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The analysis presented above concludes that, under the policy pursued by the aviation regulatory authorities, the presence or absence of a pilot on board should be largely irrelevant from an ANS perspective. Another consequence of the focused regulatory policy is that the impact on the division of responsibilities between the (remote) pilot and the air traffic controller, as well as on the liability exposure of ANS, should remain minimal.

There are nevertheless two areas where regulatory intervention will be required to account for particularities which are unique to RPA. The wide range of flight characteristics shown by RPA, and new types of missions involving long stationary operations, will require a categorisation of RPA and specific ATS procedures. Nevertheless, strong regulatory inspiration can be found in existing provisions governing the provision of ANS in mixed flight performance environments and the treatment of unmanned free balloons. The lack of a pilot on board will also require contingency procedures to manage losses of communication between the remote pilot and the RPA under his control.

Finally, the manner in which the development of the technical capability of RPA will need to fit properly in the broader roadmap for the evolution of the global and regional ANS systems. ANS stands on the verge of a major technological revolution, at the global level (under the ICAO ASBU programme), and in several key regions, such as Europe (SESAR initiative) and North America (NextGen). These offer both an opportunity and a challenge in respect of RPA development. These programmes constitute a framework within which the required technical ability can be developed and implemented in a consistent manner. In addition, the other main elements of these programmes (e.g., 4D Trajectory-based Operation[97], and System-Wide Information Management (SWIM[98])) will need to account for the deployment of RPA from the very outset.

[97] The objective of the 4D trajectory concept is to allow airspace users to negotiate a detailed trajectory for the flight in four dimensions with the ANSP.

[98] The SWIM program aims to reorganise the manner in which the data used for ATM purposes across Europe is produced and distributed. The ultimate goal is that each user of information should have access to the data needed in a timely manner and with the required level of quality. SWIM intends to reorganise the flow of data and to deploy the necessary distribution infrastructure. See "System Wide Information Management (SWIM)", SESAR Fact-sheet, SESAR SJU, 2011.

CURRENT REGULATION OF AVIATION TARIFFS IN INDONESIA

by

Prof. Dr. H. K. Martono* and Dr. Ariawan Gunadi*

SYNOPSIS

* Prof. Dr. H K Martono, SH (Indonesian University), LLM (McGill), PhD (Diponegoro University) previously served as the chief of the legal division of the Directorate General of Civil Aviation at Indonesia's Ministry of Communications. He has written extensively about aviation law and regulations in Indonesia and was the parliamentary resource person for when Indonesia was drafting the Civil Aviation Act of 2009.

* Dr. Ariawan Gunadi, S.H., M.H (Tarumanagara University), PhD *cum laude* (University of Indonesia) is a lecturer at the Law Faculty of Tarumanagara University and a legal consultant specialised in, among other topics, International Law, International Trade Law, International Business Transactions, and International Relations. He is a member of the Board of Executive and Legal Head of the Tarumanagara Foundation.

ABSTRACT

This article deals with the aviation tariff regulations in Indonesia. The scope and level of tariffs are influenced by many factors, both at the international and national levels. Internationally, bilateral and multilateral air transport agreements concluded by Indonesia with other States lay down the rules for the application and control of tariffs. Various provisions relating to tariffs in air transport agreements are compared and contrasted. At the national level, domestic legislation, ministerial decrees and overall national economic ideology aim to regulate and control tariffs. Various aspects and types of tariffs are discussed and analysed in relation to the particularities of the Indonesian air transport industry. This article concludes by providing examples of how tariff regulations have been effectively implemented and followed and also underlines certain weaknesses that are inherent to Indonesian air transport.

RÉSUMÉ

Cet article traite de la règlementation sur les tarifs imposés au transport aérien en Indonésie. La portée et le niveau des barrières tarifaires sont influencés par de nombreux facteurs, tant internes qu'internationaux. Au niveau de l'aviation internationale, les règles d'application et de contrôle des tarifs sont fixées par des accords de transport bilatéraux et multilatéraux conclus entre l'Indonésie et certains États. Les diverses dispositions relatives aux tarifs dans les accords de transport aérien sont comparées dans le texte suivant. Au niveau national, la législation, les décrets ministériels et l'environnement économique règlementent et contrôlent les tarifs. L'étude ci-dessous traite des différents types de tarifs par rapport aux particularités de l'industrie du transport aérien en Indonésie. L'article termine en démontrant comment certain pays ont réussi à mettre en œuvre un système de règlementation tarifaire efficace, tout en soulignant les faiblesses actuelles du transport aérien en Indonésie.

KEYWORDS

Air tariff, air transport regulation, Indonesia, bilateral agreement, air transport liberalisation

I. INTRODUCTION

The main function of tariff[1] regulation is to secure the economic viability of the agreed service in bilateral and multilateral agreements for the benefit of the travelling public and to eliminate the hazards of free competition.[2] In addition, a tariff can have a significant influence on airlines, travellers and aeronautical authorities. For the airlines, a tariff that is too low may jeopardise the sustainability of an air carrier's operations, while a tariff that is too expensive may make it unaffordable for travellers to travel. For aeronautical authorities, a tariff is a means to regulate the balance of the sustainability of airlines' operations and to guarantee that travellers can afford the price for the benefit of the travelling public. For these reasons, tariffs contained in bilateral and multilateral agreements must be carefully regulated by aeronautical authorities.

Until recently, the Indonesian aviation market has been strongly protected by the national government. However, there has been a significant shift in policy toward liberalising and opening up the market, as well as ratifying international aviation conventions pertaining to aviation interests, liability, safety and security.[3] Indeed, with regard to

[1] International Civil Aviation Organization's *Standard Bilateral Tariff Clauses*, ICAO Doc 9228-C/1036 (1978) [*Standard Bilateral Tariff Clauses*], define "tariff" as follows:

> Tariff means the prices or charges to be paid for the carriage of passengers, baggage and cargo and the conditions under which those prices or charges apply, including prices or charges and conditions for agency and other auxiliary services, but excluding remuneration and condition for the carriage of mail.

[2] LCJ Lehtonen, *The Bilateral Air Transport Agreements of Finland: A Study in Public International Air Law* (LLM Thesis, McGill University Institute of Air and Space Law, 1977) at 178 [unpublished].

[3] In a clear signal to modernise and liberalise the aviation market, the government of Indonesia has indicated its intention to ratify several international agreements related to aviation at a technical coordination meeting which is scheduled to be held at Mataram, Lombok on 23-26 October 2014. The government intends to ratify the *Convention on the International Recognition of Rights in Aircraft*, 19 June 1948, 310 UNTS 151, 4 UST 180 (entered into force 17 September 1953) [*Geneva Convention*]; *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, 7 October 1952, 310 UNTS 182, ICAO Doc 7364 (entered into force 4 February 1958) [*Rome Convention*]; *Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, 23 September 1978, 2195 UNTS 372, ICAO Doc 9257 (entered into force 25 July 2002) [*Montreal Protocol*]; *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991, [2007] ATS 25, 30 ILM 721 (1991), ICAO Doc S/22393 (entered into force 21 June 1998); *Montreal Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 UNTS 309, S Treaty Doc No 106-45 (2000) (entered into force 4 November 2003) [*Montreal Convention*]; and *Convention on the Suppression of Unlawful Acts Related to International Civil Aviation*, 10 September 2010, ICAO Doc 9960 (not yet in force) [*Beijing Protocol 2010*].

the liberalisation of the aviation market, after the initial signing of the ASEAN Multilateral Agreement on Air Services in May 2009,[4] in April 2014 Indonesia proceeded to ratify Protocols 5 and 6 to the ASEAN Multilateral Agreement on Air Services, which govern unlimited third and fourth and unlimited fifth freedom traffic rights respectively between ASEAN capital cities.[5] Indonesia's own Civil Aviation Act contains provisions allowing the signing of open skies agreement with foreign countries. While ultimately the goal is the full liberalisation of the aviation market without any limitation on, among other things, the place of destination, frequencies, capacity, the applicable tariff or freedoms of the air, "unlimited air transportation rights" are to be implemented "in stages" in accordance with the competitive preparedness of national air transportation companies.[6] In this vein, the Republic of Indonesia has made it its goal to conclude bilateral or multilateral air transportation agreements based on national interest and principles of fairness and reciprocity.

At this critical juncture in time, and in light of the shift in policy, it is of interest to examine bilaterals that Indonesia has signed with other States to understand the nature of the Indonesian aviation market to date. Most importantly, and also the focus of this article, is the matter of how tariffs are influenced by bilaterals and how restrictive air transportation

[4] *ASEAN Multilateral Agreement on Air Services*, 20 May 2009 (entered into force 13 October 2009), online: ASEAN <http://www.asean.org/22628.htm> [*AMAAS*].

[5] *Protocol 5 on Unlimited Third and Fourth Freedom Traffic Rights between ASEAN Capital Cities* and *Protocol 6 on Unlimited Fifth Freedom Traffic Rights between ASEAN Capital Cities*, see online: ASEAN <http://www.asean.org/images/archive/22628-Potocol-Annex.zip>.

[6] Indonesia, *Act concerning Civil Aviation*, Act No 1 of 2009, art 86(3) [*Civil Aviation Act*].

agreements of the past are compared to more liberal bilateral agreements of the present.

The liberalisation of the aviation market in Indonesia, as mentioned before, is taking place incrementally and is dependent on economic realities and market needs. As Indonesia has only just begun to open up its aviation market, it must be noted that the vast majority of Indonesia's bilateral agreements has not been updated, and many bilaterals that were signed with foreign States in the years when the Indonesian aviation industry was just developing have not been renewed or replaced with new agreements. Thus, as will be apparent in the analysis below, there will be references to bilateral air transport agreements with countries, such as the former Ceylon (modern day Sri Lanka), Czechoslovakia (modern day Czech Republic) and the USSR (modern day Russian Federation), which have ceased to exist in name. These bilateral air transport agreements still remain relevant and are worthy of analysis to gain better insight into the regulation of tariffs in Indonesia.

II. INTERNATIONAL REGULATION OF TARIFFS

A. POST WORLD WAR I

On 13 October 1919, the Paris Convention [7] established the regulatory framework for post-World War I international air navigation on a multilateral basis. [8] In accordance with Article 1 of the Paris Convention of 1919, every State has complete and exclusive sovereignty over the airspace above its territory, a right of every State that was later identified as being part of customary international law. [9] In addition, the Convention also recognised that each Contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of other Contracting States. [10] This provision is not a

[7] *Convention Relating to the Regulation of Aerial Navigation*, 13 October 1919, 11 LNTS 173, 1922 UKTS 2 [*Paris Convention*]. For the text of the Paris Convention of 1919, see (2005) XXX:I Ann Air & Sp L 5.

[8] K Martono, *Route, Capacity and Tariff Clauses of Selected Bilateral Air Transport Agreements Concluded by Indonesia* (LLM Thesis, , McGill University Institute of Air and Space Law, 1980) at 13 [unpublished] [Martono, *Route*].

[9] DHN Johnson, *The Right in Airspace* (Dobbs Ferry, NY: Oceana Publications, 1965) at 33.

[10] *Paris Convention*, *supra* note 7, art 2.

customary norm, but was set forth merely as a contractual right under the Convention. Complete and exclusive sovereignty over the airspace above a State's territory was thus restricted by the freedom of innocent passage. Furthermore, innocent passage can itself be restricted for security reasons. According to Article 15, the right of innocent passage is not to be granted to all private aircraft of other Contracting Parties. Aircraft operated for international regular air service were completely excluded. [11] Thus, regular scheduled international air service shall be subject to the consent of the State flown over. [12]

The Paris Convention of 1919 did not provide for regular air service or commercial air service, such as exchange of routes, frequencies and tariffs, nor did it accord the right to operate scheduled international air service. The Paris Convention of 1919 established only the general conditions of commercial flight and it did not purport to be an air traffic agreement permitting the aircraft of one Contracting Party to engage in regular scheduled international air service into other Contracting States. Consequently, regular international air service was still dependent upon the negotiation of bilateral agreements. [13]

With regard to bilateral agreements, States interpreted the Paris Convention of 1919 restrictively by putting limitations on commercial rights. This is reflected in the conclusion of a complementary set of bilateral agreements for the establishment and operation of regular air service. These agreements include commercial rights such as route-fixing, designation of airline and capacity as well as tariffs. [14] In 1929, the practice of limiting these rights, which had already started, found formal approval and acceptance by the majority of States.

[11] Richard Y Chuang, *The International Air Transport Association: A Case Study of a Quasi-Governmental Organization* (Leiden: AW Sijthoff, 1972) at 17. See also Martono, *Route*, *supra* note 8 at 13.

[12] As Jennings writes:

> Article 15 of the Paris Convention of 1919 excludes "international airways" (by which is meant regular, scheduled, international air services) from the freedom of passage accorded in Article 2 of Paris Convention of 1919, by providing that such services shall be subject to the consent of the state flown over.

See RY Jennings, "International Civil Aviation Law of the Law" (1945) 22 Brit YB Int'l L 191 at 197 [Jennings, "International"].

[13] Martono, *Route*, *supra* note 8 at 14. See also Samuel E Gates, "International Control of Aviation in the Time of Peace" (1939) 10 Journal of Air Law & Commerce 443.

[14] Hans Pieter Sprokkreeff, *The Regulation of Capacity in International Air Transport* (LLM Thesis, McGill University Institute of Air and Space Law, 1976) at 6 [unpublished].

With regard to tariff regulation, the Paris Convention of 1919 seemed to have focused more on technical and security matters as opposed to economic considerations.[15] In the 1920s, bilateral agreements began to address economic considerations, exchanging rights to carry traffic on specific routes into and through the territories of two Contracting Parties.[16] States attempted to develop a multilateral agreement with regard to commercial rights, and in 1929 the British proposed to amend Article 15 of the Paris Convention to provide for unhindered commercial rights. However, this proposal was rejected and the practice of limiting the growing practice of seeking commercial rights found formal acceptance by the majority of States.[17]

Although an attempt to develop commercial rights was made in 1929, "the real commercial right did not come until immediately before the World War II".[18] At that time, commercial rights were exchanged either between States or between airlines and States, and some included tariff provisions.[19] The bilateral agreements between Italy and France, Great Britain and Greece, respectively, provided that the designated airline be completely free to determine the tariff and rates to be charged. These provisions were very poorly drafted, and did not mention the scope and the level of tariff to be set up. All the abovementioned agreements provided that the designated airline should communicate with competent aeronautical authorities before the coming into force of the tariff. It is not clear whether the term "communicate" purported to mean that the tariff should be filed with the competent aeronautical authorities for seeking approval.

In accordance with the Standard Bilateral Tariff Clauses (SBTC)[20] of the International Civil Aviation Organization (ICAO), the term "tariff" means the prices to be paid for the air transportation of passengers, luggage and cargo and the conditions under which those prices apply, including the prices and conditions for agency and other auxiliary

[15] Sir George Cribbett, *Some International Aspects of Air Transport* (1950) 54 Journal of the Royal Aero Society 671.
[16] *Ibid* at 672.
[17] Martono, *Route*, *supra* note 8 at 23.
[18] *Ibid.*
[19] Chuang, *supra* note 11 at 19; PPC Haanappel, *Rate-making in International Air Transport: A Legal Analysis of International Air Fares and Rates* (Deventer: Kluwer, 1978) at 15 [Haanappel, *Rate-making*].
[20] *Standard Bilateral Tariff Clauses*, *supra* note 1.

service, but excluding remuneration and conditions for the carriage of mail. The Italy-Britain and Italy-Greece bilateral agreements used the term "charge" whilst the Italy-France and France-Greece bilateral agreements used the term "rate" and "tariff".[21] The bilateral agreement between Italy and Australia, however, did not mention tariffs at all.[22] Special attention should be given to the bilateral agreement between France and Belgium. This bilateral agreement provided that each High Contracting Party shall approve, prior to the entry into force of the agreement, all matters relating to tariffs.[23]

A question concerning international aviation was discussed in the conference held in Havana, Cuba, which led to the adoption of the Havana Convention of 1928.[24] Article 1 of the Havana Convention faithfully followed the Paris Convention of 1919 which provided that every Power has complete and exclusive sovereignty over the airspace above its territory, whilst Article 4 of the Havana Convention of 1928 corresponded to Article 2 of the Paris Convention of 1919 and provided that Contracting States undertake, in time of peace, to accord freedom of innocent passage above their territory to aircraft of other contracting states.[25]

Those above mentioned conventions were multilateral conventions which did not regulate regular air services. The establishment of regular air service was made possible only by the existence of bilateral agreements. The Havana Convention of 1928 dealt primarily with commercial and broad problems of international aviation. However, it addressed commercial services which were still dependent upon the

[21] See Martono, *Route*, *supra* note 8 at 41, n 53. The sources of specific provision are Article 6 of the bilateral agreement between Italy and France; Article 7 of the bilateral agreement between Italy and the Netherlands; Article 9 of the bilateral agreement between Italy and Great Britain; Article 11 of the agreement between Greece and France; Article XI of the bilateral agreement between Britain and Greece.
[22] Martono, *Route*, *supra* note 8 at 24.
[23] *Ibid* at 25; Chuang, *supra* note 11 at 19; Haanappel, *Rate-making*, *supra* note 19 at 15.
[24] *Pan-American Commercial Aviation Convention*, 20 February 1928, 128 British and Foreign State Papers, 505, USTS 840, 4 Hudson 2354 (1931) [*Havana Convention*]. For a detailed discussion of the Havana Convention of 1928, see Stephen Latchfort, "Havana Convention a Commercial Aviation" (1931) 2:2 J Air L & Com 207; Johnson, *supra* note 9 at 36; Jennings, "International", *supra* note 12 at 193-196; Daniel Goedhuis, "Questions of Public International Air Law" (1952) 82 Rec des Cours 202.
[25] Goedhuis, *supra* note 24 at 209. See also Martono, *Route*, *supra* note 8 at 26.

negotiation of a separate bilateral agreement.[26] The Havana Convention of 1928 has now been superseded by the Chicago Convention of 1944, which came into force on 4 April 1947.[27]

B. POST WORLD WAR II

On 11 September 1944,[28] the Government of the United States of America issued an invitation to members of the Allied Powers as well as the neutral countries of the Second World War[29] to meet in Chicago, Illinois. The conference was held in November 1944, and was attended by delegates of fifty-four nations.[30]

The purpose of the conference was to design a blueprint for the worldwide regulation of post-war international civil aviation. Whereas the conference encountered relatively few problems in the technical field of civil aviation, it was largely unsuccessful in its attempts to reach agreement on the economic regulation of post-war international civil aviation.[31] The technical field is concerned with the establishment of international arrangements for licensing pilots and mechanics, exchanging technical information, registering and certifying the airworthiness of aircraft, standardising the development of air navigation aids, collecting statistics and similar essential technical tasks and procedures.[32] In terms of the so-called "five freedoms of the air",[33]

[26] Jennings, "International", *supra* note 12 at 194. See also Martono, *Route*, *supra* note 8 at 27.

[27] *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO Doc 7300/9 (entered into force 4 April 1947) [*Chicago Convention*]. Article 80 of the Chicago Convention provides:

> Each contracting State undertakes, immediately upon the coming into force of the Convention, to give notice of denunciation of the Convention relating to the Regulation of Aerial Navigation signed at Paris on 13 October 1919 or the Convention on Commercial Aviation signed at Habana on February 20, 1928, if it is a party to either. As between contracting States, this Convention superseded the Convention of Paris and Havana previously referred to.

[28] *Proceedings of the International Civil Aviation Conference*, Chicago, Illinois, 1 November - 7 December 1944, Volume I, Department of State, 1948, 11 [*Proceedings*].

[29] Martono, *Route*, *supra* note 8 at 27.

[30] "The Postal History of ICAO: 1944: The Chicago Conference", online: ICAO <http://www.icao.int/secretariat/PostalHistory/1944_the_chicago_convention.htm>.

[31] Martono, *Route*, *supra* note 8 at 27; Haanappel, *Rate-making*, *supra* note 19 at 10; AJ Thomas Jr, *Economic Regulation of Scheduled Air Transport: National and International* (Buffalo, NY: Dennis & Co, 1951) at 192.

[32] Martono, *Route*, *supra* note 8 at 27; Robert I Thornton, *International Airlines and Politics: A Study in Adaptation to Change* (Ann Arbor, Mich: University of Michigan, 1970) at 2.

sharply contrasting views were expressed at the Chicago Conference. Basically, four major group proposals were submitted at the Chicago Conference. The proposals came from the United States of America (US), the United Kingdom (UK), Canada, and jointly from Australia and New Zealand.[34]

The joint proposal of Australia and New Zealand, which suggested the establishment of international ownership and operation of civil services on the world trunk routes or for the most important air routes, was rejected early in the discussion,[35] indicating that the Conference had moved away from extensive international control of air service. The UK proposal was to set up an international authority empowered to define international routes to be agreed upon bilaterally or multilaterally between States, define frequencies of all countries operating on any international routes, predetermine the capacity that would be shared between airlines that were allowed to fly the routes,

[33] The "five freedom of the air " are the following:

> The First freedom of the air: the right of an aircraft of one country to fly across the territory of another country without landing;
> The second freedom of the air: the right of an aircraft of one country to land in the territory of another country for non-traffic purposes;
> The third freedom of the air: the right of an airlines of one country to set down in another country traffic coming from the country of the airline's nationality;
> The fourth freedom of the air: the right of an airline of one country to pick up in another country traffic destined for the country of the airline's nationality;
> The fifth freedom of the air: the right of an airline to carry traffic from a point of origin in one foreign country.

See PPC Haanappel, *The Scheduled International Airlines and the Aviation Consumer* (LLM Thesis, McGill University Institute of Air and Space Law, 1974) at 20 [unpublished] [Haanappel, *The Scheduled*]. For a detailed description, see also Bin Cheng, *The Law of International Air Transport* (London: Stevens and Sons, 1962) at 9. As Wassenberg put it:

> Freedom of the Air is the freedom to overfly the territory of every state with civil aircraft engage in the transportation of passengers and their baggage, cargo and mail for remuneration or hire, to land in the territory of every state for technical and operation reasons and to embark and disembark traffic regardless of the origin and destination of traffic.

See Henry A Wassenberg, *Public International Air Transportation Law in a New Era: Economic Regulation of International Air Carrier Operation* (Deventer: Kluwer, 1976) at 125.

[34] John Cobb Cooper, *The Right to Fly* (New York: Henry Holt, 1947) at 168-170.

[35] As Cooper stated:

> The joint proposal of Australia and New Zealand would establish international ownership and operation of civil services on the world trunk routes or for the most important air routes, a universal convention would be adopted whereas international airlines would be conducted locally.

Ibid.

and distribute the frequencies between the countries concerned.[36] The Canadian proposal[37] was fundamentally the same as that of the United Kingdom, but gave slightly greater power to an envisaged "International Air Authority".

The US proposal was to establish a convention that would include the right of transit and the right to land without picking up or setting down passengers, cargo and mail. The US was in favour of a system of free access for each country's carriers to the territories of other countries,[38] and it was proposed that no limitations should be put on capacity, frequency or tariffs. Capacity, frequency and tariffs would be determined by the carriers themselves in an environment of free competition. The US did not approve of any economic powers for an International Air Authority as proposed by Canada. Fifth freedom capacity would be equally unrestricted and airlines would have the possibility to compete with each other on all international routes.[39] None of the above-mentioned proposals received general acceptance. In order to avoid a complete breakdown of the conference, the delegates sought a compromise and thus separate agreements were created. These resulted

[36] As Cribbett notes:

> The British proposal was easy to understand because its air carriers were cripple as result of the World War II. There was an understanding reached between the United States of America and the United Kingdom during the World War II. The British aircraft industry concentrated on fighter and bombers while the United States of America furnished transport aircraft which were easily convertible to commercial air services after the World War II. In return the British did not have a substantial commercial fleets subsequently the British Government had to protect the weakness of its airline industry. The British Government believed that uncontrolled competition would lead to excess capacity and constant pressure would push fares so low that its air carriers could not survive the competition.

Cribbett, *supra* note 15 at 58. See also Paul B Larsen, "Status Report on the Renegotiation of the US-UK Bilateral Air Transport Agreement (Bermuda Agreement)" (1977) Air Law 3 at 82.

[37] As Cooper noted:

> The Canadian proposal would set up an International Authority with regulatory powers for economic issues. Capacity would not be predetermined but an elastic set of rules based on consumer preference would apply. Regional Council to deal with matters of Regional concerned would be set up. The Convention was to be an agreement between states and was not to be concerned with such questions domestically.

Cooper, *supra* note 34. See also Jennings, "International", *supra* note 12 at 200-201; Thomas Jr, *supra* note 31 at 194.

[38] Martono, *Route*, *supra* note 8 at 29.

[39] Cooper, *supra* note 34 at 164. See Martono, *Route*, *supra* note 8 at 29.

in the International Air Service Transit Agreement (IASTA)[40] and the International Air Transport Agreement.[41]

The Chicago Convention does not give a multilateral grant of third, fourth or fifth freedoms of the air, which commercially are seen as vital rights.[42] It thereby left economic issues of international civil aviation unresolved. The International Air Transport Agreement exchanges the third, fourth and fifth freedom rights on a multilateral basis, but it failed due to lack of acceptance by States.[43] Another attempt on a multilateral basis was made in Geneva in 1947, but it also failed to gain general support. With regard to traffic rights, the Chicago Conference demonstrated the inability to establish an economic regime for scheduled international air transport on a multilateral basis. Therefore, the commencement of international air transport would have to be achieved on the basis of bilateral agreements. Under the Chicago Convention, the task was given to ICAO to prepare Standard Bilateral Tariff Clauses for use in bilateral agreements concluded by the Member States.

With regard to competition, in the fall of 1945, Pan American Airways announced that it would reduce its North Atlantic air tariffs by US$ 275 on its service between New York and London. The British government resisted the proposed tariff cut, as Britain realised it had to protect its own weakened airline industry to ensure that international air services continue to develop and to ensure the elimination of wasteful competition as well as uneconomic subsidies. Therefore, the British retaliated by announcing that they would limit the frequencies, capacity and tariffs permitted in the transatlantic services to two landings per week. For the British government, by that time, international tariff control had become a vital matter.[44]

[40] *International Air Service Transit Agreement*, 7 December 1944, 84 UNTS 389 (entered into force 30 January 1945).

[41] *International Air Transport Agreement*, 7 December 1944, 171 UNTS 387 (entered into force 8 February 1945).

[42] Martono, *Route*, *supra* note 8 at 29.

[43] The United States of America withdrew from the International Air Transport Agreement on 25 July 1956. See 15 US Dept of State Bull at 236 (1946). See Ivan A Vlasic, ed, *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper* (Montreal: McGill University Press, 1968) at 382; Robert Y Jennings, "Some Aspects of the International Law of the Air" (1949) 75 Rec des Cours 509.

[44] Haanappel, *Rate-making*, *supra* note 19 at 15-16. See also Oswald Ryan, "Recent

As would become apparent and useful when settling disputes over tariffs, the Standard Bilateral Tariff Clauses contain, *inter alia*, the definition of tariff, relevant factors for determining tariff levels, the responsibility of air carriers to agree on tariffs, mechanisms for agreeing on tariffs, submission of tariffs, approval of tariffs, duration of established tariffs, determination of tariffs in the event of differences, settlement of disputes and enforcement of tariffs.[45]

C. BERMUDA AGREEMENT OF 1946

The Chicago Convention of 1944 left the economic issues of international civil aviation unresolved. Therefore, the commencement of economic international air service was achieved on the basis of bilateral agreements.[46] In response to the failure of the Chicago Convention, the US and the UK concluded a bilateral agreement which was signed on 11 February 1946.[47] The Bermuda Agreement of 1946 intended to find a solution to economic problems such as capacity, frequencies, routes and tariffs raised by the Chicago Convention. It sought to bridge the gap between the British and American views concerning economic problems.

Developments in United States International Air Transport Policy" (1946-1947) 1 Air Affairs at 310.

[45] *Standard Bilateral Tariff Clauses*, *supra* note 20.

[46] Martono, *Route*, *supra* note 8 at 48.

[47] *Agreement between the United Kingdom and the United States*, 11 February 1946, 3 UNTS 253, 60 Stat 1499, TIAS No 1507 [*Bermuda Agreement*]. For the full text of the Agreement, the Final Act and Annex, see 14 US Dept of State Bull at 582-596 (1946); Cheng, *supra* note 33 at 554-573; Shawcross & Beaumont, *Air Law*, 3rd ed (London: Butterworths, 1966) at 261-273. Yousef Mohammad El Zoubi, *Bermuda Capacity Principles in the Seventies and their implications for Jordan* (LLM Thesis, McGill University Institute of Air and Space Law, 1977) at 204-224 [unpublished].

This bilateral air transport agreement represents a compromise between the two conflicting philosophies, i.e. the American liberalism and the British protectionism which appeared in the Chicago Conference of 1944. The American views were then aiming at free competition on the tariff, rates and fares and services whereas the British views were supporting direct international control of traffic rights includes capacity, route, frequencies and tariff as well. See Cooper, *supra* note 34 at 177. "The bilateral air transport agreement constituted a compromise between the liberal American and the restrictive British concept". See Albert W Stoffel, "American Bilateral Air Transport Agreement the Threshold of the Jet Transport Age" (1959) 26 J Air L & Com 119 at 122. "The Bermuda Plan was the result of the compromise views of the United States of America and the United Kingdom on the economic matter related to routes, capacity, frequencies and tariff provision concerning the civil aviation". Paul J De Dongo, *Progress Toward the Multilateral Exchange of Commercial Air Transport Rights* (LLM Thesis, McGill University Institute of Air and Space Law, 1954) at 192-193 [unpublished].

Essentially, the Bermuda Agreement is the result of American and British acceptance of the IASTA, including the principles incorporated in the Final Act of the Bermuda Conference together with the bilateral agreement signed in Bermuda and a detailed Annex to the Agreement.[48] The main issue of the Bermuda Agreement centred around the regulation of commercial rights involving the regulation of capacity, routes, frequencies and tariffs.

The Annex to the Bermuda Agreement had a regulated provision on tariffs, which was an important advancement in the field of international aviation cooperation. Tariffs would be set up by an "Air Authority" and for this purpose the International Air Transport Association (IATA) was chosen.[49] Tariffs to be charged by the designated airline between points in the territory of the Contracting Parties were subject to the approval of the governments acting within their respective jurisdictions.[50]

As previously mentioned, as far as international tariff-making is concerned, the Chicago Convention did not adopt any such provisions.[51] The regulation of tariffs is essential for international air transport as a safeguard for the public against any abuse of the protected position which airlines enjoy under a system of controlled entry into the industry, and to ensure the long-term economic stability of the industry by ensuring fair competition.[52] The Bermuda Agreement was the first agreement in which an understanding was made with respect tariffs.[53]

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[48] Martono, *Route*, *supra* note 8 at 49. See Vlasic, *Explorations*, *supra* note 43 at 383. The agreement followed the Standard Form set up at the Chicago Conference of 1944. It contained fourteen articles which define the conditions under which air services shall be operated between the territories of both Contracting Parties. It also set out that the modification to the Annex may be made after consultation and disagreement between the two Governments on the Agreement or the Annex shall be referred to the PICAO or its successor for an advisory opinion. See the joint statement by the United States of America and the United Kingdom Delegations on the press release made on 11 February 1946, 14 US Dept of State Bull at 303-304 (1946).

[49] Martono, *Route*, *supra* note 8 at 50. See Sprokkreeff, *supra* note 14 at 48.

[50] Vlasic, *Explorations*, *supra* note 43 at 384; Jennings, "International", *supra* note 12 at 531.

[51] Haanappel, *Rate-making*, *supra* note 19 at 14.

[52] Martono, *Route*, *supra* note 8 at 60; Issam Yahia Kanaan, *Air Transport Bilateralism in the Arab Middle East* (LLM Thesis, McGill University Institute of Air and Space Law, 1970) at 118 [unpublished].

[53] Chuang, *supra* note 11 at 28.

1. SCOPE OF TARIFFS

Under the Bermuda Agreement, the expression "rate" was used instead of "tariff", and "rate" provisions were incorporated into Section II of the Annex to the Bermuda Agreement. The scope of tariffs in the Agreement were to be charged by the designated airlines of either Contracting Party between points in the territory of the US and points in the territory of the UK, and excluded the tariffs to be charged by the designated airline to third countries to or from the territory of either Contracting Party.[54] Tariffs to be charged by the designated airlines were subject to the approval of both governments within their respective jurisdictions and in accordance with their respective obligations.

2. PROCEDURES FOR FILING THE AGREED TARIFFS

The Bermuda Agreement was the first agreement in which the US made provisions for the control of international air transport tariffs.[55] Before that time, the Civil Aeronautics Board (CAB) had no legal authority to fix tariffs for American airlines in foreign commerce. The CAB announced that it would approve the traffic conference ratemaking machinery of IATA for a period of one year. Thus, the CAB would have an opportunity to approve or disapprove tariffs when they were submitted by IATA.

Tariffs which had been set by IATA were subject to the approval of both governments.[56] However, the approval of the traffic conference machinery of IATA did not guarantee that the tariffs were agreed upon.[57] Any new tariffs were to be filed with the aeronautical authorities of both Contracting Parties at least thirty days before the proposed date of introduction. This provision was meant to give the aeronautical authorities a reasonable amount of time to review IATA-approved tariffs and give them the opportunity to approve or reject such tariffs if they wished to do so.[58] If both aeronautical authorities approved the proposed tariffs within thirty days, the tariffs would become effective on the proposed date of introduction.

[54] Cheng, *supra* note 33 at 442.
[55] Vlasic, *Explorations, supra* note 43 at 387.
[56] *Ibid* at 387-388.
[57] Chuang, *supra* note 11 at 31.
[58] Haanappel, *Rate-making, supra* note 19 at 17.

Where there was no IATA tariff-making machinery available, or in the event that the tariff conference was unable to agree on tariffs or failed to renew their approval of IATA's tariff-making machinery, the Bermuda Agreement provided an alternative method to resolve the problems with tariffs.[59] Before the CAB acquired the power to fix tariffs, that is, "prior to the time when such power may be conferred by law upon the aeronautical authorities of the United States",[60] should governments disagree on the tariffs to be charged by their designated airlines on the route specified in the bilateral agreement, the authority raising the objection to the tariffs "may take inauguration or continuation of the service in question at the tariffs complained of".[61]

After the CAB acquired tariff-fixing powers, that is, "in the event that the power is conferred by law upon the aeronautical authorities of the United States to fix fair and economic tariffs for the transport of persons and property by air on international service and to suspend proposed tariffs in a manner comparable to that in which the CAB at present is empowered to act with respect to such tariffs for the transport of persons and property by air within the United States", whenever governments disagreed on the tariffs to be charged by their designated airlines on the routes specified in the bilateral agreement,[62] the dispute would be referred to the Provisional International Civil Aviation Organization (PICAO), or to its best efforts to put into effect the tariffs recommended by PICAO or ICAO. This meant that the advisory opinion of either PICAO or ICAO would determine the tariffs if both governments disagreed over the tariffs. The Bermuda Conference was very progressive in that economic power could be given to an international authority to fix tariffs when both the governments concerned could not agree on the tariffs.[63]

[59] *Martonu, Route, supra* note 8 at 62; Haanappel, *The Scheduled, supra* note 33 at 66; Vlasic, *Explorations, supra* note 43 at 388. See also *Bermuda Agreement, supra* note 47, Annex, Sect II.
[60] See *Bermuda Agreement, supra* note 47, Annex, Sect II, para (h).
[61] 14 US Dept of State Bull at 588 (1946).
[62] See *Bermuda Agreement, supra* note 47, Annex, Sect II para 6(e).
[63] Vlasic, *Explorations, supra* note 43 at 388.

3. THE LEVEL OF THE TARIFF

Paragraph (h) of the Annex to the Bermuda Agreement provided some guidelines for the level at which tariffs should be set. The tariffs should be fixed at a reasonable level, with due regard being paid to all relevant factors, such as the costs of operation, reasonable profit and the tariffs charged by other airlines. The tariffs must be set at the lowest levels and be consistent with sound economic principles, taking into account the benefits of air travel in general. The governments concerned did not permit IATA and its member airlines to charge the highest tariffs possible for passengers and cargo. The tariffs should rather cover the costs of operation and allow for a reasonable profit margin.[64]

D. STANDARD BILATERAL TARIFF CLAUSES

For the purposes of Member States of ICAO concluding bilateral agreements, the ICAO Council issued Standard Bilateral Tariff Clauses (SBTCs).[65] In accordance with SBTCs, the level of tariff shall be established at reasonable levels, with due regard being paid to all relevant factors, including the cost of operations, the characteristics of the service, commission rates, reasonable profit and tariffs of other airlines. In the same vein, after discussion with the respective governments and consultation, the designated airline shall agree on the tariff.

The level of tariff shall, wherever possible, be reached by the use of the appropriate international tariff fixing mechanism such as IATA and approved by the aeronautical authorities within sixty days of the date of submission. If neither of the aeronautical authorities of the Contracting Parties has expressed disapproval of the proposed tariff within a reasonable period, based on the principle of legal presumption, the tariff shall be considered approved. If the tariff cannot be agreed upon by the designated airlines, the aeronautical authorities shall endeavour to determine the tariff by agreement between them.

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[64] Haanappel, *Rate-making*, *supra* note 19 at 18.

[65] *Standard Bilateral Tariff Clauses*, *supra* note 1.

III. TARIFF PROVISIONS IN INDONESIA'S BILATERAL AGREEMENTS

Apart from securing the economic viability of the agreed service, the main function of the bilateral regulation of tariffs is the establishment of tariffs at reasonable and uniform levels so as to promote economic air transport for the benefit of the travelling public and to eliminate the hazards of free competition.[66] The method most commonly applied in the regulation of international air tariffs is tariff-fixing by the airlines through the machinery of IATA, subject to the approval of their respective governments.[67] In this regard, the majority of Indonesian bilateral agreements, with slight variations in wording, delegates the determination of tariffs to IATA, subject to the approval of the governments concerned.[68] Exceptions are found in Indonesia's bilateral agreements with the Peoples' Republic of China and the former Union of Soviet Socialist Republics (USSR). In these two agreements, the tariffs to be charged were to be agreed upon by the designated airlines subject to the approval of the civil aviation authorities of both Contracting Parties.[69]

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[66] Lehtonen, *supra* note 2 at 178.

[67] A good analysis with regard to international rate-making is given by Haanappel, *Rate-making*, *supra* note 19 at 18.

[68] Indonesia's bilateral air transport agreements with Australia, Belgium, Bulgaria, Burma, Cambodia, (the former) Ceylon, (the former) Czechoslovakia, Denmark, France, Germany, India, Italy, Japan, Korea, Lebanon, Malaysia, the Netherlands, Norway, Pakistan, the Philippines, Singapore, Switzerland, Sweden, Taiwan, Thailand, the (former) United Arab Republic, and the United Kingdom.

[69] Article V(2) of the bilateral air transport agreement between Indonesia and the Peoples' Republic of China, signed at Beijing on 6 November 1964, provides:

> The minimum levels of tariffs of the specified route(s) and any sector thereof that may affect the other Contracting Party shall be agreed upon between the designated airlines and subject to the approval of the civil aeronautical authorities of both Contracting Parties.

Article 6(2) of the bilateral air transport agreement between Indonesia and the Union of Soviet Socialist Republics, signed at Jakarta on 2 November 1961, provides (originally in Indonesian language):

> The tariff referred to in paragraph (1) of this Article, together with rate of agency commission used in conjunction with them shall, if possible be agreed in respect of each of specified routes between the designated airlines concerned, in consultation with other airlines operating over the whole or part of that route. The tariffs so agreed shall be subject to the approval of the aeronautical authorities of both Contracting Parties.

A. DEFINITION OF "TARIFF"

In all Indonesian bilateral agreements, provisions exist with regard to tariffs. However, there is no definition of what a tariff is. In accordance with ICAO's Standard Bilateral Tariff Clauses (STBCs) already referred to above, the term "*tariff*" means the price or charges to be paid for the carriage of passengers, baggage and cargo and the conditions under which those prices or charges apply, including prices or charges and conditions for agency and other auxiliary service, but excluding remuneration and conditions for carriage. In contrast, in accordance with European Civil Aviation Conference (ECAC) Standard Clauses, the "tariff":

> to be charged by the designated airlines of one Contracting Party for carriage to or from the territory of the other Contracting Party shall be established at reasonable levels, due regard being paid to all relevant factors including the costs of operation, reasonable profit, characteristics of service and the tariffs of other airlines for any part of the specific route.[70]

B. SCOPE OF TARIFF REGULATIONS

The definition of "tariff" or "rates" or "tariffs" was not introduced in Indonesian bilateral agreements; however, some agreements provide for the establishment of tariffs together with "the tariffs of agency commission used in conjunction with them" [71] and some bilateral

[70] *Standard Clauses for Bilateral Agreements*, ICAO Doc 7977, ECAC/3-1 (1959), art 7(2) [*ECAC Standard Clauses*].

[71] The bilateral air transport agreements of Indonesia with Belgium, Burma, Cambodia, (the former) Ceylon, (the former) Czechoslovakia, Denmark, France, India, Italy, Lebanon, Malaysia, the Netherlands, Norway, Thailand, Singapore, Sweden, the (former) USSR, the Philippines, the (former) United Arab Republic, and the United Kingdom. The Agency commission rate which is not expressly referred to in the corresponding Article 7(2) of the *ECAC Standard Clauses* are considered an important part of the tariff structure and particularly valuable for inclusion with a view to open rate situations. See *Handbook on Administrative Clauses in Bilateral Air Transport Agreements*, ICAO Circular 63-AT/6 (1962) at 109 [*Handbook on Administrative Clauses*]. Again, as most of Indonesia's bilateral agreements with other States have not been renewed or updated, there are mentions of bilateral air transport agreements with States that have ceased to exist. As an example, the bilateral with (the former) Czechoslovakia was promulgated on 23 June 1976 in the Presidential Decree No 28 of 1976. Though the State of (the former) Czechoslovakia no longer exists, the bilateral is technically still in force.

agreements are silent in this respect.[72] In regard to the definition of a tariff, on 8 March 1978, the ICAO Council approved the STBCs as a guideline for Member States of ICAO.[73] In this definition, the tariff includes the prices or charges and conditions for the agency and other auxiliary services. In this regard, the majority of bilateral agreements concluded by Indonesia provides for the tariff which includes the airline ticket agency commission.[74]

It should be noted that Indonesia's bilateral agreement with the US in 1968 specifies the scope of application of the tariff by adopting the provision incorporated in Article 7(1) of the ECAC Standard Clauses.[75] This bilateral agreement contains a tariff provision which restricts the scope of the application of the tariff to carriage by the airline of one Contracting Party to or from the territory of the other Contracting Party.[76] Using this wording, *extra-partes* traffic as well as national third

[72] The bilateral air transport agreements with Australia, Czechoslovakia, Germany, Japan, the Netherlands, the Peoples' Republic of China and Taiwan.

[73] *Standard Bilateral Tariff Clauses*, *supra* note 1.

[74] The bilateral air transport agreements with Belgium, Burma, Cambodia, (the former) Ceylon, Denmark, France, India, Italy, Lebanon, Malaysia, the Netherlands, Norway, the Philippines, Singapore, Sweden, Thailand, the (former) United Arab Republic, the United Kingdom, and the (former) USSR.

[75] In this connection, no provision for tariff was incorporated in the Chicago Standard Form Agreement. See *Handbook on Administrative Clauses*, *supra* note 71 at 109.

[76] .The bilateral air transport agreement between Indonesia and the United States of America , dated 15 January 1968, provides :

> Article 10(A)
> All rates to be charged by an airline of one Contracting Party for carriage to or from territory of the other Contracting Party shall be reasonable, due regard being paid to all relevant factors, such as costs of operation, reasonable profit, and the rate charged by any other airlines, as well as the characteristics of each services. Such rates shall be subject to the approval of the aeronautical authorities of the Contracting Parties, who shall act in accordance with their obligation under this Agreement within the limit of their legal power.
>
> Article 10(B)
> Any rate proposed to be charged by an airlines of one Contracting Party to or from the territory of the other Contracting Party, shall, if so required, be filed by such airline with the aeronautical authorities of the other Contracting Party at least thirty (30) days before the proposed date of introduction unless the Contracting Party with whom filing is to be made permit on shorter notice. The aeronautical authorities of each Contracting Party shall use their best efforts' to insure that the rates charged and collected conform to the rate filed with either Contracting Party and that no airline rebates any portion of such rates by any means, directly or indirectly, including the payment of excessive sales commissions to agents or the

country traffic would be excluded. The bilateral agreements with Denmark, Norway and Sweden [77] also adopt the tariff provision incorporated in Article 7(1) of the ECAC Standard Clauses.

It is apparent that the application of the tariff is restricted to the carriage to or from the territory of the other Contracting Party. In connection with the application of tariffs, some Indonesian bilateral agreements provide that the tariffs apply to *any* agreed upon service,[78] while the bilateral agreement with the Peoples' Republic of China

use of unrealistic currency conversion rates.

[77] Article 7 of the bilateral agreement between Indonesia and respectively with Denmark, Norway and Sweden, done separately at Copenhagen on 23 June 1971, provides:

(1) The tariffs to be charged by the designated airlines of one Contracting Party for carriage to or from the territory of the other Contracting Party shall be established at reasonable levels, due regard being paid to all relevant factors including costs of operation, reasonable profit, characteristics of service (such as standards of speed and accommodation) and the tariffs of other airlines for any part of the specified route. These tariffs shall be fixed in accordance with the following provisions of this Article.

(2). The tariffs referred to in paragraph (1) of this Article, together with the rates of agency commission used in conjunction with them shall, if possible be agreed in respect of each of the specified routes between the designated airline concerned, in consultation with other airlines operating over the whole or part of that route, and such agreement shall, where possible, be reached through the rate fixing machinery, of the International Air Transport Association. The tariff so agreed shall be subject to the approval of the aeronautical authorities of both Contracting Parties.

(3). If the designated airline cannot agree on any of these tariffs, or if for some other reason a tariff cannot be agreed in accordance with the provisions of paragraph (2) of this Article, the aeronautical authorities of the Contracting Parties shall try to determine the tariffs by agreement between themselves.

(4). If the aeronautical authorities cannot agree on the approval of any tariff submitted to them under paragraph (3), the dispute shall be settled in accordance with the provisions of Article 10 of the present Agreement.

(5). (a). No tariff shall come into force if the aeronautical authorities of either Contracting Party are dissatisfied with it except under the provisions of paragraph (3) of Article 10 of the present Agreement;

(b). When tariffs have been established in accordance with the provisions of this Article, these tariffs shall remain in force until new tariffs have been established in accordance with the provisions of this Article.

Similarly, see Article 8(1) of the bilateral air transport agreement between Indonesia and Lebanon.

[78] The bilateral air transport agreements with Australia, Burma, Cambodia, (the former) Ceylon, (the former) Czechoslovakia, France, Germany, the Netherlands, Pakistan, the Philippines, Singapore, Thailand, the (former) United Arab Republic and the (former) USSR.

provides that the tariff applies only on specific routes.[79]

C. GENERAL PRINCIPLES GOVERNING TARIFFS

The bilateral agreement with India lays down certain general principles for the regulation of tariffs. This agreement stipulates that the tariffs "shall be established at reasonable levels [with] due regard being paid to all relevant factors".[80] These factors include the costs of operation, reasonable profit, characteristics of service, and the tariffs charged by other airlines on the route. With slight variations in wording, the majority of bilateral agreements concluded by Indonesia[81] provides that

[79] Article V(1) of the bilateral air transport agreement with the Peoples' Republic of China, dated 6 November 1964.

[80] Article 6 of the bilateral air transport agreement between Indonesia and India, signed in September 1968, provides:

(1). The tariffs on any agreed service shall be established at reasonable levels, due regard being paid to all relevant factors including cost of operation, reasonable profit, characteristics of service (such as standards of speed and accommodation) and the tariff of other airlines for whole or part of the specified route. These tariffs shall be fixed in accordance with the following provisions of this Article.

(2). The tariffs referred to in paragraph (1) of this Article together with the rates of agency commission used in conjunction with them shall, if possible be agreed in respect of each of the specified routes between the designated airlines concerned, in consultation with other airlines operating over the whole or part of that route, and such agreement shall, where possible, be reached through the rate fixing machinery of the International Air Transport Association. The tariff so agreed shall be subject to the approval of the aeronautical authorities of both Contracting Parties;

(3). If the designated airline cannot agree on any of these tariffs, or if for some other reason a tariff cannot be agreed in accordance with the provisions of paragraph (2) of this Article, the aeronautical authorities of the Contracting Parties shall try to determine the tariffs by agreement between themselves.

(4). If the aeronautical authorities cannot agreed on the approval of any tariff submitted to them under paragraph (3), the dispute shall be settled in accordance with the provisions of Article 9 of the present Agreement;

(5). (a) No tariff shall come into force if the aeronautical authorities of either Contracting Party are dissatisfied with it except under the provisions of paragraph (3) of Article 9 of the present Agreement;

(b).When tariffs have been established in accordance with the provisions of this Article, these tariffs shall remain in force until new tariffs have been established in accordance with the provisions of this Article.

[81] The bilateral air transport agreements with Australia, Belgium, Burma, Cambodia, (the former) Ceylon, (the former) Czechoslovakia, Denmark, France, Germany, India, Italy, Japan, Lebanon, Malaysia, the Netherlands, Norway, the Peoples' Republic of China, Pakistan, Singapore, Sweden, Thailand, the (former) United Arab Republic, the United Kingdom, the (former) USSR.

the tariff[82] shall be established at reasonable levels.

1. PROCEDURES FOR THE ESTABLISHMENT OF TARIFFS

The bilateral agreement with the Peoples' Republic of China provides that the tariff which will affect the other Contracting Party should be agreed upon between the designated airlines, and should be subject to the approval of the aeronautical authorities of both Contracting Parties. In the event of a disagreement concerning the tariff, the Contracting Parties shall endeavour to reach an agreement between them.[83] In all the other agreements, more elaborate procedures for the establishment of tariffs are described. Most of Indonesia's bilaterals refer expressly to IATA tariff-making machinery as the channel through which agreement between the airlines is to be made and consultation with other airlines is to be conducted.[84]

[82] In accordance with Article 7 of the Agreement of Exchange of Traffic Rights between Indonesia and Taiwan, the rates to be charged for the carriage of passenger and cargo by the designated airlines on their respective routes shall subject to the approval of the aeronautical authorities concerned and shall normally be established by the rate fixing machinery of the International Air Transport Association (IATA). *Exchange Traffic Rights Between the Directorate General of Air Communications, Ministry of Communications of the Republic Indonesia and the Civil Aeronautics Administration, Ministry of Communications of the Republic of China*, 15 August 1969, art 7 [*Agreement between Indonesia and Taiwan*]. In contrast, , Indonesia also has bilateral air transport agreement with the Peoples' Republic of China, signed at Peking on 6 November 1964, Article V of which provides:

> (1). Tariffs to be charged for the carriage of passengers, baggage and cargo on the specified route(s) shall be fixed at reasonable levels, due regard being paid to all relevant factors, including costs of operation, reasonable profit, characteristics of service (such as standards of speed and accommodation) and tariffs of other airlines. The tariffs on common and equivalent route(s) or sectors shall have the same minimum levels for the designated airlines of the Contracting Parties.
> (2). The minimum levels of tariffs of the specified route(s) and any sector thereof that may affect the other Contracting Party shall be agreed upon between the designated airlines and subject to the approval of the civil aeronautical authorities of both Contracting Parties;
> (3). In the event of disagreement between the designated airlines or in case a minimum tariff level is not approved by the civil aeronautical authorities of both Contracting Parties, the Contracting Parties shall endeavor to reach agreement between themselves. Pending any new decision concerning a minimum tariff level, the prevailing minimum tariff level agreed upon by both Contracting Parties shall remain in force.

[83] Article V(2) to (3) of the bilateral air transport agreement with the Peoples' Republic of China dated 6 November 1964.

[84] The IATA ratemaking machinery (traffic conference) is the most important for establishment of scheduled international passengers' fares. The government can represent the interest of consumers through the IATA-Traffic Conference. The government is able to give instruction on policy guidelines to its flag air carrier prior to the Conference and approves or disapproves the outcome of conference. See e.g. Indonesia's bilateral air transport agreements with Belgium, Burma, Cambodia, (former) Ceylon, Denmark, France, Germany, India, Japan, Lebanon, Malaysia, the Netherlands, Norway, Pakistan, the Philippines, the (former) United Arab Republic, Singapore and Thailand. See also ICAO, *Policy and Guidance Material on the Economic Regulation of International Air Transport*, ICAO Doc 9587 (3rd ed, 2008).

In fact, the simplest bilateral agreement, the one with Taiwan, merely provides that the tariffs to be charged for the carriage of passengers and cargo shall normally be established by the tariff-fixing machinery of IATA and be subject to the approval of the aeronautical authorities of both Contracting Parties. [85] No particular rules or procedures nor general stipulations concerning the settlement of disputes are laid down in that agreement. It would appear that in the event of a disagreement between the airlines, the tariffs could be established only with recourse to normal procedures for dispute settlement available under international law.[86]

Indonesia's bilateral agreement with Denmark provides for the establishment of tariffs by adopting the provision incorporated in the ECAC Standard Clauses.[87] In this agreement, the procedures for the establishment of tariffs are composed of two elements: the first is the bilateral agreement between the designated air carriers of both Contracting Parties and the second is the approval by the aeronautical authorities of both Contracting Parties. The bilateral agreement between the designated airlines shall be arrived at in consultation with other airlines operating the whole or part of that route.[88] Some Indonesian bilateral agreements comply with this provision.[89]

[85] See *Agreement between Indonesia and Taiwan*, *supra* note 82, art 7.

[86] The lack of diplomatic relations between Taiwan and Indonesia may explain why the bilateral agreement between the two countries is more simplified as compared to bilateral agreements between Indonesia and other countries.

[87] *ECAC Standard Clauses*, *supra* note 70, art 7(2).

[88] Article 7(2) of the bilateral air transport agreement with Denmark, Norway and Sweden are similar to the provision of the air transport agreement with Sweden. See *supra* note 77

[89] See the bilateral air transport agreements with Belgium, Burma, Cambodia, (the former) Ceylon, (the former) Czechoslovakia, Denmark, Germany, India, Italy, Lebanon, Malaysia, the Netherlands, Norway, Pakistan, Singapore, Sweden, (the former) USSR, the (former) United Arab Republic, the Philippines, and the United Kingdom.

The bilateral agreement with Thailand provides that the agreement between the designated airlines shall be guided by the decisions of the Traffic Conference of IATA. Furthermore, the bilateral agreement between the designated airlines, where possible, should be reached through the tariff-making machinery of IATA.[90] With a minor change in wording, it is essentially formulated as Article 7(3) of the ECAC Standard Clauses. The majority of Indonesian bilateral agreements uses basically identical wording as the ECAC Standard Clauses and some follow the formulation incorporated in the Standard Bilateral Tariff Clauses.[91]

The bilateral agreement with Norway stipulates that the agreed tariff between the designated airlines should be submitted to the aeronautical authorities of both Contracting Parties for approval.[92] No provision explicitly states that the agreed tariff should be submitted for approval to the aeronautical authorities of both Contracting Parties; however, the words "*the tariffs so agreed shall be subject to the approval of the aeronautical authorities of both Contracting Parties*"[93] indicate that the tariff agreed between the designated airlines should be submitted to the aeronautical authorities for approval. A majority of Indonesian bilateral agreements complies with this provision.[94]

On the subject of the submission of the agreed tariffs, the bilateral agreement between Singapore and the United Kingdom explicitly states that the tariff should be submitted to the aeronautical authorities of both Contracting Parties for approval before the coming into force of the tariff.[95] Indonesia's bilateral agreements with the United States of America, Italy, Lebanon and the Philippines are exceptions. These bilateral agreements explicitly state that the agreed tariffs should be

[90] Article 7(2) of the bilateral air transport agreement with Denmark, Norway and Sweden dated 23 June 1971. See *supra* note 77.

[91] See especially the bilateral air transport agreements with Australia, Japan, the Philippines and the Peoples' Republic of China.

[92] Article 7(2) of the bilateral air transport agreement with Denmark, Norway and Sweden dated 23 June 1971. See *supra* note 77.

[93] *Ibid* [emphasis added].

[94] The bilateral air transport agreements with Australia, Belgium, Burma, Cambodia, (the former) Ceylon, (the former) Czechoslovakia, Denmark, France, Germany, India, Italy, Japan, Malaysia, the Netherlands, Norway, Pakistan, the Peoples' Republic of China and the United Kingdom.

[95] Martono, *Route*, *supra* note 8 at 167-168.

submitted to the aeronautical authorities of both Contracting Parties for approval, and also contain a specific period of submission for the agreed tariff for the approval of the aeronautical authorities of both Contracting Parties. The majority of Indonesian bilateral agreements makes no mention of a specific period for submission.[96]

None of the Indonesian bilateral agreements, except the agreement with Lebanon, lays down a specific stipulation as to the act of approval or disapproval of the proposed tariff. In such circumstances, it would be desirable that either the approval or disapproval should be given expressly and in a reasonable time before the proposed date for the introduction of the tariffs. With the adoption of the provision incorporated in Article 7(4) of the ECAC Standard Clauses,[97] the bilateral agreements with the Philippines and Lebanon establish a specific term for the notification by each Contracting Party to the other of its dissatisfaction with the proposed tariff.[98]

It is apparent that in the absence of disapproval of the proposed tariff, it can be presumed that the tariff is approved by the aeronautical authorities of both Contracting Parties. Although the STBCs include a legal presumption, none of the Indonesian bilateral agreements adhere to this provision. The old bilateral agreement between Singapore and Greece complies with this provision. This bilateral agreement provided that, if neither of the aeronautical authorities of both Contracting Parties

[96] The bilateral air transport agreements with Australia, Belgium, Burma, Cambodia, (the former) Ceylon, (the former) Czechoslovakia, Denmark, France, Germany, India, Italy, Japan, Lebanon, Malaysia, the Netherlands, Norway, Pakistan, the Philippines, Singapore, Sweden, Thailand, the (former) United Arab Republic, the United Kingdom, the (former) USSR.

[97] Article 7(4) of the *ECAC Standard Clauses* provides:

> If the designated airlines cannot agree on any of these tariffs, or if for some other reason a tariff cannot be fixed in accordance with the provisions of paragraph 2 of this Article, or if during the first 15 days of the 30 days' period referred to in paragraph 3 of this Article one Contracting Party gives the other Contracting Party notice of its dissatisfaction with any tariff agreed in accordance with the provisions of paragraph 2 of this Article, the aeronautical authorities of the Contracting Parties shall try to determine the tariff by agreement between themselves.

ECAC Standard Clauses, *supra* note 70, art 7(4).

[98] During the fifteen (15) calendar days of the thirty (30) calendar days' period for the establishment of the date of submission under the agreements with Lebanon and the Philippines. See Article 9(4) of the bilateral air transport agreement with the Philippines., dated 24 March 1972, Article 8(4) of the bilateral air transport agreement with Lebanon., done at Beirut on 26 April 1967.

has expressed disapproval within thirty days from the date of submission, these tariffs shall be considered as approved.[99]

The old bilateral agreement between Singapore and the United Kingdom, signed on 12 January 1971, also includes a legal presumption. The agreed tariff must be submitted to the aeronautical authorities for approval at least ninety (90) days before the proposed date of introduction of the tariff. The approval of the aeronautical authorities may be given expressly. If neither of the aeronautical authorities has expressed disapproval within thirty days from the date of submission, the tariff shall be considered approved.[100]

The measures to be taken by the aeronautical authorities of both Contracting Parties in the event of failure to determine the tariffs between the designated airlines are described in different ways. The bilateral agreement with the former United Arab Republic provides that, if the designated airlines cannot agree on the tariffs, the aeronautical authorities of both Contracting Parties "shall try to determine the tariff by agreement between themselves". [101] The majority of Indonesian bilateral agreements complies with this provision.[102]

Indonesia's bilateral agreements with Australia, the Peoples' Republic of China and Japan state that the aeronautical authorities of both Contracting Parties shall endeavour to reach agreement on those tariffs, while in the bilateral agreement with Italy, no mention is made to this effect. The bilateral agreement between Indonesia and the

[99] Article 11(5) of the bilateral air transport agreement between Singapore and Greece. See Martono, *Route*, *supra* note 8 at 169.

[100] Article 9(4) and Article 9(5) of the bilateral air transport agreement between Singapore and the United Kingdom of 12 January 1971.

[101] Article 7(3) of the *Agreement Between the Government of the Republic of Indonesia and the Government of the United Arab Republic for Air Services Between and Beyond Their Respective Territories*, 13 October 1964, provides:

> If the designated airlines cannot agree on any of these tariffs or if for some other reason a tariff cannot be agreed in accordance with the provisions of paragraph (2) of this Article, the aeronautical authorities of the Contracting Parties shall try to determine the tariff by agreement between themselves.

Since then, Indonesia has an air transport agreement with the United Arab Emirates, signed at Jakarta on 15 December 1988.

[102] The bilateral air transport agreements with Belgium, Burma, Cambodia, (the former) Ceylon, (the former) Czechoslovakia, Denmark, France, Germany, India, Italy, Lebanon, Malaysia, the Netherlands, Norway, Pakistan, Singapore, Sweden, Thailand, the United Kingdom, and the (former) USSR.

Philippines establishes that the aeronautical authorities of both Contracting Parties shall take mutually agreed action based on the provision incorporated in the Standard Bilateral Tariff Clauses.

It is apparent that the above mentioned formulation is identical to the provision incorporated in the STBCs.[103] As far as Singapore's bilateral agreements are concerned, with regard to the measures to be taken by the aeronautical authorities of both Contracting Parties, some bilateral agreements have adopted the provisions incorporated in Article 7(4) of the ECAC Standard Clauses. [104] This article provides that if the designated airlines cannot agree on any tariff, the aeronautical authorities of both Contracting Parties shall try to determine the tariff by agreement between themselves. Other bilateral agreements adopt the provision incorporated in paragraph (8) in the SBTCs,[105] which provides that if the designated airlines disagree on the tariff, the aeronautical authorities of both Contracting Parties shall endeavour to determine tariff by agreement between themselves. It is worth noting here that the bilateral agreement between Singapore and the United Kingdom provides that, if a tariff cannot be agreed upon by the designated airlines of both Contracting Parties, they shall, after consultation with the aeronautical authorities of any other State whose advice they consider useful, endeavour to determine the tariff by mutual agreement.[106] None of the Indonesian bilateral air transport agreements has any such provision.

In the event that the aeronautical authorities cannot agree on the approval of any tariff duly submitted to them or on the determination of any tariff, the dispute shall be settled in accordance with the general provisions governing dispute settlement. All Indonesian bilateral

[103] *Standard Bilateral Tariff Clauses*, *supra* note 1 at 2.

[104] See e.g. the bilateral air transport agreements between Singapore and New Zealand, Norway, Sweden, (the former) Czechoslovakia, (the former) Yugoslavia, Korea, Denmark, Japan and Bulgaria.

[105] Paragraph 8 of the *SBTC* provides:

> If a tariff cannot be agreed in accordance with paragraphs 3 and 4 of this Article, or if during the period applicable in accordance with paragraph 6 of this Article a notice of disapproval has been given, the aeronautical authorities of the Contracting Parties shall endeavor to determine the tariff by agreement between themselves.

See the bilateral air transport agreements between Singapore and Australia, and Switzerland and Greece.

[106] Article 9(6) of the bilateral air transport agreement between Singapore and the United Kingdom. See Martono, *Route*, *supra* note 8 at 171.

agreements, except the agreements with the Peoples' Republic of China and Taiwan,[107] comply with this provision. However, in the absence of such a provision,[108] the result would be much the same, pursuant to the general clauses on dispute settlement regarding the interpretation or implementation of the bilateral agreement. It is worth noting that this provision is also expressly stipulated in ICAO's SBTCs.[109]

2. VALIDITY OF THE TARIFF

In the majority of Indonesian bilateral agreements, the coming into force of the tariff is made subject to the approval of the aeronautical authorities of both Contracting Parties.[110] In the event of disagreement or dissatisfaction with the tariff, under the bilateral agreement, the parties concerned, have the legal duty to prevent the new tariff from coming into force, pending the final settlement of the dispute.[111] For the transitional period, Indonesia's agreement with Australia provides that the tariffs already in force shall be applied,[112] while the bilateral agreement with Japan provides that, pending determination of the tariff in accordance with the agreement, the tariff already in force shall prevail.[113]

The majority of Indonesian bilateral agreements established the new tariff by adopting the clauses incorporated in Article 7 of the Standard Bilateral Tariff Clauses, with a minor change in wording. The provision as adopted provides:

[107] These two bilateral air transport agreements are silent on this subject.

[108] The bilateral air transport agreement with the Peoples' Republic of China, dated 6 November 1964.

[109] *Standard Bilateral Tariff Clauses*, *supra* note 1 at 2, para 9.

[110] The bilateral air transport agreements with Australia, Belgium, Burma, Cambodia, (the former) Ceylon, (the former) Czechoslovakia, Denmark, France, Germany, India, Italy, Lebanon, Malaysia, the Netherlands, Norway, Pakistan, the Philippines, Singapore, Sweden, Thailand, the (former) United Arab Republic, the United States of America, the United Kingdom and the (former) USSR. The bilateral air transport agreements between Singapore and Japan, Bulgaria, Norway, Sweden, New Zealand, Australia, (the former) Czechoslovakia, (the former) Yugoslavia, Korea, Denmark, Greece and Switzerland.

[111] Cheng, *supra* note 33 at 451.

[112] Article 6(5) of the bilateral air transport agreement with Australia.

[113] Article 9(5) of the bilateral air transport agreement with Japan, dated 23 January 1962.

> *When tariffs have been established in accordance with the provision of this Article, these tariffs shall remain in force until new tariffs have been established in accordance with the provision of this Article.*[114]

Furthermore, the SBTCs also contain the provision which confirms that a tariff shall not be prolonged for more than twelve months after the date on which it otherwise would have expired. None of the Indonesian bilateral agreements adhere to this provision.

3. CONTROL OF APPLICABLE TARIFFS

Control of compliance with tariffs established under bilateral agreements is usually exercised by the aeronautical authorities of both Contracting Parties under their own national laws and regulations.[115] No stipulations on this subject are generally included in the bilateral agreements themselves. The bilateral agreement between Indonesia and the United States of America contains a stipulation for tariff control. This bilateral agreement stipulates that the aeronautical authorities of both Contracting Parties shall employ their best efforts to ensure that the tariffs charged and collected conform to the tariff filed with either Contracting Party. Furthermore, both aeronautical authorities shall endeavour to ensure that no airline rebates any portion of such tariffs by any means, be it directly or indirectly. Payments of excessive sales commissions to agents or the use of unrealistic currency conversion rates is absolutely prohibited under the bilateral agreements.[116]

As per Article 10(I) of the Bilateral Air Transport Agreement between Indonesia and the United States, signed at Jakarta on 15 January 1968, each Contracting Party undertakes to employ its best efforts to:

> ensure that the tariff for the carriage specified in term of the national currency of one of the parties will be established in an amount which reflects the effective exchange rate (including any exchange of fees or other charges) at which the airline of the Contracting Parties can convert and remit the revenues from their transport operations in the territory of one Contracting Party into

[114] See e.g. Article 9(5)(b) the bilateral air transport agreement with Belgium, dated 20 March 1971 [emphasis added].

[115] Lehtonen, *supra* note 2 at 196.

[116] Article 10(B) of the bilateral air transport agreement with the United States of America signed at Jakarta on 15 January 1968.

the national currency of the other Contracting Party.

Furthermore:

> [I]f a Contracting Party does not have a convertible currency and requires the submission of an application for conversion and remittance, the airlines of the other Contracting Party shall be permitted to file as often as monthly, applications for conversion and remittance of surplus cash receipt, free of unnecessary or discriminatory documentary requirements. Each Contracting Party shall permit such conversion and remittance to be effected promptly at the exchange rate in effect at the time application.[117]

4. IMPLEMENTATION OF TARIFF REGULATION

a. International Flight Passenger Service Fees

As per Articles 464 and 465 of the Civil Aviation Act of 2009,[118] international flight passenger service fees are regulated by Ministerial Decree Number KM 27 of 1996, according to which all international flight passengers must pay an international flight passenger service fees. International flight passenger service fees are determined according to the facilities provided by the airport operator concerned. However there are certain categories of passengers that are exempt from any charges such as infant/baby passengers who pay only 10% of the fees, a travelling group of foreign government guests, transit/transfer passengers, personnel of the Indonesian Directorate General of Civil Aviation (DGAC), and extra crew members listed in the passenger manifest.[119]

b. International Air Navigation Service Fees

All aircraft flying over the territory of the Republic of Indonesia have to pay air navigation service fees, which are to be paid to the Technical Implementation Unit (*Unit Pelaksana Teknis* (UPT)), which is an agency under the Directorate General of Air Communications of the Ministry of Communications (DGAC, MOC) that implements airport

[117] At the time of writing, the US$ 1.00 is equal to 12.300,00 Indonesian rupiah (IDR).
[118] *Civil Aviation Act, supra* note 6.
[119] Indonesia, *Ministerial Decree Number KM 26 Year 1996 Concerning Domestic Aircraft Passenger Service Charges* (1 May 1996), art 8.

regulations. At times, the fees are paid to the airport operator, which can be either the state-owned enterprise PT Angkasa Pura I (PAP.I) or PT Angkasa Pura II (PAP.II). State aircraft used for non-commercial service, aircraft used for the purposes of Search and Rescue (SAR) operations, for humanitarian missions, foreign civil aircraft used to transport a group of foreign government guests, civil aircraft owned by the DGAC for calibration activities, and crew training and missionary flights are all exempt from paying air navigation service fees.[120] In accordance with Article 15(b) of the Chicago Convention, all air navigation service fees applicable to foreign aircraft engaged in scheduled international air service must be applied to national aircraft engaged in similar international air service without any discrimination for whatever reason.

c. Landing Service Fees

All aircraft engaged in international flights which land at Indonesian airports shall be charged landing service fees.[121] International landing service fees are calculated based on the weight of aircraft, type of flight and a group of airports determined by the MOC, but the level of landing service fees excludes the value-added tax. Landing of an aircraft without prior flight approval issued by the DGAC shall result in a fine equal to 100 times the applicable landing service fees. Landing service fees for scheduled or non-scheduled flight shall similarly be paid to the UPT for the airport or the airport operator managed by the aforementioned state-owned enterprise.

d. Stand Parking Service Fees

An aircraft engaged in international flight which lands at Indonesian airports shall be charged stand parking service fees.[122] The stand parking service fees shall be calculated based on the weight of aircraft, type of flight, period of time since aircraft parking (block on) and aircraft take-off (block off), and a collection of parking stand service fees determined by the MOC. Parking of aircraft for less than two hours is free of charge.

[120] Indonesia, *Ministerial Decree Number KM 23 Concerning Air Navigation Tariff for International Flight* (3 April 1996), art 6.
[121] Indonesia, *Ministerial Decree Number KM 24 Year Concerning Landing Fees, Parking Stand Fees and Aircraft Storage Fees for International Flight* (3 April 1996).
[122] *Ibid.*

Any aircraft parking in the traffic stand for more than two hours shall be charged the aircraft parking surcharge determined by the MOC.[123] The above mentioned aircraft parking service fees shall be borne by the airlines or aircraft operator concerned and payment shall be made together with the payment of parking stand service fees, landing fees and aircraft storage fees.

Any foreign registered aircraft that engages in domestic flights shall be deemed to cater international flights and for that reason must pay an international aircraft storage service fees.[124] International storage service fees are calculated based on the weight of aircraft, type of flight, the time period is stored in and released from the hangar, and a collection of aircraft storage service fees determined by the MOC.

Landing service fees for local flights are 50% of the tariff level for international landing service fees, while the landing service fees for flight training crews or flight tests are 25% of the tariff level for international landing service fees.[125] The tariff for an international scheduled flight due to emergency conditions or return to base is 50% of the tariff for international landing service fees. Certain aircraft, such as State aircraft used for non-commercial services, and aircraft used for the purposes of SAR, are exempt from paying air navigation service.[126]

D. ASEAN MULTILATERAL AGREEMENT ON AIR SERVICE

On 20 May 2009, Member States of the Association of Southeast Asian Nations (ASEAN) met at the 14th ASEAN Transport Minister Meeting in Manila, the Philippines, and adopted the ASEAN Multilateral Agreement on Air Service of 2009 (AMAAS).[127] AMAAS consists of 19 articles, dealing with matters such as the designation of airlines, the withholding, revocation, suspension and limitation of flight authorisation, aviation safety, aviation security, the operation of leased

[123] *Ibid*, art 14.
[124] *Ibid*, art 4.
[125] *Ibid*, art 5(2).
[126] *Ibid*, art 11(1)(c).
[127] *AMAAS*, *supra* note 4. The application and entry into effect of AMAAS is subject to the ratification by each ASEAN member. At the time of writing, Indonesia is proceeding to ratify AMAAS.

aircraft, user charges and customs duties. Apart from securing the economic viability of the agreed service, the main function of AMAAS is to liberalise the aviation markets of ASEAN Member States through the establishment of tariffs at a reasonable and uniform levels so as to promote affordable air transport for the benefit of the travelling public and to eliminate the hazards of free competition.[128]

1. DEFINITION OF TARIFF

In accordance with Article 1(6) of AMAAS, the term "tariff" denotes:

> the prices to be paid for the carriage of passengers and cargo and the condition under which those prices apply, and other auxiliary service but excluding remuneration and conditions for the carriage of mail.

The definition of tariff in AMAAS is similar to the definition provided in ICAO's SBTCs. In contrast, it should be noted that none of the Indonesian bilateral agreements provide a definition of a tariff.

2. GENERAL PRINCIPLE GOVERNING TARIFF

AMAAS establishes a general principle for the regulation of tariffs, which stipulates that tariffs:

> shall be established at reasonable levels, due regard being paid to all relevant factors, including interest of users, cost of operation, characteristic of service, reasonable profit, tariffs of other airlines, and other commercial considerations in the market-place.[129]

Basically, the general principle laid down in AMAAS is similar to the bilateral agreement between Indonesia and India,[130] the only difference being the addition of the words "*other commercial considerations in the market-place*" in AMAAS (emphasis added). The bilateral agreement between Indonesia and India provides that the tariff shall be established at reasonable levels with due regard being paid to "all relevant factors". These other commercial factors include the costs of operation, reasonable

[128] Lehtonen, *supra* note 2 at 178.
[129] *AMAAS*, *supra* note 4, art 7(1).
[130] See Article 6 of the bilateral agreement between Indonesia and India. *Supra* note 80.

profit, characteristics of service and tariffs charged by other airlines on the route.

3. PROCEDURES FOR ESTABLISHMENT OF TARIFFS

AMAAS does not require the tariff charged by airlines to be filed with or approved by either Contracting Party. However, in the event that the national law of a Contracting Party requires prior approval of a tariff, the tariff application shall be dealt with accordingly. In such cases, the principle of reciprocity may be applicable by the Contracting Parties concerned at their discretion.[131] This provision is evidence that AMAAS intends to liberalise the aviation market and allow designated airlines to determine the tariff themselves. Most bilateral agreements concluded by Indonesia explicitly stipulate that the agreed tariffs should be submitted to the aeronautical authorities of both Contracting Parties for approval. Effectively then, the implementation of AMAAS will be based on the bilateral agreement between the parties, and will be governed by the principles of fairness, reciprocity, and national interests.[132]

4. CONTROL OF APPLICABLE TARIFFS

With regard to tariff control, AMAAS stipulates that the Contracting Parties agree:

> to give particular attention to tariffs that may be objectionable because they appear unreasonably discriminatory, unduly high or restrictive because of the abuse of a dominant position, or artificially low because of direct or indirect governmental subsidy or support or other anti-competitive practices.[133]

The bilateral agreement between Indonesia and the United States of America signed on 13 January 1968, some forty years prior, similarly contains a stipulation for tariff control.[134] This bilateral agreement stipulates that the aeronautical authorities of both Contracting Parties shall use their best effort to ensure that the rates charged and collected

[131] *AMAAS*, *supra* note 4, art 7(2).

[132] *Civil Aviation Act*, *supra* note 6, art 86(2), (3).

[133] *AMAAS*, *supra* note 4, art 7(3).

[134] *Air transport Agreement between the Government of the United States of America and the Government of the Republic of Indonesia*, 13 January 1968 [*Air Agreement between US and Indonesia*].

conform to the rate filed with either Contracting Party.[135] Furthermore, both aeronautical authorities must endeavour to ensure that no airline rebates any portion of such rates, by any means, directly or indirectly. Payments of excessive sales commission to agents or the use of unrealistic currency conversion rates is absolutely prohibited under the bilateral agreement.[136]

5. CHALLENGES AND OPPORTUNITIES

Looking at AMAAS as a whole, there are considerable positive attributes to the multilateral agreement which can be beneficial to Indonesia. The country has a large home market, unsatisfied demand, large distances with inadequate surface transport alternatives, a large growing economy, and low wage cost. Due to Indonesia's geography and current transportation infrastructure, air transport is vital to enhance connectivity between Indonesia's main islands. Within major island groups such as Sumatra, Kalimantan, Sulawesi and Papua, surface transport alternatives are inadequate. Domestic shipping is not a realistic alternative. Liberalising the aviation market in Indonesia, as the proposed AMAAS aims to do, will provide opportunities to better connect places and populations that were previously difficult to reach by air.

The implementation of the ASEAN multilateral air transport agreement also highlights some of the inherent problems with Indonesia's air transport industry, namely, the lack of compliance with international standards, the relatively poor safety record, the lack of adequate training, management, and supervision for air traffic control, and lack of infrastructure, particularly adequate airport facilities to accommodate growing tourism and travel.

Opportunities for the growth of Indonesia's air transport sector may be helped by the multilateral air transport agreement with its ASEAN neighbours and complemented by continued domestic political and economic stability, accelerated economic growth, increased

[135] See *Indonesia's Strategy for Open Sky: Initial Review and Scoping Study* (Jakarta: 2010, Australia Indonesia Partnership (*Kemitraan Australia Indonesia*)), online: Indonesia Infrastructure Initiative <http://www.indii.co.id/upload_file/201009021250110.191%20FIN%20-%20Indonesia%27s%20Strategy%20for%20Open%20Skies.pdf>.

[136] *Air Agreement between US and Indonesia*, *supra* note 134, art 10(B).

employment and tourism, which in turn will contribute to an enhanced regional role and standing. In light of air transport liberalisation, the air transport sector in Indonesia should also be wary of threats such as increased airline competition from foreign (low-cost) carriers such as Air Asia, Tiger Airways, the potential lack of political will, changes in regional stability, market saturation and disasters, both natural and man-made, such as terrorism.[137]

After having dealt extensively with tariff regulations on the international level, we now turn to how tariffs are set and regulated at the domestic level.

IV. DOMESTIC TARIFF REGULATIONS

A. THE DEVELOPMENT OF DOMESTIC TARIFF REGULATIONS

1. POST WORLD WAR I

After World War I, Great Britain and the Netherlands needed to connect their colonies with the mother country.[138] Two airlines, Imperial Airways and KLM (*Koninklijke Luchtvaart Maatschappij*) competed to serve Far Eastern countries, with Imperial Airways intending to connect the British colonies of India, Malay, Singapore, Hong Kong and Australia, and KLM intending to connect Batavia (Jakarta) as soon as possible. In this competition, Imperial Airways' position was more advantageous, but KLM's load factors were superior to those of Imperial Airways because KLM provided speedier and more convenient service.[139]

In 1924, A. N. G. Thomassen landed in Clilitan Airbase, now Halim Perdanakusuma International Airport, next to Jakarta. On 23 July 1927, Capt. G. J. Geysersdoffer conducted the first commercial flight to Jakarta. In September 1929, regular air service was being conducted twice a week to Jakarta. In September 1930, KLM signed an agreement with the Netherlands Indies authorities to carry approximately 500 kg of post. With regard to tariff regulation, the tariff for the transportation of

[137] See generally *Indonesia's strategy for Open Sky*, *supra* note 135.

[138] K Martono, "Angkutan Udara di Indonesia Sebelum Kemerdekaan" in K Martono, ed, *Hukum Udara, Angkutan Udara dan Hukum Angkasa* (Bandung: Penerbit Alumni, 1987) at 4.

[139] *Ibid* at 5.

post was negotiated between the Netherlands Indies authorities and KLM.

2. POST WORLD WAR II

a. Tariff Provisions Under the Old Regime

The old political and economic regime in Indonesia tended to have a socialist ideology, and air transportation was conducted by state-owned enterprises such as Garuda Indonesian Airways (GIA)[140] and Merpati Nusantara Airlines (MNA).[141] Indonesia's Ministry of Communications (MOC) acted as the regulator of tariffs, and there was no competition between the airlines. Under the era of the "New Order", General Suharto then introduced a neo-liberal ideology that represented a mix between socialist and liberal ideology.[142]

b. Tariff Provisions Under the New Order Regime

Under the New Order, the MOC issued Ministerial Decree SK 13/S/1971[143] to permit the creation of new airlines owned by private companies. State-owned companies, such as GIA,[144] would serve trunk lines, while MNA[145] would serve feeder services together with privately-owned companies such as Zamrud Aviation, Bouraq Indonesian Airlines, Mandala Airlines, Seulawah Air Service and Indonesia Air Transport.[146]

[140] Garuda Indonesian Airways was previously a state enterprise (PN) and later changed to become a Limited Company (PT). See Indonesia, *Regulation Concerning Change from State Enterprise (PN), Perhubungan Udara to Limited Company (PT) Garuda Indonesian Airways*, Indonesia Reg 67/1971 (1971). See generally HK Martono & Amad Sudiro, "Current Air Transport Regulations in Indonesia" (2013) XXXVIII Ann Air & Sp L 55 [Martono & Sudiro, "Current"].

[141] Merpati Nusantara Airlines was previously named a state enterprise (PN), which later became Limited Company (PT). See *Regulation Concerning Change from State Enterprise (PN), Perhubungan Udara Daerah dan Penerbangan Serba Guna " Merpati Nusantara " to Limited Company (PT) Merpati Nusantara Airlines*, Indonesia Reg 70/1971 (1971).

[142] See generally Martono & Sudiro, "Current", *supra* note 140.

[143] Indonesia, *Ministerial Decree Concerning Requirements and Provisions Regarding Using Airplanes for Commercial Purposes*, Ministerial Decree No SK 13/S/1971 (18 January 1971).

[144] Indonesia, *Ministerial Decree Concerning Garuda Indonesian Airways Permit*, Ministerial Decree No T 14/4/4-U (11 July 1961).

[145] Indonesia, *Ministerial Decree Concerning Routes Structure of PN Merpati Nusantara Airlines*, Ministerial Decree No S 8/2/5-Mphb (13 January 1969); Martono & Sudiro, "Current", *supra* note 140 at 58.

[146] Indonesia, *Ministerial Decree Concerning Home Based of Airlines*, Ministerial Decree No SK

As far as tariffs are concerned, in order to prevent unhealthy competition between airlines, GIA set price leadership. The air transport policies under the New Order set up a limited multi-airline system,[147] which was composed of state-owned enterprises together with privately-owned companies. All tariffs were controlled by the MOC.[148] In addition, there was a restriction on the use of jet aircraft. Only GIA was permitted to use jet-powered aircraft, while privately-owned companies could only operate propeller-powered aircraft. Under the New Order, there was no competition between airlines due to the tariffs set and regulated by the MOC.[149] All tariffs provided by privately-owned companies had to be below GIA's tariff, while GIA's first-class tariff was permitted to be 15% higher than normal prices[150] for flights served using Airbus aircraft.[151]

c. Tariff Provisions Under the Reformation Era

In the Reformation (*Reformasi*) Era under General Soesilo Bambang Yoedoyono, air transport policy was generally less strict. Private airlines, including companies providing scheduled and non-scheduled air service, air cargo, and charter flights, as well as general aviation, grew rapidly.[152] Based on the MOC Decree Number KM 81 of 2004,[153] the requirements to establish a new airline company were very easy to meet.[154] Airlines could compete freely with little regard for the interests of consumers.[155]

402/S/70 (30 December 1969).

[147] Fachri Mahmud, *The Development of Transport Policy in Indonesia* [unpublished].

[148] Indonesia, *Ministerial Decree Concerning Higher Tariff for Garuda Indonesian Airways than Private Airlines*, Ministerial Decree No KM 96/PR.303/Phb-84 (1 May 1984).

[149] Martono & Sudiro, "Current", *supra* note 140 at 60.

[150] Indonesia, *Ministerial Decree Concerning First Class Domestic Tariff for Airbus*, Ministerial Decree No KM 157/PR.303/Phb-83 (1 August 1983).

[151] Indonesia, *Ministerial Decree Concerning Domestic Tariff changes*, Ministerial Decree No KM 96/PR.303/Phb-84 (1 May 1984).

[152] *Indonesian Aviation: Outlook 2010* (Jakarta: Indonesian National Air Carrier Association, 2010).

[153] Indonesia, *Ministerial Decree Concerning Engagement of Air Transport*, Ministerial Decree No KM 81, 19 October 2004.

[154] Martono & Sudiro, "Current", *supra* note 140 at 60.

[155] There were, and continue to be, a lot of complaints regarding delays, cancellations, and aircraft accidents, which is evidence of consumers becoming victims as a fierce competition. *Ibid.*

As a consequence of a more liberal air transport policy that encouraged heavy competition, airlines tended to charge a tariff less than that recommended by the MOC. Pricing became predatory and the ensuing tariff war indirectly eliminated other airline companies as well as sea transportation companies. As a result, only giant airlines could successfully operate, and consumers were disadvantaged in the long run.

The victims of the liberalisation policy were not only land and sea transportation companies, but airlines themselves as well, as mentioned above. Many older airlines from the New Order, such as Zamrud Aviation, Bouraq Airlines, Mandala Airlines, Seulawah Air Service and Indonesian Air Transport, went bankrupt due to their inability to compete with newcomers in the airline industry. Even new airlines have been forced to declare bankruptcy because they could not guarantee the survival of their operations, as they often entered the market without enough capital or sufficient human resources. These new airlines did not sufficiently manage their risks against accidents, and as a result a single fatal aircraft accident could bankrupt an airline.[156]

Further to this, the drafters of the Civil Aviation Act realised that the more liberal air transport policy had resulted in various negative effects which would actually disadvantage consumers. As such, the Civil Aviation Act of 2009 attempted to usher in changes in accordance with neo-liberal economic policies that would better protect consumers and also foster the growth of the aviation industry in Indonesia.

B. CIVIL AVIATION ACT OF 2009

1. OBJECTIVE OF THE CIVIL AVIATION ACT OF 2009

The aim and objective of the Civil Aviation Act of2009 is to promote the development of Indonesian air transportation and to ensure Indonesia's air transportation sector can support national development and is viable to compete and survive nationally, regionally and internationally. Its regulates a host of matters related to aviation, ranging

[156] A prime example of an airline going bankrupt is the case of Adam Air, which went bankrupt after suffering three accidents between 2007 and 2008. Article 112(1) of the *Civil Aviation Act*, *supra* note 6, provides that an air transportation business permit holder must continuously operate the air transportation activities and aircraft as specified by the permit. Due to the accidents, Adam Air could no longer sustain its operations in accordance with the permit granted, and therefore went bankrupt.

from sovereignty in airspace, aircraft production, operation and airworthiness of aircraft to aviation security and safety, aircraft procurement, aviation insurance, aircraft accident investigation, and licensing of aviation professionals. The 2009 Act also regulates scheduled as well as non-scheduled air transport, aircraft ownership and aircraft leasing, liability of air carriers, air navigation facilities, airport authorities, and, most pertinent to the current discussion, the tariffs that can be charged for the provision of air transport services and charges related to the use of aviation facilities.

2. AVIATION TARIFF POLICIES

As discussed above in bilaterals, and as standardised by ICAO, aviation tariffs in this Act refer to all tariffs, rates, fares, fees, charges or any other payments related to aviation activities. Tariffs could therefore concern matters as wide-ranging as ticketing, international and national passenger service fees, air navigation service fees, landing fees, stand parking service fees, aircraft storage service fees, hajj service fees, and so on.

Domestic tariffs are discussed in Part Four of the Civil Aviation Act of 2009,[157] and consist of tariffs for scheduled air transportation of passengers and shipment of cargo. Basically, tariff policies are neo-liberal in nature since the tariffs consist of economy and non-economy tariffs. Economy class tariffs are regulated by the MOC to protect consumers, while non-economy class tariffs are determined by airline companies based on market forces.

a. Passenger Tariffs for Scheduled and Non-Scheduled Airlines

The tariffs set by the MOC have an upper limit which takes into account factors such as the need to protect consumers and prevent unfair competition. On the whole, Indonesia's aviation regulations protect consumers by indirectly specifying a lower limit for the determination of tariffs, and at the same time the tariff regulations also prevent under-pricing practices by air service providers that aim to squeeze competing carriers out of the market. At first glance, however, it appears that this

[157] *On Aviation*, State Gazette of the Republic of Indonesia Number 1 (2009), Supplemental State Gazette Number 4956 of the Republic of Indonesia.

determination of tariffs does not adequately factor in the commercial side of the air service industry, especially for those offering premium services.[158]

In determining tariffs, the MOC considers the interest of aviation safety and security, as well as the needs of the public and airlines' operations.[159] MOC Decree Number 26 of 2010[160] clarifies how passenger tariffs for economy class are determined and that they are based on the distance flown, tax, mandatory accident insurance and surcharges. The distance tariff is the amount of tariff per flight route per trip, for each passenger, and is a calculation based on the basic tariff multiplied by the distance. This formula also factors in the nation's purchasing power or affordability of the tariff. The distance tariff consists of a basic average fee plus a reasonable profit plus a value-added tax based on taxation regulations.[161] Mandatory passenger accident insurance is required by laws and regulations. Surcharges are imposed based on additional costs that the air transportation company has to pay to operate the business. The provision stipulates that the distance tariff may be adjusted due to factors such as, among others, the fluctuation of fuel prices. Costs that the air transportation company must bear due to lack of passengers on returning flights, outbound or inbound, are also included in the calculation of the tariff. With regard to the fluctuation of fuel prices, the MOC recently issued the increase the amount of surcharges consistent with the value of American dollars.[162]

Tariff ceilings for domestic economy class passengers are stipulated by the MOC to prevent the imposition of high tariffs by airline companies and protect consumers from misleading advertising. The tariff for scheduled economy class passengers is disseminated either by the MOC or by the airlines themselves through print and electronic media and/or presented to consumers wherever airplane tickets are sold. Domestic airlines are prohibited from selling economy tickets above the

[158] Martono & Sudiro, "Current", *supra* note 140 at 81.

[159] *Civil Aviation Act*, *supra* note 6, art 126.

[160] Indonesia, *Ministerial Decree Concerning the Calculation Mechanism and Determination of Ceiling Passengers for Economy Tariff Class of Air Transportation Domestic Services*, Ministerial Decree No 26 (14 April 2010) [*Decree Concerning the Calculation*].

[161] Martono & Sudiro, "Current", *supra* note 140 at 81.

[162] Indonesia, *Ministerial Regulation concerning the Amount of Surcharges of Domestic Scheduled Transportation Tariffs*, Ministerial Regulation No PM 2 of 2014 (16 February 2014).

tariff ceiling provided by the MOC, and any airline violating this prohibition will receive sanctions in the form of a warning and/or flight route permit revocation.[163]

In addition, domestic passenger tariffs for economy class consist of tariffs based on whether the aircraft used is a jet-powered or propeller-powered aircraft.[164] Indonesia's DGAC proposes the maximum tariff after coordinating with national air carrier associations and consumer associations, and the tariff is also reflective of the class of service provided. Airlines providing full service may charge 100% of the maximum tariff, whereas airline providing medium service may charge 90% of the maximum tariff, and airlines providing no-frills service may charge only 85% of the maximum tariff.

With regard to non-scheduled airlines, the tariff is set based on market mechanisms. The tariffs for domestic non-scheduled airlines are determined based on the agreement between the user(s) and the provider(s) of transportation services,[165] while the tariffs for international scheduled passenger air transportation are determined based on bilateral agreements.

b. Tariffs for Airport Use and Related Services

In relation to tariff provisions, a fee for the use of airport services and airport-related services is charged according to the service provided. The structure and grouping of airport service tariffs are determined by the MOC, but the amount of airport service tariffs at commercially-operated airports is determined by the airport business entity itself. The tariff for airport-related services at airports not yet commercially operated is determined by government regulations while the amount of the tariff for airport-related services shall be determined based on the agreement between the service user(s) and provider(s).[166]

c. Domestic Passenger Flight Service Fees

As per Articles 464 and 465 of the Civil Aviation Act of 2009, domestic flight passenger service fees are regulated by the Ministerial

163 Martono & Sudiro, "Current", *supra* note 140 at 82.
164 *Decree Concerning the Calculation*, *supra* note 160.
165 *Civil Aviation Act*, *supra* note 6, art 128.
166 *Ibid*, arts 244, 245.

Decree Number KM 26 of 1996. In accordance with this decree, domestic flight passenger service fees are determined in accordance with the facilities provided by the airport operator in question. Similar to international flights, certain categories of passengers, such as transit/transfer passengers, guests from foreign governments, and DGAC personnel, are exempt from fees, whereas infant/baby passengers only pay 10% of the total amount.

d. Landing Service Fees

All aircraft engaged in domestic aviation which land at Indonesian airports are charged a landing service fee determined by the MOC, which is calculated based on the weight of aircraft and type of flight. Similar to international aviation services mentioned above, landing an aircraft without flight approval issued by the DGAC shall result in a fine 100 times the applicable landing service fees.

Landing service fees for a local flight are 50% of the tariff for domestic landing service fees, while landing service fees for flight training crew or flight tests are 25% of the tariff for domestic landing service fees. Tariffs for domestic scheduled flights in the case of an emergency or a return to base are 50% of the tariff for domestic landing service fees. Again, certain aircraft, such as a state aircraft operating a non-commercial service, an aircraft engaging in search and rescue operations, and an aircraft owned by the DGAC for calibration activities are exempt from paying landing, parking and aircraft storage fees.[167]

e. Stand Parking Service Fees

An aircraft engaged in a domestic aviation is also charged stand parking service fees, which are calculated based on, among other considerations, the weight of aircraft, type of flight, period of time since aircraft parking (block on) and aircraft take-off (block off). The parking of an aircraft for less than two hours is free of charge.

167 Indonesia, *Ministerial Decree Number KM 24 Year Concerning Landing Fees, Parking Stand Fees and Aircraft Storing Fees of International Flight* (1996), art 11.

f. Aircraft Storage Service Fees

All air carriers engaged in domestic aviation and which store their aircraft at an Indonesian airport are charged aircraft storage service fees, the amount of which is calculated based on the weight of the aircraft, type of flight, and a number of aircraft storage service fees determined by the MOC. Aircraft storage service fees exclude the value-added tax.

g. Flight Air Navigation Service Fees

The MOC is responsible for flight navigation service operation for aircrafts operated within the airspace served, and to fulfill this obligation, the MOC has established an agency for flight navigation operation in order to provide flight air navigation services. Air navigation services provided by the above mentioned agency give priority to aviation safety. The agency is non-profit oriented and financially independent, and all fees charged to users shall be on a cost-recovery basis and used for investment. Based on the air navigation services provided, all domestic and foreign flights using navigation services provided by the agency shall be charged a fee at a rate determined by the MOC.[168]

Provisions regarding the mechanism and procedures of flight navigation services, the establishment and certification of flight navigation services, and the service charge of flight navigation are stipulated by the MOC under its regulations.[169] Regulation No 77 of 2012 established the state-owned enterprise Indonesian Air Navigation Service Agency (IANSA),[170] which is responsible for the provision of air traffic services (ATS), aeronautical telecommunications services (COM), aeronautical information services (AIS), aeronautical meteorological services (MET), as well as Search and rescue (SAR).[171] All services provided by the IANSA will be charged in accordance with the MOC Decree.[172]

[168] *Civil Aviation Act*, *supra* note 6, art 271.
[169] *Ibid*, art 277.
[170] Indonesia, Government Regulation Number 77 of 2012, *Concerning Indonesian Air Navigation Services Agency (IANSSA)*.
[171] *Ibid*, art 3.
[172] *Ibid*, art 5.

h. Hajj Air Transportation Air Services[173]

As Indonesia is the most populous Muslim country in the world, hajj flights are a good example of how special and seasonal air transportation service is treated under existing regulations and what tariffs are applicable to these flights.

As per Articles 464 and 465 of the Civil Aviation Act of 2009, non-scheduled airlines [174] are regulated by the DGAC Decree No SKEP/1657/VIII/76 of 1976. This decree lists different types of international non-scheduled airlines, such as advanced booking charters, affinity group charters, including tour charters, student charters, and pilgrimage charters. Hajj air service transportation is classified as a charter flight. However, in accordance with the Director of Hajj and Umrah of the Religious Ministry, hajj air service transportation is scheduled during Hajj season, and for this reason is considered a scheduled flight.

Hajj candidates departing from a domestic airport to another airport in Indonesia have to pay domestic passenger service fees, while hajj candidates departing from a domestic embarkation airport in Indonesia to the disembarkation airport in Saudi Arabia have to pay international flight passenger service fees.

Domestic and international flight passenger service fees are determined in function of the facilities provided by the airport operator concerned, and value-added tax must be added on top of that tariff. Domestic and international flight passenger service fees shall be charged in one payment by the airline, and the applicable fees are transferred to the UPT for the airport under the DGAC, MOC or the airport operator. In addition, airlines carrying hajj candidates taking off from domestic departure airports to domestic embarkation airports have to pay domestic air navigation service fees, while airlines carrying hajj

[173] K Martono & Amad Sudiro, *Aspek Hukum Transportasi Udara Jamaah Haji Indonesia* (Jakarta: PT Rajagrafindo, Divisi Perguruan Tinggi, 2013) at 77. See Indonesia, The Director General of Air Communications (DGAC) Decree No SKEP/1675/VIII/76, *Concerning Type and Requirements of the Implementation of International Charter Flight to and/or From the Territory of Indonesia*.
[174] See Werner Guldimann, "The Distinction Between Scheduled and Non-Scheduled Air Service" (1979) IV Ann Air & Sp L 135; G Romanelli & M Miszerak, "Charter Flight and the Role of the Tour Operator" (1978) III Ann Air & Sp L 207.

candidates taking off from embarkation airports to Saudi Arabia have to pay international air navigation service fees.

3. OTHER FEES RELATED TO AVIATION ACTIVITIES

The Civil Aviation Act of 2009 establishes a public service management institute to manage the certification process.[175] All aspects of the operation and maintenance of an aircraft, such as the licensing of an air operator or certification of the competence of a maintenance engineer, must be certified in order to ensure compliance with the necessary safety and security standards.[176] The fees associated with the certification process are regulated and charged by the MOC.

C. BEST TARIFF PRACTICES

1. SCHEDULED AIRLINE OPERATIONS

As mentioned earlier, tariff policies in Indonesia are basically neo-liberal in nature, as the tariffs consist of economy and non-economy tariffs. Economy class tariffs are regulated by the MOC in order to ensure the viability of public transportation and to protect the interests of the traveller. An upper limit is set by the MOC to prevent unfair competition between airlines and airlines are prohibited from selling economy tickets above the upper limit tariff established by the MOC. In practice, however, the competition between domestic scheduled airlines can be very fierce, and, as a result of the operation of the market, air services have been classified into three categories of tickets in order to avoid the restrictions set by the MOC. These are daily, weekly and monthly fares.

Daily tickets consist of prime-time tickets for flights between 4:30 a.m. and 9:30 a.m., which are very pricey, and tickets for flights between 12:00 p.m. and 3:00 p.m., which are the cheapest. In the weekly category, flights on Tuesdays, Wednesdays and Thursdays are very cheap, and flights on Fridays, Saturdays and Sundays are very expensive. However, even if the price is very expensive, no price is higher than the upper limit tariff. In addition, there are other variations such as promotional tariffs and economy tariffs. Promotional tariffs are cheaper than normal economy class, while economy tariffs consist of regular economy class,

[175] *Civil Aviation Act*, *supra* note 6, art 66.
[176] *Ibid*, arts 64, 65.

flexible economy class and rigid economy class fares. This strategy not only avoids the price restrictions set by the MOC but also, in effect, influences the behaviour of consumers and the travelling public.

2. HOLIDAY SEASON OF SCHEDULED AND NON-SCHEDULED OPERATIONS

Especially in the holiday months, such as school holidays, celebration of days significant to Muslims (such as Lebaran) and the Christmas holidays, tickets prices almost reach the upper limit established by the MOC. During those periods, the demand for travel increases significantly and almost all domestic scheduled airlines provide extra flights to cater to these demands. For non-scheduled airlines, and, in response to the increase in demand during peak travel periods, tariffs are subject to negotiation between the user and the provider of air transportation.

3. CONTROL OF THE APPLICABLE TARIFF

During school holidays, Muslim holidays and Christian holidays, the MOC rigidly controls the implementation of tariff regulations. Scheduled airlines are obliged to disseminate the tariff through print and electronic media and/or by presenting the set price on every airplane ticket. Any airline violating these provisions will receive administrative sanctions in the form of a warning and/or risk the flight permit being revoked.[177] In the three years since the Civil Aviation Act came into effect, no scheduled airline has violated the upper limit on tariffs as set by the MOC, meaning that all scheduled airlines are complying voluntarily with such regulations.

V. CONCLUSION AND RECOMMENDATION

The preceding paragraphs comprehensively laid out the international tariff regulation framework as well as outlined the relevant Indonesian regulations governing the types and rates of tariffs. It was seen that tariffs for international air services are determined by a variety of factors, the most influential being the provisions contained in bilateral or multilateral air transport agreements. What is striking about Indonesia is the fact that the majority of its bilateral air transport

[177] Martono & Sudiro, "Current", *supra* note 140 at 82.

agreements has not been updated or renewed. This is so despite the intentions of Indonesia to open up its aviation market, as evidenced by the signing of the AMAAS and its protocols. Thus, as far as tariff regulation is concerned, tariffs in bilateral air transport agreements are still under the control of the government and have yet to be liberalised. The current economic and legal system and consumer purchasing power are simply unable to cope with the expensive and competitive international air transport system. It is clear that the current government tends to act conservatively by holding off on renewing or signing new international air transport agreements and leaving the matter to market mechanisms and demand for air travel.

At the national level, the regulation of tariffs in Indonesia is consistent with the overriding national ideology of neo-liberalism, which aims to protect the travelling public and to guarantee the sustainability of airlines' operations in a competitive environment. In addition, the travelling public has the right and opportunity to choose from a range of prices which have come into being as a result of the tariff ceiling set by Indonesia's Ministry of Communication, and also as a result of competitive practices between air service providers. As practice demonstrates, Indonesian airlines have to date accepted all tariff regulation set up by the government.

Though there are various regulations, both international and national, in place to control tariffs, Indonesia still needs to contend with a number of weaknesses and inherent problems. These were highlighted by the Indonesia Infrastructure Initiative report produced in 2010, in which the major concerns related to the lack of compliance with international aviation safety and security standards, poor aviation and air navigation infrastructure and services, as well as inadequate training and management of human resources. The government must pay significantly more attention to these deficiencies in order to foster the continued growth and future development of the aviation industry in Indonesia.