

**RECENT ACTIVITIES OF
THE AFRICAN CIVIL AVIATION COMMISSION (APCAC)
AND THE ASSOCIATION OF AFRICAN AIRLINES
IN THE FIELD OF TRAFFIC RIGHTS AND TARIFFS**

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August, 1985**

**A Thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of Master of Laws**

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**AFCAC AND AFRAA: THEIR ROLE IN THE FIELD OF TRAFFIC
RIGHTS AND TARIFFS**

To my parents
and to all those working
towards the alleviation
of Africa's air transport condition

ABSTRACT

The rapid development of an efficient, economic and safe air transport network in Africa is a key component in the efforts being made to transform the economic condition of that continent.

Africa has entrusted the African Civil Aviation Commission (AFCAC) and the Association of African Airlines (APRAA) with the critical role of evolving policies on air transport development on a continent wide basis and acting as vehicles for harnessing the cooperation that is essential to the implementation of programmes designed to achieve the optimum development of air services in Africa.

Part one of this thesis provides a general overview of the economic regulatory framework for commercial aviation against which the concerns of African air transport must be viewed.

Part two commences with an examination of issues that are pertinent to the application of regionalism to civil aviation and a consideration of the problems and prospects of civil aviation in Africa. This is followed by a review of the work of AFCAC and APRAA in the field of traffic rights and tariffs in recent years and a consideration of various policies and recommendations in this area.

11.

The evolution of the correct policies in the area of traffic rights and tariffs is viewed as a key feature in the endeavours towards the optimum development of Africa's air services.

RÉSUMÉ

Le développement d'un réseau aérien efficace, économique et sûr en Afrique est un élément-clé aux termes d'un effort collectif afin d'améliorer la situation économique de ce continent.

L'Afrique a attribué à la Commission de l'aviation civile africaine (AFCAC) et à l'Association des compagnies aériennes africaines (APRAA) le rôle de concevoir des politiques sur le développement du transport aérien sur une base continentale. Ces deux dernières ont également pour objectif de promouvoir la coopération entre les différents agents, celle-ci se révélant essentielle pour un développement optimum des services aériens en Afrique.

La première partie de cette thèse présente une revue générale du cadre réglementaire économique concernant l'aviation commerciale par rapport aux exigences propres au transport aérien en Afrique.

La seconde partie commence par l'étude des facteurs pertinents à l'adaptation du régionalisme à l'aviation civile et se consacre aux problèmes et perspectives ayant trait à l'aviation civile en Afrique. Par la suite, les réalisations au cours des dernières années des deux associations ci-haut mentionnées seront analysées du point

iv.

de vos droits de trafic et de tarifs aériens, ainsi que les politiques et les recommandations en ce domaine.

L'élaboration des politiques appropriées dans le domaine des droits de trafic et de tarifs aériens, est primordiale au sein d'efforts envers un développement optimum des services aériens en Afrique.

PREFACE

Protectionism for commercial aviation by individual states can be traced back to the inception of the air transport industry. In a study entitled "Airline subsidies", Legrez¹ observes that:

"Air transport was a delicate child which came into being thanks to the technical advances made in aviation during the First World War. Its parents, individual states lavished much more care on it than they did on its elders - shipping, stage coach services or even the railways...Commercial aviation was dependent on government aid and assistance in every country, without exception - not only during its infancy but also during its long adolescence."

The stage of development of a nation's air transport industry, as is often the case with other industries too, will influence every state in its aviation relations with other states. The tattered condition of the air transport industry in the United Kingdom after World War II largely explains the intransigent protectionism it advocated at the Chicago Conference in 1944, so aptly illustrated in the following commentary on the Bermuda negotiations:²

1. ATA Bulletin, June 1982, p. 1.
2. Extract from tape recording sent to the 30th Anniversary Dinner Meeting of the Institute of Air and Space Law Association (Montreal, Canada, April 15th, 1982) by Sir William P. Hired, former Director

"The British with their tiny mosquitoes, with miniscule payload, wanted regulation - naturally, and the Americans with their roomy bombers, easily convertible to decent passenger planes, and being Americans, wanted freedom to go ahead unimpeded by any regulation."

Subsidies to airlines by states have taken various forms other than direct grants. These have included: compensation for every aircraft mile flown on a route operated at the instance of the government;³ contracts between airlines and the government for the transport of mail, in which compensation was far in excess of the cost of mail carriage operation;⁴ compensation for operating aircraft purchased at the discretion of the State which are more expensive to operate than others the airline could have selected;⁵ exemption from landing charges although this

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General of IATA and quoted in Haanappel, PPC, Pricing and Capacity Determination in International Air Transport: A Legal Analysis, Kluwer Deventer, The Netherlands. (Foreword).

3. The UK, France, Germany, Belgium and The Netherlands all provided such assistance to their national carriers, ibid.
4. This was particularly the case in the United States, ibid.
5. France compensated Air France for acquiring Brouget Deux Points aircraft instead of DC-6's which were cheaper to operate; similarly, the UK compensated BEA for acquiring Tridents instead of American aircraft; and both France and the UK have subsidised the

conflicts with Article 15 of the Chicago Convention;⁶ mandatory use of flag carriers by civil servants; preferential funding arrangements, etc.⁷

The purpose of documenting some of the forms and practises of protection accorded to national airlines by their governments in the past is to indicate that developed nations have not, in the past, hesitated to implement protectionist measures in favour of their national airlines under conditions where their survival is perceived to be threatened and often when the overall air transport industry situation has been relatively strong.

This background is illuminating in the context of Africa's attempts to build a credible air transport system. The condition of Africa's air transport industry, which is

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financing for the Concorde after it was realised that financial costs could not be covered by revenues.

6. This was practised by Italy in favour of Alitalia in the 1960's, ibid.
7. With respect to the US, Wassenberg has catalogued the following discriminatory policies under US law and US policy: visit USA fares; FAA Sec. 1380 (loans or financial aid to national air carriers); Section 1117(a) Federal Aviation Act and Competitive Practises Act of 1974 (US Government Travel); US tax laws permits local governments to tax foreign carriers for non-airport purposes; FAA Sec. 1376(a) (mail rates); US tax law (benefits to US lessors of aircraft to US carriers); US Post Office policy, etc. - ITA Bulletin, June 1982.

shared by many less developed countries in other parts of the world is characterised by underdevelopment. The airlines from these countries face several disadvantages: they have higher operating costs, smaller fleets, less dense route networks and poorer aircraft utilization than the airlines of industrialized countries. Less developed countries are for the most part destinations rather than sources of traffic, and passengers from developed countries tend to travel on their flag carriers; domestic traffic is either non-existent or limited in extent and growth possibilities.⁸

The twin objectives of assuring African carriers the opportunity to compete effectively in the international marketplace and improvement both in the quantity and quality of air services in Africa cannot be attained unless appropriate regulatory policies are developed and implemented.

AFCAC and AFRAA, the two most important multi-lateral African organisations for the promotion and development of air transport in Africa have been entrusted by the OAU member states, and, more particularly, with respect to

8. E.W. Mathu, "Implications of Greater or Lesser Competition in International Civil Aviation on 'the Economic Development of LDC's", paper presented at U.S. Department of State Symposium on International Aviation Policy, Kingston, Jamaica, 30 Jan. - 2nd Feb., 1979, p. 2.

AFCAC, with the task inter alia of providing policy leadership in the technical and economic fields of civil aviation in Africa.

The investigations and studies of these two organisations in air transport matters are being conducted during an era which has witnessed exceedingly radical changes in the worldwide regulatory framework. This has involved important modifications to the bilateral and multilateral regulatory framework that was laid down in the mid-1940's.

The most conspicuous of these changes has been the emphasis on loosening government involvement in such matters as the setting of capacity to be offered by airlines and freeing airlines from the obligation for collective fare setting and government approval of such fares.

Nonetheless, such modifications were prompted by the political need to tailor air transport policies to the requirements of the consumers, particularly in the United States. The changes would not, however, have been attempted in the absence of such in-built attributes as a broad and highly developed domestic market, highly trained manpower, access to capital, adequate infrastructure, etc.

The characteristics of Africa's air transport condition which we have noted would, however, seem to discourage liberalisation in capacity and tariff setting

policy in the foreseeable future. Considering Africa's lack of financial resources and therefore inability to extend direct subsidies to its airlines, protection in the regulatory field becomes the inevitable form of government assistance to airlines. This is not to discount the feasibility, even under Africa's current gloomy circumstances of potential for selective liberalisation in some limited policy areas, in particular tariffs.



LIST OF ABBREVIATIONS

AACO	Arab Air Carrier Organisation
ACAC	Arab Council of Civil Aviation
AEA	Association of European Airlines
AFCAC	African Civil Aviation Commission
AFRAA	African Airlines Association
AFRATC	African Air Tariff Conference
AGA	Annual General Assembly
AITAL	International Association of Latin American Air Transport
ASEAN	Association of South East Asia Nations
ATW	Air Transport World
(UN)ECA	(United Nations) Economic Commission for Africa
ECAC	European Civil Aviation Conference
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ITA	Institut du Transport Aérien
OAA	Orient Airlines Association
OAU	Organization of African Unity
SAS	Scandinavian Airlines System

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PART ONE

**THE MULTILATERAL REGULATORY FRAMEWORK
FOR COMMERCIAL AVIATION**

CHAPTER ONE

1. The Origins and Evolution of the Present Day Regulatory System

1.1 Introductory Observations

The present worldwide regulatory system for civil aviation is a composite of multilateralism,¹ regionalism and bilateralism.² Its foundations were established at the Chicago Conference of 1944. The Conference attained considerable success in advancing the course of safety and efficiency in air transport operations.

In contrast, the Conference failed in its main purpose in the economic field which was to reach a multilateral agreement on the exchange of commercial rights

1. To the extent that Deregulation emphasises a relaxation of government control over entry, exit, capacity and pricing it represents a weakening of multilateralism.
2. Unilateralism too is evident in the system for authorisation of admission of Charters. Wassenberg has also argued that unilateralism is present where one State imposes Unilateral conditions such as monetary compensation in exchange for the exercise of commercial traffic rights. See Wassenberg, Public International Air Transport in a New Era, Deventer, Kluwer, 1976, p. 47.

for international civil aviation. The United States and the United Kingdom, who held widely divergent on the scope of government involvement in the international regulation of routes, capacity and tariffs, failed to reach agreement on these matters. According to one commentator:³

"The U.S.A., long an ardent protectionist nation, went into Chicago with a liberal approach in mind and aimed at free competition on rates and services; the U.K. long identified with the gospel of free trade and freedom of the seas held out for strict government control of rates and apportionment of routes and regulations of frequency and capacity."

Each nation's position at the time reflected the condition of its air transport industry; the British civil air transport equipment and facilities had been decimated by the war while Americans had emerged at the end of the war as the strongest civil aviation power in the world.

Authoritative observers were quick to conclude that the Chicago Conference had failed, being unable to resolve the issues of regulation of routes, capacity and tariffs.⁴ This view has been disputed as unduly pessimistic. It has been observed that the organisation

3. Azzie R., "Negotiation of Bilateral Air Transport Agreements", Speech delivered to the Institute of Air and Space Law, McGill University, Montreal, Jan. 22, 1966.

4. Cooper J.C., The Right to Fly, Holt, New York, 1947, p. 157.

created by the Conference, ICAO, although only endowed with consultative and advisory powers in the economic sphere today represents a suitable forum for the contracting states to discuss any matters relating to international civil aviation, including those of an economic nature.⁵

The Conference produced four draft agreements that different states could choose to sign as a whole or separately. These were the Provisional International Civil Aviation Agreement which created the Provisional International Civil Aviation Organisation (PICAO) that would coordinate international civil aviation pending the entry into force of the Convention on International Civil Aviation, more commonly known as the "Chicago Convention". The third was the International Air Services Transit Agreement also known as the "Two Freedoms" Agreement which would allow other signatory states the privilege to fly across its territory without landing, and the privilege to land for non-traffic purposes. This agreement has to date been ratified by one hundred and five⁶ states. The last

5. Milde, N., "The Chicago Convention - Forty Years After", Annals of Air and Space Law, McGill University, Montreal, 1984, p. 121.

6. Shawcross & Beaumont, Air Law, 4th Ed., Butterworths, London, 1977, Appendix A, Treaties and Conventions, Issue 9. The status as at 1st October, 1981.

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agreement was the International Air Transport Agreement also known as the "Five Freedoms" Agreement which has to date received only twelve⁷ ratifications and is consequently a dead letter. Its objective was to enable states to exchange on a multilateral basis totally or partially the five freedoms of the air.⁸

There was also annexed to these Agreements a standard format for the bilateral exchange of air services which it was hoped would serve as a model for the exchange of transit and traffic rights among states.

Articles 1, 5 and 6 of the Chicago Convention are the most significant when considering the legal regime regarding the commercial aspects of international air transportation. Article 1 reaffirmed the absolute and exclusive sovereignty of states over their national airspace and consequently the right of each state to determine who could overfly or land into its territory. Article 5 dealt with non-scheduled international air transportation and determined in the first place that state parties to the Convention would exchange, subject to minor limitations, the first and second freedoms of the air for commercial

7. Ibid.

8. For a description of the freedoms of the air please see infra, page 7.

non-scheduled flights. In the second instance, third, fourth and fifth freedom rights for commercial non-scheduled flights would be permitted on a multilateral basis subject to the state where a traffic stop takes place to impose such regulations, conditions or limitations as it deemed desirable.

Article 6 on the other hand leaves to each state the complete discretion to authorise or refuse permission to a scheduled international air service to be operated over its territory.

These provisions have, as a result, created conditions whereby international air services, particularly scheduled, can only be operated on the basis of bilateral agreements between states.

When it became clear that the Chicago Conference would not be able to agree on the exchange of commercial traffic rights and the setting of fares and rates, the Conference decided to refer all the unsettled matters to PICAO for further studies. Subsequent attempts to reach agreement at ICAO on a multilateral basis for the exchange of commercial traffic rights, in particular fifth freedom, failed and further efforts were abandoned in 1953 when it was noted at the Seventh Session of the ICAO General Assembly that

"There is no present prospect of achieving

a universal multilateral agreement.⁹

One significant step towards multilateralism in scheduled air transportation did take place in 1945 when representatives of international airlines met in Havana, Cuba, and created the International Air Transport Association, IATA, which would play a principal role in the setting of fares and rates for international scheduled air transportation.

In the field of international non-scheduled air transportation attempts at multilateralism were more fruitful. In Europe a multilateral agreement¹⁰ was concluded in 1956 between ECAC member states exchanging freely among themselves commercial traffic rights in respect of certain categories of non-scheduled operations without imposing the limitations proposed in Article 5 of the Chicago Convention on their operations. In 1971 members of the Association of South East Asian Nations concluded a similar agreement. The Arab League of Nations too adopted in 1978, in Tunis, an agreement intended to liberalise non-

9. See ICAO Ass. 7th Session, Resolutions and Indexes to Documentation, ICAO Doc. 7417, A7-P/3 Aug. 27, 1953.

10. Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, 1956. ICAO Doc. 7695.

scheduled air transportation within the member states.¹¹

As a result of this combination of legal structure and diplomatic history - the principle of sovereignty over air space, and the inability to agree on multilateral exchanges of traffic rights - nations today engage in constant bilateral negotiations for traffic rights.¹²

The classification of transit and traffic rights granted by a state is specified as follows in the international Air Transport Agreement:

"(1) The privilege to fly across its territory without landing;

(2) the privilege to land for non traffic purposes.

(These first two are categorised as 'transit rights' and the rest as 'commercial or traffic rights').

(3) The privilege to put down passengers, mail and cargo taken on in the territory of the state whose nationality the aircraft possesses;

(4) the privilege to take on passengers mail and cargo destined for the territory of the state whose nationality the aircraft possesses.;

(5) the privilege to take on passengers, mail and cargo destined for the

11. Haanappel, P.P.C., Pricing and Capacity Determination in International Air Transportation, A Legal Analysis, Kluwer, Netherlands, 1983, footnote No. 45, p. 19.

12. Freedoms of the Air, Ed. McWhinney & Bradley, Sijthoff, Leyden, 1968, p. 175.

territory of any other contracting state and the privilege to put down passengers, mail and cargo coming from any such territory.

Practise has shown that it is convenient to distinguish the following 'freedoms' in addition:¹³

- (6) The privilege to take on passengers, mail and cargo destined for the territory of any other state via the state whose nationality the aircraft possesses, and the privilege to put down passengers, mail and cargo coming from any such territory via the state of the aircraft.
- (7) The privilege to carry traffic between the grantor state and the third states only, without stopping over in the state whose nationality the aircraft possesses.¹⁴
- (8) The privilege to carry traffic between two service points within the territory of the grantor state (cabotage).¹⁵

13. Matte, N.M., Treatise on Air-Aeronautical Law, Carswell, Toronto, 1981, p. 143.

14. A popular example of such an operation is by an Iceland based carrier commencing its flights at points in the U.S.A. and terminating its flights at points in Europe without a stopover in Iceland.

15. See Article 7 of the Chicago Convention.

1.2 Bilateral Regulation

1.2.1 Capacity

1.2.1.1 The Bermuda Capacity Clause

The air services negotiations concluded between the United Kingdom and the United States in 1946, in Bermuda, evolved principles on capacity and tariff regulation that were to dominate the practise of states in their conduct of bilateral air transport relations for the next thirty years. The agreement embodied a consensus between the two states allowing airlines to determine the capacity to be offered subject to certain criteria and ex post facto review by the governments. Fares and rates would be agreed through the machinery of IATA subject to the approval of governments.

The "Bermuda principles" on capacity control have been described in the following succinct words:

"A sound and successful way of dealing with the conflicting desires then prevailing: the desire to provide, on the one hand, the kind of freedom from arbitrary controls which leads to an expanding, efficient service, and, on the other hand, some limitation on excesses and abuses of capacity offerings which some governments felt they could not accept".¹⁶

16. Supra, note 12, p. 176.

These "Bermuda principles" created the following standards:¹⁷

- the opportunity of the carriers to operate on the routes to which they have been designated shall be "fair" and "equal";
- regarding the relationship between competing carriers "the interests of the air carriers of the other government shall be taken into consideration so as not to affect unduly the services which the latter provides on all the routes or part of the same routes";
- the combined capacity of the operators and the total traffic "should bear a close relationship to the requirements of the public for such transport";
- the last criteria concerns the comparative roles of primary traffic (Third and Fourth freedom) and secondary traffic (Fifth Freedom). The primary objective of a designated air carrier would be the provision of capacity adequate to the traffic demands between the carriers own country and the ultimate destination of the traffic. The right to third country traffic would be applied in accordance with general principles of orderly development, and subject to the general principle that capacity should be related to traffic requirements between countries of origin and ultimate destination of the traffic, requirements of through airline operations, and traffic requirements along the route after taking account of local and regional services.

These principles could, between two states whose air transportation capabilities were relatively equal, provide a framework in which carriers could operate the

17. Ibid., p. 143.

capacity they considered necessary without either of them being overwhelmed by the other. The stress on fairness and equality of opportunities, the vague limitations on carriage of secondary traffic and finally the hanging, threat of ex post facto review of the operations might in such circumstances suffice to discourage the dumping of capacity, unfair competition methods and thereby assure the earning of equitable revenues by the airlines of both parties. As between unequal partners they could not operate as smoothly.

These "Bermuda principles" were incorporated into more than a thousand bilateral air agreements between states and along with the administrative clauses of the Chicago Standard Bilateral Form, the "Two Freedoms Agreement" and the IATA tariff setting machinery they came to provide a multilateral pattern for the regulation of scheduled air transportation that lasted for nearly thirty years.

1.2.1.2 The Predetermination Capacity Clause

As between states whose carriers were totally unmatched for an "equal and fair opportunity" in the competition for traffic, the weaker states came to view the "Bermuda principles" as too liberal and a license for the better equipped and more efficient carriers to dominate the

market at the expense of their own carriers. These states introduced mechanisms for limiting the capacity to be offered which came to be known as the predetermination method of capacity regulation.

The predetermination method differed from the Bermuda method by redefining the primary objective traffic as the traffic directly between the two states (inter-partes), as opposed to that originating or destined to the homeland of the carrier. In some cases bilateral air agreements totally excluded the grant of fifth freedom traffic rights. A new feature would also be a requirement that operations would not be inaugurated until the aeronautical authorities of both parties had agreed on capacity and frequencies or approved them as submitted by airlines. This would be done by specifying types of aircraft, frequency of services and in some cases the number of seats and or cargo capacity.

Among some South American states, where this method was applied in its most extreme form, the declared policy was the protection of third and fourth freedom traffic from Fifth Freedom carriers. The Argentine formula, refined under the Ferreira Doctrine, for example, was based on a reservation of at least 75% of the inter-partes traffic to the carriers of the two states with the residual being

available for carriage by third parties.¹⁸ Measures such as fixing the maximum quota of seats and number of frequencies were utilised to enforce compliance with this policy.¹⁹

Other measures such as compensation to the weaker state for unutilised traffic rights through revenue pools became common. Certain western writers did concede that this practise was excusable where a carrier was genuinely unable to compete, being without the required resources and expertise.²⁰ Unfortunately, demands for compensation were not confined to such cases and were at times insisted upon by governments whose carriers had the resources to compete but had otherwise failed to deploy these resources intelligently.²¹

Some valid criticisms of the predetermination method are listed herebelow:

- The notion that a carrier from a small nation (that may have purchased expensive equipment for which it must pay in foreign currency) will earn sufficient foreign exchange to contribute to that country's balance of payments is often illusory.
- On some segments of the world's air routes, planes fly half or more empty

18. Ibid., p. 72.

19. Ibid., p. 79.

20. Wassenberg, op.cit., at p. 49.

21. Ibid., p. 50.

while travellers are legally debarred from utilising this empty space and are often denied direct service between the two places the segment connects.²²

- On many routes this regime prevents the most efficient and economical air carriers from serving the public or subjects their services to rigid limitations that make their operations less economical and less useful to the public than they would otherwise be.²³
- This regime perpetrates the existence of highly uneconomical and wasteful carriers by shielding them from effective competition and providing them with subsidies and prevents airlines from offering services at the lowest economic costs to the public.²⁴

On the other hand, protection is being provided today in the hope that the protected carrier will emerge in the near future better equipped to handle competition, contribute to the nations balance of payments, ensure the availability of a dependable public service, play its role in the national defence and security programmes, etc.

1.2.1.3 The Liberal Capacity Clause

A very different type of air transport policy is one which holds that airlines should be completely

22. Supra, note 12, p. 96.

23. Ibid.

24. Ibid.

5

unfettered to enter and exit from any market and in their setting of capacity and tariffs. This policy evolved in the United States in the late 1970s under the so-called "deregulation" policy as writers and policy makers questioned the traditional view of air transportation as a natural oligopoly. Its supporters, who were to emerge triumphant, argued that air transportation issues such as supply, demand and pricing do not require government intervention and should be determined by the forces of the market place.

The liberal bilateral will, in general, have all or some of the following characteristics:²⁵

1. Unlimited multiple designation of airlines;
2. a liberal route structure, i.e. U.S. airlines may serve foreign countries from any points in the U.S., via any intermediate point and to any beyond point; foreign carriers, however, will usually serve (a) specified point(s) in the U.S.;
3. free determination by the designated airlines of capacity, frequencies and types of aircraft to be used, unhindered by the Bermuda capacity clauses;
4. no limitation on the carriage of scheduled sixth freedom traffic;
5. encouragement of low tariffs, set by individual airlines on the basis of the forces of the market place

25. Haanappel, op.cit., at p. 42.

without reference to the ratemaking machinery of IATA.

Inclusion of provisions on charter flights, i.e. the availability of inexpensive charter air services, is encouraged and charterworthiness is generally governed by the country of origin rule.

The liberal bilateral was vigorously promoted by the U.S. during the Carter Presidency and was concluded with about twenty states. Currently and although still a cornerstone of United States Air Transport Policy,²⁶ the Reagan Administration is less inclined towards exporting the policy to other nations. Some officials in the Administration perceive some of the bilaterals as having benefited the partners to the agreements more than the United States. There is also increased deference to the policies and viewpoints of other states on air transport matters.²⁷ An interesting development in recent times has also been the trend towards agreements of a liberal nature between states, particularly in Europe, without the

26. The policy of deregulation is embodied in the Deregulation Act of 1978 and the International Air Transport Competition Act of 1979.

27. Namack. J., "U.S. International Aviation Policy: Same Goal, New Attitudes", ATW/5/83, p. 24.

participation of the U.S.²⁸

These are today the three different types of bilateral air transport agreement that govern the exchange of traffic rights and related matters between governments. Each espouses a different approach to capacity regulation with the predetermination and the liberal method representing the extremes on either side.

An aspect of bilateralism that continues to raise controversy is the conclusion of secret memoranda supplemental to bilateral agreements which often change the meaning of such agreements, i.e. from Bermuda to predetermination.

The secrecy aspect has been considered objectionable because it negates the purpose of Article 83 of the Chicago Convention which requires that aeronautical agreements between states which are contrary to previous agreements should be registered with ICAO.

Yet another practise that impacts on the rights granted under a bilateral agreement are commercial pool agreements between airlines which in general involve the pooling of all revenues earned by the two airlines on specified routes and the sharing of such revenue on an equitable basis. Sometimes it may include the sharing of

28. E.g. between the United Kingdom and the Netherlands.

costs. One undesirable outcome of this practise is the creation of a situation of undercapacity on such routes, the motive to compete for traffic having been reduced by such an arrangement.

1.2.2 Reciprocity in the Exchange of Traffic Rights

The most crucial yet contentious part in the negotiation of air agreements is the exchange of traffic rights. Reciprocity is the basis of each states willingness to allow airlines of foreign countries to participate in its traffic. The reciprocal basis for exchanging traffic rights lies in the treatment by a state of all air transportation of cargo, passengers and mail being considered a natural asset of that state to be shared with other nations only on the basis of equivalent benefits for its own national airline.

It is therefore generally accepted that a fair route exchange requires an equitable exchange of economic benefits, expressed in terms of route rights having approximately equal market value.²⁹ The problem however is how to reach a consensus that what is being exchanged between the parties meets this test.

29. McWhinney, op.cit., at p. 179.

It is useful in the first place to agree on a criteria for measurement of market value of a route. Revenues are preferable in this regard to profits as a yardstick because of possible differences in the two airlines cost structure. Where there has already been a previous agreement between the countries, the usual criteria are the revenues to be earned in the future on the basis of past experience supplemented by realistic traffic forecasts. In any negotiations for a new agreement or the expansion of an existing one there being no historical records the potential market value will require assessment by way of traffic forecasts based on market studies.

Under the Bermuda concept of fair and equal opportunity, carriers would be left to share the third and fourth traffic on a competitive basis without intervention by governments so long as both airlines maintained fair means of competition and did not, for example, deploy excess or uneconomic capacity on the route.

With the predetermination method, however, the sharing of traffic would be specified in a categorical manner and would not be varied throughout the duration of the agreement without the consent of both governments notwithstanding the differing efficiencies of the carriers.

As regards fifth freedom sectors on the route, the Bermuda guidelines would constrain the parties to grant

Fifth Freedom traffic rights subject to the limitations previously discussed.³⁰ In-predetermination practises, Fifth Freedom traffic rights may be denied entirely or confined to a small fraction of the traffic.

In all these it should be noted that it is uncommon to bargain away traffic rights in exchange for commodities or services or any advantage unrelated to traffic rights. The bargaining of traffic rights is thus unlike the practises obtaining in the international exchange of goods and services. One justification for this approach is that such practises could serve to weaken a national carrier which would then be forced to seek subsidies from the national treasury.³¹

The initiative in proposing negotiations for a bilateral air transport may be prompted by a multiplicity of factors;³² one government might feel that a service would be useful for commercial, cultural or political reasons; the aeronautical authorities within their overall plan to

30. Supra, pp. 9-11.

31. McWhinney, op.cit., at p. 98. However, it may be observed that in recent years, the United States has attempted to link air transport relations with overall trade relations, at least in some cases, i.e. with regard to Japan. See Wassenberg, H., ITA Bulletin, June 1982.

32. Azzie, Speech, op.cit., at p. 7.

develop air transport might take the initiative, or carriers, in some cases, may press the government to negotiate an air agreement.

Prior to embarking on negotiations, a party should pre-plan its own requirements, assess the price it is prepared to pay as well as the repercussions which may develop.

1.2.3 Tariffs

Tariffs in air transportation refer to the prices to be paid for the carriage of passengers, baggage and freight and the conditions under which those prices apply, including prices and conditions for agency and other auxiliary purposes, but excluding remuneration or conditions for the carriage of mail.³³

Traditionally, the tariff clause in the bilateral agreement has addressed the following matters: the factors to be taken into account in establishing a tariff (i.e. operational costs, types of service, a reasonable profit, tariffs of other airlines operating on the same route, etc.); methods for reaching agreement on a tariff (i.e.

33. Article 2.1 of the 1967 International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services, ICAO Doc. 8681.

through an association of airlines or consultation among airlines operating on the route or, more recently, unilaterally where anti-trust laws would otherwise be contravened); how and when tariffs will be submitted to aeronautical authorities for approval and the grant of such approval; how the differences of opinion or dispute concerning tariffs will be resolved; and, often an undertaking by both parties to enforce compliance with the agreed tariffs.

Tariff matters was one of the issues where the Chicago Conference failed to reach agreement and was subsequently delegated to the airlines through IATA traffic conference machinery under the Bermuda Agreement of 1946. Such delegation to IATA required anti-trust immunity on the part of the U.S.A. which was granted each year from 1946 and made permanent in 1955.³⁴

34. In 1979 this immunity was disapproved for U.S. carriers on the North Atlantic following CAB show cause proceedings, see infra, Section 1.2.3.3 (d) pp. 41-42.

1.2.3.1 Pricing under the Bermuda and Predetermination
Bilaterals

Under the Bermuda tariff clause, the tariffs proposed by airlines would be effected unless disapproved by either aeronautical authority within thirty days prior to the date of introduction. Intervention by government would however be limited to vetoing unfair or uneconomic fares and rates. These principles were also adopted in the predetermination type bilateral agreement and came to be referred to as the "mutual" or "double" approval method because both governments must approve the proposed tariff prior to its introduction.

The delegation of ratemaking to IATA is in most cases explicit in bilateral agreements. Quite often, however, bilateral agreements may not mention ratemaking. This does not however preclude the use of the IATA mechanism provided that the governments and domestic laws are not opposed to such practises.³⁵ Countries whose airlines are not members of IATA will generally delegate ratemaking to their airlines though in practise the tariffs applied are often IATA inspired. This is true equally of airlines of socialist Eastern European states.

35. Ibid.

In 1967 an attempt was made to codify the existing IATA ratemaking practises into a multilateral agreement when the International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services was signed at Paris on the 10th of July. Its geographical scope is not limited to Europe and it is open for accession by non-ECAC states which are members of the U.N. To date, however, there are no non-ECAC states that have adhered to it.

A further attempt to design a multilateral ratemaking agreement was made beginning 1974 this time by ICAO within the context of its expanding involvement in studies in the field of economic regulation of air transport. The study, which was authorised by the 21st session of the ICAO Assembly, sought to explore the feasibility and relative benefits of either an international ICAO standard tariff clause or an international agreement embodying such a clause. The study, completed in 1978, produced a draft standard tariff clause similar in many respects to the 1967 ECAC draft clause, except that it could conceivably be applied to ratemaking both for scheduled and non-scheduled air transportation and it also did not specifically refer to the IATA tariff ratemaking machinery. Additionally, it requires airlines to discuss with governments proposed tariffs before attempting inter-carrier

consultations. Thus tariffs would be discussed with governments prior to consultations among airlines and thereafter when approval for implementation is sought.

1.2.3.2 Pricing Clauses in Liberal Bilaterals

The tariff provisions in liberal bilateral agreements originated from a "dramatic new pricing policy" prompted by six factors,³⁶ domestic airline deregulation, the overall "small government" approach of the Carter Administration, the relatively favourable industry and economic climate at the time, the appointment of pro-deregulation members of the U.S., CAB, in particular, Mr. Alfred Cahn, the then Chairman.

The principal characteristics of the liberal bilateral tariff clauses are:³⁷

- encouragement of low tariffs for the benefit of the consumer set by individual airlines on the basis of the forces of the market place without reference to the ratemaking machinery of IATA;
- pricing is in respect to both scheduled and charter transportation;
- minimal interference by governments in

36. Harbison, "Liberal Bilateral Agreements of the United States", unpublished LL.M. thesis, McGill University, Montreal, 1982, p. 16 et seq.

37. Haanappel, op.cit., p. 146.

tariff matters and then limited only to

- a) prevention of predatory or discriminatory prices or practises;
- b) protection of consumers from prices that are unduly high or restrictive because of the abuse of a dominant position; and
- c) protection of airlines from prices that are artificially low because of direct or indirect government subsidy or support.

A comparative study of more than twenty liberal bilaterals by Harbison³⁸ reveals that states have incorporated seven methods of pricing determination in their bilateral agreements. Those mentioned below are specific to liberal bilateral agreements.

Country of origin pricing: the government in whose territory the carriage originates has exclusive control over tariffs offered on the routes between such contracting states. This method was originally used predominantly in charter services but has been applied to both scheduled and charter services for example in the U.S.-Netherlands and U.S.-F.R.G. liberal bilateral agreements. Each party's powers of disapproval are limited to:

- a) tariffs offered or proposed by the other party's airlines;
- b) when the passengers' itinerary begins in its territory.

38. Harbison, op.cit.

Country of designation pricing: here the government disapproval powers follow the flag of the airline and not the origin of the traffic. This method has not yet been incorporated in any bilateral agreement. It was proposed by the U.S. in negotiations with the Netherlands who rejected it.

Double (mutual) disapproval: this arrangement takes the form of prohibition of disapproval rather than a requirement to approve. Thus no tariff can be disapproved or prevented from entering into effect unless both parties so agree.

Band pricing: in this method, the pricing is built upon an initially agreed "reference point" around which various types of pricing methods referred to above are applied.

Illustration: if, for example, 100 is the reference point an agreement can specify that from +40 to -20 will be governed by say the double disapproval method, from 80 to 50 by the country of origin method and from 50 to 40 by double approval method.

The U.S.-ECAC Memorandum of Understanding of August 1982 on pricing for the North Atlantic market employs the mechanism of Band pricing. The zones fall into five major categories: first class, which can rise as much as 150% above the reference fare¹⁰⁰ without approval; business class,

120%-150%; economy, 20% above or below; discount and deep discount, below the reference fare depending on the market.³⁹ This arrangement has been successful enough for the U.S. Department of Transportation to consider possibilities of negotiating similar regional arrangements with Asia or Latin America.⁴⁰

Matching: the purpose of matching is to preclude discrimination between the national and foreign airlines for locally originating traffic under a country of origin agreement.⁴¹ The equivalent American term of "meet" has been defined in paragraph 4 of the U.S. model double disapproval clause as "the right to establish on a timely basis, using such expeditious procedures as may be necessary:

- a) An identical or similar price on a direct or interline basis;
- b) such a price through a combination of prices.

The KLM/Lufthansa dispute of 1982⁴² regarding whether KLM could match from Amsterdam, fares to the United

39. Feldman, J., "U.S. Not Enthusiastic About ECAC Agreement", ATW 10/82, p. 29.

40. Ibid.

41. Harbison, op.cit., p. 87.

42. Feldman, supra.

States offered by Lufthansa to German originating passengers indicates the nature of problems that matching could create.

Price leadership: this concept was first incorporated in the 1978 U.S.-Belgium double disapproval clause which provided that

"Neither party shall take unilateral action to prevent the inauguration or continuation of a price charged or proposed by:

- a) An airline of a third country for international air transportation between the territories of the parties, or
- b) an airline of one party for international air transportation between the territory of the other party and a third country, including in both cases transportation on an interline or intra-line basis.

Thus an airline, be it of the contracting parties or of a third state, will not have its prices disapproved on the basis that it is undercutting other airlines, of course, so long as its pricing is not predatory.

At the root of the liberal agreement pricing system therefore is the overriding public interest in cheap air transportation, a matter of somewhat lesser interest to the governments of developing nations whose populations are preoccupied with more basic necessities of life.

1.2.3.3 IATA

a) Origins, Structure and Functions

The International Air Transport Association as it exists today was formed in Havana, Cuba in 1945 as a forum for Airlines operating international scheduled air services. It had no formal links with its predecessor, the International Air Traffic Association, a pre-World War II, predominantly European organisation.

The creation of IATA in 1945 arose directly out of the failure of the Chicago Conference to provide effective means for ratemaking in scheduled international air transportation. The organisation received almost immediate acknowledgement as the foremost ratemaking machinery for air transportation by the delegation to it of ratemaking under the Bermuda Bilateral Air Services Agreement of 1946. Since then, IATA has become the most important worldwide forum in ratemaking for scheduled international air transportation. Recent intervention by the U.S. government in favour of free determination of tariffs has, however, reduced its significance in this field.⁴³

43. See infra, section 1.2.3.3 (d) Anti-trust Implications of IATA's Activities, p. 37.

IATA was created by two documents. A Canadian Act of Incorporation, which became law in December 1945, and Articles of Association adopted in April, 1945. The aims and objects of the Association are:⁴⁴

- I) to promote safe, regular and economical air transport for the benefit of the peoples of the world, to foster air commerce, and to study the problems connected therewith;
- II) to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transportation.
- III) to cooperate with the International Civil Aviation Organisation and other international organisations.

It has five principal organs whose structure and functions may be summarised as follows.⁴⁵

The (Annual) General Meeting, in which the final authority of the Association is vested;

The Executive Committee, whose members are elected by the General Meeting and are charged with the day-to-day direction of the policy of the Association;

The four Standing Committees. Financial, Legal, Technical and Traffic - of which the members are appointed by the Executive Committee subject to confirmation by the

44. Article 3 of the Act of Incorporation of IATA, and Art. III of the Articles of Association of IATA.

45. See Haanappel, op.cit., at p. 65.

Annual General Meeting, following the appointment. The Standing Committees assist the Executive Committee and work under its direction. The Traffic Committee also assists the Traffic Conference in a policy advisory capacity.

A Secretariat headed by the Director General who is the Chief Executive and Administrative Officer of the Association.

The Traffic Conferences, which, though formally an integral part of the Association, have semi-autonomous status within IATA.

There are two classes of membership, active and associate. Active membership is open to any transport enterprise, providing international (and domestic) scheduled air services are eligible for associate membership and are ineligible to vote at IATA meetings.⁴⁶

Prior to 1978 all active members had to participate in ratemaking activities. In that year, however, largely in response to pressure generated by the U.S. CAB show case proceedings of that year,⁴⁷ IATA was reorganised and participation in ratemaking activities became optional. Participation in trade activities remains mandatory for all categories of membership.

46. Article IV of the Articles of Association of IATA.

47. See infra, pp. 41-42.

More than half of IATA's member airlines are either entirely or more than fifty per cent state owned. Thus, purely in terms of composition, IATA is largely a quasi-public international organisation. On a functional level IATA, by exercising delegated authority in the ratemaking sphere on behalf of the government, is considered a quasi-public organisation.⁴⁸

b) IATA Tariff Coordinating Conferences

The Traffic Conferences of IATA operate under rules and regulations which are determined in the first instance by the Executive Committee and are approved at the Annual General meeting. The Traffic Conferences are split into three, representing (a) the Western hemisphere, (b) Europe, Africa and the Middle East, (c) Asia and Australia.

Each active member of IATA is required to become a member of at least one of the Traffic Conferences and in practise the large airlines are members of all three.⁴⁹

Amendments to the Traffic Conference Regulations

48. For a more detailed discussion, see, Haanappel, op.cit., at p. 78 et seq.

49. Brackner, IATA, How it Works, Sitjthoff, The Netherlands, 1977, p. 39.

were made in 1978 and took effect in October 1979. These involved significant alterations to the way in which the Traffic Conferences operate.⁵⁰

The first change is that trade association activities which include matters relating to passenger/baggage/cargo handling, documentation, procedures, rules and regulations, reservations, automation, tickets, schedules, agents, etc., are now conducted in "Procedures Conferences", in which all IATA members must participate while the setting of fares and rates is conducted in "Tariff Co-ordination Conferences", in which membership is optional. Having elected to participate in tariff coordination, an airline automatically becomes a voting member in every conference covering routes within or between geographic "areas" and "sub-areas" where it operates under Third, and Fourth Freedom Traffic rights. It has the further option of becoming a non-voting member of any conference for which it is ineligible to become a voting member.⁵¹

Another change is in the scope of the agreements that are reached. Traditionally, members sought unanimous concurrence for comprehensive agreements covering the entire

50. See Report on Competition in Intra-European Services, ECAC Doc. No. 25, 1982.

51. Ibid.

tariff structure (types, levels and conditions) for the whole conference area. Under the amended provisions, where such concurrence cannot be obtained, an attempt would be made to achieve agreements covering "sub-areas". Such agreements would apply to smaller geographic units and require only the unanimous vote of the voting members of the sub-areas, unless 20% or more or five, whichever is the greater, of all other voting members of the area conference present at the meeting cast negative votes. There is a fourth provision entitling as few as two airlines, in cases where there is failure to reach agreement on tariffs applicable throughout the sub-area, to reach agreement on tariffs to be charged on particular routes within the sub-area provided all voting members operating Third and Fourth Freedom Traffic services between the countries to which the agreement is to apply concur, and the majority of the voting members of the area do not object to the agreement.⁵²

A third change to the provisions now permits airlines under specified circumstances to introduce unilaterally so called innovative fares or rates despite the fact that an area agreement already exists.⁵³

52. Ibid.

53. Ibid.

c) IATA Compliance Machinery

Efforts to ensure that IATA member airlines comply with the decisions reached in IATA's Tariff Co-ordination Conferences are a natural complement to the system of setting fares and rates. In order to cater for this requirement, a compliance office was established under the supervision of the Director General to ensure that all member airlines adhere to their agreements and to prevent members from having their traffic diverted through unscrupulous means.

In the past IATA's efforts were directed more towards apprehending and punishing offenders. Following recommendations made to the IATA Special General Meeting of the 7th June 1978, the stress now is on prevention through the adoption of a Fair Deal Monitoring programme. The programme focuses on yield improvement as the primary goal through agreements by carriers not to discount by more than a specified amount below the "official" tariffs, this amount being adjusted periodically on a market by market basis according to prevailing conditions.

d) Anti-trust Implications of IATA's Activities

States which have economic systems that emphasise competition between buyers and sellers of products and services as the primary means for the creation and distribution of the national wealth will, as a rule, have laws prohibiting commercial practises that reduce or eliminate competition.

Much of the experience touching on the anti-trust implications for IATA's activities has been gathered in the United States and a brief consideration of the U.S. anti-trust laws as they pertain to international air transportation, would therefore be appropriate.

The three basic anti-trust statutes of the United States are the Sherman Act, the Clayton Act, and the Robinson-Patman Act. In the field of international air transportation the provisions of the anti-trust laws that are most likely to be applied are section 1 and 2 of the Sherman Act.

Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies in restraint of trade. S.2 of that Act proscribes monopolisation or attempts to monopolise and combination or conspiracies to monopolise trade. Violations of either s.1 or s.2 are both criminal and civil. In the latter case, treble damage may be awarded to a

successful private plaintiff.

The courts in the United States have developed two principles which are applied to analyse whether the conduct under investigation contravenes s.1 of the Sherman Act. These are the "Rule of Reason" and the "Per Se" doctrines. Under the "Rule of Reason" doctrine, all the circumstances are weighed in order to decide whether a restriction should be prohibited as imposing unreasonable restraint on competition.⁵⁴

On the other hand, the "per se" doctrine is a finding that certain agreements or conduct are so plainly anti-competition and so lacking in redeeming virtue that they are conclusively illegal.⁵⁵ Thus, there is no necessity in such cases to show that the alleged agreement or conduct was harmful to competition.

Over the course of time certain categories of activities have been found to come within the scope of the per se doctrine. These are:⁵⁶

1. Price fixing, whether horizontal (between

54. See Tompkins, G.N., "The North Atlantic Competition or Confrontation", Government Regulation of Civil Aviation, Cases and Materials, Eds. Bradley & Haanappel, 1982, p. 717.

55. Ibid., p. 723.

56. Ibid.

direct competitors) or vertical (between companies at different functional levels).

2. Group boycotts or concerted refusals between two or more persons to conduct business with a third party.
3. Tying arrangements, i.e. an agreement by a party to sell one product but only on condition that the buyer also purchases a different product.
4. Horizontal market allocation, this being an agreement between competitors, which has the effect of eliminating competition in markets where, in the absence of such an agreement, they would otherwise compete.

In the case of monopolisation which is proscribed by s.2 of the Sherman Act, it can only be established by proof that the defendant possessed monopoly power in the relevant market, wilfully acquired or maintained that power and thereby excluded competition or unreasonably restrained competition.⁵⁷ Most investigations pertaining to monopolisation or attempts to monopolise have been in connection with pricing where, for example, pricing is maintained at a level calculated to exclude from the market

57. Ibid.

an equally or more efficient competitor.

The issue whether IATA's activities restrict competition in the provision of scheduled international air transportation has been the subject of considerable debate.⁵⁸ The better opinion seems to be that IATA has features of an international cartel, especially as far as its pricing activities are concerned, which lead to a very important limitation on competition between IATA member airlines.⁵⁹

Opinions are generally agreed that, in the U.S. at least, certain of IATA's or member airlines' activities would be considered illegal under some of the anti-trust law principles discussed above. Tompkins⁶⁰ has indicated that the following would almost certainly be subject to legal proceedings under existing U.S. laws:

- the rate setting machinery of IATA;
- the various agreements that place limits on capacity offering;
- the IATA agency system which has both group boycott and price-fixing elements;
- inclusive tours because of their tying arrangements;
- revenue pooling agreements which have elements of horizontal market division;

58. McWhinney, op.cit., at p. 80.

59. Ibid.

60. Tompkins, supra, p. 728.

- below cost pricing, especially where intended to drive charters out of business.

Up to 1979 IATA's activities that would otherwise have been illegal under the U.S. laws, had received immunity from the CAB under the provisions of s.412 of the Federal Aviation Act and had thus become legal. In exercising its authority, the CAB had made a basic finding under the "Local Cartage Test" that, although IATA's activities had aspects or elements plainly repugnant to established anti-trust principles, approval should be granted in view of "a clear showing that these activities were required by a serious transportation need, or in order to secure important public benefits."⁶¹ Amendments to s.412 of the Federal Aviation Act brought in by the International Air Transportation Competition Act of 1979, authorized the assessment of "international country or foreign policy considerations" in determining whether to confer anti-trust immunity to such agreements or activities.

In 1978 the CAB had made preliminary conclusions that IATA's Traffic Conferences served to reduce competition substantially in the provision of international air transportation and issued show cause proceedings requiring IATA to justify why the immunity hitherto afforded those

61. McWhinney, op.cit., at p. 84.

conferences should not be terminated. Following sustained protests by IATA and the international community, these proceedings were terminated in 1979 with the following orders having been made:

- a) a prohibition of U.S. carriers from participation in IATA tariff coordinating conferences over the North Atlantic;
- b) an approval of the Traffic Conference Agreements and immunity conferred for a period of two years.⁶²

The CAB approval of the IATA Traffic Conference machinery has since then been extended periodically as part of the U.S.-ECAC Memorandum of Understanding arrangements.

With regard to the EEC, it remains unsettled whether the anti-trust legislation contained in articles 85-94 of the Treaty of Rome will be enforced against anti-competitive practises that obtain in the air transport industry within and without IATA.⁶³

62. CAB Docket 32851 order 81-5-27. In April 1985, IATA filed an application to DOT for withdrawal of order 81-5-27 and termination of the IATA show cause proceedings. It sought an order extending the approval of immunity of the amended IATA Traffic Conference Machinery indefinitely subject, inter alia, to maintenance of DOT observer status at IATA Traffic Conferences affecting the United States.

63. McWhinney, op.cit., at p. 86.

A matter of concern to the international community is the so called extra-territorial effect of anti-trust legislation inherent, for example, in s.1 of the Sherman Act which outlawed "every contract, combination or conspiracy in restraint of trade within the United States or with foreign nations". Through judicial rulings, an "effects on commerce" doctrine received recognition enabling legal proceedings to be pursued in respect to activities in non-U.S. markets that had limiting effects on commerce in the United States.⁶⁴

Other states have objected to this "effects doctrine" and argued that a state wishing to counter what it sees as economic mischief committed by persons outside its jurisdiction should pursue the matter diplomatically.⁶⁵ Statutes to block or limit the effects of judgment awards made by U.S. courts have removed much of the impact from the extra-territorial effects of the U.S. anti-trust laws.⁶⁶

64. Hammaraskjöld, Knut, "About the Need to Bridge a Jurisdictional Chasm", Annals of Air and Space Law, McGill University, Vol. VIII, 1983, Montreal, p. 103.

65. Ibid., p. 104.

66. Ibid., p. 105.

1.3 Non-Scheduled Air Transportation

The Chicago Conference did not consider the status and role of non-scheduled air transportation in any significant detail. At this time, this form of air transportation played a modest economic role.⁶⁷ It is not surprising, therefore, that not a single provision regarding its role appeared in the Bermuda Agreement of 1946. For many years to come bilateral air services agreements would regulate only scheduled air services, non-scheduled air services being allowed to operate on ad hoc special authorisation.

Changing consumer patterns fuelled by growth in disposable incomes, however, led to a big increase in the proportion of the international air travel market comprising the leisure travel segment which soon overshadowed business travel as the dominant category.

The first significant development in the growth of charter transportation took place in Europe in the 1950's

67. The growth of the Charter Industry in the U.S. can be traced to the availability of qualified pilots and surplus military aircraft after the war. It was not until 1955, however, that the USCAB decided to assess the role of charters after noting the large increase in their volume of activity, see Cooke, B., "Regulation and the Supplemental Carrier", speakers papers for International Civil Aviation Conference #2, Lloyds of London Press, New York City, 1960, p. 31.

where the package tour trade was born. The price of the whole package which included ground arrangements, eg. hotel, meals, transportation, etc., was frequently less than the price of the scheduled airline fare alone and was sold to members of the public by a tour organiser and not directly by the airline.

Three basic types of commercial charters have evolved over the years, namely group charters, inclusive tour charters and own-use charters.⁶⁸

Group charters: these may be distinguished into affinity and non-affinity group charters. The rules governing affinity group charters are based upon those established by IATA in Resolution 045 which inter alia stipulates that to be eligible, a group must have principal purposes, aims and objectives other than travel and sufficient affinity existing prior to the application for charter transportation to distinguish it and set it apart from the public.⁶⁹

In time it became extremely difficult to effectively enforce these regulations and steps were taken by the U.S., Canada and the ECAC member states to replace

68. See ICAO Special Air Transport Conference, SATC Information Paper No. 2. Policy Concerning Non-Scheduled Air Transport.

69. Ibid.

affinity charters with non-affinity charters. This was achieved pursuant to the Ottawa Declaration of 1972 which introduced Advance Booking Charters (ABC) in Canada, and certain ECAC member states and Travel Group Charters (TGCs) in the United States. The basic rules governing non-affinity charters are that the full capacity of the aircraft be chartered, that each charterer contract at least forty seats on the aircraft and that passengers book at least sixty days in advance. The TGC which had more restrictions than the ABC was not a success and was finally replaced by the Public Charter in 1978 removing virtually all restrictions including the direct sale prohibition and eliminating almost all practical differences between the sale of charter and scheduled air transportation.

Inclusive tour charters. This type may be offered to members of the public by a tour operator for a round trip which includes accommodation and other ground arrangements. Where specially chartered aircraft are involved reference is made to inclusive tour charters (ITCs) and as group inclusive tours (GITs) when offered on scheduled services. It is the dominant form of charter travel in Europe. It is also the most significant form of charter in Africa where non-scheduled transportation is still in its infancy.

Own-use charters (single entity). This form of charter is permitted when a private person or corporation

charters an aircraft for his or its own use for the carriage of freight or passengers, on condition that passengers do not share in the cost either directly or indirectly.

There are other specialised charters such as student or study group charters, special event charters, all cargo charter flights and various other charter concepts like split charters, comingling and intermingling types.⁷⁰

The rationale for regulating charters has invariably involved considerations for reserving the largest share of air transportation to scheduled transportation in order to preserve their financial viability and assure the public ready access to regular air transport services. Additionally, scheduled airlines are in most cases owned by governments and as public investments require protection from excessive competition such as that which charters could mount.

Methods for regulating charters⁷¹ range from marketing restrictions, for example permitting only certain types of charters, or banning all charters in addition to mandatory consultations with the national carriers. Other

70. Ibid.

71. See Matte, N.M., op.cit., p. 153, footnote 105, p. 153.

measures may involve capacity control, i.e. absolute quotas or allocation of traffic in relation to scheduled services and price regulation either fixed in relation to IATA tariffs or a minimum charter price based on cost of service.

1.4 Conclusion

The predominance of bilateralism as the preferred method for the exchange of traffic rights among states would appear to be assured for the foreseeable future. The main transformation within the bilateral method has been the abandonment of the traditional Bermuda I principles in favour of either predetermination or liberalisation.

Although bilateralism may well be an impediment to a rational development of air services on a world basis, for example, by promoting point-to-point services at the expense of long haul services, the potential for regionalism or multilateralism to supplant the bilateral system is negligible at the present time.

The promise of regionalism in this regard appears to have been overrated as no increase in the number of 'regional cabotage zones' (i.e. beyond the Air Afrique region) has taken place in the last twenty years. Multilateralism, on the other hand, is widely regarded as 'dead',

primarily because of the wide divergence, both in outlook on the economic management of national resources among nations, and the differing capacity among airlines for effective competition in the international air transport market place.

In the area of tariffs, future developments may witness increasing application of the 'reference fare' system for tariffs approval which represents a midway position between total freedom for airlines to implement any tariff they want, and having total government control as exercised under the dual approval method. This development will, however, be largely confined to the more sophisticated markets of North America and Europe and is unlikely to be accepted for application by African and many other third world states. Tariff liberalisation in the latter markets will more likely take the form of widening the tariff base. The dual approval method is therefore likely to remain the most widely applied system for tariff regulation with increasing inter-carrier collaboration at the regional level.

CHAPTER TWO

2. ICAO Studies on the Economic Aspects of Air Transport

2.1 Introductory Observations

ICAO's efforts in promoting a multilateral agreement for the regulation of commercial international air transport matters receded, as noted,¹ after its Seventh Assembly meeting, held in 1953. It did, however, resolve at this meeting, to maintain a sort of a watching brief over these matters and directed the Council "to keep under review the possibilities of partial solutions of practical value to the contracting states...".²

Pursuant to this directive, and prior to 1977, when ICAO organised its first conference of member states to consider developments in international air transportation and agree on measures for implementing the required reforms, ICAO instituted limited initiatives on certain matters pertinent to the regulation of international air transportation including the following:

1. Supra, Chapter 1, p. 4.
2. Ibid., footnote No. 9.

- publication of guidance material for consideration by states in pursuing bilateral air transport relationships - these included the Handbook on Administrative Clauses in Bilateral Air Transport Agreements³ and one on the Capacity Clauses in Bilateral Air Transport Agreements;⁴
- promotion of cooperation between ICAO and regional aviation organisations;⁵
- the urging of compliance with Article 83 of the Chicago Convention requiring registration with the ICAO Council of any agreements relating to international civil aviation between member states;⁶
- the publication of an annual survey on fares and

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3. ICAO Circular 63 - AT/6. Handbook on Capacity Clauses in Bilateral Air Transport Agreements.
 4. Repertory Guide to the Convention on International Civil Aviation, ICAO Doc. 8900/2, Second Edition, 1977.
 5. ICAO Assembly Res. A12-18, ICAO Doc. 9440, Policy and Guidance Material on International Air Transport Regulation and Tariffs, p. 8.
 6. ICAO Assembly Res. A16-32, ibid., p. 29.

rates in international air transport;⁷

- undertaking of a study of existing bilateral tariff clauses culminating in the issuance of a recommended tariff clause for guidance to states when negotiating bilateral air transport agreements; and
- establishing a panel to examine the machinery for the establishment of international fares and rates.⁸

ICAO's revived interest, evident in the early seventies, in extending more comprehensive control over the economic aspects of air transportation, has been attributed to the growth in influence of the third world states over international affairs. Largely through the efforts of these states, in 1974 ICAO passed Resolution A21-25 entitled "Consideration of Air Transport Problems on a world-wide basis" which led to a decision by the Council to convene a Special Air Transport Conference in April 1977 with the following agenda:⁹

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7. ICAO Assembly Res. A21-26, ICAO Doc. 9275, International Air Transport Fares and Rates.
 8. Ibid.
 9. ICAO Assembly Res. A21-25, ICAO Doc. 9124 (1975). Consideration of Air Transport Problems on a World Wide Basis.

- tariff enforcement;
- policy concerning international non-scheduled air transport;
- regulation of capacity in international air transport services; and
- machinery for the establishment of international air transport fares and rates.

Studies on the second and third items were entrusted to a Panel of Experts on Air Transport Regulation (ATRP) and the last item to a Panel of Experts on the Machinery for the Establishment of International Fares and Rates (FRP). The latter panel was established pursuant to ICAO Assembly A21-26 in 1974 and held its first meeting in December, 1976. The ICAO Secretariat conducted important studies on the first item.¹⁰

A second Air Transport Conference was held in 1980 to review progress made in these studies and make appropriate recommendations. A third conference is scheduled for November 1985 in Montreal. In the following sections, a brief review of the progress and findings of these various ICAO studies will be made.

10. AT/Conf. 3 - WP/2 dated 26/3/85. A review of Tariff Enforcement Activities and Issues.

2.2 Distinction Between Scheduled and Non-Scheduled Air Transportation

Following a truly remarkable growth in the charter air transport market in the nineteen fifties and sixties, a distinction between international scheduled and non-scheduled services had become an urgent requirement having regard to the different legal regimes created by articles 5 and 6 of the Chicago Convention for the regulation of non-scheduled and scheduled air transportation. Developments in the market place had progressively reduced the distinction in the operational characteristics of the two types of air transportation.¹¹

A definition developed by the ICAO Council in 1952¹² required a flight to possess all of the following characteristics to qualify as scheduled international air service. A series of flights that:

- a) pass through airspace of more than one state,
and
- b) is performed by an aircraft for transport of passengers, mail or cargo for remuneration;

11. See supra, Chapter 1, page 44 et seq.

12. ICAO Doc. 7278-C/841, 1952. Definition of a Scheduled International Air Service.

- c) each flight is open to use by the general public, and
- d) serves traffic between two or more points
 - (i) under a published timetable, or
 - (ii) with flights so regular that they constitute a recognisable systematic series.

If any of the requirements are missing, the service is non-scheduled. While some states have accepted this definition, such recognition has not been universal.¹³

In its recommendations 3-1(a) and 3-2(a) and (b), the Conference of 1977 requested the Council to undertake studies aimed, inter alia, at establishing a definition or guidelines which characterise international non-scheduled air transport operations and distinguish these from scheduled operations, including examination of the feasibility of amending articles 5, 6 and 96(a) of the Chicago Convention, and revising the Council's 1952 definition of scheduled international air transport service.

The panel (ATRP) undertook this study. Although initially predisposed towards revising the 1952 ICAO definition, the panel later decided to retain that

13. See ICAO Special Air Transport Conference, 1977, ICAO Doc. 9199, p. 9, SATC, 1977.

definition, having concluded that it was flexible enough and only required further supplemental notes. In the opinion of the panel, certain modifications to the notes accompanying the definition would provide adequate guidance to states which may wish to classify some types of charter operations as scheduled, should they deem this desirable. This recommendation was accepted by the Second Air Transport Conference held in 1980.

A principle distinguishing feature of scheduled transportation under the ICAO 1952 definition of international scheduled transportation was that of flights being open to members of the public. In the panel's discussions this proved a problematic issue to resolve because certain types of charters (called 'programmed' or 'schedulized' charters) possess this characteristic. The panel therefore recommended that flights which were subject to substantial restrictions or conditions were not open to members of the public but states would have to determine what were 'substantial restrictions'.¹⁴ It is equally

14. ICAO Doc. 9440, *op.cit.*, p. 9. It is interesting to note that African representatives at SATC, 1977 presented a working paper (WP/No. 45) which proposed a deletion of the phrase 'open to use by members of the public' from the last sentence of paragraph (b) of the 1952 ICAO definition. The objective was to reclassify a large portion of non-scheduled air transportation as scheduled and thereby impose greater control over the operation of this type of transportation and converse-

feasible, of course, that certain scheduled flights which are encumbered by marketing restrictions could be considered as not being open to the public and thereby be reclassified as non-scheduled.

To the extent that states would have the discretion to reclassify services formerly treated as charters as scheduled operations, this will have repercussions for existing and future bilateral air transport agreements. Changes may become necessary to the provisions relating to designation of carriers, routes to be operated, and greater flexibility will be inevitable with regard to capacity and tariffs.¹⁵

It has been suggested that African states should refrain from utilising the discretion for re-classification and continue to maintain the non-scheduled character of those operations by treating them as such, thereby avoiding their regulation in bilateral air agreements given the relatively minor importance of non-scheduled transportation in Africa.¹⁶

(continued from previous page)

ly greater protection to scheduled transportation.

15. El Hussainy, Khairy, "Bilateral Air Transport Agreements and Their Economic Content with Special Reference to Africa", Annals of Air and Space Law, Vol. VIII, 1983, p. 123.

16. Ibid.

In the result, the panel did not consider it necessary to pursue the recommendations of the Special Air Transport Conference, 1977, for possible amendments to Articles 5, 6 and 96(a) of the Chicago Convention, firstly because of the complexities of the amendment process and, secondly because the solution proposed by them made such an endeavour unnecessary.¹⁷

As to whether the panel's solution is satisfactory remains a moot point. Azzie¹⁸ is of the view that it was the only acceptable solution while Guildman¹⁹ considers it 'an exercise in international frustration having failed to provide a clearcut distinction which in his view was attainable. .

17. ICAO Doc. 9199, op.cit., at p. 13 SATC.

18. Azzie, R., "Second Special Air Transport Conference and Bilateral Air Transport Agreements", Annals of Air and Space Law, McGill, Montreal, 1980, p. 3.

19. Guildman, W., "The Distinction Between Scheduled and Non-Scheduled Air Services", Annals of Air and Space Law, McGill, Montreal, 1979, p. 135.

2.3 Guidelines on International Non-Scheduled Air Transport

Recommendations 3 1(b) and 20(c) of the first Special Air Transport Conference²⁰ directed that studies be undertaken to establish guidelines for the world aeronautical community in the regulation of international non-scheduled air transport; and also policy in this area giving consideration to a number of factors, such as capacity, tariffs, travel organisers and control of services bearing in mind the public interest, and tourism development.

The final product of the panel's work in this area comprises twenty eight guidelines for states for regulation of international non-scheduled air transport.²¹ The panel apparently concluded that it would be extremely difficult to formulate guidelines acceptable to all or most states, that would also be equally useful.²² The panel therefore decided to establish a variety of guidelines reflecting different and, in many cases, diverse national

20. ICAO Doc. 9199, op.cit., at p. 11.

21. See Gertler, J., "ICAO Air Transport Regulation Panel and the Development of International Air Law", Annals of Air and Space Law, Vol. VIII, McGill, 1983, p. 75.

22. ATRP/7. Report para. 17 at 17.

policies and objectives. Predictably this involved the inclusion of the same guidelines which may be, or indeed are, contradictory and mutually exclusive, and this factor prompted the panel to clarify in its report that the presentation of the guidelines did not imply the panel's approval, support or rejection of them.²³

2.4 The Regulation of Capacity in International Air Transport Services

While there was general consensus at the Special Air Transport Conference, 1977, that the root cause of the poor performance by air carriers in the preceding years was the excessive offer of capacity, opinion was divided as to the reasons for these conditions in the market place.²⁴

It was argued by some that the fundamental reason for the excessive offer of capacity was the too rapid introduction of widebody aircraft combined with world-wide inflation and economic recession.²⁵ The majority expressed the view, however, that the problem of over-capacity was principally attributable to the absence of an

23. Ibid.

24. ICAO Doc. 9199, op.cit., p. 13 SATC.

25. Ibid.

effective regulatory machinery evident

"in the fact that,, on many routes, capacity was not closely related to demand; that fair and equal opportunity for the carriers of the parties to an agreement was often felt not to exist; and that the carrier of one state did not appear to consider the interests of the carrier of the other."²⁶

In framing the scope for the studies to be undertaken by ICAO on the subject of capacity regulation in international scheduled transportation, the Special Air Transport Conference, 1977, considered that the preferred approach to capacity regulation was the predetermination method indicating the favoured state practise of the majority of states represented at the Conference.

The recommendation of the Conference was a directive to the ICAO Council to undertake studies aimed at²⁷

- a) establishing criteria and using these to formulate alternative methods for regulating capacity on scheduled and non-scheduled international air transport services; and
- b) developing a model clause (or clauses) or guidelines for regulating capacity on the basis of prior determination for consideration, along

26. Ibid.

27. Ibid., at p. 16.

with other clauses or guidelines, by contracting states.

In the initial stages, the panel, in an attempt to develop criteria for formulation of alternative methods for regulating capacity, recognised that it would be useful to classify the objectives of states in the regulation of capacity and categorised these into two groups:²⁸ those that were generally agreed upon, and those that varied according to the national point of view. The common objectives included the avoidance of excess capacity with the consequent waste of resources, prevention of capacity dumping, protection of the environment, harmonization of regulation of scheduled and non-scheduled operations in the same market with the possibility of a reasonable economic return to the carriers, provision of good service to the consumer and assurance of fair and equal opportunity to compete. Among the variable objectives were the improvement of a state's balance of international payments, protection of interests of the national carrier and a sharing of traffic to be carried.²⁹

The panel gave priority to the development of a

28. ATRP/1 Report, para. 34 at 12.

29. Second Air Transport Conference, Report ICAO Doc. 9297, AT Conf/2 (1980) para. 14, at 13-14.

predetermination model clause in accordance with the directive of the Special Air Transport Conference, 1977. The draft clause was adopted by the Second Air Transport Conference and transmitted to the contracting states for their consideration. As adopted³⁰ it reads

"(1) The total capacity to be provided on the agreed services by the designated airlines of the Contracting Parties shall be agreed between, or approved by, the aeronautical authorities of the Contracting Parties before the commencement of the operations, and thereafter according to anticipated traffic requirements.

(2) The agreed services to be operated by the designated airlines of the Contracting Parties shall have as their primary objective the provision at reasonable load factors of capacity adequate to meet the traffic requirements between the territories of the two Contracting Parties.

(3) Each Contracting Party shall allow fair and equal opportunity for the designated airlines of both Contracting Parties to operate the agreed services between their respective territories so as to achieve equality and mutual benefit, in principle by equal sharing of the total capacity between the two Contracting Parties.

(4) Each Contracting Party and its designated airline(s) shall take into consideration the interests of the other Contracting Party and its designated airline(s) so as not to affect unduly the services which the latter provides.

(5) If, on review, the Contracting Parties fail to agree on the capacity to be provided on the agreed services, the

30. Ibid., pp. 20-21.

capacity that may be provided by the designated airlines of the Contracting Parties shall not exceed the total capacity (including seasonal variations) previously agreed to be provided".

Emphasis is therefore on third and fourth freedom traffic, with capacity on the fifth freedom sectors on the agreed services being subject to predetermination by both parties.³¹

The Panel also developed clauses on the Bermuda and free determination methods of capacity regulation which will be reviewed by the forthcoming Third Air Transport Conference. In both text and philosophy, both model clauses are similar to the forms discussed earlier,³² although with regard to the Bermuda Clause as drawn by the panel, efforts were made to improve the functioning of the ex post facto mechanism.

Regarding the work produced by the Panel in this area, one observes that contrary to the mandate extended by the Special Air Transport Conference, 1977, the Panel did not "evaluate the principles of regulation of capacity

31. See Gertler, J., "Law of Bilateral Air Transport Agreements: ICAO Air Transport Panel and the Regulation of Capacity in International Air Services", Annals of Air and Space Law, Vol. IX, McGill, 1984, p. 52.

32. Supra, Chapter 1, pp. 9-11, 14-18.

traditionally applied since 1946."³³

2.5 Machinery for the Establishment of International
Air Transport Fares and Rates

By the beginning of the 1970's, a substantial weakening of the multilateral tariff making framework for scheduled international air transport had become evident.³⁴ The diversity in state practise with respect to tariff clauses in bilateral agreements ranging from delegation of this function by governments to IATA; non-IATA member airlines unilateral ratemaking to open rate situations, contributed towards tariff practises that were largely to the advantage of the stronger, better equipped airlines and against those of the weaker airlines mainly from the developing world. This situation was exacerbated by deployment of excess capacity on most international routes.³⁵

ICAO was confronted by the concerns of member states for remedial action at its twenty first Assembly held in 1974. As a result, the Assembly passed a resolution

33. ICAO Doc. 9199, op.cit., at 56 et seq.

34. Kotaite, Assad, ICAO Bulletin, May, 1980, p. 17.

35. See discussion, supra, at pp. 60-61.

directing the Council to set up a panel of experts to address the issue. The Council in turn established a panel of experts on the machinery, for the establishment of fares and rates (FRP panel) with the following instruction:

"to examine the machinery for the establishment of international fares and rates and make recommendations to the Council for submission to the Assembly concerning possible improvements of that machinery taking into account not only the legitimate interests of the users of international air transport."³⁶

In the period between December 1976 and October 1984, the Panel held eight meetings. In the interim, ICAO convened the two conferences on air transport in 1977 and 1980, referred to previously, which reviewed the activities of the Panel.

The more significant aspects of the studies undertaken by the panel, and which will be discussed briefly in the following sections, focussed on these underlisted areas:

- scheduled passenger fares,
- non-scheduled passenger fares,
- consumer protection,
- tariff enforcement.

Other aspects of the Panel's inquiries included freight rates for both scheduled and non-scheduled air transporta-

36. Supra, footnote 7.

tion, fuel prices and IATA currency conversion problems.

2.5.1 Scheduled Passenger Fares

ICAO studies on the role of governments in ratemaking for scheduled international air travel were concluded, as noted earlier,³⁷ in favour of recommending a standard bilateral tariff clause and against an inter-governmental multilateral tariff machinery. The standard clause does, however, demonstrate significant government involvement in tariff regulation by requiring the airlines to seek governmental approval before they participate in inter-carrier discussions and to have the tariffs agreed between them approved by the governments before implementation.

A proposal tabled by the United States³⁸ at the Second Air Transport Conference, 1980, to have the "double" disapproval and country of origin concepts of tariff setting recognised by ICAO as supplemental to the standard tariff clause was rejected by the conference. The majority of the delegates considered that this method of tariff setting encouraged unilateral government action which they viewed as

37. Supra, Chapter 1, p. 24.

38. ICAO Doc. 9297, op.cit., p. 33.

undesirable and harmful to multilateral tariff negotiations.

Another aspect of scheduled international passenger fares considered by the two Conferences concerned special promotional fares. Many third world airlines are of the view that these special fares discriminate against them and take traffic away from them.³⁹ This matter was raised on behalf of these airlines by third world nations, in particular, APCAC. The two conferences affirmed the principle of equal opportunity for airlines to participate in the carriage of all traffic on the routes they serve by avoiding special fares which restrict or eliminate interlining or stopovers.⁴⁰

Another recommendation by the Panel gave recognition to the increasing participation of regional aviation bodies and airlines in the establishment of tariffs for scheduled air travel and expressed support for regional intercarrier meetings to ensure that the views of all carriers operating on the routes concerned are taken into account.⁴¹

39. Supra, Chapter 1, note 11, at p. 169.

40. ICAO Doc. 9199, op.cit., p. 31 and ICAO Doc. 9297, op.cit., p. 29.

41. Recommendation No. 4 FRP/1 - Report, Para. 52 at 15.

Finally, and largely in reaction to developments initiated by the United States against the IATA tariff mechanism,⁴² the Second Air Transport Conference, 1980 passed recommendation number 9,⁴³ urging

- the participation of the entire international aviation community in the examination of any system for the multilateral establishment of international tariffs;
- avoidance of any unilateral action that may negatively affect carriers' efforts towards reaching agreement;
- that international tariffs be established multilaterally and when established at regional level, the world-wide system should be taken into consideration;
- that wherever applicable, the IATA traffic Conference should be the preferred method for setting international fares and rates.

42. See supra, Chapter 1, section 1.2.3.3 (d). P. 41

43. ICAO Doc. 9297, op.cit., p. 35.

2.5.2 Non-Scheduled International Fares

In considering the mechanisms for the establishment of non-scheduled passenger tariffs, the Panel noted the existence of wide divergence in state practice. These varied from unilateral rules of the state of origin or destination to cases where tariffs were discussed on regional or bilateral basis. There was also lack of any uniformity with regard to requirements for filing of non-scheduled tariffs and procedures for soliciting government approval for tariffs.

One approach for establishing non-schedule passenger tariffs adopted by the Second Air Transport Conference was for states to extend, where possible, the application of the ICAO standard bilateral tariff clause to negotiation for exchange of non-scheduled traffic rights. It was considered that this would promote greater homogeneity in state practice in the establishment of non-scheduled passenger tariffs.⁴⁴

The panel had also recognised that the role of tour operators in the determination of tariffs for non-scheduled air travel was most significant and the methods of

44. Vargas, L.E., "Economic Regulation of Air Transport: The Role of ICAO", unpublished LL.M. thesis, McGill University, Montreal, 1980, p. 171.

regulation applied to them required greater uniformity, particularly for purposes of effective tariff, determination, and enforcement.⁴⁵ Two recommendations of the panel addressed this problem. One⁴⁶ proposed that tour operators be subjected to licensing or similar regulatory procedures to include filing of retail prices and other terms of the travel package, and the other one⁴⁷ urged states to facilitate consultations among carriers and between carriers and intermediaries and/or consumer organisations.

Another area studied by the panel concerned the exercise of price control over non-scheduled passenger tariffs. The 1980 Conference, while noting that this practise was not universal, proceeded to make seemingly contradictory recommendations.⁴⁸ On the one hand approving the adoption of minimum prices or reference price systems where there has been failure to achieve carrier agreed or established minimum prices, and on the other hand, calling upon states to impose the minimum necessary restraint on non-scheduled tariffs when authorizing non-

45. FRP 3/3 Report, para. 18, p. 7.

46. Recommendation FRP 3/3 - Report - para. 49, p. 11.

47. Recommendation FRP 3/4 Report - para. 47 at p. 12.

48. See Comment by Haanappel, op.cit. at p. 172.

scheduled services. On the subject of price control, the Conference made a further recommendation intended to minimise administrative difficulties in the imposition of unilateral price controls by proposing a set of guidelines for such purpose.⁴⁹

Recommendation 21⁵⁰ of the 1980 Conference was concerned with the detailed steps which states may wish to take in establishing non-scheduled passenger tariffs.

- "a) in the first instance carriers negotiate, and failing that governments establish minimum tariffs, and carriers file the tariffs they propose to apply with all interested governments;
- b) an air carrier negotiates the wholesale price(s) and condition(s) of specific operation(s) with the charter(s), within specified parameters of (a);
- c) the air carrier files the wholesale (and retail) price(s) and condition(s) resulting from (b) with the origin/destination governments;
- d) the charterer(s) file(s) the retail (and wholesale) price(s) and condition(s) resulting from (b) with the origin/destination governments;
- e) governments offer the opportunity for comments on the filings by all interested parties;
- f) governments announce approval, disapproval of filings, with or without

49. Recommendation FRP/3-8, para. 60, p. 14; and Recommendation FRD/3-9, para. 61, p. 15.

50. ICAO Doc. 9297, op.cit., pp. 46-47.

conditions or reservations, within a predetermined time scale; and

- g) filings become effective unless disapproved by either the origin or destination government, unless specifically otherwise agreed."

2.5.3 Consumer Protection

The 1980 Conference took action on certain airline practises that members of the public routinely encounter in the course of using air travel and which are generally regarded as unfair to such travellers⁵¹ or shippers.

For example, a review of IATA Resolution 049 which stipulates that the applicable fare is the one in effect on the day of travel on which the travel commences elicited general consensus that it was inequitable to surcharge passengers who had purchased tickets prior to a price increase. It was recommended therefore that states encourage their airlines to review such rules and for carriers to clearly indicate to the public at the time of purchase whether the fare might be subject to surcharge or not.

Concern was also expressed at the 1980 Conference in relation to the increasing proliferation and complexity of rules and conditions attached to fares and rates which

51. Ibid.

often gave too little weight to the legitimate interests of users and also made it increasingly difficult for users of airlines to know their entitlements and obligations.⁵²

This issue was addressed by the Conferences recommendation number 12⁵³ which called upon the ICAO Council to include in its fares and rates studies, a general review of rules and conditions associated with international fares and rates with the aim of taking the necessary measures to avoid unnecessary complications, to ensure uniformity where possible and reasonable protection of user interests.

The panel has since then followed up this recommendation and studied several tariff related issues including conditions of carriage for passengers, denied boarding Compensation, baggage allowances and charges and the IATA currency conversion system.⁵⁴ The panel did express the opinion that apart from overbooking, no-shows, baggage allowance and charges and denied boarding compensation, the rest of the issues were largely of concern to the states encompassing the more sophisticated markets.⁵⁵

52. Ibid., p. 38.

53. Ibid.

54. FRP/5 - Report p. 11-13, FRP/6 - Report p. 3-12.

55. FRP/5 - WP/2 p. 3.

2.5.4 Tariff Enforcement

ICAO's concern with the issue of tariff enforcement and its implications for air transportation predates its later involvement with the broad spectrum of air transport issues under consideration in this chapter.

The Assemblies' Resolutions A18-18 and A21-29⁵⁶ had, inter alia, reiterated the need to strengthen the IATA tariff enforcement machinery and for states to strictly apply the tariff enforcement measures contained in bilateral agreements, and/or national laws and regulations.

Recommendations 1 and 2⁵⁷ of the 1977 Conference dealt with this subject and once again advocated strict tariff enforcement by states, and by IATA's compliance system as far as IATA member carriers are concerned.

It was recognised at the 1980 Conference that the existence of a wide variety of tariff enforcement practises among states would render the development of standard practises by ICAO a "formidable task".⁵⁸ The 24th Assembly of ICAO therefore resolved that the Council should

56. ICAO Doc. 9440, op.cit., at pp. 49-50.

57. ICAO 9199, SATC (1977), op.cit., pp. 6-8.

58. ICAO Res. A24-13, Doc. 9440, op.cit., p. 50.

undertake a study to "evolve guidelines for the enforcement of tariffs by all the contracting states".

A secretariat study entitled "A Review of Tariff Enforcement Activities and Issues"⁵⁹ has, as a result, been circulated to member states for comments. This review focuses on "the underlying causes and effects of tariff malpractice, the evolving tariff enforcement activities, and the main results from a recent survey of state practises and experience regarding malpractice and enforcement". The paper requests member states for advice on the nature and scope of guidelines on tariff enforcement to be developed in response to Assembly Resolution A24-13, "particularly with regard to legal aspects, the distinction between the roles of governments and airlines and the need to retain flexibility for adaptation to regional circumstances".

Hopefully the forthcoming third ICAO Air Transport Conference will formulate guidelines on tariff enforcement whose implementation by states will offer a more effective deterrent against airline malpractices and thereby improve their collective operating results.

59. AT/Conf. 3 - WP/2 dated 26/3/85.

2.5.5 Conclusion

The results of ICAO's first major attempt to examine air transport economics since the Chicago Conference, though not yet complete, cannot be encouraging for those members, principally from the third world, who were responsible for initiating these studies. Their expectations that these studies would lead to a more expansive role for ICAO in exercising control over capacity and tariffs, or at least, devising means for such control, have not materialised.⁶⁰

Inevitably, confrontational postures have been adopted at ICAO Conferences, the nations espousing liberal policies opposing further ICAO involvement in air services regulation, and those pursuing conservative policies urging considerably more ICAO involvement. The evolution of policies encouraging the application of a free market approach to air transportation, particularly in the United States, and lately in EEC countries, has reduced any likelihood that these ICAO studies would lead to a multi-lateral homogeneous approach to air transport regulation.

60. These expectations are, in fact, unrealistic when it is recognised that except with respect to recommendations on technical standards, all other ICAO legislation is non-binding.

Such divergence is most evident in relation to practises for establishment of fares and rates and the regulation of non-scheduled services. In the former case, primarily because pricing has evolved into a critical marketing tool in the liberal markets, resulting in its being freed from virtually all controls, and in the latter case because of increasing concern in the conservative markets that scheduled services must receive overriding priority and must be protected from non-scheduled services. Agreement on these two subjects has therefore been most difficult to reach and studies have often been concluded by vague compromises.

With regard to the regulation of scheduled services, some positive results have been achieved, particularly in providing clarity to states in selecting a suitable set of objectives and criteria in regulating bilateral air services.⁶¹ While the same cannot be said

61. The 4th Assembly of LACAC held in December, 1980 resolved that member states should adopt, in their bilateral negotiations, the principle of predetermination of capacity and in its application should be guided by the criteria and guidelines for that method, see, J.C. Bogalosky, "LACAC", Annals of Air and Space Law, McGill, Montreal, 1981, p. 579. It should also be noted that APCAC at its seventh plenary session, directed its Panel of Legal Experts, in developing a Standard text for bilateral air transport agreement, to proceed on the basis of the work undertaken by ICAO, concerning the methods for regulation of capacity (APCAC/7, p. 15). Equally noteworthy was a

for the attempt to supply a distinction between scheduled and non-scheduled services, in view of the great difficulty in providing a clearcut distinction, the panel's contribution will no doubt be of practical value to those states where the problem raises serious regulatory problems.

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decision of the APCAC Bureau to examine the work of the ICAO Panel of the Regulation of Air Transport before advising whether there was any need to revise the APCAC common policy on non-scheduled operations. APCAC/9-WP 2, p. 45.

PART TWO

**RECENT ACTIVITIES OF
THE AFRICAN CIVIL AVIATION COMMISSION (AFCAC)
AND THE ASSOCIATION OF AFRICAN AIRLINES (AFRAA)
IN THE FIELDS OF TRAFFIC RIGHTS AND TARIFFS**

CHAPTER THREE

3. The Concept of Regionalism and Its Application to Civil Aviation

3.1 The Concept of Regionalism

Regionalism has been associated with cooperation between states of a particular geographical area of the globe, in contrast to world-wide multilateralism whereby such cooperation would involve a majority or world states.¹

The more important factors that contribute towards the growth of regionalism are: the drive for peaceful co-existence with neighbouring countries to minimise external threats, affinity in ethnic origin, culture, language, tradition, ideology, economic inter-dependence or sufficiently important common interests.²

The primary motivation for regional integration, particularly among third world countries, has been the

1. Wassenberg, H., "The future of multilateral Air Transport Regulation in the Regional and Global Context", Annals of Air and Space Law, Vol. VIII, McGill University, Montreal, 1983, p. 263.

2. Ibid., p. 266.

alleviation of the economic circumstances of the participants. Julius Okolo³ has observed, however, that while regional integration efforts have been fairly successful among the more advanced countries, no scheme in the third world has yet achieved concrete success. He advances the following reasons for this situation:

- "Lack of favourable 'background conditions' for integration. This would indicate absence of sufficiently developed homogeneity in some of the factors described hereabove at paragraph 2, in particular economic inter-dependence.
- The institutional structures of regional organisations are weak owing to their limited authority, i.e. member states retain the right to veto legislation approved by their representatives at the regional level.
- There is often bickering among member states over unequal sharing of economic gains.
- Nationalism predisposes third world states to a considerable reluctance to sacrifice perceived national interests on the altar of regionalism...competition and antagonism often result in the breakdown of integrative systems.
- The problem of competing ideologies, i.e. the role of foreign private enterprise, allocation of industries on a regional basis, role of the state and other oligopolistic trading enterprises. Such ideological motivated issues undermine the

3. Julius Okolo, "Integrative and Cooperative Regionalism: The Economic Community of West Africa", International Organisations, 39, 1, Winter 1985, p. 121.

feasibility of regional functional cooperation."

3.2 The Application of Regionalism to Civil Aviation

The application of the concept of regionalism to civil aviation on a wide scale is a fairly recent occurrence. The trend originated with the efforts of ECAC in the early 1950's to formulate a common policy towards non-scheduled air transport and has since been extended to include cooperation in areas such as:

- establishment of joint air transport organisations to exploit the economic potential of air services;
- commercial air transport matters such as the setting and enforcing of tariffs, a common regional approach on the exchange of traffic rights, etc.;
- technical matters such as common overhaul and maintenance centres, regional training centres, joint navigational centres, etc.

Regionalism in civil aviation has been applied through consultative organisations among states, or between airlines.

3.2.1 Regional Aviation Cooperation Among States

3.2.1.1 ICAO's Assistance to the Regional Organisations

The foremost grouping of states for purposes of coordinating civil aviation matters on a world-wide basis is the International Civil Aviation Organisation, ICAO.⁴ Its activities span both the technical and economic fields and, in the circumstances, it may be asked what role regional civil aviation organisations could play.

In the technical field, ICAO plays a role that is more or less comprehensive and leaves little scope for supplemental contribution by states on a regional basis, other than in a few areas such as air traffic control and training, or else in overseeing the implementation of ICAO standards and recommended practises on a regional basis.

In the economic field, as seen earlier,⁵ ICAO's endeavours toward securing a multilateral regulatory regime did not succeed. Neither has bilateralism been entirely successful, particularly in organising aeronautical relations between states of unequal bargaining

4. On the role and activities of ICAO; see, Cheng, B., The Law of International Air Transport, London, Stevens & Sons, 1962.

5. Supra, Chapter 1, p. 1 et seq.

strength.⁶

Furthermore, there are significant problems that the Chicago Convention was unable to provide for, and which may be more susceptible to resolution on a regional basis.

As Rosenfield⁷ observes;

"Different areas of the world have particular aviation problems which are peculiar to that region. These problems are better tackled by the aviation agencies of the governments of the area than by an international organisation such as ICAO. These regional problems vary widely, from those of Africa, also common to other developing areas of the world with young and relatively inexperienced underdeveloped national and international support systems, to those of Western Europe whose regional problems stem from the sheer quantity of international commercial traffic and highly sophisticated systems which, from sheer volume in relation to the size of the countries requires a great deal of close cooperation."

ICAO has played a very important role in encouraging the development of regional civil aviation organisations. Article 55(a) authorizes the ICAO Council, where appropriate, to create subordinate air transport

6. See, Chapter 2 on ICAO studies on air transport regulation, p. 9. At the Special Air Transport Conference, 1977, there was consensus that scope existed for regulation of scheduled air transportation on a regional basis; ICAO Doc. 9199, SATC (1977) op.cit., p. 14.

7. Rosenfield, Stanley, The Regulation of International Commercial Aviation, Oceana Publications, N.Y., 1983, Booklet No. 14, p. 3.

commissions on a regional or other basis through whom it may deal to facilitate the carrying out of the aims of the convention. Interpreted restrictively, this article does not contemplate the creation of organisations that are, at least from a legal standpoint, entirely independent of ICAO. This article has however been liberally interpreted by ICAO to allow for sympathetic treatment of inter-governmental, civil aviation organisations by ICAO in various ways.

Article 83 of the Chicago Convention too deserves attention. It permits states parties to the Convention to conclude agreements that are not incompatible with the aims of ICAO. Such incompatibility could involve duplicating ICAO's functions or undertaking activities that frustrate ICAO's efforts.

In order to strengthen its capacity to assist the regional organisations, the ICAO Assembly adopted Resolution A12-18⁸ directing the ICAO Council, inter alia, to keep in close touch with regional organisations and give sympathetic considerations to requests for assistance received from such bodies. ICAO has extended secretariat assistance and office accommodation to these organisations.⁹

ICAO has continued to demonstrate a keen interest

8. ICAO Doc. 9440, op.cit., p. 8.

9. Rosenfield, op.cit., at p. 11.

in the activities and role of regional organisations in confronting the problems facing international civil aviation. The Second Air Transport Conference, 1980, considered the existing examples of multilateral arrangements by regional groups and concluded that it would be useful to examine the ways and means of strengthening multilateral arrangements and the reasons for the failure of certain multilateral ventures.¹⁰ Noting that any agreement imposed certain constraints upon the contracting states, the conference agreed that "regional arrangements needed to be initiated from within the group of participants, inspired by the incentive of the benefit to be derived."¹¹

This section on regional cooperation in civil aviation matters between states will be concluded with a brief consideration of the organisation and functions of a number of such organisations limited to ECAC, LACAC and ACAC. AFCAC will form the subject matter of chapter five of this thesis.

10. ICAO Doc. 9297, op.cit.

11. Ibid.

3.2.1.2 The European Civil Aviation Conference (ECAC)

ECAC originated from a recommendation passed in December, 1951, by the Council of Europe, for a conference to coordinate European air transport.¹² The conference was set up as a permanent body at a meeting convened by ICAO at Strasbourg in 1955. Its objectives would be to review development of intra European air transport in order to promote coordination, better utilisation and orderly development of such air transport and to consider any special problems in this field.

In terms of organisation,¹³ ECAC is made up of a General Assembly, composed of state delegates, each from the civil aviation authority of a member state, and which meets triannually - although in practice the meetings are held once a year; a Secretariat, whose headquarters are in Paris, on the ICAO regional office premises; and, four Standing Committees,¹⁴ two of which are economic (regulatory and implementation), the third having responsibilities for facilitation, the last one being entrusted with technical matters.

12. Rosenfield, op.cit.

13. Constitution of ECAC, Article 4.

14. Ibid., Art. 15.

Mention has already been made of ECAC's policies with regard to the regulation of non-scheduled air transportation,¹⁵ which possibly remain its most important accomplishment. Other notable achievements of ECAC include:

- the Multilateral Agreement Relating to Certificates of Airworthiness for Imported Aircraft (1960). The agreement supplements the provisions of the Chicago Convention relating to certificates of airworthiness¹⁶ and facilitates the recognition of airworthiness certificates to aircraft manufactured in one contracting state and imported into another contracting state.
- The International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services, signed at Paris, 1967.¹⁷
- The "Ottawa Declaration", 1972.¹⁸

15. Supra, Chapter 1, p. 5. The importance of this agreement has been considerably enhanced by the very liberal treatment in the application of its provisions by ECAC member states.

16. Article 33, Chicago Convention.

17. See, supra, Chapter 1, p. 20 for details.

18. Ibid., p. 40.

- The U.S.-ECAC Memorandum of Understanding.¹⁹
- The "Report on Competition in Intra-European Air Services" (ECAC Doc. No. 25).

3.2.1.3 The Latin American Civil Aviation Commission
(LACAC)

LACAC was established in December 1973 pursuant to the recommendations of the second Conference of Aeronautical Authorities of Latin America. The Conference approved a Constitution²⁰ which forms the legal foundation for the organisation.

For purposes of membership, Latin America is defined as South America, Central America including Panama and Mexico, and the states of the Caribbean.

The principle objective of LACAC is, inter alia, to provide a forum within which to discuss and plan cooperation and coordination of civil aviation activities, and study air transport economic questions.²¹

LACAC's organisation comprises an Assembly and an

19. Ibid., p. 24.

20. Statute of the Latin American Civil Aviation Commission, Mexico, DF, 14 Dec. 1973.

21. Ibid., Article 2.

Executive Committee.²² The Assembly has representation from each member state and meets at least bi-annually. The Executive Committee may call special sessions.²³ A majority of the member states may also do so.

The officers of the organisation are elected by the Assembly.²⁴ They consist of a President and three vice-Presidents. The Assembly establishes the work programme and sets up committees, working groups, groups of experts and other subordinate bodies to study specific items.²⁵

ICAO provides secretariat services to LACAC at its headquarters in Lima, Peru.

Some of LACAC's recent actions have included:²⁶

- adoption by LACAC states of the predetermination method of capacity regulation;
- the elaboration of standards, methods and procedures for the implementation of LACAC Resolution A3-2 on fares and rates. The

22. Ibid., Article 5.

23. Rules of Procedure for meetings of LACAC, Article 8, rule 3.

24. Supra, note 20, Article 13.

25. Ibid., Article 7.

26. Bogolarsky, "Report on LACAC", 1980, Annals of Air and Space Law, 1981, McGill University, Montreal, p. 519.

Resolution requires the highest degree of uniformity in the national regulations and procedures of member states regarding the establishment, approval and compliance with fares and rates;

- the formulation of a regional Denied Booking Compensation scheme.

3.2.1.4 The Arab Civil Aviation Council (ACAC)²⁷

ACAC was formed in 1965 under the auspices of the League of Arab states. Membership is open to all members of the League. Arab states, non members of the League, are also eligible for membership, if accepted by two thirds of the members. There were twenty ACAC members in 1981.

In a policy statement dated January 1978, ACAC proclaimed a policy which included the following purposes:

- the promotion, development and growth of international air transport on sound and economic basis and in accordance with the requirements of public interests;
- to achieve and maintain harmony between

27. See Rosenfield, op.cit., Booklet number 17, p. 3 et seq.

scheduled and non-scheduled international air transport operations;

- to act for coordination of policies and regulations of Arab and foreign states in relation to control of capacity availability;
- the coordination of policies on the establishment of fares and rates and the enforcement of agreed tariffs.

3.2.2 Regional Cooperation Among Airlines

Another form of regional civil aviation in organisation is that created to serve the interests of airlines based in one region. Cooperative arrangements between such airlines have taken several forms including combined maintenance and training, pooling agreements, blocked space agreements, interchange of aircraft, joint airline purchasing and financing, and the creation of a single multinational airline to operate as the 'chosen instrument' of a number of regional governments, etc.²⁸

Attempts at cooperation on technical matters appear to have better prospects for success than in the commercial field. Two outstanding examples of successful cooperation

28. Wassenberg, Annals of Air and Space Law, 1983, op. cit., p. 268.

on the technical level are two European airline consortia, ATLAS and KSSU. Both organisations have achieved considerable success in developing technical cooperation including joint evaluation and selection of widebody transports and cooperative maintenance programs.²⁹ ATLAS comprises Alitalia, Lufthansa, Sabena, Air France and Iberia; KSSU, KLM, SAS, Swissair and UTA.

AFRAA too has achieved encouraging results from its activities in the field of technical cooperation, such as its Boeing 727 and 737 operators pool permitting members to obtain spares from each other's bases.³⁰

One of the reasons for the greater appeal of technical cooperation is that, unlike commercial arrangements, they do not invoke sacrifice of part of the participating airlines national image. As observed by Ali Ghandour,³¹ there has always been reticence on the part of airlines

"to come forward together because of

29. Feldman, Joan, "Regionalism facing challenges as a replacement for bilateral system", ATW 8/83, p. 49.
30. For details of AFRAA Cooperative arrangements, see Ndum, P., "Africa's Civil Aviation, Law and Policy", Unpublished DCL Thesis, McGill University, Montreal, 1984, pp. 317 et seq.
31. Supra, note 29, p. 48. Ali Ghandour is the Chairman of Alia, the Royal Jordanian Airlines.

built-in constraints - the glamour that individual nations attach to their flag carriers and, as a corollary, their reluctance to forego even the semblance of sovereignty."

Another area of cooperation that has taken increasing importance, particularly with the reorganisation of IATA's tariff establishment machinery,³² is the formulation of joint approaches to the fares and rates problems that affect international scheduled air services of the affected region. Such efforts have, in the case of APRAA, involved the setting up of specific machinery, the African Air Tariff Conference (AFRATC), by a Convention promoted jointly by AFCAC, ECA and the OAU.³³ Cooperation on tariffs has also included agreements between carriers to combat discounting and similar malpractices to supplement the efforts of IATA³⁴ in this area. This cooperation in the fields of ratemaking and tariff enforcement are confined to the regions of each organisation as any attempt to extend such coordination beyond the region would be opposed by IATA, since it would undermine IATA's just-

32. See infra, Chapter 6, p. 188 et seq.

33. The Convention on African Air Tariffs, signed in Addis Ababa, December 1980.

34. Reed, Arthur, "IATA Moves to Raise Fares; Stiffen Crackdown on Discounting", ATW 9/82, p. 25; see also Feldman, supra, p. 52.

fication for existence.

Regional airline organisations exist in all regions of the world; in Africa there is the Association of African Airlines (AFRAA); in Europe, the Association of European Airlines (AEA); in Latin America, the Association of Latin American Airlines (AITAL); in Asia, the Orient Airlines Association (OAA); and in the Middle East, the Arab Air Carrier Organisation (AACO); in the United States, the Air Transport Association of America (ATA) and in Canada, the Air Transport Association of Canada (ATAC). The membership in all these organisations is commonly limited to airlines engaged in scheduled operations only. Chapter 6 of this thesis will consider the activities of AFRAA in the field of traffic rights and tariffs.

3.2.3 Legal Considerations Relative to Regional Civil Aviation Organisations

In the context of regional enterprises, there is bound to arise legal considerations, which raise problems whose impact the participants must evaluate. For civil aviation organisations, the more outstanding of these pertain to:

- the legal personality of the joint enterprise.

This problem afflicts inter-carrier organisa-

tions and is unlikely to affect organisations constituted by sovereign governments;

- nationality and registration of jointly owned aircraft;
- the issue of air cabotage and market allocation.

3.2.3.1 Legal Personality of the Joint Enterprise

Possession of a legal personality by the joint international venture, separate from that of its constituent member airlines, is an important adjunct in facilitating its conduct of business, e.g. in matters such as ownership and transfer of property, entering into contracts, responsibility for tortious acts, participating in litigation, etc. Such a legal status should therefore be secured for the joint venture at the outset, be it by registering it in one of the member countries; or registering it in all member states; or having it incorporated by statute in one member state; or establishing it through a multilateral convention.

Equally important is the ascertainment of the body of law that will govern the activities of the joint venture, especially where there exists significant differences in the business and civil aviation laws of the participating

countries.

Considering the absence of general international legislation defining the "constitution and functioning" of international joint ventures, there exists several possibilities as to what laws could govern the activities of the enterprise, for example,³⁵

- if the entity is registered in one state, it will be subject to the laws of that state;
- if it is incorporated in more than one state it will be subject to the laws of those states;
- if it is established under a special act of incorporation, conferring legal status and identical rights and duties; in each participating state, the interpretation of the statute by national courts might vary;
- if constituted under a multinational treaty, problems of differing interpretation, particularly with regard to the language and legal concepts will be experienced. In this final example the problem would be evident both in relation to inter-governmental and inter-carrier organisations.

35. Chusmir, Stuart, Regionalism in International Civil Aviation, Harvard Law Library, 1966, p. 46.

The two foremost joint air transport enterprises, the Scandinavian Airlines systems (SAS) and Air Afrique confronted these problems in different ways.

The Scandinavian states, in founding SAS, were keen to retain the national identity of their respective airlines,³⁶ primarily for reasons of national defence and security. It was considered that a consortium arrangement would preserve the separate identities of the three airlines, without affecting the efficiency of the merged operations. The Consortium agreement is therefore between the national airlines and not the governments, although each government holds a substantial interest in its own national airline.

Within the regime of international law, SAS is therefore a private body. It is also not registered in any of the owner countries and has no nationality and is therefore subject to the laws of all three countries.³⁷ Opinion is divided as to whether SAS has any legal personality at all. The airline has, however, long been accepted in dealings with other states and organisations, as the air transport representative of the Scandinavian states

36. See Bahr, the "Scandinavian Airlines System (SAS)" 1 Arkiv für Luftrecht, 199.

37. Ibid.

and could be said to have thus acquired a defacto legal personality.³⁸

In the case of Air Afrique, this organisation was created by a multilateral treaty, as an international company.³⁹ Pursuant to Article 4 of the Yaoundé Treaty,

"The joint corporation (Société aérienne commune) shall be endowed with the fullest legal capacity recognised by the laws of the contracting states in the case of bodies corporate and shall be deemed as possessing the nationality of each contracting state, both in respect of said states and in respect of other states..."

Thus, because Air Afrique derives its legal personality from a multilateral convention, one is left without doubt as to its legal status. Article 11 of the Yaoundé Treaty requires that member states standardise their laws in matters of civil and commercial aviation to avoid disharmony in their application to the joint enterprise.

3.2.3.2 Nationality and Registration of Jointly Owned Aircraft

The problem here manifests itself with regard to how the requirements of the Chicago Convention extending

38. Chuzmir, supra.

39. Treaty Relating to Air Transport in Africa, signed at Yaoundé, Cameroun, March 28, 1961.

certain rights, privileges and obligations in respect of aircraft engaged in international air services, should be met in the case of aircraft jointly operated by two or more states.

These rights, privileges and obligations are dependent on such aircraft being registered only in one state⁴⁰ and possessing the nationality of that state.⁴¹ Such rights and privileges include:

- certain transit and non-scheduled traffic privileges in each of the contracting states subject to limited conditions;⁴²
- right to non-discriminatory treatment with regard to prohibited areas;⁴³
- prohibition against seizure of aircraft engaged in international scheduled air transportation for patent claims.⁴⁴

As a corollary, each state undertakes obligations in respect to aircraft possessing its nationality such as enforcing rules and regulations relating to the flight and

40. Chicago Convention, Article 18.

41. Ibid., Article 17.

42. Ibid., Article 5.

43. Ibid., Article 9.

44. Ibid., Article 27.

manoeuvre of aircraft⁴⁵ and the supplying of information on such aircraft to any other contracting state at its request, or to ICAO.⁴⁶ Thus contracting states are responsible for activities of aircraft possessing their nationality which are engaged in international air services.

It was apparent at the Chicago Conference that the operation of multinational airline companies would be handicapped by the prohibitions against dual registration of aircraft. To circumvent this problem, Article 77 of the Convention provided in part that the ICAO Council would determine in what manner the provisions of the convention relating to nationality of aircraft would apply to aircraft operated by international operating agencies. Controversy regarding whether the ICAO Council could, in exercise of the duty imposed under article 77, make a determination recommending registration of jointly operated aircraft on a non-national basis, was resolved by an opinion, in the affirmative, rendered by the ICAO Legal Committee in

45. Ibid., Article 12.

46. See generally, Goreish, I.R., "Registration and Nationality of Aircraft of International Operating Agencies"; Unpublished LLM Thesis, McGill University, Montreal, 1970.

1967.⁴⁷

The Legal Committee recommended two forms of non-national registration, (a) joint registration, involving the creation of a non-national register by the constituent states, for the registration of aircraft which the agency intended to operate on behalf of the participating states; (b) an international agency involving registration of such aircraft with a formally constituted international organisation such as ICAO.⁴⁸

On the basis of these recommendations of the ICAO Legal Committee, the ICAO Council passed a resolution⁴⁹ requiring a separate determination by the Council for each particular plan for joint registration. Such a plan would be formally brought before the Council "with appropriate and definite information relating to and describing such a plan...". The only such determination made so far by the ICAO Council has been the respect of a proposal by Jordan and Iraq in 1983 for a joint air cargo company, to be known

47. However, for an opposing view, see Richardson, J., "Nationality and Registration of Aircraft Operated by International Agencies", in McWhinney & Bradley, op.cit., at p. 208.

48. Ibid.

49. ICAO Doc. 8722-C/976. "Nationality and Registration of Aircraft Operated by International Operating Agencies."

as the Arab Air Cargo Company.⁵⁰

The SAS and Air Afrique were constituted prior to the foregoing council resolution and the system of aircraft registration is quite different in both cases. With regard to the SAS, primarily to avail each state the right to withdraw aircraft from service with the Consortium in a national emergency, each member airline retains ownership of aircraft which are registered in all three states in the ratio of 3:2:2 between Sweden, Norway and Denmark, respectively. In the case of Air Afrique, all the aircraft are registered in one of the States,⁵¹ Ivory Coast. The problem of dual registration was thereby avoided.

Finally, the methods of non-national registration proposed by the ICAO Legal Council could surmount possible difficulties under international legislation extending jurisdiction to the state of registry for offences committed on board aircraft. Article 18 of the Tokyo Convention avoids this difficulty through a provision entitling member states to designate the state among them which, for purposes of the Convention, shall be considered as the state of

50. See ICAO Council W/P 17746 of 3/11/83. "Nationality and Registration of Aircraft Operated by International Operating Agencies - Request for Determination by Jordan and Iraq".

51. Yaoundé Treaty, Article 7.

registration.⁵²

3.2.3.3 The Issue of Air Cabotage and Market Allocation

States under domestic and international law reserve air cabotage to their own carriers largely to protect them from competition by foreign airlines.⁵³ The legal foundation under international law for such a reservation is Article 7 of the Chicago Convention.

The term cabotage is applied more expansively in air law than under maritime law. In the latter case the reservation of trade is restricted to ports along the Coast of a state and between the home state and its overseas possessions, although the latter position is not universally accepted as valid under international law.⁵⁴ With respect to air law, all air transportation within the territorial air space which includes the airspace over the

52. Similar provisions are contained in The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (Art. 5) and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Article 9).

53. See Lewis, D.R., "Air Cabotage: Historical and Modern-day perspectives", Journal of Air Law and Commerce, p. 1059.

54. Ibid.

states overseas possessions is included.⁵⁵

The second sentence in Article 7 is considered problematic. It reads as follows:

"Each contracting state undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other state or an airline of any other state, and not to obtain any such exclusive privilege from any other state."

A restrictive interpretation of this sentence would require that if state A grants cabotage rights to state B, it must also not only concede similar rights to other states but each contracting state has the right to demand it. On the other hand a liberal interpretation would authorize state A to grant cabotage to state B provided it is stipulated that the grant is not exclusive. In such a case it has been suggested that third states would not have the right to demand cabotage rights.⁵⁶

55. "Territorial airspace" is defined in Article 2 of the Chicago Convention as encompassing that above "a States land areas and territorial waters adjacent thereto under the sovereignty, suzerainty protection or mandate of such state."

56. Lewis, *supra*, footnote 53. This opinion is not universally acknowledged. For example, the practise followed by Scandinavia, states whenever they granted cabotage is to insert a safety clause aimed at cancelling cabotage rights should they be demanded by a third state. See "The concept of Cabotage and its Implications on International Air Transport in Africa" prepared by an AFCAC panel of Legal Experts and published in AFCAC Policy in the Field of Bilateral

In view of these ambiguities, a clause is inserted in most bilateral air services agreements stipulating that the agreement mutually excludes the operation of cabotage services.

The formation of a joint multinational airline could provide an incentive to the participating states to treat their collective territorial airspace as a regional air cabotage zone. This has occurred among the Air Afrique states. Article 10 of the Yaoundé Treaty provides:

"The contracting states undertake to adopt a common policy with that of the other contracting states, for the purpose of negotiating air traffic rights within the framework of inter-governmental agreements, due account being taken of operation of the joint corporation.

Accordingly the contracting states undertake to submit draft agreements on air traffic to be concluded by said state to the committee of Ministers of Transport for its opinion.

Each state shall endeavour to take the Committee's opinion into account, as far as possible, so as to avoid concluding inter-governmental agreements which may be prejudicial to the interests of the joint corporation."

This provision has ensured that states parties to the Convention do not concede traffic rights to third states without consulting all other members and the result has been that the member states do not permit exercise of Fifth

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Air Transport Agreements, 1984.

Freedom traffic rights between two points within the region.⁵⁷ Although the Chicago Convention allows each state to determine which aircraft may fly over and into their territories (Article I), and the aforementioned Yaoundé Treaty provision is valid on that basis, the ICAO Council has cautioned that "the mere fact of joint or international registration under article 77 of the Convention would not operate to constitute the geographical area of the multinational group as cabotage area."⁵⁸

A policy of this nature should be applied selectively since it is bound to attract reprisals from third states in the form of denying Air Afrique the opportunity to participate in fifth freedom traffic outside the zone, thus inhibiting the development of air transport, particularly in Africa.⁵⁹ In any case, this policy on the part of the Air Afrique zone states is bound to inhibit current efforts to secure the liberalisation of traffic rights within Africa as a means to improving the air transport network in Africa.

It has been suggested that a result similar to regional air cabotage could be achieved without a formal

57. Ibid.

58. ICAO Doc. 8722-C/976, op.cit., 20/21 68, p. 7.

59. Supra, footnote 53, at 61.

multilateral legal instrument such as in Article 10 of the Yaoundé Treaty.⁶⁰ This could, for example, be made viable by a liberal exchange of traffic rights on a bilateral basis within the region, coupled with a restrictive approach towards third states on the grant of Fifth Freedom traffic rights. The Latin American states proposals to reserve 75% of the inter-parties traffic to states within the region is an illustration of such an approach.⁶¹ The Arab League has also had long outstanding plans for an "Arab cabotage region", though this has not been reduced into a formal agreement.⁶² It is also interesting to note that during the Carter Administration, a senior official of the administration suggested that the U.S. consider cabotage rights for groups of nations willing to negotiate as a unit.⁶³

3.3 Conclusion

While the growth in numbers and increase in influence of regional civil aviation organisations in recent

60. Chuzmir, op.cit., p. 9.

61. McWhinney, op.cit., p. 75.

62. Chuzmir, op.cit., p. 9.

63. Feldman, op.cit., p. 55.

years is self evident, the notion that regionalism could replace bilateralism as the predominant system for regulating aeronautical relations between states is unlikely to mature into reality. It is true that states continue to demonstrate a keen interest in and goodwill towards the viability of these regional organisations and enterprises, yet recent experiences indicate that regional politics and mutual suspicions could continue to inhibit states from ceding the necessary sovereignty to allow for the effective functioning of these organisations.⁶⁴

It might be prudent therefore to aim initially at more modest goals and that groups be limited to a small number rather than encompassing entire regions.⁶⁵ Efforts should also initially be concentrated in the technical fields where the scope for differences is less, and the benefits more immediate. In this respect, the advice sounded by Mr. Meline of ATLAS to those wishing to establish ventures similar to ATLAS should be most useful. He said:⁶⁶

64. For detailed treatment, see, Kaunda, G.H., "The Regional Integration of Commercial Air Transport in Africa; Political, Economic and Legal Considerations", Unpublished DCL Thesis, McGill University, Montreal, Ch. VI and VII, pp. 136-210.

65. Feldman, op.cit., p. 55.

66. Ibid., p. 52.

"be patient; discuss things thoroughly before finalizing them; be flexible; trust people; not gossip; leave national pride behind and make people believe in the venture; and don't create a bureaucracy".

CHAPTER FOUR

4. Africa's Civil Aviation - Problems and Prospects

4.1 Introductory Observations

The more common objectives of a national civil aviation policy would include national defence and security, national unity, consumer interests, national prestige and positive contribution to the national economy. Given their desperate resource situation today, African states, in formulating national aviation policies, are constrained to focus almost exclusively on the economic benefits to be derived from involvement in air transportation. The diversion of funds from other critical national programmes such as agriculture, education, health and rural development for investment in air transportation could not otherwise be justified.

From the perspective of economic development the case for setting up an air transport system in a developing country is clearly undeniable. Surface transport modes in Africa and many third world countries are severely limited. However, while many of these countries face high costs in providing and maintaining roads, mainly due to distances and climatic extremes, rural air services are at best only

moderately developed.¹

The World Bank in a 1980 study entitled "Aviation and Development"² analysed the factors which make air transport a more suitable alternative to other means of transportation in developing countries and concluded that, at least over the medium term, it may be more economical to use air instead of surface transport for the carriage of certain consignments even when the airfreight rate is considerably higher.³

Air transport can rapidly move persons, freight and mail within and outside the territory of each country and thereby fosters international tourism and trade and economic development in general. It can open up isolated areas with a potential for trade as well as assist agricultural and rural development.⁴

An ICAO/UNDP study on African economies and civil aviation⁵ has established conclusively the benefits of

1. See "ICAO, Flight Plan for the Third World"; Cases and Materials on Public International Air Law I, Ed. Vlasic, I p. 95.
2. Ibid.
3. Ibid., p. 96.
4. Ibid.
5. ICAO RAF/74/021, March 1975. "Studies to Determine the Contribution that Civil Aviation Can Make to the

air transportation to the development of Africa's economy. The study noted, for example, that the retailing of flowers to western Europe amounted to U.S.\$3 billion and that African countries with the right climatic conditions could win a larger share of this market.

Regarding tourism, the earnings of developing countries from tourism was estimated in 1978 at \$15 b., 65% of that being related to tourists arriving by air.⁶

4.2 Impediments to Development of Africa's Air Transport

4.2.1 The State of the Economy

Possibly the most crucial factor in determining the capacity to develop and sustain an air transport industry is the state of a country's economy.

Viewed as a whole, Africa remains one of the least developed regions with twenty six countries designated by the United Nations as among the thirty six "least developed

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Development of the National Economies of African States."

6. International Air Passenger and Freight Transport - Africa, ICAO circular 189-AT/73, 1984.
- V

countries" in the world. The state of Africa's economy was recently described in the following terms:

"For most Africans the economic outlook has been grim since 1960. A weighted annual growth rate of below one percent is recorded for the twenty four low income countries of sub-Saharan Africa...In the 1970's no fewer than fifteen economies registered a negative growth of per capita income. By 1980, even such high growth countries as the Ivory Coast, Nigeria, Kenya and Malawi experienced economic difficulties.

Nevertheless wide variations are experienced in the level of economic development achieved by individual countries as measured by the level of GNP per capita, from \$3580 in Gabon to \$120 in Mali in 1980.⁸

The agricultural sector which is by far the most important, and indeed has an important role to play in the promotion of air freight, has performed poorly. Manufacturing continues to play only a modest role in the economies of most of these countries mainly by way of import substitution. Balance of payments deficits have increased tremendously due to poor world economic conditions and low primary produce earnings. The overwhelming debt service of most African nations would also dictate cutbacks in investments while regrettably the recovery of the economies

7. Richard Sandbrook, "Is there hope for Africa?", International perspectives, January/February 1983.

8. Ibid.

of the western world from the recession of the late 1970s and early 1980s has had little impact on the economies of Africa.

A study by the U.N. Economic Commission for Africa⁹ has evaluated Africa's economic prospects over a twenty-five year period (1983-2008) in two scenarios envisaging the changes likely to occur in Africa during this period.

The first projection is based on historical trends and shows that Africa's economic growth will continue to be essentially dependent on external financial flows with resultant bleak prospects particularly with respect to the food and energy situation as well as social conditions.

The second scenario evaluates Africa's prospects on the basis of substantial restructuring of both its domestic and external environment and indicates appreciably high increase in the annual rate of GDP at 7.3% between 1983-2008. The second scenario is not attainable without improved organisation, efficient institutional machinery equipped with competent and skilled staff, and emphasis on cooperation and integration.

9. AFCAC 9-WP/2, p. 3 et seq.

4.2.2 The Route Network

Economic considerations did not feature prominently in the initial stages of developing air transportation by the colonial powers.

The motive for pursuing close aerial communication links between Britain and the Empire was explained by the British Secretary of State for Air, Sir Samuel Hoare, in the following words:

"...distance was the great enemy of imperial solidarity...the role of the aeroplane was to make closer and more constant the unity of imperial thought, imperial intercourse and imperial ideals".¹⁰

Significantly therefore, few efforts were made by the colonial authorities to expand intra-African and domestic air transport networks. In some cases, the development of domestic air transportation was initially left to private enterprise with limited financial support from territorial governments. In Kenya, for example, a Mrs. E.K. Wilson incorporated a private company, Wilson Airways, in 1929, becoming the first East African to provide internal and regional air services in that region for more

10. S. Hoare, "Aviation and the British Empire", Scottish Geographical Magazine XLV Jan. 1929, p. 3.

than fifteen years.¹¹

As regards the colonial outlook on an intra-African network, one author has observed

"While the colonial territories were linked to the metropolis with air routes to facilitate their administration and exploitation there was little intra-Africa linkage of the colonies belonging to different powers. This fact was strongly felt in the post independent Africa's intra-continental air routes network".¹²

Although there has been a slight improvement in intra-African airline services, connections are still unsatisfactory and long waits are common at connecting points. Often travellers have to make connections outside the African Continent.

A study currently being pursued by Africa and ITA experts under the supervision of APCAC has evaluated the quality of air services based on a sample of 31 representative airports in Africa. The average number of intra-African connecting flights is in the region of 1.6 per direction of which 64% were being carried out (1983) with two weekly flights only or less and that only 9.3% of the connections have a frequency equal to or higher than a daily

11. Kaunda, G., *The Regional Integration of Commercial Air Transport in Africa; Political, Economic and Legal Considerations*, unpublished DCL Thesis, McGill University, Montreal, 1984, p. 84.

12. Ndum, F., *op.cit.*, p. 275.

flight per direction. More than half of these "high frequency" connections are located in the Western subregion.¹³

African institutions entrusted with air transportation matters are keenly aware of the urgent need to improve the intra-Africa network. AFRAA, for example, has initiated a project entailing the development of a grid system to improve connections within the services of African carriers. The programme envisages the inauguration, on a gradual basis, of flights to provide a comprehensive East/West and North/South route network.¹⁴

4.2.3 A Weak Regulatory Framework

One prominent contributing factor to the restricted intra-African network are the policies currently pursued by African states on the exchange of traffic rights. These policies are characterised by excessive protectionism pursued through the predetermination method of capacity control with placement of emphasis on Third and Fourth Freedom traffic operations and the application of the principle of reciprocity in bilateral relationships.

13. Supra, footnote 9, at p. 11.

14. Ndum, op.cit., p. 330.

Considerable limitations are placed on the grant of Fifth Freedom traffic rights including demands for compensation for the exercise of such rights.¹⁵ A grid system would be illusory without a reasonable extension of Fifth Freedom traffic rights for rarely is there sufficient Third and Fourth traffic on transAfrican routes to make such services economically viable.

Further limitations are to be found in the formation of "regional cabotage zones" which negotiate traffic rights as one country thus restricting other countries' operations to and from these zones.

The tariff structure for travel within Africa is yet another disincentive towards improvements in traffic loads and therefore the traffic network. According to one source,¹⁶ as of September 1982, a significant proportion of the traffic is carried on preferential fares available only to certain categories of passengers (eg. artists, diplomats, ships' crews, sportsmen, etc.). The compara-

15. Supra, footnote 6. An interesting illustration of this problem was the opening by Ethiopian Airlines of the "Sahel route" - from Addis Ababa (Ethiopia) to Dakar (Senegal) via Niamey (Niger) and Bamako (Mali) in April 1984 without Fifth Freedom rights relying solely on Third, Fourth and Sixth Traffic - see "Ethiopian Airlines - A Growing Force in African Air Transport", African Air Transport, May/June 1984, p. 6.

16. ICAO Bulletin, December 1984, p. 35.

tively wide use of these fares may be seen as a result of the restricted availability of promotional fares for the general public which are available in other parts of the world.¹⁷

The same weaknesses in the tariff structure are evident on the international long haul routes into and out of Africa in which fares and rates are on average much higher than those obtaining in Europe and elsewhere.¹⁸ However, so long as the cost of operations remains a principal criteria in the structuring of fares and rates, high average fuel prices and maintenance costs will continue to be reflected in high average fares and rates in compensation.¹⁹

17. Ibid.

18. Kaunda, G.H., Speakers Papers for International Civil Aviation Conference #2, Lloyds of London Press, New York City, April 29-30, 1980, p. 117.

19. The expenses of African Airlines in 1982 were about 21% above world average in unit costs, supra, note 13, p. 36. It is therefore no surprise that African carriers consistently oppose the basing of cost criteria for tariff setting on the costs of the most efficient carrier on the route - see Commercial Aviation for Developing Countries, IATA (Comp) p. 7. On the other hand, their aircraft utilization rate is on the whole much lower than the world average - see APCAC/9 WP/2, p. 21.

4.2.4 The Market for Air Travel

The African air transport is characterised in general by a lack of a primary market for profitable involvement in international longhaul transportation. The population is largely rural living in widely scattered societies in abject poverty. Thus the bulk of the traffic transported to and from Africa originates elsewhere. Undoubtedly the capacity for Africans to engage in air travel is severely limited. As Kaunda²⁰ has observed,

"the originating traffic for long distance travel to Europe and elsewhere from Africa is almost exclusively official and business type. In a meaningful sense, there are simply no discretionary spenders in Africa and certainly no such people as African Tourists."

The share of the world air transportation carried by airlines based in Africa is extremely small. In 1983 they performed 3.0% of the total international air transport world output.²¹ Considering that some individual key airlines had a greater share than this, i.e. Air France 3.1%, British Airways 3.2% and Pan Am 4.1%. It is evident that without a significant increase in the size of the African market, Africa based air carriers will continue to be plagued by low revenues, aging fleets and other limiting

20. Kaunda, Lloyds Aviation Conference, op.cit. p. 117.

21. African Air Transport, Dec./Jan. 1984, p. 7.

factors. Their capability to meet head on competition from such giants as these on the long haul international services will remain insignificant.

Nonetheless, the potential for a modest expansion has been established. A survey of traffic patterns for international air travel for the period 1977-82 shows an average annual growth of 7.5% for passengers and 13.4% for freight all well above the world averages of 5% and 10.5% respectively for the same period. ICAO forecasts for the period 1982-92 indicates a lower growth rate of 8% and 9% respectively.²² The domestic market is expected to grow at an average of 11% for passengers and 8% for freight for the same period.²³

4.2.5 An Underdeveloped Infrastructure

Airports and related infrastructure play a critical support function for air transportation particularly in matters critical to aircraft operations and flight safety. Over the past decade, there has been a significant increase in the number of airports and improvements in facilities to existing ones in Africa. During the period 1977 to 1983 the

22. Supra, footnote 16, p. 26 and 38.

23. Ibid., p. 39.

number of airports receiving international scheduled air services including capability for receiving widebody aircraft has increased appreciably.²⁴ According to ICAO estimates approximately \$1 billion USD is currently committed in Africa for new airports, airport improvements and equipment purchases. This figure is nonetheless totally inadequate and financial constraints have obliged several States to delay or review airport development plans.²⁵

An outstanding feature in capital availability has been the decline in traditional financing sources in the forms of foreign grants, and foreign guaranteed loans offered at below market interest rates. This development is likely to persist until there is a sustained recovery in the developed market economies. Governments are therefore being forced to solicit external funds from development banks and to seek to maximise internally generated funds. All these factors contribute to the trend to cut down on new airport developments and improvements.

In the area of facilitation, a prominent irritant, are delays to passengers attributable to excessive documentary practises at airports. Cargo dwell time too is well above that experienced elsewhere due to inadequacy or

24. Ibid., p. 12.

25. Ibid., p. 18.

absence of warehouse space at certain airports. Reduction in the number and complexity of clearance forms, simplification of clearance practises and availability of customs staff at hours when they are most needed would contribute to earlier release of the goods to their consignees.²⁶

4.2.6 The Air Transport Enterprises

There are in the region of seventy international air carriers based in Africa.²⁷ Their fleets are characterised by aging, small inefficient fleets supported by ground equipment that is old and obsolete.

There is, unfortunately, increasing uncertainty with regard to aircraft replacement, a critical necessity if modest improvements to the African air transport system are to be made. This factor is attributable to economic hardships afflicting the African economies, volatility and uncertainty of currency exchange rates, the high cost and difficulty of obtaining aircraft financing for many airlines, poor financial results and further uncertainty

26. Ibid., p. 37.

27. Ibid., p. 18.

regarding the future of aviation fuel.²⁸ Aircraft orders from African countries have as a result shown a decline.²⁹ Nonetheless, the composition of the African fleet must change somehow if African airlines are to continue to offer competition to other carriers because in the long run they are the only guarantee for continued development of Africa's air services.

A further complication has arisen in the form of the forthcoming application on 1st January 1988 by States of the European community of ICAO aircraft noise standards set down in Annex 16 of the Chicago Convention. The implementation of these standards could disqualify a significant portion of the African fleet from operating into Europe. This creates added urgency for the modernisation of the African fleet.

The outlook for external financing for fleet replacement is unfavourable, at least on reasonable terms. Most external aid from foreign governments is directed towards other sectors of the economy which are viewed as more critical, such as health, agriculture, education, rural services, etc. In air transportation itself, traditional donors have been more concerned with funding the development

28. Ibid., p. 20.

29. Ibid.

of infrastructure such as airports and air navigation facilities but not the equipment needs of airlines.³⁰ On the other hand, the capacity of the airlines to generate funds internally for capital investment is non-existent. Their financial results have been dismal. During the decade ending in 1982, the operating results of these airlines as a group fluctuated between profit and loss with the cumulative results for the decade being close to zero. The balances of non-operating revenues and expenses were consistently negative, with interest charges being a major expense item; and hence the net results throughout the decade were more unfavourable than the operating results.³¹

A variety of other problems confront these airlines including interference by the state in critical management functions such as fleet selection and recruitment of personnel, lack of skilled manpower in the technical and management fields and the associated high cost of training local personnel and the concomitant retention of expatriate personnel.³²

30. Ibid., p. 34.

31. Ibid., p. 36.

32. See generally, Commercial Aviation for Developing Countries, op.cit.

4.3 A New Policy Outlook

4.3.1 Regional Cooperation

A considerable part of the efforts being undertaken to improve the condition of African air transport are on a regional basis. Overall coordination is provided by the organisation of African Unity (OAU) and the United Nations Economic Community for Africa (UNECA) with actual execution being entrusted to the African Civil Aviation Commission (AFCAC), the Association of African Airlines (AFRAA), and national aviation bodies. There is also increasing involvement in the formulation and implementation of aviation related projects by such subregional bodies as the South African Development and Cooperation Council (SADCC) and the Preferential Trade Area, for Eastern and Southern Africa (PTA).

The OAU has formulated a development strategy for Africa known as the Lagos Plan of Action. Emphasis of this strategy in the 1980's is on strengthening the role of regional economic communities and improving integration in various fields including transportation.³³

Through the efforts of the ECA, the United Nations

33. Supra, note 16, p. 11.

in 1978 adopted a Resolution proclaiming the years 1978-88 the U.N. Transport and Communications Decade in Africa.³⁴ Subsequent studies have defined Africa's global strategy for the development of transport, telecommunications, radio broadcasting, television and postal services.³⁵

Following is a list of some proposed projects relative to the air transportation sector:³⁶

- Passenger transfer system and cargo handling which aims to provide African airports with ground facilities adequate to the growth in traffic and the nature of that traffic.
- Air transport fares and rates - its purpose is to draw up rating regulations applicable to air transport in Africa.
- The Establishment of a Data Bank - it seeks to determine the methods for collecting information, of processing the data and of its dissemination.
- Formation of a multinational air carrier.
- Regional technical assistance for air freight - will aim at formulating a coherent and coordinated policy for air freight in Africa.

34. UNGA Res. 32/160.

35. Ndum, op.cit., p. 175.

36. Ibid., p. 176 et seq.

- Medium-term assistance to national airlines - this project entails short-term or medium-term technical assistance in various specialised forms to airline companies in the process of formation, rehabilitation or expansion.
- Co-ordinating agency for a full utilization of African air fleets - its objective is to ascertain whether a co-ordinating agency to deal with the underutilised aircraft of some African airlines would be viable.

4.3.2 Strategies at the National Level

Studies have indicated that the African air transport system can be made more viable by the implementation of various programmes at the national level. An ICAO survey published in 1984 made the following proposals.³⁷

Air transport enterprises:

- pursuit of innovative marketing and tariffs in order to improve the utilisation of aircraft and operating personnel,
- identification and pursuit of possible avenues by which individual airlines can achieve cost reductions,
- improvement to the financial and operational database to identify better

37. Supra, note 16 at p. 45 et seq.

- areas of potential cost reduction,
- examine the cost of fuel supply services at airports to determine possibilities of bringing aircraft fuel costs closer to those prevailing in other regions,
- evaluate the required aircraft fleet developments to meet future traffic demand and related financing requirements, taking into account the expected application of aircraft noise standards from 1988, and possible improvements in aircraft utilisation.

Airports and route facilities

- upgrade the planning process to ensure realistic assessments of future capacity requirements for airports and route facilities and appropriate allocation of resources so as to meet essential requirements,
- promote training programmes in airport management and in the maintenance of equipment and facilities,
- consider the feasibility of establishing export processing free zones,
- consider the feasibility and possible advantages of introducing co-operative arrangements for the collection of route facility charges for certain states,
- consider the desirability of establishing independent authorities or public corporations to separately manage airports, route facilities or both, where this could lead to improved efficiency and financial results,
- implement more liberal entry visa requirements and other formalities and the simplification and acceleration of passenger and baggage clearance procedure,
- ensure the provision of adequate secure warehouse storage and that steps are taken to reduce cargo - dwell times to an absolute minimum.

Conclusion

The condition of Africa's state of underdevelopment has been attributed to various cumulative causes, among them the ravages of the slave trade and colonial exploitation, the inequitable international economic order, the difficult geographic and ecological characteristics, and the economic mismanagement exacerbated by the greed, avarice, and corruption of some of Africa's leaders.³⁸ Whatever its causes, the poor state of African economies has been the single most important factor in determining the condition of Africa's air transport system; its insignificant primary market, low air carrier revenues, and a meagre capacity to invest in infrastructure and carrier equipment.

As a result regulatory policies at the regional and national level are likely to remain protectionist in the foreseeable future until such time as African carriers are in a position to compete meaningfully with carriers from the developed world.

38. See generally; Rodney, Walter, How Europe Underdeveloped Africa, Bogle-L'ouverture publications, London 1983; Underdevelopment in Kenya: Leys, Colin, UCLP, California 1975, Power and Politics in Africa, Bretton, Henry, Aldine Publishing Co. Chicago, 1973.

CHAPTER FIVE
THE AFRICAN CIVIL AVIATION COMMISSION (AFCAC)
AND ITS POLICIES IN THE FIELD OF
BILATERAL AIR TRANSPORT AGREEMENTS

5.1 AFCAC: Origins, Organisation, and Objectives

A forum to provide policy direction for African air transport was mooted within a few years following the advent of political independence. It was not until 1969, however, that the formal establishment of AFCAC took place at a conference organised in Addis Ababa, Ethiopia, by the OAU and ECA for this purpose, following several years of preparatory arrangements.¹

AFCAC was established by a Constitution dated 17th January 1979. The Commission became a specialised agency of the OAU in May 1978. The agreement formalising this agency relationship stipulates, inter alia: that AFCAC shall keep the OAU regularly informed of its activities; that the OAU may call upon AFCAC to undertake studies on civil aviation

1. See Farag, G., "African Civil Aviation Commission", unpublished LL.M. Thesis, McGill University, Montreal, 1980, on the background to the formation of AFCAC. For details on the collaboration between the OAU and ECA towards the founding of AFCAC, see Kaunda, DCL Thesis, op.cit., at p. 232.

matters; that the two organisations shall form a joint-coordination committee which will meet bi-annually and that all OAU member states will accord diplomatic privileges and immunities to AFCAC personnel.

The Commission is an autonomous body possessed of all the legal attributes associated with international, inter-governmental organisations.² The membership of AFCAC is open to African states members of the OAU or ECA.³ Such membership may be terminated upon a formal withdrawal by a state.⁴ Cessation of membership from either the OAU or ECA by a member would not by itself terminate such states membership in AFCAC.⁵

The organs of AFCAC comprise the Commission, the Bureau and the Secretariat.⁶ The Commission is the supreme authority of AFCAC and consists of delegates representing each member state. The Commission determines policies and guidelines in civil air transportation for submission to member states in the form of recommendations.

2. Constitution of AFCAC, Article I(2), see also Farag, ibid. p. 88.

3. Ibid., Article (3).

4. Ibid., Article XV.

5. See Farag, op.cit., p. 57.

6. Constitution of AFCAC, Article IV bis.

It meets in ordinary session every two years.⁷

The Bureau of AFCAC is elected at each ordinary plenary session and consists of a President and four Vice-Presidents, one for each sub-region.⁸ The Bureau has responsibility for directing, coordinating and steering the work programme established by the Commission during the plenary sessions.⁹ The Secretariat is entrusted with the "organisation of studies, meetings, maintenance of records and the like".¹⁰

ICAO provides AFCAC with some secretariat assistance pursuant to a working arrangement between the two organisations.¹¹ The cooperation agreement between AFCAC and ICAO calls for close liaison between them in the discharge of their respective responsibilities and in particular requires AFCAC not to duplicate the work of ICAO.

There is also close collaboration between AFCAC and the ECA, AFRAA and other inter-governmental and non-

7. Ibid., Article V.

8. Ibid., Art. IV.

9. Ibid., Art. IX.

10. Ibid., Art. IV bis (3).

11. Similar assistance has been extended to other organisations by ICAO, i.e., LACAC, ACAC, ECAC.

governmental international organisations concerned with civil aviation.

As regards financial matters, provision is made in the AFCAC Constitution¹² for preparation and approval during each plenary session, of a budget of the direct costs of its activities as indicated in the work programme for the ensuing years.

The objectives of AFCAC are listed in Article 3. of the constitution as comprising:

- a) providing the civil aviation authorities in the member states with a framework within which to discuss and plan all the required measures of coordination and cooperation for all their civil aviation activities;
- b) promoting coordination, better utilization and orderly development of African air transport systems.

Because of the broad and imprecise scope of AFCAC's objectives, it has at times been difficult to draw a distinction between its role and that of AFRAA. This has been especially evident with respect to the establishment of the African Air Tariff Conference (AFRATC). Opinion has been expressed, for example, that AFCAC has sought to

12. Constitution of AFCAC, Art. XIII.

emasculate AFRAA's role in the establishment, coordination and management of AFRATC.¹³

One crucial institutional weakness of AFCAC is in the constitution of its Bureau.¹⁴ It is made up of senior full time employees of member governments' civil aviation departments who can only be released intermittently to attend Bureau meetings. The Bureau incumbents are not permanent in their positions with their member governments because they are subject to transfers, and serve in these positions at the leisure of their governments. Consequently continuity in the work of the Bureau cannot be guaranteed. Thus the ability of the Bureau to undertake the exacting functions entrusted to it is impaired. It has therefore been suggested¹⁵ that the Bureau should be manned by full time experts, employed by the Commission, and that the appropriate constitutional modifications should be made to achieve this objective.

As part of its wide ranging functions the Commission carries out studies on policies of governments regarding commercial aspects of air transport; intra-African fares and rates and a possible structure conducive to the

13. See Kaunda, DCL Thesis, op.cit., p. 295 et seq.

14. Ibid., p. 266 et seq.

15. Ibid.

rapid growth of traffic in Africa and other regional or sub-regional air transport economic matters.¹⁶

One of the Commission's principal achievements has been the issuance of a General Policy Declaration on Civil Aviation¹⁷ in May 1979 which was subsequently adopted by the OAU.¹⁸ It covered wide ranging subject matter including personnel training, co-operation among and integration of African airlines, the optimum development of air services within Africa, financing of aeronautical activities and aviation medicine.

The Declaration did not address the issue of state policies and practises for concluding air services agreements, principally because the Commission had not concluded its investigation into this subject. The development of guidance material on the issue of the economic aspects of air transportation in Africa had commenced in 1971 and evolved gradually the latest development being the publication in 1984 of the "AFCAC policy in the Field of Bilateral Air Transport Agreements".

16. Constitution of AFCAC, Art. IV.

17. See AFCAC Sixth Plenary Session Report, pp. 47, 131-141.

18. At the OAU 33rd Council of Ministers Session, held in Monrovia, Liberia in July 1979.

It is proposed to deal first with the past and current African state practises in this field in a general way before presenting AFCAC's recommended policies.

5.2 The Past and Present Regulatory Environment in Africa

As in other regions, bilateralism has been, in Africa, the predominant mode for the exchange of traffic rights for scheduled air services. In the case of non-scheduled services, the basic regulatory tool has been national regulations founded upon the provisions of Article 5 of the Chicago Convention. Indeed a distinguishing feature in relation to the regulation of non-scheduled services in Africa has been the absence of either a bilateral or multilateral approach towards the regulation of this category of air transportation.¹⁹

Africa's initiation into bilateralism occurred during the colonial period. By virtue of article 2 of the Chicago Convention, the airspace over the dependent territories formed part of the territorial airspace of the

19. A draft agreement to regulate non-scheduled air transportation among Members of the League of Arab Nations, some of whom are situated in Africa was adopted in Tunis, December 13, 1978 - see Haanappel, op.cit., page 19, footnote 45.

administering colonial power. Thus metropolitan powers were vested with the legal authority to grant traffic rights to other states for sectors situated within their dependencies and beyond.

Under the famous Bermuda Agreement²⁰ of 1946, for example, pursuant to route 13 of Annex 111(6) the United Kingdom granted to the United States third, fourth and fifth freedom rights to and from Lagos to two points outside Nigeria, namely Leopoldville (now Kinshasha) and Johannesburg.

A further example is an agreement entered into between the United Kingdom and France in 1946 whose purpose was to provide transportation through the British and French territories.²¹ Several intermediate points in British territories would be served by carriers designated by France, including Tunis, Cairo, Lagos, Khartoum, Nairobi and Dar-es-Salaam. In exchange, U.K. carriers could serve intermediate points situated in the French colonies such as Niamey, Rabat, Dakar, Tunis, etc. In other agreements, the United Kingdom granted operating rights through African

20. UNTS vol. 3, p. 253.

21. Ibid., vol. 27, p. 173.

intermediate points to Italy,²² Portugal,²³ Belgium²⁴ and others.

Upon attaining independence, African states assumed the rights and obligations contained in the various air services agreements concluded between the metropolitan states for flights over and into African territories. It should be noted that while the extent to which new states are bound, upon the attainment of statehood, by agreements concluded by former colonial authorities has been a matter of conjecture,²⁵ the newly independent states have in practice accepted the rights and obligations of the departed authorities without undue protest. It could therefore be remarked that at the advent of independence, the bulk of Africa's scheduled international air services were being regulated on the basis of the Bermuda competition principles. Francis Deak,²⁶ commenting in 1967 on the increasing trend towards protectionism in the multilateral regulation of air services, noted that some of the newly

22. ICAO Registration No. 660.

23. Ibid., No. 119.

24. Ibid., No. 1022.

25. Odubayo, W., "Air Transport Bilaterals of Nigeria", unpublished LL.M. Thesis, McGill University, Montreal, 1968, p. 42 et seq.

26. McWhinney, op.cit., p. 163.

independent countries (usually former British dependencies) were using Bermuda type capacity clauses, both inter se, and with European governments.

The shift from "Bermudian" to protectionist capacity regulation principles by African states was not a coordinated move, unlike for example the cooperation that has been observed among Latin American states towards adopting regional wide protectionist policies.²⁷ A review of a series of agreements in which African states were parties, concluded between the years 1956 to 1970 shows a balanced mix of Bermuda and predetermination type capacity clauses. For example, those between Ghana and Egypt²⁸ concluded in 1960, and between Algeria and Morocco of 1963²⁹ required strict apportionment of traffic between the designated carriers, while those concluded between Algeria and Ghana in 1963,³⁰ and between Zaire and the USA,³¹ in 1970 advocated the Bermuda approach to capacity regulation. There is the possibility, however, that predetermination was in fact still being exercised in the

27. Ibid., p. 70 et seq.

28. ICAO Registration No. 1556.

29. Ibid., No. 1781.

30. Ibid., No. 1896.

31. Ibid., No. 2248.

latter cases through secret memorandum modifying the explicit Bermuda principles into a predetermination approach.

It is evident, in any case, that by the mid 1970's many African states shared the view that the Bermuda principles of capacity regulation were not suited to regulating Africa's air services. During the Fifth Plenary session of AFCAC, held in Lome, Togo, in May 1977, it was strongly advocated that only non-Bermuda type bilateral agreements of a restrictionist nature could assure the optimum development of Africa's air services.³² AFCAC was certainly influential in the moves to involve ICAO in expanding its involvement in the field of air services economic regulation and would necessarily have shared the view expressed at the 1977 Special Air Transport Conference that:

"...there was need to re-evaluate the principles on which regulation of scheduled services had in varying degrees been based since 1946".³³

32. AFCAC/5, Para. 68, p. 24. It was observed at AFCAC's Fifth Plenary Session held in May 1977: "reviewing developments in the philosophy of bilateral agreements, it was generally agreed that the type of bilateral agreements in effect in Africa were largely of the non-Bermuda type, African states for understandable reasons tending to take a protectionist stance".

33. ICAO Doc. 9199, op.cit., para. 5, p. 14, SATC.

Having indicated in broad terms the origins and consolidation of protectionism in Africa, it would be opportune to focus on the prevailing attitudes, during the present period, towards the exchange of traffic rights.

While only twenty four out of fifty one OAU member states were, in 1981, parties to the Agreement on Transit of International Air Services signed in Chicago in 1944,³⁴ transit rights have on the whole been freely exchanged among African states,³⁵ and between African and non-African states.³⁶

Turning to third and fourth freedom traffic rights, the emphasis on primary justification traffic has rendered the exchange of third and fourth traffic the norm in Africa's aeronautical bilateral relations. Indeed, the problem here seems to be in the large amount of unutilised third and fourth traffic rights. According to an AFCAC

34. The African states signatory to this Agreement are Algeria, Benin, Burundi, Egypt, Ethiopia, Gabon, Ivory Coast, Lesotho, Liberia, Madagascar, Mali, Malawi, Mauritania, Morocco, Tunisia, Cameroon, Zambia. Source, Shawcross & Beaumont, op.cit.

35. This is with exception to South Africa. The vast majority of African states deny South Africa both overflight, technical and commercial traffic rights in protest against that country's apartheid policies.

36. See AFCAC/5, para. 73, p. 25.

study,³⁷ about 560 air services agreements have been signed between African countries of which 40% are not actually implemented. The reasons for this 40% fraction of traffic rights remaining "fallow" have been said to include:

- Traffic, existing or that can be built up immediately, does not warrant economic exploitation of the routes granted.
- Traffic rights restrictions discourage combining destinations for more viable routes.
- Equipment and/or scheduling restrictions prohibit activation of routes due to "regulatorily created" shortage of resources.
- Financial and other conditions that have to be met, buried in confidential memorandum of understandings, are growing obstacles to commencement of new routes."³⁸

The approach to the exchange of Fifth Freedom that characterises most African states policies is restriction-

37. AFCAC/9 - WP/8, p. 9. A breakdown of the quota of unutilised traffic rights is not provided in the study but it can be safely assumed that the highest percentage of these rights is third and fourth traffic rights.

38. Medhanie, Semret, "Shortcomings of the African Air Services and Ways and Means to Ensure their Improvement", a paper presented to the UNECA Conference on Freedoms of the Air, Mbambane, Swaziland, November, 1984.

ist.³⁹ As Boyrie has observed,⁴⁰ the exploitation of fifth freedom traffic rights in a poor economic situation in a market with low production and limited prospects of expansion is a very acute problem indeed. This is the condition that afflicts nearly all African states. In such circumstances a state is faced with conflicting and incompatible interests; how to expand the market for its carrier(s) by obtaining fifth freedom traffic rights from other states while protecting the small amount of traffic it generates and reserving it for its own carrier.

The difficulty of reconciling these conflicts has led to excessive protection of third and fourth freedom traffic at the expense of limited access to fifth freedom traffic for all. Recognising that the logical outcome of such a policy is to seriously inhibit the development of more air links within and outside Africa, it has been suggested that a more liberalised approach to the exchange of Fifth Freedom traffic rights should be adopted, possibly

39. It has been suggested, however, that some African states have favoured non-African states, particularly their former colonial administering powers, over other African states in the exchange of traffic rights. See Ndum, op.cit., p. 260.

40. AFCAC Seminar on the Development of Air Services in Africa, held in Addis Ababa, Ethiopia, December 1982, at p. 254.

by reverting to the Bermuda competition principles, for air services within Africa.⁴¹ This should be confined to cases where the service to the point in respect of which Fifth Freedom traffic rights are being sought is non-existent or insufficient to satisfy the available demand. Thus, the number of air links and frequencies could be increased leading to an improvement in the services provided to the travelling public.

AFCAC and AFRAA appear to be approaching a convergence in their views on rationalising the exchange of third, fourth and fifth freedom traffic rights. AFRAA's basic position was articulated in a resolution, AFRAA Res. AGA 15/2, adopted in April 1983, which stipulated as follows:

"a) Fifth Freedom shall be exchanged on a reciprocal basis up to certain limits of frequency and/or capacity to be agreed by the parties concerned keeping in mind the need to expand intra African routes among member airlines without playing down the economic interest of the 3rd and 4th Freedom operators.

b) Where reciprocity cannot be achieved, the carriers concerned shall be encouraged to enter into pool agreements, Joint ventures and/or any other form of commercial agreement which may include monetary compensation to be agreed by the carriers concerned on the basis of actual uplift on the routes and which shall ensure the equitable and viable utilization of the route in the interest

41. Russeiny-Khairi, ibid., p. 102.

of the development of commercial aviation in Africa."

The two organisations have both accepted monetary compensation as a means for ensuring reciprocity in the exchange of Fifth Freedom traffic rights. The AFCAC Bureau in reviewing AFCAC's future work programme prior to the organisation's 9th Plenary Session held in June 1985, envisaged the development of a multilateral agreement which would inter alia facilitate the exchange of Fifth Freedom traffic rights (with possible financial compensation).⁴² This approach would be supplemented by inter-airline cooperation such as envisaged by AFRAA.

A study commissioned by AFCAC within the aegis of the United Nations Communications and Transportation Decade for Africa⁴³ and being conducted in conjunction with experts from the Paris based Institut de Transport Aérien (ITA), appears to question the unduly protectionist approach advocated above. In a recently concluded preliminary study⁴⁴ it recommends for example that where operating profitability on air routes on which Third and Fourth Freedom traffic is low, it should be based on Fifth Freedom traffic, particularly if the aim is to implement the AFRAA

42. AFCAC/9 - WP/8, p. 11.

43. See ibid.

44. See supra, Chapter 4, p. 118.

"Grid system". The study advocates, in addition, that states should proceed beyond the limited objective of protecting their own national carrier and consider other important benefits such as:

- general benefit for the country's air services, particularly in the case of landlocked or isolated states on major routes;
- the advantages (on the basis of reciprocity) which their own national carrier can obtain on other sectors;
- financial spin-off from the marketing of Fifth Freedom traffic.

These conclusions evidently downplay the emerging consensus between APRAA and AFCAC that monetary compensation to Third and Fourth Freedom carriers may be a prerequisite to increased access to Fifth Freedom traffic rights.

AFCAC has had occasion to address the Fifth Freedom traffic rights position in two specific geographical regions of Africa; the zone constituted by the states participating in the Air Afrique multinational airline, and the North African Arab region.

Concerning the "Air Afrique Zone", it has already been mentioned that Article 10 of the Yaoundé Treaty⁴⁵

45. Supra, Chapter 3, p. 106.

obliges member states to consult other state parties prior to concluding bilateral air services agreements with third parties with a view to ensuring that the interests of the multinational carrier are not jeopardised. This approach has meant in practise that Fifth Freedom traffic rights are extremely difficult to obtain for third parties and the area has developed into a regional cabotage zone.⁴⁶

AFCAC mandated a panel of legal experts in 1982 to examine the legal implications of the traffic rights practises within the "Air Afrique Zone". The panel reported⁴⁷ that stricto sensu the provisions of the Chicago Convention had not been infringed upon, although it could be said that the practises were offensive to the spirit of the treaty. The panel recommended an indepth cost/benefit review of the impact of closing off their collective airspace by the member states, on the performance of Air Afrique, and a determination of how a more liberal approach to the exchange of Fifth Freedom traffic could be pursued in the interests of expanding the African network of air services without causing undue harm to Air Afrique.

Regarding the situation in North Africa, it has been the view of African states south of the Sahara that

46. Odubayo, op.cit., p. 80.

47. Supra, Chapter 3, footnote 56.

their long haul operations, to Europe could be substantially facilitated by increased access to Fifth Freedom traffic on North African sectors.⁴⁸ ACAC member states have also conveyed to AFCAC their concern over shortcomings in the Afro/Arab air network,⁴⁹ particularly the absence of interconnecting air links between the two regions. The two organisations have as a consequence set up a joint project for the evaluation of the existing Afro/Arab airlinks and measures for improving such links.⁵⁰ A study has been proposed which would inter alia deal with air services agreements concluded between African and Arab states, examine any weaknesses in the network, and draw up a general plan for the development of air services between Arab and African states.

Other areas of cooperation to be considered include mutual assistance in tourism promotion, joint evaluation of equipment, interchange and cross-leasing of equipment and joint use of existing maintenance and overhaul centres for aircraft. It is also intended to include a study on fares and rates with a view to maintaining reasonable fare levels for the travelling public between the two regions. An

48. AFCAC/6, para. 108-110, p. 34.

49. AFCAC/8, para. 7, p. 24.

50. Ibid.

agreement has been drawn up encompassing all these matters and awaits signature.

Measures to assure African carriers of their fair share of traffic originating from or destined to their countries should also include curtailment of carriage of sixth Freedom traffic. Although officially not mentioned in the Chicago Convention, the exercise of sixth freedom involves the carriage of Fifth Freedom traffic through exploitation of Third and Fourth Freedom traffic rights. This is achieved through the exercise of traffic rights between two foreign countries via the home country of the operating carrier. The existence of 6th freedom traffic has however been questioned. Bin Cheng,⁵¹ for example, characterises sixth freedoms traffic as a combination of Third and Fourth Freedom traffic therefore not requiring specific sanction. Such justification is sometimes reinforced by issuing two separate tickets, one for the sector to one state, and the other for the sector from that state.⁵²

51. Bin Cheng, The Law of International Air Transport, Stevens and Sons, London, 1962, pp. 13, 323.

52. At the 6th AFCAC Plenary Session held in Bamako, Mali, in June 1979, AFCAC expressed concern over the amount of revenue African carriers were losing because of this practise.

There have been cases however where states have formally acknowledged the existence of Sixth Freedom traffic and approved its exercise.⁵³ In such an event the exercise of Sixth Freedom should be permitted on a reciprocal basis. Where a state does not acknowledge that carriage of this type of traffic should be permitted then unilateral measures may be the only means for ensuring that foreign carriers desist from carrying such traffic.

Unregulated stopover traffic is another element that poses potential for diversion of traffic from African carriers. The concept of stopover has not been defined or treated in any way by any international legal instrument.

Arising from requirements for effective enforcement of capacity regulation it is important to determine how to characterise passengers who have made a stopover in the state concerned, for example, where traffic shares have been allocated to the designated carriers on a predetermined basis. The period of stopover allowed by states differs widely, from a few days to, in some cases, one year.⁵⁴ If the passenger exceeds the permitted duration of stopover, he ceases to be treated under the traffic qualification by

53. Wassenberg, H., Aspects of Air Law and Civil Air Policy in the Seventies, Nijhoff, The Hague, 1970, p. 34.

54. Ndum, op.cit., p. 276.

which he entered that state and becomes part of the originating traffic and may become disqualified to continue his journey with the same operator who brought him in. Africa has had no cohesive policy in this area. AFCAC's recommendations will be considered in the next section along with other policies developed by AFCAC in relation to the exchange of traffic rights.

5.3 AFCAC's Involvement on Tariff Matters

During the period preceding the USCA8 show cause order,⁵⁵ AFCAC had confined its efforts in the area of tariffs to proposing strategies to member states on means for coping with the tariff imbalance on long distance travel involving points in Africa, for example, through widening the tariff base both for passenger fares and freight rates. An ICAO Study on International Air Passenger and Freight Transport⁵⁶ in 1977 had demonstrated that on long distance routes between Europe/Middle East/Africa, fares tended to be higher than the world average. It also recognised the virtual absence of quantity discounts in

55. See AFCAC/6, para. 22, p. 7.

56. ICAO Circular 147 - AT/51, Study on International Air Passenger and Freight Transport - Africa.

cargo rates to, from, and within Africa.⁵⁷

One important background factor as a basis of AFCAC's work in this area had been the continued functioning of the IATA rate-making machinery for international air transportation.

The USCAB "show cause" order and the resulting reorganisation of IATA were considered by AFCAC to have seriously unsettled the multilateral tariff order.⁵⁸ AFCAC Resolution 56-4 inter alia urged the United States government to reconsider the show cause order and directed the Bureau of AFCAC to seek the intervention of the OAU, ICAO, ECA and other interested governments with the United States government. As a result, the Secretary General of the OAU expressed to the United States Department the concern of its members on the potential harm posed by the "show cause" order to the world air transportation system, and to the rapid development of air transportation in Africa.⁵⁹

57. Ibid.

58. Supra, footnote 55, p. 9. The Managing Director of Air Madagascar is reported to have observed that African countries do not meet the preconditions for successful experimentation with deregulation, ITA Bulletin, vol. No. 7, 1982. "African Continent Remains Closed to Deregulation".

59. AFCAC/6, para. 30, p. 9.

A proposal originated by AFRAA for the establishment of an African Air Tariff Conference was adopted by AFCAC⁶⁰ and referred to the OAU. In its Resolution CM/Res. 739 (XXXIII) of 1979 the OAU requested AFCAC in collaboration with the ECA and AFRAA to take the necessary measures to organise and establish an African Air Tariff Air Conference "as a permanent institution responsible for discussing and deciding on air tariffs to be applied by African airlines". The outcome of this collaboration was the adoption of a Convention on African Air Tariffs Conference, in Addis Ababa, Ethiopia in December 1980.

Twenty five ratifications are required to bring the Convention into force⁶¹ and activate the Conference. These have not been attained to date and the prospects are not encouraging.⁶²

Pending entry into force of the African Air Tariff Conference (AFRATC), the Bureau of AFCAC has recommended the following guidelines in connexion with the establishment of Air Tariffs in Africa.⁶³

60. Ibid., para. 29, p. 9.

61. Article 12, Convention on the Establishment of the African Air Tariff Conference.

62. As of June 1985, see AFCAC/9, WP#2, p. 43.

63. Ibid., p. 55.

1. tariffs to be established within, from and to Africa should, whenever possible be agreed upon by the concerned airlines on a multilateral basis;
2. African airlines should be encouraged to convene regional and continental meetings within the framework of AFRAA to iron out any differences between them and to ensure that in the establishment of international fares and rates, the views of all airlines operating in the related routes have been duly taken into consideration;
3. air tariffs agreed upon between African airlines and/or between them and non-African carriers should be submitted to the Governments for their approval. The Governments shall ensure that the interests of their national carriers as well as of the users are safeguarded;
4. air tariffs should be established at a reasonable level, taking into account all relevant factors, particularly the operational costs, type of services, reasonable profit as well as the tariffs of other airlines operating similar routes;
5. immediate action should be taken by the African

Governments for a thorough revision of the normal air fares and rates in Africa in order to make them more dependent on distance and in doing so reduce the cost of trans-Africa air travel. African airlines should also be requested to introduce special tariffs that are more competitive on routes to and from Africa, in order to promote a more rapid growth of air travel between Africa and the main traffic generating areas;

6. all AFCAC members should take the necessary steps to harmonize their air tariffs policies with this strategy on African air tariffs.

5.4 AFCAC Recommendations on the Exchange of Traffic Rights

At the Commission's first session⁶⁴ it was decided to deal with the entire subject of bilateral agreements in two stages: bilateral agreements between AFCAC member states, on the one hand, and between AFCAC member states and non-member states on the other hand.

64. AFCAC/5, para. 71, p. 24.

5.4.1 Policies as Between AFCAC Member States

5.4.1.1 Exchange of First and Second Freedom Traffic Rights

Members were urged to adhere to the International Air Transit Agreement to enable member states airlines to enjoy the benefits of overflight and technical stopovers which were an important step towards the improvement of air routes within and beyond Africa.⁶⁵ This recommendation complements ICAO's Resolution A21-28⁶⁶ requesting member states to ratify the International Air Transit Agreement.

5.4.1.2 Exchange of Third and Fourth Freedom Traffic Rights

AFCAC recommendation S5-17 urged member states in exchanging traffic rights amongst themselves to adopt a predeterminist approach through which they would endeavour to exchange reciprocal traffic rights while ensuring that

65. AFCAC Recommendation S5-16. AFCAC/5, para. 73, p. 25.

66. ICAO Doc. 9440, Policy and Guidance Material on International Air Transport Regulation and Tariffs, p. 7.

capacity is adapted to demand. Disappointment was expressed with respect to the Bermuda capacity clause by some delegates who considered it too liberal and susceptible to abuse by the more established carriers to the detriment of the smaller carriers.⁶⁷ Thus emphasis was laid upon striving towards adaptation of capacity to demand. Parties should therefore ensure not just that their contracting partners have equitable and genuine opportunities of supplying capacity for the carriage of traffic, but must be satisfied that the principles of reciprocity and equitable sharing of traffic were stringently applied.

5.4.1.3 Exchange of Fifth Freedom Traffic Rights

The relevant AFCAC recommendation⁶⁸ calls upon members to exchange Fifth Freedom traffic rights on a mutual basis to the fullest extent possible applying the same principles governing the exchange of third and fourth freedom traffic rights. Members are requested to give preference to airlines of other member states in granting fifth freedom traffic rights. In case, however, these

67. Ndum, op.cit., p. 258.

68. AFCAC Recommendation S5-18. AFCAC/5, para. 78, p. 27.

rights have to be granted to the airlines of non-member states, reciprocal rights or adequate compensation must be obtained.⁶⁹ It should be noted that AFRAA's position on traffic rights argues for compensation also as between African carriers.⁷⁰

5.4.2 Policies as Between AFCAC Members and Non-Member States

During the Sixth Plenary Session of the Commission held in Dakar in 1979 guidelines for the conclusion of bilateral air services agreements between AFCAC member states and non-member states were formulated.⁷¹

69. Ibid.

70. Supra, p. 12. There is a possibility, however, that the current AFCAC studies on the Optimum Development of Air Services in Africa could propose policy modifications tending towards elimination of compensation as a critical determinant in the exchange of traffic rights amongst African states. See supra, p. 13.

71. Ndum, op.cit., p. 260.

5.4.2.1 Exchange of First and Second Freedom Traffic Rights

AFCAC requested members to keep in mind their obligations under the Chicago Convention, in considering the grant of the rights of overflight and technical landings to non-member states, and to facilitate the exchange of these rights except where granting of such rights is inconsistent with the overall policy of the organization of African Unity and AFCAC.⁷² It has been suggested that this Resolution contravenes the Chicago Convention by requiring states to have regard to the policies of OAU prior to granting overflight and technical landing rights except where such policies were themselves consistent with the letter and spirit of the Chicago Convention. The danger is that this guideline could present difficulties of interpretation and conflicting application by different states.⁷³ One could observe, however, that the emphatic entrenchment of a state's sovereignty over its airspace by Article I of the Chicago Convention renders such a debate redundant.

72. AFCAC Recommendation S6-17. AFCAC/6, para. 101, p. 31.

73. Ndum, op.cit., p. 262.

5.4.2.2 Exchange of Third and Fourth Freedom Traffic Rights

The guidelines for the exchange of third and fourth freedom are cognisant of the importance of these rights to the expansion of Africa's airlinks with other world centres particularly where this will contribute to the economic, social and cultural development of member states. Thus, members are encouraged to negotiate the exchange of third and fourth freedom traffic rights with non-members and to permit the introduction of services on a provisional basis between themselves and other states pending formal negotiations where it is beneficial to member states to do so.⁷⁴

The recommended capacity provisions are predeterminist for all traffic including third, fourth and fifth freedom traffic.

74. AFCAC Recommendation S6-18. AFCAC/6, para. 102, p. 31.

5.4.2.3 Exchange of Fifth Freedom Traffic Rights

In this respect AFCAC recommended⁷⁵ that these be granted to non-member states but reciprocal rights or adequate compensation should be obtained. It is interesting to note that there is no requirement for financial compensation as a factor in the attainment of reciprocity in the analogous provisions for exchanging traffic rights among African states.

While the practise of seeking compensation in exchange of traffic rights has been present for many years the states from whose airlines compensation is demanded look upon it unfavourably.⁷⁶

Other provisions that are absent in the capacity clauses between African states concern means for cooperation in meeting unexpected fluctuations in traffic demand and for possible temporary transfers, on agreed terms, of part of any traffic rights which either carrier is unable to operate.

The usual Bermuda principles for ensuring balanced competition are included in the capacity clause. There is also consultative machinery for review of complaints by the

75. AFCAC Recommendation S6-19. Ibid., para. 107, p. 33.

76. Supra, footnote 53, p. 111

party whose airline is prejudiced by the other parties fifth freedom operations and pending agreement on the dispute, existing arrangements will continue.

5.3.2.4 Exchange of Sixth Freedom Traffic Rights

AFCAC urges member states to take all necessary steps to prevent the unauthorized carriage of sixth freedom traffic by non-African airlines and for member states to enhance their cooperation in this field in order to prevent malpractices that would jeopardize the commercial viability of African airlines.⁷⁷

While this particular recommendation is with respect to relations between African and non-African states recommendation has been made with respect to African states amongst themselves. It has been suggested by Khairy El-Husseiny⁷⁸ that bilaterals between African states should permit the exercise of a certain amount of sixth freedom traffic. The different regions of Africa, he argues, are linked through specific gateway points linking the states within the region or with other regions and that

77. AFCAC Recommendation S6-15. AFCAC/6, para. 92, p. 28.

78. El-Husseiny, Khairy, op.cit., Chapter 2, footnote 15.

such links can only function effectively if interline traffic is allowed.

5.4.2.5 Stopover Traffic

AFCAC has cautioned member states that "stopover" traffic could become disguised Fifth Freedom Traffic not granted under the relevant bilateral agreements signed between states and third states⁷⁹ and requested them to accept the concept with prudence.

The AFCAC Bureau is undertaking studies which hopefully will yield a definitive interpretation of the concept of stopover and provide guidelines for effective means of controlling unauthorized stopover traffic.⁸⁰

5.4.3 The AFCAC Consultative Machinery for Granting of Traffic Rights

With the objective of encouraging speedy settlement of disputes between member states involving traffic rights AFCAC by Resolution S7-11 of May 1981 set up a consultative body to examine such disputes and make recommendations to

79. AFCAC Recommendation S6-14. AFCAC/6, para. 27.

80. Ibid.

the parties for their resolution.

The Machinery is composed of the President, of AFCAC, Members of the Bureau and two other state members chosen by the President from an AFCAC Panel.

Elaborate procedures for the conduct of the hearings exists to ensure fairness and impartiality in the proceedings.

Decisions are in the form of recommendations.

5.5 AFCAC's Recommended Tariff Clauses⁸¹

The AFCAC model air services agreements clauses on tariffs are dissimilar with respect to the inter-airline mechanisms for reaching agreement on tariffs and on the filing and approval procedures.

The tariff clause applicable to air services between African and non-African states stipulates for agreements on tariffs to be sought where possible through IATA and for the agreed tariffs to be filed ninety days prior to the proposed date of introduction, and be considered as approved if no disapproval by either government has been notified within thirty days from the

81. AFCAC Policy on Bilateral Air Transport Agreements, pp. 22 and 42.

date of submission.

On the other hand the tariff clause recommended with respect to air services between African states requires that agreement on fares and rates be pursued through the AFRATC Conference machinery, although non-African airlines operating on these routes shall also be consulted. It is not indicated how the non-African airlines shall be consulted, although this is feasible through observer status at AFRATC conference meetings. With respect to the submission of tariffs to governments for approval the tariffs are to be filed within sixty days from the intended date of introduction and are to be regarded as approved if disapproval by either party is not received within forty five days.

It is to be noted that the tariff clause for transportation between African and non-African states is closer to the ECAC tariff clause of 1967 than the ICAO model clause, considering that it specifically names IATA as the inter-airline machinery to be relied on in seeking agreements, and it does not require airlines to consult their governments prior to entering into inter-airline deliberations on tariffs.

5.6 APCAC Policies on Non-Scheduled Air Transportation

It is difficult to state with authority what methods are employed in regulating non-scheduled air transportation by African States. However, in replies to an ICAO circular addressed to ICAO member states in 1976, and to which nine African states replied,⁸² it appears that many African states do have laws, regulations or policy statements concerning international non-scheduled air transport and have published procedures for obtaining prior permission for the conduct of non-scheduled air transportation to, from, and within Africa.

It also appears that the majority of the states who replied to the ICAO circular are dissatisfied with their existing regulatory framework and would wish to make important modifications. A wide range of charter categories are operated ranging from affinity, non-affinity, incentive tour charters, group incentive, own use, split, mixed, part, student and cargo.⁸³ However, the predominant mode is

82. SATC INFO paper No. 2, Policy Concerning Non-Scheduled Air Transportation. Replies were received from Cameroon, Ghana, Madagascar, Malawi, Mauritius, Morocco, Niger, Swaziland and Tunisia.

83. For further details on charters, see ibid.

the incentive tour charter category.⁸⁴

An important distinction in relation to the operation of charters in Africa is that unlike certain other regions such as ECAC or ASEAN member states, there is no differentiation made in the regulation of air charters originating from within or outside the region. The ECAC and ASEAN agreements permit aircraft registered in a member state to operate specified categories of charter flights freely within the region, i.e., without a requirement for prior authorization, only prior notification being required.

AFCAC's attempts toward a coordinated policy in this field have so far yielded a set of recommendations for regulating the operation of charters within Africa. These were adopted at AFCAC's Third plenary session in 1975. The policy covers the "Introduction of standard application forms for authorization to operate Inclusive Tours or Affinity Group charter flights; the procedure for submission of application forms; the duration of Inclusive Tours and the control of Affinity Group charter flights as well as student charter flights..."⁸⁵ A major disappointment is that the recommendations evade the issue of eliminating the

84. See ICAO Bulletin, Dec. 1984, p. 38.

85. See Ndum, ibid., p. 296.

need for prior authorization (rather than mere prior notification) for nationals to operate non-scheduled services within the Africa region. In addition, the applications and declarations for authorization to operate non-scheduled operations are extremely cumbersome and unlikely to facilitate the operation of these services.

At the 8th plenary session of AFCAC, June 1983, it was considered that the policy of non-scheduled air transportation should be updated to take account of recent developments in other regions. It was decided, however, to await the outcome of the studies then being pursued by the ICAO Panel on the Regulation of Air Transport.⁸⁶

The AFCAC Bureau was instructed by the Ninth plenary session of AFCAC, held in June 1985, to review the results of the completed studies and advise the commission whether it would be appropriate to consider revisions to the AFCAC common policy.

AFCAC had in fact been sufficiently concerned with following up on the panels study to inquire from ICAO whether ICAO could grant it observer status on the panels.⁸⁷ ICAO declined to accede to AFCAC's request on

86. The work of this panel is considered in Chapter 2, supra.

87. AFCAC/9, WP/2, p. 45.

the grounds that panel members are experts not representatives of member states and only world wide non-governmental organisations, i.e. IATA could be accorded observer status.⁸⁸

Of particular interest to the Bureau, as it examines the panels work in the field of non-scheduled services, would be whether or not to recommend inclusion of non-scheduled services in negotiations for scheduled services in conformity with the ICAO recommended tariff clause. It might be considered imprudent to make such a recommendation at this stage taking into account that this would open up possibilities for multiple designation of carriers which could aggravate the competitive position of African carriers. Another significant aspect would be whether to recommend for adoption the procedures proposed by the Second Air Transport Conference indicating the steps which states may wish to take in establishing non-scheduled passenger tariffs⁸⁹ and which were designed to ensure extensive consultations between the airlines, the tour operators, the users of the air services and the government prior to implementation of tariffs. It might be inquired, however, whether such procedures would be particularly

88. Ibid.

89. See ICAO Doc. 9297 AT/Conf, op.cit., pp. 46-47.

useful in a region which is predominantly a destination for tourist traffic and does not originate such traffic in any significant amounts.

5.7 Conclusion

The studies undertaken by AFCAC so far have led to the conclusion that the preferred policy option on traffic rights and tariffs is a combination of strict predetermination of capacity, particularly with non-African states, and the dual approval method for tariff setting within a multilateral tariff system supplemented by the regional AFRATC mechanism.

To cater for the needs of an improved air network in Africa, such policies will need to be augmented by reciprocal exchange of fifth freedom traffic rights, a balance in the rights exchanged being assured through financial compensation, if need be.

These studies have not yet been concluded and it is feasible that further modifications may emerge from the AFCAC/ITA studies on the "Optimum Development of Air Services in Africa".

The differences noted between the capacity and tariff clauses in the draft bilateral agreements to be concluded between AFCAC member states on the one hand and

between AFCAC member states and non-member states may be summarised as follows: absence of financial compensation as a balancing factor in the exchange of Fifth Freedom traffic rights with respect to agreements between AFCAC member states; no provisions have been made for measures on cooperation in the event of temporary unexpected fluctuations in traffic demand with respect to agreements between AFCAC member states; tariff agreements to be sought via IATA with respect to extra-African air routes and within AFRATC for intra-African routes.

CHAPTER SIX
THE ASSOCIATION OF AFRICAN AIRLINES (AFRAA) AND
ITS CONTRIBUTION WITH RESPECT TO
THE REGULATION OF TARIFFS AND
THE EXCHANGE OF TRAFFIC RIGHTS IN AFRICA

6.1 AFRAA: Status, Organisation and Objectives

AFRAA was established on 4 April 1968 at Accra, Ghana, with fifteen founding members. The membership had increased to thirty-six by April 1984.¹

Its articles of Association envisage that the association should be an international legal entity recognised or registered as such in each OAU member state.² The headquarters of the Association are in Nairobi, Kenya. AFRAA has entered into a Headquarters

1. The membership of AFRAA in May 1984 comprised the following airlines: Air Algerie, Ethiopian Airlines, Ghana Airways, Air Guinee, Libyan Arab Airlines, Egypt Air, Air Mali, Air Zaire, Air Malawi, Zambia Airways, Air Afrique, Sudan Airways, Tunis Air, Nigeria Airways, Cameroon Airlines, Somali Airlines, Air Madagascar, Royal Air Maroc, Lam-Mozambique Airlines, Air Tanzania, Kenya Airways, Uganda Airlines, Air Gabon, Air Liberia, TAAG-Angola Airlines, Royal Swazi National Airways, Air Djibouti, International Air Cargo, Air Burundi, Air Zimbabwe, Air Rwanda, Air Mauritanie, Lesotho Airways, Sunbird Aviation, Sierra Leone Airlines, Pioneer Airlines.

2. Articles of Association of AFRAA, Article 2.1.

Agreement with the Government of Kenya which, inter alia, confers upon the association the usual attributes of a corporate legal person, and certain diplomatic privileges for its senior personnel, which the Government would ordinarily confer only upon the senior staff of inter-governmental organisations to which it is a member.³

Full membership to the Association is restricted to any airline operating international air services in the carriage of passengers and/or cargo and/or mail which is registered in a state eligible for membership to the OAU, whose capital of not less than 51% is owned by such state or group of such states or citizens of such state or group of such states.⁴ Associate membership is available to any airline operating domestic air services in the carrying of passengers and/or cargo and/or mail whose production is not less than two million ton kilometers, and whose capital of not less than 51% is owned by such state or group of such states.⁵

Membership may be forfeited upon resignation,⁶

3. Under the Immunities and Privileges Act, Chapter 179, Laws of Kenya.

4. Supra, note 2, Article 6.1.

5. Ibid., Article 6.2.

6. Ibid., Article 6.5.

failure to participate in the activities of the Association,⁷ failure to meet its financial obligations, or failure to implement the decisions and resolutions of the General Assembly.⁸

The organs of the Association are the General Assembly, the Executive Committee, the Secretariat and the standing committees.⁹

The General Assembly is the highest authority of the Association. It elects the members of the Executive Committee, confirms the appointment of the Secretary General, determines the membership of the standing committees and any ad-hoc committees and approves the budget and the annual reports of the Association.¹⁰

The executive Committee which is composed of seven members elected from among chief executive officers of member airlines and representing the various subregions is vested with the authority to supervise the affairs, funds and property of the Association, and to formulate and determine policies within the terms of the by-laws of the Association. The Committee also appoints the Secretary

7. Ibid.

8. Ibid.

9. Ibid., Article 8.

10. Ibid., Article 9.

General subject to the confirmation of the General Assembly.¹¹

The Secretary General heads the Secretariat and is responsible for the day to day management and control of the affairs, funds and property of the Association including the coordination of the activities of the standing and ad-hoc committees. The latter are established by the General Assembly and include the Technical, Legal, Traffic and Finance Committees.¹²

Among the aims and objectives of the Association are the following:¹³

- (a) to promote regular and economic air transport for the benefit of the peoples of the world, to foster air commerce in Africa, and to study the problems connected therewith;
- (b) to provide means for collaboration among the air transport enterprises engaged directly or indirectly in air transport services.

In its endeavour to promote these purposes the Association has worked closely with governments on fares and rates for transportation to, from, and within Africa, and has made some proposals for consideration by AFCAC and its members states in the realm of traffic rights.

11. Ibid., Article 10.

12. Ibid., Article 11.

13. Ibid., Article 5.

6.1.1 The Legal Status of AFRAA

The Association declares its claim to international legal status in article 2 of its Articles of Association. This article was amended recently, at the 17th Annual General Assembly, held in May 1985. Originally it read:

"2.1 The Association shall be an international body incorporated at the location of its Headquarters and shall be recognised or registered in each member state as such; and
2.2 shall be a legal entity..."

And was modified by replacing the underlined words with the following statement:

"established by the Memorandum of Agreement signed in Accra, Republic of Ghana, in April 4, 1968."

The objective of this amendment, it would seem, is to preempt the possibility that AFRAA could be 'naturalised' into a creature of Kenyan domestic law, where its Headquarters are situated, if it were incorporated under the domestic laws of that country, as was feasible under the unamended version of article 2. It would, in such a situation, place in jeopardy AFRAA's claim to international legal status.

The problem posed by the amendment is that while the unamended version did, at least, articulate the means by which AFRAA would attain legal status, i.e. incorporation at

the location of its Headquarters, the amended version makes the sweeping assumption that the members of AFRAA are endowed with the capacity to create an international legal person, upon whom corporate legal states would naturally attach.

The amended article should therefore be examined in a context whereby it is recognised that the members of AFRAA are corporations, organised and existing under the municipal laws of individual African states, and are therefore themselves not subjects of international law, at least according to traditional notions of public international law.

According to Brownlie,¹⁴ issues of international personality would ordinarily arise in the following context: capacity to make claims in respect of breaches of international law, capacity to make treaties and agreements valid on the international plane, and the enjoyment of privileges and immunities.

Unquestionably, states possess all these characteristics. With respect to international inter-governmental organisations, the International Court of Justice, in the

14. Brownlie, I., Principles of Public International Law, Oxford, London, 1979, Third Edition, p. 677 et seq.

Reparations case,¹⁵ formulated the rule that such organisations could have international legal status, though not necessarily as extensive as that possessed by states, the criteria being whether such status is necessary in order to execute the functions which have been entrusted to the organisation by its constituent members.

In the case of AFRAA, the issue is reduced to whether entities, ostensibly subjects of private law, can create an international legal person. There seems to be no definitive authority on this issue.

C In a study prepared for the Economic Commission for Asia and the Far East, on "The Fundamental Legal Issues Raised by the Draft of an Asian Clearing Union Agreement to be Concluded Between the 'Central Banks and Monetary Authorities' of Various Countries",¹⁶ it was doubted whether these central banks and monetary authorities, entities to which international law does not directly apply, could, through the Clearing Union Agreement, create a legal person, and even if they could, whether such a legal person would be a subject of international law.

However, in a later discussion, the study notes that:

"the principle that an international legal

15. I.C.J. Reports (1949), pp. 178-9.

16. 1971 United Nations Juridical Yearbook, p. 215.

person can be created by virtue of a treaty is nothing more than a rule of customary international law, and it may well be that a new customary rule of international law is emerging under which such a legal person could also be created by an agreement concluded solely by autonomous public entities, such an agreement being governed by international law pursuant to another new customary rule".¹⁷

The study cites three cases involving the setting up of central monetary unions by central banks from Latin America, Central America and Africa which the study considers could legitimately lay claim to limited international personality.

It is arguable that by analogy, and considering in particular that in excess of ninety per cent of its membership are airlines wholly owned by their national governments, and therefore fit into the mould of "autonomous public entities", AFRAA could lay claim to international legal status.

The essence of international legal status lies, after all, in recognition. As Schwarzenberger has stated: "In relation to itself, each subject of international law is free to recognise any other entity as a subject of international law."¹⁸

17. Ibid.

18. Schwarzenberger, International Law, Vol. 1 (3rd Ed. 1957), p. 146.

The manner in which a state deals with any agreement concluded on the international plane is a matter of the internal law of that state. So far, only Kenya, which hosts the Headquarters of AFRAA, has formalised its relationship with AFRAA. The Headquarters Agreement, referred to earlier, recognises AFRAA as "a body corporate with full legal personality". The agreement has been executed by the Minister of Foreign Affairs, on behalf of the executive arm of the Government of Kenya. Isabirye, in a study entitled "The Status of Treaties in Kenya",¹⁹ observes that the executive branch of the Government of Kenya acts as though it inherited the prerogative powers vested in the British Crown with regard to the conduct of foreign affairs, one of whose incidents is the conclusion of treaties. The practise has been consistently followed since independence, in 1963, and is considered to have acquired legitimacy in the absence of constitutional guidance on the matter.

Consequently, vis-à-vis the Government of Kenya, AFRAA is a body corporate with full legal personality, and an international status as evidenced by the extension of certain diplomatic immunities and privileges to senior staff

19. Isabirye, D.M., "The Status of Treaties in Kenya", Indian Journal of International Law, 1980, p. 63.

of the Association. Its status with respect to other African governments and third party states remains untested and will be revealed on a case by case basis. It is the opinion of this writer that AFRAA's functional qualities justify its being recognised as possessing limited international legal personality. This is particularly with reference to the quasi-public role it is expected to play in the management of AFRATC, on behalf of the OAU member states.

6.2 AFRAA's Involvement in the Regulation of Air Transport Tariffs

From the inception of AFRAA, the work programme of its traffic committee has regularly featured issues connected with ensuring fair, stable and economic fares and rates for travel to, from, and within Africa. The Committee has been particularly concerned with the harmonisation of positions of member airlines on fares and rates proposals prior to attending IATA traffic conferences, evaluating means for combating tariff malpractices, and seeking to ensure an equitable proportion of prorated revenues for member airlines for jointly operated international air services.

The predominant tariff setting machinery for

international air travel to, from, and within Africa has been the IATA traffic conferences primarily because most bilateral air services agreements to which African states are parties have either entrusted ratemaking to IATA or raise no explicit objection to this method of ratemaking. Even after participation in the traffic conferences became optional for IATA members, twenty out of twenty five African airline IATA members were participating in the traffic conferences in 1983. The traffic committee of AFRAA would therefore be concerned to ensure common positions on fares and rates proposals at IATA traffic conferences in order to secure the most beneficial tariffs for routes where the member airlines operate.

In the field of tariff enforcement, AFRAA is supervising the establishment of the IATA sponsored "Yield Improvement Programme". This programme originated from an IATA Special Annual General Meeting held in Geneva in August 1982²⁰ following revenue losses by member airlines in excess of \$3.2 billion of which more than \$1 billion was attributed to discounting and similar malpractices.²¹ The IATA proposed plan requires the execution of standard

20. "IATA moves to raise fares, stiffen crackdown on discounting" ATW, 9/82, p. 25.

21. Ibid.

agreements by all carriers operating into each country (with the host airline acting as lead carrier in the implementation of the programme) which would bind all signatories to abide by all government approved, filed and published tariffs.

The programme would focus in particular on irregularities such as:²²

- the use of non-approved sales outlets
- sale of transportation at below government approved published levels
- payment of unauthorised commission levels
- undermining of Government approved tariffs by airlines through the exploitation of currency and/or tariff differentials between markets.

AFRAA, with the encouragement of IATA,²³ is following up on the establishment of yield improvement programmes in all member airline states. At the Association's Seventeenth Annual General Assembly, it was reported that committees had been established and were functioning in twenty one states.²⁴ AFRAA has adopted

22. Ibid.

23. Minutes; 15th AFRAA Annual General Assembly Meeting, Abidjan, 11-14 April, 1983, at p. 5.

24. Minutes; 17th AFRAA Annual General Assembly Meeting,

"Guidelines on the Establishment of Local Yield Improvement Committees". The Guidelines consist of two documents, one a draft agreement for establishing local yield improvement committees and the other a draft investigation code.

In principle, a general meeting composed of all carriers operating to and from the country where the committee is located would meet quarterly each year to receive and consider reports on malpractices committed by any of these airlines or sales agents. Investigation of malpractices would be delegated to area subcommittees which would conduct investigations mainly through test ticket purchases from a fund established by the General Meeting. Punitive measures shall include warnings, fines and, where an offending member persists in a malpractice, a recommendation to the responsible civil aviation authority to suspend the offending carrier's operating rights. The latter measure would require existing bilateral air services agreements to be modified or the civil aviation laws to be amended to make provision for such measures. AFRAA has requested its members to lobby governments for such action.²⁵

Turning to the issue of proration of revenues for

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Nairobi, 1-4 April, 1985. Doc. AGA17/5.

25. Supra, note 23. Report of the Traffic Committee.

jointly performed air transportation, the views of AFRAA member airlines have been that the provisions established by IATA, when the majority of AFRAA member airlines did not exist, for the apportionment of these revenues are unfair to small interlining carriers into which category most AFRAA member airlines fall. AFRAA member airlines have therefore campaigned jointly to have the rules modified so that they can receive a larger share of the revenues. It was reported to the 17th Annual General Assembly of AFRAA that some limited successes have been achieved in this regard.²⁶

6.3 The African Air Tariff Conference (AFRATC): Its
Origins and Evolution

In 1978 the Civil Aeronautics Board of the United States issued IATA with an order²⁷ to show cause why IATA should not be stripped off its anti-trust immunity. If the order were confirmed the IATA multilateral framework for the setting of fares and rates would have suffered a severe blow with tariffs and fare setting for the largest scheduled international air transport market reverting to purely competitive forces.

26. Supra, note 24.

27. CAB order 76-6-78 of June 12, 1978.

This development spurred IATA into restructuring its organization resulting in a weakening of its multilateral tariff setting machinery. This exercise involved a classification of IATA's activities into²⁸

- (a) a Mandatory Trade Association membership involving activities dealing with the less significant non-economic regulatory functions such as clearing house arrangements, baggage handling rules, air safety and security, etc.;
- (b) optional membership in tariff co-ordination activities in respect of passenger matters, cargo matters or both passenger and cargo matters. Members were permitted to opt out of conference resolutions to which they were a party.

IATA's capacity for regulating and coordinating air fares on a world wide basis was substantially reduced.

These events were viewed with alarm by the airlines of developing nations who considered IATA's diminished capacity for tariff setting a serious threat to their continued viability. In particular, AFRAA considered that its members could not hold their own against airlines of the developed world with their superb equipment and other

28. See Haanappel, op.cit., at p. 61 et seq.

technological and manpower advantages in a system of bilateral tariff negotiation.

AFRAA protested the dismantling of IATA's multilateral tariff setting machinery. At its 11th Annual General Assembly Meeting held in Lusaka, Zambia, on April 3-6, 1979, AFRAA adopted a resolution stating that it was dangerous to dismantle the IATA tariff mechanism through the optional system. It repeated the wish of African airlines that tariffs be set on a multilateral basis.²⁹ It next focused on finding ways and means for the continued regulation of air fares and rates for travel to, from, and within Africa considering this vital to the economic survival of its members.

In 1979 AFRAA recommended the establishment of a formal traffic conference machinery which would provide a framework for negotiation of tariffs to, from, and within Africa, while ensuring that when establishing such tariffs, the existing world wide multilateral system of IATA was taken into consideration.

A tariff handbook was developed to provide rules for the regulation of tariffs and for the conduct and proceedings of the conference. The 11th Annual General

29. El-Husseiny, Annals of Air and Space Law, 1983, op.cit., p. 139.

Assembly Meeting of AFRAA passed another resolution endorsing the establishment of the African Air Tariff Conference (AFRATC). Political support for this proposal was sought from OAU, ECA and AFCAC.

The views of AFCAC and OAU were, however, that such a conference should be established by a multilateral convention of member states. This was possibly influenced by the view that attacks on conference activities by any foreign states that resented multilateral tariff regulation would be easier to resist if membership to the conference was restricted to states instead of airlines.

As a result, a diplomatic conference was convened in Addis Ababa, Ethiopia, in December 1980, pursuant to the OAU Council of Ministers Resolution 805(XXXV) which adopted a convention on African Air Tariffs Conference. AFRATC will, when it comes into effect, regulate air tariffs on behalf of African states governing travel to, from, and within Africa. Twenty-five ratifications are required to bring the Convention into force and bring the Conference into being. It has been signed by sixteen members and ratified by two.³⁰

The convention, inter alia, establishes the African

30. Report of AFCAC's participation in the Third AFRATC Experimental Meeting, Nairobi, Sept. 18-21, 1984.

Air Tariff Conference and authorises AFRAA to "implement the establishment of the conference and to organise and coordinate its activities."³¹

Membership to the conference is mandatory for all AFRAA member airlines.³² It would therefore be most convenient if all African states would ratify the convention to facilitate the functioning of the conference and eliminate the possibility for disregard by non-party states of tariffs agreed at the conference and acceptable to the governments parties to the Convention.

Articles 6 and 7 of the Convention contain provisions for the adoption of tariffs at the conference level (by airlines), submission of these tariffs to states (60 days before the proposed date of their entry into force) and approval by states (to be given within 45 days of filing, and to come into force when approved by four fifths of the contracting states).

Each state party to the Convention is required to harmonise the tariff clauses contained in any existing bilateral to which it is a party, with the provisions of the

31. Article I, Convention on the Establishment of the African Air Tariff, signed at Addis Ababa, Ethiopia, December, 1980.

32. Ibid., Article 3.

Convention³³ and to ensure compliance by all carriers operating to and from their territories with tariffs approved and adopted by the conference and the governments.

The Provisions for the Regulation and Conduct of the African Air Tariff Conference" is contained in an "AFRATC Handbook" which also includes the "Rules and Procedures of AFRATC". AFRATC is vested with exclusive authority for establishing air tariffs for travel within Africa which shall, whenever possible, be integrated within those developed by the relevant IATA Tariff Coordinating Conference.³⁴ If integration within IATA agreements is not achieved, AFRATC will apply the tariffs after approval by member governments in accordance with the provisions of the Convention.³⁵

With respect to tariffs to/from Africa, AFRATC will attempt to have its common position on tariff accepted at IATA tariff coordinating conferences failing which negotiations with affected non-AFRAA airlines will be sought. If an agreement cannot be achieved in the latter case, AFRATC "shall adopt specific tariffs to and from

33. Ibid., Article 8.

34. Provisions for the Regulation and Conduct of the African Air Tariff.

35. Ibid.

Africa and such tariffs shall be filed within all interested governments for approval."

AFRATC tariffs will only be adopted on a unanimous basis at the conference level,³⁶ unlike the requirement for only 80% approval by governments.

AFRATC shall be managed by conference officials comprising a Chairman and Vice-Chairman, elected from among AFRAA member airlines, and a Secretary supplied from among the staff of AFRAA.³⁷ The AFRATC budget shall be prepared by AFRAA and approved by the AFRAA General Assembly, and be apportioned from contributions made to AFRAA by member airlines.³⁸

The "take-off" of the AFRATC has been considerably delayed primarily because the twenty-five ratifications required to bring the convention into force have³⁹ not been attained. It is usual, however, for ratification of international conventions to take a great deal of time before entering into force.

Guildman⁴⁰ suggests two main conditions for

36. Ibid., Article IX.

37. Ibid., Article X.

38. Ibid., Article XI.

39. Supra, note 31, Art. 12(1).

40. Werner Guidman, Current Legal Problems, 1974 Vol. 27,

success in international legislation: positively, the need for the legislation must be felt by the community; and negatively, obstacles and resistance must not become prohibitive. Records can attest to the existence of the first criteria with regard to the AFRATC Convention. It received ten signatures at the end of the plenipotentiaries conference. Since then, however, some obstacles have appeared to stand in the way of sufficient ratifications being attained.

Early on, objection was raised to article 7 of the Convention which stipulates that tariffs fixed by AFRATC enter into force when four-fifths of the member governments approve them. Some members would prefer approval by unanimity among governments.⁴¹ AFRAA has attempted to circumvent this problem by requiring, in the Tariff Handbook, for unanimity at airlines level,⁴² expecting that delegates would have consulted their governments before voting on proposed tariffs.

Another obstacle relates to the demarcation of conference areas since some states already participate in IATA Conference areas that are partially outside Africa, in

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p. 233 at p. 234.

41. Supra, note 30.

42. Ibid.

particular certain North African states.⁴³

Also there are states who were predisposed towards a purely AFRAA mechanism and resent machinery deriving its authority from states.⁴⁴ There is, additionally, some tension regarding AFRAA's extent of control and management of AFRATC.⁴⁵ Another factor is that AFCAC member states governments may not have been adequately briefed on the import and urgency of taking quick action on this matter. One must also, however, take into account bureaucratic lethargy and indolence in assessing the reasons for this situation. Both AFCAC and AFRAA have regularly passed resolutions urging member governments to ratify the Convention.⁴⁶

43. Minutes of the AFRAA, 14th Annual General Assembly held in Addis Ababa, April 1982, see in particular the Report of the Executive Committee Doc. AGA 14/3 at p. 2.

44. Supra, note 30.

45. Ibid.

46. See AFRAA Res. AGA 14/1, AFRAA Res. AGA 16/2 and supra, note 30.

6.4 Activities of AFRATC to Date

With the Convention on AFRATC far removed from ratification, the Conference cannot meet in formal session. Cognisant of this handicap the 58th Meeting of the AFRAA Executive Committee directed AFRAA to convene a preliminary meeting of AFRATC to 'test the functioning of the Conference'. This meeting took place in September 1982 in Nairobi and was considered a success. Among its achievements was the election of office bearers for the Conference, adoption of a revised Tariff Handbook, Agreement on harmonised positions on proration aspects for submission to the 30th Annual General Prorates meeting of IATA and the setting up of a Yield Improvement Programme Committee for the African region.⁴⁷

AFRAA was encouraged by this development and further meetings of AFRATC were held on an experimental basis in July 1983 and September 1984 in Nairobi. On both occasions, frustration was expressed with regard to the unratified status of the Convention on AFRATC and its implications for African civil aviation.⁴⁸ A programme

47.. Supra, note 30.

48. Ibid., also AFRAA Report on the Third Meeting of Experimental AFRATC.

for intensifying the campaign to lobby aeronautical authorities for early ratification of this Convention was designed at the 3rd Experimental AFRATC Meeting and entrusted to AFCAC for implementation. Airline participants also undertook to do their utmost in this respect.⁴⁹

AFRATC, therefore, continues to function more or less as an adjunct of the Traffic Committee of AFRAA focusing on what primarily is that committee's work programme.

6.5 Anti-Trust Implications of AFRATC's Activities

In an earlier chapter,⁵⁰ when considering the anti-trust implications of some of IATA's activities, it was conceded that IATA's ratemaking machinery could have anti-competition potential in the marketing of air transportation. By analogy, the same characteristic is inherent in the proposed AFRATC tariff negotiation machinery.

However, within Africa, AFRATC's activities have the explicit approval of African governments, who did, after all, initiate and authorise the establishment of AFRATC and any decisions taken by AFRATC pursuant to its legal mandate

49. Supra, notes 30.

50. Supra, Chapter 1, p 40.

under the Convention would, by necessary implication at least, be immunised against legal action in the event that any African states party to the Convention have anti-competition laws that would prohibit price-fixing in the marketing of air transport services.

In the circumstances, it would most likely be in relation to the 'effects on commerce'⁵¹ principle, postulated in the Laws of the United States,⁵² that the issue of the anti-competition potential of AFRATC's price-fixing activities could be raised.

The possibility could arise where, in the event that a U.S. airline was unable to offer interline fares for travel on sectors within Africa, other than those approved under the AFRATC machinery, such an airline, or a passenger, might pursue treble damage claims against AFRATC (which has a legal personality distinct from its member airlines). Admittedly, the likelihood of such litigation being initiated would be deterred by the practical difficulties of enforcing such a claim. The United States has, in fact,

51. Ibid.

52. With respect to the position in Europe, Dag Hamarskjöld has observed that it is only with respect to the EEC and German anti competition laws possessing doctrines akin to "the effects on commerce" principles that the application of extra-territorial legislation in air transportation is a possibility; see Hamorskjöld, op.cit., p. 97.

admitted the limitations posed to the effective application of extra-territorial jurisdiction by conceding that:

"the U.S. anti-trust laws should be applied to overseas transactions where there is a foreseeable effect on the United States commerce; and consistent with these ends, it should avoid unnecessary interference with the sovereign interests of foreign nations".⁵³

This admission takes cognisance of comity considerations, whereby nations accord deference to the sovereignty of other states, by avoiding such interference in the internal affairs of other states as could arise were claims such as those envisaged under the 'effects on commerce' principle pursued indiscriminately. Further means for depriving any practical impact from judgements rendered pursuant to extra-territorial claims would be for African governments to enact blocking statutes similar to those passed by some European countries, such as UK and France,⁵⁴ to combat the application by the United States of its extra-territorial legislation.

53. The Anti-Trust Guide for International Operations drafted by the Anti-Trust Division of the United States Department of Justice.

54. Hamarskjöld, op.cit., p. 105.

6.6 AFRAA's Policies on Traffic Rights

While cognisant that air transport agreements through which traffic rights are exchanged, are strictly the prerogative of governments, AFRAA has nonetheless taken a pragmatic interest in the evolution of policies in this area and has sought a common position on Traffic Rights to be conveyed to member airline governments for consideration in the negotiations of traffic rights.

In the forums of AFRAA, it has been articulated that AFRAA member airlines being government owned should exert some influence towards the adoption of policies that would contribute to the improved performance of the carriers. In an interesting commentary on the potential of airlines from developing countries to influence the actions of their governments within the regulatory sphere, Geoffrey Lipman of IATA has pointed out the high leverage possessed by these carriers insofar as their shareholders (are the national governments who consider these carriers to be vital economic assets.⁵⁵ Naturally the viewpoints held by the managements of these carriers on matters such as the

55. Lipman, G., "Regulation - An Industry Perspective", paper presented to the Joint IATA/AFRAA Seminar for AFRAA Member Airlines Chief Executives, held in Nairobi, Kenya, September, 1984.

policies to be pursued in the regulatory field would be carefully considered by the governments.

The search for a consensus within AFRAA for a common understanding on the exchange of traffic rights revealed two opposing viewpoints. These involved a conflict of interest between carriers placing emphasis on the operation of Third and Fourth traffic routes with those carriers attempting to operate viable continental or subregional routes requiring access to Fifth and Sixth Freedom traffic.

The former group sought a compromise by way of arrangements involving payment of monetary compensation for operating Third, Fourth and Fifth Freedom traffic routes in excess of those available on a reciprocal basis. The latter group opposed this approach and, at one stage, unsuccessfully moved an Assembly resolution to prohibit the payment of royalties amongst member airlines.⁵⁶

A compromise was finally attained at the Fifteenth Annual General Assembly of AFRAA held in Abidjan, Ivory Coast in April 1983, which adopted a resolution on principles to govern the exchange of traffic rights. Ostensibly, in view of its emphasis on considerations of the

56. See generally, Minutes of AFRAA, Annual General Meetings numbers 13, Khartoum, April 1981, p. 5 and 15, Abidjan, April, 1983.

interests of third and fourth freedom carriers, the Resolution is aimed primarily at operation of services within Africa.

In part the resolution reads as follows:

- a) Third and Fourth Freedom traffic: to be exchanged freely on a reciprocal basis. Failing reciprocal exchange, one service per week shall be granted freely in the interest of developing the inter-African network;

For more than one free weekly frequency, the carrier shall be encouraged to enter into commercial arrangements which may include monetary compensation.

- b) Fifth Freedom: to be granted on reciprocal basis having regard to the interests of Third and Fourth traffic carriers on the route. Where reciprocity is not attainable similar principles as in (a) above to apply.

In relation to air services operated to and from Africa, the inequities in the competitive position and other advantages between African and, in particular, European carriers makes the exchange of traffic rights on a reciprocal basis largely illusory and often means that even where this is attempted the African carriers are unable to operate their allocated services.

Semret Medhanie of AFRAA has made an interesting proposal⁵⁷ for optimising the utilization of such

57. Medhanie, Semret; Shortcomings of the African Air Services and Ways and Means to Ensure their Improvement", paper presented to the UNECA Conference

"fallow" traffic rights. His proposal involves the allocation of 'Spheres of Influence' among groups of airlines within AFRAA who would pool their equipment and other resources to jointly exploit these traffic rights, with each group concentrating its operations in a defined 'sphere' based on geographical proximity, but obviously taking into account existing important air links in different spheres which must be serviced in the national interest. He favours the implementation of such a plan through a multilateral international governmental agreement, although it could be pursued on an interim basis through bilateral mechanisms. In the opinion of this writer, this plan could conceivably be discussed and implemented in the context of the 'community of interest plan' which derives from ICAO recommendation A24-12 on practical measures to provide an enhanced opportunity for developing states with a community of interest to operate international air transport services. The plan permits a state to designate the airline of another state to operate the services agreed between the first state and a third state.

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on African Air Freedoms, Mbabane, Swaziland, November 1984. Mr. Medhanie is Secretary General of AFRAA.

6.7 Conclusion

AFRAA has played an appreciable role as a forum primarily for Africa's national airlines to meet on a regional basis and seek to influence the international machinery for the establishment of international fares and rates and to forge a common position among its members on proposals related to fares and rates.

It is regrettable of course that the functioning of AFRATC continues to be delayed pending ratification of its founding Convention. The expectations of African carriers for stable and harmonised tariffs has thereby suffered great disappointment. Efforts continue, however, to convince governments to ratify the Convention and it is on the fruits of these efforts that future hopes are now focused.

In the meantime, 'AFRATC Experimental', as it has come to be known, will continue to meet and undertake functions that are ordinarily accomplished within the work programme of the Traffic Committee of AFRAA.

AFRAA's involvement with respect to seeking influence over governmental regulatory policies in the field of traffic rights has been most effective and is reflected in the possible adoption by AFCAC of recommendations in favour of introducing the monetary compensation factor in the exchange of traffic rights among African states.

POSTSCRIPT

It is evident that past efforts have not met the desire expressed by many states for a homogenous policy in the economic regulation of air transport. Multilateral machinery for such a role does not appear attainable in the coming decades, in any case, as long as the diversity in state policies towards economic management of national resources continues, not to mention the enormous gap in the competitive positions of the world's airlines.

A role for regional co-operation in the economic sphere of air transport has, therefore, been rendered inevitable if only to fill this gap. The policies and activities of these regional organisations will be important factors in the future evolution of the aviation regulatory environment. Our discussion has focused on only two aspects of such cooperation within Africa, that is, capacity and tariff regulation.

AFCAC is, perhaps understandably, committed to policies that at least in the short run must remain restrictive, particularly towards non-African states because of AFCAC's commitment to the continued viability of African carriers, who, in the long run, are the only guarantee for continued development of intra-African air routes and to a large measure for air routes between points in Africa and

beyond.

The policies that AFCAC has recommended inevitably combine an emphasis on the interests of Third and Fourth Freedom carriers with the dual approval method of tariff determination. To serve the objective of improving the intra-African air network, however, this policy has been supplemented with proposals for extending Fifth Freedom traffic rights on a reciprocal basis even where monetary compensation is the only means for attaining reciprocity. To encourage carriers to develop and operate Fifth Freedom routes, however, it would be preferable if such compensation were to be paid out of profits made on the operations on that route and should not be based merely on revenues earned. Other equally pragmatic proposals have been the promotion of joint ventures as a means for expanding the African air transport network.

AFCAC's evaluation of the most beneficial policies for African air transport has not yet been concluded. The studies presently being pursued in collaboration with ITA¹ could well propose selective liberalisation in the exchange of traffic rights. Certain African states, particularly in North Africa, have a significantly more developed air transport market and better equipped airlines

1. See Chapter 5, supra, p. 12.

than the rest and could comfortably withstand competition within a moderately liberalised environment. For example, Morocco informed the ICAO 23rd Assembly (1980) that from 1970, it had moved from the protectionist policy, that was adopted just after independence, towards a liberal policy.² This move was said to be justified by the Governments concern to develop tourism and by the national airlines increasing size and strength which enabled it to withstand competition.

With respect to non-scheduled air transportation AFCAC has proposed to deal with the issue after ICAO has completed its studies in this area. The present policies which are based predominantly on national regulations have promoted an ad hoc approach to admission of charters and have at least guaranteed a substantial measure of protection for the national carrier. Such an advantage could disappear if charter policies were liberalised indiscriminately. However, for those states that are significant tourist destinations, they might decide, once they have developed adequate capacity and marketing capacity that a measure of liberalisation in their charter policy is beneficial.

Turning to AFRATC, it is regrettable that the proposed tariff determination mechanism has been moribund

2. ICAO Doc. 9317 - A23 - Min. P/2.

for nearly five years. This is attributable to the enabling convention having failed to achieve sufficient ratifications to activate AFRATC. One may, in fact, question the benefit of establishing AFRATC by a multistate convention. It is arguable that the possible extra-territorial reach of the United States or European anti-competition laws does not pose as serious a threat to an African multilateral tariff machinery as was originally considered. The need for greater protection for the weaker airlines in the third world is no longer seriously questioned. In the circumstances, it might be more useful to abandon the attempt to create AFRATC by a formal OAU legal instrument and simply permit the airlines within the framework of AFRAA to determine tariffs for approval by governments. To continue to await further ratifications at the present rate is to invite inquiry into Africa's commitment to a common air tariff negotiation machinery.

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LIST OF APPENDICES

- I. Constitution of AFCAC.
- II. Articles of Association of AFRAA.
- III. The Convention on the Establishment of the African Air Tariff Conference.
- IV. Provision for the Regulation and Conduct of the African Air Tariff Conference (AFRAA Tariff Handbook).
- V. Summary of the Proceedings and Decisions taken by the 3rd Meeting of Experimental AFRATC, Nairobi, 18-21 September 1984.
- VI. Capacity Clause in the AFCAC Model Bilateral Between an AFCAC Member State and a Non-Member State.
- VII. Capacity Clause in the AFCAC Model Bilateral Between AFCAC Member States.
- VIII. AFCAC Declaration on Traffic Rights.

CONSTITUTION

1. The African Civil Aviation Commission (AFCAC) is an autonomous body and membership shall be open to African States members of ECA or OAU.
2. AFCAC is a consultative body and its conclusion and recommendations shall be subject to acceptance by each of the governments.

OBJECTIVES

3. The objectives of AFCAC are:
 - (a) to provide the civil aviation authorities in the member States with a framework within which to discuss and plan all the required measures of co-ordination and co-operation for all their civil aviation activities;
 - (b) to promote co-ordination, better utilization and orderly development of African air transport systems.

FUNCTIONS

- 4.1 The functions of AFCAC shall, in particular, include:
 - (a) formulating plans at the regional and sub-regional levels for the operation of air services within and outside Africa;
 - (b) carrying out studies of the feasibility of standardization of flying equipment and ground units servicing aircraft;
 - (c) carrying out studies of the possibility of integration of the policies of governments regarding commercial aspects of

air transport;

(d) carrying out studies of intra-African fares and rates with a view to adopting a structure conducive to the rapid growth of traffic in Africa;

(e) carrying out studies of regional or sub-regional air transport economic questions other than those mentioned in (b), (c) and (d) above;

(f) encouraging the application of ICAO standards and recommendations on facilitation and supplementing them by further measures aimed at greater facilitation of the movement by air of passengers, cargo and mail;

(g) fostering arrangements between States whenever this will contribute to the implementation of

(i) ICAO regional plans for air navigation facilities and services, and

(ii) ICAO specifications in the field of airworthiness, maintenance and operation of aircraft, licensing of personnel and aircraft accident investigation;

(h) fostering and co-ordinating programmes for the development of existing and future training facilities to cope with the present and future regional and sub-regional requirements for personnel in all fields of civil aviation;

(i) studying the need for collective arrangements for technical assistance in Africa with a view to obtaining the best possible use of all available resources, particularly those provided within the framework of the United Nations Development Programme.

4.2 AFCAC shall, in the exercise of its functions, work in close consultation and

co-operation with OAU, ECA, ICAO and any other governmental or non-governmental international organization concerned with civil aviation.

ORGANIZATION AND WORKING ARRANGEMENTS

AFCAC shall meet in ordinary plenary session once every two years.

At each ordinary plenary session, AFCAC shall elect its President and four Vice Presidents, one for each sub-region, who will constitute the Bureau of AFCAC.

Extraordinary plenary meetings may be convened by the Bureau and must be convened if the Bureau receives a request from two-thirds of the AFCAC members.

8. At each plenary session, AFCAC shall establish its work programme for the period until the following ordinary plenary session.
9. The direction, co-ordination and steering of the work programme between ordinary plenary sessions shall be the responsibility of the Bureau of AFCAC.
10. AFCAC shall determine its own internal organization, arrangements and procedures, including the formation of committees to study special aspects of civil aviation in Africa.
11. Member States should be represented at meetings of AFCAC by delegates senior in rank and competent in the field to be discussed for the authoritative handling of the problems.
12. There shall be established by AFCAC a Secretariat for organizing studies, meetings, maintenance of records and the like. The rules governing the recruitment and conditions of service of the staff be

determined by AFCAC. ICAO, during the initial period to be determined by AFCAC, shall have the following responsibilities:

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(i) to provide staff to carry out studies, organize meetings and undertake related activities;

(ii) to handle minutes, correspondence, etc.

AFCAC shall make full use of the experience and assistance of ICAO in conformity with the practice followed by the latter with similar international organizations.

FINANCIAL MATTERS

13. At each ordinary plenary session, AFCAC shall prepare and approve a budget of the direct costs of its activities, as indicated in the work programme for the ensuing years. AFCAC shall establish its own financial rules for assessment of members' contributions and control of expenditure. As regards the indirect costs, these shall be the responsibility of ICAO in accordance with the practice followed by ICAO in the joint financing field under Chapter XV of the Chicago Convention.

SIGNATURE, RATIFICATION AND WITHDRAWAL

14. The present constitution is open to signature by all States attending the Constitutive Conference of AFCAC and by all other independent African States members of the OAU or ECA.

The instruments of ratification shall be deposited with the Secretariat of the OAU which shall give notice of the date of deposit to AFCAC and all member States of AFCAC.

The present constitution shall be open for the signature of African States as of 17

January 1969 at the Headquarters of the OAU
in Addis Ababa.

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The constitution shall come into force provisionally as of 17 January 1969 and shall come into force definitively after ratification by twenty member States.

15. To withdraw from AFCAC, a State shall address a notification to that effect to the Secretariat of OAU which shall immediately notify AFCAC and all other members.

Withdrawal shall take effect one year from receipt of the notification.

AMENDMENT

16. This constitution may be amended by a two-thirds majority of all members.

ARTICLES OF ASSOCIATION

APPENDIX II

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(As amended by the 13th Annual General Assembly, Khartoum
30 March - 2 April 1981)

ARTICLE I

NAME OF THE ASSOCIATION

This Association shall be known as the "AFRICAN AIRLINES ASSOCIATION".
The abbreviation of both the English and French titles shall be
"AFRAA".

ARTICLE 2

LEGAL STATUS

- 2.1. The Association shall be an international body incorporated at the location of its Headquarters and shall be recognized or registered in each member state as such; and
- 2.2. It shall be a legal entity and shall have the power :
- (a) to own property or rights, real or personal, movable or immovable or any title or interest therein and to alienate sell, exchange, manage, develop, lease, mortgage pledge or otherwise deal therewith in such manner as the Association may determine;
 - (b) to enter into contracts, agreements or other instruments;
 - (c) to sue or be sued;
 - (d) to borrow money for the purpose of the Association;
 - (e) to have perpetual succession and a common seal;
 - (f) to carry out the aims and objectives of the Association and
 - (g) to do all such other things as are incidental or conducive to the attainment of the aims and objectives and the exercise of the powers of the Association.

ARTICLE 3

OFFICIAL LANGUAGES

The official languages of the Association shall be French and English.

ARTICLE 4

HEADQUARTERS

The Head Office of the Association shall be at Nairobi. It may be transferred to any other African city as the General Assembly, by a vote of two-thirds majority, may decide.

ARTICLE 5

AIMS AND OBJECTIVES

The aims and objectives of the Association shall be:

- 5.1. to promote and develop safe, reliable, economical and efficient air transport services to, from, within and through Africa and to study the problems connected therewith;
- 5.2. to foster closer co-operation among African air transport enterprises with the view to achieve their unity in but not limited to:
 - (a) co-ordinating commercial and other related activities for the common benefits of African peoples, governments and member airlines;
 - (b) strengthening economic and technical co-operation, particularly in matters relating to policy co-ordination in the selection of aircraft and equipment and encouraging the use of maintenance and training facilities and equipment of member airlines in preference to services, facilities and equipment of non-member airlines;
 - (c) promoting co-operation in the field of ground handling, joint sales promotions, interline and joint representation;
 - (d) the pooling of equipment and other resources for the use and benefit of member airlines, and
 - (e) the performance of all such other activities in promoting inter-African unity and co-operation aimed at reducing cost and protecting common interests of African peoples, governments and member airlines.
- 5.3. to promote and foster inter-African commerce and tourism;
- 5.4. to serve as a common forum for the articulation of the views of member airlines on matters and problems of common interest and unity and defend such interests at international conferences;
- 5.5. to act as a conciliatory body in the settlement of disputes and differences among members.

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- 5.6. to provide assistance in obtaining easier movement of passengers, cargo, mail and aircraft of member airlines and to promote the more rapid development of air navigation, communication and air transport facilities in Africa;
 - 5.7. to work closely with organizations specialised or generally interested in the development of African air transport services within Africa and between Africa and other continents;
 - 5.8. to establish methods for collection and analysis of data, and preparation and issuance of studies and/or reports on the economic and operating problems of member airlines; and
 - 5.9. to do all other acts which are incidental, auxiliary or conducive to or are capable of being carried out in conjunction with the provision of air transport services, to, from or within Africa.

ARTICLE 6

MEMBERSHIP

6.1. QUALIFICATION FOR MEMBERSHIP

Any airline operating international air services in the carriage of passengers, and/or cargo and/or mail which is registered in a state eligible of membership of the Organization of African Unity (OAU) and whose capital of not less than 51% is owned by such state or group of such states, or the citizens of such state or group of such states, shall be eligible for membership of the Association.

- 6.2. Any airline operating domestic air services in the carriage of passengers, and/or freight and/or mail, whose annual production is no less than two million Ton/km, registered in a state eligible for membership of the Organization of African Unity (OAU) and whose capital of not less than 51% is owned by such state or groups of such states, shall be eligible for associate membership of the Association.

6.3. APPLICATION FOR MEMBERSHIP

Application for membership shall be submitted on the appropriate application form to the Secretary General, who after scrutinizing the application, shall submit to the Executive Committee for its decision. Any applicant whose application is rejected shall have the right to appeal to the General Assembly which shall decide the matter by a two-thirds majority vote of members present and voting.

6.4. FOUNDER MEMBERS

The signatories of the Memorandum of Agreement drawn up at ACCRA, Ghana, on the 4th of April, 1968, shall constitute the founder members of the Association.

6.5. SUSPENSION AND TERMINATION

It shall be the policy of the Association to encourage every African Airline to join and remain in the Association. Discipline will be handled as follows:

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Committee that a member is in breach of these Articles of Association, or decisions and resolution of the Association or no longer fulfills the requirements for membership, the Executive Committee shall contact the member concerned with a view of obtaining a full explanation.

(b) If the Executive Committee is not satisfied with the Member's explanation, the matter shall be brought to the attention of the General Assembly, which may, after hearing the explanation of the Member, by a resolution passed by a majority of two-thirds of the total membership, cause the temporary suspension of the member. The period of suspension shall be determined by the General Assembly.

(c) If the suspended Member fails to remove the cause for suspension within the time fixed by the General Assembly, the General Assembly may, by a resolution passed by a majority of two-thirds of the total membership, cause termination of the Membership.

(d) The decision of the General Assembly on the suspension or termination of membership shall be final.

(e) The causes for termination shall include, but not limited to, the following:

(i) the continued failure of a member to fulfill the requirements for membership or to abide by the rules and regulations as defined in these Articles, by laws or resolutions of the General Assembly;

(ii) if a member is declared bankrupt or ceases to hold the authority to operate as an air carrier;

(iii) if the state under the flag of which a member is operating is excluded from membership of the Organization of African Unity;

(iv) repeated failure to meet its financial obligations to the Association.

6.6. WITHDRAWAL

A member may withdraw from the Association by giving notice by registered mail to the Secretary General. Such withdrawal shall take effect six months after the receipt of such notice by the Secretary General, but shall not discharge the member from any of the obligations to the Association for membership fees or other dues which are owing by such members for the periods of its membership. Any amount previously paid shall not be refundable.

6.7. OBLIGATIONS AND DUTIES OF MEMBERS

The obligations and duties of members shall be:

- (a) to implement the provisions of these Articles of Association with a view of achieving its aims and objectives;
- (b) to implement the decision and resolutions of the General Assembly;
- (c) to participate in activities of the Association;

- (d) to pay membership fees and other dues and contributions; and
- (e) to perform such assignments as may be directed by the General Assembly or the Executive Committee.

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ARTICLE 7

ORGANS OF THE ASSOCIATION

The Organs of the Association shall be the General Assembly, the Executive Committee, the Secretariat and the Standing Committees.

ARTICLE 8

GENERAL ASSEMBLY

8.1. AUTHORITY:

The highest authority of the Association shall vest in the General Assembly.

8.2. POWERS OF THE GENERAL ASSEMBLY:

Without limiting the generality of the foregoing, the General Assembly shall have power to:-

(a) elect members of the Executive Committee;

(b) confirm the appointment of the Secretary General;

(c) receive and consider annual and other reports of the Executive Committee, Secretary General, Standing Committees, and appointed ad-hoc Committees;

(d) approve annual budgets, membership fees and dues and any other financial contributions;

(e) appoint, on the recommendation of the Executive Committee, Auditors for the Association;

(f) approve audited Annual Statements of Accounts;

(g) receive nomination and determine the membership of standing and any ad-hoc committees;

(h) receive appeals on rejection of membership;

(i) determine the venue and date of the General Assembly meetings;

(j) approve proposed amendments to the Articles of Association and other rules and procedures;

(k) transact such other business as may be properly on the Agenda for the meeting or as may be proposed at any time by the Executive Committee and/or Secretary General. Any other matter may be considered at the General Assembly only upon two-thirds vote of the members present.

8.3. COMPOSITION OF THE GENERAL ASSEMBLY:

The General Assembly shall be composed of duly accredited representatives of all member airlines.

8.4. QUORUM:

- (a) A majority of the members of the Association shall constitute a quorum of any General Assembly unless otherwise provided in these Articles.
- (b) If a quorum cannot be obtained to hold the first meeting, the Secretary General shall send a report on the situation to all members and shall call a second General Assembly meeting to be held not less than thirty (30) days from the date of such report.

8.5. MEETINGS OF THE GENERAL ASSEMBLY:

(a) Annual General Assembly

General Assembly meetings shall be held annually at a place and time determined by the General Assembly. The Agenda for the Annual General Assembly shall be prepared by the Executive Committee and circulated to members not less than thirty (30) days prior to the date of the meeting.

Members wishing to submit items for inclusion on the Agenda of the Annual General Assembly must do so forty five (45) days prior to the date of the meeting.

(b) Extra-ordinary Meetings

Extra-ordinary meetings of the Association may be called at any time:-

- (i) at the request of one-third of the members, made in writing, to the Secretary General with a statement of the proposed agenda; or
- (ii) by the Executive Committee; or
- (iii) by the Secretary General in consultation with the President.

8.6. VENUE AND DATE FOR EXTRA-ORDINARY MEETINGS:

The place and date for extra-ordinary meetings of the Association shall be determined by the Executive Committee or the Secretary General in consultation with the President.

The Secretary General shall notify members of an Extra-ordinary Meeting of the Association, giving the place and date, at least twenty-one (21) days before the date of such meeting, together with the Agenda.

8.7. VOTING RIGHTS AT GENERAL ASSEMBLY MEETINGS:

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Each member airline shall have the right to cast one vote only by its duly accredited representative.

8.8. DECISIONS OF THE GENERAL ASSEMBLY AND PROCEDURE FOR MEETINGS:

- (a) Unless otherwise specified in these Articles of Association, the decision of the General Assembly shall be arrived at by a simple majority of the members present and voting.
- (b) The procedure for meetings of the General Assembly shall be contained in the Rules and Procedure for the Conduct and Regulation of the General Assembly.

8.9. ATTENDANCE OF OBSERVERS AT GENERAL MEETINGS:

The attendance of Observers at meetings of the General Assembly shall be decided by the Executive Committee.

8.10. CHAIRMAN OF THE GENERAL ASSEMBLY:

The President shall preside at all meetings of the General Assembly. In the absence of the President, the First Vice President and in the absence of the First Vice President, the Second Vice President shall preside at all such meetings.

In the absence of all the above named officers, a member of the Executive Committee, if present, or any duly accredited representative of a member airline present at the meeting may be elected to preside over the General Assembly. The Secretary General shall act as Secretary of the Meeting. In the absence of the Secretary General, the General Assembly may appoint a member of the Executive Committee to act as Secretary for the meeting.

- 8.11. A Member may certify in writing to the Secretary General that the provisions of a resolution adopted by the General Assembly requires the said Member, in complying with the provisions of such resolution, to contravene a resolution of IATA, or a law, regulation, or official policy of the State in which the said Member is registered. Upon receipt of such certification, the Secretary General shall notify all other Members that the Member has so certified, and the Secretary General shall declare the said resolution suspended. The said resolution shall be placed on the Agenda of the next General Assembly for further consideration.

ARTICLE 9

EXECUTIVE COMMITTEE

9.1. COMPOSITION:

- (a) The Executive Committee shall consist of seven Members: The President, First Vice President, Second Vice President and four Committee Members.
- (b) The Secretary General shall attend all meetings of the Executive Committee.

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9.2. ELECTION TO THE EXECUTIVE COMMITTEE:

All Members of the Executive Committee shall be elected at and by the Annual General Assembly from among the Chief Executive Officers of Member airlines, in accordance with the By-Laws.

9.3. POWERS AND DUTIES OF THE EXECUTIVE COMMITTEE:

The following powers and duties shall vest in the Executive Committee:-

- (a) General supervision of the affairs, funds and property of the Association.
- (b) Formulation and determination of policies within the framework of these Articles, By-Laws and resolutions adopted by the General Assembly.
- (c) Appointment of the Secretary General.
- (d) Enforcement of the provisions of the Articles of Association.
- (e) Such additional powers as may be delegated to it by the General Assembly and perform such other functions as may be necessary or desirable for the realization of the aims and objectives of the Association.

9.4. MEETINGS OF THE EXECUTIVE COMMITTEE:

(a) Ordinary Meetings

Ordinary meetings of the Executive Committee shall be held at least three (3) times a year at a place and time to be determined by the Secretary General in consultation with the President. The Agenda for the meeting shall be prepared by the Secretary General in consultation with the President, and shall be circulated to members at least thirty (30) days in advance of the meeting.

(b) Extra-Ordinary Meetings

Extra-Ordinary meetings of the Executive Committee may be called at any time by the Secretary General in consultation with the President or at the request of at least a quorum of the membership of the Committee. The Agenda, time and venue for the extra-ordinary meetings of the Executive Committee shall be communicated to members at least twenty-one (21) days before the date of the meeting.

9.5. QUORUM FOR MEETINGS OF THE EXECUTIVE COMMITTEE:

Four members of the Executive Committee including the President or First Vice President or Second Vice President shall constitute the quorum for Executive Committee meetings.

9.6. VOTING:

Each Member of the Executive Committee shall have and exercise one vote only. Whenever there is a tie in the voting, the President shall exercise a casting vote.

The business of the Executive Committee shall be transacted in accordance with its own Rules and Procedure, or as specified in the By-Laws.

ARTICLE 10

THE SECRETARIAT

- 10.1. There shall be a Secretariat headed by a Secretary General assisted in his functions by such staff as may be employed by the Association.
- 10.2. The Secretary General shall be appointed by the Executive Committee for a term of five years renewable at the end of each term for another term of five years.

10.3. POWERS AND FUNCTIONS OF THE SECRETARY GENERAL

The Secretary General shall be the Chief Executive and Administrative Officer of the Association. He shall perform his duties under the supervision and control of the Executive Committee. He shall in particular :

- (a) be responsible for the day to day management and control of the affairs, funds and property of the Association;
- (b) be responsible for the accounts and financial records of the Association, for the custody and protection of its funds;
- (c) be responsible for the establishment and functioning of a Planning Section;
- (d) co-ordination of the activities of the Standing Committees and ad-hoc Committees;
- (e) record the proceedings of the General Assembly and Executive Committee meetings authenticate and/or certify copies or extracts therefrom, and carry out such other duties and responsibilities as may be assigned to him by the Executive Committee and the General Assembly.

ARTICLE 11

STANDING AND AD HOC COMMITTEES

- 11.1. There shall be established such Standing and Ad-hoc Committees on various subjects as may be determined by the General Assembly upon the recommendation of the Executive Committee.
- 11.2. Rules and Procedures of the Standing and Ad-hoc Committees may provide for the manner in which their functions shall be carried out.

ARTICLE 12

BUDGET AND FINANCE

- 12.1. The Secretary General shall prepare a budget for the forecasted expenditures and revenue for the coming year. The budget proposal shall be circulated to member thirty (30) days prior to the Annual General Assembly.

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12.2. Annual membership fees and other dues shall be determined each year by the General Assembly.

12.3. Dues for all members shall be assessed and paid in United States Dollars or its equivalent in convertible currency. The Secretary General shall advise each member of the amount to be paid by the member soon after the determination of these dues by the General Assembly. Members shall be required to pay their dues not later than sixty (60) days from the date of receipt of the notification.

12.4. The fiscal year of the Association shall be the calendar year from 1st January to 31st December.

12.5. Any member in arrears of its dues for a period of six (6) months after the due date shall lose its right to vote in the General Assembly and the Executive Committee until the arrears have been paid. The General Assembly shall decide what other measures shall be taken against consistent failure by a member to meet its financial obligations to the Association.

12.6. Proof for non-payment of dues shall be furnished by the Secretary General supported by entries recorded in the accounts and records of the Association as well as those of the Auditors.

12.7. The Association may enter into an agreement or agreements with such countries as may be necessary providing for privileges normally granted to international organizations and the exemption of salaries paid to the Association Staff from local taxation.

ARTICLE 13

BY-LAWS

The General Assembly, on the recommendation of the Executive Committee, shall approve such By-Laws as the General Assembly may deem fit and essential for the orderly transaction of meetings and the affairs of the Association.

ARTICLE 14

AMENDMENTS OF ARTICLES

14.1. These Articles may be amended by a resolution of the General Assembly passed by two-thirds of the total membership.

14.2. Copy of the proposed amendment of these Articles shall be forwarded by registered mail to each member at least sixty (60) days before the date of the General Assembly meeting at which the amendment is to be discussed.

ARTICLE 15

DISSOLUTION

15.1. The Association may be dissolved by a resolution passed at the General Assembly meeting of all members being required to constitute a quorum.

15.2. Notice of a General Assembly to dissolve the Association shall be served to all members at least six (6) months before the date of the General Assembly meeting at which the dissolution is to be discussed.

- 15.3. If a quorum cannot be obtained to hold a meeting to dissolve the Association, the Secretary General shall send a report on the situation to all members and shall call a second General Assembly Meeting to be held after a period of ninety (90) days to either maintain or dissolve the Association. The quorum for this second General Assembly shall be the number of members present and voting. Decision shall be taken by two-thirds majority of such members present and voting.
- 15.4. On dissolution, all property of the Association shall be sold and the proceeds of such sale and all cash in hand shall, after payment of all debts and liabilities of the Association, be distributed to the members in proportion to their total contribution to the Association.

ARTICLE 16

NOTICES

All notices to Members shall be sent to the duly accredited representative of each Member at its registered Head Office, or at such other address as may be notified from time to time to the Secretary General.

ARTICLE 17

AFRAA COMMON SEAL

- 17.1. The Secretary General is empowered to order a common seal for AFRAA as provided in Article 2.
- 17.2. The Common Seal of the Association shall be kept in such custody as the Executive Committee directs and shall not be used except upon the order of the Executive Committee.
- 17.3. The Common Seal of the Association shall be authenticated by the signature of the President, or of the one member of the Executive Committee duly authorized by the Executive Committee in that behalf, or of the Secretary General or any other member of the Secretariat Staff duly authorized by the Executive Committee in that behalf.
- 17.4. The Common Seal of the Association when affixed to any document and duly authenticated under this authority shall be judicially and officially noticed, and unless and until the contrary is proved, any necessary order or authorization of the Executive Committee under this authority shall be presumed to have been duly given.

THE CONVENTION ON THE ESTABLISHMENT OF
THE AFRICAN AIR TARIFF CONFERENCE

APPENDIX III

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THE STATES PARTIES TO THIS CONVENTION

CONSIDERING the urgent need to improve the existing worldwide tariff coordinating machinery to respond more adequately to the specific needs of air transportation in Africa;

CONSIDERING that the establishment of tariffs in respect of international air services through bilateral negotiations is not likely to achieve the objective of African States to realize the optimum development of air transport in Africa;

CONSIDERING the obvious advantages of a multilateral tariff fixing and coordinating machinery in respect of international air services and recognizing the efforts made by the African Airlines Association (AFRAA) to the realization thereof;

CONSIDERING Resolution CM/Res.739 (XXXIII) on Civil Aviation in Africa of the Thirty-Third Ordinary Session of the OAU Council of Ministers, meeting from 6 to 20 July 1979 in Monrovia;

CONSIDERING the relevant provisions in the Charter of the Organization of African Unity on cooperation between Member States and bearing in mind the Chicago Convention on International Civil Aviation and the Constitution of the African Civil Aviation Commission;

HAVE AGREED AS FOLLOWS:

ARTICLE 1

ESTABLISHMENT OF THE CONFERENCE

The Contracting States hereby establish by this Convention The African Air Tariff Conference (hereinafter referred to as "The Conference") and authorize the African Airlines Association

.../2.

to implement the establishment of the said Conference and to organize and coordinate its activities in accordance with the provisions of this Convention.

ARTICLE 2

OBJECTIVES

The objectives of the Conference shall be to ensure an orderly growth of air transport services to, from and within Africa, and to that effect, the Conference shall:

1. consider and act upon all tariff matters relating to scheduled air transport services of concern to its members;
2. study, advise and coordinate all tariff matters relating to non-scheduled air transport services of concern to its members;
3. act as a machinery for negotiating all tariff matters relating to air transport services of concern to its members.

ARTICLE 3

MEMBERSHIP

1. The members of the Conference shall be Airlines operating international air transport services for the carriage of passengers, cargo and mail registered within OAU Member State or in a State eligible to OAU membership in which at least 51% of the capital investment is held by such State or group of States or by one or several nationals of such State.

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2. Associate members of the Conference shall include airlines operating domestic air transport services for the carriage of passengers, cargo and mail registered within OAU Member State or in a State eligible to OAU membership in which at least 51% of the capital is held by such State or group of such States or by one or several nationals of such State.

ARTICLE 4

OBSERVERS

1. The Organization of African Unity, the African Civil Aviation Commission and the United Nations Economic Commission for Africa shall attend and participate in all meetings of the Conference without voting right. To this effect, they shall receive in advance the Draft Agenda and supporting documentation.
2. The African Civil Aviation Commission shall report on its participation to all States parties to the Convention.
3. The Conference may invite other observers which may include worldwide and regional airline organizations to attend its meeting.

ARTICLE 5

FUNCTIONS OF THE CONFERENCE

The functions of the Conference shall be to:

1. establish air tariffs at a reasonable level, taking into account all relevant factors, particularly the operational costs, type of service, reasonable profit as well as the tariffs of other airlines operating similar routes;

2. establish its organizational structure and committees, and conduct its business in accordance with such rules and procedures as it may establish.

ARTICLE 6

ESTABLISHMENT OF TARIFFS

1. For the purpose of this Convention, the term "tariff" shall mean the price to be paid for the carriage of passengers or cargo and the conditions under which it applies as well as the prices or charges and conditions for both agency services and other auxiliary services, with the exclusion, however, of remuneration and conditions applicable to the carriage of mail.
2. Tariffs adopted shall be submitted to the Contracting States for their approval, sixty (60) days before the proposed date of their coming into force.
3. Air tariffs negotiated with third parties shall be submitted to Contracting States for their approval.

ARTICLE 7

APPROVAL OF TARIFFS

1. If more than four fifths of the Contracting States approve the tariffs adopted by the Conference all Contracting States shall be bound by such tariffs. Approval shall be given within forty-five (45) days of filing with the Aeronautical Authorities of the Contracting States. Approval shall be presumed if notification to the contrary has not been received within the prescribed period.
2. The approved tariffs shall remain applicable until new tariffs come into force.

ARTICLE 8

HARMONIZATION

Each Contracting State shall take the necessary steps to harmonize with the provisions of this Convention the tariff clauses contained in any existing bilateral agreement to which it is a party.

ARTICLE 9

COMPLIANCE AND ENFORCEMENT

ns Contracting States shall ensure that all carriers operating to and from their territories shall strictly comply with the tariffs adopted and approved in accordance with the provisions of this Convention and, bearing in mind the compliance rules and procedures established by the Conference, shall impose appropriate penalties for any breach or violation of the said tariffs.

ARTICLE 10

SIGNATURE

This Convention shall be open for signature by OAU Member States after its adoption by the Diplomatic Conference until it enters into force in accordance with the provisions of Article 12.

ARTICLE 11

RATIFICATION

This Convention shall be subject to ratification by the Signatory States. These instruments of ratification shall be deposited with the African Civil Aviation Commission.

ARTICLE 12

ENTRY INTO FORCE

1. This Convention shall come into force on the thirtieth day after the date of deposit of the twenty-fifth instrument of ratification or approval.
2. Thereafter it shall be open for adherence by OAU Member States or States eligible for OAU membership.
3. This Convention shall come into force for each State which shall ratify, or adhere to it, on the thirtieth day after the instrument of ratification or adherence has been deposited.

ARTICLE 13

DENUNCIATION

1. Each Contracting State may, at any time, denounce this Convention through a notification addressed to the Secretariat of the African Civil Aviation Commission.
2. Such denunciation shall become effective twelve months after receipt of the notice of the denunciation by the Secretariat of the African Civil Aviation Commission; provided, however, that the obligations of such Contracting States resulting from the agreed tariffs shall continue to be effective until the expiry of the validity of such agreed tariffs.

ARTICLE 14

AMENDMENT TO THE PROVISIONS OF THE CONVENTION

1. Any proposed amendment to this Convention shall be submitted to the Secretariat of the African Civil Aviation Commission and in order to be considered, shall be supported by at least one third of the Contracting States.

2. Within ten days of receipt of the support of one third of the Contracting States, the Secretariat of AFCAC shall inform the Secretariat of the Organization of African Unity who shall determine the modalities for convening a Diplomatic Conference to consider the proposed amendment.
3. Any amendment to the provisions of this Convention shall be approved by a majority of two thirds of the Contracting States, and shall become effective when ratified by two thirds of the Contracting States.

ARTICLE 15
SETTLEMENT OF DISPUTES

Any dispute among Contracting States relating to the interpretation or application of this Convention shall be resolved in accordance with the provisions of the Charter of the Organization of African Unity.

ARTICLE 16
REGISTRATION

As soon as this Convention has come into force, it shall be registered with the Secretariats of the Organization of African Unity, the United Nations Organization and of the International Civil Aviation Organization by the Secretariat of the African Civil Aviation Commission.

ARTICLE 17
NOTIFICATION

The Secretariat of the African Civil Aviation Commission shall notify the Secretariats of the United Nations Organization, the Organization of African Unity, the International Civil Aviation Organization, the African Airlines Association and all States Members of the Organization of African Unity:

1. of the deposit of any instrument of ratification, adherence, approval or accession;

2. of the date on which the Convention shall come into force;
3. of the receipt of any notification of denunciation of this Convention;
4. of any amendment to the provisions of this Convention.

ARTICLE 18

FINAL PROVISIONS

An original copy of this Convention shall be deposited with the Secretariat of the African Civil Aviation Commission for onward transmission of certified copies to the Member States of the Organization of African Unity.

IN WITNESS WHEREOF the undersigned Plenipotentiaries having been duly authorized have signed this Convention.

DONE at ADDIS ABABA SOCIALIST ETHIOPIAN this twelfth day of December One Thousand Nine Hundred and Eighty in two originals in the English and French languages, both texts being equally authoritative.

PROVISIONS FOR THE REGULATION AND CONDUCT OF THE
AFRICAN AIR TARIFF CONFERENCE (AFRATC)

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I. ESTABLISHMENT OF THE CONFERENCE

a) The African Air Tariff Conference (herein referred to as AFRATC) of the African Airlines Association (herein referred to as AFRAA) is hereby established in accordance with the Convention on the Establishment of the African Air Tariff Conference (herein referred to as the Convention and reproduced at ATTACHMENT 'A' to these Provisions) adopted at Addis Ababa on the 12th of December, 1980.

b) AFRATC shall deal with passenger fares, cargo rates, and related conditions, with respect to the following areas which are identified in a master map on file with the Secretary General of AFRAA (herein referred to as Secretary General).

i) NORTHERN

Algeria, Egypt, Libya, Morocco, Sudan and Tunisia

ii) WESTERN

Cameroon, Cape Verde Islands, Central African Republic, Chad, Congo, Benin, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Republic of Zaire, Sao Tome and Principe, Senegal, Sierra Leone, Togo, Upper Volta.

iii) EASTERN

Burundi, Comoro Islands, Djibouti, Ethiopia, Kenya, Madagascar, Mauritius, Rwanda, Seychelles Islands, Somalia, Tanzania and Uganda.

iv) SOUTHERN

Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia, Zimbabwe and Namibia.

II. OBJECTIVES

The objectives of AFRATC shall be to ensure the establishment of Air Tariffs for the economical and orderly growth of Air Transport Services to, from and within Africa, and to that effect, the Conference shall:

- i) consider and act upon all Tariff Matters relating to scheduled Air Transport Services of concern to its members;
- ii) study, advise and co-ordinate all Tariff Matters relating to non-scheduled Air Transport Services of concern to its members;
- iii) act as a machinery for negotiating all Tariff Matters relating to Air Transport Services of concern to its members;
- iv) ensure that when establishing such Tariffs, the existing worldwide multilateral system of IATA, shall be taken into consideration.

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III. MEMBERSHIP

1) Only carriers members of AFRAA shall be eligible for membership in AFRATC, and all AFRAA members shall be members of AFRATC.

2) AFRATC shall have two categories of members, namely:

i) Active Members

Active members of AFRATC shall be Airlines operating international air transport services for the carriage of passengers, cargo and mail registered within OAU Member State or in a State eligible to OAU membership in which at least 51% of the capital investment is held by such State or group of States or by one or several nationals of such State. Such members shall be voting members of AFRATC.

ii) Associate Members

Associate members of AFRATC shall include airlines operating domestic air transport services for the carriage of passengers, cargo and mail registered within OAU Member State or in a State eligible to OAU membership in which at least 51% of the capital ^{investment} is held by such State or group of such States or by one or several nationals of such State. Such members shall be non-voting members of AFRATC.

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IV. ACCREDITED REPRESENTATIVES

Each member of AFRATC shall accredit in writing to the Secretary General one representative to AFRATC who shall be the Senior Official exercising policy authority for AFRATC Affairs or one of his principal assistants. Each appointment of such accredited representative shall be duly executed by the Chief Executive of the member, and shall certify that the appointee meets the qualifications required, and with respect to voting members that the appointee has full power and authority to bind the appointing member on any matter during the conference meetings and that the appointee has full powers and authority to appoint an alternate to act on his behalf. Nothing in this paragraph shall prevent any member from appointing one representative for passenger matters, and one representative for cargo matters.

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V. OBSERVERS

1. The Organization of African Unity (OAU), the African Civil Aviation Commission (AFCAC), the United Nations Economic Commission for Africa (ECA) and the International Air Transport Association (IATA) shall be entitled to attend and participate in all meetings of AFRATC.
2. The Secretary General may invite other observers which may include Regional Airlines Associations to attend any or all of AFRATC meetings.
3. Observers to AFRATC shall have no voting right.
4. Observers shall be invited not disclose to the public or to the press any information concerning AFRATC meetings or the progress or conduct thereof for the duration of such meetings.
5. Observers shall be full time employees of the organizations they represent, and shall be employees exercising policy decisions on air transport matters.
6. Observers shall be allowed to express expert views when invited by the Chairman of AFRATC but shall not engage in Tariff negotiations.

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VI. PURPOSES AND FUNCTIONS

The purpose of AFRATC shall be to consider and act upon all tariff matters of concern to its Members, provided that any such action shall not be inconsistent with the Articles of Association of AFRAA nor with these Provisions. To that effect, AFRATC shall:

1. Analyse operating costs, market research information and other relevant data of services operated within as well as to/from the area of authority of AFRATC, with a view to evolving tariffs in the following manner:
 - 1.a For Within Africa tariffs:
 - i) Specific tariffs shall be established and transmitted to IATA for integration within the Agreements developed by the relevant Tariff Coordinating Conference.
 - ii) If integration within IATA Agreements (for Within Africa tariffs) is achieved, such tariffs shall be submitted to governments of OAU Member States for approval.
 - iii) If integration within IATA Agreements (for Within Africa tariffs) is not achieved, then AFRATC will apply the tariffs (adopted by AFRATC) after approval by governments of OAU Member States.
 - 1.b For To/From Africa Tariffs:
 - i) AFRATC shall develop negotiating positions for African airlines, and shall seek to harmonize and coordinate these positions within the relevant IATA Tariff Coordinating Conferences.
 - ii) In the event that harmonization of tariffs to/from Africa cannot be achieved through the relevant IATA Tariff Coordinating Conferences, AFRATC Members shall negotiate such tariffs with the non-AFRAA airlines concerned, taking the accepted negotiating position developed pursuant to Subparagraph b) i) hereof as a basis for such negotiations.
 - iii) In the event of failure to achieve agreement pursuant to Subparagraph b) ii) above, AFRATC shall adopt specific tariffs to/from Africa and such tariffs shall be filed with all interested governments for approval.

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II. AUTHORITY

1. Any action taken by AFRATC in accordance with these provisions shall be:
 - a) On behalf of the Governments of OAU Member States.
 - b) Deemed to have been approved by all OAU Member States unless more than 20% of these States object within 45 days in writing as per Article 7 of the Convention
 - c-1) With respect to tariffs within Africa, binding on all carriers operating within AFRATC Area (s).
 - c-2) With respect to tariffs to/from Africa, binding on all African Airlines, and subject to approval by other concerned Governments binding on all other airlines operating to/from AFRATC Area (s).
2. Only action in the form of resolution taken at AFRATC meetings shall be binding upon airlines as expressed above, and no statement in the minutes of AFRATC shall be construed as binding action upon such airlines. The expiry date as well as the intended date of effectiveness of each resolution shall be established by AFRATC.

VIII. MEETINGS OF THE CONFERENCE

1. Regular meetings of AFRATC to agree fares and/or rates and/or the conditions of their use shall be held not less frequently than once every two years at a time determined by the preceding meeting at which fares and/or rates, respectively, are agreed. The place of such meetings shall be determined by the Secretary General considering any recommendation of AFRATC, at its previous regular meeting.
2. Such meetings dealing with passenger or cargo matters may be called jointly or separately as may be required.
3. All other meetings shall be considered as special meetings. Such special meetings shall be called by the Secretary, whenever and for such time, place or purpose as the Secretary General or the Executive Committee may in writing direct.
4. The Secretary shall give at least 90 days' notice by mail, telegramme or cable to each member of AFRATC before the date fixed for any meeting, and such notice shall contain the date, the place and the scope of the agenda of the meeting, except that only fifteen days' notice of a meeting requested by the Secretary General or the Executive Committee need be given.
5. Any member seeking to have a matter related to fares or rates placed before AFRATC for action or for discussion, may make request therefore by presenting such matter in adequate written detail to the Secretary not less than 60 days prior to the meeting; describing clearly the problem and recommended solution and including any necessary documentation to support it. The Secretary shall place and appropriately designate on the agenda for the next meeting of the Conference all matters that have been so presented, provided that matters received by the Secretary less than 60 days prior to a meeting will not be included in the agenda for that meeting, but will, unless disposed of by unanimous voting at AFRATC, be included in the agenda for the next subsequent meeting.
6. Forty five days prior to regular meetings of each AFRATC, and not less than 15 days prior to the date of a special meeting, a copy of the agenda shall be mailed by the Secretary to each member. Only such business for which notice has been so given and which has been designated for action on the agenda for any meeting of AFRATC may be acted upon at that meeting. Any business which was not included in such notice, will be limited to discussion only except that any such business may be acted upon at that meeting by the unanimous vote of all members of AFRATC.
7. A simple majority of voting members shall constitute a quorum of AFRATC.
8. In the event that there is a prevailing situation that calls for a meeting within an Area or between an Area and another Area members may meet prior to AFRATC meetings.

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9. By agreement with the IATA Secretariat, AFRATC Secretariat shall submit joint African Airlines tariff proposals 30 days prior to regular meetings and at the opening day of Special meetings of IATA.

IX. CONFERENCE ACTION - VOTING

1. Each voting member shall have only one vote to be cast by its duly accredited representative, or accredited alternate.
2. Voting by proxy shall not be permitted.
3. In all cases abstentions shall be counted as affirmative votes.
4. Action by AFRATC on matters relating to fares and rates, and the conditions applicable to their use can only be taken on unanimous vote of members present and voting.
5. Adoption by cable/mail shall be deemed to be similar to Conference action.
6. Unanimous vote of voting members present at a meeting shall be deemed as action by AFRATC.

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X. OFFICERS

1. AFRATC shall have three officers: a Chairman, Vice-Chairman and Secretary provided that there may be separate officers for Passenger matters and for Cargo matters, respectively.
2. The Secretary and the staff for AFRATC shall be provided by the Secretary General and shall be employees of AFRAA independent of any of the members of AFRAA.
3. The Chairman and the Vice-Chairman of AFRATC who shall be elected by a majority vote of the members of AFRATC present at a regular AFRATC meeting, shall take office from the close of such regular meeting, and shall hold office until the close of the next subsequent regular such meeting, without compensation.
4. The elected Chairman of AFRATC shall preside at all the meetings of AFRATC. In his absence the Vice-Chairman shall preside. In the absence or unavailability of the Chairman and Vice-Chairman, the quorum shall elect, by a majority vote or by secret ballot, its Acting Chairman for that meeting.
5. The Secretary shall serve as Secretary of AFRATC and each area meetings and shall keep the records thereof and shall perform such duties as are required of him hereunder and such other duties as are required of him by AFRATC and by authority of the Secretary General. The Chairman and Secretary shall advise the Secretary General of action taken at AFRATC.

XI. CONFERENCE BUDGET AND DUES

AFRATC Budget and the apportionment thereof in the form of membership dues and fees shall be established by AFRAA in a format prescribed by the Executive Committee and presented to the Annual General Assembly for approval.

XII. COMMITTEES - SUB-COMMITTEES AND WORKING GROUPS:

1. AFRATC shall establish any Committees, Sub-Committees and working groups as may be necessary to ensure the appropriate functioning of the Conference.
2. The duties, terms of reference and membership of Committees, Sub-Committees and working groups shall be established by the Conference.
3. AFRATC may call upon any Standing Committees or Sub-Committees of AFRAA to provide support services that may be required.

XIII. COMPLIANCE AND ENFORCEMENT

Consistent with the Article (1) of these provisions, a compliance and enforcement machinery shall be established in accordance with Article 9 of the Convention on AFRATC. In this respect, IATA Compliance and Enforcement Machinery may be called upon at the request of the AFRAA Executive Committee for enforcement of Resolutions adopted in accordance with AFRATC Conference Provisions. The administrative and financial details of such machinery shall be agreed between AFRAA and IATA.

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XIV. INTERPRETATIONS AND AMENDMENTS OF THESE PROVISIONS

Proposals for interpretation and amendments of these provisions shall be discussed at the Conference, and when unanimously adopted shall be subjected to approval by the Executive Committee.

RULES AND PROCEDURES-AFRATC

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PURPOSE

The purpose of AFRATC Rules and Procedures is to ensure that the business of each meeting will be conducted as quickly, efficiently and in as orderly a manner as possible.

CHAIRMAN

- 1) The Chairman as the presiding officer of the meeting shall be responsible for:
 - a) maintaining order;
 - b) protecting the rights of all representatives; and
 - c) seeing that business is properly brought before the meeting and acted on.
- 2) The Chairman shall conduct the meeting impartially. Normally he will confine himself to statements of facts. If he wishes to express a personal opinion, he shall appoint a temporary Chairman and not resume the Chair until the matter under the discussion has been decided.
- 3) The Chairman shall rule out of order all remarks that are not relevant to the matter under discussion.

MEMBERS

- 1) No person shall speak without first obtaining recognition from the Chairman.
- 2) All remarks shall be made to the Chairman and not the meeting or to any other person.
- 3) Only one representative of each conference member shall normally sit at the conference table.
- 4) The Chairman shall ensure that all statements are expressed in clear and audible voice.

AGENDA

- 1) Action shall be taken on matters which have been clearly and fully noted on the Agenda for action.
 - a) The agenda shall include as an item for action revalidation of resolutions due to expire to which end the Secretariat will submit during the Conference meeting an appropriate list. Such list shall be for revalidation purposes only and shall not relieve members of the obligation as provided above to place on the agenda proposed changes desired in a conference resolution.
 - b) After the closing date of the submission of items for the agenda members may submit only documents which stem directly from items on the agenda. If such further submissions are received by the secretary 30 or more

days before AFRATC, they shall be circulated as normally Induced agenda submissions received less than 30 days before AFRATC, shall be distributed at the AFRATC. Any such submissions may be subject to comment by other members. However, such comments shall be circulated to the membership unless considered to be irrelevant by the Chairman. The Chairman's ruling, as to the admissibility of such submissions to a matter duly placed on the agenda shall be final.

- c) To provide other members with advance notice of the positions to be taken on fares and/or rate matters, each member shall, on a stated date prior to commencement of the AFRATC, advise the Secretary at the site what its position will be. Absence of such submissions by a member shall be deemed to indicate the member's preference for status quo position. A written tabulation of the statements will be prepared by the Secretariat and made available to accredited representatives prior to the opening of AFRATC. The foregoing does not relieve members from the responsibility of submitting alterations to fares & rates as required Sections V and VI of the Provisions for the regulation and Conduct of AFRATC.
 - d) Where a change in a fare or rate resolution affects the scope of applicability of any passenger or cargo procedural resolution, the latter may also be dealt with on the agenda of the AFRATC, as applicable.
 - e) Where a resolution applies to both passenger and cargo matters, the Passenger Tariff Conference shall be deemed the senior parent body for general purposes and shall take action on such resolution (e.g. revalidation and/or amendment(s)). Action so taken shall apply automatically to the corresponding cargo version and shall not require further action by the Cargo Tariffs Conference. However, should essentially different conditions be required for the cargo version of such general resolution, proposals must be submitted for inclusion in the agenda of the Cargo Tariffs Conference for its action. (For example: if a resolution of general application is rescinded at a Passengers Conference but is still required for cargo purposes, action for readoption must be taken at the Cargo Tariff Conference).
- 2) Business will be taken up in the following order:
- a) Meeting called to order by the Chairman;
 - b) Minutes of previous meeting approved;
 - c) Committee Reports received and acted on;
 - d) Unfinished business acted on;
 - e) New business acted on;
 - f) Budget Matters;
 - g) Election of officers;

- h) Date of next meeting; and
 - i) Meeting adjourned
3. In order that available time shall be utilised efficiently, the Chairman may impose in advance a time limit for each item or for each speaker.

MOTIONS

1. Matters shall not be debated or discussed unless:
 - a) a written proposal has been filed with the secretary; and
 - b) the manner has been proposed in the form of a motion by one person and second by another.
- 2) A motion once decided shall not be reconsidered, unless upon consent of all the representatives present.
- 3) The Chairman may entertain at any time at his discretion a motion to "put the question" under consideration: if such a motion is carried by a majority of the representatives present, the question shall be voted upon forthwith.

AMENDMENTS

- 1) Amendments that are relevant to the motion under discussion may be proposed and seconded; if adopted, the amendment shall be incorporated into or substituted for the motion.
- 2) The Chairman shall not accept any amendment to a motion that has the effect of completely nullifying the motion.
- 3) An amendment to an amendment may be proposed, but no more than two amendments to the same motion shall be before the meeting at one time.
- 4) In the event of general consent, amendments may be adopted without a formal vote.
- 5) Amendments may be proposed verbally during the discussion; provided that the Chairman may, at his discretion, require the proponent to make written presentation thereof.
- 6) Amendments shall be voted on in the reverse order in which they have been made; e.g. where a motion, followed by Amendment A, then Amendment B, has been made; the order of voting shall be:
 - a) Amendment B;
 - b) Amendment A (as modified by Amendment B);
 - c) The motion (as modified by Amendment A and B).

VOTING

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- 1) The Chairman will restate the motion before putting it to a vote. If he should not do so, a restatement may be requested by any representative.
- 2) Procedural motions other than Recommended Practices shall be adopted by a simple majority vote of the representatives present and Recommended Practices shall be adopted by a two-thirds vote of the representatives present; in either case abstentions shall count as negative votes. Substantive motions (i.e. motion intended to result in binding Conference action) shall be by unanimous vote, except as otherwise stated in the Tariff Conference Provisions. Abstentions upon substantive motions and motions for the division and apportionment of expenses of AFRATC shall count as affirmative votes.
- 3) Normally the Chairman will not vote. However, if a Chairman who is an Accredited Representative of a member elects to cast his vote, he shall explain the reasons for doing so.

PUNCTUALITY

Meetings, including all sessions thereof, shall commence promptly on time or as soon as the quorum has been assembled.

COMMITTEE REPORTS

The weight shall be given to all recommendations contained in Committee or Sub-Committee Reports. Where the vote in the Committee or Sub-Committee has been unanimous or by a strong majority, the Chairman shall endeavour to avoid any discussion of the subject.

ADJOURNMENT OR RECESSED AFRATC(S)

- 1) Meetings shall be adjourned or recessed when determined by the Chairman, unless opposed by a majority of representatives present.
- 2) Subject to these Rules and Procedures, the following guidelines shall be used in the event of an impasse in AFRATC negotiations;
 - a) The Chairman and the Secretary, jointly shall decide the point at which, in their opinion, the subject-matter and/or package has been developed to a point where alternate options are clearly and suitably defined.
 - b) The Chairman shall then recess AFRATC for a brief period.
 - c) During the recessed period:

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- i) a report on AFRATC position shall be distributed to the Senior Tariff Official and Accredited Conference Representatives as per Section III, Part 8, of the Tariff Handbook;
 - ii) the Secretary General, the Traffic Committee Chairman and the Chairman of AFRATC, jointly shall review the situation and initiate action as appropriate to the circumstances (telexes, telephone contacts, visits, etc.).
- d) After such joint review, and dependent upon the result of the action taken:
- i) the Secretary General shall request the Chairman of AFRATC to declare the meeting closed if it is considered that the reconvening of AFRATC is not warranted, or
 - ii) the Secretary General shall reconvene AFRATC which shall be:
 - (aa) of a specified limited duration (for instance, 2-5 days),
 - (bb) attended by the Accredited Conference Representative or an alternate of a senior or similar status within the company,
 - (cc) closed, and discussion on the subject matter terminated, unless agreement is reached within the time period allotted for the reconvened conference.

MEETINGS

- 1) (a) Regular Passenger Tariff Conference shall normally be convened in alternate years not later than the last week of September. Regular Cargo Tariff Conference shall normally be convened in other alternate years, not later than the last week in May.
- (b) Working hours and duration of meetings shall be as determined by the Chairman, unless opposed by a majority of representatives present and voting.
- (c) Location of the next AFRATC meeting shall be discussed prior to the end of AFRATC while heads of delegation are still in attendance.
- (d) The Secretariat will accumulate and maintain information as to AFRATC requirements and suitable sites where AFRATC might be held; a delegation wishing to invite AFRATC to be held in its country shall ascertain, prior to extending an invitation, from the Secretariat what

AFRATC requirements are and whether adequate facilities are available in such country. 6

ACCREDITATION OF REPRESENTATIVES

ARTICLE III, Paragraph (2) of the Provisions for Regulation and Conduct of AFRATC indicates the procedure for accrediting representatives to AFRATC. A form of appointment is required for AFRATC in which a member of AFRAA is a member. The official AFRAA form of appointment for accredited representatives of member airlines to AFRATC as well as the official forms for notification of accredited representatives for Joint Meetings or for appointment of alternate to accredited representatives of member airlines to AFRATC, are shown on the following sheets as follows:

- Sheet 1 : ACCREDITATION OF REPRESENTATIVES
- Sheet 2 : APPOINTMENT OF ALTERNATE TO ACCREDITED REPRESENTATIVE

The above should be forwarded to the Secretary.

PRESS CONTACTS FOR TARIFF MEETINGS

AFRATC sets forth certain requirements with respect to disclosure of information. In addition, the Tariff Committee has adopted the following principles:

- 1) When the Chairman or any member of a Working Group, other than a high level policy group, is contacted by the press in connection with the work of the group, he should be required to refuse comments and refer the press representatives to AFRAA Headquarters.
- 2) Neither the Chairman nor any member of a high level policy group should communicate with the press regarding the group's activities this function being left to the Secretary General or in his absence, the Secretary, who shall give only such information to the press representatives as is authorized by the group chairman.



SUMMARY OF THE PROCEEDINGS AND DECISIONS TAKEN BY

THE 3RD MEETING OF EXPERIMENTAL AFRATC

NAIROBI, 18 - 21 SEPTEMBER, 1984

The 3rd meeting of Experimental AFRATC was held in Nairobi from 18th to 21st September, 1984 and was Chaired by Mr. L.S. Namukombo of Zambia Airways. The meeting took the following decisions on the proposed agenda :

1. Decision No. (1) : Status of the Ratification of the Convention on the Establishment of AFRATC

Having been informed on the status of ratification of the Convention on the Establishment of AFRATC by the Observer of AFCAC, (Sixteen signatures and two ratifications), and on the recommendations of the 4th Conference of African Ministers of Transport and Communications by the Observer from ECA, the meeting agreed on the following measures to expedite the ratification of the Convention :

i) A detailed technical briefing paper be prepared by the Organizations concerned, i.e. OAU/ECA/AFCAC and AFRAA for use in the collective effort to expedite the ratification of the Convention. The paper, after approval by the four Organizations, shall be circulated to Governments by the ECA, and AFCAC and to African Airlines by AFRAA. The outline of the paper is attached hereto.

ii) AFCAC Bureau is urged to use the occasion of the 9th Plenary Session to bring the matter of ratification of the Convention to the attention of Civil Aviation Authorities with a view to securing additional signatures during the session.

2. Decision No. (2) : Yield Improvement Programmes

Having been informed on the progress of the Fair Deal Monitoring Programme world wide, and having received reports from delegates on the progress achieved in their respective territories, the meeting re-affirmed the importance and urgency of establishing Africa wide Local Yield Improvement Committees. In this respect it was agreed to establish optimum co-operation among Local Committees within the four sub-regions of Africa on the one hand and among the regional groupings on the the other hand. This, it was agreed, would be a first step towards the establishment of an Africa-wide Tariff Integrity Monitoring Group. Due to the necessity of involving Civil Aviation Authorities in implementing the programme, it was agreed that such continental body shall have close association with AFCAC. The Legal Committee of AFRAA shall be requested to draft Standard Agreements for co-operation among Local Committees and regional groupings.

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3. Decision No. (3) : Proration Matters

It was the general agreement of the meeting that the matter required in-depth study as it adversely affected the African Carriers' revenues especially in respect of the North Atlantic Proration.

Consequently, in accordance with the directive of the Commercial and Marketing Directors Seminar, held in Nairobi from 14th to 16th February, 1984, the meeting agreed to carry out this directive as a matter of priority, and requested that the AFRAA Secretariat write to the Chief Executives of MS/LN/UY/WT/RK/QC/ET/KQ/GH and QZ, who are members of the Task Force on Proration, to expeditely permit their respective experts on Tariffs and Proration Matters to attend a meeting to be held in Nairobi from 6th to 9th November, 1984. This meeting shall study and recommend suitable means and ways of alleviating the current losses that African Airlines are experiencing by way of Proration on the North Atlantic and submit same to the next IATA General Prorate meeting for adoption.

4. Decision No. (4) : Tariff Matters

WITHIN AFRICA:

1. Fares Increases

It was resolved that the following increases shall be acceptable to AFRATC members :

5% across the board except :

- Status quo from Ethiopia, Ghana, Nigeria, Tanzania, Zambia.

Status quo between Zaire on one hand and Ethiopia, Ghana, Nigeria, Tanzania and Zambia on the other hand;

- Status quo between Kenya on one hand and Ethiopia, Tanzania /Zambia on the other hand.

2. Fares Structure

Present Resolution 072b to be cancelled and all fares currently under this resolution to be transferred to new resolution, which will incorporate the present Resolution 071WW. However, it was agreed that the current fares under Resolution 072b which are above 140% of the normal one way Economy Class shall be maintained as an attachment. This exercise is basically an amalgamation of the two resolutions currently in existence within Africa.

The new resolution will read as follows :

Proposed Resolution for Excursion Fares within Africa Sub-Area

PTC 2

RESOLVED THAT,

I. APPLICATION

TC members may establish Excursion Fares for Economy round or circle trips for travel between points in within Africa Sub-Area, subject to the conditions hereof.

2. FARES

(a) the fares shall not be less than 140% of the applicable normal one way Economy Class fare.

(b) existing fares filed under 072B which are above 140% of the normal one way Economy Class fare are published in Attachment "A".

(c) these fares shall only apply when tickets are purchased at such fares prior to commencement of travel.

3. MINIMUM STAY

(a) 7 days

(b) the minimum stay period means the number of days, counting from the day after commencement of travel to the earliest day return travel may commence from the point of turnaround.

4. MAXIMUM STAY

(a) 30 days

(b) the maximum stay period means the number of days counting from the day of commencement of travel to the last day return travel may commence from the point of turnaround.

(c) extension of validity on medical grounds, as provided in Resolution 735a, paragraph (3), is not permitted.

5. STOP OVERS

One stop over in either outbound or inbound direction shall be permitted provided that no stop over shall be permitted for travel solely within the following areas :

a) Algeria, Egypt, Libya, Morocco, Sudan and Tunisia

b) Cameroon, Cape Verde Islands, Central African Republic, Chad, Congo, Benin, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Republic of Zaire, Sao Tome, Principe, Senegal, Sierra Leone, Togo and Upper Volta.

c) Burundi, Comoro Islands, Djibouti, Ethiopia, Kenya, Madagascar, Mauritius, Rwanda, Seychelles, Somalia, Tanzania and Uganda.

d) Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia, Zimbabwe, Namibia (South West Africa), and South Africa.

6. ADVERTISING SALES

Limited to Africa Sub-region.

7. DISCOUNTS

(a) Tour conductor discounts, as provided in Resolution 204, shall not apply.

(b) Agents discounts as provided in Resolution 880, shall not apply.

8. RESERVATIONS, PAYMENT AND TICKETING

Reservations of outbound journeys shall be made at the time of ticketing.

9. PASSENGER EXPENSES

Absorption of passenger expenses en route as provided in Resolution 102, shall not be permitted.

10. CANCELLATION, REFUNDS AND RE-ROUTING

(a) Prior to departure :

In the event of cancellation the refundable amount shall be 100% of the fare paid subject to Carriers' conditions of refund.

(b) After Travel has Commenced :

Refund shall be the difference between the fare paid and the normal one way journey performed.

(c) Re-routing :

Re-routing shall be permitted provided condition (5) above is adhered to.

Notwithstanding the above agreement, the following AFRATC members had reservations :

- GN - subject to checking figures
- RK - "
- ET - negative reservation on concept of introducing Excursion Fares between Addis Ababa and Nairobi, Dares Salaam and Khartoum. However, prepared to accept the resolution if it excluded introduction of same within the radius of 1,500 miles.

5. Decision No. (5) : Extra Mileage Lusaka and Entebbe via Dares Salaam/Nairobi

It was proposed to the proponent (TC) to file with the IATA Secretariat the request for reducing the inflated mileage between DAR and EBB and between NBO and EBB if their request to avoid the M25 and M5 surcharges respectively, was to be accepted. This, the proponent agreed to do.

6. Decision No. (6) : Business Class

The idea of introducing Business Class at the normal Economy Class fare, as proposed by ET, was unanimously rejected by the meeting. However, it was also the consensus of the meeting that if same were to be surcharged at 15 - 20%, it could be accommodated.

7. Decision No. (7) : Europe/Africa

Fares Increases

A general agreement was reached to have higher increases from Europe to Africa based on the following percentages :

- 5% effective 01 April, 1985
- 5% effective 01 November, 1985 except to Ghana and RK countries which will be subject for checking of fare levels.

As regards to increases from Africa, the meeting believed that until a reasonable amount of increase was effected from Europe, African carriers will find it very difficult to accept increases from their own countries.

8. Decision No. (8) : Fare Structure

There was no firm requirement for any change in the current fares structure, except with respect to Business Class where it was agreed that same should be at a level of 15-20% of the normal Economy Class Fare, with a negative reservation of Ethiopian Airlines.

9. Decision No. (9) : Date and Venue of Next Meeting

It was decided to hold the next meeting of Experimental AFRATC in Nairobi from 3rd to 6th September, 1985.

SIGNED BY :

S. NAMUKOMBO
CHAIRMAN

M.E.B. ZARROUG
TRAFFIC DIRECTOR-AFRAA

Article 8

Principles Governing Operation of Agreed Services

- 1) - The designated airlines of the two Contracting Parties, shall be afforded fair and equitable treatment in order that they may enjoy equal opportunity in the operation of the agreed services. In operating these services, the airline of each Contracting Party shall take into account the interests of the airline of the other Contracting Party so as not to affect unduly the services which the other provides on the whole or part of the specified routes.
- 2) - The operation of the agreed services between the territories of the Contracting Parties in both directions along the specified routes constitutes a basic and primary right of the two Contracting Parties.
- 3) - The primary objective of the Contracting Parties shall be the provision of capacity adequate for the current and reasonably anticipated requirements for the carriage, at a reasonable load factor, of passengers and cargo including mail originating from the territory of one Contracting Party and destined for the territory of the other Contracting Party.
- 4) - For the operation of the agreed services:
 - a) - the total capacity provided on each of the specified routes shall be determined by the aeronautical authorities having regard to the actual and reasonably anticipated traffic requirements ;

- b) - the capacity referred to in sub-paragraph 3(a) above shall be divided equitably between the designated airlines of the two Contracting Parties ;
- c*) - provisions may also be made by the Contracting Parties for the carriage of passengers and cargo including mail, taken on board or discharged at points on the specified routes in the territories of State other than the Contracting Parties. In doing so, the following factors, shall be taken into account (among others):
 - i) - traffic requirements between such points and the territory of the Contracting Party whose designated airline desires to operate a service on that route ;
 - ii) - traffic requirements of the area through which the agreed service passes after taking account of other transport services established by airlines of the States comprising the area ;
 - iii) - the requirements of through airline operation if any ;
 - iv) - if either Contracting Party considers that the operation of its designated airline on third and fourth freedoms traffic rights between it and States other than the Contracting Parties on common sectors are affected by the operations of the designated airline of the other Contracting Party, it may request consultation in accordance with Article 16 of this Agreement aimed at reaching a mutual Agreement intended to rectify the situation. Pending such an agreement, the existing arrangements in this regard shall continue to apply.

(*) Paragraph "c" shall be put only when negotiating Fifth Freedom Traffic Rights.

- 5) - In order to meet seasonable fluctuations or unexpected traffic demands of a temporary character, the designated airlines of the two Contracting Parties shall agree between themselves on suitable measures to meet this temporary increase in traffic. Any Agreement concluded between the airlines and any amendments thereto shall be submitted for approval to the aeronautical authorities of the two Contracting Parties.

- 6) - If the designated airline of one Contracting Party does not wish to use, on any one or more of the specified routes, part of all of the capacity allocated to it, it may consult the designated airline of the other Contracting Party with a view to transferring to the latter for a fixed period and on terms to be mutually agreed, the whole or part of the capacity at its disposal within the agreed limits. The designated airline which has transferred all or part of its capacity may recover the same at the end of the agreed period. Any agreement concluded between the airlines and any amendment thereto shall be submitted for approval to the aeronautical authorities of both Contracting Parties.

- 7) - Pursuant to the provisions of Article 16 of this Agreement, the aeronautical authorities shall from time to time agree on the manner in which the provisions of this article shall be implemented.

Article 9

Airports and Facility Charges

The charges imposed in the territory of either Contracting Party for the use of airports and other air navigation facilities by the aircraft of the designated airline of the other Contracting Party shall not be higher than those imposed on aircraft at the national airline engaged in similar international air services.

Article 8

Principles Governing Operation of Agreed Services

- 1) - The designated airlines of the two Contracting Parties shall be afforded fair and equitable treatment in order that they may enjoy equal opportunity in the operation of the agreed services. They shall take into account their mutual interests so as not to affect unduly their respective services.
- 2) - In the operation of the agreed services, the designated airline of either Contracting Party shall retain as its primary objective the provision, at a reasonable load factor, of capacity adequate to the current and reasonably anticipated traffic demands originating in or destined for the territory of the Contracting Party which has designated the airline.
- 3) - The designated airline of each Contracting Party shall take into account the interests of the designated airline of the other Contracting Party so as not to affect unduly the services which the latter provide on the whole or part of the same route.
- 4*) - The right to embark or disembark international air traffic in their respective territories originated in or destined to third countries, according to the provisions of Article 3 of the present Agreement shall be exercised in accordance with the general principles accepted by both Contracting Parties, that capacity shall be related to:
 - a) - the requirements of an economic operation of the route;
 - b) - the traffic requirements between the country of origin and the countries of destination of such traffic;
 - c) - the requirements of through airline operations.

(*) To be put only when exchanging fifth freedom traffic rights,

- 5) - The total capacity offered on each of the specified routes shall be agreed upon by the aeronautical authorities of both Contracting Parties, having regard to the actual and reasonably anticipated traffic. If no agreement has been reached, the provisions of Article 17 shall apply.

Article 9

Airports and Facility Charges

The charges imposed in the territory of either Contracting Party for the use of airport and other air navigation facilities by the aircraft of the designated airline of the other Contracting Party shall not be higher than those imposed on aircraft of the national airline engaged in similar international air services.

Article 10

Recognition of Certificates and Licences

Certificates of airworthiness, certificates of competency and licences issued or rendered valid by one Contracting Party and still in force, shall be recognized as valid by the other Contracting Party for the purpose of operating the routes and services provided for in this Agreement, provided that the requirements under which such certificates or licences were issued or rendered valid are equal to or above the minimum standards which are or may be established pursuant to the Convention.

DECLARATION ON TRAFFIC RIGHTS BETWEEN THE STATES MEMBERS
OF THE ORGANIZATION OF AFRICAN UNITY (OAU) AND THE
AFRICAN CIVIL AVIATION COMMISSION

— The States Members of the Organization of African
Unity and the African Civil Aviation Commission:

CONSIDERING Article II, Section 2 of the Charter of
the Organization of African Unity, which provides that
the Member States shall coordinate and harmonize their
general policies, particularly in the field of economic
cooperation, transport and communications;

CONSIDERING Article 3 of the AFCAC Constitution
which stipulated that the objective of AFCAC is to
promote coordination better utilization and an orderly
development of African air transport systems;

CONSIDERING the Declaration of General Policy in the
field of Civil Aviation adopted by the Thirty-Fifth
Session of the Council of Ministers and approved by
the Seventeenth Assembly of Heads of State and
Government of the Organization of African Unity (OAU).
(Freetown, July 1980);

CONSIDERING Resolution ECA/UNTACDA/Res. 79/6 (Air
Freedoms) adopted by the African Ministers of Transport,
Communications and Planning at their First Conference
(Addis Ababa, 1979);

CONSIDERING Resolution CM/Res. 890 (XXXVII), adopted by the
OAU Council of Ministers at its Thirty Seventh Session
(Nairobi, June 1981);

CONSIDERING the various AFCAC Recommendations in that
respect;

AWARE of the importance and sensitivity of the matter of exchanging traffic rights, especially Fifth Freedom traffic rights;

UNDERTAKES to comply with the following policy:

- 1) To exchange between them freely and automatically the First and Second Freedoms of the Air (i.e. the right to fly over the territory of each other without landing and the right to land for non-traffic purposes);
- 2) To encourage the exchange of Third and Fourth Freedoms of the Air between themselves, whenever such an exchange is likely to lead to the creation of more air links, mostly on a subregional level, improve the whole African network and foster the economic, social and cultural relations between African States;
- 3) To promote and facilitate, as much as possible, the exchange of Fifth Freedom traffic rights, for the benefit of the economies of African Airlines, the travelling public and the African Air Transport, in general, particularly in the following cases:
 - a) When the granting of such rights will enable African Airlines to inaugurate new routes;
 - b) On routes with heavy traffic and where the demand is exceeding or is expected to exceed the reasonable capacity offered under the Third and Fourth Freedoms.
- 4) RESORT to the AFCAC Consultation Machinery for any issue related to the granting of traffic rights, especially the Fifth Freedom.