Template on Ground Handling Service Provider Agreement", (2018), online (pdf): <https://aci.aero/wp-content/uploads/2018/09/Ground-Handling-Service-Provider-Agreement-Final-2.pdf>.
[1158] See *Ibid*, s 4.
[1159] See *Ibid*.
[1160] EC, *supra* note 487, art 28(2).
[1161] *Ibid*, art 28(3).

the two methods in question, if the percentage on the gross revenues is set too high without being sufficiently justified, the consideration calculated as such may exceed the value of "costs plus reasonable return", thus violating the "relevance and objectivity" standards. In other words, a risk occurs that an airport handler may overpay an airport operator.

IATA has also published a Standard Ground Handling Agreement (SGHA), which is supposed to be concluded between an air carrier and an independent ground handling service provider. The SHGA has been updated several times. When addressing these charges passing from airports to carriers via a third-party handler, Article 6.1 in all the three versions of the SGHA (2018, 2013, and 2008) includes an appendix identifying charges for different categories of services.[1162] Moreover, Article 6.2 in the three versions also specifies that all "charges, fees or taxes" that are imposed by an airport operator are not included in the charge appendix.[1163]

6.3.3 Significant Market Power of Third-Party Providers: A Perspective of Mergers and Acquisitions

The market for ground handling is becoming increasingly concentrated so that about three to five international providers own most of the market.[1164] When a third-party handler occupies a large proportion of the market, it may set high charges that deviate far from its operating costs as a basis.[1165] Therefore, the market power concern is also real for third-party handlers who have significant market power.

Mergers and acquisitions could lead to even stronger market power of these third-party handlers. Competition agencies usually take particular care against the negative impact on market competition regarding charges when they scrutinise the application from a ground handling services provider to merge or acquire another provider. One can understand this negative impact

[1162] See IATA, "Standard Ground Handling Agreement" at 20, 85-86, 144-145, online (pdf): <https://www.aviation.wisag.de/fileadmin/user_upload/aviation/iata_web.pdf>.
[1163] *Ibid* at 20, 86, 145.
[1164] Pearce, *supra* note 1115 at 34.
[1165] This situation is different from that in which an airport operator sets restrictions on access to its ground handling services. The former situation comes into being in light of competitors' market power. Restrictions in the latter situation result from airport governing measures. A report keenly notices the variations of market access restrictions, saying that restrictions can be regulatory or industrial-related (or designated) ones. See Steer Davies Gleave, *supra* note 1123 at para 4.48.

from two dimensions: horizontal integration effects[1166] and vertical integration effects[1167]. The following paragraphs briefly demonstrate the two dimensions by introducing two applications in which Swissport, a prominent global ground handling service provider, took part.[1168]

First, regarding horizontal integration effects, Swissport received permission to acquire another ground hander – Servisair – in 2013. However, the European Commission felt that the merging proposal would trigger real competition concerns by eliminating competitors at several airports including Helsinki, Birmingham, London Gatwick, and Newcastle airports.[1169] They were especially concerned about a potential monopoly over the ground handling service market appearing at Newcastle Airport since Swissport and Servisair were the only two providers there.[1170] Subsequently, the merged provider could have unreasonably increased prices.[1171] To address this, Swissport made significant commitments on divestiture, which include divesting key-role personnel[1172] and relevant ground handling businesses where competition concerns existed.[1173]

Second, an application in 2006 made by Ferrovial Infrastructuras S.A. (Ferrovial), Caisse de dépôt et placement du Québec (Quebec), and GIC Special Investments Pte Ltd (GIC) to take over BAA plc (BAA) illustrates how vertical integration effects may potentially affect a third-party handler's charge setting towards airport users.[1174] Ferrovial, Quebec, and GIC applied to jointly purchase all shares of BAA. Ferrovial, at that time, controlled Swissport, which provided ground handling services at many British airports including Heathrow, Gatwick, and Stansted airports. As BAA

[1166] When two competitors merge, "horizontal unilateral effects" are possible to occur to allow the newly merged company to increase charges or to offer under-level services without the constraints of competition. See Competition and Markets Authority, *Decision on Relevant Merger Situation and Substantial Lessening of Competition*, ME/6796/18 (2019) at para 45.
[1167] For vertical integration's conditions, see generally Martin K Perry, "Vertical Integration: Determinants and Effects" in *Handbook of Industrial Organization* (Elsevier, 1989) 183.
[1168] Swissport is one of the biggest handlers. See Gleave, *supra* note 1134 at 96.
[1169] See European Commission, *Commission Decision concerning Case No COMP/M.7021 - Swissport/Servisair pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004* [2013] at para 219. See also Geoffrey Deasy, "EU Competition Law Developments in the Aviation Sector from 4 July to 31 December 2013" (2014) 39 Air & Space L 163 at 175–176.
[1170] See European Commission, *supra* note 1169 at para 152.
[1171] Deasy, *supra* note 1169 at 176.
[1172] European Commission, *supra* note 1169 at para 217.
[1173] See *Ibid* at para 221.
[1174] *Notification of 11/04/2006 concerning Case No COMP/M4164 - Ferrovial/Quebec/GIC/BAA pursuant to Article 4 of Council Regulation No 139/2004Decision on*, 2006 at para 1.

owned these airports, several concerns emerged from Swissport's competitors as to whether this transaction would restrict their chances to compete fairly if Swissport controlled BAA's airports.[1175] Specifically, these concerns related to Ferrovial's influence on ground handling costs, providers' access to facilities, and its cross-subsidy to Swissport by charges from the operation of airports.[1176]

The European Commission was nevertheless not convinced by these concerns. Regarding the concern of costs, it reasoned that facility fees account for only 10–15% of costs, and thus would be unable to influence the total costs.[1177] On facility access, the Commission was confident about the protective effect of the 1996 Directive.[1178] Relating to cross-subsidisation, the Commission again was convinced by the method of account separation between airport operation and ground handling services in the 1996 Directive.[1179] Notwithstanding the high proportion of Swissport's market share (60–70%) at Stansted Airport, the Commission notably regarded the limited contractual period, which is usually between one to six years, between an airline and a handler, and the usually less than seven-year-long licence awarded by an airport, as effective mechanisms to ensure airlines' ability to switch providers.[1180]

Although these risks were not deemed serious enough in this particular application, they were valid and can be even more pressing in other cases for the following reasons. First, although the charges collected by an airport operator on equipment use only make up 10–15% of a ground handler's total costs, they still exist and will ultimately pass to users. Second, protection provided in the 1996 Directive has a limited subject matter jurisdiction: airports over 2-million passenger movements or fifty-thousand tonnes of freight as of 2001[1181] and only in EU countries. Third, airlines have criticised that the method of account separation appears insufficient to avoid influence between an airport operator and a ground handler affiliated with an airport operator.[1182] They instead have proposed the establishment of separate legal entities,[1183] with the European

[1175] *Ibid* at para 31.
[1176] *Ibid*.
[1177] *Ibid* at para 34.
[1178] *Ibid* at para 36.
[1179] *Ibid* at para 38.
[1180] *Ibid* at para 43.
[1181] *Groundhandling Directive*, *supra* note 1124, art 1(2).
[1182] Airport Research Center, *supra* note 1116 at 106.
[1183] *Ibid*.

Commission endorsing this recommendation by proposing making a Regulation on ground handling services.[1184]

6.4 Ground Handling Provisions in Air Services Agreements Between States

To lift restrictions on ground handling services, countries usually incorporate a provision regarding market access on ground handling services in air services agreements that they conclude with other countries. This section examines these provisions from three air services agreements, in which the U.S. is one of the two signatory parties. These three agreements reveal how the mentality of the U.S. on the regulation of ground handling services and their charges has changed over time through clauses in bilateral air services agreements.

Although bilateral agreements are not private contracts, discussing bilateral agreements helps in facilitating contractual regulation in a private law sense. For one thing, bilateral agreements can incorporate a clause to suggest using private contracts as an innovative regulatory approach. On the other hand, private contracts can refer to the clauses on airport charges in bilateral agreements, with or without modification.

6.4.1 1977 U.S.-UK Air Services Agreement

As early as 1977, the U.S.-UK bilateral air services agreement (Bermuda II Agreement) already contained a ground-handling provision. The provision is titled "Commercial Operations", clarifying that designated airlines should have choices of self-handling, handling by another airline, a third-party, or the airport authority.[1185] However, these freedoms are recognised on a conservative basis because both parties agree that they are subject to reasonable limitations and as authorised by airport authorities.[1186] This agreement leaves the calculation of ground handling pricing unanswered.

[1184] EC, *supra* note 487 at 8.

[1185] Art 8(2) of the *US-UK Air Services Agreement*, 1977 writes:

> Each [c]ontracting [p]arty agrees to use its best efforts to ensure that the designated airlines of the other [c]ontracting [p]arty are offered the choice, subject to reasonable limitations which may be imposed by airport authorities, of providing their own services for ground handling operations; of having such operations performed entirely or in part by another airline, an organization controlled by another airline, or a servicing agent, as authorised by the airport authority; or of having such operations performed by the airport authority.

[1186] *Ibid*.

6.4.2 2007 U.S.-EU Air Services Agreement

Thirty years later, the 2007 air services agreement between the EU and U.S. also contains a similar "Commercial Opportunities" provision as to ground handling services.[1187] Notably, compared with the 1977 U.S.-UK agreement, this agreement was more liberalised and objective regarding restrictions on free market access. Specifically, it also embraces the freedom of self-handling and choices among competing third-party service providers.[1188] Although competition restrictions are permissible based on laws and regulations, they are only allowed because of capacity and space restrictions.[1189] By contrast, the 2007 U.S.-EU agreement provides a method to calculate reasonable charges, i.e., "full costs plus a reasonable return on assets".[1190]

6.4.3 2018 U.S.-UK Air Services Agreement

In 2018, the U.S. and the UK concluded a new generation of bilateral air services agreements as a guarantee on their post-Brexit open skies.[1191] The ground-handling provision was accordingly revised. The new version of this provision in the second paragraph provides:

> [e]ach airline shall have the right to perform its own ground-handling in the territory of the other [p]arty ("self-handling") or, at the airline's option, select among competing agents for such services in whole or in part. The rights shall be subject only to physical constraints resulting from considerations of airport safety. Where such considerations preclude self-handling, ground services shall be available on an equal basis to all airlines; charges shall be based on the costs of services provided; and such services shall be comparable to the kind and quality of services as if self-handling were possible.[1192]

[1187] *2007 EU-US Air Services Agreement*, art 10(3).
[1188] *Ibid* at art 10(3)(a).
[1189] *Ibid* at art 10(3)(b). A report notes a tendency that "laws and regulations" have the power to impose unlimited restrictions on market access, implying that this liberalisation clause is limited. By contrast, I hold the idea that the "specific constraints of available space or capacity" imposed in this Article are limits on the scope of "laws and regulations" when they limit market access in the ground handling market. So, the level of the ground handling competition is relatively high. See Steer Davies Gleave, *supra* note 1123 at para 3.56.
[1190] *2007 EU-US Air Services Agreement*, *supra* note 1187 at art 10(3)(b).
[1191] "UK and US agree post-Brexit flights deal", *BBC News* (29 November 2018), online: <https://www.bbc.com/news/business-46380463>.
[1192] *Air Transport Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland*, 2018, art 8(3).

This new version marks two reforms vis-à-vis the 2007 U.S.-EU agreement. Regarding legal restrictions on market access, the ground of "physical constraints" gives narrower interpretative space than the ground of "capacity and space" constraints in the 2007 version. Furthermore, on the method of price-setting, the 2018 U.S.-UK agreement additionally introduces the service level in the case of self-handling as an important benchmark if a low price compromises the service quality.

6.4.4 Remarks

The three generations of the ground-handling provision indicate increasingly open market access by requiring that restrictions should only be based on objective reasons. One can also see the trend to liberalise the ground-handling provision by narrowing the interpretative space regarding when to impose restrictions on ground-handling competition. The insertion of pricing methodology is a reasonable and transparent way to calculate charges. If countries attempt to adopt a light-regulated approach via agreements to set ground-handling charges, they may refer to the revisions that appear in the 2007 and 2018 agreements in contrast to the 1977 version.

However, these provisions are not perfect. First, notwithstanding that it is legitimate to impose competition restrictions on the basis of physical constraints, a future agreement should still consider what mechanisms can be added to avoid market power abuse. Such a mechanism is absent in the three agreements discussed in this section. Second, if a ground handling provision intends to include the ground of "physical restrictions" as the only acceptable exception, contracting states may take extra care of their national laws and regulations in case relevant rules at the national level prescribe a broader scope of restrictions that may lead to a contradiction with international agreements. Preferably, an air services agreement can additionally clarify that its narrower scope pre-empts any inconsistent provisions in national laws and regulations if applied to achieve a higher degree of market competition. Third, although the U.S. in the 2007 and 2018 agreements adopts service costs as a basis to consider reasonable charges, there is a need to consider how to address the "access fees", which an airport operator may impose on all third-party providers or self-handlers. If these fees, which are passed from the airport sector to users through a competitive handling market, are general for all the competitors, the charges, even if cost-related, may not be reckoned reasonable.

6.5 Reflections and a Contractual Solution

Previous sections in this chapter follow the line of employing the degree of competition as a metric to evaluate the risks of unreasonable charges. The first half of this section concludes previous discussions by continuing to follow this line of thought. The second part suggests a contractual solution in response to the three factors mentioned in the third section.

6.5.1 Reflections

Notwithstanding the increasingly competitive ground handling market where multi-national independent providers play a crucial role, there is still a risk of unreasonable charges.[1193] One can first understand how restrictions on competition are "permitted" by law mostly due to a safety concern arising from space and capacity constraints at airports. The three modes of market access emanating from the 1996 Directive, i.e., restricted areas, centralised infrastructure, and fully liberalised services, indicate three states of competition: restricted competition, monopoly, and full competition, respectively. This typology sheds light on a basic methodology to associate different regulatory measures with corresponding market power degrees for ground handling services, although this typology in no way encompasses all deviations from one country to another. As long as physical restrictions exist relating to the use of airport premises, restrictions on ground handling competition can be made available with laws and regulations legitimising them. On the other hand, some countries still restrain from fully liberalising domestic ground handling services.

A licensing regime is usually adopted, among other regulatory measures, to deal with the issue of a lack of competition in the ground handling market when limiting competition become necessary due to facility restrictions at an airport.[1194] However, its effects are limited. For one thing, once a licence has been granted, a licensee will be in a relatively secured situation during the licence period. Subsequently, competition may not play a big part in forming reasonable prices charged by a ground handler. Another concern lies in the short term of a licence, which has a downside for infrastructure development for an airport. A short term may not cover the time that a service

[1193] IATA, *supra* note 1156.

[1194] In the UK, although the number of operators running surface access to an airport can be limited by the space restriction justification, airports face a risk of competition law violation because a limited number of downstream players may be selected on the basis of discriminatory criteria. As a solution, the licencing regime can impose a strict tendering procedure. See Martin Strom, "European Union Competition Law Developments in the Aviation Sector: July to December 2016" (2017) 42:2 Air and Space Law 215–240 at 225.

provider needs to fully recover its costs. Consequently, charges will increase to do so. Otherwise, service quality may be compromised to control costs.

There is another factor that relates to the privileged position of an airport operator vis-à-vis other ground handling service providers. If an airport operator imposes an access fee, regardless of whether this fee is charged for the centralised infrastructure provided by an airport operator or for general operating ground handling services at an airport, this fee, though paid by ground handlers, will ultimately transfer to airlines, and therefore, to passengers. Hence, an access fee should follow clear standards, such as cost recovery. It is crucial to prevent an airport operator from charging ground handlers an access fee that exceeds the costs of services an airport operator supplies.

In addition to the impact of the airport operator, a third-party ground handler may also overcharge users if it has significant market power. Using Swissport as an example, its mergers with and acquisitions of other airport or ground handling entities usually invoke scrutiny by competition agencies. Competition concerns in relation to the scrutiny cover both vertical and horizontal integration. As these competition agencies have been actively implementing competition laws and reviewing mergers and acquisitions, it might not be necessary to launch additional regulatory activities to reduce over-regulation.

Air services agreements between states usually contain a "commercial opportunities" clause, providing market access to ground handling services. Even though the three generations of this clause signed by the U.S. with the EU or the UK do not showcase a global panorama of how ground handling services are negotiated, they remind us of how a standard clause on the regulation of ground handling has evolved from a U.S. perspective. There are four interesting findings: First, the three generations use the title "commercial opportunities (operations)". Such wording indicates that ground handling services, different from aeronautical services provided by an airport at the airside, have always been regarded as activities that should be subject to commercial principles and, thus, market competition. Second, these clauses all capture the cruciality of market access: freedom of self-handling and free choices among third-party or airport providers. Third, although all three agreements have recognised that such market access should be subject to restrictions, there is a trend that they should be limited on the basis of an objective ground, i.e., physical restrictions that are only justified by a safety concern. Lastly, the pricing standard of cost-

relatedness has been added as a guarantee to avoid overcharges. Notably, the quality of services in the case of self-handling can be employed as a benchmark against which the costs is calculated.

6.5.2 A Contractual Approach

A contractual solution may address the three concerns in the governance of charges for the use of ground handling services debated in the third section. In addition to regulating contractual parties, a well-designed contractual clause that formulates reasonable ground handling charges may generate external effects on agreements concluded between other airports and ground handlers, nurturing a good contractual environment in the whole ground handling market. This is because ground handling contractual parties may strategically refer to clauses on charges from other agreements to enhance their own negotiating power. This process is akin to "pattern bargaining"[1195], which is widely adopted in the employment contract negotiation context.[1196]

6.5.2.1 The Length of a Licence Period

Because a licence can be recognised as a contract between an airport authority as a licensor and a ground handler as a licensee, we can consider it in a contractual dimension.[1197] The airport authority should consider granting a licence with enough time to cover a licensee's costs. This idea resonates with the European Commission's proposal to extend the licence period from seven years to ten years.[1198] In case a licensee manipulates its privileged position during the term, thus leading to a level of services that is lower than expected, the licensor and a ground handler as a licensee may specify the standard of services that the licensee should reach in a licence.[1199] Additionally, a handler may wish to win the licence again after the exercise of one term. A tender committee, which determines the winner of the licence in the future, may give considerable weight to the

[1195] Lahey & Heilbron, *supra* note 1151 n 50.
[1196] *Ibid* at 252.
[1197] The ACI Ground Handling Policy Paper recommends some provisions to be incorporated in a licence, which an airport operator issues to a ground handling services provider. The ACI interchangeably uses the terms "a licence" and a "concession agreement". See Airports Council International, *supra* note 1144 at 11. For arguments that have regarded licenses as contracts, see Sidney W DeLong, "What is a Contract?" (2015) 67 SCL Rev 99 at 102, 125 & 131–132. DeLong argues that licencing agreements generate "privileges" and should be recognised as contracts in addition to traditional contracts that create "rights". See also Christina Mulligan, "Licenses and the Property/Contract Interface" (2018) 93 Ind LJ 1073. In this study, Mulligan recognises that End-user Licence Agreements (EULAs) have some characteristics of traditional contracts because both scenarios allow parties to fix their rights and obligations in agreements.
[1198] EC, *supra* note 487 at 22.
[1199] Airports Council International, *supra* note 1144 at 14.

historical performance of a past licensee if it applies again in the next round. Historical performance works as a deterrent to monitor that a licensee does not abuse its exclusive rights to operate ground handling services in the long period of a licence, particularly when this operator hopes to continue its operation in the following rounds.

6.5.2.2 Access Fees

Second, regarding the concern of over-charged access fees levied by an airport operator, laws and regulations that restrict the level of access fees are still powerful instruments that will impact how an airport operator and a ground handling service provider conclude their agreements, as seen by the ACI's template agreement. This is because to align with European legislation, this template agreement expressly notes that parties may not include a certain turnover of the revenues in the access fee at European airports, and an access fee herein should be solely based on actual "recompense of the use of the infrastructure".[1200] Following this logic, for airports in other countries that do not have laws or regulations prohibiting access fees excessive of actual costs, the clause on ground handling access fees to an airport may be set much higher.

Nevertheless, aside from the traditional regulatory measure by explicit laws and regulations, improving transparent information in the contractual process may still be a meaningful and supplementary private law approach. Specifically, a ground handler can require that their agreements with an airport should have a detailed breakdown of the access fee and provide reasonable explanations, when necessary. This contractual approach that reinforces transparency of information regarding charges can prevent an airport operator from imposing excessive fees by hiding the composition of the fee.[1201]

6.5.2.3 Charges Due to the Provider's Significant Market Power

When it comes to the relationship between an airline and a ground handling provider, the entrenchment of a pricing method, namely, the cost-recovery method benchmarked by the service level of self-handling, can be drawn on. If parties attach an appendix to explain this method, they clarify how such costs will be calculated. Notably, thanks to the fact that about 60% of the total

[1200] ACI Ground Handling Service Provider Agreement at art 4.

[1201] The role of transparency in shaping informed consent can be illustrated in a public international law narrative. Bianchi argues that transparency gives people access to information and prevents power abuse. See Bianchi, *supra* note 344 at 2. Peters similarly put that transparency facilitates scrutiny. See Bianchi & Peters, *supra* note 343 at 563.

costs come from staff,[1202] parties should pay special attention to this category when calculating costs. Additionally, as has been adopted in practice, both parties can also negotiate a service level agreement to set standards of services following the costs.

[1202] Gleave, *supra* note 1134 at para 7.6.

7 The Forgotten Role of ICAO in Contributing to Reasonable Charges Regulation: A Soft Law Approach

This chapter proposes that soft law is the optimal tool for ICAO to use in airport charges regulation. Particularly, this chapter seeks opportunities to support a private law approach through ICAO's soft-law-making power. This chapter first argues why hard law does not fit the regulation of airport charges. It then examines several ICAO soft-law tools that could be useful. Finally, it briefly discusses a collaborative approach by which ICAO can work with other institutions.

7.1 The Hard-Law Making Power of ICAO

7.1.1 SARPs and PANs

The Chicago Convention entitles ICAO to make detailed rules to govern specific technical issues.[1203] These rules are usually incorporated in annexes attached to the Chicago Convention. Unlike the main text of the Chicago Convention, which was ratified by state consent, these annexes are approved and amended by ICAO's Council,[1204] which requires "the vote of two-thirds of the Council".[1205]

These rules are commonly known as standards and recommended practices (SARPs), which, as the name implies, has two components. Strictly speaking, standards are not legally binding.[1206] Nevertheless, they are de-facto compulsory as long as these rules are feasible for a state to

[1203] Matte calls these rules "technical elements of civil aviation". Nicolas Mateesco Matte, "The Chicago Convention—Where from and Where to, ICAO?" (1994) 19 Annals of Air & Space L 371 at 394. ICAO is able to establish a rich quantity of standards and recommendations by SARPs in annexes affiliated with the Chicago Convention. This well explains why the Chicago Convention has not been indefinitely extended.
[1204] See *Chicago Convention*, *supra* note 213, art 54(i).
[1205] See *Ibid*, art 90. Although the contracting states still have their say when disagreeing with a proposed annex, the threshold to successfully void it is high: it requires the disapproval of more than half of the contracting states to prevent a proposed annex from coming into effect within three months. See *Ibid*, art 90(a).
[1206] The Chicago Convention does not impose an obligation to comply with standards and procedures on contracting states. States are expected to comply with all international standards. Deviations as exceptions are permitted if states submit notifications. See *Chicago Convention*, *supra* note 213, art 38. Standards are also sometimes referred to as rules with high effectiveness. The ease of implementation facilitates the Standards' quasi-binding effect. See Francesco Giovanni Albisinni, "The Rise of Global Standards: ICAO's Standards and Recommended Practices" (2016) 8 Italian J Pub L 203 at 203,209; Ruwantissa Abeyratne, "The Legal Effect of ICAO Decisions and Empowerment of ICAO by Contracting States" (2007) 32 Annals of Air and Space Law 517–28 at 520.

implement.[1207] This quasi-binding effect should be viewed as different from the binding effect of the main text of the Chicago Convention.[1208]

In addition, there are also procedures for air navigation services (PANS).[1209] Though these procedures are nominally different from standards, they are assumed to be respected by contracting states and are, in practice, complied with by states on a similar basis as standards.[1210]

Considering the "quasi-binding" effect of standards and procedures, one may think it optimal to regulate airport charges using these semi-binding rules. I argue that there is a low chance to do so considering the purpose of these standards and procedures. ICAO applies a dichotomy mentality to distinguish between economic policymaking, on the one hand, and safety and security regulation, on the other. Only safety and security matters require global standardisation. Since 1944, when the International Civil Aviation Conference was held, the international community has confirmed its standpoint that ICAO's main responsibility is technical standard-setting and general oversight.[1211] Economic regulation is left to bilateral and multilateral agreements and to industry-wide

[1207] See Abeyratne, *supra* note 1206 at 521. In Italy, these rules are given binding effect by domestic legislation, unless other motivated decrees depress their practicability. See Albisinni, *supra* note 1206 at 225.

[1208] Vis-à-vis the SARPs, the binding effect of the main text of the Chicago Convention is absolute. Although the theory of international law suggests that states are able to take reservations to certain articles to a treaty to which they adhere, i.e., to opt out of some provisions, the reservation mechanism does not apply to the Chicago Convention, which has no provisions providing contracting states with a specific reservation option, and under international law reservations may not be taken if they would defeat the purpose of the convention. The convention's provisions build the foundations of air transport in major aspects. The subtraction of any of these provisions would obviate the convention's purpose.

According to my research, only the Republic of Panama made a reservation. It did not accept the wording "jurisdiction" in Article 2 of the Spanish text as equivalent to the word "suzerainty" used in the English version. See "Convention on International Civil Aviation Signed at Chicago on 7 December 1944", online (pdf): <https://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf> Status of the Chicago Convention.

A historical response to the wording difference is that due to the colonial reasons, the rights implied by "suzerainty" are far less than those in "jurisdiction".

Notably, this reservation does not relate to substantial provisions, so it does not make a substantial impact on how Panama undertakes its obligations under the Chicago Convention. Interestingly, the word "jurisdiction" in the Spanish text was later modified. Felix Humberto Picardi, *Legal Status of the Airspace Above the Panama Canal* 1980) [unpublished] at 89.

[1209] In the safety aspect, PANS include ICAO Doc 8168 "Procedures for Air Navigation Services – Aircraft Operations" (PANS-OPS) and Doc 9868 "Procedures for Air Navigation Services – Training" (PANS-TRG).

[1210] Ludwig Weber, *International Civil Aviation Organization*, third edition ed (Alphen aan den Rijn, The Netherlands: Wolters Kluwer, 2017) at 50.

[1211] *Ibid* at 18. In the 1980s, Professor Milde had noted that ICAO has "quasi-legislative and executive powers in the technical regulatory field". But in the economic sphere, these powers are limited to the "consultative and advisory". Milde, *supra* note 944 at 122.

self-regulation.[1212] Moreover, the Chicago Convention clearly lists the subject matters that standards and procedures should address, and economic regulation is excluded.[1213]

Responses from states at the 2008 CEANS Conference reveal their resistance to the strict implementation of regulation on economic issues. The ICAO Secretariat proposed that "[s]tates should ensure that their service providers adhere to ICAO's policies on charges and should report any deviations from the adherence to these policies".[1214] Participating states did not accept this suggestion. The final conference report removed the responsibility to submit these deviations, reasoning that this kind of binding requirement should only apply to SARPs rather than to economic matters.[1215] Economic policies belong to the fiefdom of autonomy of each state.[1216] However, a consensus was achieved to support ICAO conducting surveys as a way to monitor states' implementation of the policies in question.[1217]

Hence, standards and procedures are effective regulatory resources in technical, safety, and security spheres. These focal points are also in line with the topics of all 19 annexes so far.[1218]

[1212] Weber, *supra* note 1210 at 18.

[1213] Article 37 of the Chicago Convention specifies these subject matters:

> To this end the International Civil Aviation Organization shall adopt
> and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:
> (a) Communications systems and air navigation aids, including ground marking;
> (b) Characteristics of airports and landing areas;
> (c) Rules of the air and air traffic control practices;
> (d) Licensing of operating and mechanical personnel;
> (e) Airworthiness of aircraft;
> (f) Registration and identification of aircraft;
> (g) Collection and exchange of meteorological information;
> (h) Log books;
> (i) Aeronautical maps and charts;
> (j) Customs and immigration procedures;
> (k) Aircraft in distress and investigation of accidents; and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

[1214] ICAO Secretariat, *supra* note 275, s 4.1(b).

[1215] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276 at para 4.2.4.

[1216] See *Ibid*.

[1217] See *Ibid*.

[1218] These annexes are updated from time to time. Until now, Annex 19 on safety management is the latest annex and its second version was released in 2016. For a complete list of these annexes, see SKYbrary, "ICAO Annexes and Doc Series", (30 August 2019), online: <https://www.skybrary.aero/index.php/ICAO_Annexes_and_Doc_Series>. After three decades, Annex 19 on safety management as the most recent annex was adopted in 2013 by the ICAO Council. See ICAO, "Annex 19: Safety Management", online (pdf): <https://www.icao.int/safety/SafetyManagement/WebsiteDesignJuly2016/Flyer_US-Letter_ANB-ANNEX19-SM_2016-10-03.AP.pdf>.

However, how a state regulates airport charges remains a matter beyond the remit of standards and procedures. In nature, economic issues should be primarily addressed through the market, and there is not a single approach to fit all situations. It is unlikely that ICAO can apply standards and procedures to address airport economic concerns.

Moreover, SARPs also include another component, namely, recommended practices.[1219] Unlike standards in SARPs or the procedures in PANS, recommended practices operate only on suggestive footing.[1220] States are encouraged, but not required, to comply with these practices. One might thus question whether they may serve as a more possible vessel for economic regulation. Yet, recommended practices serve the same objectives as standards and procedures. The listed subject matters in Article 38 of the Chicago Convention also apply to the recommended practices. Therefore, recommended practices are not suitable for economic regulation for airports, even though they have a non-binding effect.

7.1.2 Conventions and Protocols

In addition to SARPs and PANS, ICAO also functions to facilitate the adoption of conventions and protocols that can be recognised as a rulemaking result in a hard-law sense. The role that ICAO plays herein is intrinsically different from making SARPs and PANS. As Weber accurately puts it, the reason for this is that ICAO only coordinates and supports member states in adopting these protocols and conventions at diplomatic conferences.[1221] These member states are the sources of authority enabling these instruments.

Yet, protocols and conventions are also not suitable for airport charges regulation. Consistent with the entrenched dichotomy that economic matters should be addressed by more flexible and

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[1219] Recommended practices are not hard law. I include this section for a complete discussion of the two components in SARPs.

[1220] In the A36-13 resolution made at the 36th General Assembly, ICAO clarifies the definition of practices by specifying:

> […] any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognised as desirable in the interest of safety, regularity or efficiency of international air navigation and to which [c]ontracting [s]tates will endeavour to conform in accordance with the Convention.

ICAO, *Assembly Resolutions in Force*, Doc 9902 (2007) at II–3.

The word choices "desirable" and "endeavour to" illustrate the suggestive feature. However, standards are recognised as rules "necessary for the safety or regularity of international air navigation and to which [c]ontracting [s]tates will conform in accordance with the Convention". *Ibid*.

[1221] Weber, *supra* note 1210 at 51.

case-by-case solutions, the majority of contracting states at the 2008 CEANS Conference expressed resistance against mandatory measures.[1222] This can be seen by taking a look at the previously approved protocols and conventions, a big portion of which address safety and security issues.[1223] Although the remaining protocols and conventions aim to solve issues that usually occupy the private law sphere, for example, the instruments of the Warsaw system, the Montreal Convention on liability unification,[1224] and the Cape Town Convention system on financial leasing,[1225] they regulate some areas where unified rules are indispensable.[1226] Given that, the idea to have ICAO address economic regulatory issues by employing protocols and conventions is likely to be infeasible.

Is it realistic to prescribe additional provisions on airport charges in addition to Article 15 in the Chicago Convention? I see this choice as unlikely. From both legislative and political perspectives, the Chicago Convention has a Magna Carta role in the international air transport field, serving as a constitutional pillar. It thus should be regarded as offering full coverage to prevent any regulatory lacuna, rather than offering specific rules on certain aspects. Hence, the Chicago Convention will see an imbalanced framework if it is overloaded with rules on airport charges. Contracting states are also not likely to approve such amendments.

[1222] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276 at para 4.2.4.

[1223] For a list of these protocols and conventions, see ICAO, "Current Lists of Parties to Multilateral Air Law Treaties", online: <https://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx>.

[1224] The Warsaw System is championed by the Warsaw Convention. Despite its ambition to build unification on rules applicable to international civil air transport, it is widely criticised for being fragmented. Many protocols were signed afterwards to amend this convention and more protocols were added to amend preceding protocols. See generally Michael Milde, "ICAO Work on the Modernization of the Warsaw System" (1989) 14 Air L 193; R.I.R. Abeyratne, "Regulatory Management of the Warsaw System of Air Carrier Liability" (1997) 3:1 Journal of Air Transport Management 37–45.

The Montreal Convention made significant progress to truly contribute to the unification of rules for international air carriage by modernising the Warsaw system, particularly on the aspects of personal death and injury. See generally Pablo Mendes De Leon & Werner Eyskens, "The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System" (2000) 66 J Air L & Com 1155; Jagdish Chander Batra, "Modernization of the Warsaw System-Montreal 1999" (1999) 65 J Air L & Com 429.

[1225] The Convention on International Interests in Mobile Equipment in 2001 (Cape Town Convention) and its aircraft protocol are jointly drafted by ICAO and the International Institute for the Unification of Private Law (UNIDROIT). For an introduction, see ICAO, "Cape Town Convention and Protocol", online: <https://www.icao.int/sustainability/Pages/Capetown-Convention.aspx>.

[1226] The Warsaw System and the Montreal Convention deal with one of the most fundamental fields: the contract of air carriage and its related liability issues. The Cape Town Convention system solved the issue of conflict of laws over aircraft property rights. This instrument has achieved huge cost advantages to the financial leasing market for aircraft and relevant transactions are secured.

What about a simplified way to enrich Article 15 without adding additional Articles? This option also stands little chance of success. Member states of the Chicago Convention are very cautious about modifying it as it is the foundation of international air transport governance. Even though there is a need of change, economic matters are not unlikely to stand as a priority on the waiting list.[1227] As one study opines, economic regulation is an "ambitious experiment" that is most likely to take place at regional and trans-regional levels instead of at a global level via the Chicago Convention.[1228]

To sum up, the rulemaking path of ICAO in a hard law sense, i.e., standards, procedures, protocols, and conventions, is not feasible to regulate airport charges.

7.2 Exploring the Soft Law Approach

Soft law[1229] may not be appealing at first sight because of its lack of binding power.[1230] However, its effect should not be underestimated. In some regulatory regimes, such as international financial regulation, soft law can achieve a higher level of adherence than that assumed by traditional international law.[1231] Soft-law making would be cost-effective as it does not have to go through a stringent procedure as other binding rules do.[1232] Even the EU member states that show a high

[1227] Since the most recent modification of the Chicago Convention in 2006, it remains unchanged. As to the changes made in 2006, they relate mostly to certain fundamental aspects like civil aviation security. See e.g. *Chicago Convention*, *supra* note 213, arts 3 bis, 45, 48(a), 49(e). Article 3 bis sets out the non-use of weapons against civil aircraft in flight, and institutional issues of the ICAO; Article 45 discusses the permanent seat of the organization; Article 48 (a) is on the frequency of Assembly Sessions; Article 49(e) discusses the powers of the Assembly regarding annual budgets.

[1228] See Brian F Havel & Gabriel S Sanchez, "Do We Need a New Chicago Convention" (2011) 11 Issues Aviation L & Pol'y 7 at 22.

[1229] Soft law may be interpreted in various ways. For a discussion on its implications, see Weiss, *supra* note 889 at 51–53. Boyle describes soft law as "non-binding normatively worded instruments" adopted both by sovereign states and organizations in international relations. Typical forms of soft law in the United Nations sphere include "resolutions, conference declarations, appropriately worded resolutions and declarations adopted by the UN General Assembly or one of its subsidiary organs or specialised agencies, or codes of conduct, guidelines, and principles adopted by any of these UN organs". Alan Boyle, "The Choice of a Treaty: Hard Law Versus Soft Law" in *The Oxford Handbook of United Nations Treaties* (Oxford University Press, USA, 2019) 101 at 101.

[1230] Scholars' discussions on the effectiveness of soft law give special notice to its non-obligatory feature. See Chris Brummer, "Introduction: Key Theoretical Parameters of the Soft Law Debate: A Basic Overview" in *The Changing Landscape of Global Financial Governance and the Role of Soft Law* (Brill Nijhoff, 2015) xvii at xvii.

[1231] *Ibid* at xix.

[1232] Rules with a hard-law feature need to go through a parliament-voting procedure. Nevertheless, soft law making is more associated with executive power. See Weiss, *supra* note 889 at 55. Lowe also argues that one of the differences between hard and soft laws is the procedures, through which rules are formulated. See Vaughan Lowe, "Sustainable Development and Unsustainable Arguments" in *International Law and Sustainable Development* (Oxford: Oxford University Press, 1999) at 30.

cooperation level in legislation do not show an interest in establishing a common regulatory framework on airport charges.[1233] Given that observation, the soft law approach appears to be a feasible way. Some possible paths under the overarching soft-law concept are discussed below.

7.2.1 Policymaking

Policymaking is a significant arena and also a frequently adopted role for ICAO to play in airport economic regulation.[1234] Regarding competence, these policies are endorsed either by the Assembly or by the Council.[1235] Chapter 2 has discussed that in addition to Article 15 of the Chicago Convention, Doc 9082 serves as an important source of airport economic regulation. Some scholars reckon that "[t]he word 'policies' is a euphemism for 'guidance'".[1236] Vis-à-vis the lack of details of Article 15 in the Chicago Convention, Doc 9082 is considered an appropriate venue to make recommendations on economic matters.

As a matter of fact, ICAO consistently refers to Doc 9082 as the main battlefield to update recommended regulatory rules regarding airport economic regulation. As of 2012, this key material had already been updated to the ninth edition.[1237] Additionally, as previously discussed, some supplements to this policy also scrutinise the implementation of contracting states by publishing survey results regarding how states have adhered to ICAO's policies. These surveys may be viewed as a soft approach.[1238]

Although ICAO contracting states cannot be forced to incorporate Doc 9082 in their national laws, many states have expressed great interest in the proposal to mandate that all ICAO member states should follow these guidelines.[1239]

[1233] See European Commission, *supra* note 149, s 5.4(13).
[1234] ICAO has collected and documented its economic regulatory rules, in the airport sector and other air transport sectors. These rules had been updated to the fourth edition in 2017. See generally ICAO, *Policy and Guidance Material on the Economic Regulation of International Air Transport*, 4th ed, Doc 9587 (2017).
[1235] *Ibid*.
[1236] Ruwantissa Abeyratne, *Rulemaking in Air Transport: A Deconstructive Analysis* (Springer, 2016) at 194. On the same footing, ICAO also collectively calls these regulatory recommendations as "conclusions, decisions and guidance material". ICAO, *supra* note 931 at foreword (para 2).
[1237] For all versions of this material, see ICAO, "Doc 9082: ICAO's Policies on Charges for Airports and Air Navigation Services", online: <https://www.icao.int/publications/pages/publication.aspx?docnum=9082>.
[1238] In airport economic regulation, they show the capability of serving as an enforcement mechanism of Doc 9082, though they are not legally binding or enforceable.
[1239] Some states expressed their will to make Doc 9082 implementable when discussing this guidance material. See Abeyratne, *supra* note 1236 at 166.

To further interpret the guidelines in Doc 9082, ICAO has issued the Airport Economics Manual, which contains detailed directions to the interpretation of Doc 9082. It is argued that the form of a manual reflects the imbalance between the responsibility of ICAO to "foster the planning and development of international air transport"[1240] and its lack of authority to make binding norms.[1241]

Notably, the issuance of a manual is flexible and effective because it is generally considered to be within the remit of the executive branch of ICAO. The Airport Economics Manual is approved by the Secretary General, rather than the Council or the Assembly, and this fast-tracking process enables a manual to provide practical guidance explaining Doc 9082 in a timely way.[1242]

7.2.2 Model Laws

ICAO has experience in drafting model laws and model regulations, and can employ these instruments in economic regulation.[1243] Model laws in economic regulation can be used to implement the objectives of ICAO in Article 44 of the Chicago Convention.[1244]

ICAO may make model laws to govern airport economic regulation on the grounds of both necessity and of feasibility. This is necessary because guidelines on airport economic governance are drafted on a suggestive footing and in loose language that requires careful revision to be

[1240] *Chicago Convention*, *supra* note 213, art 44. This Article also stipulates objectives in the airport economic aspect: "(d) [m]eet the needs of the peoples of the world for safe, regular, efficient and economical air transport" and "(i) [p]romote generally the development of all aspects of international civil aeronautics)".
[1241] Abeyratne, *supra* note 1236 at 191.
[1242] The up-to-date version of this manual is the 2013 third edition. At the 40th General Assembly in 2019, ICAO prepared a preliminary fourth edition of the Airport Economics Manual. This new version brings changes to cope with the need of small and economically non-viable airports, perfects the previous edition of the manual by refining the contents, the need to recover costs and its intersection with the emerging adoption of unmanned aircraft, and facilitates states in better analysing airports' financial needs. See ICAO, *Report on Developments Regarding the Economic Aspects of Airports and Air Navigation Services*, A40-WP/18 (2019) at paras 2.2, 2.5, 2.6, 2.10.
[1243] One example is model regulations on unmanned aircraft systems (UAS), which have been made at the request of some states seeking a mature regulatory framework so that they can refer to in the domestic regulatory process. ICAO reviewed many national laws on UAS and provided the draft model regulations for general comments. See ICAO, "Introduction to Model UAS Regulations and Advisory Circulars", online: <https://www.icao.int/safety/UA/UAID/Pages/Model-UAS-Regulations.aspx>. Another example is the Aerodrome Certification Model Regulations, which mainly purport to codify norms on aerodrome certification. These model regulations align with ICAO Manual on Certification of Aerodromes (Doc 9774). See Cooperative Development of Operational Safety and Continuing Airworthiness Programme-South Asia, "Model Air Law and Regulation" at 2 online (pdf): <https://www.icao.int/safety/fsix/Library/Model%20Air%20Law%20and%20Regs%20--%20Revised.pdf#search=AERODROME%20CERTIFICATION%20MODEL%20REGULATIONS>.
[1244] The objective to meet passengers' needs for efficient and economic air transport fits this context. Economic regulation for airports aims at reasonable charges, ultimately benefiting passengers. See *Chicago Convention*, *supra* note 213, art 44(d).

restated in a language that is suitable to serve as law provisions. To reform the language into model laws can also facilitate implementation into national legislation. Accordingly, ICAO could reformulate a model law based on its policies and guidelines on airport economic issues, particularly Doc 9082. In consequence, such a model law would enable ICAO to refine these guidelines into the form of codified law to an extent that they can be more enforceable. This is feasible because existing national legislation offers blueprints for ICAO to refer to. An essential process in model-law making is to refer to existing national laws.[1245] Some jurisdictions have promulgated laws that govern the process to achieve reasonable airport tariffs. These existing instruments could be adopted by ICAO when it makes a model law.[1246]

When drafting model laws or regulations, context-setting is important. Whether privatisation or PPPs has been adopted will impact the profit-making incentive of an airport operator. When this incentive is strong enough, it might raise the concern of market power abuse, leading to overcharging. In response, this incentive calls for more direct regulatory intervention vis-à-vis a situation in which profit-making is not a major pursuit. In Canada, should the major NAS airports not be operated by not-for-profit entities, the currently-adopted loose regulation would need substantial revision.

I suggest a solution for ICAO to give special attention to such contextual differences. A model law can offer alternative regulatory options depending on whether an airport is operated in a privatisation or PPP mode. When the operation of an airport is left to a private for-profit actor, the model law accordingly suggests tighter regulation in comparison to other situations. That being said, traditional command-and-control regulation, especially when it is in the form of pre-approval or pre-determination of a tariff rate, is not the only and preferred way to draft model law.

To support the private law approach, a model law can fulfil the role of contract law and corporate governance in imposing regulatory effects. In the contract law sector, for example, a model law can implement the principle of non-discrimination by authorising a regulator to scrutinise the

[1245] See Steven L Schwarcz, "Sovereign Debt Restructuring: A Model-Law Approach" (2015) 6:2 Journal of Globalization and Development 343–385 at 13.

[1246] The EU Airport Charges Directive and the 2011 Regulations are two good examples. In the UK, the 2011 Regulations implement the EU Airport Charges Directive. A separate section regarding airport charges regulation incorporated in an integrated Act can also be referred to, for example, the sections on the licensing regime under the UK 2012 Act.

charge clauses in contracts that an airport concludes with different airlines. The regulator can supervise whether charge differences happen when the provided services are materially the same. Another instance goes to the attempt to mandate the enforcement of the proposed charge conditions of airport operators as contracts.[1247] Meanwhile, the model law can choose to enhance the protection of individual passengers. They are third parties that do not participate in the conclusion of contracts; thus, their interests may be at risk without regulatory monitoring.

In the corporate law sector, the charter of an airport operator company may suggest as mandatory the objective of making reasonable charge setting to airlines and passengers. A model law may also propose to ensure that some actors or departments in a company, e.g., the board of directors, the CEO, and the CFO should be held accountable to ensure a reasonable charge level by respecting the due process and implementing the basic principles as prescribed in Doc 9082.

7.2.3 Model Clauses: An Example of the "User Charges" Clause

Developing model clauses has been a frequently exercised function of ICAO since the 1970s.[1248] A prominent fruit of this process is ICAO's Template Air Services Agreements (TASAs), which the fifth World Air Transport Conference in 2003 reviewed and endorsed.[1249] Notably, TASAs address airport charges regulation using a "user charges" clause.

7.2.3.1 Advantages

In addition to restating Article 15 of the Chicago Convention, this "user charges" model clause exemplifies some critical features. First, the drafters leave two alternatives for states to choose from when concluding an air service agreement. This soft law approach gives flexibility to states to negotiate according to their domestic air transport development *status quo*. This model clause can thereby gain adherence as states are able to employ this clause in a way that suits them. If a

[1247] The licensing mode imposed on Gatwick Airport illustrates this feature. Although it is formally identified as *ex ante* and tight regulation, the licensing mode is largely built upon the commitments of Gatwick Airport. As these commitments are written as the Conditions of Use, which have a contractual nature, the particular licensing mode has a contractual regulation feature.

[1248] See ICAO Secretariat, *Template Air Services Agreements for Bilateral, Regional or Plurilateral Liberalization*, Working Paper to the Fifth World Transport Conference (ATConf/5-WP/17) (2003) at para 1.1. ICAO has been endeavouring to provide model clauses for states to adopt in their air transport agreements. *Ibid*.

[1249] This conference, under the theme "challenges and opportunities of liberalisation", zoomed in on economic issues of air transport. It reproduced two TASAs, one for bilateral uses and another for multilateral uses. See ICAO, *supra* note 1234 at appendix 1. For a review of the results of these two model agreements, see generally ICAO Secretariat, *supra* note 1248.

state chooses one option of the clause, it is not bound to adopt this clause as-is and can combine it with other elements as it deems necessary. Therefore, the adoption of a model clause can be innovative.

Second, the "user charges" clause respects the privatisation trend in the airport sector, thereby creating a better possibility to be adopted by states that intend to adopt a privatisation policy.

Third, this clause produces an effect to fill the lacuna that Article 15 of the Chicago Convention leaves. As debated in Chapter 2, Article 15 only talks about the non-discrimination requirement on a national treatment basis. It does not answer whether the most-favoured treatment dimension is included. The "user charges" model attempts to fill in this gap by adding "[i]n any event, any such user charges shall be assessed on the airlines of the other [p]arty on terms not less favourable than the most favourable terms available to any other airline at the time the charges are assessed".[1250] Although this model clause is not binding, its increasingly wide adoption may accelerate to shape a new dynamic with wide adherence to embrace the most-favoured treatment dimension into the concept of non-discrimination.

Further to the third feature on non-discrimination, this "user charges" clause may also be interpreted to have an effect to reinforce other principles of airport charges regulation as discussed in Chapter 3. Besides non-discrimination, the principles of cost-relatedness,[1251] consultation,[1252] and transparency[1253] are also in this clause. ICAO's policies reiterate that air services agreements should serve as the main venue to address these four principles.

Regarding consultation, this model clause includes domestic benefits, though it is incorporated as a clause of a bilateral or multilateral air service agreement. The model clause provides that a contracting state should encourage consultative activities between an airport authority and "airlines using the service and facilities provided by those charging authorities".[1254] First, if we plainly

[1250] ICAO Secretariat, *supra* note 1248 at A-31.
[1251] Paragraph 2 in the second option of this model clause requires a cost-recovery method to calculate rates of charges. This paragraph asks contracting parties to charge airport services and facilities not exceeding their full costs. Meanwhile, these costs include a reasonable return. See *Ibid* at A-31.
[1252] Both paragraph 2 in the first option and paragraph 3 in the second option encourage airport authorities to make a consultation with airline users. See *Ibid* at A-30, A-31.
[1253] Although transparency is not explicitly mentioned, the paragraphs on consultation specify information exchange, which denotes the aim of transparency.
[1254] ICAO Secretariat, *supra* note 1248 at A-30.

interpret this requirement as the text reads, all foreign and national airlines should be included in consultation. In consequence, this clause should mean that a contracting state should commit to consult its domestic airlines, too. Second, even if the clause were strictly defined so that the airlines referred to in this clause only mean foreign airlines, it may facilitate the covering of domestic airlines in the consultation process because domestic airlines may require equal treatment, particularly when domestic law imposes a non-discriminatory requirement.[1255] Third, for regions that have achieved all the nine air freedoms like the EU,[1256] the ninth freedom of air transport, namely the cabotage right, enables foreign airlines to operate domestic routes. A foreign airline can be regarded as a domestic airline in terms of the scope of air transport services it can provide.

7.2.3.2 Limitations

However, the limitations of ICAO's role in making model clauses, as suggested by this "user charges" clause, remains noticeable. Regarding the consultation requirement, the wording "[e]ach party shall encourage consultations on user charges" may minimise the implementation of consultations[1257] because to "encourage" consultation does not necessarily ensure that an effective consultation mechanism is in place. Unlike binding conventions, where the compromise and sometimes vague language are often selected so parties feel safe to sign them, model clauses, like model laws, are more ideal and do not face this real issue.[1258] As such, the mild choice of words in the consultation paragraph detracts from effectiveness if parties adopt this clause in an air services agreement.

Additionally, the paragraph on consultation does not consider airport users other than airlines. It only requires the consultation and information exchange to be completed between a competent charging authority (or an airport) and airlines (or their representative).[1259] Interests of individual passengers are yet to be represented.

[1255] If foreign airlines are engaged in consultation with an airport authority, domestic airlines should also have an equal consultation opportunity so that domestic airlines are not discriminated against vis-à-vis their foreign counterparts.
[1256] Guillaume Burghouwt & Jaap G de Wit, "In the Wake of Liberalisation: Long-Term Developments in the EU Air Transport Market" (2015) 43 Transport Policy 104–113 at 106.
[1257] ICAO Secretariat, *supra* note 1248 at A-30, A-31.
[1258] Unlike a convention, which requires strict consensus among states, a model law enables more flexibility and effectiveness and allows countries to "sidestep" opposition to certain issues, which are obstacles for a convention to enter into effect. See Schwarcz, *supra* note 1245 at 11.
[1259] See ICAO Secretariat, *supra* note 1248 at A-30.

To embrace the idea of contractual regulation, model clauses can also mean those contractual clauses in a model contract that will help in two additional circumstances. Although ICAO drafts the "user charges" clause in bilateral or multilateral agreements between states, model clauses can be incorporated into contracts. First, a state (or a charging authority) and an airport operator can sign an agreement to clarify rules of airport charges and ways of financing investments in infrastructure. Concession or PPP contracts involving private participation in airport operations happen to belong to this category. Second, a model clause or a contract also works when an airport signs a contract (terms of use) providing conditions of charges with airline users.

A single model clause is nevertheless not enough to set out all details. It is impractical to expect that airport charge matters can be extended to great details when it is limited in space.

7.2.4 Model Codes of Conduct

Model codes of conduct are another instrument that has a soft law feature to promote the private law approach as a surrogate for traditional regulation. These codes of conduct matter in a corporate governance sense for airport operator companies, especially when a state adopts a privatisation or PPP mode thereby allowing private companies to take over the control of airports.[1260]

Because these are not ICAO's core functions, they are best conducted in cooperation with other professional organizations. ICAO's collaborative opportunities with other organizations with be discussed later.

7.2.5 The Council's Power (Obligation) to Provide Assistance

Articles 69, 70, and 71 of the Chicago Convention authorise the Council of ICAO to assist contracting states in the improvement of air navigation facilities. Article 69 sets out:

[1260] In Doc 9082, ICAO advises:

> States should ensure the use of best practices of good corporate governance for airports and ANSPs, as applicable. Consideration should be given to: objectives and responsibilities of the entities; shareholders' rights; responsibilities of the board; role and accountability of management; relationship with interested parties; and disclosure of information.

ICAO, *supra* note 9, s I, para 9.

Although ICAO identified the correlation between corporate governance and the quality of airport charges regulation, it did not give more detailed recommendations.

> If the Council is of the opinion that the airports or other air navigation facilities […] of a contracting [s]tate are not reasonably adequate for the safe, regular, efficient, and economical operation of international air services, present or contemplated, the Council shall consult with the [s]tate directly concerned, and other [s]tates affected, with a view to finding means by which the situation may be remedied, and may make recommendations for that purpose […].[1261]

This provision sets out a ground for ICAO to help contracting states with the need to build a sound economic regulatory regime in the airport sector for two reasons. On the one hand, the subject matter, "airports", is included in the text.[1262] For another, among the listed objectives, "efficient and economical operation of international air services" supports the activity of "airport charges regulation".[1263] Although the word "shall" seems to establish an obligation for the Council,[1264] the decision to act depends on ICAO's assessment of a state's need. Therefore, ICAO's activity to assistance is more akin to a power than an obligation.

Article 70 clarifies Article 69 via rules on cost-allocation regarding the expenses resulting from assistance.[1265] Article 71 further permits the Council to "provide, man, maintain, and administer" airports or air navigation facilities for the purposes stipulated in Article 69.[1266]

7.2.6 Evaluating History as a Success Story

[1261] *Chicago Convention*, *supra* note 213, art 69.
[1262] Although this provision in the original text was entitled the "[i]mprovement of air navigation facilities", its scope should include airports. The phrase "navigation facilities" thus can be broadly interpreted to cover all facilities and services regarding airports and navigation.
[1263] According to the Oxford Dictionary of English, the word "efficient" means "achieving maximum productivity with minimum wasted effort or expense". Angus Stevenson, *Oxford dictionary of English*, 3rd ed (New York, NY: Oxford University Press, 2010) **sub verbo** "efficient". The word "economical" means "giving good value or return in relation to the money, time, or effort expended". *Ibid* **sub verbo** "economical". These objectives enable an airport to reduce the costs and consequently reduce the level of airport charges subject to the cost-relatedness principle.
If ICAO can bring a more effective regulatory approach that requires fewer costs, states that receive such assistance can be considered to have reached the "efficient and economical" operation goal.
[1264] For an example of scholars holding the opinion that this provision establishes an obligation, see Ruwantissa Abeyratne, *supra* note 216 at 120.
[1265] See *Chicago Convention*, *supra* note 213, art 70. Letting the assisted states bear the costs is not the only option. There could be an arrangement that the Council bears the costs.
[1266] See *Ibid*, art 71.

Some scholars observe that ICAO's authority on economic regulation is restricted.[1267] One reason is that primary resources are distributed to the governance of safety and security issues, which was the primary ground to establish ICAO.[1268] Nevertheless, endeavours to promote airport economic regulation in a soft-law arena have proved to be effective in influencing regional and national laws and regulations.

ICAO's policy-making efforts to reform EU legislation, as seen from the EU Airport Charges Directive, have been successful. Its "recital" part first explains that this Directive was established upon the recognition of basic principles advocated by ICAO's guidance materials.[1269] Notably, Section 17 of the recital incorporates ICAO's policies as references in terms of pre-funding issues, at least when a national legal framework is not available.[1270] The Directive then in the main text elaborates on these basic guidelines as recommended by ICAO.[1271] In 2019, ten years since the Directive came into effect, an EU working document recognised the causal link between ICAO's policies and the Directive.[1272] It also characterises these principles recommended by ICAO to be "non-mandatory" and "behaviour-related".[1273]

The Directive has proliferated in the single European market because it has been incorporated into the European Economic Area (EEA) Agreement. Consequently, Iceland, Norway, and Liechtenstein, which are not European member states, are bound by the Directive.[1274]

[1267] See PMJ Mendes de Leon, "International Civil Aviation Organization (ICAO)" in *The Max Planck Encyclopedias of International Law* (Oxford University Press, 2007) at para 4. As a result, transnational negotiation on regulatory affairs primarily occurs through bilateral and multilateral agreements. See *Ibid*.

[1268] See PMJ Mendes de Leon, *supra* note 1267 at para 24.

[1269] "[ICAO's Council] in 2004 adopted policies on airport charges that included, inter alia, the principles of cost-relatedness, non-discrimination and an independent mechanism for economic regulation of airports". *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136 at recital 9. The recital of the EU Airport Charges Directive addresses the consultation requirement and acknowledges that cost-relatedness is a core feature of charges in comparison with taxes. See *Ibid* at recitals 10, 11.

[1270] "In [m]ember [s]tates where pre-financing occurs, [m]ember [s]tates or airport managing bodies should refer to ICAO policies and/or establish their own safeguards". *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136 at recital 17.

[1271] See Chapter 2.7.

[1272] This working document observes that to tackle the objectives that are targeted in the EU Airport Charges Directive, it adopted the guidelines recommended in Doc 9082 as specific measures. The report also notes that these guidelines have been widely employed by the global air industry. See European Commission, *supra* note 149, s 2.6.

[1273] *Ibid*.

[1274] *Ibid*, s 2.1. Similarly, the EU Airport Charges Directive becomes effective to Switzerland via an air transport agreement with the EU. *Ibid* n 29.

As EU member states are obligated to translate the goals in the Directive as they deem appropriate via national legislation, the non-binding rules recommended by ICAO, through the Directive, were finally transposed into national legislation. The 2011 Regulations in the UK are an example.[1275]

In addition to the above discussions, ICAO's policies and recommendations have reshaped the pricing practice in the airport sector. The still-popular weight-based method, which is recommended by ICAO when calculating landing charges,[1276] is influenced by ICAO's cost-recovery principle. This is because in combination with the non-discrimination requirement, the cost-recovery principle forms a pricing strategy according to which the weight of aircraft stands as a key factor to assess a user's capability to pay for airport charges.[1277]

7.3 Convening Conference: A Brief Chronological Review

Convening conferences is an approach to make soft law by facilitating ICAO's activities in making policies and model clauses regarding airport regulation. From a constitutional and legal perspective, ICAO's Council is competent to convene world-level conferences that can represent the common positions of the majority of states. As a body consisting of 36 contracting states, which are elected by the Assembly, the Council speaks on behalf of the voices of all ICAO contracting states.[1278] Regarding the represented groups by the Council, members are elected from three groups that focus on different interests, leading to a widely representative Council.[1279] Considering this wide representation, the Council's decision to convene a conference can be regarded as a call from the international community. Article 54 of the Chicago Convention on the mandatory functions of the Council does not include convening conferences.[1280] Nevertheless, this article should not be read

[1275] See Chapter 4.1.1.5.
[1276] See ICAO, *supra* note 9, s II, para 4.
[1277] Ruwantissa I. R. Abeyratne, "Revenue and Investment Management of Privatized Airports and Air Navigation Services—A Regulatory Perspective" (2001) 7:4 Journal of Air Transport Management 217–230 at 219.
[1278] See *Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges*, *supra* note 136, art 50(a). The Council's membership has increased several times to the current thirty-six member states. This newly approved resolution in the thirty-ninth Assembly – to increase it from thirty-six states to forty states – had yet come into effect as of September 2021. See ICAO, *supra* note 930 at I–19, I–20.
[1279] The three groups are: (1) states of chief importance in air transport; (2) additional states that make the largest contribution to international air transport; (3) states that are key to covering all the major geographic areas of the world. See *Chicago Convention*, *supra* note 213, art 50(b).
[1280] See *Ibid*, art 54.

to restrict the Council's capability of convening conferences.[1281] In practice, meetings that cope with both safety and security and economic issues are convened by the Council.[1282]

7.3.1 The Conference on the Economics of Airports and Air Navigation Services in 2000

In 2000, the Conference on the Economics of Airports and Air Navigation Services (ANSConf 2000) was held in Montreal, Canada. This conference made many recommendations that required Doc 9082 to be modified accordingly. These changes covered a wide range of emerging elements in the airport commercial section, which are still illustrative now. They include the pre-funding of airport infrastructure, dispute resolution mechanisms for airport charge decisions, independent regulation of airports, and best commercial practices, etc.[1283] To deal with these recommendations, the Council finally issued the seventh edition of Doc 9082 in 2004.[1284] The executive branch of ICAO – the Secretariat – also attempted to implement a requirement of this conference by collecting and evaluating national information regarding their national adherence to ICAO's policies on airport economic regulation.[1285]

7.3.2 The Fifth Worldwide Air Transport Conference in 2003

Three years after the 2000 Conference on the Economics of Airports and Air Navigation Services, the Fifth Worldwide Air Transport Conference was held. Although this conference was not a

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[1281] First, this article only lists a few mandatory constitutional functions. As the Chicago Convention does not forbid convening conferences, the Council should be allowed to do so. Second, convening conferences is for the benefit of air transport development and this goal aligns with the objective of the Chicago Convention.

[1282] In terms of air navigation meetings with the primary objective of making new or amending existing SARPs and PANS, the Council makes decisions about convening them. See ICAO, *Directives to Divisional-type Air Navigation Meetings and Rules of Procedure for Their Conduct*, Doc 8143-AN/873/3 (1983), part I, para 4.1. See also Weber, *supra* note 1210 at 44. The significant 2008 CEANS Conference serves as an example of economic-focused meetings. It was convened by the Council when it realised rapid changes in airport operation and air navigation services since the last conference of the same nature in 2000. See ICAO Secretariat, *Conference Origins and Organizational Arrangements*, Working Paper No 2 for the Conference on the Economics of Airports and Air Navigation Services (CEANS-WP/2) (2008) at para 1.1. The Fifth Worldwide Air Transport Conference as a follow-up to its previous series also took place due to the planning of the Council as early as 2001. See ICAO Secretariat, *Conference Origins and Organizational Arrangements*, Working Paper No 2 to the Fifth World Transport Conference (ATConf/5-WP/2) (2003) at paras 1.1-1.2.

[1283] See ICAO Secretariat, *Fourth Meeting of the ALLPIRG/Advisory Group*, ALLPIRG/4-WP/26 (2001) at para 3.1.

[1284] See ICAO, *ICAO's Policies on Taxation in the Field of International Air Services*, 7th ed, Doc 9082/7 (2004) at foreword, para 1.

[1285] See generally ICAO, *Supplement No 1 to Doc 9082: ICAO's Policies on Charges for Airports and Air Navigation Services (Edition 2004)* (2004).

follow-up of the 2000 version, which particularly focused on the air infrastructure sector, it nevertheless was convened under the topic of liberalisation and thus became relevant to airport economic regulation. One main contribution of this conference was the provision of two TASAs, which are further incorporated in the Policy and Guidance Material on the Economic Regulation of International Air Transport (Doc 9587).[1286] This chapter has previously discussed the "user charges" clause in the TASAs. This conference contributed to the model-clause making of ICAO.

7.3.3 The 2008 CEANS Conference

Five years later, in 2008, the Council once again noticed the rise of new challenges. Autonomous entities that provided airport facilities and services were growing; airport commercialisation and privatisation became prevalent; and the violation of the non-discrimination requirement in Article 15 of the Chicago Convention seemed more possible against a liberalisation background.[1287] To cope with these changes, the Council convened the 2008 CEANS conference. The final report of this conference addressed the four core principles, namely, "non-discrimination, cost-relatedness, transparency and consultation" and urged states to incorporate them in legislative acts, regulations, policies, and agreements.[1288] It is interesting to note that these four principles were only confirmed to be addressed together as the "four key principles" in the ninth edition of Doc 9082 after the 2008 CEANS conference. Prima facie, it is this conference that initially entrenched the four principles, which were later elaborated on in other ICAO's policies and manuals. As such, through the activity of clarifying core principles in airport charges regulation, the 2008 CEANS consolidated the contents in soft law.

Given the fact that no economic conference that focuses on airport and air navigation services has been held since the 2008 CEANS, the soft-law making process may arguably be slowed down or even suspended due to a lack of these conferences to serve as catalysts. From this perspective, ICAO could make efforts by requesting the Council to convene such high-level conferences to deal with issues that newly emerged after the 2008 CEANS Conference. Such new issues may include a revisiting of the subsidy (state-aid) rules, a possible waiver of airport rents or concession fees, and ways to address emergencies such as the COVID-19 pandemic through contractual

[1286] See Chapter 7.2.3.
[1287] See ICAO Secretariat, *supra* note 1282 at para 1.1.
[1288] Conference on the Economics of Airports and Air Navigation Services, *supra* note 276 at para 4.3.1.

clauses or sound corporate governing mechanisms.[1289] Notwithstanding the numerous cancellations of in-person meetings worldwide due to the pandemic, the agenda to convene conferences should not be hindered. New online technologies that permit remote discussions and information exchanges ensure that conferences can proceed.

7.4 A Collaborative Approach to the Making of Soft Law

7.4.1 Vertical Cooperation with IATA and the ACI as Adversaries

According to past publications by IATA and the ACI, their opinions as to whether airport charges should be regulated are contrary to each other. Regarding whether the airport industry has market power, which is a preliminary question before making regulation decisions, they do not stand shoulder to shoulder: On the one hand, the ACI holds the position that airports do not have market power and the competition level is increasing, with its highlighted talking point being the low-cost carriers as emerging game-changers to bolster competition.[1290] On the other hand, with its focus on hub airports, IATA alleges that the significant market power of airports remains a real concern, and its abuse may lead to overcharging.[1291] Another controversy occurs with respect to the need to regulate. Following its standpoint on recognising the market power of airports, the ACI generally suggests that regulatory measures are redundant, and governments can and should reduce existing regulations.[1292] By contrast, IATA endorses strong regulation.[1293] Their opposition can also be seen in terms of their positions on the level of airport charges. The ACI reckons that the current tariff level is reasonable, and the airports that are gradually decreasing charges are almost as many as those increasing them;[1294] IATA, as is not surprising, holds the opposite opinion.[1295]

These controversies reveal opposing interests between these two groups. Similar arguments will occur between organisations that represent airlines and airports on other levels. The ACI and IATA

[1289] For a discussion of possible measures to help airports, see generally Airports Council International, *Policy Brief: COVID-19: Relief Measures to Ensure the Survival of the Airport Industry* (Montreal, Canada, 2020).
[1290] See Airports Council International, *Airport Competition*, Working Paper No 90 to the Sixth World Transport Conference (ATConf/6-WP/90) (2013) at para 7.4.
[1291] See IATA, "Stronger Regulation of Powerful Airports Needed to Protect Consumers", (15 July 2019), online: <https://www.iata.org/en/pressroom/pr/2019-07-15-01/>.
[1292] See Airports Council International, *supra* note 1290 at para 8.1.
[1293] See IATA, *supra* note 1291.
[1294] See ACI Europe, *supra* note 34 at 29.
[1295] See IATA, "Fact Sheet: Aviation Charges, Fees and Taxes", (November 2020), online (pdf): <https://www.iata.org/en/iata-repository/pressroom/fact-sheets/fact-sheet---charges-fuel-fees-and-taxes/>.

represent two adversarial groups whose interests are not always consistent in nature. Despite these disparities, the ACI and IATA still have common interests and have managed to collaborate in many circumstances.[1296] Nevertheless, their public statements indicate that their basic standpoints are hard to completely reconcile, which makes it impractical to expect a reconciliation of their economic interests without any third-party intervention.

It could be helpful to appoint a neutral third party to hear opinions from both sides, evaluate their controversial arguments and make unbiased decisions. In this situation, the third party is akin to judges in a trial, who make their judgements by reviewing the evidence of both parties.

ICAO has the competence to serve as such a third party to collaborate with IATA and the ACI regarding soft-law making. ICAO occupies a position to oversee the interests of all stakeholders in air transport and can consult both the ACI and IATA before making policies, guidelines, model laws, and clauses, etc. This consultation process includes necessary information exchange by which the ACI and IATA can submit reports and evidence to prove their arguments. Given that both IATA and the ACI have adequate expertise, ICAO can make its decisions in an informed way. ICAO can also reduce the burden of collecting information when it substantially "outsources" this duty to IATA and the ACI, who are better equipped to do this.

ICAO showed its potential to serve as a third party at the 2008 CEANS Conference, which was a platform for the ACI and IATA to input recommendations on revising certain paragraphs in Doc 9082.[1297] Nevertheless, both parties only expressed their ideas using this platform under the auspices of ICAO without necessarily cooperating on certain controversial issues. To achieve closer collaboration, ICAO may consult both parties more frequently. Meanwhile, to be neutral, whenever it consults one party's position, it should also hear from another one to be impartially informed. Moreover, a consultation can still be agenda-triggered. Whenever ICAO needs to make policies on airport economic matters, it may activate the consultation mechanism to ask for IATA and the ACI's support.

[1296] For example, in front of the COVID-19 pandemic, IATA and the ACI jointly published guidelines on restarting the aviation industry, which will bring benefits to airlines and airports. See IATA, "ACI and IATA Outline Roadmap for Aviation Industry Restart", (20 May 2020), online: <https://www.iata.org/en/pressroom/pr/2020-05-20-01/>.
[1297] See Conference on the Economics of Airports and Air Navigation Services, *supra* note 276.

7.4.2 The Absence of Representation for Individual Passengers

Even though the economic standpoints of airports and airlines have been respectively represented through their associations, i.e., the ACI and IATA, passengers are not present.[1298] IATA is not able to properly represent passengers.[1299] However, to make reasonable airport charges, the voice of passengers should be heard.

From the perspectives of IATA and the ACI, passengers are not considered as a group in the consultation process. This fact demonstrates the need to introduce a delegate that can effectively represent passengers. At the 2008 CEANS Conference, the ACI and IATA both expressed the same suggestion to revise the consultation section in Doc 9082. Yet, neither of them suggested that passengers should be involved. The ACI persuaded that a consultation process should be limited to only conduct between the airport sector and airlines, though it acknowledges that participating parties in consultation are responsible for taking care of current and future passengers and other end users' interests.[1300]

Interestingly, the ACI emphasised that consultation differs from agreement negotiation, indicating that airports have the autonomy to set charges at their discretion in the face of disagreement.[1301] I think that these proposals are a strategic and protective approach to avoid the responsibility of the airport operators to consider stakeholder groups' views other than airlines. However, if passengers do not have a say, the designation of the consultation process is hardly in line with ACI's acknowledgement of accountability to passengers' interests.

IATA urged contracting states to endorse ICAO's policies on consultation by approaches like, *inter alia*, establishing an independent regulator in each contracting state.[1302] Regarding the scope of consultation parties, unlike the ACI, IATA did not attempt to define the scope of consulted

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[1298] Charles E Smith, "Air Transportation Taxation: The Case for Reform" (2010) 75 J Air L & Com 915 at 916.

[1299] Notwithstanding the overlapping interests between airlines and passengers, airlines may not necessarily shall all interests with passengers, or pass the benefits they get on to them. So, they may not be recognised as proper representatives of individual passengers. More importantly, some existing pre-funding charges, e.g., Passenger Facility Charges (PFCs), interchangeably Airport Improvement Fees (AIFs), are directly imposed on passengers. Consultation with passengers or passenger associations becomes meaningful in this context.

[1300] See Airports Council International, *Consultation with Users*, Working Paper No 29 for the Conference on the Economics of Airports and Air Navigation Services (CEANS-WP/29) (2008) at 1.

[1301] *Ibid* at para 2.3.

[1302] See IATA, *Consultation with Users*, Working Paper No 47 for the Conference on the Economics of Airports and Air Navigation Services (CEANS-WP/47) (2008) at para 2.4.

parties, and generally use the word "users". That said, it interchangeably used "airlines and their associations" and "users".[1303] It also failed to point out the need to cover passengers in consultation. Besides, in contrast to the ACI's view on its autonomy to impose charges regardless of consultation outcomes, IATA has insisted that the party with authority to charge users should not make charge decisions when a consultation process fails to reach an agreement.[1304]

Neither IATA nor the ACI has spoken directly on behalf of passengers regarding their position in consultation. They do not have incentives to do so as they are not established to represent the interests of passengers. In this situation, passengers as a major stakeholder in airport charges regulation should regularly be represented by an association.[1305]

Passengers can be labelled as consumers and thus benefit under the legal category that purports to protect consumers. ICAO[1306] and many contracting states[1307] recognise the role of passengers as consumers. However, current discussions on the protection of passengers from the consumer side are around issues relating to private law. The intersection between regulatory measures and passenger participation has yet to be taken seriously.[1308] To enhance passenger representation in the process of ICAO's soft law making, it may invite a consumer association on behalf of

[1303] *Ibid* at paras 2.1-2.2.
[1304] See *Ibid* at para 2.8.
[1305] The importance of introducing passengers in consultations can be illustrated vis-à-vis the transparency concern of the price of a ticket. Some scholars argue that some supplementary components of the total fare, e.g., airport charges, should be given prominence so that advertisements will not mislead potential passengers. See Francesco Rossi Dal Pozzo, *EU Legal Framework for Safeguarding Air Passenger Rights* (Cham: Springer, 2015) at 122–123 publisher: Springer. ICAO endorses a similar recommendation regarding consumer protection, requiring that passengers should have "clear and transparent information" about the total price that includes airport charges. ICAO, "ICAO Core Principles on Consumer Protection" at 2, online (pdf): <https://www.icao.int/sustainability/Documents/ConsumerProtection/CorePrinciplesBrochure.pdf>. In addition to passengers' right to know what they pay, participation in the actual decision-making process, for example, consultation, is also important.
[1306] In 2015, ICAO's Council endorsed a series of core principles on consumer protection, aiming that contracting states consult it when developing their national laws. Under these principles, ICAO tries to fit passenger rights into a consumer protection framework. See ICAO, *supra* note 1305.
[1307] For the regulatory practices and the evaluation of their effectiveness in some contracting states, see generally ICAO Secretariat, *Effectiveness of Consumer Protection Regulations*, Supplementary Working Paper to the Sixth World Transport Conference (ATConf/6-IP/1) (2013).
[1308] As discussed previously, many mechanisms only identify airlines as airport users and only include them in the consultation process.

passengers to take part in consultations. This would be particularly meaningful considering that individual participation in the rulemaking process can be ineffective.[1309]

7.4.3 Lateral Cooperation with the OECD and UNCTAD

As discussed previously, though competent in promoting economic regulation, ICAO has dedicated a majority of its resources to issues relating to safety and security. For optimal outcomes in economic regulation, a feasible solution is to cooperate with other organisations that have mature experience and rich expertise in economic regulation. The expertise in the air transport sector of ICAO and the economic intellect invested by its potential co-operative organisations will combine and produce synergy.

The Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) are two economy-specific organisations that could collaborate with ICAO in promoting policies, guidelines, and model instruments on airport charges regulation.[1310]

7.4.3.1 Competition Law Issues

Both organisations can collaborate with ICAO by making soft law instruments addressing competition. States can adopt these instruments to improve national competition laws. Competition law issues are worth being considered as an important agenda item under the airport regulation topic because they are deeply interwoven with many traditional aspects of regulation.[1311] To make collaborative instruments more tailored for the airport sector, these organisations could work on guidelines and model laws that focus especially on airport competition issues.

[1309] To introduce individual passengers, three questions should be answered: how to choose passengers; how to ensure that passengers have enough expertise and negotiating power as big associations; and how to ensure that the selected passengers have incentives to speak for the interests of the larger group.

[1310] The OECD has three main objectives: "sustainable economic growth", "sound economic expansion", and the expansion of multilateral "world trade". *Convention on the Organisation for Economic Co-operation and Development*, 14 December 1960, 888 UNTS 179 art 1 (entered into force 30 September 1961). UNCTAD has the goal of improving the economy with emphasis on globalisation, developing states, and cooperation with governments. See UNCTAD, "About UNCTAD", online: <https://unctad.org/en/Pages/aboutus.aspx>.

[1311] Prior to regulation, significant market power may trigger regulatory measures, particularly, *ex ante* measures. See Niamh Dunne, *Competition Law and Economic Regulation* (Cambridge University Press, 2015) at 3. During regulation, a general competition authority and sector-specific regulator may become concurrent regulators and concerns about power distribution arise. See generally *Ibid* at 187–262, 264–279. Regarding the regulated parties' complaints against regulatory decisions, the competition agency is usually designed as the appellate body to hear complaints, for example, the UK.

Both the OECD and UNCTAD are proper actors to deal with issues in the realm of competition law because these issues directly relate to economic development and have profound implications for the international trade and investment environment, which are the "fiefs" of both organisations. The OECD and UNCTAD have the experience to nurture soft-law instruments on competition issues. UNCTAD[1312] has elaborated the Model Law on Competition, which consists of two parts. The first part with substantive elements in competition law has remained unchanged, while the second part provides detailed commentaries to the former part; this second part is regularly updated. Though the model law character partly limits the achievement of uniform implementation, it serves as a significant pattern for states to make new or revise their own laws.[1313]

The OECD constantly conducts competition analysis on a national basis.[1314] Additionally, it also makes competition-related recommendations and good practices. These tools also have a feature of soft law.[1315] Moreover, it is interesting to note that the OECD highlights implementation by developing the Competition Assessment Toolkit, aiming to achieve regulatory objectives by using the lightest necessary regulation.[1316]

ICAO has already regarded the OECD and UNCTAD as important partners in making competition policies via "multilateral cooperation".[1317] Despite that, it has not actively cooperated with the OECD and UNCTAD to jointly develop rules to tackle airport competition and regulation issues. Closer and more integrated collaboration among them is indispensable in order to come up with more targeted solutions.

7.4.3.2 Corporate Governance

Both the OECD and UNCTAD are well established with resources related to corporate governance. Both organisations can cooperate with ICAO in setting out rules on good governance of airport

[1312] For UNCTAD's expertise in competition law and policy making, see Marek Martyniszyn, "III. 62 The Role of UNCTAD in Competition Law and Policy" in *Elgar Encyclopedia of International Economic Law* (Edward Elgar Publishing, 2017) 489 at 489–490.
[1313] See *Ibid* at 490.
[1314] For the country reviews, see OECD, "Country Reviews of Competition Policy Frameworks", online: <http://www.oecd.org/regreform/sectors/countryreviewsofcompetitionpolicyframeworks.htm>.
[1315] For these instruments, see OECD, "Recommendations and Best Practices on Competition Law and Policy", online: <http://www.oecd.org/daf/competition/recommendations.htm>.
[1316] See OECD, "Competition Assessment Toolkit", online: <http://www.oecd.org/daf/competition/assessment-toolkit.htm>.
[1317] ICAO, "Cooperation in the Field of Competition", online: <https://www.icao.int/sustainability/Compendium/Pages/2-1-Cooperation-in-the-field-of-Competition.aspx>.

operators. This specific collaborative way undergirds the suggested private law approach to the regulation of airport charges. Various forms of these rules encompass guidelines, good practices, and model codes of conduct to be followed by an airport operator entity.

The OECD is suitable to assume the task of making soft law in the field of corporate governance considering its wide representation of global economies. One might challenge that view on the ground that the original purpose of the OECD was to rebuild the Western European economy, which is too narrow to represent countries from different regions of the world. Accordingly, recommendations made by the OECD may not be accepted by the developing countries.[1318] However, the OECD has re-identified itself as a representative of the global economy, global governance, and a think tank with economic expertise.[1319] Such an evolution, marked by the OECD's increasingly adopted "soft power",[1320] illustrates its capability to tactically choose corporate governance as a path to improving global economic development.

The OECD has developed many instruments on corporate governance, ranging from general principles to tailored guidelines for state-owned companies.[1321] Moreover, it has issued recommendations for important corporate bodies, such as a company's board.[1322] It has also conducted state- and region-specific reports in the previously-mentioned or separate instruments.[1323]

[1318] The OECD was established to implement the Marshall Plan, which is also known as the European Recovery Program, with the purpose of rebuilding the Western European economy devastated by World War II. Following the membership of Japan, Australia, and New Zealand, the OECD was recognised as a club for the rich transatlantic economies. See Matthieu Leimgruber & Matthias Schmelzer, "Introduction: Writing Histories of the OECD" in *The OECD and the International Political Economy Since 1948* (Springer, 2017) 1 at 1–2.

[1319] See Matthieu Leimgruber & Matthias Schmelzer, "From the Marshall Plan to Global Governance: Historical Transformations of the OEEC/OECD, 1948 to Present" in *The OECD and the International Political Economy Since 1948* (Springer, 2017) 23 at 45–46, 48. See also Leimgruber & Schmelzer, *supra* note 1318 at 2. For a literature review of studies of the OECD and its reforms, see generally Judith Clifton & Daniel Díaz-Fuentes, "The OECD and Phases in the International Political Economy, 1961–2011" (2011) 18:5 Review of International Political Economy 552–569.

[1320] Leimgruber & Schmelzer, *supra* note 1319 at 24.

[1321] For general principles on corporate governance, see OECD, *supra* note 1049. For state-owned companies, see OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (2015). Its implementation report is at OECD, *Implementing the OECD Guidelines on Corporate Governance of State-Owned Enterprises: Review of Recent Developments* (2020).

[1322] OECD, *Duties and Responsibilities of Boards in Company Groups* (2020).

[1323] For reports available at the OECD's website, see OECD, "Corporate Governance", online: <http://www.oecd.org/corporate/>.

More and more countries are beginning to adopt light regulation by allocating the regulatory power to set the rates of airport charges to corporate governance. In response, robust corporate governance becomes increasingly significant to achieve this end.

Airport operation by state-owned companies is still widely adopted, albeit with the global proliferation of airport privatisation. The OECD Guidelines on Corporate Governance of state-Owned Enterprises will shed light on these airports, which still have a profit-making objective and autonomy to determine charges, though they are not privatised.[1324]

Assuming that the OECD and ICAO jointly make a soft law instrument on airport corporate governance, this will be helpful to an airport operator and the government or a state's legislature. For an airport operator, this soft law instrument shows good practices to draw on when managing an airport entity. For a state, it serves as a blueprint when the state considers drafting corporate legislation in the airport sector. The existing instruments created by the OECD on corporate governance are, as previously discussed, a valuable intellectual foundation that the OECD and ICAO can rely on when designing airport-specific instruments on corporate governance.

The function of UNCTAD, in terms of corporate governance, overlaps with that of the OECD.[1325] That said, UNCTAD still has an advantage thanks to its legal status as a permanent intergovernmental body under the UN system. As of July 2019, UNCTAD had 195 member states.[1326] With the endorsement of almost all economies worldwide, UNCTAD's policies, recommendations, and other model rules may see smooth implantation by states.

7.4.3.3 Contractual Regulation

Along with the increasing number of airports that are operated under a privatisation or PPP mode, the OECD and UNCTAD may cooperate with ICAO in jointly making model concessions, PPP agreements, and other agreements for privatising an airport to be signed between the government

[1324] The OECD Guidelines on Corporate Governance of State-Owned Enterprises offer suggestions in many areas that can shape an accountable governance structure – Chapter VI facilitates the transparency principle in airport charges regulation. Chapter VII discusses board responsibilities for state-owned companies. When the decision-maker regarding airport charges is another body, say, the CEO or the CFO, this body should assume responsibility regarding reasonable charge setting.

[1325] UNCTAD conducted the 2006 Guidance on Good Practices in Corporate Governance by drawing on existing works on corporate governance from other organisations like the OECD. See UNCTAD, *Guidance on Good Practices in Corporate Governance Disclosure*, UNCTAD/ITE/TEB/2006/3 (2006) at 1.

[1326] See UNCTAD, Trade and Development Board, *Membership of UNCTAD and Membership of the Trade and Development Board*, TD/B/INF.245 (2019).

and a private airport operator. A well-crafted agreement can stand as good "regulation" to achieve reasonable charges. Hence, these agreements can be restatements, specifications, or even surrogates for laws and regulations on airport charges. Although ICAO is aware of the importance of these agreements in the context of privatisation, it lacks the expertise and time to elaborate on detailed concession templates. Accordingly, the OECD the UNCTAD should come into play.

Both the OECD and UNCTAD have developed policies and guidelines on PPP and privatisation projects. Again, similar to the logic for corporate governance, a future step could be to develop a soft-law instrument in the airport sector. Regarding UNCTAD, taking advantage of its UN-subsidiary status, member states may be more cooperative at the information collection phase. For example, countries may be willing to provide agreements of passing projects that are otherwise hard to access. These agreement texts are important bedrocks because the development of model clauses or template agreements can be built on a basis more informed by actual practice.[1327]

7.5 Conclusion

As the major forum of international air transport governance, ICAO should play a bigger part in facilitating airport economic regulation. Although hard law ensures compulsory compliance, it cannot contribute to airport economic regulation because hard-law tools are *de facto* "privileges" reserved for safety and security governance. Accordingly, they are not the best niche for airport charges regulation.

By contrast, soft law may otherwise serve as an effective solution, though not legally binding. The success story that ICAO's soft law instruments have served as important references for EU legislation and the practice of airport charge setting means that this soft-law approach is feasible. Policymaking is the main battlefield to employ soft power. Empirically, ICAO has been developing guiding materials to elaborate on the vague contours provided in Article 15 of the Chicago Convention. These instruments generate regulations on airport charges. Surveys on state implementation serve as a soft monitoring mechanism.

More importantly, soft-law instruments can contribute to the private law approach of airport charges regulation. Model laws can be adopted to mandate a regulator's authorities in monitoring

[1327] Existing legal instruments serve as important references when making model laws and policies. UNCTAD's Model Law on Competition is based on new developments in national competition legislation. See UNCTAD, *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva, 2004) at 5.

the regulatory process by contracts and corporate governance. Model clauses can be drawn on when contracts are concluded between an airport and an airline or between a state and an airport. Model codes of conduct can improve the corporate governance of an airport operator. Although ICAO's functions of policymaking and conference convening do not directly relate to the adoption of a private law approach, they can be adopted for this purpose. For example, ICAO can consolidate the basic principles of airport charges regulation, which are important in regulation by private law instruments, in its guiding materials; ICAO's Council could provide assistance for a better practice of a private law approach of airport regulation to states.

ICAO can collaboratively work with other industrial institutions or international organisations to implement the soft-law developing process. ICAO can deeply cooperate with IATA and the ACI by performing as a neutral mediator to make decisions based on the other two bodies' claims. Passengers should be represented before ICAO, preferably by a consumer association.

In terms of lateral cooperation, the OECD and UNCTAD can offer expertise on economic regulation. This collaboration can facilitate a private law approach for airport charges regulation. Potentially, both organisations can establish robust corporate governance of airport companies with implications on improving the charge-setting process and developing agreements that can serve as surrogates, to any extent, to traditional regulation.

Conclusion

The first three chapters of this thesis answered one question: why has the traditional regulation of airport charges become increasingly ineffective in the changing dynamic of air transport. First of all, to distinguish the airports that should be subject to regulation from those that should not, a traditional method is to evaluate an airport's market power, and this was the focus of Chapter 1. I found that the traditional paradigm to evaluate market power has downsides, especially in the field of airport regulation. Increasing competition between airports makes "natural monopolies" no longer a one-size-fits-all label and, accordingly, makes an accurate evaluation of market power more complicated. But these competition factors are not complete enough to set airports free from any regulatory measures, still less their public good characteristic.

The measures that Australia, the EU, and Ireland, as an example under the EU, have adopted to evaluate the market power of airports all have limits. Australia evaluated the level of "competitive constrictions". The monitoring regime is short in terms of both deterrence and effectiveness. Harm will already have happened before triggering more stringent regulation. In the EU, its member states have raised many concerns regarding the reasonableness of the two thresholds identifying airports to be regulated under the EU Airport Charges Directive. One threshold, namely the biggest airport in each member state, leads to the disproportionate application of this Directive because some neighbouring countries' airports serve more passengers but escape the remit of this Directive. The second "five-million-passenger" threshold only serves as a "crude proxy" that lacks rationale. Although the Irish approach by conducting a detailed market power assessment appears more justifiable, it is not cost-effective and may be hard to use by other countries due to Ireland's unique geography.

The second chapter explored the framework of airport charges regulations at an international level. This framework shows a three-tier structure. Article 15 of the Chicago Convention, which is the most important rule, is the first tier. Although this provision stipulates the requirement of non-discrimination, the MFN dimension of non-discrimination is missing therefrom. Another issue is associated with the last sentence of Article 15, which fails to mention if taxes are included in

the “fees, dues or other charges” that are prohibited for the mere entry into or departure from the airspace of a contracting state when no airport services are provided. As a result, disputes have arisen regarding whether a tax is legitimate in terms of Article 15, and different jurisdictions interpret this provision in contradictory ways. ICAO’s Policies on Charges for Airports and Air Navigation Services (Doc 9082) is the second tier. It provides important policy guidelines for the regulation of airports. The CEANS and the Airport Economics Manual are in the third tier. Both instruments further elaborate on significant aspects of Doc 9082. However, none of the instruments in the second and the third tiers is binding.

Four principles on regulating airport charges can be summarised from this legal framework, namely, non-discrimination, consultation, transparency, and cost-relatedness. These principles are important because they serve as standards in the regulatory process. This chapter also found that the EU Airport Charges Directive is equivalent to a restatement of the four principles.

Good regulation calls for a good regulator. Hence, Chapter 3 examined the character of independence, which has been widely discussed as a key attribute in establishing a good regulator. This chapter concluded that a good regulator in airport economic matters is hard to achieve. From a practical and institutional point of view, IATA, on behalf of airlines, and the ACI, on behalf of airports, cannot reach agreement on this issue, even though the establishment of an independent regulator would benefit airports. Independence constitutes two dimensions: independence from political power and independence from the regulated parties. Independence can also be described by two aspects, namely, personnel and financial independence. The independent supervisory authorities (ISA) in the member states of the EU may lack political and financial independence, and they may have problems with successful implementation. Yet, notably, the Irish effort in institutionalising an independent regulator has been relatively successful.

Considering these drawbacks to traditional regulation, which usually employs public authority, this thesis then examined the feasibility of engaging the power of private parties (regulated parties) as a more strategic regulatory approach. I focused on how self-regulation, or private ordering, can be used in the regulatory process of setting airport charges. I described this as “a private law approach”. Before systematically discussing what this approach entails in Chapter 5, Chapter 4 conducted three case studies of the UK, Canada, and India to explore how these jurisdictions have allowed private parties to engage in regulation. I found that these countries have all done so

although they have applied this approach implicitly without linking it to the label "a private law approach".

The UK has imposed a licensing regime on airports that have met all three steps of a market power test. Regulations on airport charges have been stipulated as pricing control conditions in licences issued to airports. This licensing regime seems to indicate that the British approach to airport charges regulation has remained traditional because it embraced public authority. However, closer scrutiny of Heathrow and Gatwick airports, which are currently under the licensing regime, suggested that this regime strongly respects private autonomy instead. The licence imposed on Heathrow Airport allows it to sign contracts with airlines to determine airport charges, subject only to the regulatory restrictions in the licence. Notably, the requirement of non-discrimination between signatory and non-signatory parties aligns with one of the four basic principles discussed in Chapter 2. In the case of Gatwick Airport, private ordering was given even more space because the licence incorporates the Conditions of Use as pricing control conditions. These Conditions of Use had been used as clauses signed in contracts between Gatwick and its airport users before they were incorporated as licence conditions. This direct recognition of private ordering by a licence shows the support for a private law approach in the licensing regime of the UK.

The case study in Canada particularly demonstrates how corporate governance can be effectively adopted as a regulatory measure. First, regarding the incorporation of an airport operator, Canada's major airports have been incorporated as not-for-profit corporations. This characteristic ensures that an airport will not aim to maximise profits, but to serve the community. Second, the board members of an airport corporation are drawn from a wide range of interest groups, helping to reach decisions about operations that represent the interests of diverse stakeholders, including airlines. Moreover, ground leases signed between an airport and Canada's government also function as contractual regulations. Nevertheless, the rent associated with ground leases may unreasonably burden airport users because the rent will be passed on to airport users in the form of airport charges.

For India, its legislative reforms in the field of airport regulation permit major airports to contractually set charges in bidding documents, and their effects pre-empted the authority of Indian airport regulators. For Delhi Airport, two contracts have been used to regulate charges: the Operation, Management and Development Agreement and the State Support Agreement. However, the implementation of the regulatory regime in India is problematic, particularly from an

institutional perspective. AERA, the regulator, was short of resources and failed to fulfil its duties in due course; the TDSAT, the appellate tribunal, encountered an impasse in having its members appointed and thus could not function effectively. The ineffective cooperation between both authorities is also a major problem. Other jurisdictions should learn lessons from India's experience and avoid these problems, particularly when the regulatory process will occur in a privatisation context.

These three case studies reveal that contracts and corporate governance are two important paths that have been employed in airport charges regulation, both of which stem from the private law regime. All three countries provided legislative and regulatory support to effectively apply this approach. Traditional regulation and regulation by the private law approach cooperated to some extent.

Based on these empirical case studies, Chapter 5 discussed in more detail the central methodology of this thesis, namely, the use of a private law approach in airport charges regulation. In addition to the reasons discussed in Chapters 1,2, and 3, this approach is necessary for two reasons. First, the traditional approach to regulation is both over- and under-inclusive given the arbitrary measures used to distinguish airports subject to regulation and those that escape it. Second, top-down measures often lack the flexibility desirable in responding to particularities of individual markets. This approach is also desirable because the idea of private ordering is suitable to regulate economic issues. Two specific paths are examined under this overarching approach: contracts and corporate governance. The choice of the name "private law approach" brings two benefits. First, it implies that the two paths rely on the "regulatory potential" of the regulated parties. Second, it suggests that private law supports the use of these paths.

Specifically, contracts have a regulatory function when contractual parties prescribe regulations of airport charges in the form of contractual clauses. One can rely on this regulatory function no matter whether a contract is signed between the government and an airport operator, an airport operator and an airline, or an airport operator and passengers. Corporate governance serves as a form of regulation via many mechanisms that guide the daily management of a corporation: strategically setting the nature of an airport corporation (for-profit or not-for-profit), establishing rules of charge setting in a corporate charter and bylaws, and imposing duties upon key decision-makers in an airport corporation regarding how they should make charge-related decisions. The

board members of a corporation are the most important category among all decision-makers, meaning the internal measures that constitute regulation has to be such that they guide the board's activities.

Private law and traditional regulation work in a collegial style. First of all, both types of regulation can collaborate. The combination of private ordering and public authority generates a whole spectrum of regulatory measures. The government can choose one optimal type. It is thus unnecessary to discuss all types of regulation with the engagement of private ordering case-by-case. Second, the mandatory rules in corporate and contractual laws are underpinned by public power, which can support the implementation of the contractual and corporate governance approaches. Third, public regulation can intervene when the private law approach malfunctions. A country does not need to fear losing control of the regulated sector. Moreover, Canada's regulatory experience in the telecom sector implies that general competition law remains effective to prevent the abuse of any regulatory power that has been delegated to the regulated airports. Telecom regulators exercise "regulatory forbearance" as long as private ordering works properly. This approach shares a similar idea with the Australian monitoring regime in the airport sector. Furthermore, both contractual and corporate channels can serve to incorporate the four basic principles of airport charges regulation that were discussed in Chapter 3.

Chapter 6 focused specifically on the regulation of charges for ground handling services, which make up a large part of the fees that airlines and passengers pay to use airport services. I chose this sector because it is unique: ground handling services show a hybrid of both aeronautical and non-aeronautical services. As a result, the regulation of ground handling services has become a controversial discussion. This chapter found that ground handling services are increasingly showing features notable of non-aeronautical services. This trend seems to imply that a country will not need to regulate ground handling services, but this is not true. I examined three types of ground handling services using a typology according to their degrees of competition, namely, centralised services, restricted ground handling services, and fully liberalised services. Competition may be incomplete in the first two modes where regulation remains necessary.

In practice, three factors may be abused to unreasonably increase ground handling charges. They are the period of a licence granted to a ground handling service provider, the access fees charged by an airport to a service provider, and the significant market power of third-party service providers.

These charges eventually pass through to passengers. A contractual approach offers a regulatory solution particularly in terms of these three factors. Similar to a contractual approach, countries may incorporate a clause when concluding bilateral air services agreements to set out rules relating to ground handling services. A study of three generations of this clause signed by the U.S. and the EU and the UK indicates a trend that restrictions in ground handling competition have become strictly limited and are given narrower space for discretion. Also, the principle of cost-relatedness can serve as an important charge-setting standard in this sector.

The last chapter discussed ICAO's role in regulating airport charges through its soft-law making power. I found that ICAO's hard-law instruments are not suitable for the economic regulation of airports. Instead, soft law can work. Importantly, ICAO's soft-law solutions can also be applied to facilitate the adoption of a private law approach. These soft-law solutions include policies, model laws, model clauses in template air services agreements, model codes of conduct, the provision of assistance under articles 69, 70, and 71 of the Chicago Convention, and conferences. ICAO can collaboratively work with other institutions, including the ACI and IATA, to make soft law. It can also serve as a mediator between them. Consumer associations should play a role to better represent the voice of passengers. ICAO can also collaborate with UNCTAD and the OECD, a collaboration that can contribute to regulation by contracts and corporate governance.

Six keywords can be used to summarise this thesis, which advocates the proposed private law approach to airport charges regulation: (1) Change: this approach reforms the traditional paradigm to drawing a line between airports subject to regulation and those that are not. (2) Feasibility: the finding that the UK, Canada, and India have adopted contractual and corporate governance paths in regulation, albeit without clearly labelling them "a private law approach", indicates that this approach works. (3) Standards: a private law approach can embrace the four basic principles in its substantive content. (4) Support: public power can support the implementation of contracts and corporate governance. (5) Collegiality: traditional regulation can collaborate with regulation by private law instruments to an extent tailored to the needs of an individual country. (6) Flexibility: emergency mechanisms, such as the step-in rights clause in a contract, enable quick responses to urgent situations even when a private law approach has been embraced.

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