

matters of general interpretation are dealt with relatively successfully through the system of DIPNs. The DIPNs traverse most active areas of the IRO. Strictly speaking, no mechanism for obtaining formal rulings applies under the SDO. Under the EDO, there is, however, provision for obtaining advance rulings with respect to controlled companies.

Government spending practice and Hong Kong's high growth rate have combined to allow the maintenance of a simple, low-tax revenue law structure. In this context, the DIPNs and the specific ruling system have combined to meet the limited demand for rulings in Hong Kong. The current system is working satisfactorily.

It is likely that the Hong Kong revenue law system will gradually grow more complex over the coming years. This will happen as a result of further legislative responses to unacceptable tax planning strategies and the need, in the longer term, to broaden Hong Kong's quite narrow tax base.³⁴ As complexity grows, so too will the demand for tax rulings. At some time in the future it may be necessary to consider the introduction of a broader rulings system.

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Aeronautical Charges in Hong Kong: The Way Forward

Introduction

The gazetting of the controversial Airport Authority Bill in May 1995 ('the 1995 Bill') to provide for the independent management of Hong Kong's new airport now being built at Chek Lap Kok has highlighted several significant legal issues relating to aeronautical charges.¹ Such charges are imposed on airlines and are usually divided into two reasonably distinct categories: airport charges — essentially for an airline's use of the airport, including landing, parking, and security — and air navigation service charges — for the use of other navigation services, such as meteorological information, radio communications facilities, and air traffic control. These charges are a substantial

³⁴ The need to broaden the tax base in Hong Kong is driven by general, comparative tax policy considerations rather than by any revenue deficiency. As noted above, the Hong Kong government rarely finds itself in deficit. Moves to broaden the tax base thus are unlikely to occur suddenly.

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¹ Aeronautical charges are quite different to passenger departure taxes. The former are imposed on passengers for their limited use of airport facilities. They are not the subject of this paper, which is concerned with quite significant charges imposed on airlines for a much more substantial and complex group of services provided by aeronautical and airport authorities.

financial burden on the airline industry,² and are regularly the subject of costly disputes and prolonged negotiations between airlines and different countries' aeronautical and airport authorities.³

In this comment it is argued that there is a need to stabilise the legal foundation and framework for aeronautical charges in Hong Kong, and comments are made on a few of the 1995 Bill's major deficiencies (which were doubtless aggravated by the political difficulties surrounding its finalisation). Essentially three points are made. First, the relevant Hong Kong legislation should clearly reflect existing international law and internationally-agreed principles, procedures, and practices regarding aeronautical charges. Second, the opportunity should now be taken to remedy anomalies as to aeronautical charges in relevant legislation, namely, the Air Navigation (Overseas Territories) Order (ANOTO),⁴ which must be localised before 1997. Third, as between the 1995 Bill and a localised version of ANOTO, a consistent and workable regime should be established to clarify the division of responsibility for charges, define charges conclusively, spell out criteria for their imposition, and set explicit procedures for the negotiation of charges between airlines and the aeronautical authorities.

Present Hong Kong aeronautical charges laws

In Hong Kong, until the 1995 Bill (or a variation of it) becomes law, the Civil Aviation Department of the government of Hong Kong (HKCAD) is responsible for both categories of aeronautical charges, and the legal basis for imposing all such charges is found in ANOTO, though its provisions are quite unsatisfactory in many respects.

² Comprehensive and satisfactory figures are not published, but most recently available International Civil Aviation Organisation (ICAO) Council estimates indicate that in the decade to 1991, landing and associated airport charges, as a percentage of total *scheduled* airline operating expenses, have remained fairly stable at just over 3.5%, while charges for en route air navigation services account for around 1.5%. See ICAO Council *Statements* (note 3 below), 2 and 10.

³ Governments understandably seek to offset the costs of building and operating airports and air navigational facilities — though contracting states to the International Convention on Civil Aviation (Chicago, 7 December 1944), ICAO Doc 2187 (hereinafter '1944 Chicago Convention'), which establishes the legal framework for almost all non-commercial aspects of civil aviation, are required to provide both these by Art 28(a) — and justify this by an increasingly popular 'user pays' philosophy. This view is shared by the ICAO Council — ICAO is the International Civil Aviation Organisation which was created by Part II of the 1944 Chicago Convention — in its *Statements by the Council to Contracting States on Charges for Airports and Air Navigation Services* (ICAO Doc 9082/4, 4th ed, 1992; adopted by the Council on 22 June 1992, at the 14th Meeting of its 136th Session) (hereinafter 'ICAO Council *Statements*'), 3 (para 13), where it said: 'As a general principle it is desirable, where an airport is provided for international use, that the users shall ultimately bear their full and fair share of the cost of providing the airport.' On the other hand, substantial revenue is also increasingly obtained in the commercial exploitation of airports by rents etc paid by businesses operating there.

⁴ No 422 of 1977. This is United Kingdom subordinate legislation applied to Hong Kong, which is to be re-enacted in a localised form before sovereignty over Hong Kong reverts to the PRC on 1 July 1997.

Separate management of airport facilities and air navigation services

Separate responsibilities for managing the two different categories of aeronautical charges is desirable, as air navigation services for aircraft are quite distinct from the various airport facilities provided for aircraft. It is irrelevant that the organisations providing these services and facilities may actually be situated at the airport and to an extent are integrated at the operational level.

To the present in Hong Kong, management of both aeronautical services and airport facilities has been in the hands of the HKCAD.⁵ The 1995 Bill proposes separate management of airport facilities by the Airport Authority, with control over residual (air navigation) services resting with the HKCAD. This is reasonably in line with the ICAO Council's view that creating autonomous authorities to operate air navigation services is in the best interests of the providers and users, especially in terms of financial and managerial efficiency.⁶

Another reason to distinguish very clearly air navigation service charges from airport charges is because a system known as Future Air Navigation Systems (FANS) is expected to come into operation before the end of the century. It will internationalise the technical aspects of providing air navigation services,⁷ and more relevant to charges, this must bring some substantial changes to the commercial aspects. Under FANS, the globalised or at least regionalised management of air navigation services, and consequently the imposition of charges for them, both of which are at present run on a state basis, may well be taken out of the hands of individual states.⁸ In contrast, control of airport facilities will — subject to applicable international law — almost certainly remain with the state in which the airport is situated.

Legal authority for imposing charges

The main provision in ANOTO governing aeronautical charges states very simply and broadly:

⁵ Internationally, there is a trend towards the administration of airports (and even other air navigation facilities, as in Australia) being passed from government departments to independent airport authorities. The ICAO Council notes that where this has occurred, the airports' 'overall financial situation and managerial efficiency have generally tended to improve.' See ICAO Council *Statements*, 2, para 6.

⁶ Though the council goes on to suggest that in some cases, one authority, such as an autonomous civil aviation authority independent of government, could operate both airports and air navigation services. See ICAO Council *Statements*, 2, 10. One benefit of this would be avoiding the situation where one entity provides air navigation services and a different one provides approach and aerodrome control — though the two interact critically as the aircraft approaches an airport. Charges for approach services may be levied as a part of or separately from landing charges.

⁷ Given the nature of these en route services and their importance for safety, ICAO encourages international co-operation in their provision. See ICAO Council *Statements*, 10.

⁸ There may of course be other controversial issues relating to sovereignty. See eg 'Regional FANS Plan Endorsed,' Civil Aviation Authority (Australia) *Civil Aviation Bulletin*, Vol 3, No 3, p 6, and 'Contracting States Should be able to Exercise a Sufficient Level of Control,' Civil Aviation Authority (Australia) *Civil Aviation Bulletin*, Vol 3, No 4, p 8.

71(1) The Governor may, in relation to any aerodrome in respect of which a licence for public use has been granted, or to such aerodromes generally or to any class thereof, prescribe the charges, or the maximum charges, which may be made for the use of the aerodrome and for any services performed at the aerodrome to or in connection with aircraft, and may further prescribe the conditions to be observed in relation to those charges and the performance of those services.⁹

There is little else of direct relevance to charges in Article 71.¹⁰ There is nothing about charging criteria, or about the principles and procedures to be followed in charges negotiations. It would appear that Article 71(1) encompasses both airport charges and air navigation services charges, though the wording does not establish this unequivocally.¹¹

There may also be a problem specifically as regards the legal authority to impose charges. Under Article 71, this would appear to be contingent upon licensing 'for public use,' but it is not clear if the Governor has so licensed anyone to operate the Hong Kong International Airport at Kai Tak ('Kai Tak') — it is managed by the HKCAD, though HKCAD does not appear to be the licensee. The authors are unable to say if some confidential or other arrangement for such licensing exists but, if not, the imposition of airport charges on airlines for use of Kai Tak would not appear to find any legal foundation in that provision.

Otherwise, imposition of airport charges at Kai Tak, and some air navigation service charges, may be justified under Articles 66 and 67 of ANOTO, whereby aircraft approved for the public transport of passengers may take off or land at a 'Government aerodrome'¹² certified as available for take-off and landing (provided permission has been given), in accordance with any conditions subject to which the aerodrome has been so licensed or certified, or subject to which any permission may have been given. As Kai Tak appears to be a 'Government aerodrome' for the purposes of ANOTO,¹³ take-off and landing

⁹ Naturally, in practice the Governor would be advised by the Director of Civil Aviation (DCA) in such matters, and indeed the Governor has delegated his authority to the DCA.

¹⁰ Art 71(2) goes on to require the licensee of such airports to comply with the regulations in respect of charges and to keep the prescribed charges exhibited and readily available for persons affected by them. The licensee is also required to furnish such particulars of charges as are required by the Governor, under Art 71(3).

¹¹ For example, does 'for any services performed at the aerodrome' extend to all air navigation services just because the operational centre for such services is at Kai Tak International Airport, though the services are sometimes provided to aircraft who do not use the aerodrome, but merely overfly the territory?

¹² Art 67, ANOTO provides: 'The Governor may cause to be certified subject to such conditions as he thinks fit any Government aerodrome as an aerodrome available for the take-off and landing of such aircraft engaged on flights for the purpose of the public transport of passengers or for the purpose of instruction in flying of any classes of such aircraft.'

¹³ 'Government airport' is defined by Art 92, ANOTO, as 'any aerodrome in the Territory which is under the control of the Governor or is in the occupation of any Government department ...' Kai Tak is occupied and controlled by the Hong Kong Civil Aviation Department.

there would be governed by Articles 66 and 67, notwithstanding Article 71(1). Airport charges and air navigation charges imposed on aircraft which land or take off from such an airport would seem to be leviable by the Governor under his power to impose 'such conditions as he sees fit' — presumably including the payment of prescribed charges — under Article 67. However, these provisions clearly do not appear to authorise imposition of charges upon aircraft which merely pass through Hong Kong airspace, making use of Hong Kong air navigation services, but which do not land or take off here.¹⁴ This anomalous situation is manifestly unsatisfactory for both categories of charges.

Even if the 1995 Bill is enacted and comes into force in something like its present form, it will only provide the proposed Airport Authority with power to impose airport charges,¹⁵ not air navigation services charges. Thus, there is still little direct legal authority for the latter charges, outside the inadequately worded Articles 66, 67, and 71 of ANOTO. Appropriate changes must be made to ANOTO now or when re-enacted in a *localised* form as part of the localisation of laws occurring prior to the change-over of sovereignty to the People's Republic of China on 1 July 1997. Clearly, the new ordinance should also include more precise and comprehensive provisions authorising relevant charges, specifically defining them and setting out principles and procedures for their negotiation, similar to those applicable to airport charges in the 1995 Bill (which provisions themselves need improvement or amendment as indicated below).

Future definitions and criteria for charges

Precise definitions of various charges do not exist in legislation at present governing aeronautical charges in Hong Kong.¹⁶ Some such definitions are included in the 1995 Bill, although, as with the equivalent legislation in various other countries, these definitions are far from satisfactory, considering the comprehensive internationally-accepted recommendations of the ICAO Council which should serve as a model.

ICAO definitions of charges

Specific definitions of various kinds of aeronautical charges have been established by ICAO, in its *Statements by the Council to Contracting States on Charges for Airports and Air Navigation Services* of 1992 ('ICAO Council Statements').¹⁷ These provide detailed assistance in determining (a) which authority should manage various kinds of aeronautical charges, (b) the precise services and

¹⁴ It was already mentioned above that Art 71 of ANOTO may similarly not extend to provide authority for the imposition of charges on aircraft not taking off or landing in Hong Kong.

¹⁵ This may occur only after the scheme of charges is approved by the DCA. See cl 34 of the Bill.

¹⁶ This is seen above from the discussion of the only relevant articles in ANOTO: 66, 67, and 71.

¹⁷ See note 3 above.

activities the subject of each kind of charge, (c) the criteria for determining charges, as well as (d) the procedures to be followed in imposing charges.¹⁸

Air navigation services

Air navigation services charges (sometimes called en route service charges)¹⁹ are distinct from airport use-related charges, and are imposed for services and facilities provided to air traffic during all aspects of flight operations, such as telecommunications and weather and navigation information.

There are, however, some difficult and overlapping service areas. For example, ICAO treats as an air navigation service charge the charge for 'approach and aerodrome control facilities' when aircraft are flying in the vicinity of airports (but when the charge is *not* part of a landing charge). If the Airport Authority is set up as proposed in the 1995 Bill, *all* en route air navigation services as well as approach and aerodrome control will continue to be provided (and charged for) by HKCAD. Thus, even when these facilities are provided to aircraft that are actually landing in Hong Kong, they would (or should) not be included as part of a landing charge imposed by the Airport Authority. Preferably, such complications should be clarified in the legislation and areas of potential dispute avoided.²⁰

Airport facilities

Airport charges are for services and facilities more specifically under the management of the relevant airport authority (corporation). Basically five kinds of airport charge are recognised by ICAO: landing charges (which may also include the above-mentioned approach and aerodrome control charge)²¹; parking and hangar charges; passenger-service charges; airport security charges;²²

¹⁸ Essentially, the ICAO Council *Statements* recommend that states should encourage increased co-operation of air carriers, with both airport authorities and aeronautical authorities providing air navigation services, to ensure that economic difficulties facing both of them are shared in a reasonable manner. See ICAO Council *Statements*, 2 (airport charges) and 10 (air navigation service charges).

¹⁹ These are charges for approach and aerodrome control facilities (when not part of a landing charge) when aircraft are flying in the vicinity of airports, and route air navigation services — usually based on distance flown and aircraft weight — including air traffic services, aeronautical telecommunications services, meteorological services for air navigation, search and rescue services, and aeronautical information services (whether or not the aircraft is flying over the provider State). See ICAO Council *Statements*, 14 (para 40), 20, and Glossary of Terms, Appendix 3.

²⁰ Clause 42 of the 1995 Bill also envisages the Authority being authorised to collect air navigation services charges on behalf of the Director of Civil Aviation, if requested, and to account to the Director if such charges were not collected. This is a difficult and potentially expensive task for the proposed Authority as the latter category of charges are often imposed on airlines that merely transit the territory and do not land, so they may have no actual dealings with the Authority. Indeed, this practical problem underlines the desirability of separating the management, imposition, and collection of airport charges from air navigation services charges.

²¹ Though, as discussed immediately above, these would not appear to be part of the Authority's operations in Hong Kong. Such charges should be separately identified, but unlike landing charges, they need not be based directly on aircraft weight. See ICAO Council *Statements*, 4 (para 14(vi)) and 5 (para 17(iii)).

²² States are responsible for implementing adequate security measures at airports under Annex 17 to the Chicago Convention, though individual security functions may be delegated to airport authorities, airlines, or police.

²³ ICAO Council *Statements*, 5–7.

and airport noise-related charges²³ (though the imposition of security and noise-related charges on airline operators is controversial, as they are sometimes seen as more directly relating to airport management than airline operations, except where airlines have specifically accepted responsibility for aircraft noise and aircraft security).

Admittedly, even with the best of intentions, specific and unambiguous definitions of all relevant charges, and solutions for all definitional complexities in the description of charges, especially in view of the evolving technologies, may not be attainable in legislation. Though where definitional certainty is unattainable, there should be an express obligation to accept relevant recognised international practices as to the meaning of the facility and charge in question. This would at least eliminate some preliminary issues when charges disputes occur.

Definitions proposed in the 1995 Bill

The distinction between airport charges and air navigation service charges is merely mentioned in the 1995 Bill. The mutual exclusivity of these charges, confirmed in the above-mentioned ICAO Council recommendations, should be much clearer.²⁴ The 1995 Bill, as first published in the 1994 consultation paper, defined 'airport charges' as follows:

'airport charges' means —

- (a) charges payable in connection with the landing, parking or taking off of aircraft at the Airport;
- (b) charges payable by or in respect of aircraft passengers in connection with their arrival at, or departure from, the Airport by air ...

On gazetting, item (b) was omitted, presumably as a result of lobbying by interest groups, as no clear distinction was made between charges levied in connection with airline operations and those imposed on passengers for their use of the airport.²⁵ Thus 'airport charges' are more simply limited to the matters stated in (a).

The definition still does not specify the person upon whom the charges are imposed — it should be the operators of aircraft (as distinct from owners and

²⁴ It is merely stated that 'en route navigation service' (and not the relevant charge) 'includes any information, direction or other facility furnished, issued or provided in connection with the navigation of aircraft while in air space the control of which is wholly or partly the responsibility of the Director, being aircraft not landing in Hong Kong.'

²⁵ As occurs in s 36 of the Airports Act 1986 (UK), which states: 'airport charges' means — (a) charges levied on operators of aircraft in connection with the landing, parking and taking off of aircraft at the airport (including charges that are to any extent determined by reference to the number of passengers on board the aircraft, but excluding charges payable by virtue of regulations under section 73 of the 1982 Act (air navigation services etc)); and (b) charges levied on aircraft passengers in connection with their arrival at, or departure from, the airport by air.

charterers). Notably, it does not extend to the provision of, for example, office and other facilities required by airlines for their commercial activities. While the ICAO Council *Statements* do not include such facilities as airport charges, it may be useful to make some provision for them. Otherwise, the terms and conditions for providing these facilities, which are essential to airline commercial operations, and in respect of which bilateral air services agreements and Article 15 of the Chicago Convention require non-discrimination, are left to other negotiations.²⁶

Such uncertainties and omissions could and should be avoided, considering that the suggested definitions in the ICAO Council *Statements* go quite a way towards providing a model for international uniformity and consistency.

Charging criteria

Internationally recognised criteria for the imposition of charges should be expressly adopted in the Hong Kong legislation concerning aeronautical charges, though none is found in legislation in force at present.²⁷

ICAO guidelines and international law

For reasons of convenience and efficiency, a consolidated 'single-till' approach is recommended by ICAO in imposing and recovering such charges.²⁸ This does not imply that uncertainty may exist as to the true nature, purpose, or rationale for each of the charges being imposed. The ICAO Council *Statements* provide that facilities and services should be identified precisely, and furthermore, that the 'cost-basis' for different charges be clear. This fundamental charging criterion should be expressed in the legislation. It is not.

Airports are also required to maintain accounts which provide information adequate for the needs of airports and users (particularly in their consultations with each other — discussed below), and the accounts should set out a satisfactory basis for determining and allocating costs to be recovered, and financial statements should be published regularly.²⁹

²⁶ The term 'charge' in the Australian Civil Aviation Act 1988 (Cth), ss 3, 66, and 69–81 encompasses a multitude of fees and 'aeronautical charges' in the Australian Federal Airports Corporation Act 1986 (Cth), s 56(1)(b), extends generously to any 'services or facilities provided by the Corporation.'

²⁷ Certain principles and procedures are also set out in the clause dealing with 'User Charges' in bilateral air services agreements, though they amount to informal guidelines only. The legal status of such agreements is complex. On the international level, air service agreements are broadly regarded as 'treaties' having force in public international law but merely as intergovernmental contracts. See G N Heilbronn, 'Hong Kong's First Bilateral Air Services Agreement: a Milestone in Air Law and an Exercise in Limited Sovereignty' (1988) 18 HKLJ 64. Their force in municipal law differs according to the countries concerned, though in most common law countries they do not have the force of law and their terms cannot be relied upon in legal actions between airlines and governments: see for example *Pan American World Airways v Department of Trade* [1976] 1 Lloyd's Rep 257, 260.

²⁸ ICAO Council *Statements*, 5. It states: '15(vi) Where charges are levied by different authorities at an airport, they should, as far as possible, be consolidated into a single charge or a very small number of different charges, the combined revenues being distributed amongst the authorities concerned in a suitable way.'

²⁹ ICAO Council *Statements*, 3 (para 13).

The Council has expressed concern over the proliferation of charges on air traffic *and* retaliatory effects this could evoke, so it recommends³⁰ that states should impose charges only for services and functions which are *required* for international civil aviation³¹ and refrain from imposing charges that discriminate against international civil aviation in relation to other modes of international transport.³² These recommendations complement the requirements in Article 15 of the 1944 Chicago Convention, that contracting states must 'not discriminate amongst each other in respect of airport use and charges,' and further that charges 'must be uniform and subject to uniform conditions for the use by aircraft of every Contracting State, for all air navigation facilities, including radio and meteorological services provided for public use, for the safety and expedition of air navigation.'³³

Hong Kong charging criteria in the 1995 Bill

As to compliance with internationally recognised criteria for imposing aeronautical charges, neither the principles that charges be imposed without discrimination amongst users and be 'cost-based,' nor the requirement for their publication, were included in the 1995 Bill. A requirement that aeronautical charges be cost-related is seen in, for example, Australia's Federal Airports Corporation Act 1986, under which the Federal Airports Corporation is empowered to fix or vary charges and specify the persons by whom, and the times when, the charges are payable.³⁴ More specifically, that enactment requires that the charges must not be fixed to exceed an amount reasonably related to the expenses incurred or to be incurred by the Corporation in relation to the matters to which the charge relates, and must not amount to taxation.³⁵

It would seem desirable to include in the charges definitions, or elsewhere in the Hong Kong legislation, proper criteria, such as that charges be applied without discrimination and be cost-related. Less desirable, but probably accept-

³⁰ ICAO Council *Statements*, 3 (airport charges) and 10 (air navigation service charges).

³¹ This casts further doubt on the legitimacy of any charges imposed specifically to fund airport construction or re-development.

³² Though this would appear to be a problem only over relatively short distances, and when highly sophisticated alternative transport modes exist, for example, between Hong Kong and Macau where hovercraft and hi-speed ferries carry most of the traffic.

³³ For a detailed discussion of the international law basis for charges, see GN Heilbronn and CJ Bonsall, 'Aeronautical Charges: The Need for a More Specific Legislative Context,' conference paper delivered at the 'Air Transport in the 21st Century' conference held on 28-9 November 1994, hosted by the Graduate School of Law, Soochow University, Taipei, Taiwan. See also Heilbronn and Bonsall, 'Aeronautical Charges: the Need for a More Specific Legislative Context' (1995) 3 *Air Law* (forthcoming).

³⁴ Federal Airports Corporation Act 1986 (Cth), s 56(2). Failure to pay charges incurs interest. If an aeronautical charge is not paid within 28 days after it becomes due and payable, there is payable a penalty being an additional amount calculated on the amount of the charge at the rate of 1.5% or such other amount as is prescribed, for each month or part thereof for which the amount is unpaid. The Corporation may exempt a person from this provision: s 56(8). The aeronautical charge due and payable and penalty may be recovered as a debt due to the Corporation: s 56(9).

³⁵ s 56(10).

able, would be a more general undertaking to abide by internationally recognised principles and procedures in establishing charges. The 1995 Bill makes a limited and apparently somewhat misdirected attempt to incorporate such internationally recognised principles by way of a provision in clause 34(3)(e)(ii) of the Bill, empowering the Governor in Council to refuse to approve a scheme of airport charges made by the proposed Authority if it 'would, or would be likely to, result in a breach of an international obligation relating to civil aviation, or hindrance of the implementation of a such an obligation.'

There are two problems with this approach. First, the recommendations embodied in the ICAO Council *Statements*, like other accepted practices, do not really appear to be 'obligations' until adherence to them becomes such an accepted practice that they become part of customary international law. So it would seem that they would not need to be complied with under this provision, nor would their breach legally justify refusal of the charges or a challenge to them by any interested party. Second, compliance with existing international obligations is expressed to be a matter between the Governor in Council and the Authority and non-compliance with obligations (not to mention accepted principles, practices, and procedures) could occur with the consent of the former. Rather, the legislation should state, in as direct a manner as possible, that there is a convention-based duty imposed upon the Airport Authority in respect of airport charges, and also on the Director, as regards air navigation service charges, to comply with internationally agreed obligations, principles, standard procedures, and practices. These obligations should also extend to the Governor in Council.

Procedural matters: consultations and reviews

The final decision to impose charges always rests with the relevant aeronautical authority, which is, at the moment, the HKCAD. However, after the 1995 Bill is enacted, the relevant organisation for airport charges would be the Authority, and whoever the *localised* version of ANOTO specifies for air navigation services charges (probably the Director of the HKCAD). Either way, the ICAO Council has also emphasised the importance of early consultations between the relevant authorities and airport users (airlines),³⁶ and recommends *inter alia* that consultations be held

before significant changes in charging systems or levels are introduced ... to ensure that the provider gives consideration to the views of users and the

³⁶ Further general support for these requirements can be found in the second paragraph of the 'User Charges' clause usually found in most countries' bilateral air services agreements (discussed above at note 27). It effectively requires that each contracting party encourage consultation between its competent charging authorities and airlines using their services and facilities, where practicable through the airlines' representative organisations.

effect the charges will have on them ... in an effort to reach general agreement on any proposed charges.³⁷

Also embodied in this recommendation are requirements that such consultations be facilitated by the authority, which must ensure that adequate notice is given and adequate financial information is provided to the airlines so that the consultations can be useful. Furthermore, it is required that genuine consideration be given to airline representations with the aim of agreement being reached on charges, if possible.

In the absence of such detailed provisions in relevant legislation, disputes have arisen as to the precise procedures for consultations, as well as to their nature and scope,³⁸ involving a difference of expectations by both the airport administration and airlines as to how much consultation should be had, and as to the amount of information to be provided.³⁹ The New Zealand Court of Appeal considered that for a consultations requirement to be satisfied, the parties must go into the consultation process with an open mind, but an actual agreement need not be negotiated or reached. The court stated:

If the party having the power to make a decision after consultation holds meetings with the parties it is required to consult, provides those parties with relevant information and with such further information as they request, enters the meetings with an open mind, takes due notice of what is said, and waits until they have had their say before making a decision, then the decision is properly described as having been made after consultation.

No specific and detailed provisions exist in ANOTO or the 1995 Bill requiring consultations on charges to be held between airlines and the relevant aeronautical or airport authority in Hong Kong, though the ICAO Council recommendations require them, and this would appear to be supported by the demands of natural justice. Potential procedural disputes may be avoided by legislating a

³⁷ ICAO Council, *Statements*, 8 (para 22). It states more specifically: 'i) When any significant revision of charges or imposition of new charges is contemplated by an airport operator or other competent authority, appropriate prior notice should, so far as possible, be given at least two months in advance to the principal users, either directly or through their representative bodies, in accordance with the regulations applicable in each State. ii) In any such revision of charges or imposition of new charges the airport users should, so far as is possible, be given the opportunity to submit their views to and consult with the airport operator or competent authority. For this purpose the airport users should be provided with adequate financial information. iii) Reasonable advance notice of the final decision of any revision of charges or imposition of new charges should be given to the airport users. This period of notice should take into account the implications for both the users and the airport.'

³⁸ *Air NZ Ltd v Wellington International Airport Ltd*, McGechan J, 6 January 1992 and CA 24 September 1992 (CA 23 and 73/92, both unreported; see *Butterworths Current Law Digest of New Zealand Law*, 391). Aspects of the case were to have been taken on appeal to the Privy Council, but this has not occurred.

³⁹ The decision provided some useful judicial insight into the meaning of the term 'consultation' and relied upon a leading common law authority on the meaning of the requirement to consult, viz *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111.

consultations requirement, and specifying detailed procedures to be followed for proper consultations: notice requirements with time limits, expeditious provision of all relevant financial information, periods for consideration of proposals and supporting documentation.

Also lacking in ANOTO and the 1995 Bill are provisions for adequate judicial review or appeal of decisions relating to aeronautical charges, though no specific recommendation is made on this in the ICAO Council *Statements*. It can only be assumed that this crucial matter was to be left to the law of the forum, as most jurisdictions have broad legislative arrangements for administrative and judicial review. However, as Hong Kong still relies on the somewhat inadequate and limited common law principles and procedures for this, a specific provision for the judicial review of, or appeal from, aeronautical charges decisions made by the relevant authorities should be included.

Contrary to what would appear to be the established trend, the 1995 Bill even attempts to deny judicial review completely. It states that the Governor in Council's approvals and refusals (and his belief or absence thereof, that any scheme of charges might breach or hinder the implementation of, any of Hong Kong's international civil aviation obligation), 'shall not be questioned in any legal proceedings.'⁴⁰ This negative approach, unduly protective of administrative decision-makers, would seem to be out of step with modern legal thinking on the reviewability of administrative action.⁴¹

Conclusion

Detailed internationally accepted guidance is available to ensure that Hong Kong legislation on air navigation services and airport charges establishes a reasonably coherent and workable regime, consistent with internationally agreed principles and procedures designed to minimise disputes and facilitate co-operative relations between airlines and governments. It only remains for the proposed new laws to reflect this guidance.

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⁴⁰ Cl 30(3)(f) of the 1994 Bill.

⁴¹ It is a cause for concern, given the potential devaluation of the rule of law possible in post-1997 Hong Kong, though it may also be inconsistent with the Hong Kong Bill of Rights, especially Arts 10 and 22 which provide for 'Equality Before Courts' and 'Right to Fair and Public Hearing,' provided there are no other opportunities for appealing the relevant decisions. See eg *Building Authority v Business Rights Limited* (1993) Vic DCt, Civ Case No 940 of 1993 (Downey J).

* Senior Lecturer, Department of Professional Legal Education, University of Hong Kong. A much more substantial version of this note was presented at the Asian Conference on International Transport in the 21st Century, 28-9 November 1994, Taipei, hosted by the Graduate School of Law, Soochow University. A separate version was presented to the Aeronautical Committee (Business Law) of the International Bar Association 25th Biennial Conference, Melbourne, 9-14 October 1994.

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