



Legal aspects of User Charges on Global Environmental Goods

(UFOPLAN 2004, FKZ 204 14 105)

Executive Summary

Ecologic: RA Dr. Nils Meyer-Ohlendorf, Michael Mehling, *LL.M.*, Alexander Neubauer

in cooperation with

Prof. Dr. Astrid Epiney, *LL.M.*, Universität Freiburg i. Ue.

Prof. Dr. Stefan Klinski

Ecologic

Institute for International and European Environmental Policy

Pfalzburger Str. 43-44, D-10717 Berlin, Tel. +49 30 86 88 00, Fax +49 30 86 88 0100

E-Mail: meyer-ohlendorf@ecologic.de

I. Background

1. Defining the Issue

International airspace and international waters constitute global common environmental goods, the use and consumption of which does not fall under the jurisdiction of any national sovereign body. These goods are over-used because the laws governing access to them are under-developed. Increasingly, two environmentally-intensive forms of use – namely the airline and shipping industries – account for a significant proportion of such exploitation. With regard to the former, by the year 2050, the proportion of anthropogenic climate change attributable to aviation is projected to increase from its present level of 3.5% to 15%. Aviation, thus, constitutes the fast growing source of greenhouse gas emissions. As for the latter, increased international shipping is causing considerable environmental damage through the exchange of ballast water plus contamination caused by the discharge of waste water, sundry waste and other pollutants. Moreover, both industries emit air pollutants, in particular sulphur dioxide and nitrous oxides, both of which are known to cause subsequent adverse effects, including, for instance, acid rain.

2. User Charges as a Regulatory Option

So far, the conventional “command and control” approach to tackling environmental problems has not proven fully effective at surmounting the user problems associated with aviation and shipping. For this reason, user fees – broadly speaking, charges imposed on the use of international airspace and waters – have been proposed at the national, European and international levels. By introducing a duty to compensate the consequences of such use financially, the environmental costs associated with aviation and shipping could be allocated to the respective users of those forms of transportation, and, thereby, factored into the price of the activities. Such a system of user charges would introduce economic incentives as well as generate revenue. On the one hand, in rendering the affected transportation and airline companies economically less advantageous, user charges create incentives to switch to more environmentally friendly modes of transport or to eschew transportation altogether. At the same time, user-charge revenues can be applied toward environmental objectives or, at the very least, be used to reduce budgetary deficits.

Conceivable user charge models applicable to air travel and shipping include

- Emissions-based user charges (general emission charges, carbon dioxide emission charges)
- Fuel-based user charges (mineral oil or kerosene taxes)
- Facility-based user charges (port fees, landing charges, tolls, waterway charges)
- Service-based user charges (e.g., so-called ticket fees, transport/freight fees)

Presently, several countries have introduced user charges in connection with domestic air travel and shipping, including, for instance, Britain's Air Passenger Duty (APD). However, recent demands to expand the program to the international level have faltered due to political opposition. The discussion on the introduction of new fees on airline travel and shipping activities at the G8 Summit in Gleneagles, Scotland, in July 2005 ultimately resulted in a non-binding pledge to pursue innovative financial instruments, whereas at the European level, a working paper issued by the European Commission, dealing with innovative strategies for financing community development aid, has remained in the deliberation stage, with priority currently assigned to emissions trading as a new form of regulation, at least with a view to the inclusion of the airline industry. Legal objections, routinely cited as counter-arguments, are also responsible for the deficient integration of user charges into the pool of environmental instruments.

II. General Requirements

Before adopting a system of user charges pertaining to global environmental goods, it is imperative to determine the extent to which the implementation of such a system is determined by the framework of applicable law. While the introduction of user charges raises issues in international law, Community law and German constitutional law, it is important to distinguish between general and sectoral requirements. For all intents and purposes, general requirements are equally relevant to air travel and shipping, since they apply regardless of the particular carrier.

1. International Law

Since user charges levied on environmental resources typically entail a transboundary component, and even fees solely imposed on domestic activity may nevertheless restrict the mobility of foreign citizens passing through the imposing state, they can have numerous implications for the operation of international law. In this context, it is important to distinguish between a) general international law, which regulates the territorial powers of states on the basis of their sovereignty, and b) international trade law, which, among other, places restrictions and conditions on the trafficking of goods and services.

a) With regard to the implementation of user charges applicable to a particular territory and group of users, it is crucial to determine whether, as a matter of general international law, the implementing state possesses the authority to introduce the user charge. A decisive aspect in this regard are the territorial rights of states, domestic or foreign, as well as the legal status afforded to extraterritorial areas. The enforcement of domestic legislation beyond national boundaries is illegal under international law, a ban which equally applies to any form of user charges. This tenet of general international law also precludes the application of user charges beyond the sovereign territory of the implementing state, and the imposition of sanctions for violations committed in foreign territory, whenever the express consent or co-operation of the affected third-party state has

not been given. Accordingly, international law poses no obstacles for user charges confined in scope and application to the implementing authority's sovereign territory. User charges tied to the use of infrastructure or facilities owned by the imposing entity, or to services rendered by the imposing entity, both of which resemble *quid pro quo* fees or charges, do not infringe on the general preclusion of extraterritorial regulation or enforcement measures on foreign territory because they do not entail any transboundary state activity. In all other instances, however, user charges with transboundary effects are to be implemented in consultation with states whose sovereignty is affected by the measures. This restriction does not apply to user charges based solely on particular triggering events in foreign territory, such as emissions or fuel consumption. Such user charges are permissible, provided certain fundamental rules, in particular the principle of proportionality, are complied with.

b) International trade law also affects the implementation of user charges on global environmental goods. Although the transportation of passengers and cargo through aviation and international shipping constitutes a typical service, user charge imposed on these carriers fall outside the scope of the General Agreement on Trade in Services (GATS) pursuant to the provisions of two separate appendices. The transportation of cargo and luggage does, however, fall within the purview of the General Agreement on Tariffs and Trade (GATT), as traffic in goods. This poses no problem with regard to the prohibition against discrimination contained in Articles I and III of GATT, because of the lack of any discrimination against third-party airline or shipping providers. Nor do fees levied by the country of origin or destination constitute a restraint on transit traffic as defined in Article V of GATT. Moreover, in both instances, interventions designated as protective measures would be justified under sub-paragraph (b) and (g) of Article XX of GATT. Finally, there is no infringement of the provisions of the Agreement on Subsidies and Countervailing Measures (SCM), to the extent that the user charges on global environmental goods are not used to discriminate in favour of certain enterprises or industries according to their export rate, or to accord preferential treatment to local products relative to imported items.

2. European Community Law

To the extent user charges are imposed within the European Community or by individual Member States, adding to the applicable requirements under international law, attention must be paid to pertinent rules of Community law. With regard to user charges adopted at the Community level, the primary issues to address are a) the legislative power in terms of an autonomous implementation and administration by the Community, and b) the respective budgetary requirements. With regard to user charges levied at the Community level as well as those levied by individual Member States, c) Community state aid rules as well as d) European fundamental rights and liberties are also relevant.

a) Depending on their design, user charges levied on global environmental goods can be based on a variety of provisions in the Community primary law. Generally, product-based user charges can be based on Article 93 of the Treaty Establishing the European Community (EC Treaty), requiring a unanimous decision by the European Council, since they are relevant to the European Common Market – to the extent they are designed to harmonise indirect taxes – whereas other conceivable forms of user charges centred on environmental policy will generally be based on Article 175 of the EC Treaty. As a rule, however, user charges will have their substantive focus in the area of environmental policy and thus be based Article 175 EC Treaty . If the user charge is designed as a fee imposed on a service or benefit rendered, the prerequisites for applying Paragraph 2 of Article 175 will not usually be fulfilled and Paragraph 1 of Article 175 EC Treaty (co–decision procedure) be the correct legal basis. Paragraph 1 of Article 71 of the European Union Treaty may provide a possible legal basis where an inseparable link between a particular user charge and the conceptual aims of Community transport policy exists. At any rate, it cannot be expected that Community legislation on user charges would exceed the considerable discretion afforded to the Community legislator in choosing how to configure the charge; there is little risk, therefore, of a violation of the Community subsidiarity principle.

b) Should the Community choose to raise and impose user charges of its own accord, the introduction of such a charge would give rise to budgetary considerations. The European Community can institute a system of user fees on its own as long as it does so within the context of pre-existing community policy, and the fees imposed are proportional, effective and relevant to the objectives of the respective Community policy. Depending on the particular policy area, the revenues of the user charge must be expended so as to help effectuate the stated objectives of said policy. Moreover, the budgetary principles of the EC Treaty as well as pertinent secondary provisions must be complied with. A special fund for administering the revenues can be set up within the parameters of Community legislative powers, either on the basis of primary or secondary Community legislation, or through an international treaty. In the latter case, the revenues will not necessarily accrue to the Community budget.

c) Community provisions on state aid only affect the revenues of user charges, inasmuch as these could be expended in a manner amounting to financial assistance for individual enterprises or economic sectors. A legal obstacle will arise only where the revenues obtained by the Member States are directly allocated to certain undertakings or the production of certain goods without being attached to a service rendered in return. Even if the revenues of a user charge and their expenditure were classified as state aid, however, the determination of whether they violate the general prohibition of distorting state aid would depend on the outcome of the review procedure contained in Article 88 Paragraph 3 EC Treaty, which requires that consideration be given to the exceptions contained in Paragraph 3 as well as the Community guidelines on state aid in the area of the environment. In this respect, the aims pursued with the expenditure of revenues are

decisive; environmental objectives generally fall within the scope of the common European interest and are thus covered by said exceptions.

d) Depending on the design of the user charge, it is possible for the charge to fall within the ambit of basic freedoms as well as within the sphere of fundamental rights of the Community. At any rate, user charges tied to products such as charges tied to freight, emissions and fuel consumption, fall within the scope of the prohibition of discriminatory domestic taxes contained in Paragraph 1 of Article 90 EC Treaty. The design of these product-related user charges may not be directly linked to the origin of the products. The implementation of user charges – to the extent they are not product-based – can also be subject to the provisions of Article 43 of the European Union Treaty, which sets out the freedom of establishment. Finally, user charges may infringe on the fundamental rights pertaining to employment as well as property. Still, even if individual freedoms and rights are encroached upon, it is generally possible to advance a compelling legal justification for the encroachment. As long as the fundamental principle of proportionality is complied with, user charges may be substantiated as a tool for furthering the objectives – i.e., to implement the polluter-pays principle, install regulatory controls, or finance certain environmental projects – recognised under Community law as socially beneficial, thereby justifying the encroachment.

3. German National Law

User charges intended to function exclusively at the national level must comply not only with applicable international and Community law(s), they must also conform to the national laws of the respective implementing states. From the standpoint of Germany and its constitution, the Basic Law (GG), important questions to be addressed relate to the financial provisions of the constitution and relevant legislative powers. As a point of departure, three types of charges are available which may be used in varying ways to guide behaviour and which thereby could be used as a basis for levying environmental user charges on air travel and shipping traffic: 1) taxes, 2) *quid pro quo* charges, and 3) other types of non-tax-based charges (special levies (*Sonderabgaben*) in the broadest sense). To ensure the financial structure of a system of user charges applicable to aviation and shipping activity passes constitutional requirements, aspects related to the assessment of the fee (e.g., authority to assess, reason for the assessment, unit of measurement to be used, method of assessment) as well as to the application of the revenues (e.g., authority to raise revenue, expenditure of the monies) must be taken into account. In this respect, it is necessary to distinguish between the various possible forms of user fees (a to f)

a) If the revenue is earmarked for a special fund, the user charge must always be designated as a special levy (*Sonderabgabe*) with a financial function, in which case it can only be legally justified under German constitutional law if the revenue collected from the fee is spent in a manner serving

the interests of the group burdened by it. Because there is no way to assess this accurately, a purely national system of user charges cannot be structured as a fund.

b) User charges based on fuel consumption (so-called kerosene taxes) fall within the scope of the competing legislative power of the federal government (*konkurrierende Gesetzgebung*) as a general tax on consumption. Revenues accrue to the federal government. There are no constitutional obstacles.

c) User charges imposed on travellers as the “end customers” of the related transportation services, as in the form of specific trip-based duties (so-called “ticket taxes”) can be legally structured as a tax. In accordance with the case law of the German Constitutional Court – as opposed to the views expressed in legal scholarship and doctrine – such fees can be classified as expenditure taxes, since they effectively link a person’s private, non *quid pro quo* consumptive transaction with the individual’s ability to pay. Hence, the power to introduce such a tax and to collect its revenues rests with the federal government. Such charges cannot, however, be levied on freight.

d) At this time (presently), it is not possible, constitutionally, to institute a genuine emissions-based tax (that is, a tax exclusively based on emissions), the revenue of which would accrue to the federal government. It is not possible to categorise such a tax into one of the existing and legally permissible tax categories (in particular, the categories consumption taxes, expenditure taxes and transportation taxes) permitted by the Basic Law (GG). It may, of course, be argued that the federal legislator could design new types of taxes. At present, however, this is not a view shared by the majority in the German legal community. In any event, the federal government – as an executive body – does not have the power to designate new forms of taxes. A constitutional amendment is required before the federal government can introduce new taxes. This, however, does not necessarily preclude the incorporation of emissions into the calculation of tax rates for other permissible categories of taxes.

e) As a practical matter, because they are based on a *quid pro quo* relationship, fees levied on the use of airports and ports can be ruled out as a possible type of environmental user charge; it would be illegal for the state to assess fees substantially in excess of the level of service rendered by it to the user.

f.) Finally, an interesting option to consider – especially with regard to the management of greenhouse gas emissions – is the implementation of charges within the context of a system for the management of air as a resource (comparable to the current system of water resources management), the establishment of which would require a sophisticated level of legal, regulatory

and technical expertise, and could potentially be implemented through an umbrella law on climate change. This would make it possible to link presently existing legal instruments with concrete regulatory targets.

III. Sectoral Requirements

International Shipping

The legal parameters for imposing user charges on international shipping consist, in the first instance, of the requirements of a) general maritime law as well as those of b) pertinent international treaties regarding environmental protection of the high seas as well as maritime traffic in general. Also of importance are the pertinent provisions of c) Community primary and secondary law and d) German constitutional law.

a) To start with, the requirements of international maritime law stem primarily from the United Nations Convention on the Law of the Sea (UNCLOS), a comprehensive international treaty embodying the principles of general maritime law. The treaty contains provisions distinguishing between the law covering international waters and territorial waters, which is subject to certain national laws and sovereign powers. The freedom of navigation pervades the law of international waters. In the absence of territorial sovereignty, the flag-state principle provides the only basis for the application of national sovereignty. Coastal states, on the other hand, are accorded limited territorial sovereignty over their coastal waters: they must grant all states the right to free passage through the coastal waters. In this context, it is illegal – subject to certain exceptions – to impose levies or charges on foreign ships based solely on passage through territorial waters. Internal waters, including the associated ports, however, are part of the territory of the coastal state. Consequently, they are subject to complete territorial sovereignty. Coastal states are free to subject entry to its ports to certain conditions, provided none of the incoming ships thereby suffer discriminatory impacts based on their country of origin.

Imposing a system of user charges on maritime shipping would have the following consequences: with regard to internal waters – including their ports – general maritime law poses no barrier to states conditioning entry to these waters on the payment of user fees. With regard to territorial waters, however, assessing levies on the right to transit through these waters is prohibited. Accordingly, it is not possible to design user charges based on the use of these waters for shipping purposes. The same is true for international waters, influenced by the freedom of navigation. For these reasons, to achieve the intended legal effect, user charges should be imposed on foreign ships based on dockage; not only would the scheme be legally valid, it would prove more feasible too. From the standpoint of general maritime law, implementation of such a scheme would only require paying heed to the prohibition on discrimination.

b) It is also possible that the agreements for the protection of the seas and international traffic – though limited scope in content and geographic range - place constraints on the creation of user charges in the area of international shipping. These include multilateral treaties adopted within the institutional framework of the International Maritime Organisation (IMO). On the other hand, at the European level, a number of important regional regimes to prevent pollution of the seas have been set up. The Paris Convention on Port Authorities, finally, has adopted an independent approach. In contrast to this agreement, however, the UNCLOS generally has legal precedence in international waters, thereby limiting the applicability of (resultant) specific agreements. A review of the most important agreements with regard to international shipping and preservation of the environmental integrity of the seas has yielded no indication that any of these accords would impede the implementation of user charges. Likewise, these regimes afford no clear advantages for the negotiation of a system of user charges.

c) In the area of Community secondary law, there are two areas of relevance: legal norms mandating the liberalisation of transport services within the European Union, as well as standards regulating the taxation of energy products. In the first instance, liberalisation programs often incorporate various legal norms requiring the implementation or safeguarding of the freedom of waterborne commercial services, which might stand in conflict with a reduction in waterborne commercial traffic caused by user charges. A similar situation exists with regard to the liberalisation of cabotage, which is affected by measures adopted by one of the Member States. Any infringement by user charges on other second-order liberties applicable to the free movement of goods and services could be justified by underscoring the legitimacy of the stated goals of the user charge in light of pressing common interests. In the end, in connection with the taxation of the generation of energy as provided for in Article 14 of Paragraph 1(c) of Council Directive 2003/96, energy products supplied for use as fuel for the purposes of navigation within Community waters are entirely exempt from taxation. Whether, therefore, a tax can nevertheless be assessed, depends, according to the jurisprudence of the European Court of Justice, on whether there is a direct connection between the amount of the assessed charge and the fuel consumed. This means that, under prevailing Community secondary law, neither user charges based on fuel consumption nor user charges based on the volume of emissions are permitted with regard to navigation in international and Community waters. Paragraph 1(c), Article 14 of Union Directive 2003/96 does not, however, stand in conflict with the implementation, at the national level, of a system of user charges directed toward purely domestic transport. In the event a user charge is assessed on the basis of distance travelled or travel time, the relationship with the fuel consumed can be severed, provided the fee operates on a graduated scale based on certain categories of distance or time.

d) On the level of German national law, a variety of standards apply to environmental charges, some of which pertain to nautical traffic. Under Article 74 Paragraph 1, Clause 21, of the Basic

Law (GG), the federal level has the power to impose charges on the use of shipping lanes. It must be stressed, however, that this power does not extend to standards regulating the use of ports. Under the delegation of powers set forth in the Basic Law, the power to introduce port fees – and, therefore, the right to establish requirements with regard to the allocation of the proceeds – has been assigned to the regional states, or *Länder*. A departure from this constitutional framework would only be permissible if the user charge were designed as part of a comprehensive system for the management of air as a resource, by combining the federal competence for the regulation of air pollution with the federal framework powers to protect nature and water.

Below the level of constitutional law, attention must be given to the provisions of the Mineral Oil Taxation Act (MinöStG), which largely exempt ship fuel from taxation. The exemption stems from Community standards in force until the end of 2003, and may only be rescinded domestically to the extent that applicable Community law (especially Paragraphs 1 and 2 of Article 14 of Directive 2003/96/EC) and international law permit it. In terms of the German legal system, this would be possible without further legislative amendments. Below the level of constitutional law, at any rate, no further restrictions on the introduction of new environmental charges in the area of international shipping are apparent.

2. Aviation

As was the case with shipping, a regime of user charges for the aviation sector is subject to general requirements as well as particular provisions relevant only to air space and its use. As noted above, the first step is to distinguish the respective legal regimes and test the applicable requirements of each: a) international law, b) Community law, c) German constitutional law.

a) With regard to the permissible introduction of user charges to airline travel, the principles of the following must be taken in account: (i) general international law, (ii) international aviation agreements (Chicago Convention), and (iii) the various bilateral aviation service agreements (BASAs). Because they are not legally binding, the recommendations and policies adopted by the International Civil Aviation Organization (ICAO) with regard to the assessment and payment of fees appurtenant to airline travel only have political relevance.

(i) Under general international law, each state enjoys complete and exclusive sovereignty over its territorial air space. This enables states single-handedly to determine the right of other nations to use its air space. Whereas there is a basic prohibition against restricting air traffic over the Exclusive Economic Zones (EEZs), complete freedom of air travel applies to the air space over international waters. Consequently, the only way to introduce user charges on the use of air space without any restrictions is by imposing them on the use of the territorial air space of the introducing country. This would extend to the air space over the territorial waters of the affected as well, but not to areas belonging to the Exclusive Economic Zone (EEZs), areas constituting international

waters, or to any other areas beyond territorial sovereignty. With regard to these areas, at most, an implementing state could base the design or calculation of the user charge on circumstances occurring beyond the borders of the state's sovereign territory. Nevertheless, a scheme like this would have to pay heed to the general requirements discussed above.

(ii) The Chicago Convention regulates scheduled air traffic operated in the transport of passengers, mail and cargo. Article 15 of the Agreement sets forth the terms and conditions governing access to airports and the assessment of charges for their use. Paragraphs 1 and 2 of Article 15 extend the application of the principle of national treatment to access to airports and related aviation facilities, but pose no legal barriers to the imposition of environmental user charges on air travel, given that such charges would not discriminate against foreign carriers. In addition, under Article 15, Paragraph 2, Clause 2, no fees, dues or other charges shall be imposed by any contracting state in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon. However, inasmuch as a user charge would not be levied purely for the right to enter, depart or travel in transit, but also to address environmental issues or the common welfare, the aforementioned clause does not create a legal obstacle. Finally, Article 24 regulates the imposition of duties and exempts planes involved in flights to, from, or across the sovereign territory of another contracting state from such duties. The exemption also applies to fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft when arriving in the territory of a contracting state and retained on board after departure. In accordance with these regulations, therefore, it is not permissible to impose a charge on the fuel present on board upon arrival and which is not unloaded. These) regulations do not preclude the taxation of fuel delivered to the incoming aircraft, however.. Thus, a kerosene tax modelled after the mineral oil tax would comply with the precepts of the Chicago Convention. In any case, all other types of user charges described in the introduction are not affected by this regime.

(iii) A multitude of bilateral air transport agreements, the so-called "Bilateral Air Service Agreements (BASAs)", extend the legal framework applicable to air transport to the bilateral level. These agreements are relevant only with respect to the levying of charges on aircraft placed into service by foreign airlines; they do not apply to the flights of domestic airlines. They prohibit the introduction of charges on fuel which has been brought into one of the signatory states or supplied there. In contrast to Article 24 of the Chicago Agreement, this prescription grants an exemption status to fuel supplied in one of the signatory states. This would appear to preclude the introduction of fuel-based user charges on aviation. To the extent the duties arising under these agreements are based on reciprocity, however, which is generally the case with air transport agreements, two signatories could mutually decide to renounce those obligations without violating the overall agreement. As a consequence, the agreement would merely be a particular manifestation of the principle of national treatment, whereby foreign airlines may not be treated less advantageously than the host country's airlines. Another option would be to either amend

existing air transport agreements, or – with respect to the European Union – alter them through Community law. All other forms of fuel-based user fees – apart from those based on either delivered or transported fuel – are not fundamentally precluded by any of the air transport agreements referenced above.

b) At the European Union level, Directive 2003/96 pertaining to the taxation of energy products, generally exempts aircraft fuel. However, the directive permits Member States to limit the exemption to international or intra-Community transport. This means that a kerosene tax can be imposed on domestic flights, including, due to the open wording of this provision, foreign aircraft. In conjunction therewith, where a Member State enters into a bilateral agreement to this effect with another Member State, the Directive permits the states to depart from the exempt status. This means that, the amendment of a bilateral agreement between two Member States – but only as between members of the European Union, not third parties – can lead to a recession of this tax exempt status. Consequently, even within the Union, a kerosene tax would be possible, provided all member states amended their respective air transport agreements accordingly. In this case, the Member States could stipulate a tax level that falls below the minimum level mandated by the Directive. Inasmuch as the amounts specified in Annex I only relate to the minimum tax level, introducing higher amounts is also possible.

c) With regard to German constitutional law, in terms of taxation, apart from the various powers already established above, the link between the intended legislation and the desired objectives is of decisive importance. Acting in accordance with the prerequisites of Article 2 Paragraph 2 of the Basic Law (GG) and on the basis of the power to preserve clean air conferred by Article 74 Paragraph 1, Clause 24, of the Basic Law (GG), the federal legislator can enact regulations designed to protect the climate. The wording “preservation of clean air“, as a dynamic term, also incorporates protection of the climate against air pollution. At any rate, the federal level enjoys considerable legislative discretion in the area of aviation, as it has exclusive jurisdiction over air transport under Article 73, Clause 6, of the Basic Law (GG). The provision covers all forms of air traffic. Aside from to constitutional law, attention must be paid to the provisions of the Mineral Oil Taxation Act, which exempts air transport fuels from taxation. The tax exemption derived from Community law can be limited to international or intra-Community transport pursuant to European Directive 2003/96/EG. Further limitations arising from domestic legislation are not apparent.

IV. Policy Recommendations

The foregoing legal parameters governing the assessment of user charges on the aviation and shipping sectors allow identification of recommended courses of action which should be taken into account when implementing a system of such charges. Differences must be drawn between

competing models, as well within the models, depending on the particular area of application of the fee.

1. User Charges Levied on Fuel Consumption (Kerosene or Diesel-based Taxes)

A kerosene-based tax may be legally assessed on domestic flights and shipping activities within domestic waters as long as the following requirements are properly considered:

- The tax should be implemented as a tax on consumption, and revenues accruing therefrom channelled to the federal treasury.
- A general statement of objectives should accompany the allocation of proceeds, to the effect that that power has not been fully stripped from the department or entity responsible for budgetary matters.
- To avoid potential infringement with legislation governing state aid and subsidies under international trade law or Community law, proceeds should not be allocated to the benefit of certain undertakings or the production of certain goods.
- To counter foreseeable efforts on the part of interested parties representing the airline and shipping industries to circumvent a kerosene-based tax levied on domestic activity, the calculation of fuel consumed by aircraft in domestic flight should incorporate aircraft which acquired their fuel abroad.
- According to the terms of Article 14 Paragraph 2 of EC Directive 2003/96/EC, Member States may limit the tax exemption of aircraft and shipping fuel to international or intra-Community transport. Linking the user charges to the origin of the fuel type, however, is proscribed under the terms of the prohibition against tax discrimination, contained in Article 90 Paragraph 1 of the EC Treaty for products originating in the Member States.

Additional requirements arise in case the tax is not confined to domestic flights and shipping activity within domestic waters.

- With respect to international flights, charges cannot be imposed on either the use or supply of kerosene – including consumption-based taxes – due to the international standards prevalent in numerous bilateral aviation service agreements. Countries wishing to assess a kerosene-based tax on international flights must amend or remove the conflicting treaty provisions via negotiation with the other signatories.
- The requirement to amend existing treaties is also applicable under Community law. In accordance with Article 14 Paragraph 2 of Directive 2003/96/EC, only Member States who have signed a treaty with another Member State may depart from the exemption afforded to international and intra-Community air travel.
- With regard to the shipping industry, neither the passage of foreign ships through territorial waters nor the use of international waters for navigational purposes can serve as the legal

basis for levying user charges. The only context in which a state may legally levy user charges is on a foreign vessel docked at a port of that state.

- An autonomous levying and administration of charges by the European Community can be based on Article 71 Paragraph 1, lit d), and Article 175 Paragraph Section 1 EC Treaty, in which case the revenues have to be spent with a view to achieving the transport or environmental protection objectives of the respective policy.
- On the other hand, should the European Community introduce the fuel-based tax as a harmonized excise tax implemented by the Member States, it would rely on Article 93 EC Treaty and would, therefore, require a unanimous decision by the Council.

2. Charges Levied on Individual Trips (i.e. Ticket Fees)

Other legal requirements apply in instances where the user charges are levied on individual trips. To the extent charges are levied under German jurisdiction, the following courses of action are recommended:

- The user charges can be regarded as a federal expenditure tax (*Aufwandsteuer*) because regardless of the environmental aims of the tax, the tax is assessed against the individual executing the trip with a view to his economic ability to pay. This should be expressed in the levying process, and it is therefore recommended that the user charges be levied statutorily either at the beginning or the end of the trip, rather than during the purchase of the ticket. The phrase “ticket fee” evokes an unwarranted association with a transaction tax, to which the individual *Bundesländer* would be entitled to obtain the revenues.
- An additional recommendation would be to appoint the respective transport undertaking as a tax debtor, and to reimburse the taxes, as far as it can be verified that available seats remain open for the respective trip.
- For reasons of equal treatment and the effect of the tax, a capped, flat-rate assessment of the fine should be avoided. Furthermore, earmarking the tax revenues may only occur if the budget legislator is not restricted in its decision on the application of funds. The revenues should be appointed so that neither individual undertakings nor the production of certain goods solely benefit because that might violate the precepts of international trade law governing subsidies and state aid.

Ticket charges pertaining to international air travel must give consideration to the following requirements:

- The charges must primarily aim at reducing greenhouse gas emissions, signalling that the charge is no mere kerosene tax. For the calculation of the tax rates, significant environmental properties of airplane engines and their operation can be included.

- An independent levying and administration of charges by the European Union can be based on Art. 71, Sec. 1, lit. d) EC Treaty or Art. 175 Sec. 1 EC Treaty. In each case, the application of funds has to occur within the scope of the legal basis.

3. User Charges Based on Emissions (Emissions Charges)

Legal requirements imposed on user charges levied according to distance or emissions depend on the type and form of the charge. The following framework is derived from German law:

- The allocation of revenue to a fund garners the classification as a special levy (*Sonderabgabe*). This special levy may only be applied if revenues are applied to the benefit of the burdened group of tax payers. Presently, this appears unfeasible for environmental user charges on aviation and shipping.
- Aside from the foregoing option of creating a fund, a direct levy on emissions should be considered a tax. However, this tax cannot be classified under any of the constitutionally permissible tax categories. Without an amendment of the Constitution, the introduction of a federal emissions tax is not permissible.
- In principle, it would be permissible to design a tax so as to include consideration of emissions, or to arrange an indirect fee dependent on emissions (perhaps a tax on flights or shipping routes, or a tax on the docking of airplanes or ships).
- The Community-wide or international implementation of an emissions tax for air traffic would allow for a circumvention of Germany's restrictive finance laws. Here, the course of action recommended for borderless implementation of a ticket charge apply.

4. Fees Charged in Connection with the Use of Certain Infrastructure (Airport Fees or Docking Fees)

- Levying fees based on public use of domestic facilities and infrastructure makes little practical sense within the aviation industry, because such fees must correspond to a privilege (i.e., use of the facilities and infrastructure) accorded by the state, but the vast majority of facilities used within the industry – whether airports or air traffic control towers – are privately owned.
- With regard to user charges levied against shipping activities, from the perspective of maritime law, subject to certain exceptions, neither passage of foreign ships through territorial waters nor the use of international (sovereign) waters for navigation can serve as the basis for the assessment of such fees. However, this should not be misconstrued as preventing a sea port from exacting a charge on ships entering its territorial waters or docking at one of its ports as compensation for use of the ocean as such, rather than merely the particular port.
- Due to the Community-wide prohibition against discrimination, the only factual circumstance in which, and the only legal basis on which, a state can assess a charge against a foreign ship

that has entered its waters is where the ship docks at one of the levying state's ports. The fact that a foreign ship has dropped anchor at a given port can be supplemented by other considerations for purposes of establishing the desired rate of a dock-based fee. However, due to the Community-wide law exempting shipping fuel from mineral oil taxation, attempts to correlate such fees with fuel consumption are barred, and even attempts to directly limit emissions or depress transport mileage raise legal concerns. It is legally possible, however, to differentiate the user charges according to fixed ranges, and to link fuel consumption to length of distance travelled.

5. User Charges Imposed within Systems for the Management of Environmental Goods

- Particularly intriguing is the assessment of user charges as a constituent part of a system of managing environmental resources. The instrumental advantage of such a system lies in the fact that it allows identification of specific management objectives, toward the achievement of which a coherent set of tools can be applied.
- Within such a system it would be possible to tax certain detrimental behaviour patterns – those producing substantial externalities (significant negative effects) (such as airplanes or air travel) – to induce new behaviour and attitudes. A fee structured in this manner could be constitutionally substantiated as a valid *quid pro quo* instrument, inasmuch as the proceeds of the fee could be construed as being applied to eliminate a state-granted privilege. This possibility provides a compelling argument for managing the global environment.
- A comprehensive system of rationalisation would be particularly well suited in the area of climate protection. To leave ample negotiating room in the future so as to facilitate creation of such a system of fees, it would be advisable now to bring currently existing legal instruments (laws, treaties, conventions, etc.) pertaining to climate change together under an umbrella framework and to establish an overall plan to reduce greenhouse gas emissions.
- The legal validity of such a system could be questionable from the standpoint of international law, especially in the area of aviation – cf. Article 15, Section 2, Clause 3 of the Chicago Convention. However, such concerns are misplaced, inasmuch as Article 15, Section 2, Clause 3 of the Chicago Agreement bans the imposition of fees only to the extent such fees are levied “solely of the right of transit over or entry into or exit from its territory.”. This prohibition does not apply to the taxation of benefits afforded within the foregoing management system.