AFRICA'S CIVIL AVIATION LAW AND POLICY

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Solemnly dedicated to:

ete Ndum Nkom

ma Manyi Ayum

and Ayaoke

PREFACE

My approach to this work was greatly influenced by certain philosophies and factors. Goedhuis, one of the renowned jurists in the field of civil aviation, has stated that law serves to control the methods of satisfying the needs of mankind. Therefore, we must begin by ascertaining what these needs are in the realm of aviation.[a]

In the realm of civil aviation, as in any other realm, the singular need in Africa today is economic development. The Economic Commission for Africa declares:

> "....the major problem of the present era is economic development. It encompasses almost all sectors of the society. A jurist, as a member of this society in transition, cannot afford to be a mere observer. He must also make some positive contribution towards the common action of eliminating poverty."[b]

Undoubtedly, because of the nature of the problems of development, professionals from some other disciplines rather than law will be more directly involved. But the lawyer still has something to offer, especially in the areas of law and policy as they influence economic development.

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a. Goedhuis, D.: Air Law in the Making, 1938.
b. UN Doc. E/CN.14/INR/28 (1963) para. 7.

Law and Policy may represent two different concepts. Law, taken separately in the title of this thesis, is an abstract or collective term for the body of rules operative in the aviation community compliance with which is secured through an accepted or recognized machinery consisting of arbitral tribunals, national courts, the ICAO Council, the U.N. Security Council and the International Court of Justice. Policy, on the other hand, is an abstract or collective term for the definite courses or plans of action, selected from among alternatives and in the light of given conditions, to guide and determine present and future aviation decisions and operations in Africa.

Furthermore, laws and policies, as used in the main text of the thesis, are concrete rules, regulations, decisions and declarations. Some rules of law may contain some policy element, and some policy regulations and decisions may have some legal element, thereby making the joint usage of the two concepts in this work innocuous.

Hence Law and Policy are viewed herein also as a factor which together with other factors, such as capital investment and skilled manpower, are essential for the development of civil aviation activity in Africa. Law and Policy ensure the orderly operation and organization of the civil aviation industry. As well as giving it a

direction, they also determine the availability, or non-availability, of capital and skilled manpower.

In determining the contribution of Law and Policy to the development of Africa's civil aviation, it has been necessary to aver to the "socio-political" climate in the region. This thesis would be superficial if it did not also make the point that political stability and rectitude are essential for the development of Africa.

However, the significance of the thesis may be more appropriately seen from four angles. First, it is an intra-and inter-regional comparative study of civil aviation law and policy. Second, it demonstrates the importance of what has been called the "Law of Development" in the development of civil aviation in the Third World. Third, without necessarily constituting a defence for developing countries' aviation policy, it presents some of their own views on certain international civil aviation issues. Fourth, on some aviation subjects which decisions are still to be made, helpful facts have been analysed to enable more meaningful decisions to be made in due course.

Legal scholarship has had great influence on law and policy makers in other aviation regions. In those regions, either legal writing has stimulated the decision makers into action, or they have in many cases given

expression to the tendencies that had developed doctrinally. That kind of influence is yet to be felt in Africa. I am, nevertheless, optimistic. Yet I make no pretence about the limitations of this thesis. However, the famous author, Will Durant, has written:

> "We are all imperfect teachers, but we may be forgiven if we have advanced the matter a little and have done our best. We announce the prologue and retire; after us, better players will come."[c]

I undertook this work under difficult circumstances. I was able to complete it due to the co-operation I received from some people and sources whom I gratefully proceed to acknowledge.

My family shouldered the financial burden of my studies and were consistently morally supportive. It is a large family so I cannot mention any names for fear of committing the sin of omission. My thesis supervisor, Professor Martin Bradley, was more than an academic guide to me. I have also enjoyed his charity and humanity.

The Director of the Institute of Air and Space Law, Professor Matte, Madam Ileana Silion and Madam Josephine Leake always listened to my problems and did what they could to find solutions. I am equally thankful to Lynn Riendeau

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c. Will Durant: Story of Philosophy (in the Introduction).

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In the search for material for the thesis, I talked to many officials and travelled to a number of African countries. I am grateful to the staff of AFCAC and AFRAA secretariats for the documents and information they gave me. Mr. Ogunbiyi, the Nigerian Representative to ICAO Council, and Mr. Ajala of Lagos were very co-operative. Messieurs Osang Atom, Oyak Agbor, Assam Monaban, Ayuk Ita, Clement Asick and Madam Essame Orock gave me much assistance in Cameroon. While in Kenya, Mrs. Githaiga, Miss Immaculate Onguru and Miss Barbara Agongaz made my task easy.

Finally, I am lucky to have certain friends whose material and moral support contributed significantly to my completion of this work. Zurina Meah, I can never thank her near enough. Fidelis Ukobo, Augustine Ayuk, Raphael Obi and Elcho Stewart were friends in need and indeed.

ABSTRACT

The sources of Africa's Civil Aviation Law and Policy are various. The region's political economy as well as its historic relationship with Europe have significant influences on its civil aviation law and policy which, nevertheless, cannot deviate from the international legal framework (Chapters 1-3).

In Chapter 4, the regulations, resolutions and programmes of ICAO, ECA and IATA relevant to Africa's civil aviation activity are discussed. Chapter 5 is concerned with the OAU's declarations in the field of civil aviation and its contribution to the establishment of regional economic and aeronautical bodies. It further shows that civil aviation is important to, and will benefit from, the integration of the member states of ECOWAS, UDEAC and SADCC.

AFCAC and AFRAA are seen, in Chapters 6 and 7, as the principal institutions directly responsible for the co-ordination and orderly development of Africa's air transport system. Africa's policy on establishment and operation of airline companies is examined in Chapter 8; while Chapter 9 deals with the ADB's role in aeronautic finance. In the conclusion, it is emphasised that the development of

Africa's civil aviation industry depends largely on an improved regional economy, political stability, and international co-operation and assistance.

RÉSUMÉ

Le droit et la politique de l'aviation civile africaine ont des sources variées. L'économie politique de la région ainsi que ses relations historiques avec l'Europe influencent de façon importante le droit et la politique de l'aviation civile africaine qui, néanmoins, ne peut s'écarter de la structure juridique internationale (chapitres 1-3).

Le chapitre 4 traite des règlements, des résolutions et des programmes de l'OACI, du CEA, et de l'AITA applicables à l'aviation civile africaine. Les déclarations de l'OAU en matière d'aviation civile, ainsi que la contribution de l'organisation à la création des organes économiques et aéronautiques régionaux, sont abordées au chapitre 5. De plus, ce chapitre démontre que l'aviation civile est d'importance pour l'intégration des états membres de la CEAO, l'UDEAC et la SADCC, et bénéficiera d'une telle initiative.

La CAFAC et l'ACAA sont traitées dans les chapitres 6 et 7 comme étant les institutions principales directement responsables de la coordination et du développement ordonné du système de transport aérien africain. La politique africaine relative à la création et l'opération des compagnies aériennes est examinée au chapitre 8; tandis que

le chapitre 9 traite du rôle de la BAD dans la finance aéronautique. En conclusion, il est souligné que le développement de l'industrie de l'aviation civile africaine dépend, en grande partie, d'une économie régionale accentuée, d'une politique stable, et de la coopération et l'assistance internationales.

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ABBREVIATIONS

ABA	American Bar Association (Journal)
AC	Appeal Cases (Law Reports)
ADB	African Development Bank
ADIZ	Air Defence Identification Zone
AER	All England Law Reports
AFCAC	African Civil Aviation Commission
AFRAA	African Airlines Association
AFRATC	African Traffic Conference
AIP	Aeronautical Information Publications
AJIL	American Journal of International Law
ASEAN	Association of South East Asian Nations
ASECNA	L'Agence pour la Sécurité de la Navigation Aérienne en Afrique et à Madagascar
ASTRA	Application of Space Techniques Relating to Aviation
ATC	Air Transport Committee (Canada)
AVI	Aviation Cases
CAA	Civil Aviation Authority
CAB	Civil Aeronautics Board
Ch	Chancery (Law Reports)
ECA	Economic Commission for Africa
ECAC	European Civil Aviation Conference
ECOWAS	Economic Community of West African States
ER	English Reports
IATA	International Air Transport Association

ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
IDA	International Development Association
IDRC	International Development Research Centre
IFALPA	International Federation of Airline Pilots Association
ITA	Institut du Transport Aérien
JAL	Journal of African Law
JAL&C	Journal of Air Law and Commerce
NLR	Nigeria Law Reports
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
RFDA	Revue Française de Droit Aérien
RGDI	Revue Générale de Droit International
SADCC	Southern Africa Development Coordination Conference
UDEAC	Union Douanière et Economique de l'Afrique Centrale
UN	United Nations
UNDP	United Nations Development Programme
US&CAVR	United States and Canada Aviation Reports
WAAC	West African Airways Corporation
YUN	Yearbook of the United Nations

CHAPTER 1. THE SOCIO-ECONOMIC FOUNDATIONS OF CIVIL AVIATION POLICY IN AFRICA

It would be easier to appreciate Africa's civil aviation policy if one understood the hidden influences that are rooted both in the minds of the policy makers and in the society that the policy is directed at. The ghost of the political history of the continent is ever present in all conference-rooms where both bilateral and multi-lateral aviation decisions are made. The state of the region's economy is mainly responsible for the paucity of existing aviation equipment and facilities, and the consequent co-operative efforts in aviation matters, on the one hand, and the increasing attention to air transportation as an instrument of economic development, on the other hand.

1.1 From Colonies to Autonomous States

The slave trade which afflicted Africa for over three hundred years left lasting effects on the continent's political and economic development. It had kindled Europe's economic interest in Africa so much so that its formal abolition only re-chanelled that interest in another direction - colonialism.[1] Africa's gold, ivory, palm

1. See Abbas Ferhat: La Nuit Coloniale pp. 16-17.

oil, copper, etc., were as tempting as African slaves to the commercialized economies of Europe and America. One would have considered Africa's rich raw material[2] to be a good basis for healthy international trade in the post-slave trade era for the mutual benefit of both Europe and Africa. But Africa's contribution to the international division of labour remained essentially an extractive one.[3]

The slave trade encouraged the growth of coastal towns, accelerated the breakdown of intra-African trading ties and redirected commercial activities towards Europe.[4] It also produced a small number of wealthy Africans whose relationship with their kin in the hinterland (who felt betrayed) was strained. These wealthy Africans depended on European weaponry and support in order to maintain their contact with European traders and trading interests. But such dependence also made them vulnerable.

In 1861, for example, Chief Docemo of Lagos was easily intimidated by British gun boats to cede Lagos to the British. Other African coastal towns fell in the same

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2. See Bovil I.E.W.: Golden Trade of the Moors p. 117.

3. Langdon S. and Mytelka L.: "Africa in the Changing World Economy" Africa in the 80s, at p. 129.

4. See Davidson, B.: A History of West Africa, p. 209.

manner. Resistence to foreign annexation came from the hinterlands. The Ashantis, for example, closed the trade paths to their gold mines until they were conquered in 1873. And so did the Zulus.

Britain, France, Germany and Portugal were the principal participants in the scramble to annex Africa. Because their claims conflicted,[5] a conference was convened in Berlin (1884-1885) where an orderly partitioning of Africa was arranged. Agreements and treaties were subsequently signed, carving out Africa into colonies.[6]

The colonization exercise reflected on civil aviation activity in Africa. First, the metropolitan states exercised sovereignty over the airspace of their respective colonial territories since the Chicago Convention of 1944 considered the territory of a state to include the territories under its suzerainty, protection or mandate.[7] Accordingly, African territories were considered as cabotage zones in the bilateral air agreements concluded by

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5. French and British interests conflicted in West Africa; French, German and British interests conflicted in North Africa, etc. See Thomson, J.B.: African Explorer p. 137 et seq.

6. For example, the Treaty of Constantinople, 1886; the Anglo-Congolese Treaty, 1890.

7. Article 2, Chicago Convention.

Europe.[8]

Second, the civil aviation law and policy operative in any part of Africa was essentially a replica of that operative in the metropolitan country administering the particular territory. Furthermore, civil aviation activity was fragmented and disintegrated according to different colonial spheres. Thus, in West Africa, the four British territories of Nigeria, Ghana, Sierra Leone and Gambia were served by the West African Civil Aviation Board and the West African Airways Corporation;[9] in East Africa, Kenya, Uganda, Zanzibar and Tanganyika were served by the East African Air Transport Authority and the East African Airways.[10] Francophone Africa was served by such arrangements as Union Aeromaritime de Transport (UAT), and later by Societé pour le Développement du Transport Aérien

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8. For example, Britain granted cabotage rights to SAS (1952) between Nairobi/London on the London/Copenhagen/Johannesburgh route.

9. See Davies R.: A History of the World's Airlines, Chapter 9; Higham R.: Britain's Imperial Air Routes, p. 207 et seq.

10. See Ochieng-Obbo: East African Airways; LLM Thesis (McGill University) 1981, pp. 3-4, 20. For the history of civil aviation in French AFrica, see Monlau, M.: Le Transport Aérien en Afrique Noire Francophone et Les Accords Bilateraux Franco-Africains, LLM Thesis (McGill) 1975, Part 1.

en Afrique (Sodetraf). While the colonial territories were linked to the metropolis with air routes to facilitate their administration and exploitation[11], there was no intra-African linkage of the colonies belonging to different powers; for example, British colonial territories and French colonial territories. This fact was strongly felt in the post-independent Africa's intra-continental air routes network.

Self-Determination

After the Second World War, there emerged an important dialectic in Africa's political development: the quest for continental autonomy and the pull towards a continuing relationship with the colonial powers. The former position came to be symbolized by Nkrumah's nationalism and Pan-Africanism, while the latter was marked in French colonial Africa, and was facilitated by the personality of Charles de Gaulle.[12] Nkrumah kindled nationalistic fervour and a commitment to African

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11. King John V of Portugal, in 1709, averred to the use of air transportation for the exploitation and administration of the colonies. See Wilson and Bryan: Air Transportation p. 4.

12. See Mazrui Ali: Africa's International Relations p. 41.

liberation. De Gaulle offered the French colonies the choice of pulling out altogether from the French metropolis with the consequence of a complete severance of political, financial and educational ties with France, or remain perpetually with France in a new French community. All of the French territories except Guinea voted in 1958 to remain in the community.[13] For voting against, France punished Guinea severely by pulling out French equipment, facilities, and personnel from the territory.

However, in the 1960s even the French territories which had voted to remain in the French Community agitated[14] and wrested self-government from France. British territories were also granted self-rule partly because of the increased agitations in the territories and partly because of Britain's diminished interest in colonial administration.[15] The Portuguese colonies of Mozambique and Angola achieved independence later after more bitter struggles.

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13. See Sohn, L.B.: Basic Documents of African Regional Organizations, vol. 1, p. 251.

14. Cf. The Algerian Revolution of 1962, and Um Nyobe's Union des Populations du Cameroun rebellion in Cameroon.

15. Cf. Wind of Change Speech of 1958 in British Parliament.

Civil aviation arrangements reflected the relations the newly independent states continued to maintain with the former colonial powers. While the more nationalistic former British territories, like Ghana and Nigeria, for example, were enthusiastic to assert much independence in all fields including civil aviation, the former French territories which had a stronger inclination to remain associated with France, manifested that inclination in the field of civil aviation. There emerged a French African air transport community in the creation of Air Afrique carrier and cabbotage zone. French companies were involved to a very high degree in the operations of airlines like Air Afrique and Cameroon Airlines, while the same could not be said about the airlines owned by the former British territories. The Francophone African states were also able to establish bodies like L'Agence pour la securité de la navigation aérienne en Afrique (ASECNA) at the instance of France, while the English speaking states, even those in the same African region like West Africa, did not.

1.2 Independent Africa's Economy

It may not be easy to say whether or not Africa is better off after indepedence. Nevertheless, Africa remains seriously underdeveloped after independence. Development is a process of structural change and capital accumulation that

moves society closer to conditions in which the basic needs of people (shelter, food, clothing, etc.) are met, full employment prevails, and socio-economic equality increases Underdevelopment on the other hand, is a process of structural change and capital accumulation that moves a society in a direction that makes it more difficult to achieve these conditions. Underdevelopment in this sense can involve significant increases in per capita incomes but in a form that concentrates gains among a well-off minority and imposes social costs on a poor majority.[16]

Give or take one or two flaws in the postulate (e.g. the full employment criterion) it is a helpful yardstick with which to judge Africa. Basic needs like food, shelter and clothing are far from being met. Even in such African states which pass off as having viable economies (for example, South Africa, Nigeria and Cameroon) the wealth is concentrated among a small minority in the cities while the majority continue to live in poverty. Hence, the social polarization evident in these states.

African leaders have expended some energy trying to explain Africa's underdevelopment. A majority of them maintain that it is a product of colonial rule. Nigeria's

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16. Steven Langdon and Lyn Mytelka: "Africa in the Changing World Economy" Africa in the 1980s, op.cit., p. 124.

Nnamdi Azikiwe asserted that colonialism interrupted normal African development and forced backwardness on the technologically less advanced natives.[17]

Guinea's Sekou Toure has his own thesis: Imperialist domination brought about the fragmentation and destruction of the pre-colonial African economy. The re-constituted economy was then integrated as a subordinate part of the economies of the metropolitan countries. All colonial policies, notwithstanding philanthropic and altruistic justifications and rationalizations were instituted to benefit the metropolitan countries. Funds were denied to potential African entrepreneurs. Technical training was limited to those select individuals who could bolster the colonial system and help it function. Social welfare schemes were developed to keep African workers healthy and, therefore, productive. Traditional institutions were either destroyed or retained on the basis of their utility to colonial regime. The colonial system took African goods at a very paltry price and sold them at a very high price. The profits did not go to the Africans, the real creators, the true owners of the products - they

17. See Nnamdi Azikiwe: "Ethics of Colonial Imperialism", Journal of Negro History XVI (July 1931), pp. 287-308.

went into the cash boxes of the colonialists.[18]

Some non-Africans too hold a similar view. The author, Claude Wauthier, for example, states that:

> "The trade in 'black ivory' (slave trade) drained her (Africa) life away...within a few years of the legal ending of the slave trade came the great carve-up, when the whole continent was placed under the domination of the banner of 'civilization'.... Since the rights of man had not been extended to the black man, he gained precious little from the so-called civilizing work of colonization. How else can the present state of underdevelopment be explained?"[19]

There are some African leaders (mostly from francophone Africa) who refuse to believe that colonization is responsible for Africa's undevelopment. In the forefront of this school of thought is Ivory Coast's Houphouet-Boigny, who has been branded in certain quarters, rightly or wrongly, as the 'African apologist for French colonial policies'. Houphouet-Boigny rather believes that under development is to some degree the result of natural handicaps of tropical countries. He then states:

> "While the French presence in Africa is the result of military conquests or of peaceful penetrations, France has, to her credit, suppressed slavery, halted inter ethnic quarrels, educated the masses and instituted sanitary and medical improvements without precedent, and given her 'culture to an

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18. See his speech in the United Nations General Assembly, 15th Plenary Session, October 10, 1960, UN Official Records A/PV 896, p. 564.

19. Claude Wauthier: The Literature and Thought of Modern Africa, p. 7.

African elite'".[20]

Assuming, arguendo, that colonization, like the slave trade, was not very helpful to Africa's economic development, one would expect, however, that after more than two decades of decolonization independent Africa would be well on the way towards economic development. After all, did Congo's Patrice Lumumba not predict that "Africa would be great when she was free"? Nigeria's Azikiwe was no less categorical in his view that "she (Africa) who through deportation and inner submission managed to enrich and civilize those who, in their abundance, shamelessly stripped her of everything, will in the end make her fortune". But the present state of most African national economies do not point to fortune or greatness.

Free Africa's economy has been summarized thus:

> "For most Africans, the economic outlook has been grim since 1960. A weighted annual growth rate below one percent is recorded for the twenty-four low-income countries of sub-Sahara Africa....In the 1970s no fewer than fifteen economies registered a negative growth rate of per capita income. By 1980, even such high growth countries as the Ivory Coast, Nigeria, Kenya and Malawi experienced severe economic difficulties."[21]

To be specific, take the two cases of Zaire and

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20. Houphouet-Boigny: "Black Africa and the French Union" Foreign Affairs XXXV (July 1957) p. 594 et seq.

21. Richard Sandbrook: "Is there hope for Africa?", International Perspectives January/February 1983, p. 3.

Ghana. Zaire has the natural potentialities of a rich country, and for a time, it appeared to be heading in that direction. Then, she made an about-turn, for the worse. A recent account from there gives the picture: only three out of nine regions are still accessible to the capital, Kinshasa, by ordinary vehicle. Bridges have collapsed and there are no immediate plans to repair them. Roads have been washed away.[22] Yet, when there was a French-African summit in Kinshasa in October 1982, the Zaire government spent about five million dollars on renovating guest houses, and repairing streets in residential Kinshasa for the delegates' appreciation. Only for that government to turn around to France immediately for credits for further expenditure on the voice of Zaire T.V. projects.[23]

The national airline, Air Zaire, is barely functional. It takes six days upstream, five days down, to go from the capital, Kinshasa, to one of the most important provincial capitals, Kisangani. In 1982, Zaire entered the infamous list of the countries that could not pay their international debts. How has the cobalt and copper rich country become credit-worthless?

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22. See Xan Smiley: "Misunderstanding Africa", The Atlantic Monthly, September 1982, p. 70.

23. Africa Now, November 1982, p. 20.

According to a report submitted by the former international Monetary Fund appointed controller of the Bank of Zaire, Erwin Blumenthal, that country's head of state, Mobutu, had, with the able assistance of some European firms and financiers, illegally piled away in his, and his clansmen's Swiss bank accounts between four and six billion dollars of Zaire's foreign and domestic public revenue. The report concludes:

> "...the current corruption in Zaire ...makes any control of fraud impossible and destroys every attempt by the international institutions, by friendly nations or by the commercial banks to reconstruct the economy of Zaire."[24]

Ghana is another sad case. She became independent in 1957, and for a short while she prided herself with the second highest income per capita in Africa. She led the world in cocoa export, and produced ten per cent of the world's gold. But nine years after independence this country went bankrupt. Since the overthrow of her first leader, Nkrumah, in 1966, there have been five coup d'états. Today, Flight Lieutenant Jerry Rawlings, the self-proclaimed redeemer, is forcibly in power for a second time.

Rawling's achievements so far include the execution of three former heads of state, a vicious attack, in the typical manner of leftist revolutionaries, on every institution and policy that had the support of his

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24. Ibid., p. 33.

predecessors. The International Monetary Fund, for example, was severely denounced soon after he seized power as an instrument of capitalism - only to turn to it later for aid.

Ghana's reputation as the Mecca of African nationalism and of dynamic political leadership is now in the mud. Her economy is in a deplorable state. It has been reported[25] that many factories have closed altogether for lack of materials, while those that remain open commonly operate at only ten percent of their capacity. In the markets goods are in short supply. Cassava harvests have fallen to 1.8 million tons from 3.6 million tons some ten years ago. Cocoa production which accounts for seventy percent of the country's exports has dropped from 500,000 tons in 1971 to 200,000 tons in 1983. Her foreign debts stand at $2 billion, the equivalent of her two years export earnings.

From the accounts of Zaire and Ghana, one cannot help but conclude that the slave trade and colonization are not the only causes of Africa's continuing underdevelopment. In addition to them, the indiscreet greed and corruption of some African leaders, the instability of many African states, the incompetence and irresponsibility of some of the

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25. See Time Magazine, February 21, 1983, p. 42.

leaders contribute to Africa's underdevelopment.

History is replete with examples of states which have had one kind of serious set-back or another. The Jews have been sent to captivity, forcibly dispersed and even massacred. Yet those who returned to Palestine formed the tiny State of Israel, surrounded by unfriendly neighbours and desert, but making economic progress. The Germans suffered two World War defeats, were partitioned and occupied after the Second World War, yet both East and West Germany have made remarkable economic recovery. The United States was once a British colony, today it is the greatest economic power. Japan was badly devastated in the Second World War. Her industrial plants in Tokyo were demolished, the industrial cities of Hiroshima and Nagasaki were wiped out, and the economy collapsed.[26] Japan has an enviable economy today.

How would an African leader then expect an African youth to understand that the poverty, disease, famine and misery around him are due to the fact that their country was until 1960 a colony? How can a government persuade villagers that there is no farm-to-market road for their produce because of the slave trade and colonialism?

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26. See Lee Asher: Air Power, pp. 21-23; See also Lemkin, R.: Axis Rule in Occupied Europe (1944).

Nevertheless, there have been some factors beyond the control of Africans[27] that have contributed too to retard the region's economic development. The oil crisis in the seventies severely affected the economies of African States notwithstanding their solidarity with the Arabs. Long and frequent periods of drought caused much damage to sub-Sahara states like Somalia and Ethiopia. Price fluctuations for raw materials in the world market leave African producers worse off. Zambia, for example was severely affected when the price of copper fell in 1975. The recent recession of the world economy is felt most by the developing countries.

Within and outside Africa, suggestions are being advanced that would turn the economy around. It has been pointed out, for example, that in 1982, two of the most prosperous countries in Africa, were still colonies as far as their economies were concerned.

> "The Ivory Coast, officially independent, but her wealth is managed by sixty thousand Frenchmen who have put that country's economy at the top of the African league, judged by every yardstick of productivity and development. Similarly, Zimbabwe enjoys the legacy of Ian Smith's White Rhodesia - a white machine which even the professed marxist Prime Minister, Robert Mugabe, is reluctant to

27. See "Cross Country Analysis of Growth in Sub-Saharan Africa", World Bank Research News Vol. 3 No. 2. Summer 1982.

dismantle."[28]

Certainly, this is not a suggestion that African States should revert to colonial states or be neo-colonized. It rather suggests a more liberal and practical policy towards private and foreign investments.

A major proposal has been advanced by Third World Governments and reform-minded intellectuals for the creation of a New International Economic Order.[29] This demand is based on the view that the present international economic order is fundamentally inequitable. The benefits from North-South exchanges of primary commodities, manufactured goods, technology, and skilled manpower, seem to favour the already developed and privileged partner. Today, one finds a situation in which Africa, though bearing no responsibility for high interest rates, or the rising costs of her imports, must, nonetheless, shoulder the economic burdens which these impose. Developing countries demand greater access to developed countries markets, especially for their manufactured exports; for more stable and higher prices for their primary commodity exports; for controls to prevent abuses in the transfer of technology by

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28. Xan Smiley: "Misunderstanding Africa", The Atlantic Monthly, September 1982 op.cit. pp. 70-71.

29. See Report of the International Committee on Legal Aspects of NIEO, ILA Conference, Montreal, 1982.

transnational corporations; for the recognition of the right to national ownership of natural resources; and for the increased availability to the South of financial resources from reformed international monetary and development agencies.

The Report of the Independent Commission on International Development Issues (Brandt Report) entitled 'North-South: A Program for Survival' (1980), endorsed many of the points raised in the Third World's proposal.[30] The Brandt Report maintains that a North-South dialogue could lead to the re-structuring of the international economic and political order in directions that would benefit the world's population in the North as well as in the South. It notes that international solidarity must stem from strong mutual interest in cooperation and from compassion for the hungry.

The on-going North-South negotiations, however, manifestly demonstrate the unwillingness of Western Governments to accept any re-structuring of the International Economic Order that would 'penalize' their national economies. The developed countries are not persuaded by the fact that their economies would derive

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30. See Barbara Ward: "Another Change for the North?", 59 Foreign Affairs, 386 (1980-81).

long-term benefits from growing world markets for their sophisticated products. It has been observed, therefore, that:

> "Governments....act according to short-term interests which lead them to oppose any changes requiring expensive structural economic adjustments, ...(r)eforms in the international economic and political order are not negotiated on the grounds of social justice and long-term mutual interests; rather, they become faits accomplis as a consequence of shifting economic power balances."[31]

Consequently, strong as the case for a New International Economic Order may be, African States cannot place all hopes on it as a means to bring about the economic development of the region. There are other possible roads to development, and the different modes of transport contribute to development.

Civil Aviation and Economic Development

It is significant that whenever a team of economists is sent to advise on the action needed to stimulate economic growth in an under-developed country, they invariably agree, whatever their political persuasions, that the government of the country concerned must plan the essential investment in social overhead capital. And high

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31. Richard Sandbrook: "Is there hope for Africa?", International Perspectives January/February 1983, op.cit., p. 7.

on the list of these basic capital requirements will invariably be found the development of the country's transport system.[32]

Road and rail systems in most of Africa are grossly inadequate, while river transport is too often affected by the seasons. The sea ports of most of the coastal states are overcrowded and poorly connected to the rest of the country.[33] Although institutions like the International Development Agency (IDA) and the World Bank, to name only a few, have committed large sums of investment to the transport sector in the Third World,[34] it has been established that to construct a Third World System of Surface Transport equivalent even to that which existed in the Western World prior to the Second World War would cost far in excess of the total of all official development assistance available for investment.[35] Thus, the importance of air transport as an alternative to surface

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32. See Wheatcroft S.: Air Transport Policy, at page 47.

33. See ICAO: Flight Plan For the Third World 5 (1980).

34. See, for example, Mason and Asher: The World Bank Since Bretton Woods, pp. 706-710.

35. See Clell Harval: "Transport Research in the World Bank", World Bank Research News Vol. 1 No. 2, May 1980, p. 1 et seq.

modes in developing countries, especially Africa, has been underscored.

The Managing Director of Air Madagascar, Mr. Rajasfetra, states:

> "In Africa, the aircraft plays a much more important role than in economically developed countries owing to the inadequacy of, or even inexistence of road, rail, waterway and maritime infrastructure and the difficulty of operating in the rainy season in inter-tropical zones.[36]

The World Bank confirms that view. It states that civil aviation is far more important for developing than for many developed countries mainly due to the relative deficiency of surface transport infrastructure. Air transport's share in total inter-urban passenger movement is often several times what it is in equivalent-sized developed countries. Some areas of Africa are accessible only by air, particularly in certain seasons. More important, individual routes that do not have alternative surface infrastructure often show much higher air traffic shares than routes of comparable nature in more developed countries.[37]

Civil aviation, besides serving as a vital transport mode where others do not exist, may be an

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36. See ITA Bulletin No. 37-E, November 1980, p. 877, at 879.

37. "Aviation and Development", World Bank Study (1980).

alternative to a crushing tax burden which normally subsidizes much of the expense of construction and maintenance of surface transport systems, all of which cost far more than the infrastructure required to support civil aviation. Thus, civil aviation can be a more efficient use of resources than surface transport systems.[38]

This is also the view of the Director General of the International Air Transport Association (IATA), Knut Hamarskjöld. In an address delivered in 1978 to a conference on African civil aviation he stated these facts:

> "It has been calculated that two modern regional airport developments, related facilities and four converted four-engined air freighters can be obtained at the same cost as only eighteen miles of rural African highway. And those eighteen miles, once laid in a certain direction, point there forever. Airports, planned small, later can be expanded or even abandoned. The aircraft can land anywhere - provided basic facilities are there - and can surmount any terrain."[39]

It has further been established that an air transport system would be more cost effective than road transport in terms of distance and anticipated traffic in areas with relatively sparse populations such as are found in Africa. An air transport system would be more cost-effective than road for distances as short as eighty

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38. ICAO Assistance to Civil Aviation in the Developing World, (ICAO Technical Bureau Publication).

39. See AFCAC/Airline Coop/6.

kilometres, over which a maximum of 3,700 tons of merchandise or 37,000 passengers would be transported in a year. To carry that number of passengers in each direction would require a daily air frequency of slightly more than two fully loaded DC-4s, each transporting forty-four passengers. Furthermore, air would hold its cost advantage over road for distances of 483 kilometres, carrying up to 225,000 passengers in each direction per year. To transport this volume would require a daily frequency of about six medium-sized jet aircraft, each carrying 100 passengers.[40]

Conclusion

Before independence, civil aviation played some limited role in Africa. It was conducted and directed by the administrations in the colonies or groups of colonies, and ultimately related to the respective metropolis in Europe. In the post-independence era, African governments are conducting and directing civil aviation in their states, but each state is ultimately linked to the whole continent as an economic region. If one considered civil aviation as a grandiose transport system for rich people, then one would

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40. See United States Department of Transportation, 2nd National Transportation Report to Congress, 1974.

be tempted to conclude that civil aviation still has an insignificant role in Africa which has a very poor economy. But civil aviation is not a luxury, it is a necessity for independent Africa. It is not a product of economic development, but an instrument for economic development. Africa's Civil Aviation Policy has as its ultimate goal the stimulation of the region's economic development. Furthermore, since the region is very poor, the financing of the basic, civil aviation infrastructure and facilities is done mainly from foreign resources.

CHAPTER 2. THE BASIC LEGAL STRUCTURE OF CIVIL AVIATION IN AFRICA

The concept of law as an instrument to regulate human activities has been familiar to Africans. Before the people were colonized and introduced to foreign laws, they had established their own effective indigenous legal system which came to be branded customary law or native law.[1] Whatever it is called, the fact remains that it is fundamentally the rules that have been fortified by established usage. Thus, the Privy Council advised in the Nigerian case of Eleko v. Officer Administering the Government of Southern Nigeria[2] that the courts could apply modified customary law if it had the general acceptance of the community subject to it. The introduction of foreign law to Africa by the Europeans did not fill a vacuum - it only created a dualism.[3] The task of the courts has been to direct the gradual convergence of the two notions of law, to fuse them where fusion does not damage

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1. See Allott, A.N.: The Future of Law in Africa at p. 4.

2. [1931] A.C. 662 at p. 673.

3. See Allott, A.N.: "Discussing African Law", Integration of Customary and Modern Legal Systems in Africa, p. 88.

the feelings of those concerned, to adapt old customs to modern life and to interpret one legal system to the other with insight and dignity.[4]

Transactions Unknown to African Customary Law

Civil aviation is a transaction that was unknown to Africans until the advent of foreign rule. It also involves parties that are not subjects of customary law. Customary law applies only in causes and matters where the parties thereto are natives; and, occasionally, in causes and matters between native and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to any other rules of law which would otherwise be applicable. It does not apply where a transaction is unknown to native law and custom.[5]

In the cases where customary law was inappropriate, the received laws applied . The received laws are mainly the European municipal laws introduced to Africa. The laws were introduced through express enactments. On the proclamation of the Protectorates of Northern and Southern

4. Ibid., Footnote 1, p. 13.

5. See for example, S.27(2) High Court of Lagos Act Cap 80 Laws of the Federation (Nigeria) 1958; Bakere v. Coker (1935) 12 NLR, 31.

Nigeria, with effect from January 1, 1900, for example, English law became applicable there as it stood in England on that date. The English law thus received comprised the common law, doctrines of equity and statutes of general application. As provided in the Gold Coast courts ordinance, the common law, the doctrines of equity and the statutes of general application which were in force in England on July 24, 1874, became in force in Ghana.[6] Since the common law is essentially case law,[7] it further implies that decisions of English courts on civil aviation cases, for example, had extensive application in British Africa too.

When African States achieved independence, they retained most, if not all of the received laws. Many statutes that have been promulgated since independence repeat statutes from the colonial period, modifying them only in details.[8] In the case of the former British colonies, English decided cases have strong persuasive

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6. See Cap. 4, Section 83, Gold Coast Courts Ordinance.

7. See David and Brierly: Major Legal Systems in the World, p. 348.

8. See Xavier Blanc-Jouvan: "Traditional and Modern Concepts in Land Law", Integration of Customary and Modern Legal Systems in Africa, op.cit., p. 223.

authority and are frequently cited in the courts especially where there are no local precedents.

2.1 Africa and International Law

Professor Elias has explained that in large areas of Africa there emerged broadly similar political and economic conditions, and, therefore, similar rules of customary law thereby producing a universal body of principles of African customary law that is not essentially disimilar to the broad principles of European law. He further states that African customary law shares with customary international law the characteristic that its validity does not depend upon the theory of sovereignty. Africa also shares with the rest of the world a certain measure of common experiences in international living that entail the observance of certain practices of warfare, treaty-making and patterns of international behaviour and morality.[9]

On attainment of independence, African States became members of the United Nations and other international organizations. In 1961, African jurists met in Lagos, Nigeria. They declared that the Rule of Law is a concept

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9. Elias, T.: Africa and the Development of International Law, p. 43.

shared by all countries having varying economic backgrounds and political structures. They rejected any notion of a purely African legal system distinct from other systems in the world and stated that they would be guided by both 'local tradition and foreign example'.[10]

It is evident from the above facts that the way was effectively cleared for the emerging African States to enter into any international relations, engage in international activity, like civil aviation, without feeling estranged from the international legal framework. This is particularly helpful since international air transportation is governed principally by International Law.

The legal framework of civil aviation in Africa is, therefore, based on the acts enacted by independent African States, the relevant European municipal laws which have been adopted in the different former African colonies either in their original or modified forms, and the rules of international law. It is in the light of these considerations that the next points are examined.

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10. See Report of the Conference On the Rule of Law in Africa (International Commission of Jurists) 1961.

2.2 The Legal Regime of the Airspace

The airspace is the principal locality of air transportation - it is the industry's invaluable and indispensable facility. Not surprisingly, the legal regime of the airspace is often the starting point and unavoidable issue in any serious academic work in civil aviation. Here the issue will be examined with special emphases on matters material to Africa.

2.2.1 Proprietary Rights in Airspace

Assertion of private rights over the airspace stems from the view that airspace and land are not two different things, the former being merely an extension of the latter. He who owns a piece of land will logically own the block of space above it. To the Romans, this was not an abstract or theoretical concept. It was a concrete and practical one as expounded in the doctrine of cujus est solum, ejus est summitas usque ad coelum.

This doctrine was popularised by the Romans and other successive legal systems to create and regulate exclusive rights giving a landowner - either use or ownership in usable space above his land. Since classical Roman law attached to ownership the full right of doing whatever one liked with the thing owned, it was, therefore, maintained that the Roman landowner had the full and free

use of all above and below his land. That included control over lands or buildings and freedom from interference with the air above and the ground below.[11]

With the advent of the aircraft, the doctrine was subjected to serious test in courts by claimants who wanted to take advantage of the Roman concept of land ownership. Of interest to African states who were former British colonies, is the case of Pickering v. Rudd[12] where an English court ruled that firing a bullet into the air or the innocent passage of a ballon over private property did not infringe the ownership rights of the land owner. In the American case of Hoffman v. Armstrong[13] it was also held that the right of ownership over everything above the surface of the soil did not extend to anything disconnected with or detached from the soil itself. But can it be said that the 'coelum' is detached or entirely disconnected with the soil? The answer is positive only in the sense that it is not a concrete thing like a building or plant that is so attached or connected for the purpose of making a valid

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11. Roby Henry John: Roman Private Law in the Times of Cicero and Antonines vol. 1, p. 414.

12. 171 E.R. 70 and 400 (1815); see also S.40 of British Civil Aviation Act 1958.

13. Cited in McNair: The Law of the Air, at p. 33.

legal claim.

For the African States with a French legal heritage, both the Coutume de Paris and article 552 of the French Civil Code are relevant. Those laws endorsed the ownership of the air block above private land.[14] However, the French Civil Aviation Code of 1957 gives a right of passage in the air medium,[15] but the right of overflight must not interfere with the exercise of the rights of the land owner.[16] Interestingly, but not surprisingly, Cameroon, a former French colony, adopted wholesale the provisions of the French Civil Aviation Code: Aircraft of Cameroonian nationality, and foreign aircraft which have been granted traffic rights or special temporary authorization, may fly freely over the territory of Cameroon subject to the observance of air traffic and navigational regulations.[17] But the right of aircraft to fly over private property may not be exercised in such a way as to interfere with the exercise of the rights of the owner of such property.[18]

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14. Matte: Treatise on Air-Aeronautical Law, pp. 56-57.
15. Art. L.131-1.
16. Art. L.131-2.
17. Art. 35, Cameroon Civil Aviation Code, 1963.
18. Art. 37, ibid.

The 'Cujus est Solum' doctrine does not apply and has never been popular in Africa especially in respect of the airspace. In the states which apply the common law system the nearest legal rule to the 'Cujus est Solum' rule is the principle of Quicquid Plantatur Solo Solo Cedit which stipulates that whatever is affixed to the soil is part of the soil. A landowner has the same property rights over whatever is on the land as he has over the piece of land itself.[19] But even this principle is further watered down by subsequent legislative acts that it is inconceivable for the airspace to be covered by it.[20]

A landowner will not claim against an aircraft overflying his private property. He can, however, sustain an action against an aircraft operator if the aircraft is flown low enough to intrude upon his ground property or activities as to render his piece of land valueless or of

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19. See, for example, the Nigerian case of Francis v. Ibitayo, (1963) 13 NLR 11, where plaintiff erected a building on defendant's piece of land when negotiations for sale of the piece of land had not been completed. When the negotiations finally broke down plaintiff sued to recover the building. It was held that the building was part of the piece of land and had become the property of the defendant land-owner who was not obliged to give it back or pay compensation to the plaintiff.

20. Cf. Section 3 of the Miscellaneous Provisions Act (formerly Cap 89 of the Interpretation Act) of Nigeria.

less value.

2.2.2 The State's Rights Over the Airspace

Although exclusive private rights over the air medium are not recognized, a state's rights are. The latter rights are grounded on the internationally recognized principle of state sovereignty and jurisdiction. The state territory and its appurtenances (airspace and territorial sea) together with the government and population within its frontiers, comprise the physical and social manifestations of the primary type of international legal person, the state.[21] Sovereignty is not only used as a description of legal personality accompanied by independence, but also as a reference to various types of rights, indefeasible except by special grant, in the patrimony of a sovereign state. It is this type of right that a state, as an international legal person, has over its air coelum. A state does not, stricto sensu, own the airspace above its land and sea territory any more than it could be said to own the population within its territory. Accordingly, when states talk about their airspace that can only be construed to mean their right to use of, and control over the use by

21. See further, Brownlie: Principles of Public International Law, p. 109.

their nationals and foreigners of the airspace above their territory.

The principle of sovereign rights over the airspace is mainly the development of international custom rather than the creation of international treaties. Thus, it has been stated that during the 1914-1918 war, the principle of sovereignty was inscribed in different national legislations as having a customary character.[22] In the Paris Diplomatic Conference of 1910 there was a general agreement that useable space above the lands and waters of a state is part of the territory of the state. The draft provisions of the convention which were accepted in principle, but never signed, stipulated that states were entitled to regulate flights over their territories as fully as they had historically regulated other forms of human activity in national territory.[23]

The Paris Convention of 1919 merely endorsed the existing principle, while the Chicago Convention simply "recognized that every state has complete and exclusive sovereignty over the airspace above its territory".[24]

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22. Matte: Treatise on Air-Aeronautical Law, op.cit., p. 39.

23. Cooper, J.: Explorations in Aerospace Law, p. 105.

24. Art. 1, Chicago Convention.

Bin Cheng, therefore, asserts that the Chicago Convention provision is merely declaratory in nature and affirms a principle which seems to be generally recognized under customary international law.[25]

Being a principle of customary international law, an African State, or any state for that matter, does not have to be a party to the Paris Convention or the Chicago Convention in order to legitimately assert its sovereignty over the airspace above its territory. This valid proposition can, however, give rise to serious controversy over the competent exercise of jurisdiction over the airspace of territories with controversial sovereign status. Such can be the case with the African territory of Spanish Sahara whose sovereignty has been recognized by some African States and not by others.

2.3 The Airspace Over the Territory of Namibia

2.3.1 Legal Status of Namibia

Namibia (South West Africa) was a German colony, which is still not independent today. The Chicago Convention rests the exercise of sovereign rights over the airspace of colonial territories on the metropolitan

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25. Bin Cheng: The Law of International Air Transport, p. 120.

country.[26] But Namibia, though not self governing, does not have a competent metropolitan country today that can exercise the sovereign rights over the territory.

At the end of World War I, defeated Germany's colonies were given to the victorious allied and associated powers to administer under the mandate system which was a creation of the League of Nations. South West Africa was granted to the Union of South Africa to administer.[27] The doctrine of sovereignty has no application to a mandated territory. Sovereignty over such a state is in abeyance; if and when the inhabitants of the territory obtain recognition as an independent state, sovereignty then revives and rests in the new state.[28] Namibia's sovereignty is still in abeyance.

South Africa ultimately exercised sovereign rights over the territory of South West Africa until the United Nations withdrew her mandate over the territory. But South Africa continues to occupy Namibia illegally.

General J.C. Smuts expressed the design to

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26. Art. 2, Chicago Convention.

27. Art. 6, League of Nations Mandate for South West Africa.

28. Judge McNair: International Status of S.W. Africa ICJ Reports (1950) p. 128 at 150.

incorporate South West Africa into South Africa as soon as the mandate was granted. But President Woodrow Wilson of the United States was quick to point out that there would be no annexation of the German colonies and possessions without exception. Complete authority and control would be vested in the League of Nations, and the administering nations would be mere agents, appointable and changeable at the League's discretion.[29]

The relationship between South Africa, as a mandatory, and the League of Nations, as the supervisory, Authority was a difficult and stormy one. This state of affairs persisted until 1946 when the League was dissolved and the mandated territories bequeathed to the successor, the United Nations Organization, as trust territories. But South Africa, after initially recognizing the competence of the U.N. over South West Africa, later declared that the mandate had expired with the dissolution of the League and that it was under no obligation to place the territory under the U.N. trusteeship system.[30]

In 1950, the International Court of Justice ruled

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29. Tempereley: A History of the Peace Conference of Paris, vol. 1, p. 378 et seq.

30. See South African Memos on S.W. Africa dated October 17, 1946, and November 7, 1946.

that the mandate did not lapse with the dissolution of the League; that the supervisory rights of the League had become invested in the U.N., and that South Africa was accountable to the U.N. General Assembly for her continuing administration of the territory.[31] South Africa defied this ruling.

On October 27, 1966, the U.N. General Assembly decided to revoke the South African mandate for South West Africa because of South Africa's grave and persistent breaches of the Mandate. The U.N. further decided to administer the territory directly itself.[32] South Africa denounced the U.N. resolution as ultra vires and continued to disregard subsequent U.N. General Assembly and Security Council resolutions calling on her to withdraw from the territory.[33] Consequently, the United Nations declared South Africa's continued presence in Namibia as illegal. The Security Council stated:

> "...The continued presence of the South African authorities in Namibia is illegal...all acts which the South African government took on behalf of or concerning Namibia after the termination of the

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31. ICJ Reports (1950) p. 135.

32. UNGA Resolution 2145(XXI).

33. UNGA Resolutions 2325(XXII) and 2372(XXII); Security Council Resolutions 264 (1969), 269 (1969) and 283 (1970).

mandate are illegal and invalid."[34]

On July 29, 1970, the advisory opinion of the International Court of Justice on the legal consequences for states of the continued illegal occupation of Namibia by South Africa, was sought by the U.N.[35] The court upheld the validity of the U.N. resolutions. It ruled that as a rule of jus cogens member states as well as non-member states are under an obligation to recognize the declaration of the illegality of South Africa's presence in Namibia and to act in accordance with the decisions contained in the resolutions because

> "...the termination of the mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all states in the sense of barring erga omnes the legality of a situation which is maintained in violation of international law."[36]

Nevertheless, South Africa still occupies Namibia and many western nations continue to deal with the South African government through their multinational corporations, in respect of the territory. South Africa has usurped complete and exclusive sovereign rights over Namibian territorial airspace to the extent that she maintains military air bases at Swakopmund and Ohopoho in the

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34. Resolution 276 (1970).

35. Resolution 284 (1970).

36. ICJ Reports (1971) p. 56.

Kaokoveld.[37]

For practical purposes, South Africa's illegal traffic and navigational regulation and control of the airspace over the territory of Namibia has been condoned as a necessary evil. But there are two other internationally recognized authorities exercising control over Namibia: the United Nations administrator and the recognized liberation movement, SWAPO. This territory of not less than 317,827 square miles, poses a problem to international aviation.

In the case of an aircraft accident in that territory, for example, is it Pretoria, or the United Nations or the Nationalist Movement (SWAPO) which is competent to carrying out the functions provided in article 26 of the Chicago Convention? In the case of an aircraft hijacked to that territory which authority will be expected to assume the responsibilities of returning the aircraft either to its commander or to its state of nationality and apprehending the hijackers? Finally, since South Africa's administration is illegal, null and void, who is competent to make or take part in the making of crucial aviation policies concerning the territory of Namibia? As far as civil aviation is concerned, it is very difficult to discern

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37. See Accounts of Ethiopia and Liberia v. South Africa, published by the Ministry of Information Pretoria, p. 260.

who is precisely in charge of things in Namibia.

2.3.2 Effect of the ICAO Resolution Granting Observer Status to Liberation Movements

The observer from the African Civil Aviation Commission (AFCAC) to the ICAO 1974 Assembly (21st Session) called the attention of the international community to the fate of dependent African territories as far as civil aviation is concerned.

> "When in ICAO or in AFCAC we meet and discuss problems affecting civil aviation in various parts of Africa, there is usually no one competent to represent the African territories which are still under colonial rule. As a result, our meetings tend to disregard the problems of those areas. Certainly, the best arrangements for the development of civil aviation in Africa can be made only if all the pertinent problems are considered."[38]

He then urged the Assembly to take a positive decision regarding the implementation of the United Nations General Assembly resolutions which provide for the invitation of liberation movements to the meetings of the United Nations Specialized Agencies. ICAO, being one of such agencies, was bound to give effect to the U.N. Resolutions.

The ICAO Council is authorized to invite non-contracting as well as contracting states and also public and private international organizations to ICAO

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38. See ICAO Doc. 9119-A-21 Min.P/4.

Assembly meetings.[39] But the Council did not have any express authority to invite liberation movements. It, therefore, requested the Assembly to authorize it henceforth to extend invitations, through the Organization of African Unity (OAU) and the Arab League, to representatives of liberation movements recognized by those organizations, to attend, as observers, ICAO meetings dealing with matters pertaining to their respective territories.[40] The request was the subject of very hot debate in the Assembly.

The Tunisian delegation argued that to allow liberation movements to participate in meetings of international organizations would serve to prepare them for a happier future and to encourage understanding among states. It then proposed that:

> "The Assembly authorizes the council to extend invitations, through the Organization of African unity or the Arab League, to representatives of Liberation Movements recognized by these two organizations to attend...."

The proposal was supported by over sixty African and other Third World countries as well as the Soviet Union.[41]

The Israeli delegation was outraged by the certainty that the Tunisian Proposal would provide a framework for the Palestinian Liberation Organization to

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39. See ICAO Res. A5-3, A1-10 and A1-11.

40. See ICAO Agenda Item 17, para. 18, WP/36 (1974).

41. ICAO Doc. 9119-A-21 Min.P/9.

participate in ICAO meetings. It contended that:

> "any approval of the principle of inviting the PLO - a name identified with acts of air piracy of the most extreme and murderous nature - would be an insult to the principles governing ICAO's activities and a source of grave danger to international civil aviation."

The delegation, therefore, proposed an amendment to the Tunisian proposal which would have the effect of deleting the reference to the Arab League and of changing "recognized by those organizations" to read "recognized by the organization". The conclusion to be drawn from the Israeli contention is that the invitation of recognized African liberation movements was not the subject of opposition.

The United States supported the Israeli proposal because, according to its delegation, the PLO had among its members subordinate groups that openly espouse and perpetrate acts of air piracy. But the proposal was defeated - sixty-eight against, thirty-four abstentions and only four votes for. South Africa was one of those countries which abstained.

By virtue of the Assembly's approval of that ICAO Council request, the South West Peoples Organization (SWAPO), being the liberation movement recognized by the OAU, is competent to take part, as an observer, in all aviation policy-making at international organizations where such policies affect the territory of Namibia. The African Civil Aviation Commission, for example, extends regular

invitations to that liberation organization to attend all its plenary sessions as an observer.[42] The same does not apply, however, to the Polisario Front, the movement fighting for the independence of Spanish Sahara.[43] The issue of the recognition of that Front by the OAU is still unresolved.

2.4 The Limits of a State's Territorial Airspace

The law is very particular about the precise identification of any subject or object which forms an issue of litigation. Contracts have been voided because the subject matter was not precisely identifiable.[44] In land cases, the property in dispute must be clearly determinable.[45] It is stipulated that for a state to be

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42. See Art. XV, OAU/AFCAC Agreement establishing AFCAC as a specialized Agency of OAU.

43. Cf. (1975) ICJ Rep. p. 4 for ICJ's advisory opinion on the status of Western Sahara at the time of Spanish Colonization and the legal ties between the dependent territory and Morocco and Mauritania.

44. "Parties must make their own contracts and this means that they must agree as to its terms with sufficient certainty. If the terms are unsettled or indefinite, there will be no contract". See Chitty on Contracts, 23rd Ed. p. 43.

45. See for example, Montpetit: Traité de Droit Civil Tom 3, p. 332 where it stated: "L'action petitoire n'est

recognized as a subject of international law, it must possess, inter alia, a defined territory.[46]

It must be startling to the lawyer that a state's territorial airspace which is the subject of guarded sovereign rights and the theatre of international activities and incidents, is not precisely identifiable. The heights and widths of states' territorial airspace are vague and varied.

The United Nations Charter and modern international law forbid the use of force as an instrument of national policy or as a means of settling international disputes.[47] But it is also generally agreed that every sovereign state has an inherent right recognized by international law to protect its territorial integrity and to defend its borders against unlawful violation.[48] Many such violations are alleged in the territorial airspace,

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(continued from previous page)
pas recevable si l'héritage du demandeur n'est pas délimitée...et certaine".

46. See, for example, Article 1 of the Montevidio Convention on Rights and Duties of States.

47. See U.N. Charter Article 2(4); Articles 8 and 9 of the Draft Declaration on Rights and Duties of States.

48. Article 12, ibid., see also Bowett: Self-Defence in International Law p. 34.

some with fatal consequences.

Some of the incidents were generated by disputed aerial frontiers. On June 13, 1952, a Swedish military aeroplane was shot down by the Soviets over the Baltic. Among the facts disputed was the actual extent of the Soviet airspace, as the Soviet Union's claim to territorial waters of twelve miles - and consequently the airspace above those waters - was not recognized by Sweden.[49] A few months later, (on October 7, 1952) a United States B29 aircraft was shot down by the Soviets in a territory the United States claimed was Japanese while the USSR claimed was their airspace.[50]

Incidents of this sort tend to underscore the need for a clear delimitation of territorial airspace. Where the airspace a state claims to protect from external violation does not have generally acceptable limits then, the state may not have a good basis to rest its right of self-defence, otherwise there will be many more cases of arbitrary acts of defence resulting in serious international incidents that threaten world peace.

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49. See Johnson, D.: Rights in Air Space, page 71.

50. See ICJ Report (1956), p. 9.

2.4.1 The Horizontal Limit

It is the horizontal limit of territorial airspace that reasonably concerns African States. For the land-locked states the horizontal limits of their airspace start and end where their neighbouring territories end and start. For the littoral states, their airspace extends to the limits of their territorial waters. The determination of the airspace limit in the latter case further depends on the determination of the water limit - a subject which is far from being settled, as can be seen from the Libya/U.S. aerial confrontation over the Gulf of Sidra.

Libya claims a twelve-mile territorial limit of waters plus the Gulf of Sidra. The United States claims the Gulf of Sidra is international waters. In August 1981, the U.S., on the basis of that claim, ordered her sixth fleet to carry out a naval exercise in the Gulf. U.S. F-14 fighter planes flew over the Gulf. Since Libya claims the Gulf, the airspace over it accordingly forms part of her territory. She, therefore, ordered her two SU-22 jet fighters to attack the 'intruders'. A dog-fight ensued and the Libyan planes were downed.[51]

Official Africa's reaction to the incident was

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51. Aviation Week and Space Technology, August 24, 1981, p. 9.

passive and nonchalant. This was so not because they agreed with the U.S. claims or because Ouadafi, the Leader of Libya, was unpopular, but because the Libyan claim was debatable. Libya claims a twelve-mile territorial water limit as well as all the Gulf of Sidra South of a line from Benghazi to Misurata. Not many other African States recognize a twelve mile limit. The United States has traditionally recognized only three nautical miles limit since the earliest days of the Republic.[52] Some African states also recognize this limit.

Both the twelve-mile and three-mile limits are well founded. As far back as 1930, the League of Nations convened a conference on the progressive codification of International Law. The Conference concerned itself primarily with the width of the territorial sea. The following positions were taken by the states in attendance: twelve states, including South Africa, the United Kingdom and the United States, claimed three miles; six, including Egypt and France, claimed three miles and the contiguous zone; the Scandinavian countries claimed four miles; Italy, Brazil and five other states claimed six miles, while Cuba and Spain were among the countries that claimed six

52. See U.S. v. Postal, 589 F. 2d 862 at 869 (5th Circuit, 1980).

miles and the contiguous zone; Portugal and the Soviet Union claimed twelve miles.[53]

By 1958, the number of countries claiming twelve miles had risen significantly. Three African countries, Ethopia, Egypt and Libya, were among them.[54]

In the 1958 conference on the Law of the Sea, held at Geneva, positions adopted at the conference ranged from adherence to three miles with no special zones to opinions that each coastal state has the right to determine the limit. The United States and the United Kingdom persisted in the three-mile limit which they inherited from the anachronistic cannon-shot rule. Since there was no compromise decision, the 1958 Convention on the Territorial Sea and the contiguous zone could only fix the limit of the contiguous zone (twelve miles),[55] but not the territorial sea.

In 1966, however, it was stated:

> "In 1951, the great preponderance of States were recorded as claiming a territorial sea of 3 miles.... Today, the number of 12 mile states exceeds those opting for three miles since the latter number has shrunk."[56]

In August 1981, the United Nations draft convention

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53. Barry Buzan: Seabed Politics, p. 5.

54. Ibid., p. 14.

55. Article 24(2) 1958 Convention on Territorial Sea.

56. Burke: Towards a Better Use of the Ocean, p. 62.

on the Law of the Sea was signed in Geneva,[57] and opened for signature on December 10, 1982.[58] The text of the Convention reflects the claim of the majority of states. It reiterates that sovereignty extends to the airspace over the territorial sea as well as to its bed and subsoil.[59] Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles, measured from the baselines determined in accordance with the Convention.[60]

This convention provides a more legitimate and guided basis for states in the African region to use, through a regional conference to establish a uniform limit to their territorial waters. However, although uniform limits will prevent a good number of incidents arising from conflicting territorial limits, the extension of the territorial sea to twelve miles will restrict the freedom of movement of aircraft above the high seas.[61]

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57. See U.N. Doc. A/CONF.62/L.78, of August 28, 1981.

58. See U.N. Doc. A/CONF.62/122 of Oct. 7, 1982, also 21 ILM 1261 (1982).

59. Article 2(2) of the Convention on Law of the Sea.

60. Article 3 ibid.

61. Article 12 of Chicago Convention provides that the rules in force over the high seas shall be those established by the convention. Contracting states may

The Convention on the Law of the Sea is a fact, it now exists. Whether or not it becomes a fully operational treaty, widely supported, generally followed, it is and will be the cause of significant effects.[62] The United States herself will finally abandon the three-mile claim. In 1970, for example, she adopted an oceans policy one component of which was an effort to obtain international agreement on a maximum of twelve miles sea territory.[63]

For Africa, the Convention may seem to provide a solution for the determination of the limits of territorial sea, but the delimitation of territorial rivers and lakes may still pose a problem. Many African states are separated by rivers. The River Congo, for example, separates Zaire

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not adopt measures to conflict with them (Annex 2). It has further been stated that the extension of the territorial sea by 12 miles will bring the airspace over the World's most important international straits such as Gibraltar, Hormuz, Bab et Mandeb, Dover and Malacca under territorial control. See Richardson: "Power, Mobility and the Law of the Sea", 58 Foreign Affairs, pp. 902, 905-906 (1980). Innocent passage through the straits does not embrace any right of over flight. See Kay Hailbronner: "Freedoms of the Air and the Convention on the Law of the Sea" AJIL vol. 77, No. 3, July 1983, p. 495.

62. See Allott, Philip: "Power Sharing in the Law of the Sea", AJIL, January 1983, vol. 77 No. 1 p. 1 et seq.

63. Brownlie: Principles of Public International Law, op.cit., p. 194.

and the Republic of Congo. Some are separated by lakes. The Lake Chad, for example, is shared by Cameroon, Chad, Nigeria, and Niger. This situation creates marginal aerial frontiers.

Some of these neighbouring states have not always had excellent relations with one another and some hostile incidents have been registered.[64] Defence against sneak attack or other military necessity, is not, however, a major concern here. Many possible situations and problems might, and some certainly will, arise in connection with the more active administration and exploitation of such marginal territories. New situations may raise issues of jurisdiction in the air, express language in any convention to the contrary not withstanding.[65]

As African states increase their air power and civil aviation activities, marginal territorial airspace could be volatile during crisis relations between

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64. In May 1981, Cameroonian and Nigerian naval patrols exchanged fire along disputed territory on the Cross River which bounds the two countries in the South. Some Nigerian soldiers were killed, and the two countries came very close to war. The Cameroon Government later accepted to compensate for the Nigerian soldiers killed without accepting responsibility or admitting guilt for the incident.

65. See Hayton: "Jurisdiction of the Littoral State in the Air Frontier" 3 Philippine International Law Journal (1964) p. 369, 381 et seq.

neighbouring states.[66]

How can common rivers and lakes be delimited so as to avoid unnecessary disputes in the air and on the surface? In the 18th century, Austria acquired a portion of the Shore of Lake Garda, and challenged the claim of the Republic of Venice over all the waters of the Lake. She argued that rivers as well as lakes, except in case of public agreements, were a part of the continent which they nourished and they became divided in proportion to frontage. She asserted that legal values increase in direct proportion to the extension of the subject. Thus, in the Austrian Civil Code of 1811 it was provided that if an island was formed in the middle of a body of water, the owners of the properties situated along its two banks had the exclusive right to appropriate it in two equal shares or divide it between them in proportion to the length of their parcels of land on the shore. This is the principle of proportionality.

Although the above principle has been used in other

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66. In 1981, the Cameroon Government sent two diplomatic notes of protest to the Governments of Libya and Chad for alleged violation of her territorial air space by Chad and Libyan military aircraft supporting Wadei against Habre.

cases,[68] Hugo Grotius had expressed the view that in doubtful cases, sovereignty extended to the middle of the water.[69] The Treaty of Moscow signed on July 12, 1920 between Lithuania and the U.S.S.R. provided that in the cases where their frontier was carried along lakes, rivers and canals, it should pass through the middle of the lakes, rivers, and canals.[70]

It is much safer if states exercise their dominion over their frontier rivers and lakes as a unity.[71] The exceptional velocity of the aircraft and the specialized utilization of the airspace are not compatible with marginal territorial airspace which results from the sharing of

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68. The Supreme Court of the Holy Roman Empire in 1526, settled the dispute over Lake Saint Andrea between Arco and Castelbarco in accordance with the principle of proportionality.
So was Lake Geneva divided in the Treaty of Lausanne in 1564; see V. Adami: National Frontiers in Relation to International Law 40 (translated by T.T. Behrens 1927).

69. See Hugo Grotius: Dejure Belli Ac Pacis, Bk 11, Chap. III #XVIII, Carnegie Endowment Edition of 1646, 1913.

70. Article 2 of the Peace Treaty of Moscow, Doc. E/ECE/136 p. 18. See further, Louisiana v. Mississippi 202 U.S. 1 at p. 50 (1906).

71. See Samuel Pufendorf: De Jure Naturae et Gentium 1672. IV, Chap V, #8, Carnegie Endowment Edition of 1688, 1934.

international rivers and lakes - whether such sharing be based on the principle of proportionality or the principle of sovereign equality.

Some groups of African states have taken a step in the right direction through the establishment of the Lake Chad Basin Commission and the Rivers Senegal and Niger Basin Commissions respectively. The Republics of Cameroon, Chad, Niger and Nigeria signed a Convention at Fort Lamy (N'djamena) Chad, on May 22, 1964 establishing the Lake Chad Basin Commission.[72] The measure was necessitated by the fact that schemes drawn up by the respective member states for the utilization of the water in the Chad Basin were liable to affect the regime of the Basin and its exploitation. The Commission was, therefore, established to prepare general regulations, ensure their effective application, and maintain liaison among the states, among other things. The Chad Basin is open to the use of all member states without prejudice to the sovereign rights of each.[73] The member states shall establish common rules for the purpose of facilitating navigation on the lake and

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72. See Nigeria Treaties in Force 1960-1968 (Lagos, 1969) pp. 217-224.

73. Article 3 of the Statute of Lake Chad Basin Commission.

on the navigable waters in the Basin and to ensure the safety and control of navigation.[74]

In November of the same year, 1964, nine West African Governments signed an agreement establishing the River Niger Commission at Niamey, Niger.[75] The objects of this Commission are similar to those of Lake Chad Basin Convention. The Commission shall, among other things, draw up general regulations regarding all forms of navigation on the River.[76] A similar Commission also exists for the Senegal River Basin.[77]

Through these arrangements, the issue of marginal territorial belts both on the surface and in the air space above the rivers and lake is reasonably settled. One hopes that similar measures will be taken in respect of the other international rivers in Africa. Such an agreement between Cameroon and Nigeria in respect of the Cross River which

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74. Article 7 ibid.

75. Contracting Parties are Cameroon, Chad, Dahomey (Benin), Ivory Coast, Guinea, Mali, Niger, Nigeria and Upper Volta.

76. Article 2(f) Niger Basin Agreement.

77. The Senegal River Basin Convention was signed at Bamako, Mali, on July 26, 1963. For the text, see Sohn L. (ed.) Basic Documents of African Regional Organizations Vol. III p. 1015; Senegal: Journal Officiel 20-2-65 pp. 171-172.

separates the two countries in part, is long overdue.

2.4.2. The Vertical Limit

The issue of the vertical limit of territorial air space is more contentious than the case with the horizontal limit. While States do not dispute the need for a horizontal delimitation, there is a disagreement on whether or not there should be a vertical limit - a demarcation between the airspace and the outer space. Even if it were agreed on a demarcation, the criteria and means for the demarcation pose another controversy.

The international community, recognizes two regimes above the surface territory, the regime of the airspace and the regime of the outer space. States may exercise sovereign rights over the airspace above their territories,[78] but they are not competent to do so over the outer space above their territories.[79] In spite of the frequent usage or reference to and a general acceptance of the regime of the outer space, in contra-distinction to the regime of the airspace, a legal definition of outer space and its earthward limit has not been established, thus creating another legal myth and lacuna.

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78. See article 1, Chicago Convention.

79. See Article 11 of Outer Space Treaty 1967.

ICAO has declared:

> "So far no studies have been undertaken by ICAO on the definition of 'airspace' and 'outer space'. The 'airspace' referred to in the Convention... is generally understood to be the airspace routinely used by international aviation transport where it is necessary to ensure safe separation between aircraft ... (T)he possible development of hypersonic aircraft and rocket transports may progressively extend into what may be regarded as the lower region of outer space, the area in which safe separation between vehicles must be ensured."[80]

Both the 'lower region' and 'outer space' are not defined either by the United Nations Committee on the Peaceful Uses of Outer Space, or in the Outer Space Treaty of 1967. And there do not seem to be any efforts going on to do so.

> "As the Committee on the Peaceful Uses of Outer Space had been unable to identify practical problems which would require a definition and/or delimitation, the question of defining a lower limit or outer space was no longer on the agenda of the Scientific and Technical Sub-Committee."[81]

Today, with the emergence of the controversy over the geostationary orbit, for example, it can no longer be correctly said that there are no practical problems requiring both the definition and delimitation of outer space and the airspace. At the International

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80. Space and Civil Aviation 11 (ICAO publication).

81. U.N. Doc. A/AC.105/240, para. 45 (1967); also Doc. A/4141, para. 28, page 68 (1959).

Telecommunications Union Broadcasting Satellite Conference held in Geneva in 1977, the Australian delegate asserted that the status of the geostationary orbit was measurably connected with the definition and/or delimitation of outer space and it could not be considered in isolation. The Colombian delegate also stated that there was no definition of outer space that was valid and satisfactory for the international community such as might be cited to support the argument that the geostationary orbit was included in outer space. Therefore it was imperative to arrive at a legal definition of outer space, since to apply the 1967 Space Treaty without one, would be merely to ratify the presence of the States that were already using the geostationary orbit.[82]

Since such a legal definition or/and delimitation was not arrived at, Equatorial States met at Bogota, Columbia in 1976 and declared that the geostationary synchronous orbit is a physical fact linked to the reality of our planet because its existence depends exclusively on its relation to gravitational phenomena generated by the earth, and must, therefore, not be considered part of outer space. They went on to claim that the segments of the geostationary synchronous orbit are part of the territory

82. ITU Doc. No 181, pp. 1 and 19.

over which Equatorial States exercise their sovereignty. Accordingly, they proclaimed their sovereignty over it. Congo, Kenya, Uganda and Zaire were four African States that made up the eight countries that signed the Declaration.[83]

This claim has been dismissed by the Space powers and doctrinaires as misconceived and unfounded.[84] It is not intended here to weigh the validity of the arguements for and against the claim. It will only be stated that in the absence of a legal definition and delimitation of outer space, the dismissal of the Equatorial States' claim is as arbitrary as the claim itself.

Meanwhile, two camps have emerged in respect of the delimitation contention - the 'Spatialists' and the 'Functionalists'. In the Outer Space Committee of the United Nations, the Spatialists advocate the establishment of a limit between airspace and outer space. The

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83. Other members are Colombia, Brazil, Ecuador, and Indonesia. See U.N. Doc. A/AC105/C/S.R.298, U.N. Press Releases OS/223, 224 and 852. (1976).

84. See Christol: Satellite Power Systems, White Paper on International Agreements, U.S. Dept. of Energy Research, Satellite Power Systems Project Office, Washington, p. 104 et seq.; Gorove: "The Geostationary Orbit: Issues of Law and Policy", 73 AJIL (1979) p. 444; Gorbiel: "The Legal Status of Geostationary Orbit: Some Remarks". 6 Jl of Space Law (1978) p. 171.

Functionalists oppose the establishment of such a limit because, as they claim, aeronautical activities, in contra-distinction to terrestrial activities, should be subjected to one and the same regulation irrespective of any altitude at which they are carried out.[85]

Spatialist jurists, such as Professor Bin Cheng, postulate that delimitation will establish a precise legal framework consonant with the basic legal principles of international law, thereby removing a source of potentially dangerous conflicts between states and affording some safeguards of the rights and interests of non-space powers which otherwise are likely to be eroded by incipient customs based on the present complete freedom of the space powers.[86] But Functionalist jurists, like Professor Nicolas Matte, draw attention to the practical problems delimitation will cause to low-altitude satellites and systems using only a fraction of an orbit; the space shuttle which is launched as a spacecraft and lands like an aircraft once the deorbit manoeuver is performed; terrestrial aerospace vehicles which will fly between two points on the earth's surface but will rise above the

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85. See U.N. Doc. A/AC.105/C.2/7 p. 58-66 (1970).

86. See Bin Cheng in V Annals of Air & Space Law 1980, p. 323 et seq.

airspace into outer space in doing so; direct broadcasting and remote sensing by satellites which will give rise to a conflict between the legal principle of national sovereignty of each state over its territory.[87]

The functionalist views would have been more persuasive had there been one regulatory framework for aerospace activities. On the one hand, however, there is in existence one regulatory framework governing airspace activities and aircraft, and on the other hand, there is another regulatory framework governing outer space activities and spacecraft. Which of the two regimes governs the hybrid activities and craft? If an object from, or part of, the space shuttle, for example, dropped and injured a third party on the surface will a claim be based on the Rome Convention for damage caused by aircraft to third parties on the surface of 1933 and/or 1952, or on the 1972 Convention on International Liability for Damage caused by Space Objects?[88]

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87. See Matte: Aerospace Law, p. 134.

88. "If one looked at the choice of law problem purely from a functional perspective, there appears to be substantial support for the view that the shuttle is a spacecraft and remains so during descent and the rules of space, not air, law are to apply to it". See Stephen Gorove: "The Space Shuttle: Some of its Features and Legal Implications", Annals of Air and Space Law vol. VI - 1981 at p. 387; Gorove: "Legal Aspects of the Space Shuttle", 12 International Law,

If airspace and outer space were clearly delineated, it would be possible to base such a claim on either the air convention or the space convention depending on the regime the shuttle was, or estimated to be, when the damage was caused. Another alternative may be to establish a third liability regime for hybrid craft.[89]

The debate for and against delimitation may soon be over as opinion seems to be increasingly leaning towards delimitation.[90] More attention is being directed towards where to set a limit rather than whether or not it is necessary to delimit.[91]

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1978, at page 155; Section 308(f) (1) of the NASA act of 1956 as amended by Pub. L. No. 98-48, 98 Stat. 348 (1979); 42 U.S.C. (1979) p. 2451 et seq.

89. It may be interesting to know that some authors are even suggesting an intermediate zone contiguous to air space, on the one side, and outer space, on the other - "Mesospace". See Jaeger and Reynen: "Mesospace, the Regime Between Air Space and Outer Space" 18 Colloq. on the Law of Outer Space (1975) p. 75; Haanappel, P.: "Air Space, Outer Space and Mesospace" 19 Colloq. On the Law of Outer Space (1976) p. 160.

90. See Bin Cheng: "For Delimiting Outer Space" Earth-Oriented Space Activities and Their Legal Implications (Ed. Matte) p. 234 et seq.; Lubos Perek: "Delimitation, is it necessary?" ibid., p. 275 et seq. But see also the opposing views of Mircea Mateesco-Matte, ibid., p. 287 et seq., and Neil Hosenball, ibid., p. 341 et seq.

91. U.N. Doc. A/AC.105/C.2/7 (1970); Doc. A/AC.105/C.2/7/

The Science Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) has been assigned the task of studying how and where a limit could be set. Some scientific criteria have been suggested, albeit not accepted.[92] Many suggestions have also been made in the Legal Sub-Committee of COPUOS, on where to delimit the airspace regime.

Professor Goedhuis, in a draft resolution at the 1966 Helsinki Conference of the International Law Association, proposed that air sovereignty extended to the lowest perigee of any satellite so far placed in orbit. In other words, the boundary between airspace and outer space would be determined by means of the lowest perigee of any satellite which has been or may be put into orbit.[93] Since satellites are being placed into orbit frequently, the boundary, according to this suggestion, would be fluctuating like prices at the stock exchange market, as technology modifies the 'lowest perigee' of satellites.

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Add. 1 (1977).

92. See Lubos Perek: "Scientific Criteria for Delimitation of Outer Space", Journal of Space Law (1977-78) vol. 5-6, p. 111 et seq.

93. See ILA Report of the 52nd Conference Helsinki (1966) p. 160 et seq.

In 1958, the Italian representative in the Legal Sub-Committee of COPUOS, Professor Ambrosini, advocated that national sovereignty should be limited to 'approximately a hundred kilometres from the surface of the earth'.[94] Belgium also supported a one hundred kilometre limit.[95] But even more significant, is the position taken by the Soviet Union, one of the two super space powers. In 1979, the USSR declared, inter alia, that the 'region above 100 (110) kilometres altitude from the sea level of the earth is outer space, and that 'the boundary between airspace and outer space shall be subject to agreement among states and shall subsequently be established by a treaty at an altitude not exceeding 100 (110) kilometres above sea level.[96]

In the light of the above positions, one can safely state that a definition and a boundary of airspace and outer space will be forth-coming. This is more so as the United States, and other parties that are branded functionalists are not in principle against a definition and a boundary. They only seem to be arguing that they are not appropriate now.[97] However, this is the same attitude that was

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94. U.N. Doc. A/C.1/PW.982 (12-XI-1958) p. 56.

95. Doc. A/AC.105/C.1/L.76 (1976).

96. Doc. A/AC.105/C.2/L.121 (1979).

97. Doc. A/A.105/C.2/SR.316 (4.IV.1979) p. 2.

manifested with regard to the Outer Space Treaty. When the two Super Space Powers finally decided it was time for the world to have a space treaty, the 1967 Outer Space Treaty emerged with all the lacunae that were purposely designed to suit their objectives. That is a rational way of seeing the non-definition of outer space in the treaty and the ambiguous provisions in respect of the militarization of outer space.

One respects the principle that international law-making in any field of activity should be cognizant of the views of the principal participants in that activity. In view of the dangerous escalation of the arms race by the super powers, one no longer feels safe to rely on their dictation of the terms of the development of international law which is aimed at maintaining peace, order and security in the international community. For example, through their creation of such principles as Air Defence Identification Zones (ADIZ), the free and safe navigable airspace over the High Seas is shrinking;[98] by a ruthless extension of the principle of self-defence, stray commercial civil aircraft

98. See USA Exec. Order No. 10197, 15 Reg. 9180 (1950); Canada NOTAM 22/25 (1951), Air Navigation Order Ser. V No. 14 of 7-4-61; Head: "ADIZ, International Law and Contiguous Zone" 3 Alberta Law Review (1964) p. 182 et seq.

and their innocent occupants are destroyed.[99]

In establishing a treaty in the future on the boundary issue, considerations of both existing capabilities and future potentials and expectations in aeronautical and space activities should be high on the agenda. But over and above, considerations of peace and security on earth should not be sacrificed for military progress. Perhaps the role to be played by the non-space powers like Third World States is to ensure that a balance is struck between aeronautical interests and space interests, technological progress and peace.

Conclusion

African States can more appropriately be said to have adopted rather than contributed to the establishment of the existing legal framework of international civil aviation. Civil aviation was unknown to African until the arrival of Europeans in the continent, and African independent states emerged when some of the most important and basic air law treaties had already been established.

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99. See, for example, the Soviet destruction of Korean Airline Flight 007: ICAO Bulletin, January 1984, p. 22; Speiser, S.: Legal Issues Arising from the Shooting Down of Korean Airlines Flight 007" West International Law Bulletin, Vol. 2, No. 1 Winter 1984, pp. 1, 35 et seq.

However, African civil aviation does not suffer any special disadvantage by that mere fact. In fact, some of the principles adopted such as the principle of state sovereignty, have been very helpful. Since the international legal framework is dynamic, African states contribute to its modification through their regional organizations, the ICAO, the United Nations and other international law-making bodies.

CHAPTER 3. INTERNATIONAL TREATIES AS GUIDES TO AND RESTRAINTS ON NATIONAL LAWS AND POLICIES

Interdependence is an imperative of international relations and of a viable international aviation system. For a policy in international civil aviation to be viable it must command some international acceptance. Law and policy makers in the international aviation community are, therefore, constrained to take, as far as possible, a broadly harmonious regulatory policy approach. International treaties such as the Chicago Convention of 1944, the Warsaw Convention of 1929 and its satellites, to name only a few, serve a valuable purpose as guides to, and restraints on governments and bodies engaged in aviation law and policy making.

3.1. Freedom of the Air

3.1.1 Historical Development

By the beginning of the twentieth century, the vision of a rapid development of air navigation began to be obvious, and concern about the freedom of aerial navigation began to be noticed principally among jurists. Side by side with the desire to proclaim a complete freedom of the air were the requirements of national safety and the avoidance of dangers to which the inhabitants of an overflown country

and their property might be exposed by unrestricted use of the airspace.[1] The theory of freedom of the air opened prospects for the progress of air transportation, but it also presented serious disadvantages to the states being overflown.[2]

Paul Fauchille, the rapporteur of the Brussels meeting of the Institute of International Law in 1902, made the first significant efforts to find an adequate solution to the problem of combining the possibility of free international air transportation with a certain security for the states overflown. He submitted to the meeting a draft code on the 'Régime juridique des aérostats'. He stated in that draft:

> "L'air est libre. Les états n'ont sur lui en temps de paix et en temps de guerre que les droits necessaires à leur conservation. Ces droits sont relatifs, à la répression de l'espionage, à la police douanière, à la police sanitaire et aux

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1. See Wagner, W.J.: International Air Transportation as Affected by State Sovereignty p. 13 et seq.

2. Besides disadvantages of strategic character, there were also problems of transportation of contraband, customs duties, falling objects and ballast. It should be recalled that as early as 1904, a German balloon was shot down by Russian soldiers and in 1908, about ten German balloons carrying military officers crossed into France. See Johnson: Rights in Air Space op.cit. pp. 70-71.

nécessités de la défense." [3]

A few years later, Fauchille revised his philosophy. "L'air est libre" implied a non-recognition of sovereignty over the air space. The principle of sovereignty was too entrenched to be eroded. In the place of "L'air est libre" was proposed "La circulation aérienne est libre", thus leaving the status of the airspace as it stood.[4] In advocating free aerial navigation, he went further to balance it with the interest of state security by providing that navigation by foreign aircraft at heights of less than 1500 metres above national territory or at distances of less than 1500 metres from the coast were forbidden.[5]

Although the Institute of International Law approved Fauchille's text, it was evident that the theory did not command popular acceptance. Thus, in 1913, the International Law Association meeting in Madrid, adopted a resolution which, while still paying lip service to the principle of freedom of aerial navigation, asserted

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3. Article 7 of the code. See also Fauchille, P.: "Le domaine aérien et le régime juridique des aérostats" 8 RGDI 414 ff (1901).

4. See Fauchille, P.: "La circulation aérienne et les droits des états en temps de paix" 17 RGDI 55 (1910).

5. See Articles 8-11 of the draft code.

much more strongly, the powers of the subjacent state.[6] The resolution stated:

> "It is the right of every state to enact such prohibitions, restrictions and regulations as it may think proper in regard to the passage of aircraft through the air space above its territories and territorial waters. Subject to this right of subjacent states, liberty of passage of aircraft ought to be accorded freely to the aircraft of every nation."[7]

There is no doubt that those who advocated the freedom of the air were to a great extent influenced by an analogous principle of maritime law. In propounding the doctrine of the Sea, Grotius had even gone further to state that the same thing would need be said about the air if it were capable of any use for which the use of the land also was not required.[8] Would Grotius have advocated the freedom of the air, therefore, if he were cognizant of the various kinds of military and civil activities that the air

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6. Westlake and other British jurists maintained at the 1911 Madrid Conference of the Institute of International Law that States had full sovereignty over the airspace above their territory and their territorial waters, and that each state has the right to establish regulations concerning air navigation as it thinks fit; see Wagner, W.J.: International Air Transportation as Affected by State Sovereignty, op.cit., p. 21.

7. See Johnson: Rights in Air Space, op.cit., p. 21.

8. Grotius: De Jure Belli Ac Pacis (1625) op.cit., Bk 11, Chapter 2 Section 3(1).

later became "capable of use without the use of the land also"?

The freedom of the seas became acceptable only by conceding to states wide powers over an area of sea adjacent to their coasts; a state would be even more concerned about what might take place in the air above it than in the seas off its coasts. Thus, the Dutch foreign minister, in a reply to the German Government in connection with the detention of a German aviator who had landed in Holland in 1915 without authorization, stated:

> "The great liberty of action of an airplane, the facility with which it reconnoiters and escapes all control, have necessitated in its respect a special and severe treatment.... The case where an aviator crosses the aerial frontier by mistake differs essentially from that of the soldier who crosses it by mistake on the ground. The circumstances in which the latter enters Netherlands territory permit the authorities guarding the frontier to find out whether or not his presence within the territory...is due to a mistake unconnected with military operations... The circumstances which have caused a belligerent aviator to land on Netherlands territory or to fly over it escape the control of Netherlands authorities...."[9]

Either because of the great importance attached to the principle of national sovereignty per se as it existed then, or the serious concern for state security as it

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9. 7 Harckworth, Digest of International Law at p. 551. (1940). See also Ivan L. Head: "ADIZ, International Law and Contiguous Air Space", 3 Alberta Law Review, at page 191 (1964).

continues to exist today, or both, states never allowed foreign aircraft to freely fly over their territories as of right. Aircraft are able to navigate foreign airspace because of certain privileges granted to them through some multilateral and bilateral agreements.

Thus, even where a country like Cameroon states as her policy that:

> "its skies are open to all countries infatuated with peace and willing to maintain it in the field of civil aviation."[10]

The statement must still be taken with a "pinch of salt". First, Cameroon asserts sovereignty over her airspace when she refers to "its skies". Second, very few countries, if any, today, will qualify as "infatuated with peace". Third, Cameroon provides in her civil aviation code that only foreign aircraft which have been granted traffic rights through international or diplomatic agreements, or, have been given special temporary authorization may travel freely over the territory of Cameroon.[11]

3.1.2 The Freedoms' Agreements

On December 7, 1944, the Two Freedoms' Agreement, otherwise called the International Air Services Transit

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10. See ICAO Doc. 9317-A23 Min P/3 pp. 33-34.

11. Article 35, Cameroon Civil Aviation Code.

Agreement, and the Five Freedoms' Agreement, otherwise called the International Air Transport Agreement, were signed. In the former, each contracting state granted to the other contracting states in respect of scheduled international air services;

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

2) The privilege to land for non-traffic purposes.[12]

Over twenty-three African States are parties to this Agreement (Transit Agreement).[13]

In the latter Agreement (Air Transport), each contracting state granted to the other contracting parties in respect of scheduled international air services:

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

2) The privilege to land for non-traffic purposes;

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

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12. Article 1(1) Transit Agreement.

13. Algeria, Benin, Burundi, Cameroon, Egypt, Ethiopia, Gabon, Ivory Coast, Lesotho, Liberia, Madagascar, Malawi, Mali, Morroco, Niger, Nigeria, Rwanda, Senegal, Somalia, South Africa, Swaziland, Togo, Zambia.

> cargo destined for the territory of any other contracting state and the privilege to put down passengers, mail and cargo coming from any such territory.[14]

Only three African States are parties to this Agreement.[15]

The Five Freedoms Agreement is of no moment to international air transport today. The importance of the Agreement was undermined by the fact that it was accepted by very few States. In Europe, only three states adhered to the Agreement.[16] As to the great non-European countries, only the United States adhered to the Agreement without reservations. Thus, the United States which was the promoter of the Agreement, and a few countries scattered all over the world which adhered to the Transport Agreement constituted an insignificant minority in the international air transport community. This situation led the United States to denounce the Agreement on July 25, 1946.[17] Following the United States denunciation, Nicaragua, the Dominican Republic and China denounced it too. Since the Agreement binds only a few states, and only very few of them

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14. Article 1(1) Transport Agreement.

15. Burundi, Ethiopia and Liberia.

16. Greece, Netherlands and Sweden.

17. See "U.S. Withdraws From Air Transport Agreement", Press Release of July 25, 1946, 15 U.S. Department of State Bulletin 236, (1946).

have developed international air services, it has very little, if any practical significance.

Furthermore, the enjoyment of the privileges in both the Transit and Air Transport Agreements is not unfettered. Among other limitations, the exercise of the privileges shall be -

> "in accordance with the provisions of the Interim Agreement on International Civil Aviation, and when it comes into force, with the provisions of the Convention on International Civil Aviation both drawn up at Chicago on December 7, 1944."[18]

On May 1947, the Convention on International Civil Aviation came into force when the United States Department of State officially announced that the required ratifications had been filed.[19]

3.1.3 Articles 5 and 6 of the Convention on International Civil Aviation (The Chicago Convention)

Articles 5 and 6 of Chicago provide for the freedom of civil aircraft to navigate the airspace of other contracting parties. Article 5 concerns non-scheduled services, and it stipulates that -

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18. Article 1(2) of both Agreements respectively.

19. See Wagner: International Air Transportation, op.cit., p. 136.

> "Each contracting state agrees that all aircraft of the other contracting states, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this convention 'to make flights into or in transit non-stop across its territory, and to make stops for non-traffic purposes without the necessity of obtaining prior permission.... Such aircraft, if enaged in the carriage of passengers, cargo, or mail for remuneratin or hire or other than scheduled international services, shall also have the privilege of taking or discharging passengers, cargo, or mail...."

As far as non-scheduled services are concerned, both commercial and non-commercial civil aircraft belonging to contracting states have a right to fly over or into contracting parties' territories. It will be noted that this article provides for "right" rather than a "privilege" which was granted in the two Agreements mentioned earlier. On May 10, 1952, the ICAO Council issued an analysis of what amounted then to non-scheduled service.[20]

Article 6, on the other hand, restricts the freedom of aerial navigation for the purposes of scheduled international services. Flights for such services, are dependent upon the "special permission or authorization" of the over-flown states. This special permission or authorization is commonly granted today through bilateral or other diplomatic agreements, consonant with state's sovereignty.

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20. See ICAO Doc. 7278-C/841 p. 7 et seq.

Hence article 5 is both significant and curious as it erodes the rather jealous principle of exclusive and complete sovereignty recognized in article 1 of the same convention. How did the High Contracting Parties at Chicago achieve this, and more importantly, how is the article applied in fact?

Article 5 of Chicago represents the triumph of idealism over realism. The United States, champion of the former at Chicago 1944 conceived the draft provision. In the proposal by her delegation, the U.S. proposed:

> - Each contracting state grants the right to fly across its territory without landing, and the right to make technical stops in its territory, to the aircraft of the other contracting states engaged in scheduled airline services...(art.5);
>
> - Each contracting state agrees that aircraft of the other contracting states not engaged in the carriage of passengers, cargo or mail for compensation or hire shall have the right to make flights into or in transit across, or to land in territory under the jurisdiction of such state without the necessity of obtaining its prior permission...(art.6);
>
> - Each contracting state agrees that aircraft of the other contracting states engaged in the carriage of passengers and cargo for compensation or hire on other than scheduled airline services shall have the right to make flights into or in transit across territory under the jurisdiction of such state and to make technical stops without the necessity of obtaining prior permission...(art. 7).[21]

Canada advocated the grant of such rights only to

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21. See Doc. 16/1/1 Chicago 1944.

the aircraft recognized by an "international air authority". The Canadian proposal provided:

> "We propose...the establishment, by an international convention of an international air authority. We also propose that the nations of the world should grant four freedoms of the air to airlines whose operations have been authorized by the authority. These four freedoms are: -
> 1) The right of air transit;
> 2) The right to land for servicing;
> 3) The right to carry passengers, freight, and mails from the country of origin to any place in the world;
> 4) The right to bring passengers, freight and mails back to the country of origin from any place in the world...."[22]

There were other delegations which did not quite favour the grant of such broad and generous rights. China and Brazil were some of them.

China's concern over the Japanese penetration into her territory had led her to adopt a restrictive policy. But she eventually began to appreciate the importance of international civil aviation and was eager to welcome the extension of air services into her territory, "so long as her national security and sovereignty remain unaffected". The Chinese delegation, therefore, proposed that the right of transit should be contingent upon the reaching of mutually satisfactory understanding. In the case of non-scheduled transit, flights, commercial as well as private, should follow such routes and use only such

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22. Chicago Doc. 50 of November 2, 1944.

airports as are specified, upon the application of the party concerned, by the government of the state in which the flight or landing is to be made.

In the case of emergency transit which does not have the required authorization or fails to follow a specified course, the aircraft in transit must land as soon as possible at the nearest airfield in the state in which the emergency occurs. When the aircraft makes an emergency landing in an airport not open to technical stop, such aircraft must remain on the airfield to await examination and authorization before continuing its flight. In the case of commercial entry, the route and airports to be used within the territory of a state by any international air services - scheduled or non-scheduled - should be designated by that state.

The Chinese stressed:

> "A State, when national security requires, may temporarily suspend, with prior notice, the right of transit and commercial entry of foreign aircraft."[23]

The Brazilian delegation proposed that the provisions of Article 5 be substituted by the following:

> "Each contracting state undertakes to grant, in routes fixed by itself, the right of flight over its territory without landing and, through an agreement with the interested state, will permit technical stops, flights into or in transit across

23. Doc. 141-1/10-11/9/44 (Chicago).

> its territory to civil aircraft of such state which, may or may not be engaged in scheduled airline service. Permission may be refused to an enterprise of another state, and permission already granted may be revoked..."[24]

The Convention itself contains many internal limitations to the article[25] which some contracting states would gladly apply to water down the effect intended in the draft article. For instance, the Convention prohibits the carriage of munitions or implements of war in or above the territory of a state in aircraft engaged in international navigation, except by permission of such state. Each state shall determine by regulations what constitutes munitions or implements of war giving due consideration, for the purpose of uniformity, to the recommendations ICAO may make from time to time.[26]

But the main issue concerning Article 5 is in respect of the requirement of prior permission or authorization. The ICAO Council once stated that the article means that flights of the type described in the article can be operated without applying for a permit that may be granted or refused at the election of the state to be entered. Indeed, no instrument designated a "permit" should

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24. Doc. 279 of November 15, 1944 ibid.

25. See for example articles 10, 11, and 89 of the Convention.

26. See Article 35.

normally be required even if it were automatically forthcoming upon application. Only advance notice of intended arrival for traffic control, public health and similar purposes may be required.[27]

Under the proviso in article 5(2), however, ICAO states:

> "...the regulations, conditions or limitations which a state may impose under the proviso of article 5(2) include also the requirement of prior permission, the right to make such regulations should not be exercised in such a way as to render the operation of this important form of air transport impossible or non-effective."[28]

Article 5 has been applied differently. Some states subjected the grant of a prior permission to the condition that their national airlines raised no objection. Some would not authorize non-scheduled operations by a certain state. And still others would not allow, in principle, foreign non-scheduled operators to carry regional traffic without a special agreement.[29] Some states have

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27. ICAO Doc. 7278-C/841 of (May 10, 1952) op.cit. p. 9. Annex 9 provides for 48 hours prior notice.

28. Ibid., p. 12. See also Bin Cheng: Law of International Air Transport, p. 197.

29. See Goedhuis: "Questions of Public International Air Law" 81 Recueil La Haye 1952, at pp. 270-271, Bin Cheng, Law of International Air Transport, op.cit., pp. 197-198.

also concluded multilateral or bilateral agreements for the purpose of granting the rights provided in article 5. ECAC member states' Paris Agreement of 1956, South East Asian States' Manila Agreement of 1971; and the United States and Canada bilateral agreement of 1974, are some examples which demonstrate states practice in respect of the article.

The situation in Africa is also restrictive not only as it concerns the rights provided in article 5 of Chicago but also in respect of the two freedoms provided in the Transit Agreement. Regarding the former, Nigeria, for example, regulates as follows:

> "If an operator intends to carry out a (series of) non-scheduled flight(s) in transit across, or making non traffic stops in, the territory of Nigeria, he may do so after obtaining prior permission in writing from the Director of Civil Aviation.... If an operator intends to perform a (series of) non-scheduled flight(s) into Nigeria for the purpose of taking or discharging passengers, cargo or mail, he shall apply to the Director of Civil Aviation for permission to carry out such operations not less than 48 hours in advance of the intended landing....
> ....Prior permission in writing is required for all flights, by private aircraft overflying Nigeria or making stops in Nigerian territory...."[30]

It will be pointed out that this requirement of prior permission goes beyond what was permitted in the ICAO

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30. AIP Nigeria FAL 1-2 (Ministry of Civil Aviation 31-10-77).

Council Resolution of May 10, 1952.[31] The requirement for prior permission was allowed only in respect of article 5(2), but not in the cases falling under article 5(1). Thus, the United Kingdom policy, for example, requires prior permission only in respect of non-scheduled operators engaged in the carriage of passengers, cargo or mail.[32]

In the fifth plenary session of the African Civil Aviation Commission (Lome, 1977) the Commission further revealed that First and Second Freedom Rights were not always freely exchanged even among members party to the Air Transit Agreement. It urged that when AFCAC member states negotiate bilateral agreements between themselves they should bear in mind their obligations to exchange First and Second Freedom Rights in accordane with the principles of the Chicago Convention.[33]

3.2 Ban on Over-flight of South African Aircraft by Some African States

Some African States party to the Transit Agreement as well as the International Civil Aviation Agreement, have, nevertheless, expressly prohibited South African aircraft

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31. See Footnote 28 above.

32. See 1, article 68 of UK Air Navigation Order 1960.

33. AFCAC Res. S5-16.

from over-flying or landing in their territories.[34] South Africa is a party to the Chicago Convention.

Ethiopia, for example, stipulates:

> "All aircraft registered in South Africa, aircraft chartered or owned by the South African government, aircraft chartered or owned by South African nationals, or citizens or persons residing in South Africa, and any aircraft of other nationalities leaving from or bound for South Africa, are not authorized to fly over Ethiopian territory or land at aerodromes in Ethiopia."[35]

The measure taken by the African States concerned is neither frivolous nor arbitrary. It is grounded on a United Nations General Assembly resolution which, inter alia, requests member states to refuse -

> "landing and passage facilities to all aircraft belonging to the Government of South Africa and companies registered under the laws of South Africa."[36]

The United Nations made the request in view of South African Government's "continued and total disregard of its obligations under the Charter of the United Nations, and its

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34. The States are Algeria, Egypt, Ethiopia, Sudan, Libya, Kenya, Uganda, Tanzania, Guinea, Nigeria, Mauritania, Togo, Upper Volta, Seychelles, etc. See The Aeronautical Information Publications of the different states; Flight International, September 5, 1963, Aviation Week and Space Technology, September 2, 1963.

35. AIP Ethiopia FAL 1-9.

36. UNGA Res. 1761(XVII) of Nov. 6, 1962, see also UNGA Res. 1904(XVIII) of Nov. 20, 1963.

determined aggravation of racial issues by enforcing measures of increasing ruthlessness involving violence and bloodshed". It was after South Africa had shown contempt for that resolution too, that many African States began to enforce it.

It will be noted, however, that the Ethiopian regulation mentioned above goes beyond the provisions of the U.N. Resolution to the extent that the prohibition includes aircraft of other nationalities leaving from or bound for South Africa. Ethiopia may be more serious about seeing South Africa effectively punished than some other African States are.

Thus, the Kenyan regulation, on the other hand, falls even short of the provision and objective of the United Nations resolution. It states:

> "Aircraft registered in the Republic of South Africa are not permitted to land in or overfly Kenya."[37]

Kenya's regulation achieves very little as the case of Luxavia proves. Luxavia is the new name of South Africa's former Trek Airways. The change of name is only a camouflage designed to beat the ban and avoid suffering the same fate as South African Airline. Luxair, the Luxembourgh airline, acts as a cover for Luxavia, Two South African

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37. AIP Kenya FAL 1-3.

companies, Rent Meester and Safmarine, own and control Luxavia, whose aircraft are registered in Luxembourgh, instead of South Africa. Luxavia operates regular scheduled flights between Johannesburg and Luxembourgh via Nairobi, Kenya, charter flights to the Far-East via the Seychelles, and to Jeddah via Sudan.[38]

Luxavia's corporate veil deserves to be lifted to give effect to the United Nations Resolutions. In Gilford Motor Co. v. Horne, Lord Hanworth MR, ruled:

> "I am quite satisfied that this company was formed as a device, a strategem, in order to mask the effective carrying on of a business of Mr. E.B. Horne. The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business which...was a business in respect of which he had a fear that the plaintiffs might intervene and object."[39]

Gilford is not an isolated precedent. The House of Lords, in Daimler Company v. Continental Tyre and Rubber Ltd., a case involving a German company, held:

> "This is a question of public policy, and public policy looks at the substance and not at the form of the transaction.... It is true that a corporation is distinct from its corporators; but a corporation can only act through its agents.... If the whole thinking power of this company is German, the corporation is German. It matters not

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38. See Graham, D.: International Civil Aviation and Human Rights, LLM Thesis McGill 1981, pp. 74 and 75.

39. [1933] Ch 935 at 936.

where the company is incorporated."[40]

Luxavia is South African. It is a folly to regard it as a Luxembourgh company. Since its aircraft, de facto and de jure belong to the two "companies registered under the laws of South Africa", African states, and other U.N. member states for that matter, should comply with the United Nations Resolution and refuse them "landing and pasage facilities". This is what Ethiopia has done to Luxavia. The only conceiveable circumstance under which any South African aircraft may be granted landing and passage facilities is when such aircraft are in distress - for humanitarian reasons.

The policy to ban South African Aircraft from overflying some African territories has not gone unscathed. One of the severe criticisms leveled against it states:

> "Many states in Africa have broken their treaty obligations. The General Assembly has the power to make recommendations only, but not in contravention of treaty obligations. There is little doubt that, had the security council passed a resolution similar to the one adopted by the General Assembly, States would have been bound thereby and it would have surpassed their obligations under the Chicago Convention or the Transit Agreement. This did not happen and, therefore, it would appear that the steps taken by the United Nations were insufficient to permit states to break their treaty obligations."[41]

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40. [1916] 2 AC 307.

41. Graham, D.: International Civil Aviation and Human Rights, op.cit. pp. 70-71.

That the United Nations General Assembly "has the power to make recommendations only", represents only one of many views. Even within the conservative frame of article 38 of the Statute of the International Court of Justice, legal effect may be given to the collective pronouncements of the General Assembly.[42] The fact that while certain decisions of the Security Council are mandatory for U.N. members and General Assembly resolutions are recommendations only, does not prevent a few General Assembly resolutions from embodying directive principles or agreed standards which may, by reason of their content, purpose and form of adoption, secure as great international observance as a treaty.[43]

Moreover, it is too cursory to judge the validity of the action against South Africa on the basis of the legal effect of U.N. General Assembly resolutions only. Some other issues of fact and law relevant to South Africa have to be considered as well. What is South Africa's attitude to international law in general, and to the Chicago Convention in particular?

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42. See Oscar Schachter: "The Evolving International Law of Development" 15 Colum J. Transnational Law 1976 p. 1 at p. 5.

43. See Fawcett: "The Development of International Law", International Affairs November 1970, p. 131.

The International Civil Aviation Organization, at its Fifteenth Session in 1965, declared that South Africa's apartheid policies constitute a permanent source of conflict between the nations and peoples of the world; that the policies of apartheid and racial discrimination are a "flagrant violation of the principles enshrined in the preamble to the Chicago Convention".[44] ICAO then went on to request all nations and peoples of the world to exert pressure on South Africa to abandon its apartheid policies and urged South Africa to comply with the aims and objectives of the Chicago Convention.[45]

One of the most fundamental rules of international law is that treaties must be performed in good faith - the rule of pacta sunt servanda.[46] But when one party to a treaty has thought it fit to liberate itself from the engagements enshrined in the aims and objectives of a treaty in flagrant disregard of the protest of the other parties, such as South Africa does with the Chicago Convention, for example, there is no legitimate basis for the other parties to continue to perform the treaty in good faith with respect

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44. See ICAO Doc. 8516-A15-P/5 p. 185.

45. ICAO Resolution A15-7 of 1965.

46. See Bishop, W.: International Law, 3rd Ed. p. 141, Rice and Mayda, "Some Thoughts on the Binding Force of International Treaties, 1956 Wis. Law Review 186.

to the recalcitrant party.

Thus, good faith in treaties is allied to reciprocity. It is not strange that parties to a treaty have in the past modified their performance of it when they realized that the other party did not observe it scrupulously. In the Santa Cruz case[47] which involved the Anglo-Portuguese treaty, Sir Scott, applying the principle of reciprocity,[48] stated:

> "But then again I am to inquire whether Portugal has put the same interpretation upon it; for if that government has used a different interpretation, that forms the rule which I must follow."

Furthermore, South Africa is a falcon, preying on weaker African States as and when she pleases. Zimbabwe, Zambia, Angola, Mozambique and Lesotho have been victims of invading South African troops. Other African States vocally opposed to the South African Government policies of apartheid and racism are targets of South Africa's destabilization policy. The South African Government uses both military and civil aircraft as instruments for the execution of its illegal policies. The abortive attempt to overthrow the government of the Seychelles in 1981 was masterminded by South Africans using a commercial F-28

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47. 1 C.Rob. 50 at p. 67.

48. See McNair: Law of Treaties p. 225 et seq.

aircraft chartered from the Royal Swazi Airline.[49] South African Airways is known to practice racial discrimination.[50] On one occasion, the airline refused to accept black passengers on a flight from New York City.[51]

It does not need much persuasion to appreciate that South Africa is capable and would undermine the security of any African State without feeling restrained by international law. The closure of the airspace of some African States to South African aircraft should also be judged on the requirement of state security and defence.

A nation's right to protect itself from destruction would prevail over any treaty obligations. Vattel is quoted as postulating that:

> "...a nation ought carefully to avoid as much as possible, whatever may cause its destruction.... A nation or state has a right to everything that can secure it from such a threatening danger, and to

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49. See Simon Jenkins: "Destabilizing Southern Africa", The Economist, 16-22 July 1983, pp. 19-28.

50. Cf. article 2 of the Universal Declaration of Human Rights, see also UNGA Res. 1904(XVIII) of 1963; UNGA Res. 2106(XX) of 1965. In Article 56 of the U.N. Charter all U.N. members pledge themselves to take joint and separate action in co-operation with the U.N. for the achievement of universal respect for and observance of "Human Rights".

51. See Joseph C. Goulden: The Superlawyers, at page 57.

keep at a distance whatever is capable of causing its ruin."[52]

Even the United States, powerful as she is, was quick to suspend "Polish Civil Aviation privileges in the United States" and all Aeroflot Service to the United States during the Polish crisis in December 1981. "Foreign Policy and defence needs of the United States" were the underlying considerations for the measures.[53]

It would be naive to judge states' international aviation policies on the basis of legal principles alone. The less balanced and firmly established the reign of law is in a community, such as the present international community, the more likely it is to be dominated by political and other metalegal demands of the day.[54]

The issue, as far as South Africa is concerned, is not one of "breaking treaty obligations". It is one in which a contracting state, through her contemptuous adoption of policies that flagrantly violate international law, and by constituting itself a security threat, has prevented some other contracting states from continuing to extend to her

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52. See Ivan Head: "ADIZ International Law and Contiguous Air Space" 3 Alberta Law Review, op.cit., at p. 192.

53. See 76 AJIL (1982), p. 379.

54. See generally, Allan James (ed.): The Bases of International Order, (Essays in honour of C.A.W. Manning) 1973.

some treaty privileges. One party cannot avail himself of the fact that the other(s) has (have) not fulfilled some obligation if the former party has by some illegal act or acts prevented the latter from fulfilling the obligation.[55].

3.3 The Warsaw Convention and Montreal Agreement

The Warsaw Convention was signed on October 12, 1929, and is the most important treaty on private international air law. Its main objective, as the title spells out, is the unification of certain private law rules relating to international transportation by air. It has two other objectives: to afford a more definite basis of recovery by passengers and shippers thereby tending to lessen litigation; to limit the carriers' liability thereby protecting the industry from calamitous claims.

The convention has of recent been subjected to very severe criticisms especially in respect of the provisions on the carriers' monetary limitations on liability. The monetary limits provided in article 22, are now regarded by some contracting parties as obsolete and grossly inadequate. Although the limits were raised in 1955 in an amending Protocol at the Hague, some countries refused to ratify that

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55. See Chorzow Factory Case PCIJ ser. A No. 9 p. 31.

amendment, and some which did still remain dissatisfied.

The United States has not ratified the Hague Protocol because she is not satisfied with the raise on monetary limits as amended. Instead, she initiated a collateral agreement involving international carriers which fly to, from or stopover in the United States. The agreement raised the monetary limits significantly. That agreement was signed in Montreal, on May 13, 1966.

Paradoxically, while some contracting states complain that the monetary limits are too low, there are others, especially those from the developing world, who strongly resist any increases in the limits. They complain that high limits will be ruinous to their infant carriers. Some text writers have not failed to express their sympathy for the case of the latter states. John Martin, an American lawyer, has commented on the Montreal Agreement thus:

> "It seems to me it is a little out of character for our State Department to be blackmailing the carriers into any kind of a convention. However, that is what has happened as a result of the CAB Agreement No. 18900 - the Montreal Agreement. Indeed, it is not only blackmailing United States Carriers, but it is overburdening foreign carriers and overburdening people who we are trying to help with our foreign aid - the so-called emerging countries...."[56]

Be that as it may, not only have about forty

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56. John Martin: "The Defendants' View of Montreal" JAL&C vol. 33, 1967 p. 538.

African countries ratifed the Warsaw Convention and its amending Protocol, Hague 1955, but all the African Airlines flying to or stopping over in the United States have been compelled to sign the Montreal Agreement. It is not intended here to dwell upon the inadequacy or excessiveness of the monetary limits provided in the Convention and the Agreement,[57] as far as Africa is concerned. It is only intended to show the constraints these arrangements impose on Africa's policy-making in the field they cover.

The African Airlines Association (AFRAA) recently adopted a policy aimed at harmonizing aviation legislation in the continent. The Legal Committee of the Association has initiated work on the publication of a handbook on national laws and regulations affecting air transport in the region.

The project is also aimed at eventual harmonization of aviation legislation in Africa to enable better co-operation and integration of policies and operation of African Airlines.[58] This, no doubt, is a very good policy.

However, the Association's observer to the African

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57. See generally, A. Tobolewski: Monetary Limitations of Liability in International Private Air Law, DCL Thesis (McGill University) 1981.

58. See AFRAA Bulletin No. 24, Feb. 1982 p. 4.

Civil Aviation Commission Seventh Plenary Session in Nairobi, stated:

> "The laws of each member state of AFCAC in respect of civil aviation have been under study by AFRAA for sometime. A degree of uniformity on the most essential elements is undisputably required if air transport is to contribute fully to Africa's economic integration. Of particular significance are the legislation, or lack of them, concerning limitations of liabilities of air carriers in pursuit of their air transport roles....adoption and ratification of the various conventions regulating these aspects are still pending in some member states.... We suggest that AFCAC attend to the harmonization of aviation related legislations and each delegation, take it upon itself to further this goal in its sovereign state."[59]

This appeal is more probably directed to the liability limitations in international carriage by air. Except for the Warsaw satellite conventions such as Guatemala, Guadalajara, and the Montreal Protocols which have not yet come into force, it is not quite correct to state that there are no existing legislation governing the liability limits in international transportation by air. As stated earlier, one can hardly point to an African country which is engaged in international air transportation that is not a party to the Warsaw Convention[60] and the amending

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59. See AFCAC/7 p. 217.

60. These African States have ratified or adhered to the Warsaw Convention of 1929: Algeria, Botswana, Cameroon, Congo, Benin (Dahomey) Egypt, Ethiopia, Gabon, Gambia, Ghana, Guinea, Ivory Coast, Kenya, Liberia, Libya, Lesoto, Madagascar, Malawi, Mali,

Protocol, Hague.[61]

Moreover, the Warsaw Convention applies of its own force to international transportation by air and binds contracting parties. Any attempt by AFRAA or any government or intergovernmental body to legislate lower liability limits than those provided in the Convention[62] will be inconsistent with the provisions of Warsaw Convention, and protanto null and void. The Convention provides that carriers could enter into any contract of transportation or make regulations which do not conflict with its provisions.[63]

However, it also provides that any clause contained in the contract and all special agreements entered into

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Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tunesia, Uganda, Tanzania, Upper Volta, Zaire, Zambia. Some other African states have acceded to the Convention through the doctrine of State Succession, e.g. the United Kingdom ratified the Convention on behalf of the former Southern Rhodesia, Zimbabwe, on March 3, 1967. See Weishaupt: Selected International Agreements Relating to Air Law, pp. 182-185 at p. 184.

61. All the countries above have ratified the Hague Protocol. Ibid., pp. 186-189.

62. See Article 22 of Warsaw, article XI of Hague Protocol for the monetary limits.

63. Article 33 Warsaw.

before any damage occurred by which the parties purport to infringe the rules laid down by the Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction shall be null and void.[64] More importantly, any provision tending to relieve the carrier of liability, or to fix a lower limit than that which is laid down in the convention shall be null and void.[65]

The Montreal Agreement of 1966, which is merely a carrier's agreement, succeeded in not being caught by the provisions of Warsaw because the limits were raised rather than lowered. The Convention does not disapprove such arrangements, since it provides that by special contract the carrier and the passenger may agree to a higher limit of liability.[66]

It will also be noted that for the African carriers flying to, or stopping over in the United States, any attempt to legislate lower limits than those provided in the Montreal Agreement will equally be misconceived. Such an exercise will most probably be visited by the United States Civil Aviation Authority's refusal of landing rights, to the

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64. Article 32.

65. Article 23.

66. Article 22.

affected African airlines in the United States.[67]

One appreciates the fears for a fledgling aviation industry as exists in Africa to be subjected to calamitous liability claims. More so, when the industry is more of an instrument for development than a consumer product. Such fears were also entertained when the industry was just budding in America and Europe. But the industry was not protected from ruinous claims by legislating lower liability limits than those provided in the Warsaw Convention, rather it was saved through the prudent and practical judgements given by the courts in the determination of the quantum of compensable damages in particular cases. The courts refused to allow "the language of the provisions of the Convention to become a verbal prison, for the letter killeth but the spirit gives life".[68]

This author, while appreciating states' efforts at legislating rules to govern international aviation, is of the strong view that the orderly development of the aviation industry depends to a large extent on the wise and prudent

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67. On the Montreal Agreement, see: Mankiewicz, R.: Difficulties With the Montreal Agreement and the Future of the Air Carriers Liability (1968); Hildred: "Air Carriers Liability", 33 Journal of Air Law 521 (1967).

68. ECK v. United Airlines, 9 Avi. 17, 322.

application of the legislation by the courts.[69] There is no gainsaying the fact that the treaties governing international aviation are intended to, and should be, applied uniformly throughout the countries which are parties to them. The internationality of aviation justifies uniformity of laws. Unfortunately, uniformity may produce consistency and certainty, but not necessarily justice.

It is not pleaded that courts should interpret international aviation laws differently in the case of Africa. But it must be remembered that the life of the law is experience - the felt necessities of the time and place. Thus, it will be restated:

> "It has never been claimed, even in the most rigidly codified systems that the judge should shut his mind to the reasoning of others in like circumstances. No intelligent system would so crudely paralyse the indispensable instruments of analogy and parity of reasoning. Hence, in all systems some degree of judicial uniformity is certain to exist and even to be applauded. But great care is taken to 'save' the fundamental rule that uniformity, however convenient, shall not degenerate into a line of least resistence, it must remain a guide and never become a tyrant."[70]

A court properly seised of an air transport

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69. See Ndum: "Evolution of Case Law On Carriage of Goods by Air" Term Paper, Institute of Air and Space Law, McGill University, Feb. 1982; Ndum: "Economic and Legal Developments on Carriage of Goods by Air" LLM. Thesis, McGill University, 1982, pp. 91-101, 224-225.

70. C.K. Allen: Law in the Making pp. 161-162.

liability case in Africa, or any developing country for that matter, has a duty to balance the legitimate interest of the claimant with the continued survival of the carrier. The monetary limits stipulated in the Convention and the Agreement are the ceiling. A court has to decide not only that a claim is legally justified, but also the amount of compensable damages in the circumstances, which cannot exceed the limits, but may not necessarily reach the ceiling. There is no sacrosanct rule of jurimetrics available to aid a judge in the assessment of the quantum of damages. But there is this general advice:

> "If a man is badly injured and his damages are great, the damages should be (made) to compensate for those great injuries. If a man has minor injury, the compensation should be small. Compensation which gives too little...is not right, and compensation which gives too much is not right."[71]

But even a statement like the above rather creates more questions than solutions. "Too little" or "too much" compensation will depend on a number of factors and circumstances which include the applicable legislation, the society, and the character of the business. Compensation which would put a developing country's airline out of business might be tantamount to "too much". But

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71. Lee S. Kreindler: "A Plaintiff's View of Montreal" JAL&C Vol. 33 1967 op.cit. at p. 528.

compensation which would be inadequate as to undermine the confidence of clients in the airline and lead them to choose alternative airlines would also be considered too little.

3.4 Aviation Terrorism and International Obligations

Civil aviation terrorism originates from many sources, for different objectives. The most relevant source to African states is the Middle-East political rancours. A number of African states are Arab - some of them have been directly or indirectly involved in the crisis with Israel. The Organization of African Unity and the Arab League maintain significant relations.[72] After the October 1979 Arab-Israeli war most African states severed diplomatic relations with Israel in protest against her continued occupation of conquered territory contrary to U.N. Resolution 242.[73] African states also support the Palestinians' right to an autonomous homeland. Accordingly, the most dramatic incidents of aviation terrorism in Africa either involved Palestinian terrorists or involved some African Arab countries. Hence, a need arises to balance

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72. See Mazrui: Africa's International Relations, op.cit. pp. 150-155.

73. See The New York Times, 6 October 1973 p. 9; An-Nahar, a weekly analysis of political and economic developments, November 5, 1973, p. 4.

political solidarity with international legal obligations.

Political terrorism invokes different emotions and reactions, to the point that the term "terrorism" becomes more subjective than objective.

> "One man's terrorist is another man's hero or freedom fighter, or whatever. The term 'terrorism' is a judgemental one in that it encompasses some event produced by human behaviour but seeks to assign or ascribe a value or quality to that behaviour, by implication it is 'good' or 'bad' according to one's respective view point."[74]

Terrorism is violent theatre played to an audience that is tone-deaf, weary and unutterably blasé.[75] Only the terrorist spectaculars can now command attention. The difficulty for the terrorists has been how to produce the spectacular while remaining within the bounds dictated by the concerns of practical politics.

One way of producing these spectacles is by taking hostages. By so doing a bargaining position is created. The hostage becomes an unfortunate pawn in a limited power struggle - he is only a means to an end. The hostage-taker

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74. H.H. Cooper: "The Problem of the Problem of Definition of Terrorism" Chitty's Law Journal Vol. 26, No. 3, 1976 p. 106 at 108. See further, UNGA Official Records of the 28th Session, Doc. A/9024 of 1972; and U.N. Doc. A/9028 of 1973.

75. See H.H. Cooper: "Hostage Taking..." Chitty's Law Journal Vol. 26, No. 3, 1976, p. 91 et seq.; Gerald, F. Fitzgerald: International Terrorism and Civil Aviation p. 2.

seizes dominion over another human being so as to be able to exchange the power of life and death he has acquired for something or some objective.

One of the notorious ways of taking hostage is by skyjacking aircraft.[76] As long as the captured aircraft is in the skies, the hostage-taker enjoys some advantage and can bargain from a relatively invulnerable position. But the aircraft cannot remain in the skies indefinitely, so the hostage-taker must have a safe haven to go to when he surrenders.

It is heartening that even though states may severally continue to differ on which acts constitute terrorism and which are not, depending on their political sides in a given case, they agree, as an international community, that skyjacking of civil aircraft and other acts of unlawful interference with civil aircraft consittute the greatest threat to international as well as domestic civil aviation, and must not be encouraged. One of the most effective means of discouraging these acts is to make no member state of the international community a safe haven for the perpetrators of such acts. Sir William Douglas, Chief

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76. For some statistics on incidents of and losses in skyjacking see The Semi-Annual Report to U.S. Congress on Civil Aviation Security System Program, Department of Transportation, FAA 1978, p. 6, and Information from ICAO Public Information Bureau, August 1980.

Justice of the Supreme Court of Barbados, has stated:

> "...the consequences of hijacking are so destructive of international peace and concord, and so dangerous to the lives and safety of air travellers, every system of law must provide for the suppression of the offence and the trial of its perpetrators....hijacking, like piracy, and slave-trading, is a crime against all mankind, the commission of which places the state where the offender is found under an international obligation either to punish or to extradite him."[77]

At regional and international conventions, recommendations have been made, resolutions taken, and legislation adopted - all directed at combatting skyjacking and other offences on aircraft. The Organization of American States (OAS) in a draft convention on Terrorism and Kidnapping for Purposes of Extortion (1970), provided that "aerial piracy should not be considered as a political offence".[78] The motives that impelled aerial pirates to act are irrelevant to the issue of their criminal liability. Political motivation does not necessarily make the resulting offence political. The character of the offence does not depend upon the motive of the offender, but rather upon the

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77. See The Abidjan Airline Hijacking Demonstration Trial at p. 96.

78. Article 3, OAS Draft Convention on Terrorism and Kidnapping for Purposes of Extortion 1970.

nature of the rights it infringes.[79]

The Council of Europe, in April 1970, emphasised the duty of every state to punish severely or ensure the severe punishment of persons convicted of the offence of air piracy, and to dissociate itself from acts of political terrorism directed against commercial airlines regardless of political circumstances involved. It further directed the European Civil Aviation Conference (ECAC) to organize a meeting to review progress made on the implementation of the various measures proposed at European and at international levels on the issue of hijacking.[80]

There are two United Nations Resolutions on the issue that are worth mentioning too. At the 1831st Plenary Meeting of the United Nations General Assembly in 1969, Resolution 2551 (XXIV) was passed dealing with forcible diversion of civil aircraft in flight. It provides:

> "Deeply concerned over acts of unlawful interference with international civil aviation....

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79. Dr. T.O. Elias - "Opinion of Presiding Justice", The Abidjan Airline Hijacking Demonstration Trial, op.cit., p. 180. See further, Horlick, G.: "The Developing Law of Air Hijacking" Harvard International Law Journal vol. 12 (1971) p. 55 et seq.; Bradford, A.: "The Legal Ramifications of Hijacking Airlines" ABA Journal, vol. 48, p. 10-34.

80. Council of Europe, Recommendation 599 (1970) paras 3 & 8. See further, Text of the Convention on the Suppression of Terrorism, Strasbourg 1977.

> Considering it necessary to recommend effective means against hijacking in all its forms....
> Mindful that such acts may endanger the life and health of passengers and crew in disregard of commonly accepted humanitarian considerations:
> 1. Calls upon states to take every appropriate measure to ensure that their respective national legislations provide an adequate framework for effective legal measures against all kinds of acts of unlawful interference with, seizure of, or other exercise of control by force or threat thereof over civil aircraft in flight.
> 2. Urges states in particular to ensure that persons on board who perpetrate such acts are punished..."

The second U.N. Resolution was passed in 1970. Resolution 2645 (XXV) again called upon states to prosecute and to punish aerial pirates or to extradite them for prosecution and punishment.[81]

International measures against aerial piracy and other offences on civil aircraft have been concretized in three conventions. These are: the Convention on Offences and other Acts Committed on Board Aircraft, signed at Tokyo on September 14, 1963. Thirty-one African states have ratified it,[82] the Convention for the Suppression of

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81. Other relevant U.N. Resolutions include UNGA Res. 31/102 and 31/103 of Dec. 15, 1976; UNGA Res. 32/147 and 32/148 of Dec. 16, 1977; 32/8 of Nov. 1977, U.N. Security Council Res. 286 of September 9, 1970 and U.N. Security Council Res. 332 of April 12, 1973.

82. Botswana, Burundi, Chad, Congo, Egypt, Ethiopia, Gabon, Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone,

Unlawful Seizure of Aircraft, signed at the Hague on December 16, 1970 - thirty African states have ratified it,[83] and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971, which thirty African states have ratified.[84]

The Tokyo Convention applies to offences against penal laws and acts which whether or not they constitute offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board an aircraft.[85] The definition of offences is left to the jurisdiction of

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(continued from previous page)
South Africa, Togo, Tunisia, Uganda, Upper Volta, Zaire, Zambia, see ICAO Doc. 9382, Annual Report of the Council, 1982, p. 171.

83. Benin, Botswana, Cape Verde, Chad, Egypt, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Ivory Coast, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, South Africa, Sudan, Togo, Tunisia, Uganda, Zaire. See ICAO Doc. 9382 op.cit., pp. 171-172.

84. Botswana, Cape Verde, Chad, Egypt, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Ivory Coast, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra-Leone, Seychelles, South Africa, Sudan, Togo, Tunisia, Uganda, United Republic of Cameroon, Zaire, ibid., p. 173.

85. Article 1 Tokyo Convention.

national laws. Significantly, the Convention authorizes the aircraft commander, "when he has reasonable grounds to believe that a person has committed, on board the aircraft, an offence or an act contemplated in article 1" to impose upon such person reasonable measures, including restraint, which are necessary to protect the safety of the aircraft, persons or property therein; or to maintain good order and discipline on board; or to enable him to deliver such person to competent authorities or to disembark him.[86]

Although it is the state of registration of the aircraft which is competent to exercise jurisdiction over offences and acts committed on board an aircraft,[87] a contracting state which is not the state of registration may exercise criminal jurisdiction over an offence committed on board an aircraft in the case where the offence has been committed in the territory of such state; the offence has been committed by, or against a national or permanent resident of such state; the offence is against the security of such state; the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such state; and where the exercise of jurisdiction is necessary to ensure the observance of any

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86. Article 6, ibid.

87. Article 3(1), ibid.

obligation of such state under a multilateral international agreement.[88]

The Tokyo Convention was, nevertheless, far from ideal for serving the field it was intended to govern. It has been criticized that its effect is no longer the same as was originally intended, and that it is legally flawed and should, therefore, not be ratified.[89] It became necessary for ICAO to draw up a more appropriate and effective draft convention which would serve to discourage and suppress unlawful seizure of aircraft. That draft convention was eventually signed at the Hague in 1970.

Parties to the Hague Convention agree that any person who on board an aircraft in flight unlawfully, by force or threat thereof, or by any form of intimidation, seizes or exercises control of that aircraft, or attempts to perform any such act; or is an accomplice of a person who

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88. Article 4.

89. See Juan Lopez Gulierez: "Should the Tokyo Convention of 1963 be Ratified?" 31 JAL&C 1965 p. 1 et seq.; Robert Boyle and Roy Pulsifer, "The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft" 30 JAL&C 1964, p. 353 et seq. However, the Tokyo Convention is significant in that it is the first multilateral treaty exclusively directed at the suppression of unlawful acts on board aircraft, and provided the basis of subsequent treaties on the subject. See Thomas, C., and Kirby, M.: "The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation", 22 International and Comparative Law Quarterly (1973) p. 163 et seq.

performs or attempts to perform any such act commits an offence[90] punishable by severe penalties.[91]. Each contracting state shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence in cases where the offence is committed on board an aircraft registered in that state; or where the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board, or where the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or his permanent residence in that state.[92]

A contracting state of the territory in which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence, as provided in the laws of that state, for such time as is necessary to enable any criminal or extradition proceedings to be instituted.[93] Contracting states also undertake to include the offence as an extraditeable offence in any

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90. Article 1 Hague Convention.

91. Article 2, ibid.

92. Article 4, ibid.

93. Article 6, ibid.

treaty existing or to be concluded.[94]

The Hague Convention was a major step forward in international regulation aimed at the safety of aviation. It introduced the concept of universal jurisdiction and it obliged contracting states to institute legal proceedings against hijackers.[95] Its shortcomings, however, lie in the fact that it did not go far enough in the imposition of obligations on contracting states by eliminating asylum for the offenders and imposing penalties in every case. It only applies to aircraft in flight,[96] thus excluding "non-onboard" offences on civil aviation.[97]

The Tokyo Convention dealt with offences and other acts committed on board aircraft, and the Hague Convention was concerned with the unlawful seizure of aircraft; but the safety of civil aviation demanded that the lacuna of

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94. Article 8, ibid.

95. See Matte: Treatise on Air-aeronautical Law, op.cit., p. 366.

96. An aircraft is deemed to be in flight, for the purposes of the Hague Convention, from the moment all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. See Article 3 of the Convention.

97. See Chung, D.: Some Legal Aspects of Aircraft Hijacking in International Law, p. 643 note 33; Mankiewicz, R.: "The 1970 Hague Convention", JAL&C Vol. 37-No. 2 (1971) p. 201.

aircraft and airport installations sabotage be rectified.[98] Hence, the Montreal Convention was drafted in 1971.[99]

In the Montreal Convention, a person commits an offence if he unlawfully and intentionally performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of the aircraft; or destroys an aircraft in service or causes damage to an aircraft which renders it incapable of flight, or places or causes to be placed a device or substance which is likely to destroy or damage an aircraft in service; or destroys, damages or interferes with air navigational facilities likely to endanger the safety of aircraft in flight; or communicates false information which endangers the safety of an aircraft in flight.[100]

The Convention considers an aircraft in flight from the moment when all its external doors are closed following embarkation, until the moment when these doors are open for

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98. See Thomas C. and Kirby M., The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation" 22 International and Comparative Law Quarterly 1973, op.cit. at p. 165.

99. See Abramovsky, A.: "The Montreal Convention", Colum. Journal of Transnational Law", Vol. 14 1975, p. 278.

100. Article 1, Montreal Convention.

disembarkation. The flight is deemed to continue in the case of a forced landing until the competent authorities take over the responsibility for the aircraft and for the passengers and property on board. An aircraft is considered to be in service from the beginning of the pre-flight preparation of the aircraft by ground personnel or crew for a specific flight until twenty-four hours after any landing.[101]

It has been remarked that these three Conventions mark a chronological progression in the fight against aerial terrorism. Although they complement one another and have a certain influence, they are still inadequate. The success of the Conventions is subject to the support received from states in addition to the political atmosphere which allows the adoption of a framework within which a state may be required to respect its obligations derived from international law.[102]

Yes, the success of the Conventions is subject to

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101. Article 2, ibid.

102. Matte: Treatise on Air-Aeronautical Law, op.cit. pp. 370-371, see also the observation of the Delegate of France in ICAO Doc. 8936 LC/164-1 p. 39; Horlick, G.N., International Response, op.cit., p. 176; Abramovsky, A.: "Multinational Convention for the Suppression of Unlawful Seizure and Interference with Aircraft, Part II of the Montreal Convention" 14 Colum. Journal of Transnational Law 1975 p. 300.

the support received from states. How much support have states given to the Conventions? More specifically, how much support have African states given to the Conventions?

In 1973, a diplomatic conference was convened in Rome to establish a convention which would provide for sanctions against states harbouring hijackers. The sanctions contemplated included the suspension of air services to offending states. That Conference broke down. In 1978, the heads of government of seven western nations met in Bonn and adopted a draft declaration put forward by Canada and Japan. In the declaration they agreed to take immediate steps to cease all flights to a country which refuses extradition or prosecution of those who have hijacked aircraft and/or do not return such aircraft. There were skepticisms about the practical application of that declaration.[103]

The Entebbe Debacle

An Air France airbus that left Israel for France with 250 passengers and a crew of twelve aboard, was

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103. See Fingerman, M.: "Skyjacking and the Bonn Declaration of 1978: Sanctions Applicable to Recalcitrant Nations", California Western International Law Journal, Vol. 10 (1980) p. 142 et seq.; cf. Schwenk, W.: "The Bonn Declaration on Hijacking" 1979 Annals of Air & Space Law Vol. IV, p. 307.

hijacked on June 28, 1976, after a stop-over in Athens. The hijackers forced the plane to land first in Benghazi, Libya, and finally, at Entebbe, Uganda. The hijackers who were acting for the Palestinian Liberation Organization (PLO), demanded the release of about 153 convicts in Israeli, West German, French, Swiss and Kenyan jails. On June 27, the hijackers released 47 non-Israeli passengers, and, then, another 100. The remaining passengers were held hostage in Uganda, then under the rule of Idi Amin, until they were rescued by Israeli military commandos on July 3. In the course of the rescue operation, an Israeli officer died, some Ugandan soldiers and some hostages were killed.[104]

A lot has been said and written about the Entebbe incident. One cannot help but admit that the Israeli operation was simply fantastic for its military worth. There are conflicting views, however, on whether the Ugandan government acted to protect the hostages and negotiate for their release, or was directly implicated in colluding with the hijackers. If the accounts given by foreign writers and/or projected in movies are anything to go by, then it would seem Idi Amin co-operated with the hijackers beyond

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104. See William Stevenson: 90 minutes at Entebbe, for the dramatic story. See further, Magdelenat, Jean-Louis: Sécurité de l'aviation et le terrorisme, DCL Thesis (McGill University) 1981 p. 225.

the limits conscionable by international law (of which Uganda was, and is, a party to Hague Convention). Be that as it may, in passing judgement on Uganda in respect of aerial terrorism, regard must be had of the man, Idi Amin, who Uganda was unfortunate to have then as her leader. Idi Amin was a ruthless military dictator - it would have taken only Ugandans in armor to openly challenge his policy. He was a fanatical sympathiser of the Arab cause in the Middle-East, only a few other Ugandans were.

Cooper has stated:

> "In the shadowy depths of Third World Politics with their clumsy instinctive groping for some national identity, it was relatively easy for political skyjackers to find shelter and comfort if not material support." [105]

This statement cannot and should not be construed as reflecting Third World Policy on hijacking. The learned opinions of Sir William Douglas and Dr. T.O. Elias, a Third World Judge and a Third World renowned international jurist respectively, have been quoted above as representing the legal views of Third World countries on the issue. There is plenty of evidence that Israel had valuable help from a Third World country, Kenya, in the successful execution of

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105. H.H. Cooper: Hostage Taking Chitty's Law Journal Vol. 26 No. 3 (1978) op.cit. at page 94.

the Entebbe operation.[106] The same will be said about the Mogadishu incident (infra).

It is true that the Organization of African Unity (OAU) complained to the Security Council about the "Israeli Act of aggression against the Republic of Uganda".[107] It is not intended here to go into the arguments of whether or not Israel committed an act of aggression against Uganda. It will only be stated that the Israeli forcible entry and intrusion into Uganda's sovereign territory is prima facie unconscionable in international law. Israeli military aircraft had no right to navigate Uganda's airspace without Uganda's prior authorization. Even the Conventions on hijacking do not authorize a state to invade another sovereign state in order to rescue hostages or apprehend hijackers. The circumstances that warranted the Israeli operation only mitigate rather than exculpate and cloak with legality[108] the Israeli action as some authors[109]

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106. See Accounts in The Guardian (London) of Monday, July 5, 1976 and Financial Times (London) of Monday July 5, 1976.

107. See U.N. Doc. S/12126.

108. "The credit of International law has more to gain by candid admission of breaches when they occur, than by attempting to throw a cloak of legality over them." See Brierly, J.: The Law of Nations 5th Ed. at p. 319.

would want us to believe. To legalize that action would be creating a dangerous precedent that might one day be used as a stick with which to beat even the mighty.

The fact that the OAU brought the complaint to the United Nations does not amount to support for hijacking. On the contrary, the OAU opposes all acts of sabotage and hijacking of civil aircraft. On March 6, 1970, the Council of Ministers of the Organization meeting in its fourteenth ordinary session at Addis Ababa, condemned all attempts and acts of hijacking and sabotaging of civil aircraft, called upon all states to undertake strict measures to protect civilian air travel from being endangered and appealed to all states to apprehend and punish such criminals in order to ensure the safety of international air travel.

Furthermore, the African Civil Aviation Commission (AFCAC), a specialized agency of the OAU, spelt out the policy of member states in its first plenary session at Dakar in 1971. In a subsequent recommendation adopted by the Commission it was provided as follows:

> - considering the recrudescence of unlawful acts of seizure of aircraft and other illicit attacks against civil aviation in the air and equipment and facilities on the ground;

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109. See for example, Green, L.G.: "Humanitarian Intervention - 1976 Version", 24 Chitty's Law Journal, p. 217.

- considering that the occurence of such acts undermines the confidence of the public in transport by air, so necessary for the development of Africa;

- considering the Convention for the Suppression of Unlawful Seizure of Aircraft concluded at the Hague on 16 December, 1970, and the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, particularly its article 11;

- strongly recommends to Member States to take all necessary measures with a view to the conventions referred to above being signed and ratified at the earliest possible opportunity;

- invites States, even before ratification of, or adherence to the Tokyo Convention, to give effect to the principles of article 11 of that Convention.[110]

Article 11 of the Tokyo Convention which the recommendation refers to provides that when a person on board has unlawfully committed by force or threat thereof an act of interference, seizure or other wrongful exercises of control of an aircraft in flight, or when such an act is about to be committed, contracting states shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft. The contracting state in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall take the aircraft and its cargo to the persons lawfully entitled to possession.

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110. AFCAC Recommendation S1-31.

The Mogadishu Incident

Contrary to the erroneous impression created in respect of the Entebbe debacle, African states do not co-operate with hijackers. On the contrary, they have even gone out of their way to cooperate with foreign powers, when appropriately requested to do so, to settle hijacking predicaments. The Mogadishu incident involving a hijacked Lufthansa 737 is noteworthy.

Lufthansa Flight 181 was hijacked out of Majorca in 1977. For about a week the Lufthansa 737 was flown across Europe, the Middle-East, and finally, landed in Mogadishu, Somalia, despite that government's refusal to authorize it to land there. Many other countries, including Sudan had also shut their airspace and landing facilities to the hijacked aircraft. The aircraft commander was murdered by the hijackers before the aircraft finally landed in Mogadishu.

The incident ended on a happy note when West German commandos successfully stormed the aircraft, rescued the hostages, killed three and captured one of the hijackers. President Siad Barre of Somalia had personally granted the West German request for the rescue operation in his country.

In the case of the hijackers of the Japanese DC-8

en route from Paris to Tokyo in September 1977, they were accepted in Algeria. But it is known that that drama ended relatively tamely only when the hijackers surrendered to the Algerian authorities after the government had acceded to a request by the Japanese government to grant the Japanese hijackers and their companions asylum. Algeria simply provided in that case a badly needed solution, on humanitarian grounds, which no other country had the courage to provide.

The International Federation of Airline Pilots Associations (IFALPA) has blamed countries which refuse to allow aircraft in distress to land in their territories thereby endangering the lives of the crew as was the case in the Lufthansa Flight 181 where the pilot was killed.[111] One appreciates IFALPA's concern. One has also to appreciate the dilemma of small states faced with the volatile issue of hijacking. The Entebbe incident had many lessons that cannot be ignored. Small and weak states would be caught between what desperate die-hard hijackers could do, and what a no-nonsense foreign power might think fit to

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111. Article 25 of the Chicago Convention requires contracting states to assist aircraft in distress or to permit the owners of the aircraft or state of registry to provide necessary assistance. IFALPA directs that hijacked aircraft be recognized by states as aircraft in distress. See IFALPA Report of 36 Conference pp. A/B21-A/B25 (1981).

do with the probable consequence of loss of innocent lives and destruction of property to the detriment of the state which allowed the hijacked aircraft to land in its territory. Small states are not properly equipped to handle incidents of hijacking. Inviting foreign intervention like Somali did, could expose some of these states to terrorist reprisals and political embarrassment. Hence, many small states like Sudan would prefer to keep a hijacked aircraft at bay.

Conclusion

No state exists as an island. International relations have given States little choice but to conclude international agreements for their collective good. International Civil Aviation is one of the fields with the greatest number of these agreements. It is unfortunate that some states, however, have by their own design, made it impracticable for some members of the international aviation community to continue to extend to them the benefits deriving from some multilateral agreements. Like Portugal and Ian Smith's Rhodesia, it is hoped that South Africa will someday change her policies to conform with the acceptable norms of the international community. South Africa, her neighbours and the civil aviation community will then give better effect to the relevant treaties, for the general

benefit of the African region.

Furthermore, unlawful interference with civil aviation is the one act of violence which transcends the different notions of 'terrorism' and 'nationalism'. It is an international crime that should never be condoned anywhere, on any grounds. African states should ratify all the three treaties dealing with the offence and ensure their implementation.[112] No state is immunized against the threats and adverse human and economic effects of unlawful interference with civil aviation - no matter how powerful, peaceful or obscure it is.

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112 Algeria and Tanzania, for example, have not signed any of the treaties on the suppression of unlawful acts against civil aviation.

CHAPTER 4. WORLD BODIES AS SOURCES OF LAW AND POLICY APPLICABLE TO CIVIL AVIATION IN AFRICA

African states, like many emerging states, are, by and large, the fruition of the United Nations' role in the decolonization process. Conterminous with the task of decolonization is an even more difficult responsibilty of bringing about the economic and social advancement of these new states. The world organization has been carrying out these responsibilies in the field of civil aviation through its specialized agencies - mainly the International Civil Aviation Organization, the United Nations Development Programme and the Economic Commission for Africa. Although the International Air Transport Association is not an inter-governmental body, the effect of its policies and regulations on Africa cannot be disregarded.

4.1 The International Civil Aviation Organization (ICAO)

4.1.1 Aims of ICAO

The Convention on International Civil Aviation provided in article 43 for the formation of ICAO. In article 44, the aims of the Organization were enumerated as follows:

a) to insure the safe and orderly growth of

international civil aviation throughout the world;

b) to encourage the arts of aircraft design and operation for peaceful purposes;

c) to encourage the development of airways, airports and navigation facilities for international civil aviation;

d) to meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;

e) to prevent economic waste caused by unreasonable competitions;

f) to insure that the rights of contracting states are fully respected and that every contracting state has a fair opportunity to operate international airlines;

g) to avoid discrimination between contracting states;

h) to promote safety of flight in international air navigation; and

i) to promote generally the development of all aspects of international civil aeronautics.

Today, membership of the ICAO stands at about 150. The majority of the member states are developing countries, of which not less than 49 of them are African states.[1] These states cannot, without substantial technical and financial aid, provide in their territories the essentials for orderly and safe international air navigation; neither can they, without such aid, have a fair opportunity to operate international airlines. Thus, the Convention on

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1. See ICAO Doc. 9382, op.cit., pp. 161-163.

International Civil Aviation made provisions for ICAO to assist developing states in the field of civil aviation. These treaty provisions are supplemented by some ICAO resolutions directed at the same objective.

4.1.2 ICAO Assistance

Where a contracting state does not have reasonably adequate civil aviation infrastructure and facilities for the safe, regular, efficient and economical operations of international air services, present or contemplated, the ICAO Council shall consult with the state directly concerned, and other states affected, with a view to finding means by which the situation may be remedied. The Council may make recommendations for that purpose. However, it will not amount to an infraction of the Convention if any contracting state fails to give effect to such recommendations.[2]

A contracting state may conclude an arrangement with the Council for giving effect to such recommendations. The state may elect to bear all of the costs involved in any such arrangement. If the state does not so elect, the Council may agree, at the request of the state, to provide for all or a portion of the costs.[3]

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2. Art. 69 of Chicago Convention.

3. Art. 70.

On the request of a contracting state, the Council may agree to provide, man, maintain and administer any or all of the airports and other air navigation facilities required in the territory for the safe, regular, efficient and economical operation of the international air services of the other contracting states. The Council may specify charges for the use of facilities thus provided.[4] The Council shall assess the capital funds required for the provision of facilities in these circumstances, in agreed proportions over a reasonable period of time, to the contracting states consenting thereto whose airlines use the facilities.[5]

When the ICAO, at the request of a contracting state, advances funds or provides airports or other facilities in whole or in part, the arrangement may provide, with the consent of the state, for technical assistance in the supervision and operation of the airports and other facilities, and for the payment, from the revenues derived from the operation of the airports and facilities of the expenses, interest and amortization charges.[6]

A contracting state may at anytime discharge any

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4. Art. 71.

5. Art. 73.

6. Art. 74.

obligation into which it entered in respect of the provision of the necessary facilities and take them over. However, it will be required to pay to the Council an amount considered reasonable in the circumstances. If the state considers that the amount fixed by the Council is unreasonable, it may appeal to the ICAO Assembly against it. The Assembly may confirm or amend the decision of the Council.[7] Funds obtained by the Council through re-imbursement, shall, where applicable, be returned to the states which made the original capital available, in the proportion of their assessments.[8]

Joint support of aviation projects through the contribution of ICAO member states has been realized in three main instances: the Danish Joint Financing Agreement of 1956, the Icelandic Joint Financing Agreement of 1956,[9] and the Arrangement on Aeronautical Communications Services over the North Atlantic.[10] No arrangement of these sorts exist in Africa.

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7. Art. 75.

8. Art. 76.

9. See ICAO Doc. 9360, DEN/ICE/4 1982; ICAO Doc. 9382, op.cit., p. 87.

10. See ICAO Recommendation 2/14 of the LIM/EUR/NAM/NAT of 1979.

However, a number of African states have benefitted from assistance programmes administered by the ICAO Technical Assistance Bureau. The programmes consist of the United Nations Development Programme (UNDP), Trust Funds (TF) and the Associate Experts Programme. ICAO also maintains a Voluntary Assistance Programme[11] through which the Council is authorized to receive voluntary contributions in the form of scholarships, fellowships, training equipment and funds for training from states and other public and private sources.[12]

ICAO Policy on Assistance

In 1971, the ICAO Assembly adopted a consolidated resolution dealing with the policies and procedures of technical assistance.[13] That resolution has been updated and replaced by another one.[14] The resolution approves the actions taken by the Council of ICAO for ICAO's

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11. See ICAO Resolution A16-7.

12. In 1982, for example, the Netherlands contributed $12,800 as a donation to assist civil aviation in the least developed countries. The Government of France and a French Organization, FIAS, donated four-18 month fellowships in civil aviation, and $9,639 for civil aviation training equipment for the developing world. ICAO Doc. 9382, op.cit., at p. 91.

13. ICAO Res. A18-8.

14. ICAO Res. 23-7 of 1980.

participation in the UNDP, the use and development of Funds-in-Trust and the introduction of the Civil Aviation Purchasing Service to assist governments and organizations in procuring high value items of civil aviation equipment.

Developing countries were encouraged to seek funds for the development of their civil aviation from other multilateral and bilateral sources to complement funds available from national budgets and the UNDP. They were also requested to give high priority to regional and inter-regional projects because of the great benefit such projects represent. The establishment of conveniently located national or multinational training centres with aid requested from the UNDP and other funding sources was to be continued and states were encouraged to regard such institutions as regional training centres which can provide advanced aeronautical training to students from neigbouring states of the region concerned so as to promote a self-reliant capability within that region. The importance of education and training in the field of civil aviation[15] and the better preparation of students for such specialized training was stressed.

The ICAO Council was also requested to examine the

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15. See UN Economic and Social Council Res. 906(XXXIV) on the subject of Education and Training.

procedures for administration, execution and evaluation of the Technical Assistance Programme in the light of the practical needs for the technical assistance, the general objectives of the organization and the particular guarantees implied by the international character of the organization. The Council will further study possible improvements with a view to ensuring conformity of the procedures that are employed with the policy of the organization and the relevant provisions of the Assembly resolutions, bearing in mind the overriding requirements to meet the technical assistance needs of developing countries in the most timely and efficient manner.

ICAO has established the basic principles and general policy for rendering its financial and technical aid to contracting states.[16] The provision of ICAO aid is based on voluntary actions on the part of contracting states. The organization, through its Council, is the responsible international body to evaluate the adequacy of existing air navigation facilities and services, and ascertain the additional requirements for the operation of international air services, and to initiate expeditious action towards meeting those requirements.[17]

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16. ICAO Res. A1-65.

17. Paras 3.1 and 3.2 of Annex to Res. A1-65.

In each case of financial and technical aid the Council will consider appropriate methods for the financing of the required air navigation facilities or services, but, in general, such financing will be furnished collectively by those states which will benefit from the provided facilities or services. The assessment of contributions in cash or kind will be agreed upon between the contributing states, the supported state and ICAO. In assessing the amount of the contribution of each state, account will be taken of the benefit to be derived by such state.[18] Land necessary for the establishment or improvement of a facility or service which is provided by the supported state will be considered as a part of its share of the contribution towards the provision of the facility or service.[19]

The Council will have at its disposal an emergency revolving fund for the purpose of temporary finance in cases when the breakdown of an essential facility or service is imminent. Expenditures from this fund will be reimbursed by the contributing states.[20]

The cost of operation and maintenance of a facility or service provided through ICAO in the territory of a

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18. Paras 4.1.1 and 4.1.2 ibid.

19. Para. 4.1.3 ibid.

20. Para. 4.1.6 ibid.

supported state will, in so far as possible, be borne by that state. Any user charges imposed by the supported state will be levied and employed in compliance with the terms of the agreement under which the facility or service was provided or, in default of this, in compliance with recommendations to be made by the Council. No custom duties or other levies will be imposed by the supported state on equipment and materials required for the construction, operation or maintenance of a facility or service provided through ICAO.[21]

A number of civil aviation projects have been established in the developing countries through ICAO financial and technical aid. Some of them are in Africa. A few of them will be mentioned.

The Expansion of the African School of Meteorology and Civil Aviation (EAMAC), Niamey, Niger

The project was initiated in 1977 with the aim of assisting in the creation of supplementary courses at the advanced level in the school, and increasing the school capacity to meet the training needs of the participating states who happen to be the members of ASECNA. In 1981, 56 students graduated: 20 in Air Traffic control, 14 in

21. Paras 4.1.7 and 4.1.8 ibid.

meteorology and 22 in telecommunications. Fifty-four more students were enrolled and a special course in Aeronautical Information Services was provided to four students from some of the ASECNA member states. New facilities have been constructed and the projects training equipment have been installed.

The Multinational Pilot and Aircraft Maintenance Training Center, Addis Ababa

This project took off in 1979 with the objective of upgrading the training for pilots and aircraft maintenance technicians offered at the Ethiopian Airlines Centre, through the provision of training equipment and the standardization of course material. The training capacity is to be extended so as to accommodate additional students from other African countries.

A new Aircraft Maintenance Technician School building with 20 classrooms as well as a hangar workshop and instructors offices have been completed. Already, many students have graduated in Airframe, Powerplant and Avionics maintenance. The Pilot Training School provided instructions for CPL/IR multi-engine and ATPL Theory courses. A flight systems trainer which facilitates pilot training has been constructed. A good number of pilots have successfully graduated from the centre.

Flight Calibration Unit - Nigeria[22]

Started in 1980, this project is for the establishment of a Flight Calibration Unit within the Federal Ministry of Civil Aviation to be staffed by national personnel trained to carry out flight calibration inspections for navigation and landing aids in Nigeria. Assistance was provided to the Ministry of Aviation for the acquisition of the Calibration aircraft and the Sierra console equipment, as well as for the establishment of the calibration laboratory and maintenance offices of the Unit. On the job training in respect of the Consol operation, the theodolite operation, and the calibration pilots was started. Ten Nigerians were awarded fellowships for training as flight inspection pilots, flight inspection technicians and instrument en-route and approach procedures specialists. ICAO specialists also provided assistance to the Ministry of Aviation for the preparation of operational manuals and for the development of Flight Inspection Procedures.

Another large scale project became operational in

22. Funds for these projects came from both UNDP and Nigerian government sources. The radar equipment was acquired by the Nigerian government from and installed by an Italian firm.

Nigeria in 1979. The radar air traffic controllers project was designed to assist the Nigerian government in its efforts to improve air safety in the territory. Qualified radar controllers will put into operation the comprehensive ATC radar system located at five aerodromes. National personnel are trained under a fellowship programme and on-the-job training. A senior air traffic control adviser provided over-all supervision and co-ordination of the project while non-local radar controllers were engaged under a sub-contract and deployed to Murtala Mohammed, Kano, Port Harconot and Enugu airports. Advice was also provided to that country's Civil Aviation Directorate on airspace planning and utilization, implementation of en-route air traffic control services, new airport development, and the utilization of simulator equipment to upgrade OJT radar training and reduce training time. A training guide was completed for Lagos Radar.

In 1980, yet another project was launched for Advanced Aeronautical Training at Zaria. It was aimed at expanding the scope of training already being offered by the Zaria Centre, and to assist in updating and enlarging syllabi and instructional technique. Training was also started on the F-28 jet simulator which was purchased through ICAO's Civil Aviation Purchasing Service (CAPS), following its installation and official acceptance by the

government.

In addition to initiating various projects in Africa such as those memtioned above, ICAO also awards fellowships to African's to carry on aviation related studies. In 1981, for example, the total fellowship awards made to Africans under ICAO programmes stood at not less than 250.[23]

Of significance too is ICAO's international assistance in re-establishing operations of international airports and related air navigation facilities.[24] There have been instances where airports and related air navigation facilities have been damaged or disrupted by civil wars or other disasters, and the states concerned were unable, without international support, to re-establish the operation of such airports and/or facilities, but it was found in the interest of international aviation to re-establish such facilities as early as possible. Such is the case with Beirut Airport in Lebanon.

In Africa, the N'djamena Airport in Chad is another example. The landlocked sub-Sahara state has been going through a long civil war which has left some of its infra-structure in ruins. The N'djamena international

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23. Figures extracted from appendix 12 of ICAO Doc. 9356.

24. See ICAO Res. A22-11.

airport which is Chad's main gateway to the outside world, was badly damaged during the war. The African Development Bank's modest aid to re-establish the airport on the basis of ASECNA's modernization plans was far from enough. ICAO, following a United Nations General Assembly Resolution of 1981, supplied more aid, as a matter of urgency for the reconstruction work on the airport.

The Convention on International Civil Aviation places a prima facie obligation on contracting states to establish within their territories the essential air navigation facilities and services.[25] Pursuant to this provision, the ICAO requires a contracting state to "exhaust all possibilities of arranging directly for the provision of adequate air navigation facilities and services before applying to ICAO for aid."[26]

Many African states have made great efforts to discharge that primary obligation in the Convention. Gabon, for example, has an airport infrastructure which is among the densest in the world. Most of the projects were initiated and executed by the Gabonese government itself. In July 1978, Plessey Radar Limited was awarded a thirty-million-dollar contract by that government for the

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25. Article 28, Chicago Convention.

26. Para. 3.4 of the Annex to ICAO Res. A1-65.

extension and modernization of the country's civil aviation air navigation infrastructure.[27]

Cameroun is another example. The government undertook to expand and modernize the Douala international airport. A contract was also awarded to Ital Airport in 1979 for the completion of Yaoundé international airport. A sixty-nine-million-dollar contract was awarded to Plessey Radar Limited for the modernization of the Garoua international airport to bring it up to ICAO class A standard.[28]

There is no doubt that projects of these magnitudes have great impact on the economies of the states concerned. For poorer states, the initial impact can be severe on the national revenue. The case of Burundi is illustrative.

A poor and landlocked country, difficult of access by other means of transport, the Republic of Burundi must

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27. The project included the supply, installation and running-in of twelve NDBs, three VORs and one ILS, and the installation of a UHF air-ground network with four ground stations connecting Libreville with all aircraft in flight in the Gabonese airspace. Part of the funds was advanced by the Export Credits Guarantee Department of UK. See ITA 1981/No 11, p. 80.

28. Part of the funds for the projects was advanced by Manufacturer Hanover Export Finance Limited and the Export Credits Guarantee Department of UK. See: "The Air Transport Situation and Prospects in Africa" ITA 1981/No 11, op.cit.

rely more and more upon civil aviation to alleviate the difficulties it faces in the planning of supply routes. In order to live up to her primary treaty obligation, she embarked upon a project, very modest by others' standards, to provide the infrastructure at the Bujumbura international airport to accommodate large four-engine aircraft of the Boeing 707 and DC-8 types. For a small and poor country, the sums spent to establish the facilities and services were burdensome and even at the expense of other sectors of development. The Burundi government later complained:

> "...the first to benefit from aeronautical installations and services in countries like ours are the large airlines of the wealthy countries. Despite the conclusion of air agreements on the basis of reciprocity, the operation of our aerodromes is almost entirely in one direction, because we do not have the means to provide any competition. This leads me to say that the rich countries with large airlines should bear the major share of our expenses for airport installations and services..."[29]

It is not disputed that where a state cannot afford the modern equipment of air transportation it is at a disadvantage vis-à-vis her better equipped competitors. But a state can still benefit significantly from her modern international airport when she cannot effectively compete in air carriage. The benefit derives from airport charges

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29. Statement by Chief Delegate of Burundi to the 21st Session of ICAO Assembly 1974. ICAO Doc. A21 - Min. P/2.

levied on the foreign airlines. The revenues derived from international airports like Nairobi, Lagos, Cairo and Johannesbourg, to name only a few, contribute in no small way to the viability of the national economies of the African states concerned.

Be that as it may, Burundi's request that the rich countries with large airlines using that country's airport should bear the major share of the expenses has valid grounds. Chapter XV (articles 69-76) of the Convention contains provisions enabling states like Burundi to be helped. There does not seem to be any good reason why joint financing arrangements like the Icelandic and Danish types cannot also be used in cases like Burundi.

It would be better still if the rich states gave direct assistance to the poor states for the development of the essential civil aviation facilities through other bilateral and multilateral arrangements. This direct assistance is necessary since financial assistance from ICAO is supposed to be the last resort.

However, Burundi's lament did not seem to have gone unheard. A forty-million-dollar development project for which France was to provide direct financial aid was later launched at the Bujumbura international airport - used mainly by French and Francophone airlines. This project comprised the construction of a new 4200 m^2 passenger

terminal designed to take four hundred and fifty passengers an hour, modernization of the existing terminal, consolidation of the runway and its extension to 3600 metres, loading stands, and construction of an access road with its lighting.

The project was to be financed by the Banque de Développement en Afrique (or ADB), the Caisse Centrale de Coopération Economique Française, the Fonds Français d'Assistance Technique and the Burundi Government. In another project also financed by France, a new runway was built to permit operation of wide-body aircraft between Burundi and Europe.

One is, nevertheless, tempted to ask whether it is economically prudent for states like Burundi to spend so much money to build big international airports. With better regional or sub-regional planning, would it be necessary to build a big international airport at Bujumbura with Nairobi, Entebbe, Kinshasa international airports nearby? Cases like these underscore the importance of better regional co-operation and economic integration in Africa.

4.1.3 The UNDP/ICAO Project in Africa

In 1974, the African Civil Aviation Commission requested the United Nations development Programme to finance a study initiated by ICAO to determine the

contribution that civil aviation can make to the development of the national economies of African states.[30] This project was the first effort at investigating the cause and effect relationship between civil aviation and African economies. In order to achieve a multi-disciplinary approach to the survey, ICAO worked in close collaboration with other specialized agencies of the United nations such as FAO, UNCTAD, ITC, UNIDO and UNOTC.

In March 1977, a final report was submitted to African governments.[31] Over two hundred recommendations were made in the report to governments - most of them national in character, some of them sub-regional. All in all, the report presented broad conclusions of a pan-African nature in the fields of agriculture, industry and commerce, tourism and civil aviation.

Agriculture

It was established that air transport could stimulate the production for export of fruits, vegetables, cut flowers, seedlings and medical plants, fresh meat, hides and skins as well as fin fish and crustacea.[32] The lower

30. AFCAC Recommendation S2-32.

31. UNDP/ICAO Report RAF/74/021.

32. Ibid. at page 17.

the value of the freight, the more critical becomes the cost of its transportation by air. Consequently, air tariffs usually render the export of middle-value vegetables, such as tomatoes and cucumbers, marginal or unprofitable. Higher-priced goods, such as asparagus and strawberries, are not so sensitive to air freight costs. Cut flowers are even less so, and fresh fish - particularly live lobsters - are hardly sensitive at all.

Air cargo from Africa to Europe is relatively limited at present. Airlines have been compelled to offer low rates to attract some business in mainly agricultural products because profitable industrial freight is lacking in the region. To make up for the low rates and the relative scarcity of North-bound cargo, air carriers must transport a considerable volume of higher-yield cargo between Europe and Africa. If they cannot do so, they will inevitably have to reduce cargo capacity in both directions. Such reduction in air cargo capacity could seriously restrict the export of African products by air.

African governments were, therefore, strongly advised to desist from taking measures which serve to reduce the volume of South-bound air freight. One such measure which has gained notoriety is the custom policy by which duties are applied to the CIF (cost + insurance + freight) value of air imports. Air tariffs are generally five times

as high as sea tariffs. The application of the same scale of duties to goods transported by air and sea further exacerbates the cost of air imports to the point where importers are obliged to use surface transport exclusively.

Africa's "restrictive aviation policy" was identified as an obstacle to the widest possible distribution of Africa's air exports. The "restrictive policy" is usually designed to protect the national airlines by minimizing competition. Sometimes, this restriction works against the larger interest of a country's national economy. Mali, for example, has been engaged in the export by air of horticultural produce. Scheduled air services between Europe and Mali served only one country - France. At one point, the horticultural co-operative was unable to fill orders from importers in Germany, Switzerland and Scandinavia. The Malian government had to be persuaded to relax her policy and permit charter flights to land at Bamako and carry vegetables and fruits to other European markets beside France. When Mali finally adopted a less restrictive policy, her air exports were broadened and increased without necessarily harming the interest of the national airline, Air Mali.

Industry and Commerce

African industry is still embryonic. This is true not only of heavy industry, but also industry to transform raw materials into finished goods. It is in the area of transformed, value-added goods that civil aviation has been found capable of making its greatest contribution. Commerce in Africa consists of inter-continental trade as well as traditional exchange - intra-Africa in nature - which is essentially unregulated and carried on by thousands of small traders.

The development of industry and commerce depends largely on regional co-operation among groups of neighbouring African states. One goal of such co-operation is to enhance complementarity and reduce wasteful competition. Another goal is to achieve the economy of scale, lacking in individual states, through a concentration of resources and production; and finally to create free trade zones to encourage and facilitate the production and exchange of goods within Africa itself, as well as for export. Aviation can play a most effective role in this sphere of regional co-operation.

Free trade zones produce goods for export by combining low cost labour with materials imported free of duty. Hong Kong and Singapore are outstanding examples of the success of the free trade zone concept. Each of these

two states is small, neither can supply the materials for even a fraction of what it produces. The materials are imported duty-free and are transformed by cheap labour. Aviation is ideal for the transportation of the finished products to overseas markets. Thus, Hong Kong is one of the world's largest exporters of tailored garments, and for years has considered air transport the fastest, most efficient and cheapest means of exporting these products.

It has, therefore, been strongly recommended to African governments to group together skilled or unskilled workers who can be trained in such a way as to ensure standardization and significant volume of production. Where a country cannot supply the materials needed for production, the material should be imported, duty-free, later to be exported as finished goods. Every country would be required to make an inventory of its assets in terms of labour and/or material, and request expert assistance from the relevant United Nations Specialized Agencies which are willing and ready to help countries launch labour-intensive enterprises.

Tourism

Tourism is a potential source of foreign exchange earnings, a generator of employment and a means of diversifying the economic activities of a country. The

provisional estimates of the total number of international tourist arrivals by all modes of transport reported by the World Tourism Organization (WTO) for 1982 was two hundred and eighty million, down by 1.3% from the 1981 figure of two hundred and eighty four million. Despite this, WTO estimates that world revenue from tourism rose by 4% from $95,988 million to $99,925 million in 1982. Two regions in the world experienced an increase in international tourist arrivals during the year (1982). Africa recorded 9.3% and Asia and Pacific, 3.2% increase. The Americas which account for 19% of total world tourist arrivals experienced a 5.6% decline, while Europe which accounts for 70% of the world's total, was down by 0.3%. The Middle-East also recorded a 2.1% decline.[33]

A tourist comes into the country to "consume" the tourist product. The process is thus different from traditional exports which are sent to other countries to be consumed. Without air transport, tourism to Africa would virtually disappear. Paradoxically, Africa's distance from Europe and other tourist sources restricts tourism because the cost of air transport becomes an important part of the final price of the tourist product.

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33. See ICAO Annual Report of the Council for 1982, Doc. 9382, op.cit., p. 8.

A country's natural endowments - sun, sea, historic sites, game reserves - are the raw materials from which the tourist product is fashioned. The product itself must include transportation to and from the destination, and on the ground: lodging, food and drinks, allied services, guides, tourist circuits, etc. The fabrication and execution of the tourist trade product is a complex undertaking which requires organization and co-ordination of all elements involved.

More than 75% of air traffic to, from and within Africa is business-motivated. The percentage is much higher to countries which receive few tourists, but lower to tourist centres such as Kenya, where pleasure travel is at least 50% of the market, and Gambia where 80% of the air arrivals are tourists. Nonetheless, three quarters of air passengers to Africa as a whole, travel on business - on tickets bought by someone else - at the high fares level which business travellers are obliged to pay. This situation provides the airlines with a solid base of continuing traffic and revenue, and permits them to offer much lower promotional fares to add to their business traffic a new market - tourism.[34]

African governments were advised to adopt a

34. UNDP/ICAO Doc RAF/74/021, op.cit., p. 71 et seq.

flexible aviation policy which would accommodate both scheduled and charter services if they wished to increase the volume of their tourism. Countries with a large hotel capacity, not more than 60% occupied, and sufficient ground staff and facilities, could consider receiving charter loads of tourists - in the case where scheduled airlines are unable to accommodate large numbers of tourist passengers. It should first be determined why scheduled airlines cannot carry more tourists before deciding on charters because the reason may stem from capacity or frequency restrictions imposed by the government itself.

Such was once the case in one African country where hotels were barely 50% full. Requests from various European tour operators indicated that twenty thousand additional tourists wished to travel to the country. It was evident, however, that the scheduled airlines could not accommodate them, and it was too large to arrange for transport by charters. Only after refusing the business, did the government realize that the inability of the airlines to carry the traffic was not because they lacked the seats, but because the frequency restrictions and traffic quotas imposed upon them had made them "full up". The country thereby "lost" about $4 million, on the assumption that each of the twenty thousand visitors would have spent an average of $200 for a ten-day stay. The national airline, it was

established, was full in any event and could not have carried more passengers.

> "Restrictions are generally imposed to protect the national airline against ruinous competition, but when the airline needs no protection (...) a protectionist policy should be relaxed, or the country's overall economic interest may be threatened."[35]

An African government might well decide that its own airline should not be protected in respect to tourist traffic for purely economic reasons. Developed airlines in Europe and North America have huge resources at their disposal to stimulate tourism and employ these resources in ways that will make them the most money. No African airline can match their collective manpower and facilities. It is quite natural that many tourists will be influenced to travel by these well established airlines. To put unreasonable restrictions on the number of tourists these airlines might carry, would discourage their selling efforts and consequently reduce the overall number of tourist arrivals in Africa.

Civil Aviation

Compared to road transport, air transport is relatively cheap to develop, but relatively expensive to operate. The capital needed to construct a domestic air

35. Ibid., at p. 81.

network is much less than the investment required to build roads. The time factor is also much less. Often overlooked is the potential value to the national economy of the money saved by building an air rather than a road network in a tropical rain forest country with very difficult terrain. Besides, the development of an air network does not preclude the eventual construction of a road system. Air will be employed to pioneer a given route. When traffic reaches a certain level, the alternative of a road may be justified. Such an approach reduces the risk of building an under-utilized road at enormous expense. The capital thus made available may be invested in more immediately productive enterprises.

Domestic services may be rendered with aircraft of an older generation, simple to operate and inexpensive to maintain. Utilization of such aircraft may be low because of limited traffic or restrictions on hours of operation, but this is not a vital factor in the airline's economy because the cost of its fleet is proportionately low. However, as more modern and costly aircraft are introduced it becomes important that they should be utilized more intensively to reduce amortization costs per flying hour.

Africa's airlinks with other continents have immeasurably speeded its economic growth. The business and technological expertise a developing continent needs to

accelerate its progress is becoming available more than ever before. An African country's international airline may garner foreign exchange by reducing the country's outlay on overseas travel. By building international airports, most countries have already incurred the high developmental costs associated with the provision of major ground facilities. Airports tend to become the centres of commercial and industrial activities. They can of themselves be valuable sources of revenue (not least, foreign exchange) in the form of landing fees and charges for traffic handling, maintenance and supplies, rents of duty-free shops, etc.

The UNDP/ICAO project further made recommendations, based on the analysis above, in respect to, inter alia, fifth freedom rights and landlocked states. It stated that the "denial of fifth freedom rights, whatever the justification, cannot help but restrict the growth of air traffic." Protectionism falls most heavily on smaller airlines which can never expand in any appreciable way if their route networks are limited to their own countries and their immediate neighbours. If fifth freedom rights were accorded to other African carriers, an action which always holds out promise of reciprocity, the African airlines' share of the total traffic carried would increase while that of foreign airlines would diminish. "Governments should take a liberal attitude to the granting of 5th freedom

rights to the airlines of other African countries in their own common interests."[36]

Considerable attention was given to the problems of the landlocked states. It was recommended that Gabon and Rwanda should conclude an air agreement to facilitate the exchange of fruits and vegetables from Rwanda for entrepôts goods from Gabon. An all-cargo service between Pointe Noir (Gabon), Bangui (Centre Afrique) and N'djamena (Chad) to provide the inland countries with speedy access to and from the sea, was also recommended. It was also recommended that another air service be introduced to link Lagos (Nigeria) and N'djamena (Chad). Finally, a collective action by Botswana, Lesotho, and Swaziland to improve their air services was recommended.[37] Some of these recommendations have eventually been implemented.[38]

4.1.4 Facilitation

The laws and regulations of a state (party to the Chicago Convention) concerning the admission into or departure from its territory of passengers, crew or cargo of

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36. Ibid., p. 119.

37. Ibid., p. 127.

38. See Sky Power Journal of the Nigeria Airways 1982 (Route map).

aircraft shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that state.[39] Each contracting state agrees, however, to adopt all practicable measures through the issuance of special regulations or otherwise to facilitate and expedite navigation by aircraft between the territories of contracting states and to prevent unnecessary delays to aircraft, crew, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance.[40]

Many national laws or the administration of some national laws at the airports hinder the speedy and regular movement of passengers and cargo by air. This necessitated the ICAO Council to adopt Annex 9 to the Chicago Convention[41] which was designed, among other things, to expedite the entry and departure of aircraft, passengers, cargo and other articles at international airports. The annex is accordingly titled "Facilitation". It has been subject to eleven amendments and now contains more than two

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39. Article 13, Chicago Convention.

40. Article 22, ibid.

41. ICAO Council's competence to adopt annexes to the Chicago Convention is based on articles 37, 54(1) and 90 ibid.

hundred and fifty Standards and Recommended Practices.[42] African policy in respect of two of its provisions, namely, "transit traffic" and "travel documents" will be examined.

Transit Traffic

The annex states that customs clearance shall be applied and carried out in such a manner as to retain the advantage of speed inherent in air transport. Speed of air transportation should not be confined to the speed of the aircraft alone. Speed in the air, for example, in the case of air freight, must be matched by reasonable speed on the ground in getting the shipment quickly from the shipper, through ground handling and clearance controls, to the consignee otherwise the aircraft speed is negated.

A shipper or consignee in Africa could be so frustrated by the slothful and extortionate practices of the customs at many African airports. It is no secret that in many African countries the customs is one of those departments where employees get rich quickest at the expense of the national interest. No African state has taken effective measures to abate such corruption.

Facilitation is particularly involved when traffic passes through an ICAO member state. Each state is required

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42. See ICAO, the first 35 years, p. 18.

to provide for direct transit areas at airports so that aircraft, passengers, cargo, stores and mail need not undergo any examination except in special circumstances.[43] The "special circumstances" that justify the authorities of a transit state to subject cargo, passengers and stores in transit to examination was the subject of judicial interpretation in the African case of Ministère Public et Administration de Douanes v. Schreiber et Air France.[44]

In that case, a Dakar (Senegal) court of Appeal stated:

> "...il est vrai que la...annexe stipule qu'une inspection de baggages en transit aérien peut avoir lieu dans des cas spéciaux déterminés par les authorités compétentes. Mais...il résulte de l'exprit de la convention que cette inspection exceptionnelle ne saurait avoir lieu que pour des raisons tant nationales qu'internationales d'ordre public ou de sécurité...notamment les cas s'il s'agissait de contrebande d'armes de guerre ou de stupéfiants..."[45]

Let us examine some Facilitation provisions of an

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43. Chapter 5, Annex 9 of Chicago Convention.

44. RFDA (1957) p. 355.

45. This decision is in contrast to the one given in the American case of Samuel Leiser v. United States Customs (1956, US&CAVR p. 416) where the court ruled that appellant's undeclared diamonds should be forefeited regardless of the fact that the passenger and his diamonds were in transit. The Dakar decision would seem to be preferable.

African state to see how they accord with Chapter 5 of annex 9. The Nigerian provisions are excerpted here:

Customs Requirements

All passengers may be required to complete and sign a declaration form in respect of personal effects and baggage whether accompanying them or otherwise consigned. The baggage of all passengers entering Nigeria by air is conveyed direct from the aircraft to the approved place for examination, and all such persons must produce their baggage including any articles carried with them, to the customs officer and answer such questions as may be put to them concerning their baggage or any other article therein. All persons leaving Nigeria must produce their baggage and any other articles carried with them for examination at the place approved for that purpose, and answer any questions with respect to such baggage or such articles as may be put to them by the customs.[46]

Goods may not be unloaded from an importing aircraft without the authority of the customs officer, nor at any place other than the examination station at the airport. When the customs officer has given his consent all goods in the aircraft are required to be unloaded except

46. AIP Nigeria FAL 2.2.

such as to be carried on to another customs airport in Nigeria or at a foreign destination and are permitted by the customs officer to remain on the aircraft. Unless the customs officer otherwise permits, all imported goods unloaded from the aircraft must be deposited forthwith in the Transit shed at the airport. Goods which have been loaded or retained on board for exportation or use as stores may not be unloaded without the authority of the customs officer. When part of the inward cargo is unloaded and part retained on board the aircraft for on-carriage to a destination outside Nigeria, the cargo manifest should include the general statement: "Part cargo remaining on board for exportation". Cargo retained on board for exportation may not be interfered with while the aircraft is at the customs airport.[47]

From the above provisions it seems transit cargo can leave a Nigerian airport with the least delay if it is to be further transported in the same aircraft it arrived. In the case of a change of aircraft and/or flight, where it will be necessary for it to be unloaded from the arrival plane the transit cargo can only be deposited separately at the discretion of the customs officer. Otherwise, both transit and final arrival cargo are deposited together at

47. Ibid., FAL 3.

the "transit shed" where even the transit cargo is highly liable to be examined.

Immigration Requirements

All passengers are required to complete a landing card on arrival, embarkation or departure for presentation to the immigration officer and are required to hold a valid passport. Entry permits, but not visas are required of citizens from the Commonwealth and of countries covered by Visa Abolition Agreements.[48]

An alien who lands from an aircraft at an approved airport for the purpose of embarking on an aircraft at the same airport and remains throughout the period of his landing and embarkation within the transit area of the airport is not required to present any documents for the purpose of immigration control. When a passenger is travelling through Nigeria in transit, for a period not exceeding twenty-four hours, the requirement for a visa is normally waived provided that the traveller has entry facilities to his country of destination and transit visas for any countries en-route which require them, is booked to transit onwards by the next available aircraft if a change

48. Citizens of ECOWAS member states and Cameroon are covered by this Agreement.

of aircraft is involved.[49]

Another observation that must be made about Facilitation in Africa is in respect of air import licenses. Virtually all African governments require licenses for imported goods, and most limit the category of goods which may be carried by air, in order to save foreign exchange. Having decided that certain merchandise is so valuable or urgently needed that it should be imported by air, one would expect the state to do everything possible to facilitate its delivery. All too often, however, this is not the case. It is not surprising that the UNDP/ICAO Project had to recommend specifically to some African governments to modify and facilitate their Air Import Licenses procedures.[50]

Travel Documents

The situation is even more disheartening in respect to the issuing of passports to nationals by African governments. Annex 9 provides that contracting states shall not require from temporary visitors travelling by air any other document of identity other than a valid passport.[51]

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49. Ibid., FAL 2.1.

50. See UNDP/ICAO RAF/74/021, op.cit., Annex 2 of the Report.

51. See Chapter 3, Annex 9 of the Chicago Convention.

States who wish to be more liberal could accept official documents of identity such as national registration cards, alien resident permits, etc., in lieu of a valid passport. In Africa, members of certain regional associations such as UDEAC and ECOWAS could temporarily, visit member countries with only "Laissez-passer" or "permits".

Nevertheless, attention must be drawn to the provisions of paragraphs 3.5.2 and 3.5.3 of Annex 9, (seventh Edition) which were upgraded from "Recommended Practices" to "Standards"[52] in the 9th session of the Facilitation Division of the ICAO in 1979. The provisions as amended, read as follows:

> "3.5.2 Contracting states shall issue passports with an initial period of validity, except in special circumstances, of at least five years, valid for an unlimited number of journeys and for all countries.
>
> 3.5.3 States shall institute simple procedures for the renewal or replacement of passports and grant, except in special circumstances the same period of validity for the new or renewed passport as for the initial issue."[53]

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52. A "Standard" is a specification of uniform application which is recognized as necessary for the safety and regularity of international air navigation, and is regarded as binding on member states except in the case where a member state gives notice of non-compliance in accordance with article 38 of the Chicago Convention. A "Recommended Practice" on the other hand, is one agreed as desirable but not essential and binding on members.

53. FAL/9, ICAO Doc. 9272 (1979) p. 3-3.

It will be noted that many African states did not file notices of non-compliance with the amended standard as required by article 38 of Chicago. Yet they do not comply with this provision. The United Republic of Cameroun, for example, still issues passports with an initial period of validity of three, instead of five years. The passport is not valid for all countries (not valid for South Africa, for example).

But even more distressing is the reluctance, bordering on unwillingness, of some African governments to issue passports to their nationals at all. Even though Cameroun was a member of the ICAO Facilitation Division that carried out the amendment of these provisions in 1979, yet she and Ghana are among the African states that are blameworthy.

The Universal Declaration of Human Rights which was adopted and proclaimed by the United Nations General Assembly on December 10, 1948, and which Cameroun solemnly declared in her 1972 Constitution to observe, provides:

> "Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country."[54]

Nothing in the Declaration may be interpreted as

54. Article 13, Universal Declaration of Human Rights.

implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms set forth therein.[55]

A citizen's enjoyment of the right to leave any country, including his own, and to move to or reside in another state is greatly dependent on his possession of a valid passport. Where his government refuses to issue him a passport for no valid reason, then there seems to exist a case of violation of one of his human rights.

There are passport offices in the national and provincial capitals of Cameroun. In principle, every Cameroonian is competent to obtain a passport on the fulfillment of certain conditions. But these conditions are so many and so onerous that they amount to a device to discouraging rather than encouraging most citizens to obtain the travel document. Even when these conditions are met, one cannot be sure to obtain a passport in a timely manner. Some corrupt passport officials must be bribed. Bribery is not the official policy of the government, but by failing to take serious and effective measures to curb it, or worse still, by pretending to be unaware of its transparent existence, the government condones it.

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55. Article 30 ibid.

A government operates through its agents. Where its agents responsible for the issuing of travel documents are engaged in an activity that is obviously capable of, and results in, frustrating law-abiding citizens' rights to obtain the necessary documents, and go unpunished, then, the government is vicariously engaged in an activity which is aimed at the destruction of that human right provided in Article 13.

The consequences of such a policy can be illustrated in practical terms. In January 1983, the Nigerian Government decided to evict illegal aliens from Nigeria. Illegal aliens were foreigners living in Nigeria "without regularizing their stay". For a foreigner to regularize his stay in Nigeria, he must be in possession of a valid passport. Most of the aliens evicted came from Ghana and Cameroon, countries whose governments do not issue passports to their citizens readily. The Nigerian government was condemned for the inhumane act of throwing out the aliens who, no doubt, suffered a lot of hardships in the process. Unfortunately, the governments of the countries from which the aliens went to Nigeria were not condemned at all for not issuing their nationals valid passports with which they would have been able to regularize their stay in Nigeria.

Another consequence lies in the fact that because

nationals cannot obtain travel documents easily, they are bound to, if they must travel to other African countries, do so clandestinely. Potential air travellers are constrained to travel by bush tracks and creeks at tremendous risk and expense. It is mainly for this reason that leisure travelling by Africans even within Africa is virtually non-existent. Thus, the tourism industry in Africa is entirely dependent on consumers from Europe and America.

4.2 The United Nations Economic Commission for Africa (UNECA)

4.2.1 Establishment and Objectives

The Economic Commission for Africa is a specialized agency of the United Nations - a creation of the United Nations Economic and Social Council (ECOSOC). ECOSOC, an organ of the U.N.,[56] is authorized, in accordance with the general objectives of the U.N. as set out in the preamble of the Charter, to, inter alia, set up Commissions in economic and social fields.[57] Accordingly, ECOSOC established in 1947, the Economic Commission for Europe (ECE),[58] the Economic Commission for Asia and the Far

56. Article 7(1) of UN Charter.

57. Article 68 ibid.

58. ECOSOC Res. 36(IV) of March 28, 1947.

East (ECAFE), [59] and the Economic Commission for Latin America (ECLA).[60]

In 1947, 1950, 1951, and 1956 moves were initiated in the ECOSOC Assemblies for the establishment of an Economic Commission for Africa similar to those established earlier, but the efforts were futile,[61] because the colonial governments administering African territories were not in favour of it.[62]

When Ghana became independent, she raised the issue again at the twelfth session of the U.N. General Assembly in 1957. A draft resolution sponsored by twenty-nine Third World States was introduced, approved and passed.[63] In 1958, ECOSOC established ECA.[64]

The aims and objectives of ECA are spelt out in its Terms of Reference as provided in the Resolution establishing the institution. In paragraph 1 of the Terms

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59. Ibid., Res. 37(IV).

60. Ibid., Res. 70(V) of August 11, 1947.

61. See Akintan: The Law of Economic Institutions in Africa, p. 22.

62. See 1/UN (1951) p. 372.

63. Ibid., at p. 185, see also UNGA Res. 1155(XII) of 1957.

64. ECOSOC Res. 671A&B(XXV) of April 29, 1958.

of Reference, ECA is required to:

a) Initiate and participate in measures for facilitating concerned action for economic development with a view to raising levels of living and strenthening the economic relations of the countries in the region;

b) Make or sponsor investigations and studies of economic and technological problems and developments within the region and disseminate the results of such investigations and studies;

c) Under-take or sponsor the collection, evaluation and dissemination of economic and technological and statistical information;

d) Perform such advisory services as the countries and territories of the region may desire, subject, however, to the available resources of the secretariat and that such services do not overlap with those rendered by other bodies of the United Nations or the specialized Agencies;

e) Assist ECOSOC in discharging its functions within the region in respect of any economic problem in the field of technical assistance;

f) Assist in the formulation and development of co-ordinated policies as a basis for practical action in promoting economic and technological development in the region.

In conformity with these requirements, the ECA Conference of Ministers convened at Kinshasa, Zaire, from February 24 to March 3, 1977, determined to do all within its power to give decisive impetus to the development of the African continent and to the establishment of a new international economic order.[65] Accordingly, an

65. See ECA Doc. E/CN.14/710 of 26/12/77.

important resolution was adopted on a Transport and Communications Decade in Africa for the years 1978-1988.[66] The resolution recommended that the international community, the Paris Conference on International Economic Co-operation, and the relevant United Nations bodies should proclaim a Transport and Communications Decade in Africa.

The recommendation was favourably received in the relevant quarters. The Ecosoc, at its sixty-third session, adopted a resolution supporting the ECA recommendation.[67] The United Nations General Assembly, at its thirty-second regular session, adopted its own resolution endorsing the recommendations contained in the ECA resolution and proclaimed the years 1978-1988 the United Nations Transport and Communications Decade in Africa.[68]

4.2.2 Objectives and Programmes of the U.N. Transport and Communications Decade in Africa

The various organs aimed in their resolutions at supporting a global strategy for the development of

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66. ECA Res. 291(XIII).

67. ECOSOC Res. 2097(LXIII).

68. UNGA Res. 32/160.

transport and communications for the continent as a whole focussing on harmonization, co-ordination, modernization and development. They further aimed at mobilizing the technical and financial resources required for that purpose. Within this context, the ECA undertook to define the basis and components of a strategy for the establishment of an integrated transport and communications network in Africa and to prepare the development programmes and plans for each mode of transport and communications for the region with a view to promoting the key sectors of industry, agriculture, and trade during the Decade.

In order that ECA might secure the commitment it required from the African states for the preparation and implementation of the programmes for the Decade, it brought the issue to the attention of African Heads of State during the OAU summit held at Khartoum, Sudan, in July 1978. The African leaders adopted a resolution fully supporting the ECA programmes.[69]

The resolution, inter alia, appealed to all the member states to proclaim the Decade at the national and sub-regional levels so as to make African countries aware of its goals; to assume an active role in the implementation of the programme for the Decade; to join their efforts to

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69. OAU Assembly Res. CN/675(B)(XXXI).

mobilize international resources for the implementation of various transportation and communications projects with a view to opening up the various regions of African countries completely, due attention being paid to the special case of the landlocked states. The resolution also appealed to member states to facilitate the strengthening of intra-African co-operation.

The Assembly, then, requested the Administrative Secretary-General of the OAU and the Executive Secretary of the ECA to convene jointly, by early 1979, a meeting of African ministers concerned with matters relating to transport and communications work and planning. The meeting was accordingly convened. It defined Africa's global strategy for the development of transport and communications in the region, and prepared a programme of action for the implementation of the Decade. Studies subsequently carried out within the framework of the Decade relate to road transport, telecommunications, radio broadcasting, television and postal services. Some of the projects relating to air transport will be further mentioned here.

Passenger Transfer Systems and Cargo Handling (Project No. AIP-02)[70]

This project involves the study of passenger transfer systems and cargo handling equipment, as well as the inventory of the equipment in use, identification of the proper procedures for a rational use and correct maintenance of the equipment; choice of new equipment suitable for the airport concerned, and a financing scheme for the procurement of new equipment. Its objective is to increase the efficiency of airport facilities in the reception of passengers and the handling of cargo. It aims to provide African airports with ground facilities adequate to the growth in traffic and the nature of that traffic.

Many African airports do not have suitable transfer systems and handling equipment, and even where they are available, they are often out of use because of poor maintenance. The coming into service of wide-body aircraft makes it necessary for airports to acquire auxiliary equipment for passengers such as boarding steps and access tunnels; and for cargo such as supply lorries and unloading conveyor belts.

The benefits of this project, therefore, can be

70. The various projects mentioned hereunder were extracted from two main sources: ECA Doc. E/CN.14/726 Add. 1, and ECA Doc. E/CN.14/147 Add. 1, Part V.

appreciated in the fact that efficient and adequate transfer systems and handling equipment will significantly reduce the amount of time wasted by passengers and damage caused to cargo at many African airports. The availability of these facilities will also reduce the damage and delays that can be caused to even the aircraft. For it was noted by ECA that "aircraft flight schedules are often thrown into confusion in African airports because of the slow pace at which loading and unloading operations are carried out. Such delays are a source of substantial financial losses for the airlines - the cost of a minute's delay for a Boeing is estimated at $US 200".

Air Transport Fares and Rates (Project No. AIP-03)

This project is aimed at drawing up rating regulations applicable to air transport in Africa, taking into account in particular the financial situation of national and multinational airlines, the characteristics of the routes, the impact of fares and rates on the volume of traffic and as a consequence, on the development of exchanges (freight and passengers) and possibly of tourism. The study, started in 1980, is undertaken with the co-operation of the various African airline operators, AFRAA, and a team of three consultants. The cost of the project was estimated at $US 0.2 million (1978 value).

The Establishment of a Data Bank (Project No. AIP-04)

This project is designed to determine the methods of collecting information (selection of standard reference documents), of processing the data (leading to publication and the updating of the documentation) and of dissemination. A choice of the site for the centre would be cognizant of the fact that it must have an acceptable geographical location, and the financial arrangements needed to ensure its existence. The project was slated to take off in 1981 and the estimated cost was $US 0.1 million.

The development of air transport in Africa is linked to the quality and volume of information available. The usefulness of a "databank" as proposed by ECA cannot be denied. Its task is not merely to collect statistics already available at ICAO, AFCAC, ASECNA and AFRAA but to prepare general information going beyond the scope of African airline companies, to provide marketing data and news of the industrial world.

The role of the "data bank" would differ from that of other statistical bodies. Its specific task is at the level of processing information leading to publication and dissemination of documentation. Such a task would enable the "data bank" to realize its higher objective of guiding

commercial policies and stimulating commercial activities in Africa.

Formation of a Multinational Air Carrier (Project No. AIP-05)

This project originated from the governments of Chad, Central Africa and Congo. It entails a feasibility study of a joint airline company for the three countries.

The project calls for two experts to undertake a mission of one year to the countries concerned. The experts are expected to elaborate a scheme for second and third level network for regional and domestic activities and for a commercial freight network, taking into account the vital need to provide these countries with better means of communicating with the rest of the world. The experts are also expected to study the prospects of traffic flows (types of customers) as well as to study the costs and revenues. They are then to draw up an operational diagram which entails organization charts of personnel, budgetting and financial outline.

Regional Technical Assistance for Air Freight (Project No. AIP-06)

In this project, technical assistance for air freight specialists will formulate a coherent and

co-ordinated policy for air freight in Africa. The project aims to develop freight transport by air and to increase efficiency. Until the project was initiated in 1978, air freight had been seriously neglected in Africa and virtually no attempt at marketing and publicity had been undertaken by the airlines. The project was expected to assist governments and airlines to arouse the interest of commercial and industrial firms in the advantage of freight transport by air.

It was also expected to make prospective customers aware of what range of transport services can be offered to them, as well as the cost of such services. Six experts were dispatched on short and medium-term missions with a view to identifying the most effective action to publicize transport of freight by air in the countries which expressed interest.

The seasonal nature of most African exports represents a financial handicap for the airlines, which are unable to plan their operations in such a way as to satisfy on a profitable basis the needs for air transport at certain times fo the year. This problem can only be solved by developing air freight in the slack season.

Medium-Term Assistance to National Airlines (Project No. AIP-07)

This project entails short-term or medium-term technical assistance in various specialized areas to airline companies in the process of formation, rehabilitation or expansion. It aims at overcoming "certain weaknesses and shortcomings of the personnel of African national airline companies" by placing at the disposal of airlines which wish to use their services, a small group of air transport experts - economists, managers, operating personnel, etc.

Each expert would be expected to contribute, within the framework of his specialized field, to the development of the airlines. They would do this by setting up commercial structures, implementation of plans and programmes, economic analyses, management, air traffic operations, in-flight services, productivity, etc. They would also promote the services in their fields by training one or more experts in their respective fields to take over from them at the end of their tenure.

It was established that some African airlines had skilled executive staff but not in sufficient numbers to cope with organizational problems. Furthermore, countries like Burundi, Congo, and others, could find the assistance in this project worthwhile as they are engaged in the formation, rehabilitation and expansion of their various

airline companies.

Co-ordinating Agency for a Full Utilization of African Air Fleets (Project No. AIP-08)

This is a regional project for the rational use of African air fleets. Its aim is to ascertain whether a co-ordinating agency to deal with the underutilized aircraft of some African airlines would be viable. Such an agency would endeavour to promote the fullest possible utilization of African fleets and would act as an intermediary between potential African lessors (airlines with underutilized equipment) and lessees (airlines needing equipment for a short time). The project which was estimated to cost $US 0.5 million, to be financed entirely by external funding, was placed under the management authority of AFRAA.

A number of African airlines have purchased very expensive equipment partially justified by their present and future needs. However, this equipment is seldom utilized to its full capacity, thereby resulting in high operating costs. At the same time many other African airlines wish, for commercial reasons, to use the latest type of equipment, but do not have the financial and technical means (especially flight-deck personnel) of acquiring such equipment. It is, therefore, essential to set up an agency

which would centralize all available information and act as an intermediary between African lessors and lessees. The tendency so far is for African airlines to lease equipment from non-African companies.

Prospects for Success of the Decade's Programme

The success of the United Nations Transport and Communications Decade in Africa would be greatly beneficial to the African economy. The success, however, depends on many factors. ECA conceived this unique programme, initiated most of the projects, co-ordinates the management and mobilizes the resources necessary for its implementation. A great deal more, it must be noted, rests in quarters outside the ECA. Most of the projects are placed under the management authority of aviation bodies in Africa such as AFCAC, AFRAA, ASECNA and the civil aviation departments of various African states. This is prudent and challenging. It is incumbent upon these institutions to diligently and efficiently discharge the responsibilities entrusted to them within their fields of authority to demonstrate their competence and maturity.

It should also be noted that the financing of the various projects mapped out for the Decade is largely dependent on external funding. It is hoped that the international agencies concerned and the rich nations as

well will make the required funds available. There are few other ideal situations than this to give concrete meaning to the "Development of International Economic Co-operation",[71] or of contributing to "balanced world development".

4.3 The International Air Transport Association (IATA)

4.3.1 Formation and Functions

The IATA is a trade association of the world's international airlines. Unlike the ICAO which is an intergovernmental organization whose members are states, IATA is a private international organization whose members are airline companies. The Association was founded at the International Air Transport Operators Conference at Havana, Cuba, in April 1945, and incorporated at Montreal in December 1945.[72]

IATA is a private organization with a difference, so much so that, it is sometimes refered to as a "quasi-public organization". The composition of its member

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71. For details on the "Development of International Economic Co-operation" and the "Charter of Economic Rights and Duties of States", see UNGA Res. 36/441 of December 17, 1981; and for "Economic Relations among States" see UNGA Res. 35/166 of December 15, 1980.

72. See 9-10 Georges VI, Chap. 51 as amended by 23 Elizabeth II, Chap. 26 (Laws of Canada).

airlines[73] shows a "public" characteristic in that more than one half of them are either entirely or more than fifty percent State-owned. This means that those airlines which form a majority in IATA are, in fact, State controlled and when acting in the Association they can be regarded as acting under State supervision and control. A certain number of privately owned member airlines are so strictly controlled by their respective governments that they too can be regarded as behaving in accordance with the will of their governments when acting in IATA.[74]

Furthermore, in addition to normal Trade Association activities,[75] IATA has been delegated powers by many governments to act on their behalf in the tariff co-ordination process for the establishment of international fares and rates.[76] This function of setting fares and

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73. For IATA membership, see Article IV of its Articles of Association.

74. See Haanappel: Ratemaking in International Air Transport p. 2.

75. Trade Association activities are Technical, Medical, Legal, Facilitation, Research, Industry Finance, Standardization, Clearing House and Bank Settlement, Interlining. See World Airline Co-operation Review, vol. 13, No. 5, August-September 1978, p. 10.

76. Most states provide in their bilateral agreements for the fixing of fares and rates by IATA subject to the

rates, otherwise called "ratemaking", is the Association's most important and contentious function. It is carried out through Traffic Conferences established by the Association.[77]

Traffic Conferences

There are Traffic Conferences for passenger matters[78] and cargo matters,[79] covering three main geographical areas. Africa falls in Area 2 which encompasses all of Europe (including the part of the USSR in Europe), Iceland, the Azores, Ascension Island, and that part of Asia lying west of and including Iran.[80] Traffic Conferences are further divided into Procedures Conferences and Tariff Co-ordinator Conferences.[81] Tariff Conferences comprise Conferences corresponding to the three geographical areas, and conferences corresponding to sub-geographical areas within the three main areas. Thus,

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(continued from previous page)
approval of the governments concerned.

77. See Article VII(5) IATA Articles of Association.

78. IATA Traffic Conferences Provisions, section 1(1) Amendment No. 43.

79. Ibid., section 1(2).

80. Ibid., section 1(3) Amendment No. 44.

81. Ibid., section IV(3-9) Amendment No. 47.

Africa does not only fall under Tariff Conference 2, but also in TC.2 within Africa sub-area, TC.2-Europe-Africa sub-area, TC.2 Middle-East-Africa sub-area, and so on.[82]

The Traffic Conferences function more or less independently from the rest of IATA, but membership, voting, or non-voting, in a Traffic Conference is contemporaneous with membership in IATA.[83] The Procedures Conferences take action in respect of such matters as passenger and baggage handling documentation, reservations, ticketing technical specifications, restricted articles, and so on. The Tariff Conferences are concerned with the analysis of relevant operating costs, fares and rates. Composite meeting of Tariff Conferences deals with matters relating to fares, rates, and currency rules that are referred to it by any Tariff Conference.

Formerly, any airline which became a member of IATA had to participate in all IATA activities and bear a proportionate share of the cost of those activities. Following the restructuring of the Association in 1978, however, Active members of the Association are required to participate in the trade association activities, but it is

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82. See the First Schedule, Traffic Conferences, Amendments No. 56-61, 75-76.

83. See section 2, (1-3) T.C. Amendments 44-45.

optional for such members to participate in, exercise voting rights, or express opinions with regard to the Tariff Co-ordination activities if they so desire.[84]

Members electing to participate in Tariff Co-ordination activities would, in the areas of the world where they operate Third/Fourth/Fifth Freedom services, be obligated to participate in the Tariff Co-ordination activities, but be free to elect to participate in respect of passenger or cargo activities only, or both. In respect of the elected activities, the member would be required to be a voting member of each Traffic Conference of the area it operates Third and Fourth Freedom services; have an option to become a voting member of any Traffic Conference in which area it operates Fifth Freedom services; be bound by all agreements reached in all Traffic Conferences, whether or not, a voting member.[85]

However, only an agreement in the form of a resolution of a Traffic Conference shall be binding upon the

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84. See Recommendation 1, IATA 34th Annual General Meeting, Nov. 13-15, 1978 (Montreal), see also World Airline Co-operation Review, vol. 13, No. 5, August-Sept. 1978, op.cit., p. 9 et seq.

85. See section VIII (8) & (9), Traffic Conferences Provisions, Amendment 74.

members thereof.[86] Where a member certifies in writing with respect to any action taken by a Traffic Conference that such action would require it to contravene an applicable law or regulation or official policy of the State of which it is a national, the member shall not be bound thereby, and each other member, upon receiving notice thereof from the Secretary, shall have the right to indicate to the Secretary whether it will continue to be bound thereby.[87] Each voting member of a Traffic Conference shall have only one vote. There is no voting by proxy. Abstention or failure to vote on the part of any accredited representative, or his alternate, present at the meeting is deemed to be an affirmative vote.[88]

The unanimity rule is retained with some modifications. Resolutions may only be passed at any meeting of a Tariff Conference upon the unanimous affirmative vote of all voting members present at the meeting.[89] The unanimous vote of the voting members of a sub-area present at a meeting are deemed action by the Conference unless twenty percent or more of all other voting

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86. Section VIII(1) ibid.

87. Section VIII(2) ibid.

88. Section VIII(3) ibid.

89. Section VIII(11) ibid.

members of such Conference present at the meeting cast negative votes. A member casting such negative vote may declare at the same time that any Resolution adopted will not apply to services to or from the country under whose flag it operates.[90]

In the case of a stalemate, two or more members may reach an agreement under certain conditions. Such an agreement shall be binding on those members party to it, and members not present at the Conference who operate Third, Fourth or Fifth Freedom Services between the countries which the Agreement is to apply. Any other member may declare itself to be bound by such agreement.[91]

Governments have generally given their approval to the new IATA machinery as evidenced at the ICAO Second Air Transport Conference in February 1980.[92] The increased flexibility and innovation in tariff co-ordination would, to a certain extent, solve the problem inherent in seeking multilateral consensus on tariffs. The re-organization of traffic Conferences into many sub-area groupings allow increased emphasis on the market knowledge and tariff

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90. Section VIII(12) ibid.

91. Section VIII(14) ibid.

92. See World Airline Co-operation Review vol. 16 - No. 1, January-March 1981 p. 21.

requirements of carriers with major commercial interests in those areas. This innovation is consonant with the growing diversity of regional markets within the global tariff system.

Nevertheless, there are still disagreements on tariffs on certain routes. Underlying commercial and aeropolitical conditions make multilateral tariff agreements through the IATA machinery hard to achieve, or even not very helpful, in some sub-areas. Local market peculiarities and changes require the continuous adjustment of the tariff co-ordination mechanism to meet the needs of individual members' flexibility while preserving the essential collective tariff structure. Thus, there is still room within IATA for regionalization of Conference activity.

Some thirty-two African airlines are members of IATA.[93] Existing IATA tariffs show lower fares between industrialized nations and higher fares to and from developing countries, as well as between developing countries. The existence of the low fares in the mature markets, the developing countries' rejection of open competition, and other matters, gave rise to a need for closer consultation between African airlines and African

93. See IATA Membership list, World Airline Co-operation Review vol. 18, No. 4, October-December 1983.

governments in respect of tariffs co-ordination.

4.3.2 IATA and AFRATC

The OAU requested AFCAC to act in collaboration with AFRAA, ECA and OAU to organize and establish an African Air Tariff Conference (AFRATC) as a permanent institution responsible for discussing and deciding on air tariffs to be applied by African airlines.[94] Arrangements for the establishment of AFRATC were worked out and in a Diplomatic Conference held at Addis Ababa from December 5-12, 1980, AFCAC, AFRAA, OAU and ECA adopted a convention establishing an African Air Tariff Conference. However, when the Convention was adopted, only ten states signed it.[95] The convention needs twenty-five ratifications to come into effect, that number of ratifications is yet to come.

AFRATC is supposed, when it comes into effect, to fix air tariffs - on behalf of African states - governing travel to, from and within Africa. It appears that reluctance to ratify the convention stems from article 7 of the convention which stipulates that tariffs fixed by AFRATC become operational when four-fifths of the member

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94. See OAU Res. CM/Res. 739(XXXVIII).

95. Comoros, Djibouti, Egypt, Ethiopia, Gabon, Gambia, Ghana, Mali, Sierra Leone and Zaire. Guinea signed later.

governments approve them. Some states are worried by this clause and want approval of tariffs by unanimity among governments.

The African Airlines Association has taken measures to get around this difficulty. It is requiring that all tariffs at AFRATC level be approved on the unanimity principle and members who for various reasons are unable to attend a conference meeting, have the right to veto any tariffs to and from their own territories.[96]

The wish of some states for unanimous approval is not unprecedented, and AFRAA's measures are not unreasonable. The IATA operates, to a great extent, on the unanimity rule. Only actions in the form of resolutions taken at a meeting of a Traffic Conference are binding on the member airlines concerned. But such actions can only be taken upon the unanimous affirmative vote of all members present at the meeting of a Tariff Conference.[97]

The unanimity rule envisaged in AFRATC by AFRAA can, however, be contrasted with that which exists in IATA. In IATA, it is only the accredited members present in a meeting that must vote unanimously. It seems that the

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96. See AFRAA Bulletin No. 24, February 1982, pp. 1-2.

97. See Section VIII, Traffic Conferences, Amendment No. 74.

dissent of members who are absent from a meeting is of no moment. Only in standing committees is action by mail vote possible.[98] IATA Resolutions are subject to approval by governments. The exercise of a veto right in the IATA affects the binding force of a decision in its entire application.

On the other hand, the decisions of AFRATC are taken by member governments directly and become final. The exercise of a veto right, as suggested by AFRAA, in AFRATC affects the binding force of the decision in its application to the vetoing member state only.

Is AFRATC prejudicial to IATA? Far from it! The existence of IATA has not diminished the extensive governmental control over international air tariffs which is being exercised mostly on a national basis either in accordance with applicable bilateral air agreements or even unilaterally. It has even been postulated that many international tariff problems could be solved or avoided through a more adequate system of intergovernmental tariff control.[99] This was not intended to mean that ICAO, or any other intergovernmental organization of that nature,

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98. Section IV, Amendment No. 73.

99. See Haanappel: Ratemaking in International Air Transport, op.cit. at p. 144.

should take over the task of international ratemaking because such organizations "do not seem to be the proper forum for a highly technical, complicated and economic activity such as international ratemaking". The type of intergovernmental control envisaged, therefore, is that which taking into account the interests of both the airlines and the consumers, such control could take the form of recommended or binding tariff guidelines to airlines before they begin to determine their tariffs - either individually or on an inter-carrier basis.

To all intents and purposes, AFRATC is an appropriate "inter-governmental" institution, representing a "sub-area", playing the role of a "limited-agreements" broker. However, it is still a viable IATA policy recommendation that

> "governments consult with other governments concerned before issuing government ordered tariffs and that they should exercise restraint in the issuance of such tariffs or in taking other unilateral action which tends to undermine multilaterally agreed tariff structures.[100]

To avoid conflict with IATA, AFRAA has been designated the implementing agency of AFRATC to harmonize the provisions of the Convention with the multilateral

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100. "IATA defines Policy on Key Civil Aviation Economic matters" IATA News Letter No. 23 (December 21, 1976), p. 2.

tariff system.[101] Hence, IATA has expressed support for the establishment of AFRATC:

> "AFRATC would be a valuable adjunct to tariff co-ordination on a wider scale and would help to co-ordinate African positions in preparation for discussions in IATA."[102]

4.3.3 IATA Policies of Special Relevance to Africa

Growth Through Harmonization

This is a policy which IATA is trying to sell to the entire aviation world. Overall growth objectives can only be achieved efficiently if the development of the various elements of the total civil aviation system are harmonized. Developments in, for example, airport terminals and aprons, runway capacity and air traffic control capacity must be co-ordinated so that no one element becomes a bottle-neck.

The same goes for the air route structure and air traffic control system. Developments in adjacent countries must be harmonized so that the capacity of an entire route - which may pass over a number of countries - is not restricted in any one of them. This harmonization is obviously a very difficult task since many developments,

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101. Article 1 of AFRATC Charter.

102. IATA Annual Report 1982 (Geneva) op.cit., at p. 21.

particularly at airports, have lead times of ten years or more. "Nonetheless, it must remain a prime policy objective".[103]

Lack of harmonization in the above context imposes serious limitations on the growth of civil aviation. Opposition to airport developments by environmental and anti-development protest groups as it is the case with Tokyo/Narita, for example, constrains the use of current capacity through an ever-spreading and ever-tightening system of airport curfews. Public demand and international scheduling considerations also tend to create peak problems at airports even when overall capacity is ample for the daily traffic.

Politics constitute another road-block. Lack of political will to co-ordinate military/civil air traffic especially between neighbouring countries leads to inefficiency in the use of the airspace. Political disputes between adjacent countries (rife in Africa) often disrupt the air route structure. Some of these disputes can only be resolved very slowly by patient negotiations, and so remain a source of restrictions which prevents the full

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103. World Airline Co-operation Review vol. 17, No. 3, July-September 1982, pp. 9-11.

exploitation of existing route network.[104]

One of IATA's aims as spelt out in its articles of Association is:

> "To promote safe, regular and economical air transport for the benefit of the peoples of the world, foster air commerce, and to study the problems connected therewith".[105]

In accordance with this aim, IATA designed special programmes of interest to the developing countries in order to bring about a harmonized growth of international air transport.

Task Force on Developing Nations' Airlines

A seven-man Task Force was formed at the thirty-fifth Annual General Meeting in Manila, in 1979, to thoroughly review the Association's activities and services in relation to developing countries' airlines, with the aim to "correct the imbalances in their operating environment

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104. In February 1983, for example, a Sierra Leone Newspaper report alleged that Master Sergeant Doe, the Liberia head of state, had personaly shot and killed his wife for trying to assassinate him. The Liberia Government demanded an apology from the Sierra Leone Government. When the latter refused to do so, Liberia, inter alia, suspended air services between the two countries. See West Africa No. 3420, Feb. 28, 1983, p. 562.

105. Article 111, Articles of Association.

and to promote self-reliance.[106]

The Task Force, headed by Brigadier General Emos Haimbe, Managing Director of Zambia Airways, was asked to: consider how such airlines might make better use of existing IATA services; what, if any, new services and activities could be undertaken; or existing services adapted, in a way that would be of primary help to such airlines, and present its recommendations to the Executive Committee. The Task Force was also directed to make specific efforts to ensure that the Association is attuned and responsive to the needs of developing nations' airlines.

The Task Force has initiated a membership inquiry, which - together with a questionnaire - elicited information from carriers, supplemented the inquiry with field missions by IATA regional directors, and conducted four regional seminars in Cartegena (Columbia), Douala (Cameroun), Singapore, and Amman (Jordan). Among the recommendations it has submitted to the Executive Committee are those involving the initiating of new ultimately, self-supporting programmes, the improving of members' relations, the refocussing of existing activities, the provision of project and feasibility studies, and the initiation of seminars,

106. See IATA News Letter No. 25, (November 30, 1979), World Airline Co-operation Review Vol. 15, No. 5, September-October 1980, pp. 20-21.

workshops and training programmes for the airlines of developing states.

Programme for Developing Nations' Airlines

Development assistance for developing nations' airlines is what this programme is all about. IATA occasionally co-operates with ICAO in the UNDP/ICAO Technical Assistance Programme. On one such occasion, the Association contributed several proposals of direct potential benefit to the airlines of eight developing countries at an estimated value of nine million dollars.[107]

Another area of activity involves the identification and contacting of specialized multilateral and bilateral assistance agencies which are potential contributors to airline assistance projects. In this context, it is recognized that there is a critical need to develop the interface between airlines and their governments with respect to their contact with development assistance organizations. Those funding agencies which are unfamiliar with aviation needs, will be apprised of the needs of carriers in developing nations and the impact of such

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107. See World Airline Co-operation Review vol. 16, No. 4, October-December 1981, p. 8.

assistance on national development, particularly in the context of technical training, small industries and import substitution.

A training Advisory Board is established to review developing nations' airline training requirements. A management-level training course in airline operations, as well as in specific IATA activities, has been developed. Airport Development Training seminars and security workshops are organized. To crown it all, the Association has published a "Directory of Consultancy and Training Services" which is intended to be a basic reference document for world-wide circulation to the airlines and to airport and civil aviation authorities.

Conclusion

There is heartening evidence of some progressive policies issuing from the ICAO, ECA and IATA, policies aimed at the development of civil aviation in Africa. The practical utility of these policies, however, depends on how the benefactors execute, and beneficiaries utilize the programmes which are the concrete expressions of those policies. Technical aid is highly appreciated by the recipient states. In the Africa-Indian Ocean Sixth Regional Air Navigation Meeting held at Arusha, Tanzania, in 1979, participants expressed strong views about the experts sent

by institutions like the ICAO to developing countries, especially African states.

The selection of experts should be closely monitored so that maximum benefit is afforded to states. For projects in which supervisory matters are involved, only experts with managerial experience should be sent. The proportion of funds expended on consultants should not be excessive compared to the total project cost.[108] Only specialists with a good understanding of the people should be sent. The need for follow-up action to ensure that lasting benefit is derived from the aeronautical facilities installed cannot be over-emphasised.

The recipient states should prioritize projects which have very high multiplier effects on their economies. The location of such projects is also very important. There is no sense in a state buying equipment which cannot be operated at its full capacity, just because a neighbouring state, whose acquisition of same was justified by its own economic circumstances, had bought it. It is also not prudent to locate an international airport, for example, at the village of the country's leader if such location is of comparatively little economic promise.

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108. See Report on Agenda Item 16, and Recommendation 16/3. ICAO Doc. 9298 AF1/6.

CHAPTER 5. THE OAU, AND OTHER AFRICAN SUB-REGIONAL ASSOCIATIONS AS SOURCES OF AVIATION POLICY

5.1 The Organization of African Unity (OAU)

5.1.1 Formation

In January 1961, five independent African states committed to radical policies formed what was known as the Casablanca Group,[1] and signed a document setting out the aims and purposes of a proposed organization, among which were provisions on economic and social co-operation, the establishment of an African High Command for self-defence of members and ridding Africa of all forms of colonialism. Five months later, in May 1961, twenty-one other independent African states, preferring moderate policies, held their own conference in Monrovia, Liberia, and came to be known as the Monrovia Group. They agreed to promote "African Social Solidarity and political identity" but not on the basis of a "political integration of sovereign African states". When both Groups met at Addis Ababa on May 25, 1963, they signed a charter creating a pan-African organization known as the Organization of African Unity (OAU).

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1. The five states were Ghana, Guinea, Mali, Morocco, and the United Arab Republic.

5.1.2 Aims and Objectives of the OAU

The Fundamental Principles of the Organization are enunciated in the preamble to the Charter. The principle of the inalienable right of peoples to self-determination and to freedom, equality, justice and dignity is stated. The promotion of understanding among the African peoples and co-operation among African states is expressed. There is also the resolve to safeguard and consolidate states' hard won political independence and their territorial integrity, as well as to fight against neo-colonialism in all its forms. Also provided is the belief that all African states should unite in order to assure the welfare and well-being of their peoples and to re-inforce the links between them by establishing and strengthening common institutions. Finally, there is the affirmation of faith in the Charter of the United Nations and the Universal Declaration of Human Rights as the solid foundations for peaceful and positive co-operation among states.

The Organization has as its main objectives, the promotion of unity and solidarity among African states, the co-ordination and intensification of co-operation and efforts to achieve a better life for the peoples of Africa; the defence of the sovereignty of member states, their territorial integrity and independence. Other objectives are the eradication of all forms of colonialism in Africa

and the promotion of international co-operation, having due regard to the Charter of the United Nations.[2] Member states are required to co-ordinate and harmonize their general policies, particularly in the fields of political and diplomatic co-operation, economic co-operation, including transport and communications, educational and cultural co-operation; and health, sanitation and nutritional co-operation.[3]

5.1.3 Economic, Transport and Communications

A very severe critic of the OAU, Elenga M'buyinga, has painted a very gloomy picture of the Organization's failure in this field as in others.[4] However, he states:

> "The OAU has at best contributed to the development of an embryonic inter-African road and communications network. Apart from the creation of the African Development Bank, that is the sum total of the Organization's achievements."

But Colin Legum, while acknowledging that the OAU has suffered since its inception from the limitations inherent in all international organizations not dominated by

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2. Article 2(1) OAU Charter.

3. Article 2(2) ibid.

4. See Pan Africanism or Neo-Colonialism - The Bankruptcy of the OAU, pp. 186-192.

a strong central power, gives a more generous list of the OAU's achievements in this field. He states:

> "...the nationalist elites understood that political co-operation was the best hope of developing modern economies and preventing their continent from continuing to be an area primarily for raw material exploitation. Thus, the OAU initiated regional and functional organizations under continental supervision, such as the African Development Bank, the Trans-Africa Highway Commission, the Inter-African Coffee Organization, and more than 40 other trading, banking, communications and training bodies, which are also linked to the United Nations Economic Commission for Africa".[5]

In the field of civil aviation specifically, the OAU deserves some credit for the establishment of the African Civil Aviation Commission (AFCAC) and the African Air Traffic Conference (AFRATC). Furthermore, the Organization has at various summit meetings issued some policy declarations specifically concerning the development of civil aviation in the region.

5.1.4 The "Economic Charter of Africa"

When African heads of state met in Addis Ababa in June 1973, they approved an "African Declaration on Co-operation, Development and Economic Independence", what later came to be known as the "Economic Charter of Africa". The Declaration contains a chapter on Air Transport which

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5. See Africa in the 1980s, op.cit., p. 37 et seq.

consists of a critical study of, and recommendations on, the civil aviation industry in Africa.[6]

As stated in that chapter, the dominance of the North-South (Europe and USA/Africa) axis over the East-West (Trans-Africa) axis is one of the most striking characteristics of air transport patterns in Africa. Another is the persistence of almost exclusive links between African countries and the former colonial powers which they were linked to, in contrast to the slow emergence, in spite of the large number of landlocked countries in Africa, of air transport links between African countries. A third is the extensive dependence of African national airlines on extra-African airlines for finance, technical assistance and management.

These three factors seem to account for the continued absence of an integrated air route system, for the substantial volume of African air traffic handled by external airlines, and for feebleness of attempts at intra-African co-operation and integration. Furthermore, the development of new types of aircraft and new and more efficient forms of organization and management now being adopted by the extra-African airlines provide challenges which can best be met through intra-African co-operation.

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6. See AFCAC/Airline Co-op/4, Appendix VII.

It was recommended that such co-operation should be in the form of rationalization of time-tables, reduction of fares within the continent, elimination of privileges enjoyed by foreign carriers, exchange of air traffic rights, standardization of aircraft types, sharing of aircraft repair and maintenance facilities and joint organization for ground safety services and accident investigation. Common operation of international services, co-ordination of research and personnel training and the eventual amalgamation of African airlines were also recommended.

The final recommendation called upon the OAU and ECA, in collaboration with AFCAC and AFRAA, to propose measures for dealing with the existence of excess capacity in African airlines, the heavy losses incurred by many of them, the persistence of a North-South axis at the expense of the East-West axis, and the possibilities of developing air freight and postal services.

The dominance of the North-South axis over the East- West axis and the almost exclusive links between African countries and their former colonial powers in contrast to the slow emergence of air transport links between African states is a valid and serious diagnosis. African states have for too long been operating an air transport structure inherited from their colonial powers. That structure was designed to suit the needs and exigencies

of the particular era. It was economically and politically more profitable to develop the North-South axis than to develop the East-West axis during the colonial era. With very few exceptions, the need was not seen to link the dependent African territories to one another by air. Thus, to travel from one dependent African territory to another, even neighbouring ones, by air, one had to go through Europe.

The attitudes adopted by the African states themselves towards one another were not progressive. Intra-African transportation development was seriously impeded as a result.

On December 14, 1957, for example, the Grand Conseil d'Afrique Equatoriale Française (AEF) passed a motion expressing opposition to the idea of linking the Nigeria railway with that of Sudan, by building a railway across landlocked Chad, one of the AEF territories. Nigeria (a former British territory) had made the proposal to the International Bank for Reconstruction and Development. The AEF Grand Conseil ordered the territorial assemblies of AEF to "exercise vigilance against projects where only foreigners would benefit".[7] Nigeria and Sudan were "foreigners" because they were not francophone territories.

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7. See West Africa Magazine No. 3410, December 13, 1982, p. 3221.

But had the project been endorsed, not only Nigeria and Sudan, but also Chad and Africa as a whole would have benefited from it.

There is no doubt that this sort of unprogressive mentality persisted long after most African states had gained self-autonomy. It made the initiation and co-ordination of continental development projects impossible. The establishment of the OAU went a long way to effect some change of this mentality.

On the extensive dependence of African airlines on extra-African airlines for finance, technical assistance and management, the OAU recommendations above do not seem to provide an effective solution. African airlines are mostly state-owned, and since most of the owner states are not rich enough to finance the safe operation, development and expansion of their airlines from government coffers and are unwilling to raise the required capital from their own private sector, the only alternative is external financing - interestingly, from foreign private sector. If foreign airlines invest in African airlines, it is only prudent and just that they participate in the management of such airlines, if for no other reason, than to ensure that their investments do not go down the drain.

This, however, only explains in part why there are so many foreign personnel in many African airlines. Another

plausible reason is that mobility of labour within Africa is almost non-existent. An African state lacking some qualified personnel would hardly go to recruit them from a neighbouring African state with an adequate and available supply of such manpower. Rather, the needy state would embark on an overseas mission to look for them.

In Arusha, 1979, the Africa-Indian Ocean Regional Navigation Meeting noted that a good number of qualified aviation experts are now available among nationals of states in the region. Such experts should not only be considered for recruitment by ICAO, but also by African aviation authorities in need of them. It is also incumbent upon states with such qualified nationals to co-operate in encouraging the experts to apply for technical assistance work in, or facilitate their secondment to, the needy states in the same region.[8]

5.1.5 The Declaration of General Policy in the Field of Civil Aviation[9]

The seventeenth summit meeting of heads of state and government of the OAU, held in Freetown, Sierra Leone, in 1980, approved a "Declaration of General Policy in the

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8. See ICAO Assembly Res. A22-8.

9. See generally, African Air Transport Magazine,

Field of Civil Aviation" which is to serve as a policy guideline throughout the entire African continent. The Declaration, first presented for consideration by the Council of Ministers in the thirty-third ordinary session held in Monrovia, Liberia, in 1979, was approved by the thirty-fifth session of the Council held in Freetown before the summit.

In essence, the Declaration defines the basic principles of collective or individual action by African states in the field of civil aviation. In it, African governments undertake effectively to strengthen co-operation between African airline companies with a view to rationalizing the continent's air services, particularly regarding the harmonization of time-tables, setting up of special reduced rates, exchange of air traffic rights, standardization of aircraft used, sharing of aircraft repair and maintenance facilities and joint organization for research and personnel training.

The role played by air transport in the social and economic development of member states in the promotion of intra-African trade was highlighted. Since inadequacies in the African transport network constitute a bottle-neck in intra-African trade and economic co-operation, it was

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(continued from previous page)
November/December, 1980, p. 7.

decided that co-operation among, and integration of, African airlines would lead to collective self-reliance.

The short and long-term objectives envisaged in the co-operation and integration include the following:

- Standardization of aircraft and establishment of common technical specifications for the aircraft types to be operated.
- Optimum utilization of technical and training facilities (both existing and projected) through a better distribution of work loads in every field.
- Reduction of operation costs and a better return on investments.
- Creation of jobs requiring a high degree of technical proficiency.
- Strengthening of relations between member states.
- Creation of multinational airlines.

Other related matters covered in the Declaration include the optimum development of air services in Africa, financing of aeronautical activities and the role of the African Development Bank (ADB), research activities in technical fields, technical co-operation, aviation medicine and co-operation with other bodies.

The adoption of the "General Policy in the Field of

Civil Aviation" is a significant element in the implementation of the United Nations Transport and Communications Decade in Africa. The air transport sector shares seven percent of the Decades projects which constitute forty-eight percent of the regional projects and fifty-two percent of national projects. The adoption of a common policy by African countries could create an impetus in co-operation arrangements to implement regional projects which will in turn have a positive impact on national projects. It would also seem that this Declaration would bring some kind of pressure to bear on African states in respect of the vexed issue of exchange of traffic rights among themselves. As the then Chairman of the OAU, President Siaka Stevens, stated:

> "We have recognized the need to rationalize our air links by granting appropriate traffic rights and, to this end, we have adopted a declaration which should serve as a policy guideline throughout the continent."

But after all is said and done about the OAU aviation policy declarations, the fact remains that policies are only as viable as their sources. As mentioned earlier, the OAU suffers from the limitations inherent in all international organizations not dominated by a strong central power. Consequently, they are effective only when dealing with issues on which there is a general consensus. A general consensus does not come readily or often, but it

does come sometimes, nevertheless, even in the OAU.

The decisions of the OAU taken even by the General Assembly which is its supreme organ, have only the status of recommendations. The implementation of these recommendations depends on two principal factors: - the constraints on members to implement them, constraints generated by the faith in or respect for the organization that is held by its members; and the value of the material substance of the recommendations.

How much esteem do the OAU members hold their organization in today? The OAU may not have fulfilled the highest aspirations of its members, it may have had a good share of some caustic exchange of abuses, walk-outs, and public controversy, but it remains close to the hearts of its members. As Peter Enahoro put it:

> "The crisis surrounding the organization has amply demonstrated that it is truly an African body. It can act extremely foolishly one moment, but can go right on from that imbecility to self-redemption... Never put your money on it that the OAU is about to break up."[10]

Moreover, the policy declarations on air transport deal with a subject matter of great import to the member states. The enthusiasm and seriousness with which members approved the declarations at the two summit meetings is encouraging evidence that they will do all they can to give

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10. Africa Now, November 1982, p. 5.

effect to the recommendations contained therein.

5.2 L'Union Douanière et Economique de l'Afrique Centrale (UDEAC)

There are sub-regional organizations which have formulated some important policy guidelines and regulations that directly or indirectly affect the development of civil aviation at the sub-regional levels. Three of these organizations, the UDEAC, ECOWAS and SADCC will be treated here, starting with UDEAC.

The Union Douanière et Economique de l'Afrique Centrale (UDEAC) became formally operational in December 1965, after the presidents of Chad, Central Africa, Cameroon, Congo and Gabon had signed a treaty in December 1964, establishing the union. Chad and Central Africa withdrew from the Union a few years later. Central Africa returned to it, and while Chad is suspected to be considering rejoining the Union, the other members have treated her in fact as if she were still one of them in their intra-sub-regional relations. Equatorial Guinea, is about to join the Union. Cameroon, Gabon and Congo have so far constituted the solid foundations on which the continuous and effective functioning of the Union is based.

The objectives of UDEAC are spelt out in the preamble to the Treaty establishing it. These objectives

include the extension of the national markets of member states through the removal of barriers to inter-regional trade, the adoption of a procedure for the equitable distribution of industrialization projects and the co-ordination of development programmnes for the various production sectors. These objectives can be exploited equally for the development of the air transport industry in the sub-region. This is more so as the whole region is very poorly provided for by surface transport infrastructure. Railways are few and short, the road network both inter and intra-state is terrible, especially during the rainy seasons when the existing pot-holed laterite roads become impassable.

The Union constitutes a single customs territory within which there shall be free movement of persons, goods, merchandise, services and capital.[11] This is a fortunate provision. As stated earlier, customs duties, especially as based in the Cost-Insurance-Freight (CIF) policy, constitute a big impediment to the development of the air freight industry in Africa. An arrangement which provides for free movement of goods and merchandise within a region with poor surface transport facilities could stimulate the air freight traffic within the region. It is even more fortunate when

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11. See articles 27, 32 and 64 of UDEAC Treaty.

the arrangement also provides for free movement of services and capital. Such a provision, combined with stimulated air freight traffic, can be conducive to the orderly development of industrialization and trade within the region. Furthermore, specialists from one state could be employed by, or seconded to another state as recommended in the ICAO Resolution A22-8.(supra)

One is not quite optimistic about the free movement of capital within the Union because of the instability of some of the member states. While Cameroon and Gabon are relatively stable and developing steadily, the same cannot be said about Central Africa, Chad with her fratricidal feuds, and to a certain extent, Congo with her violent changes of government. This situation makes it not only impracticable for some member states to afford to export capital to the other member states, but also foolhardy for the able member states to export their capital to them. This is most unfortunate as Central Africa and Chad are very poor and landlocked states in the sub-region and need foreign capital to develop their civil aviation.

The Union's transport policy is incorporated in the industrialization policy which lays down the framework for harmonization of development plans, transport policy and the

distribution of industries.[12] Industrial projects are divided into five categories.[13] Transportation can be subsumed, under the category of "projects in which the market is limited to two member states, and in which bilateral arrangements are sought,[14] for the purpose of exchange of traffic rights through the instrumentality of bilateral air agreements. It can also be subsumed under the category of "industrial projects concerning more than two member states and in which harmonization is sought within the Union",[15] for the purpose of establishing common aeronautical schemes such as the common pilot training centre in Gabon.

Within this framework, the Congo, Central Africa and Chad have undertaken a study to launch all-cargo air services from Pointe Noir (Congo) to Bangui (Central Africa) and N'djamena (Chad) in order to give the two landlocked countries speedy access to the sea for their imports and exports. The three countries have also submitted a proposal to the Economic Commission for Africa (ECA), for the establishment of a joint airline company. Gabon, with a

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12. See articles 47 - 58 of the Treaty.

13. Article 51.

14. Article 51(d).

15. Article 51(e).

burgeoning fleet of aircraft is considering ways to provide the equipment for the proposed all-cargo service for the land-locked countries.

A new union in the sub-region is being contemplated - a Central African Economic Community. It appears that the new union will be an improvement and expansion of UDEAC. Whatever is the case, it is hoped that the founders of the proposed association will fully appreciate the pivotal role of transportation in the industrial and commercial undertakings in the region, and accordingly make better defined and serious transport provisions in the new charter. The existing UDEAC treaty does not sufficiently emphasize the development of transportation. It is, therefore, not surprising that the transport infrastructure within the Union has not improved since the formation of the Union.

5.3 The Economic Community of West African States (ECOWAS)

A West African Conference on Economic co-operation was held in Accra, Ghana, from April 27, to May 4, 1967. An agreement was signed establishing an Economic Community.[16] The Treaty of that Community was later signed in Lagos, Nigeria, on March 28, 1975, by fifteen

16. See UN Doc. E/UN.14/399 (May 24, 1967).

states. Unlike UDEAC whose membership consists of francophone African states only, ECOWAS membership consists of both francophone and anglophone states.[17]

ECOWAS' main objectives are the promotion of, co-operation and development in, the field of economic activity particularly in the areas of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions, and in social and cultural matters. These objectives are to be achieved in stages. The areas of co-operation include

> "...the implementation of schemes for the joint development and evolution of a common policy in the fields of transport, communication...and infrastructural facilities."[18]

The treaty set up technical and specialized commissions, one of which is the Transport, Telecommunications and Energy Commission.[19] This Commission is charged with formulating plans for a comprehensive network of all-weather roads within the community as well as plans for the connection of all the railways of the member states and for the improvement and

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17. Members are Benin, Ghana, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo, Upper Volta, Gambia, Guinea and Guinea Bissau.

18. Article 2, ECOWAS Treaty.

19. Article 9(4).

re-organization of such railways.[20] The Commission is further charged with formulating plans and policies on shipping and international waterways, air transport, telecommunications and postal services.[21] Member states are required to evolve common transport and communications policies through the improvement and expansion of their existing transport and communications links and the establishment of new ones.[22]

A good transport network is a sine qua non for the economic integration of the West African sub-region. In appreciation of this fact, the ECOWAS ministeral Council meeting which was held in Conakry, Guinea, in May 1983,[23] took some positive steps towards the physical integration of the Community.

The Council directed the ECOWAS Secretariat to submit a draft highway code to the Transport Commission. If the code is approved, it will be commonly applied throughout the sub-region. The Executive Secretariat was also asked to liaise with member states to ensure the construction of the uncompleted portions of the Trans-West Africa Highway before

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20. Articles 41 and 42.

21. Articles 43-47.

22. Article 40.

23. See Nigeria's Sunday Times of May 22, 1983 at page 24.

1988, using national consultancy firms as much as possible. Two training centres, one for anglophone members, and the other for francophone members, are to be established in the Community for the training of personnel in road maintenance and other road construction programmes. Toll systems will be introduced as one of the means of generating funds.

A consultative meeting was planned with the aim of establishing a multinational coastal shipping company. Another consultative ministerial conference of West and Central African states would also be convened to deal with maritime transportation and its specialized agencies, as well as the management of shipping companies. The Secretariat was further directed to study the International Convention on the Law of the Sea in view of the importance to the ECOWAS member states of the issues involved.

On air transportation, the Conakry meeting urged a study of the co-operation among West African airline companies to see how it could lead to the establishment of an ECOWAS Airline. It would be recalled that earlier in Abidjan, Ivory Coast, the chief executives of West African airline companies had met to discuss ways and means of assisting one another towards establishing a sub-regional carrier.[24]

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24. See AFRAA Bulletin No. 30, December 1982, p. 2.

It should be cautioned that the fate of Air Afrique, a successful multinational airline, most of whose members are ECOWAS member states, should be given very careful and prudent consideration in any move to form an ECOWAS Airline. Chad, Central Africa and Congo are members of Air Afrique, but not members of ECOWAS. The French airline company, UTA, has considerable interests in, and power over Air Afrique. The French, in particular, will probably be uncooperative in the formation of a sub-regional airline which will undermine their entrenched interests and influence, especially as they will not have any direct control over the prospective airline company.

Yet a common West African airline company will solve the problem of the exchange of traffic rights within that region, a problem created by the establishment of an Air Afrique zone. Nigeria's Odubayo, for example, has strongly called on his country to rescind all the air services agreements concluded with the individual member states of Air Afrique and replace them by a single agreement negotiated jointly with all the states participating in the co-operative company. The effect would be to re-adjust the amount of traffic rights exercised by Air Afrique in a manner "more beneficial to Nigeria Airways than is otherwise the case at present". He further advocates that the exchange of capital for capital should be replaced with a

policy of reciprocal exchange of traffic generating points of equal potential.[25] Without necessarily endorsing the substance of what he advocates, Obubayo is genuinely disastisfied with an arrangement which many other African aviation authorities are also complaining about.[26]

The air transport industry in the ECOWAS sub-region deserves some brief comments. New airlines are being attracted to the region from Europe, North Africa and Asia.[27] Some of Africa's successful international airlines are based in West Africa (Air Afrique and Nigeria Airways). Along the coast, air traffic has great prospects, but greater growth is hampered mainly by aviation policy of protectionism. The situation inland is different. The landlocked member states - Mali, Niger and Upper Volta have minimum air access to the sea, and their domestic networks are inadequate.

ECOWAS is Africa's regional economic organization with the largest number of member states. Its objectives and schemes are so ambitious that it can safely be said to be Africa's nearest institution to the European Economic

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25. Odubayo, W.O.: Air Transport Bilaterals of Nigeria, LL.M. Thesis, (McGill University) 1968, at p. 108.

26. See AFCAC/7 p. 13, para. 41.

27. See ICAO/UNDP Doc. RAF/74/021, op.cit., p. 105.

Community. Accordingly, ECOWAS may learn some lessons from the experiences of the EEC. The history of the latter demonstrates how difficult it can be to subordinate national interests for a higher regional interest. This is particularly evident in the various efforts at integration of air transport in Europe.[28] Nevertheless, the EEC has achieved much for Europe, and ECOWAS has the potential for doing the same for West Africa. The air transport industry will benefit from the establishment of a free trade zone in the region. One hopes that the serious economic, cultural and political differences among the member states will be reconciled or subordinated to enable the community to function productively.

5.4 The Southern African Development Coordination Conference (SADCC)

There has not been a significant sub-regional organization in Southern Africa similar to UDEAC or ECOWAS. This is understandable in the light of the politics and policies of the Republic of South Africa which is the leading country in that region.

However, on July 23, 1980, South Africa's Prime

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28. See Weber, L.: European Integration and Air Transport, LL.M. Thesis (McGill University), 1976.

Minister, Botha, and the leaders of Transkei, Venda, Bophuthatswana and Ciskei[29] agreed to form a constellation structure to stimulate development in the sub-region. It was hoped that other independent states in the sub-region such as Lesotho, Swaziland, Zimbabwe, and Botswana would join the association. But the constellation never gained momentum as it was viewed by the other states as a "strategem for economic dominance by the Republic of South Africa while maintaining its internal policy of separate development".[30]

On July 3, 1979, leaders of Angola, Botswana, Mozambique, Tanzania and Zambia, as well as invited guests from the international community, met at Arusha, Tanzania. It was at that conference that the establishment of SADCC was initiated. As conceived then SADCC was not aimed at formally integrating the member states economically, but at formulating and implementing specific projects notably in the fields of transport and communications, the co-ordination of foreign aid and the promotion of industry

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29. Transkei, Venda, Bophuthatswana, and Ciskei are the "national states" within the Republic of South Africa - recognized by the government of South Africa only.

30. See generally, Gordon Boreham's articles in International Perspectives January/February 1981, pp. 19-23; and January/February 1983, pp. 8-13.

and trade.

In April 1980, the states aforementioned were joined by Lesotho, Swaziland, Malawi and Zimbabwe in another meeting at Lusaka, Zambia. The Lusaka meeting issued a declaration titled "Southern Africa - Toward Economic Liberation". The objectives of the declaration were the reduction of economic dependence on South Africa and the increase of economic interdependence among the members; the attainment of greater control over their own economic destinies; and the establishment of an economically powerful block of nations stretching from the Indian Ocean to the Atlantic Ocean.

When the nine states met again in Harare, Zimbabwe on September 11, 1980, they allotted to themselves specific tasks in conformity with the "Programme of Action" contained in the Lusaka Declaration. Zimbabwe was charged with a food security plan; Zambia, mining and a development fund scheme; Swaziland, a manpower development and training programme; Tanzania, a regional plan for industrialization; Angola, a regional energy programme; Botswana, a project for regional control of animal diseases and for the growing of crops in semi arid areas. The co-ordination of fisheries, forestry and wildlife was assigned to Malawi, while soil conservation and land utilization was the responsibility of Lesotho. Finally, Mozambique was given the responsibility of

designing a transportation and communications strategy.

At the SADCC 2 Summit meeting held at Maputo, Mozambique, in November 1980, ninety-seven transport and communications projects were proposed to thirty foreign governments and eighteen international agencies concerned with development.[31] Six hundred and fifty million dollars was pledged mainly for these projects by external donors. In March 1983, the European Economic Community (EEC) announced the allocation of 28 million ECU, approximately $US 26 million[32], to transport and communication projects in the sub-region. This aid package accords with the EEC's decision to increase focus on regional development initiatives in the developing world.[33]

The money will be channelled to SADCC through its sub-organ, the Southern African Transport and Communications Commission (SATCC) based in Maputo, Mozambique. The aid will be provided in almost pure grant terms, with only a very small portion carrying a norminal service charge. 10 million ECU will go to the rehabilitation of the Tanzania-

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31. The list grew to one hundred and six projects as was later announced at SADCC 5 Summit held at Gabarone, Botswana, in July 1982.

32. IECU = $0.92.

33. See African Business, August 1983, No. 60, p. 33.

Zambia railway; the Botswana-Zambia road is allocated 5 million ECU. Work on a container terminal in Lesotho will receive 1.4 million ECU, while 2 million ECU will be spent on a Malawi-Tanzania telecommunications link. The airport construction project in Swaziland will receive 2 million ECU. The remaining 7.6 million ECU will be used to fund various technical studies and training programmes related to transport and communications.

It will be noted that two member states of SADCC, Mozambique and Angola, have not been allocated any direct funds from the EEC aid package. This is because the two states are not members of the EEC's Lomé Convention, the vehicle through which the EEC has decided to channel aid to the Third World.[34]

However, both states have developed interest in joining the Lomé Convention and were planning to take part in the negotiations scheduled for Brussels in late 1983. Angola has already become very active in EEC affairs to the extent of sending observers to most of the important meetings of the Community.

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34 For text of the Lomé I Convention, see The Courier, No. 31, Special Issue, March 1975. For analyses of the Convention see K.R. Simmonds: "The Lomé Convention" 16 Common Market Law Review vol. 3, (1979) p. 425 et seq.; B. Wolfgang: "The Lomé Convention and the International Law of Development" [1982] JAL vol. 26, No. 1, pp. 74-93.

Another point worthy of note in the sub-region is the course adopted by some of the states in the field of civil aviation. Botswana, Lesotho, and Swaziland have agreed in principle to launch regional services among the three landlocked states by joint-leasing of aircraft. Zambia and Mozambique have also expressed their intentions to participate in the programme.[35]

Mozambique's participation in the scheme will be of great benefit to the landlocked states. Air cargo services from the Mozambique's Indian Ocean port of Maputo to the landlocked states, especially those surrounded by the Republic of South Africa (Swaziland and Lesotho) will give those states speedy access to the sea for their imports and exports. This will, no doubt, bring SADCC a step closer to its primary objective of reducing members' economic dependence on South Africa, and increase interdependence among themselves.

SADCC has a dependable foundation as its members do not have marked political and cultural differences. Its projects are truly regional, and the sharing of responsibilities among members is prudent. It leaves its central organ to be concerned mainly with the co-ordination, rather than with the planning and execution, of projects.

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35. See Annex 3, UNDP/ICAO project RAF/74/021, op.cit.

Furthermore, the allocation of projects among members ensures that projects in the region are not duplicated, they are not initiated in competition with, but supportive to, one another. Other African sub-regions should borrow a cue from SADCC, especially in respect of civil aviation infrastructure and facilities such as the location of big international airports.

Conclusion

Regional and sub-regional organizations in Africa can accelerate the economic development of the continent. Foreign aid donors and international development agencies are more attracted to projects initiated at regional and sub-regional levels than those initiated by individual states. Regional institutions like the OAU, UDEAC, ECOWAS and SADCC are best suited to initiate such projects.

Transportation, of which air transport is a vital mode, is necessary for the economic and physical integration of Africa. It, therefore, deserves high priority in the schemes of the various regional organizations. The African-Indian Ocean Navigation Conference in 1979, urged African states to give high priority to civil aviation projects in negotiating financial and technical assistance with foreign governments and institutions, and donor states were

requested to increase their aid for civil aviation projects.[36]

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36. Recommendation AF1/16/4 (1979).

CHAPTER 6. AFCAC, A PRINCIPAL SOURCE OF LAW AND POLICY

The African Civil Aviation Commission (AFCAC) is the specialized regional institution established by African states exclusively for civil aviation matters. For that reason, many important decisions affecting the development of Africa's civil aviation activity have issued from there mainly in the form of recommendations to member governments for implementation. Some of these decisions will be examined in this chapter.

6.1 Establishment and Objectives

The establishment of AFCAC derived its legal validity from the Chicago Convention, and was supported by the ICAO. The Chicago Convention authorizes the ICAO Council, where appropriate and as experience may show to be desirable, to create sub-ordinate air transport commissions on a regional or other basis and define groups of states or airlines with, or through which, it may deal, to facilitate the carrying out of the aims of the Convention.[1] This provision is interpreted liberally to give validity not only to regional sub-ordinate aviation bodies created directly by the ICAO, such as the ICAO regional offices, but also

1. Article 55(a) Chicago Convention.

regional aviation bodies established by the group of states in the region as long as the objectives and functions of such bodies are not subversive of the aims of the Chicago Convention and the functions of ICAO.

Accordingly, an ICAO General Assembly Resolution adopted a General Policy in respect of air transport work in the regions through bodies like AFCAC.[2] In the General Policy, the ICAO Council was invited to, inter alia, give sympathetic consideration to requests for assistance in air transport matters of regional interest presented by contracting states or regional organizations and, when required, to support the creation, on the request of states, of regional civil aviation bodies likely to establish with ICAO relations comparable to those which ICAO maintains with the European Civil Aviation Conference (ECAC).[3]

Concrete efforts to establish AFCAC started in 1964 when a recommendation was made to that effect by the African Air Transport Conference which was organized jointly by ICAO and ECA in Addis Ababa.[4] In 1967, at a meeting of the OAU Council of Ministers held at Kinshasa, Zaire, a

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2. ICAO Assembly Resolution A16-23, also AFCAC/1 at page 63.

3. ICAO Resolution A18-21.

4. See Doc. E/CN/14/148 Trans/34; OAU/AFCAC/3.

resolution was adopted to establish AFCAC based on a text prepared by ECA and the OAU. In 1969, at Addis Ababa, the Commission was established during a conference organized by the OAU and ECA. It was considered that the Commission would be "a major instrument for the rational development of civil aviation in Africa as well as a vital factor for the economic development of the continent."[5]

AFCAC's membership is open to African states members of ECA or OAU.[6] Its objectives are 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; and to promote co-ordination, better utilization and orderly development of African air transport systems.[7]

6.2 Functions and Organization

AFCAC formulates plans at the regional and sub-regional levels for the operation of air services within and outside Africa, fosters and co-ordinates programmes for the development of existing and future training facilities

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5. See AFCAC/1, Appendix 6 - Minutes 1, at page 73.
6. Article 1 of AFCAC Constitution.
7. Article III ibid.

to cope with the present and future regional and sub-regional requirements for personnel in all fields of civil aviation. It concerns itself with 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.

It encourages the member states to apply ICAO standards and recommendations on facilitation and takes further measures aimed at greater facilitation of the movement by air of passengers, cargo and mail. It fosters arrangements between member states that would contribute to the implementation of ICAO regional plans for air navigation facilities and services, as well as ICAO specifications in the fields of airworthiness, maintenance and operation of aircraft, licensing of personnel and aircraft accident investigation.

The Commission also carries out studies in a number of areas. They include standardization of flying equipment and ground units servicing aircraft; policies of governments regarding commercial aspects of air transport; intra-African fares and rates and a possible structure conducive to the rapid growth of traffic in Africa; and other regional or sub-regional air transport economic

questions.[8]

It is evident that the Commission has very wide functions. To succeed in its functions, therefore, AFCAC works in close consultation and co-operation with the OAU, ECA, ICAO, AFRAA, and other governmental or non-governmental international organizations concerned with civil aviation.[9]

The Commission meets in ordinary plenary session once every two years. At each ordinary plenary session, it elects its president and four vice-presidents, one for each sub-region, who then constitute the Bureau of AFCAC. Estraordinary plenary meetings are convened by the Bureau only on request from two-thirds of the AFCAC members. At each ordinary plenary session, the Commission draws up its work programme for the period until the next ordinary plenary session. The direction, co-ordination and steering of the work programme between ordinary plenary sessions is the responsibility of the Bureau of AFCAC.[10]

The Commission requires that member states be represented at meetings only by delegates senior in rank and competent in the field to be discussed for the authoritative

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8. See generally, article IV(1)(a)-(i).

9. Article IV(2).

10. Articles V-IX.

handling of the problems.[11] AFCAC's Secretariat organizes studies, meetings and maintains records. The conclusions and recommendations that issue from the Commission are not binding on the member states and are, therefore, subject to acceptance by each of the govenments.

6.3 AFCAC Declaration of General Policy on Civil Aviation[12]

At the 23rd Bureau Meeting of the Commission held at Bamako, Mali, from May 17-19, 1979, the text of a General Policy Declaration was approved. Since AFCAC has been granted the status of a specialized agency of the OAU,[13] the approved text was presented for adoption to the OAU Council of Ministers at its 33rd session in Monrovia in July 1979.[14] After it had been adopted it was further approved in the 16th Conference of the OAU Heads of State

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11. Article XI.

12. See AFCAC/6 pp. 47, 133-141.

13. The Council of Ministers of the OAU at its 25th Ordinary Session held at Kampala, Uganda, in July 1975, adopted a resolution granting AFCAC the status of a specialized agency of the OAU. See also AFCAC Recommendations S3-19 of 1975 and S4-1 of 1975; OAU/AFCAC Agreement, article 1.

14. This procedure is provided in article VII of the OAU/AFCAC Agreement.

that followed the ministerial conference.

The declaration is essentially a definition of the basic principles of collective or individual actions by African states in a broad field of civil aviation which covered personnel training, African airlines cooperation and integration, optimum development of air services, financing of aeronautical activities, aviation medicine, etc.

6.3.1 Training of Aviation Personnel

The declaration noted the efforts made so far by AFCAC to implement a general personnel training plan in all disciplines affecting aeronautical activity in order to satisfy the needs of the member states.[15] The action taken by the joint AFCAC/OAU Coordination Committee with the participation of UNDP and ICAO[16] to procure the necessary

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15. At AFCAC's Fourth Extraordinary Plenary Session in Libreville, Gabon, in August 1975, a decision was made establishing two multinational training centres for pilots and ground staff at Franceville, Gabon, for the French-speaking countries, and Addis Ababa, Ethiopia, for the English-speaking countries. See AFCAC/6 WP/19 and WP/20.

16. An OAU/AFCAC co-ordinating committee was set up in Dakar, Senegal, in March 1977 to find means of acquiring funds for the operation of the civil aviation training centres. See OAU Council of Ministers Resolutions CM/Res. 568(XXIX) and CM/RES. 655(XXXI). The Committee, with the participation of the UNDP and ICAO, convened a conference of Donor States in Geneva from May 31, to June 2, 1978. A project document later

funds to implement the plans of the multinational pilot training centres, the establishment of whch was decided by AFCAC, was supported. A request was further made that high priority be accorded to the promotion of all multinational projects in view of the benefits which result from the joint organization of personnel training and research.

Ratification of the Convention establishing multinational civil aviation training centres was endorsed as a prerequisite for the implementation of the training institutions particularly as regards their physical and administrative organization.[17] The implementation of standardized syllabi for the training of aircraft pilots and maintenance technicians, as well as the preparation of appropriate standard syllabi for other disciplines of aviation training with a view of harmonizing the procedures for issuance of personnel licences and promoting a programme of personnel exchanges as part of the overall co-operation between African states in the field was strongly favoured.

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released by the ICAO, for example, provided for a UNDP contribution of $7.3 million for the period 1980-1984, Gabon's contribution (through bilateral financing) of $20 million, and Fellowship Funds at $6.2 million. See AFCAC/6 P 78 para. 76.

17. The AFCAC Bureau was instructed at the Fifth Plenary Session in Lomé, Togo, 1977, to draft the Convention. The subsequent draft convention was signed in October 1978 at Libreville.

6.3.2 African Airlines Co-operation and Integration

Arrangements were made within a framework of a four-year plan (1978-1981) for establishing co-operation between African airlines with a view to, inter alia, achieve the following objectives:

- standardization of aircraft and establishment of common technical specifications for the aircraft types to be operated;
- optimum utilization of technical and training facilities (existing or projected) through a better distribution of the workloads in every field;
- reduction of operating costs and a better return on investments;
- creation of jobs requiring a high degree of technical proficiency;
- strengthening of relations between states; and
- creation of multinational airlines.

At the sub-regional meetings organized by the Commission,[18] schemes were designed to:

a) Harmonize the different types of procedures for

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18. At Tunis (1974); Addis Ababa (1976), Bangui (1977), Banjul (1978), Douala (1978), and Dakar (1980).

the issuance of airworthiness certificates for aircraft and technical personnel licences, and aircraft operating and maintenance standards and procedures, having regard to three licensing systems - CAA, FAA, Bureau VERITAS - with a view to establishing a common policy in this field.

b) Collaborate with the African Airlines Association and certain aircraft manufacturers for the purpose of making studies on common technical specifications for the aircraft to be operated.

c) Create, in co-operation with African financial institutions, especially the African Development Bank, structures which will make it possible for the African airlines to acquire aircraft on the most favourable terms.

d) Create an African aircraft leasing corporation.

6.3.3 Optimum Development of Air Services in Africa

The objectives laid down in the African Declaration on Co-operation, Development and Economic Independence[19] which seek the best possible development of African international air services in every field, especially the

19. This Declaration was issued in Addis Ababa by the OAU in May, 1973.

structure of the route networks, flight frequencies, co-ordination of timetables, co-operative arrangements among airlines and the facilitation of intra-African cargo services, are reiterated in the declaration. Studies were to be conducted on an optimum system of airline flight connections which would form part of a concerted policy for co-ordinating timetables at a number of pre-determined airports. Such airports would have their infrastructure adapted to the operating conditions of the system envisaged; and a traffic forecast would be prepared for the purpose of determining the capacity and quality of the services at each airport, as well as the cost-benefit of the routes concerned and the facilities to be installed.

In accordance with the resolution on air transport policy adopted by the Conference of African Ministers Responsible for Transport, Communications and Planning, which took place in Addis Ababa in March 1979, the concept of cabotage traffic and its implications for international air transport in Africa would be carefully studied by AFCAC with a view to fostering the development of intra-African air transport. Studies were also to be carried out on the policy of granting traffic rights - especially Fifth Freedom Rights - and the collection of data vis-à-vis the financial provisions of the agreements concerning the routes in question.

6.3.4 Aviation Medicine

Aviation Medicine first attracted the serious attention of the AFCAC when the issue of sickle cell anaemia and the ICAO recommendations thereon[20] came for consideration before the AFCAC second plenary session in Accra, Ghana, in 1973. The Commission observed that there had been deliberate and determined efforts by some doctors to confuse sickle cell disease and sickle cell trait, especially in flying.[21] As far as flying is concerned, there is a definite difference between the two. While sickle cell disease would disqualify a qualified pilot from flying, there was no scientific basis to disqualify a candidate with sickle cell trait.

The Declaration contained an earlier recommendation that member states include the subject of sickle cell anaemia in their research programmes and co-ordinate their

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20. See ICAO Recommendations 20/1 and 20/2, 1970 PEL/TRG/MED. See further ICAO Resolution A21-24 of 1974. In particular, the Resolution advised contracting states that the mere possession of the sickle cell trait should not be a reason for disqualifying an applicant from flying duties in civil aviation unless there is positive medical evidence to the contrary (Res. A21-24, para. 4). AFCAC's subsequent decisions on this issue are based mainly on the above ICAO Resolution. See AFCAC/3 - WP/2 paras 106-112.

21. See AFCAC/2 PEL/TRG/MED. pp. 30-31.

efforts. The AFCAC Bureau was further instructed to convene a seminar of medical experts to discuss the matter and develop suitable guidance material, and to arrange for medical representation of AFCAC at international medical conferences on the subject.[22]

A report on the actions taken pursuant to the earlier recommendation was presented and examined in the third plenary session of the Commission in Kampala, Uganda. In the report, inter alia, a suggestion was made to establish a study group on aviation medical matters.[23] Accordingly, the Bureau was instructed to make a selection of members of the study group from among qualified doctors nominated by states, and member states were urged to make such experts available.

More specifically, it was recommended that each member state should establish an aviation medical body for the purpose of advising the aviation authorities on all medical matters relating to personnel licensing; investigating possible health hazards associated with flight, and all incidents occurring before, during and after flight; conducting research in medical problems associated with medical safety and advising on any other health matters

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22. AFCAC Recommendation S2-33.

23. See AFCAC/3 - WP/11 para. 5.

affecting aviation. Close liaison was advised to be maintained firstly among the national aviation medical bodies of AFCAC member states, and secondly, between the said bodies and the AFCAC Secretariat. Finally, a list of medical experts in the field of aviation medicine who AFCAC may call upon to represent it at international or regional meetings was to be drawn up and maintained by the AFCAC Secretariat.[24]

The Study Group submitted its report at the fifth plenary session (Lome, 1977).[25] A significant recommendation made in the report was the setting up of an African Aviation Medical Association (AFAMA) to carry out scientific research and investigation on aviation medical matters and disseminate same by means of publication of periodicals or journals. At the sixth session (Dakar, 1979), it was agreed that AFAMA should be set up to operate as an independent professional body, but if and when specific needs for research on medical matters arise, the Association will request AFCAC to approach ICAO and WHO for possible assistance. The Bureau was directed to examine, with the assistance of a group of legal experts and specialists of aviation medicine, the draft statutes of the

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24. Recommendation S3-16.

25. See AFCAC/5 - WP/17.

medical association, and to organize, if necessary, a conference of African aviation medical specialists in liaison with ICAO and WHO in order to consider the formation of the association, define its terms of reference and determine its work programme.[26]

AFAMA structures were set up in 1983. At its eighth session, AFCAC included in its 1984/85 Work programme, the task of assisting in the organization of AFAMA work programme. AFCAC also plans to establish a regional project with the assistance of CHO and UNDP. The aim of the project is to promote activity in the field of aviation medicine among member states.[27]

6.3.5 Action Proposed by States

In the General Policy Declaration, it is provided that AFCAC member states take all necessary steps to relate particular aviation projects which require outside assistance to the overall development requirements of each country. In this connection, states should envisage steps that may be required for funding training fellowships, particularly at multinational aviation training centres, through UNDP country programmes and other multinational and

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26. Recommendation S6-22.

27. See AFCAC/8 - WP/33 p. 7.

bilateral funds. The training programmes established or adopted by the Commission should be implemented at national or multinational training centres with a view to standardizing the duration and content of identical courses. States will, of necessity, have to adopt or revise their various regulations in the field of civil aviation training, taking into account particularly the programme prescribed for each aeronautical training course.

Member states were further requested to adopt a joint position on matters affecting the negotiation and conclusion of bilateral agreements with non-member states according to principles which are determined by the OAU in accordance with the development of world air transport policy.[28] Finally, member states were recommended to take action to conclude agreements with a view to fostering intra-African air transport which would facilitate the travel of persons by abolition of entry visas or by easing the formalities required in this connection.

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28. AFCAC's policy in this respect is not unprecedented. ECAC introduced a similar policy in respect of North Atlantic non-scheduled services. Cf. The Ottawa Declaration of 1972; the Memorandum of Understanding of June 5, 1975.

6.4 Topical Policies

The General Policy Declaration barely mentioned other issues like international air fares and bilateral agreements. Nevertheless, these issues and the development of non-scheduled services have been the topics of intense and elaborate deliberations at all the Commission's sessions. Many recommendations have been made on these topics at the various sessions, an assemblage of them forms substantial policy guidelines in the areas.

6.4.1 Bilateral Air Transport Agreements

Bilateral air transport agreements basically involve legal and policy considerations. On the legal plane, the chosen instrument forming the basis of operating international scheduled services is the government bilateral agreement.[29] The extension of bilateralism to multilateralism failed at Chicago and ICAO, and has been achieved partially in non-scheduled air services in Europe[30] and South East Asia.[31] The operation of

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29. See Article 6 of Chicago Convention.

30. See ECAC Agreement on Commercial Rights of Non-Scheduled Air Services Within Europe, Paris 1956.

31. See ASEAN Agreement on Commercial Rights of Non-Scheduled Services Within the ASEAN Region, Manila 1971.

world air transport is thus based mainly on a bilateral contractual legal framework.

Bilateral government agreements are certainly the most important and probably the most flexible regulatory tools in international commercial aviation. Their main function is to exchange traffic rights between two governments in favour of their respective carriers, and to establish part of the regulatory framework for the latters' activities. At the same time, the two governments, by their agreement, contribute to the overall international air transport regulatory system.

The sovereignty of states and the diplomatic relations existing between the states in any given bilateral agreement make uniformity of bilateral air agreements, prima facie, unattainable. However, the effect of a bilateral air agreement in practical application often goes beyond the two parties to it. It also affects an aviation region. Moreover, stability, predictability and consistency are good requirements for any regulatory system. Thus, bilateral agreements should not generate inconsistencies, contradictions and incompatibilities within the overall regulatory system.[32]

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32. The overall regulatory system consists of national regulations, bilateral agreements, multilateral regulations e.g. Chicago Convention and regional

Professor Guldimann has stated that the difficulties of the air transport industry stem, in no small degree, from the contradictions and inconsistencies of national policies, as expressed by national regulations and bilateral agreements. What is urgently needed to remedy the situation is multilateral co-ordination - a multilateral framework for bilateral agreements. Such a framework could list and define principles and concepts such as: categories of traffic and carriers; methods of specifying the markets to be served by the various categories of carriers and of services; methods of determining the compensatory character of tariffs and of securing the interrelationship of tariffs; and the field of discretion of governments party to a bilateral agreement.[33]

A world-wide multilateral framework for bilateral agreements will, of course, be over-ambitious. It is more practical and realistic to found such a framework in different air transport regions. This is where the role of such regional bodies as AFCAC can be very important and valuable.

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agreements; Industry regulations e.g. IATA tariffs. See Guldimann: "Bilateral Agreements as Regulatory Instruments in International Commercial Aviation", International Air Transport (Ed. Matte), p. 122.

33. Ibid., p. 124.

AFCAC claims that it has given its members a more extensive policy in the area of bilateral agreements than is implied in the juxtaposition of individual national policies or of partial multinational associations. It has also given them an institutional "expression" by its mandate which is mainly directed towards a general co-ordination programme based on all available and desirable documentation.

More importantly the Commission does not delude itself and mislead its members. It cautions:

> "To accomplish anything in this field, a realistic course should be taken, which means taking as a basis the situation as it is. Considering the imperfections or shortcomings which this situation may involve, there is reason for being open to prospects for innovations; but, in their turn, these prospects will not materialize unless they are also based on a realism".[34]

The subject of bilateral air transport agreements was raised in the first plenary session of the Commission in 1971.[35] Two issues fell to be decided. Some delegates expressed the view that the Chicago Convention sufficiently covered the situation of air transit so it was redundant to particularly adhere to the Air Transit Agreement. The Commission recommended that member states must, all the

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34. See "Policy of AFCAC Member states on Bilateral Air Transport Agreements" AFCAC Circular No. 3 1973 (AFCAC Bureau) p. 5.

35. See AFCAC/1 p. 14, Agenda Item 8(4).

same, adhere to the International Air Services Agreement to accord with ICAO resolution A16-25,[36] which, inter alia, urges contracting states which have not yet become parties to the Agreement to give urgent consideration to the possibility of doing so. Such adherence would enable states to benefit from the rights of over-flight and technical stop-over which are provided only in the Air Services Agreement.[37]

The other issue concerned the Bermuda type capacity clause which some members claimed was not in the interest of African states. In capacity regulation under the Bermuda system, international traffic on a given route is regarded as a whole, the constituents of which are interdependent and cannot be dissociated.

The Bermuda Agreement bases international operation on carriage of all the types of traffic defined by the Freedoms of the Air (3rd, 4th and 5th Freedoms). Third and Fourth Freedom traffic is considered primary traffic and is regarded as a capacity entitlement. At the same time, Fifth Freedom Traffic is deemed essential as a subsidiary element. This competition stems from an aviation policy geared, above

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36. ICAO Resolution A16-25 is now superceded by ICAO Resolution A21-28. See ICAO Doc. 9349 (1980) p. A-2.

37. AFCAC Recommendation S1-14.

all, to long-haul services, the setting-up of which was a major concern of the United States at the time the Bermuda Agreement was signed with Britain in 1946. And, to be profitable, long-haul services must carry shares of Fifth Freedom Traffic.[38]

Nowadays, the operation of air services over long distances is still a very important consideration of major European and U.S. airlines. For the non-African airlines, Africa may thus seem ideal for this subsidiary traffic mostly on routes to and from South America, Australia and the Far East.[39]

Although many states, de facto, adopt the Bermuda-type agreement as a model,[40] there is nothing, de jure, that impels any states to base their bilateral agreement on the Bermuda model. African states, because of their limited resources to operate air transport services, prefer to base their bilateral agreements on traffic coming

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38. See Barry Diamond: "The Bermuda Agreement Revisited" Journal of Air Law and Commerce, Vol. 41, (1975), p. 419 et seq.; Johnson: The International Aviation Policy of the U.S., Journal of Air Law and Commerce Vol. 29 (1963) p. 366 et seq.

39. See AFCAC Circular No. 3 (1973) op.cit.

40. See P. Sand et al: An Historical Survey of the Law of Flight at page 34, Bin Cheng: "Beyond Bermuda", Air Transport (Ed. Matte) op.cit., p. 81.

under the Third and Fourth Freedoms, For, even if by the rule of reciprocity - an African state receives the same number of Fifth Freedom points in Europe, for example, its national carrier is not always in a position to compete with the European carriers in their own territory.

Therefore, rather than adopt the liberal and flexible provisions of the Bermuda Agreement, most African states adopt protectionism at the level of both their international intra-Africa routes and international extra-Africa routes.

In Bermuda I, the capacity provisions were very liberal and flexible. Carriers were free to determine the capacity they would offer on the bases of the traffic requirements between the country of origin and the countries of destination, the requirements of through airline operation; and the traffic requirements of the area through which the airline passes after taking account of local and regional services.[41]. Governments, however, would study and analyse the traffic capacity figures on an ex post facto principle to see whether the capacity carried conformed to the general principles of "Fair and Equal" provided in the agreement. The agreement could, following such a review, be

41. See Barry Diamond, supra footnote 38, p. 446 et seq. Wassengbergh: Aspects of Air Law and Civil Air Policy in the Seventies, p. 22 et seq.

re-negotiated, rescinded, or submitted to an ad hoc tribunal for rectification of the imbalance and adjustment of the capacity.

That was the case in 1970 when the United States and the United Kingdom had to negotiate a new agreement in 1977 which came to be known as Bermuda II. Although Bermuda II incorporates the principles of Bermuda I, there is a significant difference in respect of the capacity clause. Bermuda II has a more restrictive capacity clause.[42]

Most African states favour pre-determination of capacity. Nigeria, for example, professed to adopt the Bermuda principles but in fact, "judging from the Standard Draft on which her bilateral air transport negotiations were based and the consistency with which it is adhered to in all her agreements, she favours a policy of pre-determination of capacity".[43]

At that first session, therefore, AFCAC decided to deal not only with the "capacity clause", but with the whole subject of bilateral agreements in two stages: bilateral

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42. See for example Annex 2 which regulates the capacity on the North Atlantic route.

43. Odubayo: Air Transport Bilaterals of Nigeria, op.cit., p. 33. See particularly article 9 of the Nigerian Standard Draft Agreement at p. 28. See also AFCAC/5 p. 24 para. 6q.

agreements between AFCAC member states on the one hand, and between AFCAC member states and non-member states, on the other hand.[44] And at the fifth session (Lome, 1977), the policy on bilateral agreements between member states only was discussed.

In respect of First and Second Freedoms, it was claimed that member states had been exchanging them freely without restrictions in all the bilaterals concluded between themselves in accordance with the International Air Services Transit Agreement. The Commission, however, noted that the freedom rights were not always fully exchanged and recommended that when member states negotiate bilateral agreements between themselves they should bear in mind their obligations to exchange First and Second Freedom Rights in accordance with the principles of the Chicago Convention.[45]

With respect to Third and Fourth Freedoms, it was noted that there were problems connected with the application of the Bermuda principles which were no longer satisfactory as they did not permit a rational development of air transportation in Africa. AFCAC members were urged to facilitate the optimum development of air services

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44. Recommendation S3-13.

45. Recommendation S5-16.

between their states particularly where Third and Fourth Freedom Rights related to the operation, of "primary justification traffic".

It was recommended that members do not put any obstacles to negotiations leading to the exchange of these two rights and that the exercise of the rights be facilitated as much as possible. Pending the formal conclusion of an air services agreement or the fulfillment of the constitutional formalities necessary to bring the agreement into effect, member states should, as far as possible, endeavour to permit on a provisional basis, the introduction of air services between themselves particularly as regards Third and Fourth Freedom Rights. Finally, in the exchange of these rights members should adopt a pre-determinist approach through which they should endeavour to exchange reciprocal traffic rights while insuring that capacity is adapted to demand.[46]

Member states are required to promote to the fullest extent possible mutual exchange of Fifth Freedom traffic rights among themselves. In their mutual exchange of these rights, they should apply the same principles governing the exchange of Third and Fourth Freedom traffic rights. They are also required to give preference to the

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46. Recommendation S5-17.

designated airlines of member states in granting the Fifth Freedom traffic rights; however, if they have to grant these rights to the airlines of non-member states, reciprocal rights or adequate compensation should be obtained.[47]

It was at the sixth session (Dakar 1979) that guidelines for the conclusion of bilaterals between AFCAC member states and non-member states were formulated. One of the views that crystalized during the discussions was that protectionism was a policy to be avoided by developing states and that AFCAC should undertake concrete studies that would demonstrate the advantages of liberalizing air transport in Africa so as to increase airline traffic, revenues, and the use of airport facilities in Africa and promote trade. It was also revealed that the experiences in Africa generally pointed to the practice of protectionism when dealing with other African states while the rights refused to African counterparts were often granted freely to non-African states.

The United States Observer explained that his country previously traded traffic rights on the basis of analysis and evaluation of the benefits derived. This policy of strict balance of benefits has been replaced by one based on trading opportunities without attempting to

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47. Recommendation S5-18.

qualify the value of specific rights before they are traded. As a result, U.S. airlines have become more competitive, and more efficient thereby giving a new momentum to international air transport. Consequently, air transport services are better and improved and the public in general is better served.

Some member states favoured the principle of making traffic rights available to all on the basis of reciprocity which could be interpreted in different ways depending on the particular cases. Yet others argued that the problems of air transport were not identical everywhere in the world, thus, different solutions were required for different areas. The exchange of traffic rights between African countries and powerful non-African countries had often resulted in extensive advantages to the latter and few advantages to the former, it was alleged.[48] The subsequent recommendations made by the Commission are more or less a synthesis of the various positions maintained by the member states.

First and Second Freedom Rights

The Commission considered that these two rights were an indispensable means for the airlines to fulfill their duty of providing public transport services to the

48. See AFCAC/6, page 30, paras 97 and 98.

international community. It was, therefore, recommended that when member states negotiate bilateral agreements with non-member states they should bear in mind their obligations to exchange First and Second Freedom Rights in accordance with the principles of the Chicago Convention, except in cases where the granting of such rights is inconsistent with the overall policy of the Organization of African Unity and AFCAC.[49]

This recommendation could be contentious to the extent that it subjects the principles of the Chicago Convention to the "overall policy of the Organization of African Unity and AFCAC". It has been cautioned that such a provision could be contrary to the provisions of the Chicago Convention and of the International Air Services Agreement. It would require the assessment of the OAU/AFCAC policy prior to the exchange of traffic rights and this could lead to difficulties of interpretation and conflicting application by different states and possibly jeopardize the development of international air transport.[50]

There will certainly be different interpretations of the "overall policy" of the OAU and AFCAC, since what amounts to that "overall policy" is, in fact, a number of

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49. Recommendation S6-17.

50. See AFCAC/6 page 31, para. 100.

policies formulated by the OAU and AFCAC respectively. The different interpretations may, unfortunately, defeat the OAU and AFCAC's goal of attaining a harmonious African policy towards the grant of First and Second Freedom Rights to non-African states.

Furthermore, although the Chicago Convention, in article 6, gives States the right to grant permission or authorization, and to determine the terms of such permission or authorization, before foreign carriers can operate international air services over or into their territories, that provision cannot be construed to subject the principles of the Convention to national or regional policies. Accordingly, the only purposeful construction to be given to the AFCAC recommendation above is that AFCAC member states will determine the terms of their bilateral agreements with reference to the "overall policy" of the OAU and AFCAC, in accordance - and not in conflict with - the principles of the Chicago Convention.

Third and Fourth Freedom Rights

In recognition of the great need to develop air services not only between AFCAC member states, but also between them and third states in the interest of the African continent, the Commission has established certain guidelines to facilitate necessary negotiations by member states with

third states for the exchange of Third and Fourth Freedom Rights to promote the operation of primary traffic: Where the exchange of these rights is expected to foster economic, social and cultural development, member states are strongly recommended to negotiate with the non-member state or states for the exchange of the rights. Pending the formal conclusion of an air services agreement or the fulfillment of the constitutional formalities necessary to bring the agreement into effect, member states may permit on a provisional basis, the introduction of air services between themselves and other states regarding Third and Fourth Freedoms if the benefits of such provisional arrangements are obvious. In any case, member states must pay careful attention to capacity clauses to ensure that the carriers of the two contracting parties have equitable and genuine chances of supplying capacity for the carriage of traffic while ensuring the application of the principle of reciprocity and the equitable sharing of the traffic - whatever its description.[51]

It will be pointed out that the phrase "equitable sharing of the traffic" is susceptible to many interpretations. It could imply equal sharing of the traffic as one of the maxims of Equity states that "equality

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51. Recommendation S6-18.

is equity". Pragmatism, however, leads one to believe that the drafters of the recommendation did not intend the equal sharing of traffic. "Equal" is not in every case the same as "equitable". One is inclined to construe "equitable" in this recommendation to connote "fair and just" when all the factors are considered in a given bilateral negotiation. "Fair and just" in this case is different from the controversial "fair and equal" in the Bermuda type of agreement.

Fifth Freedom Rights

Some member states at the sixth session (1979) seriously contended that there was a necessity to define cabotage in connection with the formulation of a policy for the granting of Fifth Freedom Rights. This was justified on the ground that certain flights operating between points located in different states were considered as cabotage and the Fifth Freedom was refused to other flights operating on the same routes, thus acting as a hindrance to the development of intra-African traffic. A proliferation of protected zones had resulted in which it was not possible for third parties to obtain traffic rights in view of the exclusive and pre-emptory agreements in existence between

partner states.[52] Another position was that while some African airlines require the protection usually extended by governments to infant industries, there were many that did not need any protection in the nature of a restriction of Fifth Freedom Rights, but would, on the contrary, benefit from the healthy environment of vigorous competition.[53]

It would not be expedient to deny, in all cases, Fifth Freedom Rights to non-African states because on some routes, this is the practical means of providing air transport services between two points. As long as African states are careful to obtain reciprocal concessions, the grant of Fifth Freedom Right to third parties on such routes would be to the advantage of African states.

AFCAC's position on this subject is expressed in a recommendation which represents a significant relaxation of the restriction on Fifth Freedom Rights to non-African

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52. See AFCAC/6, p. 32, para. 105. The protected zones referred to are the Air Afrique Zone and the Magreb countries (Tunisia, Morroco and Algeria) arrangement. See chapters 8 and 10 of this thesis.

53. It should be noted that Morroco, an AFCAC member state, informed the ICAO 23rd Assembly (1980) that from 1970, Royal Air Maroc had moved from the protectionist policy, that was adopted just after independence, towards a liberal policy. This move, is justified by the Government's concern to develop tourism and by the national airline's increasing size and strength which enabled it to withstand competition. See ICAO Doc. 9317-A23 - Min P/2.

members. The recommendation states that where member states consider it necessary they should grant Fifth Freedom Rights to non-AFCAC member states. In doing so, however, they should obtain reciprocal rights or "adequate compensation".[54]

The requirement for "adequate compensation" deserves further treatment here. Direct or indirect sale of traffic rights is not a strange phenomenon. A country with valuable traffic rights can make an outright sale of the rights to a foreign airline.[55] Fifth Freedom Traffic Rights are valuable; and, as Thornton put it, they are also a form of power based on the granting country's trip-generating strength either as a source or as a destination.[56]

The British Overseas Airways Corporation (BOAC) paid the Central African Airways (CAA)[57] $490,000 annually for ten years for the privilege of operating CAA's

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54. Recommendation S6-19.

55. See Thornton L.: International Airlines and Politics, p. 88.

56. Ibid., pp. 75-76.

57. See The Story of the Central African Airways 1946-1967, a magazine of the Central African Airways. Salisbury, Rhodesia, 1967.

London-Salisbury flights.[58] In the United States/ Portugal Air transport agreement, Portugal obtained substantial concessions from the U.S. in exchange for base rights in the Azores. The concessions included U.S. payment to cover the cost of facilities of the Azores base, the re-equipment of Portuguese armed forces under the Mutual Defense Assistance Program and the financing of the railroad project in the then Portuguese colony of Angola.[59]

Other means have been employed to obtain operating rights and route structure advantages. KLM, for example, had attempted to obtain traffic rights on certain routes through the partial ownership of Air Ceylon in 1955. The strategy failed when other governments resented the arrangement as a veiled attempt by KLM to obtain operating rights into Singapore and other South East Asian nations.[60]

One more example is that of Zambia. In 1967, the Zambian government required the payment to Zambian Airways of 15% of the net revenues derived by foreign carriers from

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58. See World Airline Record, 6th Ed. 1965, pp. 41-42.

59. See "Air Transport Agreement with Portugal Revised", US Department of State Bulletin, July 13, 1947, p. 103.

60. See Thornton, International Airlines and Politics, op.cit., p. 91. See also World Airline Record, idem, p. 60

the exercise of Third, Fourth and Fifth Freedom Traffic Rights in Zambia, pending the exercise of reciprocal rights by Zambian Airways.[61]

The "adequate compensation" policy is, however, not unscathed. Its most important opponent would appear to be Dr. Wassenbergh. His serious view is summarised as follows:

Some developing countries not yet able to fully exploit their own national traffic potential or claim full reciprocal rights for immediate use, resort to compensation. Payments in various forms to national carriers for traffic carried on certain routes or segments is likely to become more frequent to compensate for imbalanced situations. It should only be applied in a competitive situation. Payments by foreign carriers to national carriers for traffic carried on certain routes or route segments will result in lower revenue for the carriage of that traffic. This, in turn, will discourage these carriers from applying for lower fares for the routes concerned to the detriment of further development of traffic on those routes. To have to buy traffic rights on certain routes means that a national carrier can peddle the traffic to and via its country to the

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61. See Wassenbergh: Aspects of Air Law and Civil Air Policy, op.cit. page 31, footnote 20.

highest bidder. Payment for traffic rights is merely a temporary compensation for the losses which the national carrier expects to suffer as a result of the additional competition on the route.[62]

Barry Diamond has stated that the acceptance or rejection of economic criticisms of bilateral air transport agreements is much more a matter of whose international civil aviation "ox" is being gored than it is a matter of pure logic. Geography is one of the important factors to be taken into account in evaluating the economic criticisms of bilateral air transport agreements.[63]

Dr. Wassenbergh is KLM's adviser to the Netherlands Government. KLM's route network, including that of its subsidiary, NLM City Hopper, extends over "227,960 miles and links 119 cities in 75 countries in the world". The greater and very vital segment of this network consists of international routes which are the backbone of KLM's prosperity.[64]

The Netherlands air policy is principally a product of her geographical location and the size of her home

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62. Ibid., pp. 31-32.

63. Journal of Air Law and Commerce Vol. 41, 1975 op.cit. at p. 424, especially footnote 33.

64. See, for example, KLM Annual Report 1981-1982.

market.[65] Dr. Wassenbergh has expounded that policy thus:

> "Netherlands gives priority to international interests as the sublimated national interests of all states (a practice which could be called enlightened protectionism). The fact that...Dutch civil aviation would profit from this liberal policy if it were also followed by other countries cannot be seen as an explanation of the Dutch liberal approach but merely as a coincidence and only partly as a consequence."[66]

One cannot help but become suspicious of the altruistic value of this pious policy of "enlightened protectionism" when one juxtaposes it with the propounder's stated doctrine that

> "The promotion of international traffic by air would be to the advantage of each individual state regardless of who carries the traffic - a decision that should be given primarily to those best willing and able to engage in air transportation". (my underlining)[67]

This doctrine is subversive of the fundamental

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65. In Journal Officiel de la Republique Française, No. 20, December 1, 1967 at p. 871, it was stated that certain states with a modest national market, like Holland with KLM, have become masters at combining routes permitting the transportation of traffic that has little connection with any activity in the home country: "If industrialized countries are experts in negotiating traffic rights and combining the use of them, the newly independent states do not always have the necessary skill to avoid being duped". See Wassenbergh: Aspects of Air Law and Civil Air Policy, op.cit., p. 11.

66. Wassenbergh, op.cit., p. 11.

67. Ibid., pp. 10-11.

principle of the International Civil Aviation Convention (Chicago) that international air transport services be established on the basis of equality of opportunity. Had the Dutch doctrine been applied immediately after the Second World War, for instance, only a few American and British airlines would have been around today carrying on international air transport services in the world. Even KLM would not have qualified to be in operation. Could it be said that it is to the advantage of "each individual state" regardless of the fact that only U.S. and British companies would be engaged in international carriage by air?

It has been claimed that a nation which can ship its goods under its own flag has a competitive advantage over those that rely on foreign ships and aircraft.[68] African states have known that better as a large part of their meagre foreign reserve, earned on the export of raw material, goes for payments to foreign shippers. For this reason, countries like Ghana, Nigeria, Cameroon, and others, established their own shipping lines. On a competitive basis with many foreign shipping lines, they will not pass the test of best able and willing. Yet their propriety for

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68. See Sletmo, G.K., "International Air Transport and National Interests" 3 ARKIV FOR LUFTRETT (1967) p. 278 at p. 288.

transporting the traffic cannot be impugned.[69]

The same applies to air transport. To put fledgling African airlines in the same competition box with mighty foreign airlines, like KLM, and draw the qualifying line at "best willing and able" is mindless - there will be no contest. If we agree, as we must, that each party to a bilateral air transport agreement is entitled, prima facie to some traffic on the given route,[70] that entitlement cannot be recognized in the case where the designated airlines are in a competitive parity, but denied in the case where one is in a less competitive position.

Air traffic right as an article of commerce is a natural extension of the theory of property.[71] The U.S. view of what constitutes a fair route exchange, for example, is stated thus:

"...bilateral air transport route exchanges must be

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69. See article 2 of the Convention on a Code of Conduct for Liner Conferences signed in Geneva in 1974, which came into force on Dec. 31, 1980. See further, Shah, M.J., "The UN Liner Code of Conduct (1974) - Some Key Issues Regarding its Implementation" European Transport Law, Vol. 16, 1981, pp. 491-554, especially at p. 519.

70. Professor Ferreira of Argentina holds the view that air traffic is the property of the state and traffic between two countries accrues to them in equal shares. See Ferreira, E.: The Capacity Problem Under the Argentine Doctrine in International Air Law pp. 32-33.

71. See Barry Diamond, supra, (footnote 63) at p. 432.

> viewed within the general framework of over-all commercial policy, we should follow similar commercial trading concepts in making route exchanges. Under these principles the appropriate test for route exchanges...is an equitable exchange of economic benefits."[72]

Based on the principles of commercial trading, therefore, compensation for the transportation of another state's traffic entitlement is no less justifiable than, for example, compensation for goodwill and custom in business is.[73] As long as states continue to conclude bilateral agreements as a means of exchanging commercial traffic rights, they will remain free to negotiate the terms which seem most appropriate to foster their respective economic interests.[74] The promotion of international transportation by air per se will remain only a secondary

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72. See Frank Loy: The Freedom of the Air (Ed. McWhinney & Bradley 1968) page 3.

73. On compensation for goodwill and custom in business see, for example, the decision in Trego v. Hunt [1896] AC 7.

74. Thornton states: "since by international convention, a state has full control over which airlines will serve its territory, each state has control over the use of the power resulting from traffic generated within its borders. The right to serve a traffic point then becomes a valuable property, fully within the control of the governing state, and capable of being granted or with-held in accordance with governmental desires". See Thornton: "Power to Spare: A Shift in International Airline Equation", Journal of Air Law and Commerce, Vol. 36, 1970, pp. 675-676.

consideration.

However, the determination of compensation should be trusted to the governments, not the airlines, in developing states. In determining whether compensation should be paid or not, and the compensable amount in any given case, the government is in a better position to, and should consider the interest of the passengers as well as the benefits which will accrue to the national economy as a whole (and not to the national airline only) from the operation of the air service by the foreign carrier. This is particularly so with the considerations of tourism and air cargo.

Moreover, compensation should not necessarily be in monetary payments. It could be in the form of provision of civil aviation facilities or equipment by the compensating foreign state. The United States International Aviation Facilities Act of June 16, 1948,[75] an Act to encourage the development of an international air transportation system, provides for, inter alia, the establishment and operation of airport and airway property in foreign territories, and the training of foreign nationals in aeronautical and related subjects. Some African states can

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75. Public Law 647, 80th Congress; 62 Stat 450; 49 U.S. Code 1151 as amended.

explore the possibilities of benefiting from the provisions of that Act in the negotiations of bilateral air transport agreements with the United States.

6.4.2 Stop-Over Traffic

Stop-over traffic has raised some questions of the international carriers' legal and contractual competence with regard to routes and rights. Since the practice has a direct effect on competition between airlines many states have come to regulate it in their bilateral agreements. As competition increases, so is the tendency to restrict or regulate the practice.[76]

Accordingly, the practice of stop-over has become of some concern to the national aviation policy of African states with international carriers, or whose territories are served by foreign carriers. This concern has been expressed in AFCAC sessions where member states seriously complained that stop-over traffic had become disguised Fifth Freedom traffic not granted under the relevant bilateral agreements signed between member states and third parties.

AFCAC has so far not been able to establish a common and well defined policy for member states on this

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76. See generally, Bin Cheng: Law of International Air Transport, op.cit., pp. 16, 319-324; 392 and 406.

issue because the Commission is not yet sufficiently apprised of the concept of stop-over traffic and its concomitant implications. Rather, it has instructed its Bureau to collect detailed information on stop-over traffic, and to propose a definition of "stop-over" as well as the effective ways of controlling unauthorized stop-over traffic in Africa.[77]

The Problem of Definition

In a very simplistic form, stop-over implies three minimum elements, namely an operating country, a country where a stop-over is made in an intermediate position along the route of the proposed journey, and a third country. For a passenger travelling from country A to C, via country B, on the airline operated by country A, the stop-over consists of breaking his journey at country B.

When in 1954 the Council of ICAO was requested by Lebanon to examine the problem of stop-overs with reference to article 44 of the Chicago Convention,[78] the ICAO, inter alia, gave its definition of the concept. It stated:

> "...is the action of a passenger who at a stop on his journey does not take the first available plane for the next stage of his journey, but takes a later plane."

77. See Recommendation S6-14.

78. See ICAO Doc. 7586, C/883, June 24, 1955.

The ICAO definition is too simplistic and ambiguous. By "first available plane" is it a reference to the plane of the original carrier of the passenger or the plane of any other operation on the same route? In other words, whose "first available plane"? And is the passenger in this case supposed to go on "the next stage of his journey" on the same ticket or any other ticket? Again, when he "takes a later plane", how late is that "later"?

The IATA's own definition is more substantial, but still equivocal. It is as follows:

> Stop-over which is equivalent to the term break of journey, means a deliberate interruption of a journey by a passenger, agreed to in advance by the carrier at a point between the place of departure and the place of destination."[79]

The IATA definition gives the impression that the determination of stop-over rests solely on the passenger and the carrier. This is misleading as the determination of the duration of the period of interruption of the journey and the identification of the Freedoms of the Air of the passenger interrupting the journey go beyond the competence of the passenger and the carrier.

In the absence of an adequate multilateral definition of the concept of stop-over, states sometimes have had to define stop-over in their bilateral agreements.

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79. 10 IATA Bulletin (1949) at page 137.

Such definitions, no doubt are subjective rather than objective, depending on the circumstances and interests involved in a particular case. One such definition is found in the United Kingdom/Canada Agreement of 1958, to wit:

> "For the purpose of this Exchange of Notes ... "stop-over" means a temporary break in a passenger's journey at an intermediate point on his route for a purpose other than changing aircraft, it being understood that the duration of the break shall not extend beyond the date of expiry of the passenger's ticket..."

It can be seen that even the United Kingdom and Canada do not intend to have the above definition as sacrosanct. They leave themselves open to other definitions for other purposes.

Duration

It will be seen that the IATA definition leaves the passenger and the carrier to agree in advance on the duration of the break in journey at the intermediary point. The United Kingdom/Canada definition limits that duration to the life of a valid passenger's ticket. The life of a passenger's ticket depends on whether the issuing carrier is a member of IATA or not. If it is a member of IATA, the date of expiry will further depend on whether the passenger is on an excursion or a regular trip. For although an IATA resolution fixes the validity of a passenger's ticket at one

year,[80] the carriers sometimes provide otherwise (for shorter periods) in the ticket, carrier's tariffs, condition of carriage or in related regulations. If the carrier is not a member of IATA, then the validity of the ticket will be a contractual term between the two parties, though it is likely to be determined by the carrier and would probably not exceed a year.

The United States/Sweden Air Agreement is significant in two respects, it contains two periods of duration for two different types of traffic demands, and in one case it even sets the minimum length of the break in journey. Services provided by a designated airline under article 12 of the agreement retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such airline is a national and the countries of ultimate destination of the traffic. The two parties recognize that the traffic demands referred to are those of traffic whose initial origin or ultimate destination, as shown on the ticket is in the country of which the transporting airline is a national whether or not the traffic passes through, connects at or "stops over for any length of time within the period of validity of the ticket at any point or points en

80. Resolution JT 123(2) 0 40.

route".[81]

But in the case of services of a designated airline over a route specified in the annex to the agreement, in contra distinction to the services provided under article 12, in meeting their primary objective of providing capacity adequate to the traffic demands between the country of which such airline is a national and the countries of ultimate destination of the traffic they may also add to their primary objective the provision of capacity adequate to the demands of passenger traffic "stopping over for twelve hours or more at a point in the country of which such designated airline is a national en route to or from points not in the country of which such designated airline is a national. This addition to the primary objective does not extend to passengers stopping over for "less than twelve hours."[82]

A study was made of how different states have fixed the length of stop-overs.[83] IATA's one year maximum period of the validity of a ticket provides a wide margin

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81. See note 3 from the United States Secretary of State to the Swedish Ambassador, June 1966: Exchange of Notes between the Government of U.S. and Sweden Replacing the Annex to their Air Transport Agreement of 1944.

82. Ibid.

83. See ITA Studies 63/10-E pp. 19-20. The material following is based mainly on analysis of these studies.

for the practice of stop-overs. The shortest of these (for instance, less than 12 hours) become mere connections; on the other hand, the longer the stop-overs, the more difficult it would be to maintain the identity of traffic as Third and Fourth Freedom. Thus, a good number of states keep the length of a stop-over at between two days to fifteen days, for example, Greece, Argentina, Venezuela and Pakistan.

Between the arbitrary fixing of the length of stop-overs and the liberalism which authorizes stop-overs of up to the maximum period of the validity of a ticket, there is an intermediate formula - "the bona fide stop-over" - whereby the operator undertakes to furnish proof that only genuine stop-overs will be made, that is to say of a minimum duration and not merely for the purpose of making a connection. It was on these terms that Great Britain granted cabotage traffic to SAS in 1952 between London and Nairobi on the combined routes London/Copenhagen, Copenhagen/Johannesburg. The object in this case was to control Sixth Freedom traffic, and cabotage between the United Kingdom and her overseas territories operated as Sixth Freedom traffic. This type of regulation, however, is not popular.

Another yardstick is to fix the maximum or minimum length according to whether Fifth Freedom or its variant

Sixth Freedom traffic is involved. In the case of Fifth Freedom traffic it is the maximum duration which sets a limit to the period during which the passenger may enjoy, implicitly or explicitly, Third and Fourth Freedom status. In Greece, for example, on certain routes the passenger maintains his Third Freedom identity for two days; for Argentina, Venezuela and other countries this period is extended to two weeks.

Another example is found in the negotiations between the United States and the Netherlands in 1961, and it concerns Sixth Freedom traffic.[84] In an effort to persuade the Netherlands' carrier, KLM, to reduce its Sixth Freedom traffic which the U.S. CAB considered as part of Fifth Freedom traffic, and accordingly subject to control by the Bermuda machinery, the United States proposed two forms of restriction which were both refused by the Netherlands. One of them provided for the fixing of stop-overs in the Netherlands at a minimum, of three days (72 hours), for a New York/Amsterdam/Copenhagen or a Hamburg/Amsterdam/New York passenger. All passengers staying under three days in Amsterdam were considered as Sixth Freedom traffic; on the other hand, after the tree days, they would be regarded as

84. See "The CAB's Review of US Transatlantic Operations" ITA Information Paper No. 167, June 1962.

Netherlands national Third or Fourth Freedom traffic.

The somewhat unusual nature of the Sixth Freedom may account for the "maximum" and "minimum" rules, although it is just as widely used as the Fifth Freedom. The reason for this type of Sixth Freedom is to enable countries to detect and identify this traffic, whereas regulation of Fifth Freedom traffic is to discriminate between it and Third and Fourth Freedom traffic without its status or normality being questioned when establishing Freedom identities. Be that as it may, international policy on the fixing of stop-overs lengths remains difficult to define because of lack of uniformity and diversity of regulations and practices.

Stop-overs and Identification of Traffic

Just as there is no uniformity in fixing the duration, there seems to be no uniformity too on the identification of stop-over passengers. The Chairman of TWA, in 1954, Mr. Warren Pierson gives support to this assertion. Commenting on the U.S./India dispute of (1954-1956) he stated that the impasse was due to the fact that some of what the U.S. regarded as Third and Fourth Freedom traffic, the Indians called Fifth Freedom traffic. That was because the U.S. felt that any traffic which she had a hand in generating in the United States, whether it

stopped over in Paris, Rome or some other place, was Third and Fourth Freedom traffic, especially if the passengers were American citizens.[85]

Stop-overs are reduced to three characteristic cases according to the juridical or economic nature of the problems they pose. These are: Airline holding complete traffic rights; Airline holding partial rights only; change of airline.[86]

Airline Holding Complete Traffic Rights

Here, State A, State of operator and of origin of the passenger, has a bilateral agreement with State B, State of stop-over (Third and Fourth Freedoms), and State C, State of destination, where Fifth Freedom Right is granted to A on the route BC, as well as Third and Fourth Freedoms on the route AC. In such a case, it is usual to consider the granting of the route and of full traffic rights as being sufficient justification for stop-overs to be made. Under these conditions, stop-overs are part of the contractual picture, being merely accessory to the exercise of traffic rights without there being any specification as to whether

85. See "American Aviation" 15 February 1954. See also, "Some Aspects of United States Air Transport Policy", ITA Research Paper No. 286, March 1956.

86. See ITA Studies 63/10-E, op.cit. pp. 9-18.

they are dependent on AC Third Freedom or on BC Fifth Freedom traffic. Generally, stop-overs are practised within this framework without difficulty.

But B may consider that the unlimited practice of stop-overs on its territory is detrimental to its own carrier, in which case it may consider such stop-over passengers not as belonging to the Third and Fourth Freedoms between A and C but to Fifth Freedom between B and C.

Such was the case in the US/India dispute mentioned above. It was also the object of contention between the United States and France in 1950s. France determined to protect Air France on the sectors of routes from Paris on which PAA and TWA, with Fifth Freedom rights everywhere, except on Paris/Istanbul, were putting up very strong competition, especially between Paris and Rome. The French contention that some stop-over traffic, was part of Fifth Freedom traffic because of the length of the stop-over, was refuted by the United States which maintained that the only valid criterion was that of ticketed origin and destination. Thus a New York-Rome passenger was considered part of U.S. Third Freedom traffic even after a stop-over in Paris.

A country wishing, therefore, to restrict stop-overs even in the case in which complete rights are exchanged may have to resort to one of three ways. It can arbitrarily limit the stop-overs by quota; or limit them on

the basis of duration. The third option is to limit the stop-overs according to the sector which will be "open" or "closed" depending on the competition on the given route or the segment of the route.

Airline Holding Partial Rights Only

Here, the airline operating from State A has been granted the route ABC as a result of bilaterals concluded by States A and B on the one hand, and states A and C on the other hand for the exchange of Third and Fourth Freedom rights between AB and AC but without Fifth Freedom rights between BC; either B or C, or both, having refused to grant the Fifth Freedom. The airline from State A may only put down passengers at State B, but may not embark passengers from there to C, the sector BC becoming known as the "Blind Sector".

In this case, stop-overs are much more obviously special privileges, superadded to conceded rights. They can no longer be associated with Fifth Freedom rights since such rights have not been granted. The marginal nature of stop-overs, and the lack of a well defined basis have led to different methods of application of the concept in this kind of situation. In some cases, the practice of stop-overs is completely banned. Such is the case with Air France on the Montreal/Los Angeles sector of its Paris/California route,

where the airline does not possess Fifth Freedom Rights and where stop-overs are forbidden by both Canada and the U.S. However, on the Caracas/Bogota sector, which is completely closed by Venezuela to Fifth Freedom traffic, stop-overs are allowed for a maximum of fifteen days with the provision that the journey must be continued on the same carrier.[87]

There is a possible case where a stop-over is made by a foreign passenger at points in the same country, in which case it comes under the incomplete rights category since cabotage is a reserved right. Cases of this kind are likely to be found in large countries like the United States and Brazil and in the Air Afrique "multinational zone".

A Brazilian regulation to this effect[88] distinguished between foreign passengers from or to Brazil, and those merely in transit. In the first case, a passenger travelling on a foreign carrier may not make a stop-over; he can only stop-over if he travels by a Brazilian carrier. In the case of a passenger in transit, for example, Caracas/ Belem/Rio/Buenos Aires, travelling on a foreign airline, one stop-over only is allowed in Brazil and the journey must be

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87. See "Interpretation of Traffic Rights" ITA Bulletin No. 30 of 28 July 1958 (489/R); see also ICAO Doc. 7586, C/883, 24 June 1955 op.cit.

88. Regulation No. 168 of July 12, 1950.

continued as stated in the passenger ticket. Any failure to comply with this condition may result in the passengers being required to change to another airline.

The United States' policy in this case is enunciated in CAB decision in Re Qantas Empire Airways.[89] In that case, CAB stated:

> "...transportation may be provided between two United States points by a foreign carrier only where the same air carrier providing a domestic portion of the transportation also provides to and from a foreign point, and where both the domestic and foreign segments of the journey are covered by through tickets... or in circumstances where the carrier is merely transporting across the United States traffic picked up by it at a foreign point and to be discharged by it at yet another foreign point... Under United States authorization permitting commercial access to this nation, a foreign carrier may incidentally transport within this country only that traffic which it brings in or carries out."[90]

CAB's statement demonstrates that the United States is not restrictive on cabotage stop-overs in certain circumstances. While there is a parallel between the reserving of Fifth Freedom rights on an international sector such as between Montreal/Los Angeles or Anchorage/Tokyo, and

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89. 29 CAB (1959) p. 33, see Bin Cheng, op.cit., pp. 318-322; see also ITA Bulletin Nos 30 of July 28, 1958 (489/R) op.cit.; 45 of August 8, 1958 (752/R); and 19 of November 5, 1959 (312/R).

90. CAB Order E-13710 (1959) p. 1, see further, section 1108(b) of the Federal Aviation Act; SITMAR CAB Cruises 14 AVI 17, 177 (1976).

the reserving of cabotage on a domestic sector like San Francisco/New York, the United States policy is more restrictive in the former case than in the latter case. But even this apparent conclusion should be taken with some reservations, for it seems to reflect more of an international diplomatic disposition then a scientific regulation.[91]

Change of Airline

A passenger departing from country D on D's airline, makes a stop-over at country B before travelling to his destination at country C. Is country A's carrier operating the route ABC competent to take on the passenger at B and fly him to C?

The IATA interlining arrangement provides for the interchange of tickets for passengers. The agreement has received popular acceptance and inter-lining has become a great convenience of international transportation by air.[92] As far as the airlines are concerned, therefore,

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91. SITMAR Cruises Inc. CAB Order 75-8-88; D.R. Lewis: "Air Cabotage: Historical and Modern Day Perspectives", Journal of Air Law and Commerce Vol. 45 (1980) p. 1059.

92. See "The International Multilateral Airline System: Its Benefits and Requirements" February 1980 (An IATA Publication).

if there is a corresponding agreement between carriers A and D, A may take on at B a passenger who has travelled from country D via carrier D and fly him to his destination at C; reciprocally, a D carrier may fly from B to C a passenger who has travelled from A to B via carrier A.

In practice, however, traffic rights are the governing consideration in most cases, and the matter is determined, not by the airlines, but at governmental level by bilateral agreements. As a result of increasing competition, some countries even ban the transfer of passengers from one carrier to another after a stop-over, permitting transfers only on connecting flights.

The ban is enforced even in the most favourable case where say, A and D possess full traffic rights as a result of bilateral agreements (AB, AC, BC and DB, DC, BC for A and D respectively). These restrictions would certainly be imposed in the case of partial rights in which either A or D or neither of them possesses Fifth Freedom rights on the BC sector.

This discrimination between airlines taking over traffic from one another has led to the distinction between "on-line" and "off-line" traffic. It is more usual to authorize "on-line" but not "off-line" stop-overs. In its most restrictive form, this ban may be imposed upon two carriers of the same flag. But most cases involve carriers

of different nationality. Formerly, the airlines were able to evade bans in certain areas by means of inter-carrier agreements, but national policies have become more restrictive to protect the national carriers likely to be adversely affected by such foreign evasive arrangements.

AFCAC's Task

There is no doubt that the regulation and control of stop-over traffic in Africa is not going to be an easy matter. The problems associated with stop-overs cannot be isolated from the general context of international diplomatic relations in the field of aviation. One wonders whether AFCAC can come up with a single regulation or policy of general acceptance and application in Africa in respect of stop-overs. As long as AFCAC member states have their respective sovereign rights to conclude bilateral air agreements, inconsistency of approach to individual cases will be more probable.

However, AFCAC's function is to provide common guidelines to, and not to impose a common regulation on, member states on international civil aviation matters of regional concern. In its effort to formulate a policy on stop-overs in Africa, AFCAC should have consideration to a number of points: the determination of duration of stop-overs; the existence of restrictive zones such as Air

Afrique "cabotage" zone; the nature of Africa's route network and the practice in respect of grant of traffic rights; and African airlines co-operation vis-à-vis the change of airline. It should also seriously consider the special nature of tourist traffic. In the final analysis, member states should be able to decide in a given case whether a particular stop-over modifies the identity of the passengers or not, and even if it does, whether it contributes to the development of traffic without undue harm to the national carrier serving the route. Member states will also have to decide whether to control stop-over traffic on a given route by quota limitation, or on the basis of duration, or by "opening" or "closing" certain sectors depending on the competition.

6.4.3 Non-Scheduled Operations

It is evident that contracting States do not give practical effect to the provisions of article 5 of the Chicago Convention. The article requires that aircraft of contracting states not engaged in scheduled international air services, if engaged in the carriage of passengers, cargo or mail for remuneration or hire, shall also have the privilege of taking on or discharging passengers, cargo or mail in the territories of contracting states without the necessity of obtaining prior permission.

At regional levels, however, some states have multilaterally agreed on measures to develop non-scheduled operations within their region. In Europe, the member states of the European Civil Aviation Conference (ECAC) concluded the Paris Agreement of 1956 granting commercial rights of non-scheduled air services within their states, to themselves. They agreed to admit the aircraft

> "registered in a state member of the European Civil Aviation conference and operated by a national of one of the contracting states..."[93]

freely to their respective states for the purpose of taking on or discharging traffic.[94]

South East Asian States, apparently borrowed a cue from the members of ECAC and granted to themselves commercial rights to operate non-scheduled services freely within their region, when they met in Manila in March 1971. Their agreement applies to any civil aircraft,

> "registered in an ASEAN state and operated by a national of one of the member states or a firm or corporation substantially owned and having effective control by nationals of one of the member

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93. Article 1 Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, Paris 1956. However, note the limited character of the non-scheduled services allowed as provided in article 2 of the Agreement.

94. Article 2, ibid.

states..."[95],

engaged in non-scheduled international flights for pay or hire in the territories within the ASEAN region. For the services specified in both the Paris and Manila Agreements, member states may not require prior authorization, and states may not legislate to require prior authorization. Only prior notification is required.

In spite of the importance of non-scheduled services to a developing region, Africa does not have a harmonized policy, concretized in a multilateral agreement similar to Paris or Manila, to facilitate the operation of these services. However, in 1973 AFCAC member states agreed to develop a common policy concerning the regulation of non-scheduled operations taking into account the work of other bodies in this field including the Madrid Congress and the European Civil Aviation Conference.[96] It was also decided to develop a standard form of application for permission to operate charter inclusive tours.[97]

The Bureau was instructed to arrange for regular annual collection, analysis and publication of statistics on

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95. Article 1, Agreement on Commercial Rights of Non-Scheduled Air Services Within ASEAN Member States - Manila 1971.

96. See AFCAC/2 p. 8.

97. See AFCAC/2 - WP/10 for the draft form.

commercial non-scheduled passenger traffic, giving data on arrivals and departure in each state by regions of origin and destination of passengers with a breakdown between inclusive tours and other non-scheduled traffic. Member states were particularly requested to provide the required statistical data to the Bureau.[98]

At the third plenary session (1975) an AFCAC policy on Regulation for Non-Scheduled Operations within Africa was adopted.[99] In essence, the policy covers the 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 students charter flights. Furthermore, the policy provides for co-ordination between civil aviation departments in respect of the enforcement of the regulation, fare structure, the requirements for group travelling, non-scheduled air bilateral agreements, privilege travel on charter inclusive tours of representatives of travel agencies or tour operators, and the use of inclusive tours by AFCAC states' nationals residing abroad.

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98. Recommendation S2-5.

99. See Recommendations S3-4, S3-5. See further, AFCAC/3 pp. 81-93.

The requirements and procedures stipulated in the policy regulation regarding the application and declarations for authorization to operate non-scheduled services in Africa, especially when considered side by side with the slothful red-tapism notorious in many African states, do not help to facilitate the operation of these services. One cannot help but conclude that AFCAC has sacrificed a fundamental aviation principle - facilitation - on the altar of "the need to obtain adequate information to ensure satisfactory operation and control of charter flights" in Africa. There is a need to revise the long list of application and declaration requirements.

Regrettably too, AFCAC evaded the issue of eliminating the need for prior authorization (rather than mere prior notification) for nationals or companies of member states to operate non-scheduled services within their region. In providing for member states to conclude bilateral agreements for non-scheduled services purposes, the Commission did not discriminate between the necessity to conclude such arrangements with non-AFCAC member states and non-necessity to do so between member states. It simply states:

> "States should endeavour to extend existing bilateral agreements to cover provisions concerning non-scheduled operations. In so doing, states should ensure that the level of non-scheduled operations is not such as to adversely affect

scheduled air services."[100]

This plea does not dissuade many states from holding back their authorization for both AFCAC and non-AFCAC members alike to operate non-scheduled services in their territories even where such services are in the interest of African economies. Tourist and cargo traffic cannot in many cases be appropriately transported by scheduled services only. On certain routes and in certain seasons, such traffic is more profitably transported by non-scheduled services. While it is necessary to protect the scheduled services of African national carriers, allowance and facilitation should be made for genuine non-scheduled services. It should not take much persuasion to convince a state to authorize the transportation of its own traffic, which cannot be transported by its national airline, by non-scheduled operators, as it was the case with Mali, for example.[101]

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100. See: AFCAC/3 p. 83, para. 7(d); Recommendation S5-14(a) on air cargo.

101. It took a recommendation of the ICAO/UNDP Project to persuade the Government of Mali to permit charter flights to land at Bamako to transport Mali's horticultural produce to European markets outside France. See UNDP/ICAO Project RAF/74/021, op.cit., p. 19.

6.4.4 Aeronautical Satellites

The most obvious justification or need for the introduction of an aeronautical satellite system is associated with the possible inability of existing conventional techniques to satisfy more stringent requirements, or meet the need for greater capacity of international civil aviation operations. Improvements in long-distance aeronautical mobile communications, for example, are desirable to provide voice communications of better quality, reliability and the capability of direct contact between pilot and appropriate ground agencies, and to permit automated air-ground data interchange when required.

An aeronautical satellite system can increase both the capacity and the quality of aeronautical communications particularly in comparison with long-distance aeronautical mobile terrestrial communications. The introduction of new techniques such as medium or high speed data interchange with aircraft via satellite can contribute to the efficient utilization of the available frequency spectrum and facilitate the introduction of improved Air Traffic Services. The need for an aeronautical satellite system is also reinforced by new operational requirements which cannot reasonably be satisfied by the application of other techniques, for example, ATC surveillance of air traffic

over ocean and sparsely populated areas.[102]

The ICAO Panel on Application of Space Techniques Relating to Aviation (ASTRA) has developed a list of potential benefits that can be derived from aeronautical satellites. The benefits include: improved long-range communications for all traffic; direct pilot-to-controller capability; improved application of separation standards thereby improving airspace utilization; reduced workload per communications contact resulting from improved channel quality, availability and flexibility of channel (VOICE/DATA) use; and reduced workload at ground communications stations associated with present HF system.[103]

The airlines have shown interest in having one or more air-ground satellite channels provided to assure safe, efficient and profitable operation of their aircraft.[104] They have depended on transoceanic point-to-point satellite voice and data channels provided by commercial sources such as INTELSAT. Such dependence is said to create great

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102. See generally, ICAO Doc. 9004 AN-CONF/7 pp. 2-1 to 2-3.

103. ICAO Doc. 8873, ASTRA/111 at page 2-5.

104. Cf. the existence of the International Maritime Satellite Organization (INMARSAT) for the Shippinglines. On INMARSAT, see David Sagar: Annals of Air and Space Law Vol. VI (1981) pp. 586-591; Vol. VII (1982) pp. 504-509; Vol. VIII (1983) pp. 477-483.

economic penalty for supersonic aircraft operators.[105]

At the Seventh Air Navigation Conference of ICAO (Montreal 1972), some significant decisions were made in respect of the establishment of aeronautical satellites system. The conference decided that appreciation be given to those states which individually and collectively have carried out research and development in areas relevant to the use of satellites by civil aviation and that encouragement be given to all states and international organizations to carry out or to continue to carry out such research and development work, as far as possible in collaboration and to make known to ICAO the results of such work.[106] It was further decided that states and international organizations, in a position to do so, be encouraged to:

a) carry out an international programme to provide a satellite system for experimentation and system evaluation;

b) develop in a timely manner specifications of airborne equipment to operate in such a system;

c) make available to ICAO the plans, specifications and programme of the system;

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105. ICAO Doc. 8873, ASTRA/III, op.cit., pp. 2-4 to 2-5.

106. Recommendation 2/3 AN-CONF/7.

d) ensure adequate liaison with ICAO on questions of mutual interest relating to the evaluation and developmental programme.[107]

AFCAC's Participation in the AEROSAT Project

In 1971, the United States decided to establish a pre-operational aeronautical satellite above the Pacific Ocean. A group of European countries, members of European Space Research Organization (ESRO), also decided to do the same above the Atlantic Ocean. These two systems would have varied because the necessary equipment would have been different for flights over these two regions. The establishment of a global system was dependent on the ASTRA Panel of ICAO which had the task of making recommendations on the system to be used. The ASTRA Panel was dominated by Western European countries, which placed the Americans in a rather delicate position. Finally, an agreement was reached to establish a joint system called AEROSAT.[108]

The original AEROSAT draft agreement provided for a $140 million programme for the construction and launching of four aeronautical communication satellites: - two above the

107. Recommendation 2/6, ibid.

108. See Aviation Week and Space Technology, January 11, 1971, p. 19, Aviation Week and Space Technology April 12, 1971 p. 17.

Atlantic and two above the Pacific Ocean. The system was to be financed in equal parts by the USA and ESRO. They would, each having a veto power, administer the system jointly.[109]

In 1974, Canada joined the two original parties in signing a memorandum of understanding with the objective of establishing an experimental system on a commercial basis. The results of the experiment would then serve the establishment of an operational system. The United States Congress voted against that government's financial contribution to the project. An AEROSAT extended committee was subsequently formed, and participation in it was open to possible users. AFCAC sought to participate in its work.

In 1979, at the sixth plenary session (Bamako), AFCAC instructed its Bureau to take all necessary action to follow the work of the AEROSAT Extended Committee to ensure that African requirements were duly taken into consideration. The Bureau was also to report to the seventh session on the result of the studies made and if possible, on the financial implications of introducing any new techniques resulting from such studies.[110]

AFCAC's participation in the Extended Committee

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109. See Matte: Aerospace Law, p. 65.

110. Recommendation S5-28.

involved, in the first stage, the drawing up of an AF1 questionnaire which would be used to collect all the necessary information in order to present a coherent description of the existing system in the AF1 Region covering the ATS, COM, and MET fields, and to identify the major problems of the region. In the second stage, it would distribute the information gathered to long-haul user airlines and provider states of both air navigation and meteorological services following which a schedule for collecting the answers would be established. The final stage would be the analysis of the information received and the submission of the Africa-Indian Ocean Region.

The replies showed approval for the application of satellites for air navigation in the African region. There has been a great concern over the lack of efficient telecommunications systems for aeronautical purposes in the region. As a result of poor communication, there have been a number of reports of traffic incidents.[111] Satellites are necessary especially for point-to-point aeronautical telecommunications.

Unfortunately, the AEROSAT experimental project has been discontinued. The work of the Extended Committee was

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111. See paper presented at the AFCAC Seventh Plenary Session (1981) by the ASECNA Observer (AFCAC/7 - WP/35).

re-organized accordingly. However, the new orientation of the work of the Committee does not meet the objectives of AFCAC member states, thereby rendering their continued full participation in the Committee sterile.

To that effect, ASECNA proposed that a group of experts be set up to study the optimum utilization, for aeronautical purposes, of existing satellite telecommunication systems. Accordingly, AFCAC is undertaking a feasibility study of the use of existing satellites to complement aviation communications through a direct access to those satellites with the help of mini-earth stations in full consultation and co-ordination with ICAO and the Special Inter-Agency Committee (OAU/ECA/PATU/UNESCO/URTNA) on satellite communications established within the framework of the United Nations Transport and Communications Decade in Africa.[112]

Many African states are at present participating in the INTELSAT system through their respective Posts, Telephone and Telegraph (PTT) Administrations. It makes good sense in the light of the present economic circumstances of many AFCAC member states, for Africa to increase her participation in INTELSAT, for example, rather than establish a new satellite system for the exclusive use

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112. Recommendation S7-23.

of Civil Aviation Authorities. However, in view of the monopoly of the PTT Administrations over the existing systems, civil aviation authorities will have to receive PTT's authorization to have access to the satellites. It is hoped that this would not present a serious problem.

In the long run, nevertheless, African Civil Aviation Authorities will have to use a separate satellite system for aeronautical purposes exclusively. As the volume of aviation activity increases, and as the present AFTN network proves more and more unsatisfactory, the need to improve aeronautical telecommunications and meteorology will not be properly satisfied by dependence on the existing telecommunications satellites. AFCAC should remain ready to participate in any other aeronautical satellite project which distributes costs at the comprehensive level without unduly penalizing the poorest countries.

Conclusion

AFCAC's singular role in the development of civil aviation in Africa is already showing practical results. Its contribution to the training of African aviation personnel over the past years at the training centres in Africa is only one example. Its painstaking formulation of policies, as well as the efforts at harmonizing the various national aviation policies is no less laudable. However,

AFCAC does not enact policies, it only recommends them. Useful as these policies may be, there is evidence that some member states do not implement them. Some delegates at the sixth session expressed their disappointment that the recommendations proposed for adoption might not be implemented as "had been the case in the past in connection with other recommendations" unless they were referred to political authorities at a higher level to have them implemented.[113]

AFCAC is now a specialized agency of the OAU.[114] It would seem that the OAU could be the medium for political authorities at a higher level to ensure the implementation of AFCAC recommendations. Farag has even expressed the optimism that the OAU can ensure a better enforcement of AFCAC's decisions.[115] It is not an illogical proposition. But such optimism should be shared with some reservations as the OAU's record of enforcing even its own decisions is not good. Thus, it is suggested that national aviation authorities should persuade and pressure their governments

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113. See AFCAC/6 p. 30 para. 97.

114. See Agreement between the OAU and AFCAC establishing AFCAC as a specialized agency of the OAU, signed at Addis Ababa on May 11, 1978. (Appendix infra).

115. Farag George: AFCAC, LL.M. Thesis (McGill University) 1980 at p. 92.

to incorporate some of the AFCAC recommendations of great importance (especially those on technical matters) into their national aviation regulations. This way, important AFCAC decisions will be more potent and certain.

Finally, AFCAC's membership, compared to similar organizations in other regions (ECAC, LACAC, for example), is very large, and the geographical area of activity, very extensive. Moreover, the Commission has recently amended its constitution providing for its plenary sessions to be held every three years (instead of two years as before).[116] To be more effective AFCAC's administration should be decentralized to some extent to enable more of its activities to be initiated and carried out at sub-regional levels. The Headquarters at Dakar would then be concerned mainly with the co-ordination of the activities of its sub-regional offices. The Commission took a step in that direction before when it organized a series of sub-regional meetings on airline co-operation and integration. That initiative should be continued in many other areas.

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116. AFCAC sub-regional meetings. See Docs AFCAC/Airline Coop/1 (1974); AFCAC/Airline Coop/3, (1976); AFCAC/Airline Coop/4 (1977); AFCAC/Airline Coop/5 (1978), AFCAC/Airline Coop/7 (1980).

CHAPTER 7. THE AFRICAN AIRLINES ASSOCIATION'S (AFRAA's) POLICIES

AFRAA is an organization of African airlines. It was formed on April 4, 1968, at Accra, Ghana, with fifteen founding members.[1] Over the years, new members have joined, bringing the membership to over thirty-six. Like AFCAC, AFRAA has formulated some important policies on air transport in Africa. But unlike AFCAC, AFRAA's activities have not received much attention in published literature. This chapter will throw some light on the Association, but will concentrate more on the examination of some of the important policies issuing from it.

7.1 Aims and Structure of AFRAA

AFRAA is an international body incorporated at the location of its headquarters, Nairobi (Kenya)[2] and is recognized or registered in each member state as such. It is a legal entity and has the power to own property or rights, real or personal, movable or immovable, or any title

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1. Air Mali, Air Zaire, Air Afrique, Air Algérie, Air Guinea, Ghana Airways, East African Airways, Egypt Air, Nigeria Airways, Sudan Airways, Air Tunisie, Zambia Airways, Air Maroc, Ethiopian Airways, Air Malawi and Libyan AL.

2. See Article 4 of AFRAA Articles of Association.

or interest therein, and to alienate, sell, exchange, manage, develop, lease, mortgage, pledge, or otherwise deal therewith in such manner as it may determine. It also has the power, inter alia, to enter into contracts, sue or be sued, to borrow money for the purpose of the Association, to carry out the aims and objectives of the Association and to do all such other things as are incidental or conducive to the attainment of those aims and objectives.[3] French and English are its official languages.[4]

The aims and objectives of the Association are:

- 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;

- to foster closer co-operation among African air transport enterprises with the view to achieve their unity through such means like:

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

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3. Article 2.

4. Article 3.

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) 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 costs and protecting common interests of African peoples, governments and member airlines.

The Association is also 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, as well as act as a conciliatory body in the settlement of disputes and differences among members. It shall provide assistance in obtaining easier movement of passengers, cargo, mail and aircraft of member airlines and promote the more rapid development of air navigation, communication and air transport facilities in Africa, as well as foster inter-

African commerce and tourism.

Furthermore, the Association aims at working closely with organizations specializing in, or generally interested in, the development of air transport services within Africa and between Africa and other continents. It plans to establish methods for collection and analysis of data, and preparation and issuance of studies and reports on the economic and operating problems of member airlines. It shall also do all other acts which are incidental, auxilliary or conducive to or are capable of being carried out in conjunction with the provision of air transport services to, from or within Africa.[5]

Although it is the policy of the Association to encourage every African airline to join it, applicants for membership must meet certain qualifications. 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 of the Organization of African Unity, 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. Any airline operating domestic air services in the carriage of passengers, cargo or mail whose annual

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5. Article 5.

production is no less than two million ton/km, registered in a state eligible for membership of the OAU, and whose capital of not less than 51% is owned by such state, or group of such states, shall be eligible for associate membership.[6]

It may be interesting to note the criterion for qualification which simply requires a state to be eligible for membership, and not necessarily be a member of the OAU. This can be very helpful in a case where an airline is registered in a state which later decides, of its own volition, to withdraw from membership of the OAU. If Morocco had withdrawn from the OAU as she threatened to over the Western Sahara issue, Royal Air Maroc would remain a legitimate member of AFRAA because Morocco is prima facie eligible for membership of the OAU.

However, there seems to be a serious omission in the case of associate membership. Whereas an airline, operating international services whose majority shares are held by the state or states or individuals of the state or states qualified for OAU membership, is eligible for membership, in the case of associate members (the domestic carriers) the majority shares must be held by the State or States only. In other words, a private domestic airline

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6. Article 6(1) and (2).

cannot qualify as an associate member even where its majority shares are held by private African citizens. One cannot see the rationale for such discrimination. It can only be explained as an omission, and the article should be amended accordingly.

It will be noted further that unlike the IATA articles which spelt out membership as open to scheduled international carriers, the AFRAA articles do not discriminate between scheduled and non-scheduled carriers in the qualification for membership. It can, therefore, be said that AFRAA membership is open to both scheduled and non-scheduled carriers.

Members of AFRAA have certain obligations and duties. They have a duty to implement the provisions of the Articles of Association, to participate in the activities, pay membership fees and dues and perform such assignments as may be directed by the General Assembly or the Executive Committee. They are obligated to implement the decisions and resolutions of the General Assembly.[7] A member who is in breach of these duties and obligations may be suspended from the Association or its membership may be terminated.[8]

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7. Article 6(7).

8. See Article 6(5) on Suspension and Termination of

The organs of the Association are the General Assembly, the Executive Committee, the Secretariat and the Standing Committees.[9] The highest authority of the Association is vested in the General Assembly which has the power to elect members of the Executive Committee; confirm the appointment of the Secretary General; and receive nominations and determine the membership of Standing and any ad-hoc committees, as well as receive and consider their respective annual and other reports.[10]

The General Assembly is composed of duly accredited representatives of all member airlines. General Assembly meetings are held annually at a place and time determined by it. Extraordinary meetings may be called at any time.[11]

Each member airline has a right to cast one vote only. There is no mention in the articles on the status of the vote of an associate member. Is it as weighty as the vote of a full member? Since there are no provisions on the

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membership.

9. Article 7.

10. See Article 8(2) for the powers of the General Assembly.

11. See Article 8(5) on Procedure for calling General Assembly Meeting, and criteria for calling an Extraordinary Meeting.

separate rights and duties of the associate-members in the articles of association, one would conclude that all reference to members' therein includes associate-members.

The Executive Committee consists of seven members: the president, first and second vice presidents, and four committee members. The Secretary General has to attend all meetings of the Executive Committee. Members are elected from the Chief Executive Officers of member airlines. The Executive Committee has the powers and duties to supervise the affairs, funds and property of the association, and to formulate and determine policies within the framework of the Articles. The appointment of the Secretary General and the enforcement of the provisions of the Articles are also the responsibilities of the Executive Committee.[12]

The Secretariat is headed by a Secretary General who is appointed for a term of five years, renewable at the end of each term for another term of five years. He is assisted in his functions by such staff as may be employed by the Association. He is the Chief Executive and Administrative Officer of the Association and his duties are supervised and controlled by the Executive Committee. He is responsible for the day to day management and control of the affairs, funds and property of the Association, as well as

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12. See generally, article 9.

the co-ordination of the activities of the Standing and ad-hoc committees. He also records the proceedings of the General Assembly and Executive Committee meetings.[13]

Standing and ad-hoc committees are established on various subjects as determined by the General Assembly upon the recommendation of the Executive Committee. These Committees make their own rules and procedures of operation.[14]

7.2 Policy Issues

7.2.1 The 11th Assembly Resolutions

In a supplementary report to the 11th Annual General Assembly, the Executive Committee, after reviewing the various recommendations contained in the reports of the Standing Committees, and also taking into account the decisions that were accepted in past Annual General Assemblies, summarized in resolution form certain decisions. The Annual Assembly adopted them. The resolutions covered, inter alia, joint operations of AFRAA airlines, joint insurance, collective sub-contracting, joint overhaul and maintenance, and joint fuel purchase.[15]

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13. Article 10.

14. Article 11.

15. See Report of 11th Annual General Assembly (April 1979)

Joint Operations of AFRAA Airlines

This plan is motivated by the need to consolidate intra-African services, bearing in mind the steady rising cost of operations and the benefit of joint operations of member airlines. It was decided that on intra-African services operated by more than one AFRAA member, operating members should enter into cost and revenue pool agreements for the purpose of offering the public sufficient capacity, reliable and efficient services on the one hand, and reduce costs and eliminate unhealthy competition among members - through over capacity, price wars, etc., on the other hand. Where a member is operating alone without Fifth Freedom rights between two other member countries, the national carriers of those two countries should use that opportunity to enter into agreements such as purchasing of block space and/or operating on common basis with specific flight numbers.[16]

So far, one route, the East-West, is jointly operated by Air Afrique and Ethiopian Airlines. Cameroon Airlines and Nigeria Airways have expressed their desire to join the group. This policy can provide some solution to

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held at Lusaka, Zambia.

16. Ibid., page 15.

some national airlines which are experiencing difficulties on certain routes. For instance, Air Mali can co-operate with Air Algerie, Tunis Air, and Royal Air Maroc on their European route; or/and it can co-operate with Air Afrique and Nigeria Airways on its regional route.

Another joint venture of interest is the agreement concluded between Kenya Airways and the Seychelles Government.[17] In the agreement, Kenya Airways will provide regular air services between the Seychelles and Europe. Two European carriers operating on the Europe-Seychelles route will cease their weekly flights to the Seychelles. It seems that it is the Seychelles which made the first approach to the Kenya Airways in an effort to boost her tourist industry since the Seychelles does not have an international carrier. It would also seem that the various European countries concerned had to give their consent to the agreement to avoid problems that could arise in respect of traffic rights. However, henceforth other small states which would like to follow the example of the Seychelles would find their position greatly facilitated by the recent ICAO Assembly Resolution 18/2 (See Chapter 10, infra).

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17. See AFRAA Bulletin No. 31, January 1983.

Joint Insurance

The Legal Committee was charged with studying the implications and workability of a joint insurance scheme for African airlines. Such an insurance scheme would cover aircraft hull, passengers, mail and cargo, and third party. One obstacle was identified; it would be difficult to insure jointly through any of the existing insurance companies in Africa since they are owned by the respective governments who have directed their national airlines to insure only through the local national companies who then re-insure with overseas brokers.

But considering the high rates of premium being paid at present by African airlines to insurance companies and having regard to the economic and financial gains to be realized if African airlines pooled their resources together, the scheme should be pursued. Accordingly, it was resolved that member airlines subscribe to the joint insurance scheme. The Secretary General was then requested to take appropriate action if necessry at the level of regional African Insurance Organization, and obtain the best terms of insurance premium possible for AFRAA members.[18]

18. Report of 11th Annual General Assembly, op.cit., p. 14.

Collective Sub-Contracting, Joint Overhaul and Maintenance Base

The majority of African airlines which have not yet acquired maintenance bases and overhaul shops are obliged to sub-contract the maintenance and overhaul of their aircraft and equipment to non-African servicing companies. The cost of these services, particularly that relating to labour, is very high. Furthermore, in negotiating maintenance agreements one has to take into account the amount of equipment to be overhauled, a consideration which lends support to the need for African airlines to take joint action, to pool their combined potential in maintenance and overhaul facilities.

AFRAA has set a bargaining group reflecting the existing fleet and equipment, to contact and negotiate with appropriate servicing companies in their operational areas, in order to agree on behalf of members on the best economic terms (cost and transport) for the maintenance and overhaul of their equipment. The bargaining group is required to present before the Annual General Assembly a comparative study of the different offers made and advise on the best offers accepted. The group is directed to give priority to the sub-contracting of the maintenance and overhaul of such high cost equipment as engines.

In addition, Working Groups have been set up by the

AFRAA Traffic Committee to study the possibility of either collective sub-contracting of handling requirements or the establishment of jointly owned handling companies at Paris, London and Rome airports.[19] Not less than twelve AFRAA member airlines fly to Paris. They could reap financial and marketing benefits if they undertook their handling requirements collectively. The Working Groups have been mandated to look into all aspects of collective sub-contracting, especially the potential commercial and financial advantages. Phase two of the study will examine the question of establishing jointly owned handling companies. Members separately contracting their commercial handling requirements at non-African airports will be persuaded to do so jointly with other members.

Be that as it may, collective sub-contracing abroad in respect of maintenance and overhaul should be seen as a temporary expedient. The ultima ratio should be the establishment of joint maintenance and overhaul bases for African airlines in Africa. This is what has occurred in Europe under the organizational framework of ATLAS and KSSU.

Five airlines - Alitalia, Lufthansa, Air France, Sabena and Iberia, make up ATLAS for the purpose of maintenance and overhaul of their wide-body aircraft (B747, DC-10 and Airbus). Air France is responsible for the

19. See AFRAA Bulletin No. 24, February 1982.

servicing of B747 air frames and all General Electric engines, while Alitalia takes care of the DC10. Pratt and Whitney engines of all the aircraft are maintained by Lufthansa. KSSU consists of KLM, Swissair, SAS and UTA. This group does more than joint maintenance and overhaul of their fleet - the members also co-operate in technical and commercial matters. Neither ATLAS nor KSSU has a separate legal personality distinct from those of the respective member airlines.[20]

The states of registry of these airlines groupings are not relieved of their respective international responsibilities under the Chicago Convention by these technical arrangements. Articles 29(b) and 31 of the Convention, read together, place responsibility on the state of registry to see that the aircraft of its nationality is in a state of airworthiness while engaged in international air transportation. Therefore, the ministries of transport of the states concerned with these two arrangements have formed supervisory groups to ensure that the aircraft are regularly and properly maintained under their voluntary groupings. Thus, there is the ATLAS Airworthiness Authority

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20. See Joan Feldman: "Regionalism facing many challenges..." Air Transport World, August 1983, pp. 49 and 52, Weber, L.: European Integration and Air Transport LL.M. Thesis (McGill University) 1976 op.cit., pp. 106-107.

(AAA) to supervise ATLAS and NSSF (Netherlands, Switzerland, Scandinavian Countries and France) to supervise KSSU.

It will also be pointed out that the state of registry may not, where third parties are concerned, shift her responsibility to the state of maintenance.[21] For example, where a third party suffers damage as a result of the faulty maintenance of a Swissair aircraft by Air France, Switzerland, not France, may be held responsible. But the Swiss government supervisory agency may ask its French counterpart to indemnify it for the latter's negligent or faulty supervision.

Africa can borrow a useful cue from the European arrangements and set up regional overhaul and maintenance bases for AFRAA member airlines. But they will have to sort out a few things first - whether to establish such bases on the premises of aircraft types or aircraft parts. In either case, there are some problems.

A study of African airlines' fleets shows a considerable diversity.[22] There are jet, turboprop and piston aircraft. Almost half the jets are operated by Northern African carriers and Eastern African carriers. The

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21. See Article 83 bis, Chicago Convention.

22. See ITA Study 1981/No 11, p. 33 et seq. The text that follows is taken from that study.

jets used most are the B.737, the B.707 and the B.727. Boeing thus accounts for almost three-quarters of the market, followed by European jets and then McDonnell Douglas. The Boeing 747 fleet has almost doubled in the past five years. Air Algerie has been operating a B.747 since 1979, Royal Air Maroc, since 1978, Air Gabon also since 1978, and Air Madagascar, since 1979. Recent acquisitions are found in the fleets of Air Afrique, Cameroon Airlines and Nigeria Airways. South African Airways has been operating the wide- body aircraft since 1976. Today it has about thirteen B.747 in its fleet.

The Caravelle has almost disappeared from African airline fleets, since of the twenty in service in 1976, only about five remain today. About seven DC-10s are operated by West and Central AFrican carriers, and eleven A.300 aircraft operated by Egyptair, Air Afrique and South African Airways. There is a substantial number of F-28s. Cameroon Airlines and Air Gabon have included a number of Hercules (C-130H-30s and L-100-30s) to their fleet. For the USSR-built aircraft, about nine are in service: five 1L-76s by the Libyan Arab Airlines, three Yak 40s by TAAG Angola and one Yak 40 by Air Guinea.

The turboprop and piston aircraft are especially concentrated among Eastern and Western Africa carriers. Four types of aircraft, the F-27/FH-227, the DHC-6, the DC-3

and the HS 748 account for over 70% of this type of aircraft fleet. The USSR-built turboprop fleet are operated by TAAG Angola (four AN-26s) Air Guinea (three AN-12s, three AN-24s and three IL-18s) and Air Mali (one AN-24 and one IL-18).

With these diversified fleet types, it will not be easy to establish common maintenance and overhaul bases. The other possibility is to establish bases for the maintenance and overhaul of aircraft parts. With the present poor route connections, a problem could arise in transporting, for example, a 747 engine from Madagascar to a base in Morocco for maintenance or overhaul. Where the aircraft parts are of varied specifications as they exist today, there can also be a problem.

These are the preliminary issues to be settled before common maintenance and overhaul bases can be established in Africa. African carriers will have to limit their fleet acquisition to an agreed number of aircraft types which must meet Africa's needs. They will further have to encourage and comply with AFRAA's efforts to standardize the specifications for wide and narrow-body aircraft. So far, AFRAA has made available a specification guide for use by prospective buyers of the B.747, 737-200 and the McDonnell Douglas DC-10. Another guide is expected to be prepared for the Airbus-310 and 300, Boeing 767, 757

and 737-300, as well as the MDF.100.[23]

Joint Fuel Purchase

Another area of joint efforts concerns fuel purchase. Air transport economists estimate that fuel prices consitute about twenty to twenty-five percent of the total airline operation costs. This is a disturbing fact particularly as African states were among the worst affected by the world wide energy crisis before the oil glut. Another startling fact is the wide disparity found in the prices being paid by African airlines at different fuel stations of member countries and from the same suppliers.

The General Assembly of AFRAA considered a report submitted by the Economic and Finance Committee on the advantages to be gained by member airlines through a joint fuel purchase venture and passed a resolution. It was resolved that member airlines should come into a basic agreement for the purchase and uplift of fuel. They should also conclude an agreement with an oil supplying company at each station served for the purchase of fuel at the lowest possible price for members to enjoy. For stations within Africa, as a matter of urgency, the national carrier is vested with the responsibility of negotiating and securing

23. See AFRAA Bulletin No. 23, January 1982.

the joint fuel purchase for and on behalf of member airlines.[24]

Standard Syllabi and Common Personnel Licensing

AFRAA has developed standard syllabi for all classes of aviation professionals whose work requires government licensing.[25] The syllabi were designed to suit the training to the African situation while maintaining the highest possible standards acceptable to ICAO. Another objective of the exercise was to help in the task of creating common personnel licensing in Africa.[26]

In 1981, the Association published its standardized syllabus for the training of flight dispatchers. This came after the publication of the pilots and technicians training syllabi which received the approval of AFCAC in 1979. A syllabus for the training of cabin crew and other commercial personnel has also been published.

However, the task of supervising, preparing the curriculum of and determining standards for the training

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24. Report of AFRAA 11th Annual Assembly, Lusaka 1979, op.cit., page 16.

25. See Article 32 of the Chicago Convention obliges contracting states to license their aviation personnel.

26. See AFRAA Bulletin, No. 23, January 1982, op.cit.

centres is the jurisdiction of the different national aviation authorities, not the airlines. The standard syllabi can only act as useful guidelines, but the authorities of the centres concerned are not bound to implement these unless they are directed to do so by their aviation authorities. Hence, it has been reported that the Zaria (Nigeria), Rabat (Morocco) and Embaba (Egypt) training centres have not been following the AFRAA designed Syllabi because, inter alia, their respective civil aviation departments have not directed them to do so.

To ensure that AFRAA's valuable efforts in this area are not in vain, the Association should co-opt the support of AFCAC which represents the different national aviation departments. Such was the case when representatives of AFRAA and AFCAC licensing experts met in Addis Ababa in March 1981, to jointly work out a draft recommendation for common personnel licensing in Africa. The recommendation was then presented to the AFCAC Assembly for approval and implementation by African states. The value of that recommendation, undoubtedly rests largely on AFRAA's work at evolving standardized syllabi for all classes of aviation professionals requiring licensing.

Until then, Africa's aviation personnel licensing had been a victim of the prejudices of Africa's different colonial cultures. As a result, the exchange of aviation

personnel was severely hindered. A pilot, for example, licensed by a francophone African state could not be allowed to fly an aircraft registered in a neighbouring anglophone state. The same applied to maintenance technicians, flight engineers, and flight dispatchers. To get around such an anomaly, a professional had to acquire a foreign license usually from Europe or the United States, because these licenses were generally accepted by African states.

7.2.2 The Grid System

In a closing speech at the AFRAA 11th General Assembly (1979), the Zambian Minister of Power, Transport and Communications, General Kingsley Chinkuli, made two points. First, he deplored the fact that African nations, after many years of self-rule and independence, still depended on the former colonizing countries to provide communication links for them. Second, he stressed the urgent need to improve intra-Africa air transport schedules so that air traffic from "countries that are next door to each other should not first have to go to Europe before they can reach their African destinations."

AFCAC organized a seminar at Addis Ababa from November 29, to December 3, 1982, on the Optimum Development of Air Services in Africa. One of the principal speakers at the seminar was AFRAA's Secretary General, Semret Medhane.

He revealed a plan conceived by his Association that could bring about easy access by air throughout Africa. It is an African Capital Air Link Plan called the Grid System, a system which is said to find logical support from the experience of the air route structure of North America, in contrast to that of Europe.[27]

North American and European Route Structures Compared

In North America, through regulatory control by Federal governments, Eastern gateway cities such as Montreal, Boston, New York, Washington, Miami, etc., and Western gateway cities such as Los Angeles, San Francisco, Vancouver, etc., came into prominence. In the mid-continent, a limited number of gateway cities such as Chicago in the North and Houston in the South, etc., followed suit. East/West and North/South trunk routes were operated between these gateway cities touching most of the cities of North America. These routes collected and disseminated continental traffic while at the same time

27. See generally, Semret Medhane: "Optimum Development of the Air Routes Network - The AFRAA Grid System and the Possibilities for Dramatic Improvement in Air Connections between African Cities", paper presented at AFCAC Seminar (Addis Ababa, 29 November - 3 December 1982). The text following is mainly a summary of that address.

making the preferred gateways effective hubs for trans-oceanic services.

The process gradually smoothed out to less landings per route, while maintaining high frequencies, with enormously increased traffic. More gateways were subsequently opened when saturation of airspace at the old hubs, on the one hand, and suitably modest capacity long haul aircraft, on the other hand, became the norm. As a result, North America boasts of a highly effective and efficient air route system.

Europe is a different case. The many national entities embarked on the establishment of national airlines and concluded numerous bilateral air services agreements. These agreements provided for Third and Fourth Freedom operations, leading to as many hubs as there are capital cities and more. The aircraft utilized became relatively smaller, routes shorter, and air travel more disjointed - the end effect being higher costs of operation, higher fares and a lowering of services than would have been the case were Europe able to follow the North American example.[28]

Unfortunately, Africa followed the European

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28. It should be noted however, that Deregulation in the US has significantly altered the pattern, so much so that the US is operating at present the hub system like Europe rather than the Grid System.

example. The Grid System was advocated as the means to change the course, through co-operation, towards the North American system. The consequences of failure to change course will be higher costs of air transport production, reduced level of convenience and a lower pace of continental development. Point to point and non-stop services between each and every African major city is impractical.

Under the Grid System, basically four East/West routes are planned:

- The North band connecting Cairo, Tripoli, Tunis, Algers and Casablanca.
- The Sahelian band connecting Djibouti, Addis Ababa, Khartoum, N'djamena, Niamey, Ouagadougou, Bamako, Conakry, Bissau, Banjul, Nouakchott, Dakar and Praia.
- The Equatorial band connecting Seychelles, Dar es Salaam, Kigali, Bujumbura, Kampala, Mogadishu, Bangui, Douala, Lagos, Cotonou, Lome, Accra, Abidjan, Monrovia, Freetown.
- The Southern band connecting Mauritius, Comoros, Antananarivo, Maputo, Mbabane, Maseru, Gaberone, Windhock, Blantyre, Harare, Lusaka, Luanda, Kinshasa, Libreville, Sao Tome and Bata.

All capitals or major cities of Africa lie on these four bands, or on variations of them, and most or nearly all of these cities can be directly connected to one another

from East to West and vice versa. If daily flights, using the most appropriate equipment, are guaranteed on each band in both directions, any landing at one of the cities on the band will open connections to all the cities on that band. If Air Madagascar, for example, lands in Djibouti on its flight from Antananarivo to Paris, it will bring the other cities in the Sahelian band in direct connection to Antananarivo. If the same flight lands in Tripoli, the other four cities of the Northern band will likewise come on the line. Similarly, if all the African carriers which operate to Europe, choosing their transfer points in Africa, were to increase the number of landings of their European flights, an average multiplying factor of three to five connections per landing should be attainable on either side of the flight segment.[29]

A proposed pattern of operation of the East/West routes is day flights westward and night flights eastward. This gives the advantage of longer daylight operation by the time differences between East and West Africa. There is more than four hours time difference between Dakar (Senegal) and Mogadishu (Somalia) and more than five hours between the Seychelles and Cape Verde. Times of departure of West bound flights could be progressively delayed from Southern Africa

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29. See AFRAA Bulletin No. 10, 18th August 1978, p. 22.

to Northern Africa so that connections could be made with the North bound flights.

The success of the Grid System will depend mainly on two factors: government and airline policy harmonizations. Government policy in all areas of traffic rights, tariffs, transfer of funds and aviation safety will have to be harmonized. And so should airline policy in respect of equipment, personnel training, technical activities at airports and commercial operations.

Traffic rights will have to be exchanged among African states in a manner which is conducive to the realization of the Scheme. Where the rights are not controversial or non-commercial such as the First and Second Freedom Rights, a uniform and permanent solution such as the adoption of a multilateral agreement as recommended by the African Civil Aviation Commission, should be reached by African states. It will be easier to follow such a course if provisions are made for reasonable state security and if such rights are granted for pre-agreed and economically viable airways and airports. The implementation of AFCAC Recommendation S5-16 (which deals with First and Second Freedom Rights) by member states[30] will be highly desirable - and so should the recommendations concerning the

30. See Chapter 5, supra.

other four types of freedom rights.

Fifth and Sixth Freedom Rights in particular should be treated in such a way that a conducive atmosphere for investment in the Grid System is created and maintained. Liberal exchange with various formulae to safeguard the interest of passive partners on the East/West routes is highly recommended. On the North/South routes, where traffic to and from Europe is recognized as very significant, a recognition of Sixth Freedom traffic values by those countries occupying relatively advantageous geographical locations should enable them to compensate the others by granting Third, Fourth and/or Fifth Freedom Traffic Rights to points within or even outside Africa on non-reciprocal basis. In the absence of this consideration, countries occupying less advantageous geographical positions will continue to maintain a defensive posture on Third and Fourth Traffic Rights which inhibits effective connection between the regional East/West routes.

It is also highly desirable for governments, through AFRATC, to agree on intra-Africa tariffs that will not adversely affect the growth of traffic and increase in frequencies envisaged in the Grid System. The airlines will have to maintain the appropriate tariffs to sustain the system under economically viable conditions. More importantly, the problem faced by African carriers regarding

the transfer of funds earned from one African State to another must be solved. Governments will have to give high priority to the remittance of funds in hard currencies since the resources by African airlines for the production of air transport in the region are almost entirely in hard currency.

The effect of safe air routes, approach and landing systems or the disastrous consequences of unsafe or uneconomical systems cannot be ignored. Whatever efforts expended and investments made on the Grid System, if facilitation at airports remains sloppy, the desired goals will not be achieved. The system was conceived on the basis of an increasing number of air passengers and cargo as well as the ability of such traffic to make the necessary connections at other airports before arriving at their ultimate destinations.

The airlines, on their own part, will be required to make concerted efforts to standardize their equipment and their personnel training. The maintenance of their short and medium haul as well as certain basic ground equipment, re-inforced by the expectations of the passenger and shipper at the various transfer points, the load imposed on airport authorities and the convenience for aircraft exchange among the airlines to make the system work at its maximum, will be significantly improved through standardization.

The employment of local personnel at all major African airports reduces the cost of production of air transport and enhances the economic activities of the countries in which the airports are situated. Standardization of the training provided to various technical, operational and service personnel of African carriers will further enhance the success of the plan. In this respect, it will be necessary for AFRAA airlines to co-operate among themselves as well as with the member governments.

Finally, commercial co-operation is essential. There are two main areas where it is called for: - handling of passengers and cargo at all African airports; and working out agreements that enable the use of a single air equipment on routes of two or more airlines. Working out an arrangement that can bring about acceptable and lasting joint ventures among African carriers is not easy. But it is an inescapable reality they must come to terms with if they genuinely hope to operate the Grid System.

There is a low-key working arrangement going on among a number of African carriers at Nairobi airport that is inspiring and worth encouraging and copying by others.[31] The airlines concerned are Sudan Airways,

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31. The working arrangement does not constitute Nairobi a

Cameroon Airlines, Air Zaire, Air Madagascar and Zambia Airways. The others are Kenya Airways and Ethiopian Airlines. All but the last two operate a fleet of B.737 equipment on their respective Nairobi routes. The B.737 operators provide spare parts, Kenya Airways provides warehousing and technical manpower is provided by Ethiopian Airlines for the whole group. The arrangement has been working successfully, but the benefits would have been even greater were all the members operating one type of equipment.

7.3 Relations With Other Bodies

It will be remembered that one of the stated objectives of AFRAA is to work closely with organizations specialized, or generally interested in the development of air transport services within Africa and between Africa and other continents (Article 5 of AFRAA's Articles of Association). AFRAA has been attending the sessions of those organizations as an observer. In one of the AFCAC sessions AFRAA stated that it should be regarded by AFCAC and the OAU as a positively complementary body and a source of an essential and collective point of view of African

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maintenance Base. Maintenance of the aircraft is done by Ethiopean Airways at its base in Addis Ababa.

airlines that should help in arriving at a realistic crystalization of policies in general, and in the serious efforts being made in the healthy and balanced development of the infant aviation industry in Africa.[32]

AFRAA's relation with the OAU is in the process of being raised from an observer status to that of a specialized agency.[33] This development can have a double-edged effect. Such promotion will bring the OAU's political weight behind AFRAA's decisions and give them added force and effect. The OAU too will profit in this way as its economic policies will be more felt in the operation of air transport services. However, as a specialized agency, the unhealthy political dissensions that are prevalent in the OAU may spill over into AFRAA and hamper the effectiveness of its purely economic and commercial activities. One can understand the prudence in AFCAC, which co-ordinates the activities of the various national aviation departments of African states, becoming a specialized agency of the OAU, but one cannot easily discern the wisdom in bringing AFRAA, whose membership comprises, or should comprise, both state and private African airlines, and whose

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32. See AFCAC/3 (Appendix 6, Min. 2) p. 136.

33. See AFRAA: Some Basic Informative Facts, (a release from the AFRAA Secretariat), at page 6.

activities are mainly economic and commercial, under the direct influence of a supra-governmental institution - the OAU. It should be appreciated that whereas AFCAC is basically an inter-governmental body, AFRAA is a private Association, albeit the fact that most of its member airlines are state-owned.

Relations with IATA, ECA and ITA are also good. AFRAA is certainly not a diminutive of IATA, but some of their goals and objectives are similar. They have, therefore, worked together in instances such as the setting up of a monitoring programme for the Africa-Europe region, data collection systems on traffic costs, and the organization of seminars like the one for African aviation officials. At the Second IATA/WTO Joint Conference held at Mexico in 1977, AFRAA's Secretary General was elected to chair one of the three committees.[34]

As mentioned earlier, ECA assigned some of its projects under the Transport and Communications Decade in Africa to AFRAA for management. ECA also entrusted AFRAA with the responsibility of making a comprehensive air transport study for the ECOWAS. AFRAA is a member of the Institut du Transport Aérien (ITA). The ITA's studies on

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34. See AFRAA Bulletin No. 10, 18th August 1978, op.cit., p. 10.

world air transport trends and scenarios are of immense benefit to AFRAA.[35] In 1982, ITA invited AFRAA's Secretary General to sit on the ITA Board, in an effort to further internationalize the make-up of the Board and increase the Institute's audience throughout the various regions of the world.[36]

Conclusion

AFRAA's first obligation is to protect the interests of its member airlines. In carrying out this legitimate obligation, it should be careful not to allow the exercise to be destructive of the objectives set by those who established the airlines which constitute its membership. Most of the AFRAA airlines are state-owned, established primarily to be instruments of development of their national economies. Maximum profit-making by such airlines is not an overriding consideration for their operation. Before AFRAA works itself into a frenzy about cases of alleged air fare discounts,[37] for example, it

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35. See for example, "The Air Transport Situation and Prospects in Africa" by an ITA Group (ITA Study, 1981/No. 11 and ITA Study, 1982/No. 1).

36. See AFRAA Bulletin No. 25, March 1982.

37. See AFRAA Bulletin No. 29, November 1982, and AFRAA Bulletin No. 31, January 1983.

should pause and reflect on the effects such discount fares could have not only on the African airlines, but also on the African economy in general.

AFRAA cannot controvert the fact that its members do not have enough resources to stimulate tourism in Africa, which is one of the reasons Africa accounts for a very small share of the world's tourist traffic. Would AFRAA not be doing a dis-service to the African economy if it discouraged some resourceful foreign carriers from discounting the existing Africa's record high fares and boosting tourism in effect? Of course, one is not oblivious to the fact that such an exercise should not be pursued to the point where small African airlines will eventually buckle under the weight of large unscrupulous foreign airlines. Nonetheless, one would believe that AFRATC, rather than AFRAA, is in a saner position to draw the line between what is good for Africa's economy and what is safe for African airlines in such cases.

Most members of AFRAA were established partly as public utilities, and are expected to render some public services. AFRAA, therefore, cannot and must not operate on lines similar to its counterparts elsewhere. The Air Transport Association of America (ATA), for example, can afford to guard the economic interest of its members so zealously because it operates in a society where consumers

are adequately protected under well established and defined consumer laws. The average African passenger or shipper is in a much weaker position vis-à-vis the African carrier. This is the main explanation for the very few cases and small claims made against African carriers by their African clients.[38]

Finally, while it is proper for AFRAA to protect its fledgling members against very strong foreign competitors, nevertheless, protection should not encourage complacency or abate lack of competitive spirit. African airlines must be reminded of what the AFRAA Secretary General said at the 1982 Nairobi meeting:

> "Protectionism ... may be necessary ... In the long- term ... we can't exist solely to protect ourselves ..."

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38. During this author's research tour of Africa (February to May, 1983) he interviewed a high official of a Nigerian air freight company about any cases - in or out of court - brought up by clients against the carrier. He was told there were none, even though it was admitted there had been some instances where consignments had been damaged or there had been partial loss.

CHAPTER 8. NATIONAL POLICIES ON ESTABLISHMENT AND OPERATION OF AFRICAN AIRLINE COMPANIES

8.1 Ownership of International Airlines

International policy in respect of ownership of the major air carriers is varied. The United States is an exceptional country where air carriers are completely private-owned.[1] In some countries there are both state-owned and private-owned international carriers operating side by side. In Britain, British Airways is state-owned while British Caledonian is private; in Canada, Air Canada is state-owned while CP Air is private; and in France, Air France is state-owned while UTA is private. There is also a variation even in the state-ownership approach. Airlines such as KLM, Lufthansa, Sabena, SAS, have majority state ownership with significant private ownership. On the other hand, Japan Airlines, Swissair, and Varig (Brazil) have majority private ownership and minority state ownership. Then there are those airlines which are

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1. In the exercise and performance of its powers and duties under the US Federal Aviation Act of 1958, the CAB shall consider, inter alia, as being in the interest and in accordance with the public convenience and necessity, the promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry. Section 102(a)(11) (72 Stat. 740, as amended by 91 Stat. 35, 49 U.S.C. 1302).

entirely owned by the state. Aeroflot (U.S.S.R.) and Qantas (Australia) are some examples.[2]

The general impression one has of African international airline companies is that they are state-owned. However, except for a few cases, for example, Air Guinea, a majority of them are not completely state-owned. Ominously, one seems to discern that most African governments have allowed only foreign private participation in the state-owned airlines. Thus, Alitalia owns up to 49% of Somali Airlines, Air France has reasonable shareholdings in Air Madagascar, Air Comoroes, Tunis Air, Royal Air Maroc, Cameroon Airlines and Air Djibouti. UTA owns significant interests in Air Afrique.

In this chapter, some sampled cases will be examined to illustrate a number of points: Cameroon Airlines is a state-owned airline with significant foreign participation; Nigeria Airways is a state airline co-opting indigenous private participation; Kenya presents a situation where private-owned domestic carriers supplement the state carrier, Kenya Airways; and Air Afrique is a co-operative venture. Finally, the proposed formation of a pan-African airline (or airlines) will be studied.

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2. For more information, See Gidwitz, The Politics of International Air Transport, op.cit., pp. 6-14.

8.2 Cameroon Airlines (Camair)

Historical Background

On October 1, 1961, the former French and British Cameroons re-united to form an independent Federal State, which later became a United Republic in May 1972. Before independence, air services to, from or within the territory were operated by French and British companies. On the attainment of independence, the Government decided to establish a national airline. However, it opted to achieve that goal by signing the Yaoundé Treaty of 1961 which created the multinational airline - Air Afrique.[3]

Cameroon assigned to Air Afrique its domestic routes and designated it under her bilateral air agreements. However, a tiny domestic carrier, which was completely foreign owned, called Air Cameroon, was established at that time to service the small domestic routes which Air Afrique could not serve.

In 1971, Cameroon pulled out of Air Afrique. She gave two reasons for the action. The provisions of the Yaoundé Treaty were no longer scrupulously observed, and the

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3. For details on Air Afrique, see infra, section 8.6.

functioning of the multinational airline was unsatisfactory, she claimed. After denouncing the Yaoundé Treaty, the Government submitted a bill to Parliament for the creation of Cameroon Airlines. The bill was passed and in July 1971, the airline was established.

But the new airline needed assistance to operate safely and efficiently. The Cameroon Government fell back to the 1960 Franco-Cameroun Co-operation Agreement which stipulated that in a case like the establishment of an airline, Cameroon could call on France to give assistance. Air France was accordingly chosen as the instrument to provide the necessary assistance.

Capital Investment

The initial capital of the airline was set at 1,500 million francs CFA[4] consisting of 30,000 shares of 50,000 francs each. The Cameroon Government held 70% of the shares, while Air France held the remaining 30%. No shares were offered to the Cameroon private sector. The management board was made up of nine Cameroonians and four French men. Ahmadou Mouliom Njifendjou was appointed the first President/Director General.

In February 1973, the capital was raised to 2,900

4. 50 francs CFA is the equivalent of 1 French Franc.

million francs; in August 1979, it was further raised to 6,000 million. Following yet another raise in March 1982, the company's capital now stands at 6,700 million francs CFA, made up of 120,000 shares of 50,000 francs each. Air France's shares have dropped to 25% while the Government's shares have gone up to 75%[5]. Air France was not required to give up some of its original shares. The Government simply acquired the extra shares accruing from the increased capital. Air France's share therefore diminished in ratio to the new capital. The device to reduce the extensive foreign holdings in a state corporation is prudent and should continue to be used.

Fleet

Cameroon Airlines started with a Boeing 737 acquired from Air France, a Boeing 737 medium haul from Air Lingus (Irish Airlines) a DC-4 from Air Niger and two other small aircraft it retained from Air Afrique and the former Air Cameroon. Then began the programme to build the fleet. In 1972, two Boeing 737s and a Boeing 707 were acquired directly from the American manufacturer. A Twin Otter (DHC-6) was acquired in 1974 and another Boeing 737 was purchased in 1977. In April 1981, a Boeing 747 Combi long

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5. See: Dimension (Revue De Bord) Cameroon Airlines, pp. 9-14.

haul was acquired and in 1982, a Hercules 748-2A and a Super Hercules all cargo were bought from the Canadian manufacturer, De Havilland.

Route Network

The long haul network consists of Douala-Paris-Douala; Douala-Marseille-Paris-Douala; Douala-Rome-Douala, which is operated in a pooling arrangement with Alitalia. The airline also flies Douala-Rome-Geneva-Douala, and Douala-London (via Rome)-Douala.

The regional network is made up of Douala-Libreville-Douala; Douala-Libreville-Brazaville-Douala; and Douala-Yaoundé-Banqui-Douala. Other routes are Douala-Malabo-Douala; Douala-Lagos-Cotonou-Abidjan-Douala; Douala-Yaoundé-Ngoundere-Garoua-Maroua-N'djamena-Douala. Finally, there is the trans-African route of Douala-Kinshasa-Bujumbura-Nairobi, with a return by Bujumbura-Kinshasa-Douala-Lagos-Cotonou-Abidjan-Douala. In 1979, the airline suspended its services on the uneconomic routes to Addis Ababa, Monrovia, Accra and Dakar.

The domestic points served are Douala, Yaoundé, Maroua, Garoua, Ngoundere, Batouri, Bertoua, Bafousam, Foumban, Bali, Kribi, Dschang and Mamfe.[6]

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6. See Le Journal de Cameroon Airlines, 1981.

Sense of Purpose

The former Cameroon's leader, Ahidjo, re-iterated the purpose for the creation of Cameroon Airlines in an address to the nation on December 16, 1982. He said:

> "Nous n'avons pas seulement créé Cameroon Airlines pour relever un défi et marquer notre souveraineté, nous l'avons fait aussi dans la conscience que le transport aérien est un puissant outil économique."

Thus, the airline was established for both political and economic purposes. How are these purposes reflected in its actual operations?

The fanfare with which the creation of the carrier was greeted by Cameroonians on November 1, 1971, when the inaugural flights from Douala to Yaoundé, and Paris to Douala were made, the national frenzy which welcomed the acquisition of the B-747 on April 4, 1981, are evidence of the immense political sentiments attached to the Cameroon flag carrier. There is nothing wrong for Cameroonians to feel so strongly attached to what is theirs. But can the politicians succeed in curbing such patriotic sentiments as well as they did in fanning it so that when the occasion eventually arises pride for a national airline can be compromised for a second venture in the formation of a multinational airline instead?

Internally, Cameroon Airlines reflects the

political realities of the policy and practice of the Government. Air France's participation is proof of Cameroon's non-aligned policy that is oriented more to France and a positive attitude towards foreign investment. Since its creation, there have been four Presidents of the company. All four are from Francophone Cameroon, and strong political supporters of the Ahidjo regime. Of the thirteen points served domestically by the carrier, only two are in Anglophone Cameroon - Bali and Mamfe, and even these receive rather scrappy and highly irregular services. Mamfe is, in fact, falling into disuse like the once significant Tiko airport which is now abandoned.

Yet, the anglophone part of the country has an impassable road system. This too is a reflection on the national airline, which was created to be an important tool of economic development, of the government's neglect of that part of the country, neglect which has led many political observers to conclude that the re-unification of the two Cameroons has cost the former British Cameroon very much in terms of economic development.

Economically, Cameroon's steady development is based on a series of five-year development plans, an emphasis on the development of agriculture, and, recently, the exploitation of oil. Cameroon's good trade relations with her neighbouring African states, Europe and North

America are a big asset too, as well as a good basis for the viable operation of her national airline which has been called upon to contribute to the successful implementation of the development plans. Thus, it has been stated with particular reference to the current development plan (1981-1986):

> Cette année, 1981, qui voit la mise en service du Boeing 747 de Cameroon Airlines, est aussi l'année de démarrage du nouveau cycle de développement du Cameroun. C'est le "point d'envol" du nouveau plan quinquennal de développement économique et social (...) qui doit contribuer à la préparation du Cameroun de l'an 2000. A sa façon, Cameroon Airlines s'y prépare aussi. Car il est des signes qui ne trompent pas quant à l'état de santé de l'économie d'un pays. Cameroon Airlines est bien placée pour le savoir: son personnel est en contact direct avec les hommes d'affaires qui affluent du monde entier. Et ils sont de plus en plus nombreux ces hommes d'affaires qui empruntent l'avion pour se rendre à Douala.[7]

In Africa, Cameroon's main trading partners are Gabon, Nigeria, Ivory Coast, Central African Republic, and Congo. Passenger air traffic between Cameroon, Gabon, Nigeria and Ivory Coast is among the top intra-African passenger traffic flows. Air freight traffic between Cameroon, Gabon, Congo and Central African Republic is also among the top intra-African freight traffic flows.[8]

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7. Ibid.

8. See "The Air Transport Situation and Prospects in Africa", ITA Study 1982/No. 1, op.cit., at pages 26-36.

Outside Africa, Cameroon's chief trading partners are the U.S.A., France, Italy, the Netherlands, Spain, West Germany, Japan and the United Kingdom. In 1981, for example, Cameroon exports to the United States amounted to seventy-eight milliard francs (CFA) while she imported sixteen milliard francs worth of goods. But her exports to France were sixty-eight milliard francs while imports were one hundred and thirty-nine milliard francs. Cameroon Airlines passenger and freight traffic to France is the highest on its inter-continental service. But there is no air service between Cameroon and the United States.

United States/Cameroon business relations are assuming increasing and more significant relations than even Franco/Cameroon relations. The new Cameroon leader, Paul Biya, has expressed very serious intentions to redress the balance of trade which had been widely and perpetually in favour of France since Cameroon became independent. On the other hand, however, U.S. government and private sector investment in Cameroon has been accelerated. U.S. oil companies, banks, engineering and construction firms are flowing into Cameroon.[9]

The Cameroon government and the Cameroon Airlines

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9. See Douane Sams: "The Legal Aspects of Doing Business in Cameroon" International Lawyer, Summer 1983, vol. 17, No. 3, p. 489 et seq.

should seize that opportunity to conclude an agreement for the commencing of an air transport service between Cameroon and the U.S. Such a service could be through a pool arrangement with either the designated American carrier (as is the case in Cameroon Airlines/Alitalia) or with another African airline serving the route (Air Afrique or Nigeria Airways). The potential American tourist traffic on such a route is a foreign revenue earning product that should not be ignored.

Balance Sheet

The airline is making some progress. Passenger traffic has almost quadrupled since its creation. In 1971-72, 112,621 passengers were carried; 500,375 in 1979-80; 571,000 in 1980-81; and 644,500 in 1981-82. This represents an annual growth rate of 12%. Freight traffic has also increased manifold. In terms of revenue, the airline started making profits in 1974/75. In 1980/81, a total profit of 19,947 million francs CFA was realized as compared to 18,722 million in 1979/80.

More efforts to increase the airlines revenues were initiated this year in the form of promotional fares. In an advertisement,[10] the airline offered special seasonal

10. See: Cameroon Tribune, March 16, 1983; L'Avion Pour

discount fares for trips to Europe or within Africa as follows:

- 50% discount for families: when the two members of a married couple want to travel together, the second one is granted 50% discount.

- When four or more people go on a tour to one of the French speaking countries of black Africa, there is a group discount of 50%.

- For a student who flies to his/her parents residence or place of study within the French Speaking countries of Black Africa, there is a 40% discount.

- Anyone over fifty-five years of age who goes on a trip of 14-60 days enjoys a 40% discount.

- For young people (over 12 and under 29) who go on a trip of 10-30 days within Africa, or 10-60 days to Europe, there is a 60% discount.

- Regardless of age, for a round trip of 7-30 days in Europe, there is a 35% discount; and a similar trip to Africa there is a 30% discount.

The seasonal promotional fares were necessary to enable the airline to take advantage of the economy of scale which was afforded by its wide-body aircraft, as well as upset the season's traffic slump. However, the exercise,

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Tous, a publication of the Cameroon Airlines, 1983.

especially with the overt reference to "discount" fares could be offensive to AFRAA, of which Cameroon Airlines is a member. That Association has been threatening to take serious actions against what it called illegal fare discounts.[11] Although reference was directly made to "foreign carriers" as the offenders, it also said that it would stop discount fares, which were prevalent in Europe, America and Asia, from "spreading to Africa". By that threat one could deduce that AFRAA would not condone even its own members indulging in fare discounts.

However, it cannot be said that the action by Cameroon Airlines amounts to an illegal fare discount as it accords with the decision of AFCAC. In its sixth session (1979), AFCAC advised, as one of the measures to be taken by its members to increase the revenue of their airlines, the increasing of load factors by improved utilization of capacity through such means as introduction of promotional fares and rates for off-peak travel.[12] The mechanism for fixing or determining such "promotional fares and rates" was not provided; so it would rest on the individual member states who could multilaterally do it through AFRATC.

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11. See AFRAA Bulletins No. 29, November 1982, and No. 31, January 1983.

12. See AFCAC/6 pp. 7-8, para. 25.

However, at the time Cameroon Airlines published its promotional fares, Cameroon had not ratified the AFRATC Charter.

A State airline, like Cameroon Airlines, does receive and act upon certain directives from the Civil Aviation Department of the National Ministry of Transport. Sometimes those directives may conflict with other directives issued by the carrier's association on the same subject. The former prevail over the latter, especially where the airline is heavily financially dependent on its government.

Prospects

Cameroon Airlines has good prospects due to a number of factors. Cameroon is geographically advantageously located in the continent. It is a meeting point between West and Central Africa, and lies midway between Northern and Southern Africa. Douala, the major international airport, is also a sea port of great importance not only to Cameroon but also to the neighbouring landlocked states of Chad and Central African Republic. Moreover, Douala is planned to be the main hub of the proposed route network across Africa linking Madagascar and Cameroon to provide more East-West flights connecting with

the existing north services.[13]

Cameroon Airlines can profitably exploit this geographical advantage. Already, Chad which is a member of Air Afrique depends more on Cameroon Airlines. Air Afrique has literally abandoned its Douala-N'djamena route because it is not profitable enough. Cameroon Airlines now serves this route exclusively - transporting all the entrepôt products from the coast to the hinterland. The same is the case with Central African Republic. This partly explains why the Cameroon carrier is equipping its fleet with more and more advanced cargo aircraft.

The Airline enjoys another big advantage. Cameroon's oil industry is doing well. Fuel cost which accounts for much of the operating costs of oil importing state's airlines, is not as grave a problem to the Cameroon carrier. Cameroon is one of the very few African states that are relatively stable economically and politically.[14] This is an environment conducive to the development of a viable airline.

Cameroon Airlines took off along a course guided by

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13. See Anthony Vandyk: "AFRAA Conference Reveals Increasing Co-operation Among African Airlines" Air Transport World, June 1983, p. 28. Cf. "AFRAA Grid System", section 7.2.2 supra.

14. See The Economist, November 13, 1982, pp. 92-93.

common sense and realism when it co-opted the participation of Air France. Many budding airlines in developing countries had started their lives with a blind myth of national liberty which beclouded their appreciation for method, order and efficiency. An airline can pride itself with showing its national flag, but it must, nevertheless, respond and adapt itself to the realities of the modern air transport industry. That is why Air Guinea was constrained to fall back on the Irish airline, Air Lingus, belatedly for guidance.[15]

An airline needs money to operate safely and efficiently. It can get all the money from its government (if its government can afford it at all), or can get part of the money from its government and part from private investors. Cameroon Airlines adopted the latter course. Again, an airline needs technical and managerial expertise to function properly. A newly formed airline should not be conceited to ask for such expertise from an older airline on reasonable terms to enable it to start well. Cameroon Airlines used such expertise.

However, a state corporation of strategic, economic and political importance such as an only national airline,

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15. See African Air Transport Vol. 2, No. 6, November/December 1981, pp. 22-23.

should not be controlled by foreigners very extensively, for too long - even if such foreigners come from a former colonial metropolis. What the French did to Guinea and Algeria when those states boldly asserted their rights before a hitherto apparently benign France should serve as a useful guide. Cameroon Airlines has to accelerate the training of indigenous personnel to form the bulwark of its management and operational staff. The gradual process of loosening the foreign financial grip on the airline should also continue. Cameroonians in the private sector are willing and able to invest in their national airline. If the airline can sell its shares to a foreign company, one cannot understand why its own co-nationals are not competent to hold some of its shares too. The airline needs more capital investment to expand and meet the challenges of the future. The law establishing it should be amended so that when next there is an increase of its capital, the new shares should go to the Cameroon public and private sector.

Such amendment is necessary because the airline as at present constituted is a limited liability company having only two share holders.[16] The Cameroon government should

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16. In Cameroon, corporate transactions are governed by either the French Code de Commerce, or the Nigerian Companies Ordinance, depending on whether the company is registered in Francophone or Anglophone Cameroon. Cameroon Airlines was incorporated in the former.

remain the majority shareholder in any new arrangement.

8.3 Nigeria Airways

Historical Background

Regular air services have been operating in Nigeria since 1930, but the first recorded instance of an international flight into the country took place shortly after World War I, when a pioneering pilot from the Royal Air Force flew from Khartoum (Sudan) landing on a race course in Kano, Northern Nigeria. Throughout the 1920s the same Khartoum based Royal Squadron operated selected flights into Nigeria landing at both Kano and Lagos. The first commercial aircraft flew between Lagos and Kano in 1930. It was a de Havilland "Moth" and it flew the route for six years.[17]

In 1936, Imperial Airways inaugurated the first regular air mail service to Nigeria from Europe via

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Accordingly, articles 29-36 of the Code de Commerce which deal with the Société Anonyme (Limited company) are more relevant. For useful information, however, it may be advisable to look further at Section 1 of the Nigerian Companies Ordinance (Act) of 1922; Sections 28 and 31 of the Nigerian Companies Decree of 1968.

17. See African Air Transport, September/October 1982, vol. 2, No. 5, p. 22.

Khartoum, using a DH86 bi-plane. After World War II, the West African Airways Corporation was established to serve Nigeria and the neighbouring states. WAAC was owned by four British West African governments: - Ghana, Nigeria, Sierra Leone and the Gambia. The first WAAC Service in Nigeria was a flight between Lagos and Calabar in October 1946.

Nigeria Airways was formed as a company incorporated in Nigeria on August 23, 1958 on the dissolution of the West African Airways Corporation. Its objectives were enumerated in article 3 of its Articles of Association. Article 4 provided that the liability of the members is limited, and article 5 put the share capital of the company then at £6,000,000 divided into 60,000 shares of £100 each. The Federal government of Nigeria held 50% of the shares, Elder Dempster Lines held 33-1/3% and the British Overseas Airways Corporation (BOAC) held the remaining 16-2/3%.

On the attainment of independence in 1960, the shares of the two foreign partners were bought out by the Nigerian government. However, the government did not pay for those shares itself, rather, it directed the Nigeria Airways to pay the foreign partners.[18] Many years later,

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18. It will be noted that the courts have held that a company cannot purchase its own shares - Trevor v. Whiteworth (1887) 12 AC 409. Neither can a company

a Commission of Enquiry condemned the company's compliance with the government's directive:

> "We consider it improper for the Government to have asked the Nigeria Airways to pay this sum of money to buy over the shares, especially as Nigeria Airways is not a partner and, therefore, cannot buy shares. The Nigerian government, the sole share holder in the company, should pay this amount and we recommend that the money be refunded to Nigeria Airways."[19]

After the two foreign partners had relinquished their shares, Nigeria Airways became wholly owned by the Federal Government. Apart from its commercial activities, the airline also has social security and defence objectives. While it is expected to make a profit, it is also expected to protect and assist in the development of the country's economy by flying to airports dictated by the Federal Government. It could also act as a back-up for the national air force, and as transportation auxiliary in the event of a war or national emergency. The role played by the airline during the Nigerian civil war as well as its annual function in the airlifting of Nigerian pilgrims to Saudi Arabia are

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finance the purchase of its own shares - Wallesteiner v. Moir (1974) 3AER 217. See also Section 55 of Nigerian Companies Decree 1968. But see D.W. Fox: "Companies purchasing their own shares" Journal of Business Law, 1982, p. 109 et seq.

19. See Report of Inquiry into the Affairs of Nigerian Airways (1968) p. 12.

some examples.[20]

The Minister of Aviation directs the general policy of the company. He exercises his control through specific directives to the Board of Directors. Such directives include the way in which the company should be run. The Board of Directors have had occasions to complain that "the airways was being run by Decree, all efforts were directed to the ministry and the staff no longer realized that a Board existed".[21]

Fleet

Nigeria Airways started operations with small passenger aircraft such as Doves, Herons, DC-3s and Piper Aztecs. It then progressed to short, medium and long range jets in the early 1960s. At first, it acquired the Fokker F27 turboprop, then the faster and more comfortable F28s. As the airline began to serve new routes within Africa and across the Atlantic and to Europe, Boeing 707s and 727s were added. Today, it has a fleet of over thirty aircraft which consists of three DC-10-30s, six B727s, eleven B737-200s, eight F28s, three B707s and a Piper Aztec. It also leased a

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20. See Africa Now, November 1983, pp. 85-94.

21. Report of Inquiry into the Affairs of Nigerian Airways, op.cit., at p. 37.

B747-200 from SAS and owns another.

Some factors have favoured the remarkable expansion of the company's fleet within a short period. Financial institutions have been particularly well disposed to lend it money. Some twelve years ago (1971), Chase Manhattan made a significant loan available that enabled the airline to purchase two B707s. Early in 1983, another deal was concluded by which the airline received a loan of over $70 million to fund its fleet expansion. The deal was co-ordinated by the Chase Manhattan Capital Markets Group and the National Westminster Bank. The loan which is to be repaid over the period of eight years is to enable the airline to increase its fleet of B737s, four of which have already been delivered for use on domestic services.[22] The B737s will replace some of the F28s, B707s and B727s.

Route Network

Nigeria Airways operates ten weekly services to the United Kingdom. This route is operated by a DC-10-30 and a B747-200 from three Nigerian airports - Lagos, Kano and Port Harcourt - to Heathrow Airport in London. While the Nigeria-U.K. route remains the principal service, the

22. See African Air Transport, March/April 1983, vol. 4, No. 2, p. 31.

airline also operates scheduled services to Amsterdam, Rome, Paris, Frankfurt, Zurich, Jeddah and New York using DC-10-30 equipment.

There is not only a remarkable passenger traffic between the United Kingdom and Nigeria,[23] but also a freight traffic boom. As a result of the increasing congestion of Nigerian international sea ports, Nigeria Airways has found itself in a profitable position to transport a reasonable part of the goods consigned to Nigeria from abroad. Nigeria is Britain's tenth export market, her largest outside Western Europe and the U.S. In 1981, Britain's exports to Nigeria were worth £1204 million. Nigeria Airways broke its own 1980 record for the carriage of cargo from London by 60.8% in 1981 and boosted its freight revenue by 70%.

Amsterdam is another profitable route. 4,373 passengers were carried on that route by Nigeria Airways in 1981, which was a marked increase over the figures for the previous year. In the same year, cargo amounted to 550,492 kilograms which was also an increase over the 1980 figures. The Rome-Nigeria route recorded 22,984 passengers in 1981,

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23. Informal talks between Nigeria Airways and British Airways are reported to be in the offing for the introduction of a Concorde Service on this route. See African Air Transport September/October 1982 vol. 2, No. 5, p. 22.

10,326 between January and June 1982; 932,800 kilogram of freight in 1981 and 520,635 kilogram in the first half of 1982. The introduction of the other European routes (Zurich, Frankfurt and Paris) were a direct response to the considerable demands from business travellers and European freight forwarders.

Within Africa, the airline flies to Accra, Abidjan, Monrovia, Freetown, Conakry, Banjul, Dakar, Niamey, Cotonou, Lomé, Douala, Libreville, Nairobi and Addis Ababa. Its service to Luanda, Angola, has been suspended. It plans to acquire between 1983-84, four 225-seat A310 Airbus aircraft to re-inforce its fleet for use on the African routes. Domestically, although Nigeria has an enviable surface road infrastructure by African standards, air transport is a very popular means of travelling from one part of the country to another. In 1980, for example, the airline operated over one hundred flights daily to fourteen airports within the country, carrying an average of seven thousand passengers a day.[24] The local points served are Lagos, Benin, Enugu, Port Harcourt, Calabar, Markurdi, Jos, Yola, Maiduguri, Kaduna, Kano, Sokoto, Illorin and Ibadan.

The domestic services are flown with the B737 and

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24. See African Air Transport, July/August 1980 vol. 1, No. 4, p. 32.

Fokker aircraft. Airline executives in Lagos predicted that the airline will be carrying about five million passengers daily on the domestic services by 1985, as against one million passengers on international routes.

Prospects and Problems

Nigeria is Africa's most populous nation, with a population of about eighty-five million people within her nineteen states. Nigerians are a travelling people. The economic importance of this oil-rich state as a key trading partner with Europe and the U.S.A. is another important factor contributing to the good prospects for Nigeria Airways. The annual growth rate of the airline has been forecast by Nigerian authorities as 37%. The Nigerian government has been taking appropriate measures such as the building or upgrading of the national airports to meet the increasing and potential air traffic.

At the commissioning of the twenty-one-million naira Ibadan airport in 1982, the government stated:

> "Nigeria's fast industrial and economic development is a compelling condition for the government to provide immediate infrastructure to accelerate easy movement of people and goods within and outside the country's frontiers in order to give further boost to the nation's economic growth ... towards the attainment of these objectives, the provision of up-to-date and reliable navigational aids and modern airports will be given priority attention ... with a view to assisting airlines, especially Nigeria Airways, to cope with the expansion in both

> domestic and international traffic. Nigeria Airways will be given adequate Federal Government support to acquire more aircraft to enable it to provide more capacity for its rapidly increasing passenger and cargo traffic..."[25]

Nigeria Airways also has a number of problems. It has so far failed to meet the expectations of the Nigerian travellers and shippers. Delays and flight cancellations are almost a rule rather than an exception. The demand for seats is often too high for the airline to cope with and this results in sickening queues at domestic airports as people wait for flights. Weather conditions have not been very helpful. Fog in the South and strong winds and sand storms (from the Sahara) in the North are mainly responsible for the flight cancellations and delays. On occasions, even serious accidents have been caused. In November 1983, for example, an F28 on a domestic flight from Lagos to Enugu crashed at Enugu killing the passengers.

A second major problem concerns the management of the airline. A very competent and dependable management is vital to the successful operations of an airline. Nigeria Airways seemed to have been in great want of a satisfactory and acceptable management. A Nigerian has written:

> "Since Nigeria Airways' development out of the defunct West African Airlines Corporation (WAAC)... it has hardly enjoyed a stable indegenous

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25. Address read by Dr. Wayas (Senate President) on behalf of President Shehu Shagari.

> management. Various managers of the airline tried to meet the travelling demands of the Nigerian public, but the rate at which public complaints about the airline's "inefficiency" mounted day in day out, caused concern not only to the Federal Government[26].. but to employees too who were often maligned."

In 1980, the Nigerian government concluded a two-year contract with KLM to manage the airline. Nigerians were not satisfied even with that arrangement. The government was severely criticized for "donating Nigeria's economy once again to foreigners". One of the Nigerian newspapers, the National Concord, later dismissed the arrangement summarily:

> "The KLM contract, about the cost of a modest passenger plane, did not work."

In 1982, the KLM contract came to an end and management of Nigeria Airways went back to Nigerians. The complaints persist as ever.

A third problem is an alleged constant and too much interference by the government, through the Ministry of Civil Aviation, in the affairs of the company. This was revealed to the Minister of Aviation on a visit to the Airways House (Headquarters) in 1980. As mentioned earlier, the Directors of the airline had complained before that the airline was "being run by decree". There were cases to

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26. Femi Ogunleye: "Nigeria Airways in Perspective", African Air Transport, July/August 1980, Vol. 1, No. 4, op.cit., p. 32.

support the Directors' claim. It was established that on one occasion, the Minister of Civil Aviation (Dr. Mbadiwe then) exercised undue interference, appointed someone to the post of General Manager and made it appear as if the Board of Directors had made the appointment. On another occasion, an officer who was suspended by the management as a disciplinary measure, was reinstated on the orders of the minister.[27]

Another type of interference comes from other ministries and quasi-governmental bodies. It is claimed that they present travel warrants to the airline which are hardly ever redeemed. As a result, the airline looks rich on paper but is poor in fact.[28]

These incidents of meddlesomeness by the government with the airline are unfortunate, but not unexpected. Any airline which is 100% owned by the government and which frequently falls back on the government for financial support may have the advantage of feeling secure since it may not be allowed to go bankrupt like its private-owned counterpart. But there is a price-tag for that security -

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27. See Report of Inquiry into the Affairs of Nigeria Airways, op.cit., p. 37.

28. Nigeria's National Concord, Monday, February 21, 1983, p. 2.

extensive control and undue interference by the government. It is even more unfortunate when such control has to come from unscrupulous politicians in government. It is understandable, therefore, that one of the solutions devised for the airline's problems is to wrest some percentage of ownership from the Federal Government and put it in private hands. In February 1983, the Minister of Civil Aviation announced the "privatization" of Nigeria Airways. By that measure, the Federal Government will retain 51% of the shares in the airline, 40% will go to the public and 9% will be held by the Airways' employees.

This measure has several merits. The government still has the majority shares and so maintains the necessary and considerable control over the airline to preserve its public utility character which would otherwise be sacrificed for profit-making were the airline to be any more privatized. The inclusion of members in the Board of Directors who would be accountable to the private shareholders will act as a check to the excesses of the government. The employees have an incentive to work more efficiently as they will have a stake in the success or failure of the airline.

But does this new policy entitle non-Nigerians working for the airline or residing in Nigeria, to hold shares in Nigeria Airways? Mr. A.D.O. Abutu, a

representative from Benue State and Chairman of the Public Relations Committee of the House of Representatives, was quoted by the Nigeria "National Concord"[29] as stating that the shares would after all not be sold to foreigners but to Nigerians.

Legally, there is no reason why foreigners working for the Airways or legally residing in Nigeria cannot hold some of the shares allotted to the public and employees of the Airways. The Promotion of Nigerian Enterprises Decree of 1977 does exclude foreigners from participating in certain enterprises in Nigeria. The first schedule of that decree reserves businesses which are relatively easy to operate to Nigerians exclusively. Air transportation does not appear in that schedule. Schedule two deals with businesses that must have at least 60% indigenous equity participation, that is, businesses in which, by and large, Nigerians still require skillful, technical or financial support to operate well. The operation of air transport services would rather fall in this schedule. It may also be considered under schedule three which deals with complicated or intricate enterprises that call for foreign participation but in which Nigerians must hold at least 40% shares.

Another measure taken by the government is the setting up of a National Council for Aviation which will

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29. Ibid., p. 16.

initiate, monitor and advise the government on national aviation policies. The membership of the Council consists of the Minister of Defence, the Chief of Staff of the Armed Forces, the Director of Civil Aviation, the Head of Nigeria Airways, Head of Nigerian Airports Authority, the Principal of the National Civil Aviation Training Centre, Zaria, the Director of the Meteorological Department, and a person nominated by the President . The Council has purely advisory functions.[30]

Nevertheless, the representative of Nigeria Airways is in a position now to introduce some of the problems of the airline to the Council for possible solutions and subsequent advice to the Minister of Civil Aviation. For instance, weather problems will be directly discussed with the Director of Meteorology; and a better working partnership between the Nigeria Airways and the Nigerian Airports Authority can be established through their joint participation in the Council.

The measures adopted by the government above are sound but not adequate. Both the government and the airline must accept some facts. The Nigerian consumers generally

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30. See Chapter 2, para. 17, of the Federal Government Views on the Report of the Fact-Finding Panel into the Activities of the Civil Aviation Department of the Federal Ministry of Aviation, 1981.

like to choose from different alternatives. They abhor the restriction of their choices and monopolistic enterprises. The Nigeria Airways was not legally established to monopolize air transport in Nigeria like the National Electric Power Authority (NEPA) monopolizes electricity supply. But Nigeria Airways has, in fact, enjoyed a monopoly in the operation of scheduled domestic services, until recently. The Nigerian consumers' unconscious resentment for Nigeria Airways, which is seen as another much-resented NEPA, is mainly accountable for the incessant complaints against any management of the airline.

Nigeria Airways requires some back-up air transport companies to meet the demands and expectations of the ever increasing domestic traffic. A few private companies have of recent entered the domestic air transport market. Their scale of operation is too small to make much impact. The most popular among them, Dantata, for instance, operates a service between Lagos and Kaduna only. Another private operator on a larger scale will not hurt the interest of Nigeria Airways on some domestic routes and even on the Nigeria - United Kingdom international route where intending Nigerian travellers are often stranded for weeks during the peak seasons.

One such private carrier was expected to start operations at the end of 1983. It is the United African Air

Transport (UAAT).[31] Founded by a Nigerian, Mr. Okwesa, UAAT has plans to operate both international and domestic air services. The main base and hub of the carrier will be the Nigerian oil-city of Port Harcourt. It will operate charter services to London carrying both passenger and freight traffic twice weekly using B707-320C aircraft.

As charter services UAAT operations may be limited to Affinity Groups or Inclusive Tour traffic, but even this will be enough to provide profitable load factors for most of the year, especially as it will be using a combined passenger/cargo aircraft. Stansted will be the United Kingdom terminal of the service from Port Harcourt, with inbound flights routed via Luxembourg and return flights flown non-stop. It is hoped that the Nigerian and British governments will grant the company the licences to operate the international service. While the company plans to operate charter services on the international route, it plans to operate scheduled services on the domestic route.

The establishment of private carriers to supplement Nigeria Airways meets the needs of Nigerian travellers so should be encouraged by those in the relevant positions of authority. Nevertheless, the government should establish an

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31. See African Air Transport, November/December 1982, Vol. 3, No. 6, page 5.

efficient machinery to regulate and oversee the activities of such carriers so that travelling or shipping by them will be safe, secure and unexploitative.

8.4 The Kenyan Policy

In the preceding section the policy of establishing private carriers to supplement the services of a national carrier was supported. But there are only a few African governments which have encouraged the operation of such supplementary services. Kenya is one of the few exceptions.

Kenya Airways is the country's national carrier and international flag bearer. After the collapse of the East African Airways in 1976,[32] of which Kenya was a member together with Uganda and Tanzania, the government of Kenya established its own national carrier - the Kenya Airways. The company was incorporated as a limited liability company on January 22nd, 1977, the government officially announced the formation on February 4th, 1977. Kenya Airways is the designated carrier in Kenya's bilateral air transport agreements. The airline flies to Europe, the United States, Asia, within Africa and domestically.

But Kenya Airways is not the only air carrier in

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32. See Section 8.6 infra.

Kenya. There are over twenty-two private companies engaged in different forms of air transportation in the country.[33] Kenya has a viable tourist industry due to her tourist attractions. But Kenya, like most other African states, does not have a satisfactory surface transportation system to these sites of tourist attraction. Many towns and villages are not easily accessible by road. Kenya Airways alone, or the defunct East African Airways for that matter, could not profitably provide services to all the domestic points. It takes small companies with small equipment and low operational costs to serve such points profitably. The Kenya government did not constitute a road-block to the establishment of such small private companies.

Sunbird Aviation Company

Sunbird Aviation is one of such private air carriers that needs special mention. Totally Kenyan owned, with the Kenyan government holding some shares, Sunbird has been operating for over twelve years. In its early days, it flew a scheduled service around Lake Victoria taking in the

33. See the list of the private air transport companies published by the Kenyan Ministry of Transport and Communications - Directorate of Civil Aviation Circular FOPs/3010.

three East African countries of Uganda, Kenya and Tanzania. Today, it flies more scheduled domestic routes. It operates a daily service between Nairobi, Kisumu and Keekorok with a DC-3 having a capacity for twenty-eight passengers. Formerly, it operated a flight in association with Kenya Airways over the Mombassa-Malindi-Lamu sector, but it cancelled the service on the ground that the route was better served by the Mombassa-based operators (Cooper Skybird and Coast Air).

Sunbird has established a passenger terminal at Wilson Airport, Nairobi, with waiting room facilities and a car park. With a fleet of nineteen assorted aircraft and twenty-two pilots, the company is bidding hard for more domestic routes in order to "bring flying into the reach of many more people, just as Laker did for the public across the Atlantic."

The Managing Director, Captain Knight, thinks Sunbird can introduce new services at cheaper fares by acquiring new and economical aeroplanes. He claims the restrictions on the replacement of the airline's aging DC-3s is the main factor inhibiting the growth of the company's network of scheduled services.[34]

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34. See African Air Transport, September/October 1981, Vol. 2, No. 5, page 26.

Private operators like Sunbird have not been shown to harm the operations of the national carrier, Kenya Airways. On the contrary, as Captain Knight stated, Sunbird is always ready to assist the national carrier. He regarded his company as a serious source of revenue, but nevertheless of importance to Kenya Airways as a feeder service. Accordingly, he suggested that the national carrier should concentrate on international foreign exchange earning and tourist producing services, leaving the smaller carriers to cover the domestic scene. If the public interest served by the national carrier on the domestic routes is not sacrificed in the process, the suggestion deserves the government's consideration.

Unreasonable or ill-conceived restrictions imposed on air transportation, such as the restriction of entry by private operators in the domestic sector, especially where the national carrier is not satisfactorily serving that sector, tend to seriously hamper the national and economic welfare, rather than protect it. But this does not and cannot mean a request to any African government to open a flood-gate for any company desirous to engage in air transport operations. The safety considerations of public transportation should never be compromised. Governments which fail to properly regulate even the surface transport industry always have dreadful statistics of road accidents

to their discredit. The air transport industry can only thrive on strict and effective regulations.

8.5 Regulation of Private Carriers

Since this author advocates the existence of private domestic carriers to complement the services of the national carriers where necessary, it is necessary to establish the bases for the establishment of such private carriers. Specifically, how do governments regulate new entrants to the air transport industry in the more experienced countries? What are the lessons to be learned from them?

The "Fit, Willing and Able" Test

This test is mainly the conception of the United States of America. The U.S., in the early days of aviation considered the air transport industry as being of such fundamental importance to the national economy as to require regulation for its orderly development. There was serious concern about the intensive, extreme and destructive competition in which all transport modes were engaged because such an economic environment had injurious effects on the transport industry and its ability to adequately provide the service required to satisfy the needs of commerce, the public interest and the national defence. But

of even more particular concern was the competition in the air transport industry:

> "The airlines ... are engaged in intensive competition with each other and with ... other carriers. This competition is being carried to an extreme which tends to undermine the financial stability of the carriers and jeopardize the maintenance of transportation facilities and services appropriate to the needs of commerce and required in public interest and the national defence."[35]

In 1938, the Civil Aeronautics Act was signed into law establishing the Civil Aviation Authority (CAA), which became the Civil Aeronautics Board (CAB) in 1939. The Board was given the powers to, inter alia, regulate the entry of intending companies into the air transport industry.[36] CAB has to certify that a new entrant is "fit, willing and able" to carry on air transport services.[37]

In Re Silvas Air Lines Inc.[38] CAB stated four requirements an applicant must satisfy in order to be certified as fit, able and willing. They are: Managerial Expertise, a Credible Operating Proposal, Financial

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35. See US Senate Report to the 75th Congress (1st session) 1937, No. 686.

36. See 49 U.S.C., #1371 (1979).

37. See Section 401(d)(1) of the Federal Aviation Act of 1958; 49 U.S.C., #1371(a)(1)(d)(2) (1977).

38. CAB Order 80-10-103 (1980).

Capability, and a Compliance Disposition. Silvas' application was rejected because the company lacked commercial aviation experience; its operating proposal was not credible; it did not have enough financial resources to yield sufficient capital to enable it to commence operating without subjecting the public to undue risks; and its compliance disposition was questionable. Silvas had "failed to meet the Board's Fitness Standards in any of its four elements".

In Sun Pacific Airlines case[39] for example, the company had assembled a managerial team of personnel with experience in the airline industry, and significant financial and business backgrounds. In determining the applicants compliance disposition it was considered that neither the company nor any of its members had any history of failure to comply with the Civil Aviation Act, any other Federal or State Law, or regulations. As for its finances, the following significant pronouncement was made:

> "...the standard does not require an applicant to have already financed its operations, whether internally or through debt or equity instruments, but merely to present a credible plan for obtaining funds. The carrier's plan needs not demonstrate that its service will be profitable; the purpose of the regulation is not to ensure that a new applicant will make a profit or even necessarily remain in business, but rather to insure safe operations and protect consumers against loss of their funds."

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39. CAB Order 81-6-126 (1981).

The four standards of determining whether an applicant is fit, able and willing to engage in air transport operations can be adopted by other governments. But the yardstick for assessing the standard of financial capability as propounded by the CAB in Sun Pacific is suspect. It has, accordingly, been seriously criticized even within the United States itself.

In the Transcontinental Low-Fare Route Proceeding Case[40] where CAB had earlier relaxed the financial capability standard by abandoning its requirement for a new operator to demonstrate that it possessed resources commensurate with the nature and scope of the undertaking, sufficient to enable it to operate safely, that is, that the company possessed sufficient capital to operate the proposed service, or commitments from investors or lending institutions to provide the requisite capital, Richard O'Melia, Member of the Board expressed this strong dissent:

> "...(it) is tantamount to a determination that the financial resources of an applicant...have practically no relation to its fitness to provide air transportation. This key determination of what is a critical statutorily mandated prescription, one which is legislated to endure even after the Board's licensing authority is terminated, has been reached by a sight-of-hand (sic) maneuver that has in terms of its potential impact no parallel in my experience with agency action. From this day forward, an aspiring entrepreneur need only show that in a set of perfect circumstances the proposed

40. CAB Order 79-1-75 (1979).

operation could be feasible."

CAB's positions on the financial standard in both Sun Pacific and Trans-continental Low-Fare Proceedings are inconsistent with its pronouncement in United States Overseas Airlines Inc.[41] In that case, the Board stated:

> "The meaning of the phrase (fit, able and willing)...must be determined in the context of the problems Congress saw and the objectives it intended to accomplish. Looking at the pattern of the supplemental legislation and its legislative history, we are convinced that Congress viewed the financial fitness of supplemental carriers as having a direct bearing on safety of operations and fair treatement of the public; that it contemplated that such carriers should have and maintain a minimum financial strength and stability sufficient to protect the public from risk and abuse, and that it intended for the Board to eliminate from its supplemental field carriers who did not meet such minimum standards before financial weakness could translate itself into injury to the public rather than with-holding action until after the financial unfitness had evolved into damage or injury to the public."

For Africa in particular, it will not be enough for an applicant to "merely present a credible plan for obtaining funds". The applicant should also prove that a reasonable amount of the funds necessary for it to commence operations without undue risks to the consumers and the public are available. The applicant should, in addition to convincingly demonstrating its minimum financial strength, show prospects of financial stability in order that

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41. 41 CAB, 461 (1964) at pp. 463-464.

consumers will not be exposed later to abuse or undue risks. A carrier which does not operate profitably is liable to neglect the proper maintenance of its equipment, to hire cheap and unskilled personnel, and to resort to economising to the point that its services will not only be below standards but even dangerous. A poorly maintained aircraft flown by an inefficient crew is literally a flying coffin. No one should be allowed to gamble with the safety of air transportation. We should know better from the record air disasters.

Test of Public Convenience and Necessity

An applicant may prove that it is fit, able and willing, but if the proposed service is not necessary and convenient to the public, the application may be rejected. "Public convenience and necessity" is susceptible to various connotations. To have any useful meaning, it must be construed in the light of a specific subject at issue. What then, does "Public convenience and necessity" import in the subject of air transportation?

In Wisconsin Telephone v. Railway Commission of Wisconsin,[42] Barnes gave some guides:

> "The words are not synonymous and effect must be given to both. The word 'convenience' is much

42. (1916) 156 N.W. 614 at 617.

> broader and more explicit than the word 'necessity'. Most necessities are also conveniences, but not all conveniences are necessities. If we regard the word 'necessity' as meaning something that is indispensible, it could not be said that the connection in this case is a necessity.... So...the word will be construed to mean not absolute but reasonable necessity.... Inconvenience may be so great as to amount to necessity...a strong or urgent reason why a thing should be done creates a necessity for doing it...the word sometimes means indispensible, at others, needful, requisite or conducive."

The above dictum can adequately serve the purpose of a general legal explanation, but where the phrase is used statutorily, it will be more appropriate to construe it in the light of the purpose the statute is meant to serve, that is to say, the phrase will be given a purposeful interpretation.

In the case of the United States Federal Aviation Act, for example, it was asserted that in interpreting the concept of public convenience and necessity, the CAB traditionally weighed and balanced a number of criteria (and no single criteria was deemed to be controlling). That involved a two-step process: - determining the number of carriers the market in question could reasonably and profitably support; and selecting from among the various applicants which carrier or carriers should be certificated.[43]

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43. See P.S. Dempsey: "The Rise and Fall of the Civil Aeronautics Board..." (1980) Transportation Law Journal

In the Northwest Airlines Inc.[44] case CAB has explained the principle guiding the two-step process:

> "This determination must be made in the light not only of the cost to the public incident to the inauguration and operation of the service, but also of the regulation of the expansion of the industry at a crucial period of its development in a manner which will not only foster sound economic conditions in air transportation at the present time but also in the future. One of the factors directly related to the interests of the public and to the economic welfare of the industry is the relationship between the estimated commercial revenues and operating costs of the proposed service".

The Board then enumerated four considerations for the determination of "public convenience and necessity".[45] Will the new service serve a useful public service, responsive to a public need? Can and will this service be served adequately by existing routes or carriers? Can the new service be served by the applicant without impairing the operations of existing carriers contrary to public interest? Will any cost of the proposed service to the government be outweighed by the benefit which will accrue to the public from the new service?

These criteria may be suitable to the United States

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p. 91 et seq.

44. ICAA 573, 577-579 (1940).

45. See Delta Air Corporation, 2 CAB 250, 251-252 (1940).

circumstances, but may not be recommended for wholesale adoption by African states. The United States does not have a state-owned national carrier so the government agency responsible for determining these criteria is in a disinterested position to make more objective decisions. In Africa, the governments have significant interests in the national airlines so that the government authorities required to determine criteria like the above will tend to be very protective of the state carriers. Many otherwise qualified applicants are likely to be written-off under such pretexts as "the proposed service will impair the operations of the national carrier contrary to the public interest", or "the service will be served adequately by the national carrier".

For this reason, it will be helpful to look at a few other approaches too. The Canadian approach is one of them. In Re Canavia Transit Inc. and others,[46] the ATC interpreted the phrase "Public necessity and convenience" to mean "Public Demand".

In carrying out its mandate pursuant to sub-section 16(3) and its residuary discretion pursuant to sub-section 16(1) of Canada's Aeronautics Act, the Commission, like CAB,

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46. See Canadian Transport Commission, Air Transport Committee Decision and Order, October 1980, ATC Decision No. 6529, August 28, 1981.

follows a two-step process to determine whether a proposed service is necessary for and convenient to the public. First, it determines whether there is evidence or sufficient evidence of a public demand for the proposed service. In this case, it would not matter whether the public demand is in terms of necessity or convenience. If there is insufficient evidence of a public demand, then no licence can issue; if there is sufficient evidence, then a licence can issue.

Second, the Commission determines whether or not to issue a licence. Public demand is weighed against other considerations falling under the umbrella of "Public interest". In this case it does matter whether the public demand is in terms of convenience or necessity. If it is in terms of necessity, it will be less difficult for a licence to be issued.

This process may be cumbersome but has more advantages than the one used by the United States. Firstly, it gives meaning to "public necessity and convenience" as a concept. Secondly, it also gives meaning to "convenience" and "necessity" as individual words used in that concept. Thirdly, it introduces a new concept, "public interest".

"Public interest", however, calls for a further explanation. For our purposes, the Canadian Air Transport Commission states that the relevant public is the public at

large, and not only the users or potential users of the proposed commercial air service. Some matters that are relevant to the consideration of "public interest" are:

1. National transportation policy (as set out in the National Transportation Act, Section 3 (Canada).

2. Inter-modal co-ordination and harmonization.

3. Government policy from time to time.

4. Sundry matters such as environmental concerns, equity, etc.

In the final determination of "Public necessity and convenience" four questions are asked by the Air Transport Commission: Is there a real requirement for the proposed service which is not adequately being met by existing services? If the application is granted, will the new service have an unduly adverse effect on or destroy other services which are now essential to the user public? Does the applicant have the ability and resources to institute and continue to provide a service adequate to meet the public need? Is the projected demand for the service adequate to give reasonable expectations of its becoming viable within a practical time frame?[47]

The Canadian considerations would appear to be more

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47. See ATC Review Committee on Re Canavia, Decision 1982-02 p. 5 (File 2-C576-1).

practical for Africa. It is not just enough to argue that there is an existing service provided by the national carrier, it must be further demonstrated that the service is adequate. Nigeria Airways, for example, cannot be said to be providing adequate services on many of its domestic routes. Again, whereas it is easy for it to be claimed that any new service will in some way impair the operations of the national carrier serving a proposed route, it will not be equally easy to prove that the adverse effect is unduly. Where it can be shown, for example, that the introduction of a new service on the Douala-Yaoundé route will have an "adverse effect" on the operation of Cameroon Airlines on the same route, but, nevertheless, the "adverse effect" is justified vis-à-vis the benefits that will accrue to the public and the national economy in general, the proposed service should be approved.

Finally, the consideration that a demand be adequate to give reasonable expectations of its becoming viable within a practical time frame is necessary to ensure that an applicant is not only financially fit at the time of commencing the service, but will remain financially fit during the operation of the service. Such continuous financial stability assures economic safety which, as pointed out earlier, is ineluctably tied up with operational safety.

Burden of Proof

It has never been controverted that an applicant has the burden of proving that it is "fit, willing and able" to operate a new service. The same is not generally true with the burden of proving that the proposed service is of "public convenience and necessity". Canada's policy is that an applicant also has the burden of proving the "public convenience and necessity" test. This is the conclusion one draws from the Canadian Transport Review Commission's decision in Re Canavia (supra). In its directives to the Air Transport Committee for a re-examination of the case, the Review Committee stated:

> "(ATC shall) determine which, if any, of the applicants have proven that the services they propose are required by the present and future public convenience and necessity..." (emphasis added)

Before de-regulation, the United States maintained a similar position. The burden of proof, of both the "fit, willing and able" test and the "public necessity and convenience" test was on the applicant.[48] The 1978 De-regulation Act, however, requires an opponent (commonly an existing carrier) to prove that a proposed service is

48. See 5 U.S.C. #556(d) (1979).

inconsistent with "public convenience and necessity".[49] The CAB determines whether the opponent has discharged the burden of proof or not on a preponderance of evidence.[50]

In Re Piedmont Aviation Inc. et al,[51] the CAB stated:

> "Under the Airline De-regulation Act of 1978, we must approve an application...unless we find, by a preponderance of the evidence, that approval will not be consistent with the public convenience and necessity. The new Act creates a presumption that the grant of all applications is consistent with the public convenience and necessity. It places on any opponents of these applications the burden of proving them inconsistent with the public convenience and necessity..."

Only very few people with even a general knowledge of Africa will honestly deny the fact that the role of, and dire need for, adequate transportation systems in the economic development as well as the basic travelling needs of the people of Africa establish a prima facie case that the operation of new transportation services of any mode to add to the existing ones is consistent with "public convenience and necessity". One would, therefore, submit that it is enough for an applicant in Africa to prove only that it is "fit, willing and able". Any party that decides to oppose the approval of a new application should be

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49. 49 U.S.C. #1371(d)(9)(B) (1979).

50. 49 U.S.C. #1371(d)(9)(C) (1979).

51. CAB Order 79-1-104 (1979) pp. 5-6.

burdened with proving that the proposed service is inconsistent with "public convenience and necessity".

To return to the situation obtaining in Kenya, the Kenyan Civil Aviation Board (CAB) is responsible for the licensing of operators. In considering an application for a proposed service, it takes into account the fitness of the applicant and the impact of the service on the public. But it is particularly sensitive to the effect the new service would have on Kenya Airways and/or other existing operators. If the new service will be prejudicial to these carriers, the application will be rejected. From the number of supplemental carriers existing today in Kenya, however, the Kenyan CAB had been considerably liberal in considering whether a new service would be prejudicial to the then existing carriers.[52]

It will still be observed that Kenya's policy is akin to the regulatory philosophy of the United Kingdom. The U.K. Civil Aviation Authority (CAA) in considering whether to grant any air transport licence, shall have regard to the effect on existing air transport services provided by British airlines of authorizing any new services the applicant proposes to provide under the licence. Where

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52. See Githaiga, S.: The Prospect of Airline Deregulation in Kenya, Term Paper (Institute of Air & Space Law, McGill University 1982) pp. 19-35.

the existing services are similar, in terms of route, to the proposed new services or where two or more applicants have applied, the CAA shall have regard in particular to any benefits which may arise from enabling two or more airlines to provide the services in question. The Authority shall satisfy itself that existing activities of other efficient British airlines will not be needlessly impaired; and will favour "proposals that widen the range of benefits enjoyed by passengers and shippers."[53]

Thus, the United Kingdom does not provide for protecting the interests of inefficient British carriers, it does not also provide for the protection of existing British carriers to the detriment of passengers and shippers. Although Kenya does not have such expressed checks like Britain, her government has a very liberal investment policy which is the main explanation for the number of supplemental air carriers. There is no evidence so far that the existence of these private operators has prejudiced the interests of the national airline, Kenya Airways.

The Kenyan Civil Aviation Board does not only grant supplemental air carriers the certificates of operation for remuneration, it also has to grant them certificates of

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53. See UK Statement of Policies on Air Transport Licensing, CAA Official Record Series 2, No. 465 of April 1981, pp. 7-13.

safety before and during operations. Their operations are strictly monitored by the Directorate of Inspection team which checks flight plans, over loading, fuel, valid certificates and aircraft performance.

There are two systems of inspection. As a rule, the operators have to undergo a general inspection four times a year. Then there are in addition spot checks to find out whether pilots are overworked, operators are adequately informed about the latest navigational bulletins and directives, as well as checking to ensure that inexperienced pilots are not assigned to difficult and problem routes. To avoid situations where a company may overwork its pilots in order to maximize profits at the expense of safety, the Board allows operators to hire free-lance pilots for temporary assignments. But this policy has proved to be counter-productive as a high incident rate has been recorded against the free-lancers. It is found that they are not diligent enough and fly for the money even when they are fatigued or an aircraft is not airworthy.[54]

A regulation on "Pilot Establishment" is being prepared. The regulation will establish "an aircraft-pilot

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54. Information collected at interview with the Director of Operations, Kenya Civil Aviation Division. See further Civil Aviation Act (Laws of Kenya) Chapter 394.

ratio". For example, any private operator with a fleet of four aircraft will be required to have at least two full-time pilots. Henceforth too, pilots' flying hours experience will be a major consideration in allowing them to fly certain routes.

8.6 Air Afrique

On three occasions a number of African states have jointly established international air carriers. Four British West African states, Nigeria, Ghana, Sierra Leone and Gambia established the West African Airlines Company (WAAC) in 1946. In that year too, four East African states, Kenya, Uganda, Zanzibar and Tanganyika conceived the establishment of East African Airways. Then, in 1961, twelve francophone African states signed a treaty establishing their own co-operative airline, Air Afrique. The first two companies, West African Airways and East African Airways are now defunct; only the third, Air Afrique, has survived.

Formation and Membership

On March 28, 1961, twelve francophone African states[55] signed a treaty relating to air transport in Yaoundé, Cameroon. The Yaoundé Treaty established an Air Transport Corporation (La Société Commune) to be incorporated in each of the member states to the Treaty.[56] They called the corporation "Air Afrique" and contracting parties agreed to designate it in their respective air bilateral agreements as the instrument for exercising their traffic rights.[57] Air Afrique was given full legal capacity recognized by the laws of the contracting states as well as the nationality of each contracting state.[58] The Articles of incorporation of the Company appear as an annex to the Yaoundé Treaty.

Air Afrique is required to have, and has, offices in the capitals of each of the contracting states.[59] To ensure the smooth running of the airline, members undertook to, inter alia, adopt the same position, as against third

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55. Cameroon, Central Africa Republic, Congo, Dahomey (Benin), Chad, Gabon, Ivory Coast, Mauritania, Niger, Senegal, Togo and Upper Volta.

56. Article 1, Yaoundé Treaty.

57. Article 2.

58. Article 4.

59. Article 3 of the Articles of Incorporation.

states, when negotiating traffic rights, and every such agreement must be cleared by the Committee of Ministers responsible for civil aviation in the member states.[60] They also agreed to harmonize their laws and regulations in matters of civil and commercial aviation, drafts of which laws and regulations must be approved by the Committee of Ministers.[61] Of the twelve founding members of Air Afrique, Cameroon, and then Gabon, have withdrawn and formed their own national airline companies - Cameroon Airlines and Air Gabon.

Capital and Fleet

At the time of incorporation, the authorized capital was 1.5 billion francs CFA, divided into 150,000 shares of 10,000 francs CFA each. 108,000 of the shares were to be owned equally by the twelve member states (9,000 shares each) and 42,000 shares were to be owned by the corporation itself.[62] De facto, however, a very significant percentage of the shares were owned by French interests - UTA and Air France, through their holding company, "Sodetraf". It has been stated that when Air

60. Article 10 of Yaoundé Treaty.

61. Article 11.

62. Article 5, Articles of Incorporation.

Afrique started operations, these French companies owned as much as 56% of the initial capital.[63] In 1979, the operating capital was 5.8 billion francs CFA. The French interests stood at 28% while the African member states held 6.54% interest each.[64] The capital has been raised to 13.8 billion francs CFA in 1984.

Air Afrique has an impressive fleet by any Third World standards. It consists of two B727s, (leased from Yugoslavia's JAT), two Airbus A300s (a third will be delivered in 1984), eight DC-8s, a Caravelle, three DC-10s and one B747 freighter. A passenger B747 will be delivered in 1984. Training of personnel and maintenance of equipment are carried out in UTA facilities in France, Air Afrique training institutes in Abidjan and Dakar, and the Technical base at Dakar.

Route Network

Air Afrique operates services to Europe, touching such points as Paris, Bordeaux, and Lyon in France; Geneva in Switzerland and Rome in Italy. It also flies to New York

63. See Anthony Vandyk: "Air Afrique" Air Transport World, September 1983, p. 69.

64. See Gidwitz: Politics of International Air Transport, op.cit., p. 11.

in North America and Jeddah in Asia. Within Africa, it serves many African capitals. It has a pooling arrangement with Ethiopian Airlines on its trans-Africa route to Nairobi.

Domestic services within the individual member states are not provided by Air Afrique, but by small airlines of the member states. However, Air Afrique and/or UTA hold some interest in most of those domestic carriers.

The Air Afrique Cabotage Zone

Article 10 of the Yaoundé Treaty obliges contracting states to adopt a common policy in negotiating air traffic rights within the framework of inter-governmental agreements, due account being taken of the operation and interests of the joint corporation. In accordance with this article, the remaining ten member states of Air Afrique have established the territory formed by them as a multinational zone for the exclusive services of Air Afrique.

> "Dans la négociation des accords le droit de cabotage ne peut être concédé à une compagnie étrangère à l'intérieur de la zone multinationale".[65]

65. See Koffi Aoussou: "Contribution Africaine au Développement du Transport Aérien International", International Air Transport (Ed. Matte), at p. 25.

A brief appraisal of the international implications of this policy will be attempted. The Chicago Convention provides that each contracting state has the right to refuse permission to the aircraft of other contracting states to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. But contracting states may not 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.[66]

The first part of that provision does not present any problem. The second part, however has been an issue before the ICAO. At both the sixteenth and eighteenth sessions of the ICAO Assembly, the Swedish Delegation proposed that the second part be deleted from the provision on the grounds that it was extraordinarily restrictive in the sense that states will be most reluctant to open up cabotage routes to any state because of the risk of being forced to do the same with respect to all other states, which is tantamount to a restriction of the exercise of national sovereignty. ICAO did not adopt the proposal, and the provision has remained giving rise to many

66. Article 7 of Chicago Convention.

interpretations.

The members of Air Afrique have construed the provision as to raise the application of the concept of cabotage from national to international territories. The Chicago Convention authorizes the establishment of multinational airlines.[67] But Air Afrique seems to be the only multinational airline having an international cabotage zone. SAS, for example, does not have such a zone. The fact that the Air Afrique cabotage zone is unique or unprecedented does not necessarily mean that it is illegal. "From the legal point of view, this policy is not in contradiction with Chicago Convention provisions, the well established principle of sovereignty gives every state the right to grant or not to grant traffic rights to foreign carriers according to its discretion and interest".[68]

Be that as it may, an ICAO Council Resolution on nationality and registration of aircraft operated by international operating agencies states:

> "...the mere fact of joint or international registration under Article 77 would not operate to constitute the geographical area of the multinational group as cabotage area."[69]

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67. Article 77, ibid.

68. Remark by the AFCAC Panel of Legal Experts on Bilateral Agreements. See AFCAC/8 - WP/8, p. 4.

69. See Note 2, ICAO Doc. 8722 - C/976 - 20/2/68, p. 7.

It would seem the ICAO resolution appropriately applies only where the aircraft of the international operating agency are jointly registered, which is not the case with Air Afrique whose aircraft are registered on national basis in Ivory Coast. Nevertheless, the resolution could be construed as an indication that the international civil aviation community does not approve of policies establishing cabotage zones in relation with multinaional airlines.

What are the implications of the Air Afrique Zone to the multinational airline, on the one hand, and to the member states, on the other hand? There is no doubt that the joint air carrier is enjoying some short-term benefits from the exclusive use of the multinational zone. But the airline may suffer, as a direct result of the very privilege it enjoys now, in the long-run. It will reciprocally not be granted Fifth Freedom Traffic Rights by foreign states and this could adversely affect its operations and future expansion.

Some of its member states are also suffering to a great extent as a result of the airline's mal-exploitation of the zone reserved for its exclusive use. Air Afrique's President, Koffi Aoussou, has been heard to announce:

> "Pour se rendre, par exemple, de N'djamena au Tchad, en Afrique Centrale, à Abidjan en Côte d'Ivoire, en Afrique Occidentale, il est souvent

préférable de le faire via Paris."[70]

Consumers' time and money would be saved if another African international carrier, for example, Cameroon Airlines, were to transport the traffic from N'djamena to Abidjan without having to take such traffic to Europe first.

Balance Sheet

Generally, one can say Air Afrique has not performed badly financially. In 1975, for example, the company transported a total of 429,000 passengers - over 1.353 million passengers/kilometres. About 80% of this traffic came from member-states and France. About 90% of the traffic was business and the rest, tourist. The airline recorded a profit of 68.6 million francs CFA on a turn-over of 102.8 million francs CFA in 1982. That represented a 19.2% increase over the 1981 turn-over. First class traffic was down 6% from the 1981 figures. But the 1982 total of 697,132 passengers carried was a 4% increase over the 1981 passenger traffic. However, freight and mail traffic in 1982 fell by 2% and 9% respectively below the 1981 figures.

Although official figures have not been made public yet, 1983 does not seem to have been a good year for the joint carrier. The Chairman of the 56th Administrative

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70. See International Air Transport (Ed. Matte) op.cit., at p. 26.

Council of Air Afrique convened at Niamey, Niger, Niger Minister of Transport, Amadou Nouhou, is reported to have stated that Air Afrique has experienced a "particularly poor" passenger result in 1983,[71] despite an increase in demand on the North American route. The Chairman said that there was a serious drop too in freight traffic, which was "more worrying". One reason given for the drop in passenger revenue was the development of charter flights in competition, and it was hinted that cut rates for tourists might be a possible solution.

The mainstay of Air Afrique's traffic had been business and government passengers travelling between the former French African colonies and metropolitan France on which the airline and its French partners, UTA and Air France, had a virtual monopoly. Today, that monopoly is seriously challenged by the airlines of the break-away member states of Air Afrique, namely, Cameroon Airlines and Air Gabon. These two airlines, are no doubt, proving to be very commercially aggressive competitors to Air Afrique and the other French airlines on the African and European routes.

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71. See West Africa No. 3462, 19/26, December 1983, at p. 2962.

Critique

Air Afrique is a praise-worthy co-operative effort by small and poor states that banded together in order to embark upon a project involving a large amount of capital. Seperately, only one or two of the present ten member-states could have afforded to establish an international air carrier of any significance. The participation of the French companies in the venture was a sensible measure which afforded the airline both managerial expertise and financial stability.

However, it is not a point to the credit of Air Afrique that after more than two decades of its establishment, it still has a very large number of Frenchmen as navigational personnel and technicians. And this is so at a time when unemployment is on the increase in the member-states of the airline. The often quoted excuse that there is a lack of indigenous manpower qualified for the positions does not have much credibility. It is known that those who make policies for Air Afrique have resisted persistent appeals from some of the governments of the member-states to accelerate the training of indigenous experts. It is also known that member-states hardly agree on the distribution of positions among themselves, so remain content with Frenchmen taking or remaining in those positions as a compromise. It is unfair for Air Afrique's

policy-makers, (for some reasons that can hardly be said to be cogent) to deliberately stagnate the development of indigenous expertise, while it is generally believed and often stated by foreigners that Africa badly lacks skilled manpower.

Furthermore, Air Afrique's policy of maintaining the equality of member states through a strict and rigid regulation of the shares held by each member state[72] is unprogressive. Article 4 of the Yaoundé Treaty obliges the contracting states to have equal shares in the corporations capital. But this provision is not binding on the French companies since France is not a party to the Yaoundé Treaty. Accordingly, the equality of shares does not seem to affect the shares held by foreign interests. While foreign investment and partnership in African economic ventures is desirable and to be encouraged, the laws regulating such joint ventures should not be designed to be instruments of keeping the African participants in perpetual subservience to their foreign partners.

It does not make good business, and even political, sense to tie down the number of shares Ivory Coast can afford to hold in the company in order to maintain the equality of the interest of self-afflicted Chad. It has

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72. See articles 4 and 5, Yaoundé Treaty.

been found that some of the member-states are slow in coming, or even unable to come, up with funds to raise the company's capital. Why should Senegal, for example, not buy the shares allotted to Central African Republic if the latter cannot afford to pay for the value of the shares allotted to her?

8.7 Pan-African Airlines

The establishment of multinational airlines similar to Air Afrique or SAS has been recommended for Africa on many occasions and in many fori. In spite of its desirability, its implementaion is neither easy nor near. Besides the political, economic and technical implications fraught in such an ambitious undertaking, there also seems to be a mix-up of what is really desired.

8.7.1 A Pan-African Air Carrier or Pan-African Air Carriers?

The OAU Freetown Declaration of General Policy in the Field of Civil Aviation mentions the "creation of multi-national airlines".[73] One would construe this to mean a number of multi-national airlines established by groups of African states. The AFCAC Declaration of General Policy

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73. See section 5.1.5 supra.

also provides for the "creation of multi-national airlines".[74] Again, an apparent reference to more than one air carrier. At the 15th Annual General Assembly of AFRAA which took place at Nairobi, the Chairman and General Manager of Uganda Airlines (a former president of AFRAA), Colonel G.W. Toko, suggested that AFRAA should comprise not thirty-six airlines, some with just one or two aircraft of outmoded type, but "a number of strong regional carriers with strong economic foundations capable of withstanding international competition on their own."

The creation of a single Pan-African Airline has been mentioned too on a number of occasions by AFRAA, AFCAC and the IATA. At AFRAA's Abidjan Assembly, the report of the AFRAA Traffic Committee referred to a pan-African airline in regard to the development of the African Grid System.[75] AFCAC states that in its 1984-85 Work Programme, it has as one of its tasks the co-ordination of activities envisaged within the framework of the OAU feasibility Study on the "creation of a Pan-African Airline".[76] IATA, in its 1982 Annual Report at page 21,

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74. See section 6.3.2 supra.

75. See Anthony Vandyk: "AFRAA Conference", op.cit., Air Transport World June 1983 at page 28.

76. See AFCAC/8 - WP/33 at page 7.

states:

> "The main impetus coming from governments is being directed towards co-operative ventures, including particularly the study conceived within the Organization of African Unity of the establishment of a Pan-African airline. IATA is co-operating in the evolution of this proposal".

The analysis following will illustrate the implications of the concept of a multi-national airline or airlines, drawing from the experience of history and present realities. It will in the light of these implications suggest whether Africa should establish a single Pan-African Airline or a number of multi-national airlines; and whichever, how to go about it.

8.7.2 Past Attempts

Two notable attempts at establishing joint airline companies with some initial success were made in Europe in the 1920s. In October 1920, La Société Franco-Roumaine de Navigation Aérienne was established. Conceived as a political and strategic link between France on the one hand, and Rumania, Czechoslovakia, Poland and Yugoslavia on the other hand, the company inaugurated the Paris-Strasbourg-Prague air route in 1920, extended it to Warsaw in 1921, and to Istanbul in 1923. In 1925, the company changed its name to La Compagnie Internationale de Navigation Aerienne (CIDNA). Despite the new name and the fact that it received

small financial support from Czechoslovakia, Rumania, Poland and Yugoslavia to supplement the main French funding, the company was registered under French laws and had only French nationality.[77] However, it was obliged to employ not only French nationals, but also the nationals of the other associated states to carry out its operations. In 1933, CIDNA ceased to exist.

In 1921, the German and Soviet governments established their own joint company called "Deruluft" to operate an air service between Berlin and Moscow. The paid up capital was contributed in equal shares by each of the governments, and so were subsidies. The Board of Directors consisted of an equal number of Soviet and German members. One half of the personnel and equipment was German, the other was Soviet. Although Berlin was the general headquarters of the company, there were two general managers - a Russian at Moscow and a German at Berlin.[78] At the beginning of 1937, the services of Deruluft were suspended indefinitely, and not long after, the company was liquidated.

In the 1930s and 1940s, mainly necessitated by the

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77. See Lawrence Tombs: International Organization in European Air Transport, p. 29 et seq.

78. Ibid., p. 134 et seq.

military importance of air transport and the need for collective security, moves were made to establish joint air services on a dimension beyond bilateralism. In 1932, the French government submitted a proposal to the disarmament conference in Geneva, convened by the League of Nations, for the internationalization of public air transport services. A provision was made for the establishment of an International Air Union with personnel and equipment which could not be requisitioned by the governments which adhered to it. The Union's assets were to be placed at the disposal of the League of Nations in times of crises. The proposal was never supported.[79]

The British made two unsuccessful attempts on the line of the French above. In 1935, they proposed a plan for the internationalization of air transport and the creation of a European Air Police Force within an institutional framework. The plan envisaged all civil aviation to be directed, controlled and piloted by the paid servants of a European Air Transport and Police Board which would have an international monopoly for air traffic. The plan was

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79. See Matte: Treatise On Air-Aeronautical Law, op.cit., p. 126; Goedhuis, D.: "Questions of Public International Air Law..." 31 Recueil des Cours (1952) p. 254.

rejected.[80]

In 1944, the British Labour Party proposed in a pamphlet entitled "Wings for Peace", the creation of a World Air Authority which would own and operate the main trunk air routes round the world.[81] That proposal too was not popular.

Only Australia and New Zealand seemed to have been impressed by the British proposals. In the Chicago Conference of 1944, they proposed the establishment of an international authority which would act as the only international airline operator owning civil aircraft. That proposal too was not accepted. As the Canadian Delegation dismissed it, "it was the regulation, and not the ownership of operatiosn which had to be international." However, the Conference agreed that contracting states which wished to could institute joint air transport operating organizations or international operating agencies or pooling arrangements on any routes or in any regions.[82] A state may

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80. See Lawson, R.N.: "A Plan for the Organization of a European Air Service", The New Commonwealth Institute Monographs Series C, No. 2, p. 17 et seq.

81. See Weber, L.: European Integration and Air Transport, LL.M. Thesis (McGill University) 1976, op.cit., p. 31.

82. Article 77 of the Chicago Convention.

participate in such arrangements or organizations either through its government or through an airline company or companies designated by its government. The companies may be state-owned or partly state-owned or private-owned.[83]

After Chicago, the dream for a single world-wide air transport operator was abandoned, rather, efforts were directed at regional or sub-regional arrangements. In 1946, for example, Britain, Australia and New Zealand formed the British Commonwealth Pacific Airlines Corporation (BCPAC) having as its objective the exploitation of a route Sydney-Aukland-Honolulu-San Francisco-Vancouver. It was incorporated in Australia under Australian laws (company Act of New South Wales). Australia held 50% of the shares, New Zealand, 30% and Britain, 20%. Its inaugural service was carried out in 1948 and shortly after that the multinational air carrier ceased to exist.[84]

An unsuccessful effort was made in 1957 to merge European airlines under the name of Air Union. An agreement could not be reached on three basic issues: the quotas to be assigned to individual member states, the transfer of supervision to an inter-governmental ministerial committee,

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83. Article 79.

84. See Bernard Dutoit: La Collaboration entre Compagnies Aériennes, pp. 165-166.

and a common stock of aircraft.[85]

As earlier mentioned, Africa has had some short-lived joint arrangements too. The West African Airways Corporation (WAAC) is one example. After the Second World War, the British Overseas Airways Corporation (BOAC) started scheduled flights into the British colonies of West Africa. The need for a local feeder service in the region resulted in the establishment of WAAC whose services covered Nigeria, Ghana, Sierra Leone and the Gambia. In 1958, Nigeria left WAAC, carving from it the Nigeria Airways Limited. Ghana which became independent in 1957, soon established her own national airline - the Ghana Airways. With Nigeria and Ghana out, WAAC collapsed.

But an even more important example is the East African Airways. The company originated from a joint arrangement made in 1946 by Kenya, Uganda, Tanganyika and Zanzibar. The last two became the United Republic of Tanzania in 1964. On June 6, 1967, the three independent East African States signed the Treaty for East African Co-operation. By that Treaty, Kenya, Uganda and Tanzania established the East African Community (EAC), and the East African Common Market as an integral part of the

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85. See Report of the Transport Committee of the European Parliament - E.P. Working Document 195/72 of the 1972/73 Session, p. 15 et seq.

Community.[86] Furthermore, the Treaty established four corporations of the EAC; the 1946 joint carrier, East African Airways, was given the status of one of the four corporate institutions.[87] Kenya owned 67.7% of the company's shares; Uganda, 22.6% and Tanzania, 9.7%.[88] Its headquarters was at Nairobi which was also the hub of its operations. East African Airways served domestic, intra-East African routes, as well as intra-African routes. It also operated services to Europe and India. In January 1977, the multinational company was dissolved.

Why did all the cases enumerated above of multi-national arrangements for a joint air carrier fail? The premise for the necessity of establishing such companies is suspect. The establishment of a multi-national carrier is often urged on the ground that only such an arrangement would be commercially profitable to the particular group of states. This may be a sound economic theory, but there is more to the establishment of airlines than commercial profits. National interests in air transport services are

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86. Article 1(1) of the Treaty for East African Co-operation.

87. Article 7(1), ibid.

88. See Ochieng-Obbo: East African Airways, LL.M. Thesis (McGill University) 1981 p. 40.

complex, varied and even contradictory that it can be difficult to have a compromise.

Wheatcroft has had to ask: "What are these matters of national interest which most of the countries...seem so determined to protect and what hopes are there that they may be reconciled in an agreed definition of common international purpose?"[89] One could sum them up under three considerations: military matters, political considerations and economic nationalism.

National air fleet, like national maritime fleet, are significant national security assets. In an article published by the London Observer in 1935,[90] the point was categorically made by a senior official of the British Air Defence Ministry:

> "The following facts are incontrovertible: - That the ground organization which provides a nation-wide system of aerodromes and air parks, with their accompanying equipment for supply and repairs, would be invaluable in war; that the civil air mechanics are fully qualified for military service, that the pilots who fly airlines are, ipso facto, by reason of their exceptional experience in blind flying and in air navigation, first class bombing pilots...The demand for greater weight-carrying capacity, higher speed and increased range, combined with a reduction in the weight/power

89. Wheatcroft, S.: Economics of European Air Transport, p. 205.

90. Cited by Tombs: International Organization in European Air Transport, op.cit., Footnote 32, at p. 23.

> ratio, has led to the production of commercial transport machines possessing a very high potential for military efficiency...
> Apart from these considerations, there is no doubt that...suitability for military use has frequently taken precedence of (sic) economic requirements in the design and construction of civil machines. The result is that some of the latter now employed actually possess a better military performance than that of the obsolescent military types which... air forces...are partly equipped. Similarly, a nation's entire civil air transport equipment lends itself to military exploitation..."

The above stated facts are no less incontrovertible today. States are so sensitive to their military vulnerability that they are very reluctant to relinquish ownership, or forbear from owning and having uncompromising control over a strategic industry like air transport.

Political nationalism constitutes another stone-wall. When states merge their airlines they concede some of their individual identity and prestige abroad. Some authors have tried to give developing states a sense of guilt for "establishing national airlines to show their flag abroad". First, it is fallacious to state that any developing state established an airline just to show its flag abroad. Second, it is the developed countries, which attached so much importance to "national prestige through the airlines". A Briton, Colonel Moore-Brabazon argued in Parliament:

> "I hate the word 'prestige', but I like to bring it in for the reason that every English aircraft which travels from one side of the world to the other is a little bit of England. England will be judged by that little bit by those for whom that is the only

thing they know of England."[91]

France once explained that her airline to the Antilles was principally a political one, since the United States had made so much pro-American and anti-French propaganda in South America that the French aviator had to go and "kindle the patriotic ardor of a population most sympathetic and alluring but under the influence of the chase after the dollar." The Italians on their own part have also been heard to claim that their aircraft would be the "flying messengers of the new word addressed by the Duce to the peoples of the Orient."[92]

The other developed nations may not be saying the same thing in the same erudite words, but the truth remains that national prestige is no less attached to their airlines. The airlines of the principal combatants in the "Cold War", the United States and the Soviet Union, sometime in the past, did not operate services on certain routes because those routes were commercially profitable. They flew them to win or keep more hearts to their respective sides.

Neither can it be said that the use of a national airline to promote a nation abroad is devoid of any economic

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91. See Lissitzyn Oliver: International Air Transport, op.cit., Footnote 32, at p. 23.

92. Ibid., page 58.

bencfits. A national airline can be a very valuable medium of good publicity abroad for national industries such as tourism and trade. Such publicity through the national airline will best be appreciated when it is considered that developing countries receive publicity abroad only on the happening of some incidents such as a coup d'état or civil strife. That kind of publicity does not help to attract investors to these states. Cameroon, for example, is better publicized abroad through her national carrier, Cameroon Airlines, than she was while a member of Air Afrique. Mention has already been made of how Cameroon Airlines is expected to contribute to the success of the current Five-Year Development Plan by publicizing the country abroad and attracting investors.

An airline is also an object of economic nationalism. In the present world of unemployment, it creates jobs for the nationals and relieves the government of some worries. Since its employees have to have skill and expertise, the airline becomes a very vital medium for the transfer of technology and know-how from the developed to the developing countries with national airlines. It will be appreciated that some of the problems that have arisen in multi-national airlines such as Air Afrique have had to do with the employment of the nationals of the respective member states. Governments can understandably be impatient

when such a strategic multi-national corporation does not facilitate the employment and training of their own nationals.

Beside these nationalistic considerations, some multi-national air companies have collapsed because the common bases on which they were founded had crumpled. The West African Air Corporation (WAAC) was established on a colonial foundation. When the member states attained their independence, the colonial base caved in and along with it went most of the institutions that stood on it.

The East African Airways was established on the political camaraderie that existed among the three East African states at the time of the establishment of the East African Community. Eventually that political amity was jeopardized by the emergence of some stronger forces: Kenya's ideology which was capitalist and profit-oriented conflicted with Tanzania's socialism; Uganda had a new leader, Idi Amin, who was a dictator. Uganda's totalitarianism was seriously incompatible with Kenyan and Tanzanian democracies. Political goodwill, that which had held the three states and their common institutions together, suffered a dead blow - and so did the East African Community and its corporations, among them, the East African

Airways.[93]

States see examples of past failures and are reluctant to initiate new joint air carrier arrangements. They also know, especially the developing countries, that with their different approaches to, and unique problems of, development, a multi-national carrier cannot be easily and readily mobilized as an instrument for their respective national development plans, in the same way it can be done with a national carrier.

An example is Chad - a member of Air Afrique. She is landlocked. Her only maritime gateways are through Cameroon and Nigeria (and through Libya to a certain extent). She would, therefore, need an air carrier to transport her entrepôt goods from either the Cameroon or Nigeria seaports. But Air Afrique, the carrier Chad designated in her bilateral air agreements with Cameroon and Nigeria respectively, does not maintain services on the N'djamena-Douala or N'djamena-Lagos routes because these routes are not, as far as the carrier is concerned, profitable.

In case it might be concluded that this author is opposed to the establishment of multi-national air carriers,

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93. See further Ochieng-Obbo: East African Airways LL.M. Thesis (McGill University) 1981 op.cit., pp. 77-96.

two examples of successful joint carriers will be mentioned. One of them is Air Afrique which has been examined earlier.[94] What holds Air Afrique together?

There are three main factors that have kept the multi-national company, Air Afrique, in one piece. First, the colonial and cultural base is still firm. The members of Air Afrique are still devoted members of the French Commonwealth Africa and strong apologists of French culture. French is the only official language used in all the member states and it is the working language of the airline. The role of a common language as a unifying force in a continent with a plethora of official languages should not be underestimated. This partly explains why no non-francophone African state is or has ever shown the interest to join Air Afrique. The common French cultural identity of the member states erodes their individual national identities significantly, thereby constituting a binding force. This also explains in part why even former French colonies such as Guinea, Mali and Cameroon which have a less powerful French cultural identity do not find it comfortable to be in Air Afrique.

The second factor follows from the first - it is the French interests in Air Afrique. The economies of even

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94. See section 8.6 (supra) of this work.

the most influential members of Air Afrique, Ivory Coast and Senegal, are managed to a very great extent by the French. UTA, and to a lesser extent, Air France, provide Air Afrique with management, operational and technical services thereby making the French the live-wire and the overseer of the company. One is not so sure that Air Afrique would still be together without the French. One is sure, however, that no African state which does not tolerate an extensive degree of foreign control of its national economy would like to be in Air Afrique.

Finally, the reason that brought some of the members to the co-operative venture in the first place now keeps them in it - poverty. When Cameroon and Gabon became dissatisfied with Air Afrique, they withdrew. They left because they had the financial viability to establish their own national airlines. Some other members have had occasions too to be dissatisfied with the company. Chad, for example, once threatened to withdraw from the arrangement but had to resign herself to grumbling aloud. It should also be recalled that Chad, Congo and Central African Republic have submitted a project to the United Nations Transport and Communications Decade in Africa Programme for the establishment of their own joint airline company. Should that project be studied, approved and supported, those three countries will definitely pull out of

Air Afrique.

The Scandinavian Airlines System (SAS)

Outside Africa, there is only one important multinational air carrier in existence. It is the Scandinavian Airlines System (SAS). Whereas in Air Afrique twelve small states decided to pool their resources together to establish an international carrier, in the case of SAS, three small airlines of Sweden, Denmark and Norway, each struggling for survival in the face of relatively very strong foreign competitors in the international air transport market, decided to pool their resources together in one joint stock company which was incorporated in 1947. In 1951, the SAS consortium took over all the international routes operated hitherto by the three small airlines severally.

The Swedish carrier holds three-sevenths of SAS shares, the Danish and Norwegian carriers hold two-sevenths each. Each of the holding carriers is in turn owned by its respective parent government and state-influenced private interests. The Board of Directors of SAS is composed of the members of the Boards of the three parent companies - DDL (Denmark), DNL (Norway) and ABA (Sweden). At Board meetings, however, a maximum of six representatives from

each of the parent companies have the right to vote.[95] Each of the three countries maintains a separate domestic carrier and charter operators.

The SAS Board of Directors makes strong efforts to distribute managerial and flight positions as well as other responsibilities, facilities and programmes equitably among the three participating states.[96]

SAS does not have a distinct legal personality of its own from those of its parent companies. Its assets belong to the holding companies, not to the consortium, and each parent company is severally liable to third parties. The respective governments negotiate with foreign governments for obtaining traffic rights for SAS.[97] But since the consortium does not possess its own legal personality, there is no direct relation between it and the parent governments. The governments deal with it through the national mother companies which in their turn assign to SAS any rights obtained or obligations imposed by the governments.

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95. See SAS Annual Report 1957-1958, "Board of Directors".

96. See for example, SAS Annual Report, 1978-79, pp. 27-32.

97. See Wassenbergh: International Civil Aviation Policy and the Law of the Air, at p. 78, for the SAS Clause.

There are many other weak airlines which could, nevertheless, not take the initiative taken by the SAS members. Some conditions specially favoured the successful establishment of SAS. The three States are in one geographical area. Their people have much in common such as their mutually comprehensible languages. They had similar legislation, governmental systems and political regimes at the time of founding of SAS. The last condition could partly explain why Finland, a close neighbour to these three States, which was politically tilted to the Soviet Union then, could not join in the venture.

The question has been asked whether SAS could be successfully established today in the light of the changed conditions in the region. A former president of the consortium, Knut Hagrup, is quoted as saying in 1978 that:

> "It would be impossible to form SAS today. The three countries are more national than they were after World War II. They are not in the mood to go together and make one airline."[98]

Some doubts have even been expressed about SAS's future existence as the only successful airline consortium. Some also believe there can never be another SAS that will

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98. See Gidwitz, idem, p. 10.

last as long.[99] It may be impossible to form SAS today. The future of SAS may be open to speculations, but SAS is still in existence now. One important lesson to be learned from that is that a subsequent upsurge of nationalism should not always be allowed to pull down the successful institutions that have been established by and serve a group of states together.

8.7.3 Africa's Option

The preponderance of the analysis so far weighs against the establishment of multi-national airlines. Africa's situation, however, would compel her to be influenced by the few successful cases rather than by the many unsuccessful ones. Nevertheless, a plan to form a single pan-African international airline is less practical.

The lessons of Africa's history and politics do not favour the successful establishment of a single African international air carrier. Theoreticians of Pan-Africanism who wanted to see all African states united under a single political entitity have by now realized that they laboured under a delusion. The concept of an "African Common Market", once pursued with great enthusiasm, is now "blowing

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99. See Joan Feldman: "Regionalism facing many challenges as a replacement for bilateralism" Air Transport World, op.cit., August 1983, at p. 49.

in the winds". What has emerged in its place is sub-regional economic groupings. And, even assuming that the formation of a single Pan-african Airline were feasible, would the single continental airline serve the best interests of the consumers and African states?

It has been demonstrated earlier that national airlines which operate on domestic routes without some reasonable competition from supplemental carriers tend to operate rather sloppily, to the inconvenience of the travelling and shipping public. A national carrier enjoying the zealous protection of one government is barely tolerable; a single continental carrier enjoying the unfettered and combined protection of all African governments may be too much for the public. And there may be problems too for the carrier.

Petty annoyances by nationals and governments of the member-states of such an airline in respect to the distribution of positions and facilities could be enough to seriously affect the good management and operations of the airline. Reconciliation of the wide range of national ideologies and philosophies which will be imposed on the company could be very difficult, if not impossible. And what is more, will African states by establishing only a single joint carrier not be putting all their eggs in one basket?

The other option which seems more prudent, practical, and safe is for African states to establish a number of sub-regional international air carriers. It is suggested that the number of such carriers be based on and reflect the present sub-regional alignments which are in turn based on and reflect economic co-operation or cultural affinity. Five such airlines could emerge from the ECOWAS group, UDEAC or Central Africa group, SADCC or Southern Africa group, the North Africa and the East Africa groups. Furthermore, the airlines should be in the form of consortia, with the national or domestic carriers, rather than the governments, of the states comprising the respective groups holding shares in them. The exclusion of direct government participation will minimize undue political and administrative interference by states in a basically business institution. Side by side with the five continental carriers should operate supplemental carriers consisting of national and charter operators. The continental carriers should concentrate on international operaions while the supplemental carriers act as feeders and back-up operators by carrying domestic and non-scheduled traffic.

The establishment of these sub-regional airlines should not be rushed. It should be an evolutionary rather than a revolutionary process. Perhaps the starting point

would be for the existing airlines of the states in the different sub-regions to initiate or/and increase their co-operation with one another through pooling arrangements, the establishment of common maintenance bases and the acquisition and use of common facilities. Over and above, the states and their nationals should be subjected to effective psychological and political re-orientation and preparation, through seminars and symposia, in order to neutralize such built-in constraints as the glamour that individual states have so far attached to their national carriers, and their reluctance to concede even the semblance of sovereignty.

Conclusion

The establishment and successful operation of an efficient air carrier requires big capital investment and expertise which are not readily available in the developing states. It is, therefore, right that African governments, which are in a better position to raise the required capital than the private sector can, establish state-owned airlines, as has been done. It is also prudent for some foreigners to be invited to contribute either part of the capital or some of the qualified manpower to help in the efficient and safe operations of these companies.

This, however, does not justify government policy

to protect a state-owned airline to the point that air transportation becomes a veiled monopoly of the government. Without advocating de-regulation of the US-type, it is, nevertheless, submitted that not only is some private participation in a state-owned airline necessary in order to neutralize the slothfulness prevalent in government establishments in most African states, but also that the establishment of private supplemental carriers, by fit and able companies, to provide services on routes not adequately served by the national airlines be encouraged.

Perpetual large-scale foreign participation in a state-owned airline is not healthy. A state-owned airline is a very important job-creating and expertise-developing industry for the nationals of the owning state. It is also a strategic industry for the government. Permanent and massive foreign participation may only be permissible in the private or supplemental carriers.

Finally, there is an irrebuttable need for the amalgamation of the existing mushroom African international carriers into a few stronger carriers for efficiency and better economic results. Such an exercise should not be carried out by one stroke of the pen in a diplomatic conference of political leaders. Rather, it should be effected through a gradual and well planned process - recommendably, by the airlines themselves - for it to

succeed and endure.

CHAPTER 9. THE AFRICAN DEVELOPMENT BANK AND CIVIL AVIATION IN AFRICA

9.1 General Sources of Aviation Financing

The installation and maintenance of aviation facilities in Africa are financed principally by the African governments, through aid given by international institutions such as the ICAO, ECA and UNDP, and through aid given by friendly foreign governments. The acquisition of equipment for the airlines is financed mainly from the capital granted by the governments (in the case of state-owned airlines), through the shares sold to foreign companies (as in Air Afrique and Cameroon Airlines, for example), and through credits advanced by foreign financial institutions. It has been mentioned how Nigeria Airways would be able to expand its fleet by means of a $70 million loan through a transaction concluded by the Chase Manhattan Capital Markets Group and the National Westminster Bank. Cameroon was able to acquire two De Havilland transport aircraft through the credits advanced by the Canada Export Development Corporation.

Nigeria and Cameroon were in favourable positions to secure loans from foreign capital markets. Nigeria's economy is potentially viable. And so is Cameroon's, a country that now leads the league of African

creditworthiness with a triple-A rating.[1] However, many other African countries, and consequently their airlines, are not so fortunate. Ghana Airways or the Guinea national carrier, for example, do not find it easy to acquire new, or replace outmoded equipment.

It is particularly in situations where external credits have been scared away that the establishment of an African financing source becomes an imperative. In the Freetown OAU Declaration of General Policy in the Field of Civil Aviation, the African Development Bank was invited to play an important role in the financing of aeronautical activities in Africa.[2]

9.2 Establishment and Objectives of the ADB

At a conference of African Finance Ministers convened at Khartoum, Sudan, from July 30 to August 4, 1963, at the initiative of the Executive Secretary of the Economic Commission for Africa, the final text of the Agreement establishing the African Development Bank (ADB), was approved and opened for signature. The Agreement came into force on September 10, 1964, when the required number of

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1. See Brian Murphy: "Cameroon - Africa's happy exception", International Perspectives, March/April 1983, at page 22.

2. See section 5.1.5 supra.

instruments of ratification were deposited.[3] The inaugural meeting of the Board of Governors of the Bank was held in Lagos, Nigeria, in November 1964, with twenty-five African governments in attendance as members of the Bank. At that meeting Abidjan, capital of Ivory Coast, was chosen as the Bank's permanent headquarters. On July 1, 1966, the ADB started operations at its headquarters.

Membership

At its inception, ADB maintained a very restrictive membership policy directed at keeping it a strictly regional bank. Membership was restricted to only independent African states.[4] Consequently, the ADB was the only regional bank in which membership was made up of only the developing countries in the region in which the bank was expected to serve, thereby excluding the United States and other capital exporting countries.

The rationale for that policy was that the ADB was conceived and established in skeptical times about regional banks generally, and the African one in particular. African states were desirous to fortify their self-help attitude and did not approach non-African countries for

3. See Article 65 of the ADB Agreement on ratification.

4. See Art. 3(1) as it then was.

subscriptions to the share capital of the Bank.[5] Non-African countries could, nevertheless, participate in the Bank by granting it Special Funds designed to serve its purposes and activities coming within its functions.[6] However, it was later realized that the restriction of membership to African states alone was not advantageous. In 1979, the decision was made to broaden the base of the Bank, and in 1982, the Agreement was amended to open membership to non- African states. Today, the United States, the United Kingdom, Canada and other western capital exporting countries and some non-aligned states are members of the ADB.

Legal Status

The ADB has an international personality and is granted contractual powers to deal not only with its member states, but also with non-member states and other international organizations.[7] It can sue or be sued.[8] But it has immunity from legal actions not related to the exercise of its borrowing powers. In cases arising from the

5. See ADB Doc. No. ADB/BG/111/5, Annex 1 p. 4.

6. See Article 8 of the ADB Agreement.

7. Article 50.

8. Article 51.

exercise of its borrowing powers, it can be sued only in a court of competent jurisdiction in the territory of a member state in which the bank has its principal office, or in the territory of a member or non-member state where it has an agent for the purpose of accepting service or notice of process or has issued guaranteed securities.[9]

Objectives

The principal objective of the Bank is to contribute to the economic development and social progress of its members individually and jointly.[10] To achieve this objective, the Bank, inter alia, uses its resources for the financing of investment projects and programmes relating to the economic and social development of its members, with special priority being given to projects or programmes which by their nature or scope concern several members, and projects or programmes designed to make the economies of its members increasingly complementary and to bring about an orderly expansion of their foreign trade. The Bank further participates in the selection, study and preparation of projects, enterprises and activities contributing to development. It mobilizes within and outside Africa,

9. Article 52(1).

10. Article 1.

resources for the financing of investment projects and programmes; and provides such technical assistance as may be needed in Africa for the study, preparation, financing and execution of development projects or programmes.[11] Civil aviation projects undoubtedly qualify for ADB's financing, planning and study.

9.3 ADB's Resources

The Bank's authorized capital stock was fixed at $250 million, divided into 25,000 shares with a par value of $10,000 each.[12] In 1973, it was increased to $320 million; in 1974, to $400 million.[13] Today, the capital stands at $6 billion. The authorized capital is divided into two equal parts - half is paid-up and the other is callable.[14] Every member is required to subscribe shares of the capital stock of the Bank.[15] Each member has 625 votes and in addition, one vote for each share of the capital stock of the Bank held by the member.[16]

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11. Article 2.
12. Article 5(1).
13. Board of Governors Res. 11/73 and 8/74.
14. Article 5(2).
15. Article 6.
16. Article 35(1).

Payments of the paid-up half of the shares are made entirely in gold or convertible currencies, and in the event of calls made on the callable half, payment may be made in gold, convertible currency or in the currency required to discharge the obligation of the Bank for the purpose for which the call is made.[17] States that ratified the Agreement in accordance with article 64(1) on or before July 1, 1965, otherwise called Original Members, were required to make their contributions to the paid-up capital in six instalments spread over a period of four and a half years. In the case of non-original members, the Board of Governors determines the date and amounts to be paid.[18]

Unfortunately, some members are known to fall in arrears of payment of subscriptions so much so that the Bank has found it difficult to effectively carry out its functions. One of the reasons given for some members' failure to pay is the fact that payments have to be made in gold or convertible currencies which are hardly available in the poor member states. But the Bank has no other choice than to stick to the policy because the local currencies of most of the member states are of little or no value for the services of the Bank.

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17. Article 7.

18. Article 7(1) and (3).

To compound the Bank's predicament, some members who obtained loans from it are in default of payments. The Bank's Management was constrained to decide that bad payers will not be eligible for new credits or for disbursements on existing ones until they have paid up. Some of the countries likely to be affected by the Banks tough position are Sudan, Ghana, Tanzania, Sierra Leone and Zaire.[19]

Other Sources of Acquiring Funds

The UNDP is one of the principal benefactors of the ADB. Besides participating in the financing of some projects initiated by the ADB, the UNDP also made a grant of $2.7 million to the Bank directly to meet the expenses of a pre-investment unit aimed at formulating and evaluating development projects. The United States and European states made available to the Bank $65 million in 1975, and under a Trust Fund, Nigeria also made about $50 million available to the Bank in 1976. The Bank can, in addition, sell some of its securities[20] or benefit from contributions received through a Special Fund[21] or it can increase its capital

19. See Africa Now, May 1983, p. 75.

20. Article 23.

21. Article 8.

stock.[22]

The Bank can, furthermore, borrow funds in member countries, or elsewhere. The decision to open up to non-African members vastly expands the Bank's capital base and, thus, its capacity to borrow. But a problem exists on whether it should borrow against the whole of its callable capital (African and non-African) or only a part of it. In the past, the Bank has borrowed successfully with a top triple-A credit rating on European and other capital markets for fairly short maturities. Now it aims at penetrating the national bond markets in key industrialized countries with the objective of borrowing fixed interest loans at maturities of fifteen to twenty years.

Officials feel that such a policy is prudent since the Bank lends out at fixed interest for long maturities. However, it is likely to get the best terms if it only borrows against non-African capital, or more precisely, against the hard currency portion of its callable capital since the currency of even some of the non-African members, (for example, the Argentine peso) is no asset on the international markets.

The borrowing capability of the ADB is of particular interest to the region's civil aviation industry.

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22. Article 5(3).

It is evident that the Bank does not have enough funds in terms of its own capital resources to finance to a significant degree aeronautical activities in addition to other development projects falling within its purview. In order to make any impact in the aeronautical development sector, the Bank will have to mobilize external resources by borrowing on the external financial markets or generating aid from the relevant foreign agencies. This will be more appreciated when it is noted that the ADB has a conservative 1:1 gearing ratio, in other words, its outstanding debts shall not exceed its established capital resources. This has been interpreted to mean that before the Bank can extend a loan it has to secure the funds in advance.

However, the ADB is not in a critical state. As mentioned above, the ADB may establish or be entrusted with the administration of Special Funds which are designed to serve its purpose and come within its functions. Accordingly, it established the African Development Fund. The Bank has just opened talks in Abidjan on the fourth replenishment of this Fund. It is requesting about $2,500 million to carry out its 1985-87 lending programme. While it appears unlikely that the ADB will be granted this amount, the final amount is expected to be higher than the earlier accepted amount of $1,000 million. The United States, the Fund's principal donor among the twenty-five

non-regional member-states, has demonstrated support for ADF IV.[23] This is heartening considering the Reagan Administration's negative attitude towards replenishment of international aid funds.

9.4 ADB's Activities in the Civil Aviation Field

The ADB grants loans on soft terms, and provides technical assistance in the form of advisory service on investment, economic and financial matters. It is required to provide or facilitate financing for any member, political sub-division or any agency thereof or for any institution or undertaking in the territory of any member as well as for international or regional agencies or institutions concerned with the development of the African region. It is competent to provide finance without government guarantee or to guarantee loans made by others, or invest in equity.

Accordingly, the Bank was able to provide a $5 million loan at 7% interest rate to Air Afrique for the purchase of two DC-10-30 aircraft. It also contributed to the $40 million modernization and expansion project on Burundi's Bujumbura International Airport. It was the ADB too that took the first initiative to rehabilitate Chad's N'djamena airport following the severe damage it sustained

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23. See West Africa, January 9, 1984, No. 3464 at page 79.

during the Civil War. The Bank's aid to re-establish the airport on the basis of the ASECNA's modernization plans was supplemented by ICAO's assistance.

At present, the Republic of Congo is in the process of developing her transport infrastructure which was prioritized in that country's current five-year development plan (1982-86). Paved roads are to be built, the rail network upgraded and ports improved. Although Congo is a member of Air Afrique, the state-owned domestic airline, Lina Congo, is undergoing a major overhaul including a revamping of its administrative services and an augmentation of its fleet. The ADB, along with the World Bank, the Saudi Development Fund, the Kuwait Fund, the Canadian Development Agency and the Arab Bank for Economic Development in Africa (BADEA) will fund the projects, with the ADB and the World Bank making the highest contributions.[24]

But the significance of the ADB in the field of civil aviation lies more in what it can do than in what it has already done. It is expected to co-operate with other organizations in the region such as the ECA, AFCAC and AFRAA, as well as mobilize foreign resources for the aeronautical projects planned for the region.

To accomplish certain tasks in its 1984-85 Work

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24. See African Business, January 1984, No. 65, page 30.

Programme, for example, AFCAC is counting heavily on the co-operation of the ADB. In the area of airline co-operation and integration, for instance, AFCAC, with ADB's co-operation, will study the creation of a co-ordinated network of maintenance facilities, the creation of an aircraft financing and leasing company. They will also plan the centralization of vital information on financial or contractual arrangements concerning aircraft purchase, as well as gather information on the airlines' plans or programmes in respect of aircraft purchase and other financial arrangements. The ADB will also be involved in the co-ordination of activities envisaged within the framework of the OAU feasibility study on the creation of the Pan-African airlines.

As for its potential role to facilitate the availability of foreign capital for aeronautical projects in Africa, the ADB will have to go about it on two approaches. One of them is to generate funds from the foreign development-financing institutions to finance aeronautical infrastructure and equipment. The other is to act as a medium through which African airlines can borrow from foreign capital markets.

Development-Financing Institutions

There are a number of foreign institutions that are rich sources of funds for the development of aeronautical activity in Africa, if appropriately approached. With the innovative trend in aviation financing which is increasingly favouring multi-national co-operation, the ADB is in a better position than individual African states to generate resources from these sources to finance especially regional or sub-regional aviation projects.

The World Bank[25]

Established in 1944 as part of the Bretton Woods Agreement, the World Bank is primarily designed to provide loans below market rates for long-term development projects. The Bank's terms of reference insist that it lend to projects which can yield an economic rate of return. The definition of such projects, however, has been continuously extended as the Bank has become increasingly concerned with poverty-focused planning and employment generation.

However inflexible and long-term its finance, the Bank's various arms dominate the flow of multilateral aid to the Third World. In 1982, for example, it accounted for

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25. See generally, Mason, E. and Asher, R.: The World Bank since Bretton Woods, Chapters 6-12.

nearly 55% of all such aid (excluding that from OPEC and EEC channels). In the Bank's 1983 fiscal year a total of $1.794 billion was approved for African countries.

The Bank has three lending facilities. The International Bank for Reconstruction and Development (IBRD) is allowed to lend on a 1:1 ratio with its capital. Only 10% of the members' capital subscription is deposited, the rest is used as guarantees for the Bank's borrowing on the capital markets and from bond issues. This structure determines the interest rate it charges on loans, which is based on the cost of borrowing. Current rates on loans are under 8%, providing for a spread of ½-1% over the cost of borrowing. But the loans are usually made on very tight terms thereby limiting some African states' use of its lending facilities.

The International Development Association (IDA) is the soft-loan affiliate of the World Bank with a totally separate funding operation. Donors provide funds for a three year period. The Sixth Replenishment (IDA VI) was fixed at $12 billion, but has been held up (leading to a shortage of funds) due in part, to the United States new policy towards the Fund. President Reagan recently announced a massive cut in the U.S. contribution quoting congressional reluctance as the cause of the drastic

cut.[26] The United States has traditionally been the biggest contributor to the Fund. IDA interest rates are a nominal 3/4-1% and the repayment period is extended to fifty years with a ten year grace period. As a result, it is an ideal source for extensive borrowing by African states.

The third arm of the World Bank, the International Finance Corporation (IFC), is not quite a source of concessional finance. It was set up with the objective of encouraging private investment in developing countries by providing loan and equity capital, helping to raise further amounts and giving advice and practical support to investors in setting up operations in developing countries.[27]

Finally, the World Bank has established a Special Assistance Programme designed to help countries restore their development efforts despite adverse external circumstances. The programme which was approved in February 1983, includes expanded structural adjustment lending. Previously, at least 60% of the Bank's lending was allocated to projects, while balance of payments support was limited to 40%. Now this rule is relaxed to allow more structural adjustment lending.

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26. See New Africa, January 1984, No. 196, at p. 59.

27. See Peyrard, Prat and Soularue: Banques et Fonds Internationaux chapitre 1.4, pp. 51-61.

Arab Funds[28]

The largest of these funds is the OPEC Fund for International Development, which has been raised to the status of a permanent agency. In addition, there are the Arab Bank for Economic Development in Africa (BADEA), the Special Arab Aid Fund for Africa, Arab Fund for Economic and Social Development and the Islamic Development Bank and Islamic Solidarity Fund. For African countries, BADEA and the OPEC Fund are of significant importance.

Between 1975-82, BADEA committed a total of $513.96 million in sixty-seven projects and six technical assistance grants for thirty-seven different African countries. In addition, commitments made for non-project support to African governments by the Special Arab Aid Fund for Africa (SAAFA), whose capital has been integrated with that of BADEA, stand at $214.2 million. Projects that fall within the financing competence of BADEA include civil aviation projects. Equatorial Guinea, for instance, recently signed an agreement with BADEA for a $4.7 million loan to help finance the building of Bata International Airport. The loan, 17.2% of the total estimated cost of the project, is

28. See André Simmons: Arab Foreign Aid 1982; see also West Africa, No. 3420, 28 February, 1983, p. 562; African Business, August 1983, No. 60, op.cit., p. 37.

for sixteen years, with a four year grace period, at 5.5% interest rate.[29]

There are also the Saudi Fund for Development and the Kuwait Fund for Arab Economic Development. The Saudi and Kuwait Funds also provide the greater part of the contributions to the OPEC Fund, which is the major source of multilateral aid provided by OPEC countries. However, only the Arab African states have so far benefited significantly from these Funds.

EEC Aid[30]

The European Economic Community Aid comes in two forms: that from the ordinary budget of the EEC, which primarily consists of food aid; and that which comes from the European Development Fund (EDF) as part of the Lomé Convention. African countries, excluding Mozambique and Angola, were allocated some $2 billion under Lomé I. Of this sum 75% comprised direct grants and loans from EDF for projects and special programmes; some 5% was risk capital

29. See New Africa, January 1984, op.cit., No. 196, p. 51 et seq.

30. Ibid., p. 55. See also West Africa, No. 3423, 21 March, 1983, p. 742; see further, Peyrard, Prat, Soularue: Banques et Fonds Internationaux, op.cit., chapitre 2.6, pp. 118-129.

from the European Investment Bank (EIB) and 15%, payments under the Stabex scheme for compensation shortfall in earnings of certain exports to EEC.

Under Lomé II (1980-85) total aid is worth some $4.72 billion, compared with $2.95 billion under Lomé I. Of this total, 65% is in outright grants and much of the rest in low interest loans.

Finally, the traditional sources of aviation funding, such as the United Nations Development Programme and the International Civil Aviation Organization, can still be counted on. There are also other regional aid schemes designed to fund regionally based projects. The Japanese Official Development Assistance (ODA) is one of such schemes. Japan has announced that it will increase the assistance substantially by 1985, and would like to effect the increase through contributions to the International Development Association (IDA).[31] Should the increased funds be impeded by the pro-rata system operative in the IDA, one hopes the Japanese government would still maintain the new funds independent of the IDA. The African Development Bank president, Wila D. Mung'Omba led a two-week

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31. ODA's official development assistance or aid flows to less developed countries and multilateral institutions as defined by the Development Assistance Committee of OECD of which Japan is one of the members.

mission to Japan in November 1983, and this issue was not lost sight of in talks with the Japanese Government.[32]

By establishing meaningful working relations with these development-financing institutions, the ADB can generate funds to replenish its Special Funds (under article 8) and through those Funds, finance some civil aviation projects in Africa. It can also help in the study and planning of regional aviation projects so that they are good enough to attract funding from these external sources.

The Bank is already making the right steps. Talks are going on between it and the ICAO to conclude a co-operative agreement before the end of 1984. Possible areas of co-operation between the two institutions include the identification of projects and pre-investment studies; preparation of all project documents required at the various stages of each project; execution and management of projects including airport management; and supervision of projects and training of personnel. They will also co-operate in the post-evaluation of projects, with ICAO also acting in an advisory capacity in matters related to civil aviation development, such as the required equipment for development projects and their procurement, as well as in matters relating to the recruitment and provision of qualified

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32. See African Business, January 1984, No. 65, p. 39.

experts and/or consultants for aviation projects.

Borrowing From Foreign Capital Markets Through the ADB

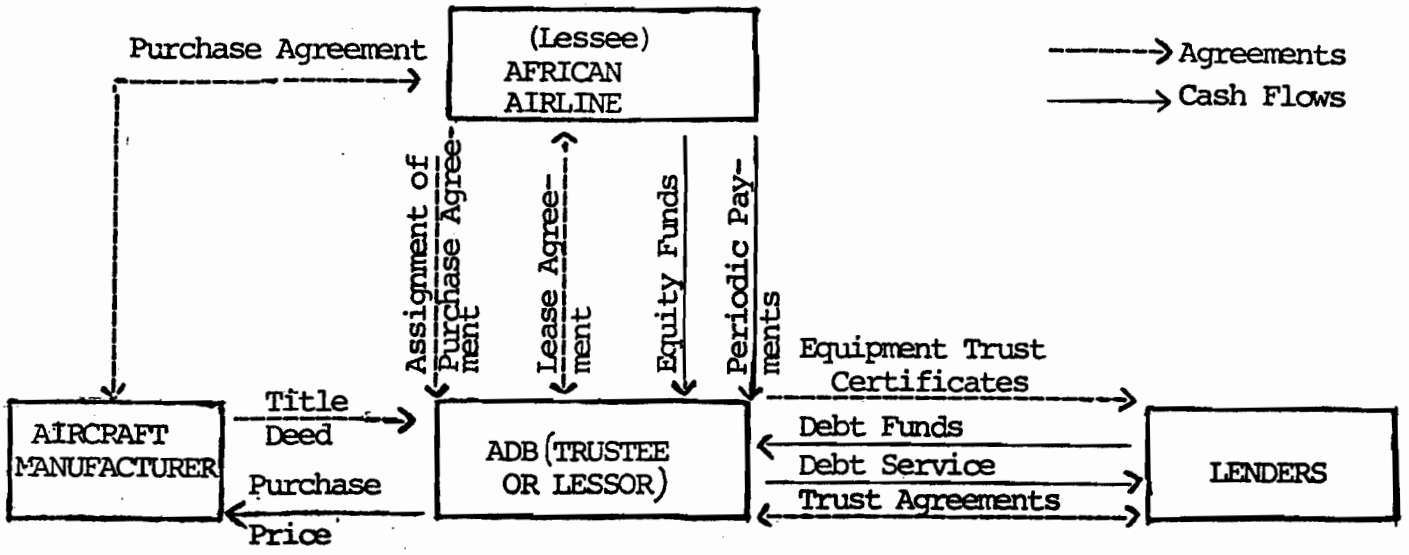
Airlines may be able to borrow from such foreign capital markets as the Chase Manhattan Group, the National Westminster Bank, the Canada Export Development Corporation and some aircraft manufacturers credit markets, through the ADB, in order to acquire new equipment. As mentioned earlier, some of these airlines may not qualify to borrow from these foreign capital markets directly either because the states of which they are nationals are credit worthless, or the risk of lending to them without very credible guarantees is too high. On the other hand, the ADB is very credit worthy and can borrow more easily from those markets and at lower interest rates. The ADB can therefore, borrow from them and in turn lend to some of the African airlines.

The ADB can, furthermore, act as a trustee or lessor in accordance with an equipment trust financing arrangement. In that kind of arrangement, an African airline will conclude a purchase agreement with an aircraft manufacturer or seller. The airline will conclude another agreement with the ADB - a lease agreement in which the ADB will be the lessor while the airline will be a lessee. The ADB will conclude a trust agreement with some lenders or

lender, and a title agreement with the aircraft manufacturer.

The ADB will receive debt funds from the lenders and issue them equipment trust certificates; it will then use the funds to pay the aircraft manufacturer who will issue it the title deed to the equipment. The ADB will then lease the aircraft to the airline which will have assigned to the ADB the purchase agreement. The airline, as the lessee, will pay to the ADB, the lessor, equity funds and the periodic instalments for the rest of the amount. The Bank will in turn make periodic debt payments to the lenders. When the full purchase amount has been paid to the ADB by the airline, and it has paid off the lenders, the transaction is determined and the airline is given the title deed to the equipment.[33] This is diagramatically illustrated as below:

33. For detailed information on the concept of Equipment Trust Financing, see Johnston, D., Legal Aspects of Aircraft Finance, LL.M. Thesis (McGill University) 1961, chapter VII, pp. 72-87.



The ADB is best suited to afford the African airlines the advantages of some of the equipment financing schemes and equipment acquisition opportunities that emerge occasionally in the aircraft industry. Several United States and other foreign airlines are taking advantage of the cheaper funds available in Japan through the so-called "Samurai" and "Shogun" lease purchases. Through this scheme, long-term and fixed rate loans are available. The Japanese introduced this arrangement because of a balance of payments surplus in their favour. They are now embracing the aircraft acquisition business aggressively.[34]

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34. See Joan Feldman: "Innovative Financing..." Air Transport World, June 1983, at page 25.

However, it is not easy for many African airlines severally to take advantage of the Japanese credits because of such problems as country of ownership, tax benefits and currency fluctuations. The ADB can co-ordinate these loans for their benefit.

Furthermore, African airlines are not taking full advantage of the credits available in the American Export-Import Bank which is principally designed to support sales to less developed countries. Thus, the United States Special Trade Representative, William Brock, was heard to comment on the Bank's promise to give loans to Alitalia's purchase of new American aircraft, that he could not understand why the U.S. should subsidize exports back and forth among developed countries instead of saving the credits for the developing countries.[35] Besides Alitalia, Air Canada has also received the Bank's funding for its 767s.

African airlines should also be able to take advantage of the occasional used aircraft glut to acquire some good and well maintained equipment on attractive terms. The used aircraft market is very extensive now and even airlines of developed countries are capitalizing on it to acquire additional equipment. Northwest Airlines (U.S.) has

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35. See Joan Feldman: "Recession spurs new financing schemes..." Air Transport World, March 1983, p. 51.

acquired seven used B727-100s at "much less cost" than their original purchase price. In a symposium on the used aircraft market held in Washington in November 1983, it was revealed that there are several used aircraft available for sale. Many of these aircraft are in very good condition. For example, as Alitalia planned to buy thirty new DC-9-80s, it also arranged to sell a batch of older equipment to the manufacturer, including DC-9s, DC-10s, DC-8s and Boeing 727s. The U.S. Export-Import Bank has parked away on the Arizona desert five DC-10s it repossessed from Great Britain's Laker Airways.

As American Airlines top executive, Pope, told a meeting of the New York City Bar Association, one of the greatest myths in the airline business today is the belief that new airplanes are economically better than old ones. But the difference in price between the new and old models is so great that it takes a very long time to amortize this price difference through the operating cost savings of the new planes. So for some poor African states, it may be advisable to consider the acquisition of some not-too-old, well maintained and airworthy used equipment as well as some good old model aircraft available at give-away prices when planning an augmentation of their airlines fleets.

Conclusion

The African Development Bank, more than any other financial institution in Africa, is in an ideal position to promote the development of civil aviation industry in the region. Since its own resources are limited, its role will be mainly to advise the regional organizations and companies engaged in civil aviation on investment, economic and financial matters based on dependable and expert studies expected of such a specialized financial institution. It is further expected to play a major role in generating funds both from within and outside the region for the financing of projects and acquisition of equipment.

However, member states and other regional beneficiaries must help the Bank to help them. The ADB, like any other financial institution, operates within the bounds of certain principles. Financial markets are fragile and their functioning depends on trust and confidence. Furthermore, transaction costs of borrowing and lending differ in various capital markets. These costs comprise the real resource costs of borrowing and lending, plus an element of risk which is determined or calculated on a number of bases including imperfect information and invevitable uncertainty. For instance, real resource costs would rise if, in order to reduce risk the lender sought more information.

It is, therefore, not helpful to the ADB when borrowing from foreign capital markets in order to lend to its African customers, or when guaranteeing foreign loans for African borrowers, if some African members continually fall in arrears of payment of their subscriptions or borrowers remain in default of payments. The failure of some member states to meet their subscription obligations to the Bank in respect of the paid-up portion of their share capital stocks renders almost valueless the purported guarantee the callable portion might be to any potential lender to the Bank. And if borrowers cannot pay debts owed to the Bank, the Bank will not risk guaranteeing foreign loans for them. The Bank aptly summarised this situation in one of its reports as one of the "blots on the Bank's record which prevents it from effectively pleading its cause among the capital exporting countries."[36]

Finally, in order to present a good case abroad for a potential beneficiary, the Bank will need sufficient and reliable information and statistics to study and prepare the project to be financed. Some African states are noted for holding back information from researchers and investigators.

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36. Interim Report by the Board of Directors of the ADB for the period January 1 to June 30, 1971, Schedule 2, page 4.

That attitude does not help them in the financial markets - it rather makes borrowing more costly. A more stable, predictable and less traumatic political climate in the region will make the task of the ADB even more easy.

CHAPTER 10. GENERAL CONCLUSION

This chapter is both a reflection on the main issues raised in the preceding chapters, and a projection into the future of civil aviation in Africa. A few general recommendations are also made.

10.1 Reflection on issues raised

A Colonial Legacy

Before the advent of colonialism, there was a civil aviation vacuum in Africa. Civil aviation activity in the region is basically a legacy of the colonial administration. In some respects, one is tempted to judge the colonial policies too harshly; in some, however, one should be grateful. On sober reflection, there are even some pre-independence aviation arrangements that may have to be re-introduced with necessary changes.[1]

The civil aviation acts of most African states are mainly a re-wording of the civil aviation acts of their different former colonial powers, as they were at the time

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1. The West African Airways Corporation (WAAC) operated jointly by the four British West African colonies of Nigeria, Ghana, Sierra Leone and Gambia, was dissolved as those states prepared to become independent. Cf. sections 8.3 and 8.7.2 supra. Today, a West African Airline is being contemplated - cf. section 5.3; and recommended - section 8.7.3 supra.

of independence. Since independence, their former European powers have enacted new acts to reform their aviation laws in accordance with changed times and conditions.[2] Most African states, however, continue to apply the obsolete laws. These states should revise their aviation codes to accord with the current aviation and regional developments.

Nigeria, for instance, has passed a significant Civil Aviation Act in 1982, amending the 1964 Nigeria Civil Aviation Act. The new Act, inter alia, provides that the Nigeria Civil Aviation Authority shall take the powers previously conferred on the Ministry of Aviation under the 1964 Act in respect of the regulation of Nigeria air transport and the licensing of aircraft in the country.[3] The value of the new Act lies in the fact that decision-making in respect of technical civil aviation matters has to a very great extent, been wrested from politicians and entrusted to technocrats.

Another area of revision concerns the bilateral air

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2. Britain, for instance, has since then introduced: the Civil Aviation Policy of November 1969 (cmnd 4213); the Civil Aviation Act of 1970; the Civil Aviation Authority Regulations of 1972; the Civil Aviation Policy Guidance of February 1972 (cmnd 4899); Civil Aviation Policy Guidance of February 1976 (cmnd 6400); the Civil Aviation Act of 1980, etc.

3. Interavia Air Letter, June 21, 1983. See also IATA Legal Bulletin No. 59 (1983) p. 45.

transport agreements concluded by African states immediately after becoming independent. The agreements were generally very restrictive. Such restrictive agreements among African states are no longer justified when the overall interest of the region is considered. They should, therefore, be re-negotiated or amended to reflect the liberal recommendations of the AFCAC on the grant of air traffic rights to member states.[4] A review of some of the agreements concluded with non-African states, especially the former colonial powers, may also be worthwhile.

The International Legal Framework

Africa is a part of the international civil aviation community which is regulated, to a very large extent, by international law. Sovereignty is one of the principles of international law which has significant application in the field of civil aviation. There are some areas in Africa where sovereignty is disputed such as Namibia and the Western Sahara. The International Civil Aviation Organization had addressed itself to the problems of such territories in one of its General Assemblies.[5] But it can and should do more than that. International air

4. Cf. Section 6.4.1 supra.

5. ICAO Assembly (21st Session) 1974, cf. Section 2.3.2 supra.

transportation cannot be really safe if some parts of the world are not safe to fly over. Annex 1 to ICAO Resolution A1-65 provides that

> "ICAO will, when required, initiate collective action towards the provision of necessary facilities and services on the high seas, in areas of undetermined sovereignty and, exceptionally, in the territory of non-contracting states."[6]

This should be applied to those African territories.

The liberal and harmonious operation of international air transport services is brought about through the adherence to the provisions of certain international treaties such as the Chicago Convention, the Warsaw Convention and others. The ban on overflight of South African aircraft by some African states has been justified in this thesis.[7] Although it has been shown that there is a further legal justification for applying the ban to veiled South African air transport companies such as Luxavia, there does not seem, however, to be a legal justification for extending the ban to cover foreign aircraft flying to or from South Africa. The Ethiopian regulation,[8] for example, is, to that extent, excessive.

Most African states are parties to the principal

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6. Annex 1, Resolution A1-65, para. 3.5.

7. Cf. section 3.2 supra.

8. See AIP Ethiopia FAL 1-9 (1.5.1).

civil aviation treaties governing liability and other areas of air transport services. In the area of civil aviation security, some states have not ratified all the treaties and some have not ratified any of them. Looking through the list of states that are parties to the Tokyo, Hague and Montreal Conventions as of 1st January 1983,[9] one finds that Algeria and Tanzania have not ratified any of these conventions concerned with civil aviation security. Their reluctance to ratify these Conventions may not be unconnected with their stance on the concept of international terrorism as exemplified in their arguments at the United Nations Ad Hoc Committee set to define the concept of international terrorism in 1973.[10] They argued that any definition of international terrism should not constrain national liberation movements or impede the struggle against "racist regimes" and "foreign domination". They maintained that to eliminate international terrorism, its causes must be eliminated first.[11]

One sympathises with these views. However, although political terrorists have been responsible for the most spectacular civil aviation acts of sabotage, the threat

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9. See ICAO Doc. 9382, op.cit., pp. 170-172.

10. See UNGA Res. 3034(XXVII) 1972.

11. See 28 GOAR, Supp. 28, U.N. Doc. A/9028, p. 21.

to the security of civil aviation is not posed exclusively by them. Moreover, the general view among governments is that crimes against the security of civil aviation are not political crimes. The Tanzanian Government would appreciate that view. On February 26, 1982, five Tanzanians skyjacked an Air Tanzania jet to Stansted Airport in England. They claimed to be fleeing from political oppression and demanded the removal of the Tanzanian President. The English court rejected the claims and convicted them to prison terms ranging from four to eight years.[12]

The Governments of Tanzania and Algeria should reconsider their positions and ratify the relevant treaties on this subject. Unlawful interference with civil aviation may not be at the rate witnessed in the late sixties and seventies, but it remains a singular threat to the safety of international civil aviation. Accordingly, concerted efforts by all states towards its elimination is necessary.

Regionalism

Decolonization involves political self-determination and nation-building by peoples who had depended heavily in the past on the political and economic will of foreign powers. At Algiers in October 1967 African

12. See IATA Legal Information Bulletin No. 58, p. 10.

states demanded a new international law[13] - an international legal order based on development and co-operation ("pacte du développement") in the place of the former one which was based on a "pacte de conquête".[14] Ever since the adoption of the Charter of Algiers in 1967, national, sub-regional and regional/continental self-reliance has been strongly emphasized in Africa. In 1977, the Executive Secretary of the Economic Commission for Africa, Mr. Adedeji, while expressing gratitude to donor countries, also used the occasion to press the point for the recognition of the principle of self-reliance by African states.

In this thesis, some programmes and institutions designed principally to promote collective self-reliance in the fields of civil aviation and economic development in Africa were mentioned. The establishment of multinational civil aviation training schools is already producing good results.[15] The plan to establish common maintenance

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13. See Doudou Thiam: Speech at the meeting of the Group of 77 in Algiers in October 1967 (1971) 41 Verfassung und Recht in Ubersee p. 52 et seq. See further ECA Doc. E/CN.4/1334 of January 2, 1979.

14. See Konrad Ginther: "Re-defining International Law...", Journal of African Law, 1982, Vol. 26, No. 1, pp. 49-67, at p. 59.

15. Cf. sections 4.1.2 and 6.3.1 supra.

bases[16] should be pursued more vigorously. Consideration should be given to the development of some of the reasonably well established small maintenance bases (such as the Air Afrique DC-10 maintenance base at Dakar, the Air Algerie B-727 maintenance base, and the Ethiopian Airways B-737 maintenance base) into regional maintenance bases. It will be noted, however, that the establishment of such multinational maintenance bases will not diminish the respective governments' duty to diligently certify to the airworthiness of their national aircraft. In United Scottish Insurance v. U.S.,[17] and Varig Airlines v. U.S.,[18] the United States Government was held liable for negligent certification of the aircraft lost in two different accidents.

The three sub-regional economic associations - UDEAC, ECOWAS and SADCC - are of great significance. They will enhance the economic development and integration of the sub-regions. The development of civil aviation will undoubtedly be facilitated since a good transportation

16. Cf. section 7.2.1 supra.

17. Suit No. 81-5062, US Court of Appeals (9th Circ.) 1982; US Supreme Court Document 82-1350.

18. Suit No. 81-5366, US Court of Appeals (9th circ.) 1982; US Supreme Court Document 82-1349.

system is both a condition for and a result of economic development and integration.

Chad has been re-admitted into UDEAC and Equatorial Guinea and Sao Tome and Principe have applied for membership. Following a series of meetings held in Gabon in 1981 and 1982, plans are being made to create a more ambitious economic association in the sub-region which will comprise the members of UDEAC as well as Burundi, Rwanda, Zaire and Angola.[19]

ECOWAS is gathering momentum with the establishment of a Fund for Cooperation, Compensation and Development. The Fund has approved its first major loan of $4.5 million to Upper Volta for the financing of transport and telecommunications projects. The loan is to be paid back in a period of eleven years with a five year grace period.[20]

The on-going geopolitical developments in Southern Africa will certainly affect the SADCC arrangements. Negotiations between the Republic of South Africa on the one hand, and Angola, Mozambique and Lesotho respectively, on the other hand, have resulted in the conclusion of some

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19. See AFCAC/8 - WP/2 p. 5.

20. See West Africa, No. 3437, 27 June, 1983, p. 1517.

significant agreements.[21] The nine members of SADCC issued a statement in Lusaka welcoming "signs of a less aggressive stance by South Africa".[22] A rapprochement between the Republic of South Africa and the members of SADCC will have far-reaching effects on the economy and transportation systems of the sub-region.

Furthermore, the sub-regional economic associations can play more direct roles in the development of civil aviation in Africa. As was earlier suggested,[23] some measure of decentralization of AFCAC to enable limited agreements to be reached at sub-regional levels is desirable. Article 5 of AFCAC provides for sub-regions, but only in respect to the appointment of members to its Bureau. The sub-regional economic associations correspond to the geographical sub-regions of AFCAC in West, Central and Southern Africa. AFCAC sub-regional offices should be established in each of them. The sub-regional offices will be able to conclude sub-regional liberal agreements on issues on which continental agreements cannot be reached, such as the grant of air transit rights and commercial rights for non-scheduled services.

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21. See South Africa Digest, March 2 1984, pp. 3, 17-18.

22. See The Economist, 18-24 February 1984, p. 33.

23. See chapter 6, Conclusion (supra).

The African Development Bank is another regional institution that was shown to be of potential importance to the development of civil aviation in Africa.[24] Following the opening of its doors to non-African members in 1982, seventeen non-African countries have become members[25] and many others are preparing to become members.[26] This policy has broadened the financial base of the bank and reasonably improved its capability to fulfill its objectives. The development of transportation systems is only one of its manifold objectives.

Thus, in the current five-year plan (1982-1986) in which the bank's lending target is $7.3 billion, 22% of it will go to transport. Of the rest, 11% is for industry and development banks, 5% will go to non-project activities, 33% to agriculture, 20% to public utilities and 9% to health and education.[27] Even though the bank hopes to attract an additional $20 billion from external sources before 1986, it

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24. Cf. chapter 9 supra.

25. The non-African members now are Austria, Belgium, Canada, Denmark, Finland, France, West Germany, Italy, Japan, Kuwait, Republic of Korea, Netherlands, Norway, Sweden, Switzerland, United States, and Yugoslavia.

26. Those preparing to become members include Argentina, Brazil, Portugal, Saudi Arabia, United Arab Emirates, and the United Kingdom.

27. See West Africa, No. 3428, 25 April 1983, p. 994.

will still not be viable enough to meet all its commitments to the economic development of the region.[28]

Consequently, the ADB can only make a small contribution to the financing of aeronautical activities from its own resources. One suggestion made in this thesis, in the light of this reality, is the acquisition of aeronautical equipment through an equipment trust arrangement by which the ADB can play an important role.

Equipment trust financing has been used successfully in the United States by railroad companies to finance a major portion of their rolling stock,[29] as well as U.S. domestic carriers to acquire aircraft.[30] This financing method has considerable appeal to the investment community because of its reputation for security and the flexibility of the concept which permits the issuance of equipment trust certificates to a broad range of investors - both public and private. For the airline industry, carriers are enabled to purchase aircraft on repayment terms

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28. See Statement by the Bank President in West Africa, No. 3430, 9 May 1983, p. 1136.

29. See D. Street: Railroad Equipment Financing (1959).

30. See Johnston: "Legal Aspects of Aircraft Finance" 29 Journal of Air Law and Commerce 1963, p. 161 et seq. (part 1), p. 299 et seq. (part 2).

approximately equivalent to those in equipment leases while obtaining the benefits of ownership, including the investment tax credit, accelerated depreciation allowances and the residual value associated with the acquisition of new equipment.[31]

In the face of very limited financial resources, there is a further, and more important requirement in Africa for rational, prudent, and broad-based planning in the establishment of civil aviation facilities and operation of air transport services to maximize the economic benefits derivable from the civil aviation industry. To this end, the establishment of multinational airlines in the place of the numerous African national airlines has been strongly favoured and recommended by both African and non-African bodies concerned with air transport matters. The position maintained on this issue in this thesis is a realistic and optimistic one. Accordingly, the gradual formation of five multinational airlines consortia is recommended to operate regional and international scheduled services.[32] Such an arrangement is practical and also conducive to the successful operation of the Grid System envisaged by

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31. See Walter W. Eyer: "The Sale, Leasing and Financing of Aircraft" 45 Journal of Air Law and Commerce, 1979-80, pp. 217-274, at pp. 229-230.

32. Cf. section 8.7.3 supra.

AFRAA.[33]

10.2 The Future Development of Civil Aviation

Civil aviation contributes to the social and economic development of a region; a region's socio-economic conditions, laws and policies in turn affect the development of its civil aviation industry. Thus, an exercise in the projection into the future of civil aviation in any region must be based on certain existing considerations. For Africa, these considerations include: the political economy, the will to modify old, and adopt new policies, the effectiveness of the regional institutions, and better international co-operation.

The Political Economy

The development of civil aviation in Africa is to a great extent tied to the political economy of the region. So far, that development has been impeded by two road blocks - the region's infamous cultures of poverty and instability. Poverty is not only responsible for Africa's comparatively very small air transport market, it has also starved the industry of capital investment. Political instability retards national production, adversely affects international

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33. Cf. section 7.2.2 supra.

trade and scares away investors. Those who are courageous enough to invest under such climate demand very high returns to compensate for the high risks. Then a new wave of patriots seize power by force and to rationalize their unconstitutional and forcible enthronement, they condemn every existing policy and parrot substantively the same vague and worn-out rhetoric. And like those whom they replaced in power, they soon become too busy with pompous trifles and pre-occupied with the persecution of their political opponents - real or imaginary opponents. And the masses get poorer.

Poverty perpetuates instability. The late U.S. President, John F. Kennedy, once made the point that "the most skillful counter-guerilla efforts cannot succeed where the local population is too caught up in its own misery to be concerned about the advance of communism".[34]

Instability in its own turn perpetuates poverty. The first off-spring of instability is insecurity. In a state of insecurity, the local population is more pre-occupied with mere survival than with the improvement of their living condition. There is no incentive for the farmers to cultivate large pieces of land with food crops

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34. In a Special Message to the US Congress on Urgent National Needs May 25, 1961.

when they fear another round of civil strife or some armed marauders will force them to move away before the harvest. They cannot be induced to produce more export crops when they have not been paid for the previous harvests sold because their rulers have spent all the national revenue to finance their internal power struggles, or for their personal aggrandizement.

Africa has been a major recipient of foreign aid in various forms. Yet the "poverty-instability-poverty circle" persists. There are many reasons for this state of affairs, a few of which can be mentioned here.

Downward trends in the world economy hit the poor countries most. A study by United Nations experts states that if 1% decline in economic growth was registered in industrialized countries, a decline of 1.5% would follow in developing nations. And in the developing countries, the poorest are those mostly affected by the recession as a decline of 2-3% in per capita income might take off up to 10-15% of the income of the poor layers of society in these countries.[35]

Another reason is that only a small portion of the foreign aid gets to its ultimate target. To give economic

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35. See West Africa, January 2, 1984, No. 3463, op.cit., at page 32.

aid on the main basis that the regime in power is pro a certain cardinal point (East or West) without considering the relationship of the regime with the people it governs, is not wise. Where a regime is alienated from, and unaccountable to the people, foreign aid in that case is more a tool to eliminate the poverty of the ruling clique than a tool to eliminate the poverty of the society.

Furthermore, where economic aid is used to buy food from the donor state rather than produce food in the recipient state, the recipient state remains perpetually poor. For in this case, the money goes back to its source and has no multiplier effect in the recipient state. This is why the International Fund for Agricultural Development (IFAD) can be a more effective and valuable means of solving hungry nations' problems than food credits. Unfortunately, this U.N. agency that helps small farmers and rural poor may be in jeopardy if the United States, its largest donor, cuts back her contribution to it as she did to the IDA. So far, the U.S. has paid only half of the $180 million that she promised to it for the 1981-83 period.

But for a more effective and long-term impact on the region's political economy, international trade and commerce must be stimulated. To do that, there have to be investments. Investment policies and laws must be attuned to attract foreign and private investors. Libya, for

example, on attainment of independence adopted a policy which aimed in the first instance at making available an open range where private capital could establish factories with technical and financial assistance from the government. After considering the national need, the government embarked on an industrial project on the basis that the private sector had abstained from it for some economic, social or other reasons.[36] That policy provided a good basis for Libya's viable economy.

The prioritization and planning of investment projects in the region deserves a careful re-examination. In respect to the former, there is evidence to show that many African governments have been guilty of misplaced priorities. For example, it is not prudent for the government of a developing state to spend a huge sum of foreign loans on an "independence" or "national" tower when the majority of the population cannot travel to where the tower is built. It does not make much sense either to commit all the nation's meagre resources to a modern four-lane highway connecting only two towns (or leading to the

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36. See ECA Report on Investment Laws and Regulations in Africa. Doc. E/CN.14/1NR/28 (30/10/63). See further, A.N. Allott: "Credit and the Law in Africa..." Journal of African Law Vol. 19, Nos 1 & 2 (1975) pp. 73-83; A.M. Akiwumi: "A Plea for the Harmonization of African Investment Laws", ibid., pp. 134-153.

leader's village) while there are not even passable laterite roads to facilitate the evacuation of food stuff and export produce from the rural markets.

African governments frequently consult foreign experts to plan their investment projects. While some of the plans expressed by these foreign consultants have been useful, many others have resulted in development failures. Such failures are due to two main factors. The foreign experts do not involve local experts in their feasibility studies and subsequent planning. The result is that their plans are not adequately adapted to local conditions, with disappointing results. For example, a team of French "experts" carried out a feasibility study for a cement plant in the Republic of Benin. The study was carried out in the dry season and the plant which was subsequently built in accordance with the results and recommendations of the study, began operations in the rainy season, only for the company to realize that provision was never made for equipment to dry wet limestone. Similar mishaps occur all over Africa, and in the planning of civil aviation projects.

The other concerns the time-factor for developing projects. Good projects cannot be selected and designed in three to nine months by visiting teams of specialists. More lengthy, serious and focused studies are required if

projects in the key sectors are to be more successful.

The World Bank has made certain observations that deserve serious consideration by African governments and the capital exporting countries. In a study entitled "Accelerated Development in Sub-Sahara Africa - An Agenda for Action",[37] the Bank states, in summary, that the ability to generate good projects - the basic units of development action - is essential for efficient use of investment funds. With few exceptions, this capacity is weak in Africa. The lack of well-prepared projects constrains the flow of aid to a number of countries.

While it emphasises that African governments must review their policies and programmes if their development objectives are to be achieved, it admits that policy reform is difficult and delicate. In all societies, formidable obstacles prevent quick responses to even the most carefully reasoned calls for change. For these reasons and others, African governments need additional outside assistance.

The first step for the international community is a commitment to larger aid flows. While per capita aid to Africa is already relatively high, the needs are particularly large and pressing when compared with those of

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37. A 1981 Publication of the World Bank (Washington, D.C.). See particularly pages 7-8, and 31.

most other developing regions which are at roughly the same level of per capita income. The second step is to establish a new kind of social compact. On the donor side, assistance must not only be greater, but more effective. Aid must be accompanied by closer attention to project selection and design, more flexibility in aid modalities and greater attention to the policy environment, and systematic policy dialogue with their African partners.

On the African side, the Bank points out that aid flows have not always been used effectively, their development impact has been diluted by inadequacies in the domestic policy environment. It implores African governments to take firm action on internal problems, be more open to proposals to revise policies in the light of experience, and be willing to accept the proposition that without policy reform higher aid will be difficult to mobilize.

Co-operation Between the Developed and the Developing States in the Field of Civil Aviation

Understanding and trust are the pre-requisites of more productive co-operation between the developed and the developing states in the field of civil aviation. By understanding one means that certain facts must be faced. It is not right to maintain the view (held by the developing

countries and the Soviet Union) that the problems of the Third World are wholly a legacy of the colonial period, and therefore it is up to the former colonial powers to solve them. The United States and the other Western democracies must face the fact that a more determined commitment to development is the best way to manifest their practical support for freedom. Preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation is highly desirable.

By trust one means that certain suspicions are no longer justified and must be curbed. It is not helpful for the developing countries to consider every private foreign investment as a ploy for economic exploitation. Neither is it right for the polarised developed countries to believe that once a developing country has not declared political support for a certain bloc; or where it invites foreign military aid to defend itself from an external aggressor (like in the case of Angola) it is necessarily an enemy who does not deserve their development aid.

It has been necessary to raise these issues because many aviation projects have been planned or about to be designed for Africa. The successful execution of those projects depends greatly on external funding. Africa needs the co-operation of the developed countries - ex-colonial

and non-ex-colonial, East and West. In addition, aviation policies have been formulated and adopted that are aimed at and designed to promote the development of civil aviation at sub-regional or/and regional levels. The attitude of the international aviation community will be the final factor that will render them either useful or sterile.

One positive form of co-operation between the developed and developing states in the field of civil aviation is manifest in the recent ICAO 24th Assembly Resolution 18/2 on the "Practical measures to provide an enhanced opportunity for developing states with community of interest to operate international air transport services." The resolution was drafted and presented by the United States, Canada and a group of Carribean states.[38] It is a very necessary resolution.

Although the Chicago Convention expressly recognizes the right of all contracting states to a fair and equal opportunity to operate international air services, the criterion traditionally recognized for a national carrier has, in its strict application denied to many developing countries the realization of this right. Traditionally, an air carrier would only qualify as a national carrier where

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38. Antigua and Barbuda, Barbados, Grenada, Guyana, Jamaica, Saint Lucia, Trinidad and Tobago. See ICAO Doc. A24-WP/62-EC/13.

it is substantially owned and effectively controlled by the government or the nationals of that country. In practical terms, even though many developing countries have concluded bilateral agreements which accord them traffic rights to other countries, they have been unable to utilize such rights because they cannot afford to establish a national airline which passes the test of substantial ownership and effective control.

ICAO Resolution 18/2 is designed to redress that situation. In essence, the Resolution calls upon contracting states to recognize the concept of community interest within regional economic groupings as a valid basis for the designation by one developing state or states within the same regional economic grouping where such airline is substantially owned and effectively controlled by such other developing state or states or its or their nationals. It urges contracting states to allow an airline substantially owned and effectively controlled by one or more developing state or states, or its or their nationals, belonging to a regional economic grouping to exercise the route rights of any developing state or states within the same grouping under mutually acceptable terms and conditions. Finally, it directs the ICAO Council, when and if requested, to render all feasible assistance to states wishing to enter into such regional arrangements.

This resolution has provided a legal basis for some African states which do not have national airlines (Seychelles, Equatorial Guinea etc.) to exploit the traffic rights in their bilateral agreements by assigning their routes to the national carriers of neighbouring states. The resolution is also a big asset to the prospective pan-African airlines suggested in chapter 8 supra. It is accordingly suggested that article 4 of the AFCAC draft model bilateral agreements approved at the eighth session, before Resolution 18/2 was approved, be amended to reflect this development.

A traditional form of co-operation has been the provision of civil aviation aid by the developed to the developing states. What is requested here is that such aid should be designed to have broader economic impact and long-lasting technical effects. The recent revelation where over six hundred Cubans were exported to Grenada - a country where the majority of the population is unemployed - to build an airport is not unique. Many such ridiculous cases abound in Africa.

A high proportion of developing countries have abundant supplies of labour while capital resources are scarce. In developing these countries' aviation, or whatever, infrastructure, a desirable course of action would be to use labour-intensive methods wherever these are

productive and appropriate so that capital can be concentrated in activities where labour would be less productive. Labour-intensive construction methods strengthen community involvement, reduce unemployment and promote a more equitable distribution of income through the employment of local people. In these countries, the purchase and maintenance of equipment is paid mainly in foreign exchange, but wages paid to indigenous labour will remain largely near the project location and stimulate demand in the local economy. As Dr. Adedeji Adebayo, Executive Secretary of the ECA, has pointed out:

> "Africa today presents a remarkable paradox: it has...an increasing population of mostly young, energetic people, eager to learn and to work but without jobs, sinking gradually into poverty and despair..."[39]

It is not enough to send foreign experts or technicians to an African country to carry out an aviation project. Such experts and technicians should be further enjoined to train local personnel to replace them speedily and effectively. This has often not been the case. In a workshop on "Research on Technology Policy in Developing Countries" organized in Dakar, many unpleasant facts were brought to light. One of the investigations turned up a

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39. See "Africa, the permanent underdog?", International Perspectives, March/April 1981, p. 15.

French electrical company operating in Senegal since the 1930s that has still not trained any Senegalese to manage operations.[40]

In December 1983, sixty-five people died in the crash of a Nigeria Airways F-28 on an internal flight from Lagos to Enugu. The crash aroused indignation in the Nigerian press which claimed that the crash would have been prevented if the Enugu airport had functional navigational aids. The radar installed at the Enugu airport in 1980 had broken down shortly after the foreign technicians had left, and had never been repaired.[41]

The ultimate goal of foreign assistance should be its termination. In the field of civil aviation, that goal is not yet in sight partly because civil aviation is dynamic and partly because of the superficial impact of the assistance. It is self-defeating to install aeronautical equipment in a developing country but not ensure that it remains functional by providing for its maintenance and operation by adequately trained indigenous personnel. Technical assistance is not worth much if all it is designed to achieve is only short-term and immediate results. The

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40. See The IDRC Reports Vol. 12, No. 4, January 1984, p. 25.

41. See Africa Business No. 65, January 1984, at page 7.

day when developing countries can no longer depend solely on little blessings from the developed countries can only come when "foreign training produces local trainers, when foreign skills breed local skills, and when foreign capital creates local capital."

Modification of Old, and Adoption of New Civil Aviation Policies

The international civil aviation industry and community are dynamic, not static. The member states of the European Economic Community are a good example of states which attune their regional aviation policies to this dynamic process. In the area of traffic rights, for instance, the EEC Council, on June 7, 1983, adopted a directive on scheduled inter-regional air services which will be applicable as from 1985.

The directive resulted from a proposal of the EEC Commission submitted in 1980 aimed particularly at the liberalization of inter-regional air traffic and the extension of the regional aviation network in Europe. It provides in essence that EEC member states may not refuse permission for scheduled inter-regional air services proposed by another member state, if these services conform to certain criteria. Firstly, they must serve only Second and Third category airports, that is, smaller airports such

as Stuttgart, Manchester or Lyon. Secondly, the routes must be longer than four hundred kilometres, except for routes from and to the United Kingdom. Thirdly, the aircraft used must not be larger than for a maximum of seventy seats, or thirty tons of cargo. Finally, the services must not interfere with already existing indirect connections, provided these indirect connections require a transit time of not more than ninety minutes or not more than 50% additional flying time.[42]

The above directive is mentioned not necessarily for African states to adopt wholesale,[43] but as an example of the versatile attitudes of governments in other regions towards their existing aviation policies. Now is the time for African states too, to re-examine some of their long existing civil aviation policies and arrangements, with all their complexities and vain memories, in a bold drive towards new horizons.

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42. IATA Legal Information Bulletin No. 59, July 1983, p. 54. See further, O.J. No. C343, p. 13 (of December 31, 1981), Neue Zurcher Zeitung, 9 June, 1983.

43. It will be noted that the Association of European Airlines (AEA) has issued a subsequent statement maintaining that the legal framework of inter-regional air services in Europe should continue to be defined in the context of existing bilateral agreements. The new EEC directive may, therefore, only have limited significance for the future development of inter-regional air services in Europe. Ibid.

The Air Afrique and Magreb states' protected traffic zones are two arrangements that should be re-examined. The Air Afrique cabotage zone has been mentioned earlier in this work.[44] The Magreb states, Algeria, Morocco and Tunisia, have another protectionist arrangement in the North African transversal with respect to third countries in and outside Africa, with the exception of Saudi Arabia.[45] These two arrangements restrict Fifth Freedom Traffic Rights as to affect even primary traffic on certain regional routes. Furthermore, they constitute a very serious obstacle to the setting-up of transversal air routes at the various levels of the East-West Axis and the Northern transversal. It is, therefore, recommended that the two protected zones be dismantled in favour of the Grid System proposed by AFRAA.

Another area of necessary policy modification concerns the protection of the state-owned national airlines. Such protection has, in some cases, been excessive, unnecessary and detrimental to the overall interest of the national economy. Fit and able private non-scheduled operators should be given a chance to back-up the national carriers on some domestic (and sub-regional)

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44 Supra, section 8.6.

45. See AFCAC Circular No. 3 of 1973, op.cit. page 14.

routes.[46]

There is a persistent direction-wise imbalance in traffic on the North-South axis. The main traffic flows go from north to south, with relatively small amount in the opposite direction.[47] Both the African governments and AFRATC should address themselves seriously to this issue. The former has an important role to play in generating local traffic. One way of doing that is to facilitate travelling by their citizens through the issuing of travel documents with the least inconvenience and delay. Every citizen in any state member of the civilized international community has a fundamental right to possess a valid passport - a right which his government can deny him only in very exceptional circumstances. A citizen does not constitute a danger to the state or a regime by merely travelling outside his national borders. On the contrary, as Saint Augustine aptly put it, the world is like a book and he who has not travelled reads only a page.

The governments can also generate freight traffic. The UNDP/ICAO Study highlighted the immense potentials of Africa's horticultural and agricultural air exports to

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46. See supra, section 8.5.

47. See UNDP/ICAO Report No. RAF/74/021 of 1977 op.cit., page 101; see also section 5.1.4 supra.

Europe and made a number of helpful recommendations to several African governments.[48] With the exception of Kenya and Ivory Coast, not many of the governments concerned have seriously responded to the recommendations. It is high time they did.

On the part of AFRATC, that body should fix incentive fares for northbound traffic. It is better to have a plane-load of low fare traffic than an almost-empty plane of high fare traffic. If the African air transport market has to grow significantly, then, air travel in the region should cease to be the privilege of African high government officials, a few wealthy businessmen, and visiting foreigners. Let it spread, as it should, over a wider spectrum of the people, who out of necessity would also prefer to travel by air. There is potential traffic in many middle-income Africans and businessmen. That market cannot continue to remain unexploited while directional traffic imbalance, for instance, is decried.

The Effectiveness of the Region's Civil Aviation Bodies

The performance of AFCAC and AFRAA will no doubt, greatly affect the development of civil aviation in Africa.

48. Ibid., Annexes 1-6, p. 137-195.

The two bodies themselves must, accordingly, grow from strength to strength. They can only grow if they are insulated from political quibbles of member governments; if they are strongly supported financially and technically. AFCAC has become a specialized agency of the OAU. Nevertheless, it should continue to harmonize its policies and programmes with those of the International Civil Aviation Organization (ICAO). It will need increasing support from the ICAO and the UNDP. One would also like to see some meaningful co-operation between it and the EEC and ECAC in the future. After all, the airlines of the member states of the EEC and ECAC operate significantly in Africa and, therefore, also stand to gain from the development of civil aviation in the region.

It has been proposed that AFRAA be made a specialized agency of the OAU. This author maintains that such a move is both unnecessary and improper.[49] Nevertheless, AFRAA deserves the continuous support and patronage of the OAU since the Association is an active participant not only in the development of the region's air transport industry, but also in its economic development. Furthermore, it accords with the spirit of the International Law of Development for not only the IATA, but also the

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49. Cf. section 7.3 supra.

airlines associations in the developed regions, such as the Air Transport Association of Canada, the Association of European Airlines, and the Air Transport Association of America, to aid AFRAA to achieve the objectives provided in its Articles of Association. These objectives are patently development-oriented.[50]

Equally important is the fact that AFCAC and AFRAA are specialized bodies and should have only highly specialized personnel in their decision-making positions. It will be counter-productive for member states to fill the posts in these bodies with political appointees or national favourites who are not sufficiently knowledgeable in the field of civil aviation. More importantly, the staff of these bodies should be immunized against undue political interference. They should be allowed to go about their tasks according to the dictates of their knowledge without any over-zealous political leaders breathing down their necks.

Finally, the novelist, V.S. Naipaul, was quoted by Professor Richard Sandbrook as saying that Africa has no future.[51] It necessarily follows that civil aviation in

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50. See Article 5 of AFRAA Articles of Association.

51. See International Perspectives, January/February 1983, op.cit., at page 6.

the region has no future. But one would prefer not to think so. Africa may be cheerless today, but it is certainly far from being hopeless. However, hope should be based on some practical indicators, otherwise it could be a delusion. Unless Africa can come up, as early as possible, with a purposeful, single-minded, selfless and development-oriented leadership that can engineer the development of the region's economy; unless much ensues from the "historic responsibility of the entire international community" to help Africa to restructure its economy by massive support of, for example, the African Food Plan, the Transport and Communications and Industrial Development Decades, and the Programme for the Twenty-six Least-developed countries of Africa; then Naipaul may be proved right. And he is not alone in his prophecy of doom. Both the Development Committee of the Organization of Economic Co-operation and Development (OECD), and the Executive Secretary of the ECA, predict that if there is no concerted effort to improve the economy of the region, then Africa in the year 2000 will be in the bottom of a deep black hole.[52]

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52. See generally, World Development Report 1982 (World Bank Report). See also Résumé du Rapport sur le développement dans le monde 1983, 6me vol. (25 juillet 1983) par la Banque internationale pour la reconstruction et le développement/Banque mondiale.

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APPENDIX

1. The OAU Declaration on Co-operation, Development and Economic Independence.

2. Agreement establishing AFCAC as a Specialized Agency.

3. Agreement between AFCAC and ICAO.

4. AFCAC Consultation Machinery for Granting Traffic Rights.

5. AFCAC Policy on Regulations for non-scheduled services.

6. The Amended AFCAC Constitution.

7. Typical examples of existing bilateral air agreements (capacity clauses) of African states.

8. AFRAA Articles of Association.

9. The Yaoundé Treaty (Air Afrique).

10. The UDEAC Treaty.

11. The ECOWAS Treaty.

12. The ADB Agreement.

ORGANIZATION OF AFRICAN UNITY: DECLARATION ON AFRICAN COOPERATION, DEVELOPMENT, AND ECONOMIC INDEPENDENCE*

[May 28, 1973]

AFRICAN DECLARATION ON CO-OPERATION,

DEVELORMENT AND ECONOMIC INDEPENDENCE

P R E A M B L E

We the Heads of State and Government of African countries assembled in Addis Ababa on 25 May 1973 on the occasion of the Tenth Anniversary of the Organization of African Unity;

Reaffirming the principles and objectives laid down in the Charter of 25 May 1963 establishing the Organization of African Unity;

Reaffirming the total commitment of our States to the provisions of the Algiers Charter, to the Declaration of Lima, to the African Declaration on Industrialization, to the OAU Declaration on the United Nations Conference on Trade and Development and to the African development priorities as defined by the Addis Ababa memorandum;

Recalling the relevant resolutions of the Organization of African Unity, the Economic Commission for Africa, and the African Development Bank;

Considering the profound and legitimate aspirations of our peoples;

Concerned by the ever-deteriorating economic and social position of the developing countries in relation to the developed countries and convinced of the constantly widening gap between the developed and developing countries;

Believing that the continuance of such a state of affairs generates a deep feeling of frustration with predictably serious consequences for peace and international security;

Concerned by the ineffectiveness of the measures adopted during the past decade to combat under-development and by the inability of the international community to create conditions favourable for the development of Africa;

Convinced that the mobilization of the continent's immense human resources in order to stimulate and orientate the creative spirit of Africans can lead to a rapid transformation of our economies and raise our peoples' standard of living;

Convinced that the effective mobilization of the vast natural resources of the continent will be greatly facilitated by a high degree of economic integration; that regional co-operation is not only an indispensable instrument of regional integration but provides a means of co-ordinating and strengthening the position of African countries in their relations with the outside world and thus enables them to play an effective role in influencing the international context so as to foster the creation of conditions more favourable for development;

Believing that neither language differences nor differences of economic size or structure constitute insurmountable obstacles to economic co-operation and regional integration, and that all barriers to intra-African co-operation, especially those which are remnants of colonialism or by-products of the vertical relations of dominance exercised over Africa by the developed countries, can be eradicated;

Believing that the prospects of far-reaching changes in the international environment, the important events taking place in the world and the efforts being made to find durable solutions to long-standing problems offer African countries an exceptional opportunity to establish a concerted approach and to participate fully in the establishment of a more equitable international order in the economic, commercial and monetary fields;

Aware of the serious threat arising from the constant wish of the developed countries to reserve themselves, particularly in Africa, spheres of influence that are not only political but also economic, and determined to defend the economic independence of Africa;

Convinced that the developing countries, by strengthening their common front, are capable of achieving their development targets;

Solemnly proclaim our firm determination to achieve the economic independence and development of the continent through the effective mobilization of its immense human and cultural resources;

Decide, therefore, to adopt the present Declaration setting out the basic principles of collective and individual action by all African countries on Co-operation, Development and Economic Independence.

AFRICAN ECONOMIC CO-OPERATION AND INTEGRATION

I. MOBILIZATION OF HUMAN AND MATERIAL RESOURCES

A.1 The Governments of African countries, with a view to making maximum use of Africa's potential human and natural resources, undertake to:-

Human Resources

A.2. Guarantee to the entire population the right to education and training based on African realities and provided in a a form suited to Africa's need and development objectives, and take all necessary measures to respect this right;

A.3 Direct university and higher education programmes to the training and research needed to ensure Africa's scientific and technological independence (as towards an applied research that will be required) and to effect radical changes in the economic and social environment in the interest of development;

A.4. Facilitate the free movement of persons essential for the exchange of ideas and economic integration and give priority to co-operation in the exchanges of professional manpower and skilled and unskilled labour among African countries;

A.5. Take appropriate measures to put an end to the braindrain from Africa and to prompt qualified Africans living aborad to return, with a view to the rapid phasing-out of technical assistance from outside Africa;

A.6. Accelerate the implementation of an Africanization policy in each country and ensure effective and equitable African representation in international organizations and the United Nations agencies in Africa;

A.7. Give full support, through their respective States and the Organization of African Unity, to the programmes of the Association of African Universities and other institutions for the fostering of co-operation in particular areas of training and research, most especially the teaching of African and relevant foreign languages, the extension of training facilities to meet specific shortages of middle

and high-level African personnel, the investigation of economic, social, cultural, scientific and technological problems that are of particular importance for African development, and the exchange of university teachers and students:

Natural Resources

A.8 Undertake a systematic survey of all Africa's resources, with a view to their rational utilization and joint exploitation, where appropriate, in order to accelerate the continent's development;

A.9. Defend vigorously, continually and jointly, the African countries' inalienable sovereign rights and control over their natural resources;

A.10 Intensify co-operation in the multinational exploitation of rivers and lakes and basins;

A.11 Promote the exchange of information concerning the exploitation and use of water for supplying towns and industries;

A.12 Exploit, for development purposes, Africa's hydroelectric potential on a multinational, sub-regional and regional basis, wherever possible;

A.13. Intensify the use of other sources of energy such as solar and thermal energy whose utilization can be progressively substituted for that of wood and help to halt the process of land being transformed into desert and the increased incidence of drought in Africa;

A.14 Protect Africa's sea and ocean resources coming within national jurisdictions effectively and jointly from international over-exploitation (by the developed countries);

A.15 Rationally harness, on a continental basis, the research of the sea-bed and ocean floor outside national jurisdiction

for the benefit of Africa's development and of its peoples and ensure full participation of the African land-locked countries;

II - AGRICULTURE

Promote the modernisation of African agriculture theough the introduction of modern and advanced techniques in the fields of production, distribution and storage; achieve the gradual replacement of the traditional peasantry by farmers trained in modern methods; and strengthen African co-operation in this sphere with a view to exchanging experience;

A.17 Promote efforts to ensure a rapid and substantial increase in Africa's food production;

A.18. Make special efforts to expand rural infrastructure and improve the conditions in rural areas in order to raise the standard of living of the rural populations;

A.19 Provide rural extension service so that small-scale farmers can be helped to produce surpluses that can be used for the financing of processing industries;

A.20 Take necessary steps to ensure that African products are processed to the greatest possible extent in Africa prior to exportation;

III - TRANSPORT AND INFRASTRUCTURE

A. 21. Accelerate the creation of a modern infrastru cture of roads, railways, airliness, inland waterways and the like which constitute the fundamental basis for development and intra-regional co-operation;

A22 Establish, as a matter of priority, links between national road systems and the junction between these areas and the sea ports in order to facilitiate the rapid transport of persons and goods, the opening up of isolated areas in each country and providing access to landlocked countries;

A.23 Eliminate all forms of obtacles to the regular movement of vehicles especially by simplifying formalities at the frontiers and harmonizing highway codes and transit regulations;

A.24 Take the necessary steps to establish consortia of African shipping companies which will enable them to operate with greater efficiency, share the use of terminal and maintenance facilities, and explore in common the possibilities of technical innovation in the transportation of African exports;

A.25 Adopt a common stand in favour of early negotiations so as to obtain favourable freight rates and exert an influence on freight rate level, in respect of maritime and coastal shipping services;

A.26 Take all necessary measures to establish shippers councils in Africa and to associate landlocked countries with them as much as possible;

A.27 - Set up adequate freight systems designed to promote intra-African trade and African exports;

A.28 Effectively strengthen co-operation between African airline companies with a view to the rationalization of the continent's air services, particularly as regards the harmonization of time-tables, the setting up of special reduced rates, exchange of air traffic rights, the standardization of types of aircraft used, the sharing of aircraft repair and maintenance facilities and joint organization of research and personnel training;

TELECOMMUNICATIONS AND COMMUNICATIONS

A.29 Intensify efforts towards the implementation of the Pan-African telecommunications network, including the eventual

installation of a Pan-African satellite, and take steps to secure the standardization of equipment, the improvement and co-ordination of operational arrangements and the provision of appropriate personnel training facilities;

A.30 Define common general policies on all questions relating to intra-African postal communications problems and policies, particularly as regards the standardization and co-ordination of postal procedures and practices, and the establishment of vital intra-African postal systems;

V - INDUSTRIALIZATION

A.31 Promote the industrialization of Africa, in particular by the expansion of national markets and accelerating the development of technology, taking due account of the growing importance of transnational companies in this field;

A.32 Identify the economic regions of Africa so as to promote a systematic development of the entire continent through regional planning with national planning on a rational basis; and identify areas of common interests, so as to promote their development through planning and programming;

A.33 Take adequate measures to ensure rational industrialization, within the context of subregional and continental economic entities, on the basis of an equitable sharing-out of costs and benefits by co-ordinating industrialization policies and harmonizing development plans, paying special attention to the problems of the least developed and landlocked countries;

A.34 Organize exchanges of information among African countries on matters pertaining to industrialization, promote co-operation and assistance by competent international institutions, and take adequate steps to put an end to practices of foreign transnational companies that are contrary to Africa's interests;

A.35 Call upon the developed countries, with a view to promoting African industries, to apply the generalized system of preferences in a loyal and non-disenanating manner and to abolish effectively all tariff and non-tariff barriers and restrictive business practices;

A.36 Promote co-operation between developing regions, with special regard to the export of processed and semi-processed products, in order to change the vertical structure which dominates relations between developing countries and developed countries;

A.37 Promote, through a policy of training, guidance and extension services, the involvement of Africans in the industrial sector;

A.38 Adopt suitable measures to encourage the rapid transfer of appropriate techniques to Africa both from the developed market-economy countries and from the Socialist countries and their incorporation in production processes, and set up continent-wide institutions capable of promoting applied scientific research and the use of techniques resulting from local research; eliminate middlemen in the realm of imports in order to reduce the high-cost of imported products,

MONETARY AND FINANCIAL MATTERS

A.39 Take all necessary measures to promote effective monetary co-operation among African countries especially by:

(i) Organizing mutual consultation on monetary matters between African countries,

(ii) Giving a more important role to African currencies in intra-African payments,

(iii) Instituting payments arrangements among African currencies in Intra-African payments,

(iv) Setting up, at the regional or subregional level, one or more payment unions with an

African external settlement fund; to this end, study in a concrete manner all possibilities of financing the fund in collaboration with appropriate international institutions.

B. Rapidly strengthen effective financial co-operation in Africa by setting up subregional capital markets, and by inviting ADB to give priority to the financing of multinational projects and those which foster African economic integration.

Environment

A.40 Take all necessary measures for the protection of nature and the environment which constitute one of Africa's irreplaceable resources, and to counteract the effects of natural disasters of which other countries are constant victims,

A.41 Adopt a common front to combat drought, which constitutes a threat to the entire continent,

A.42 Take all steps to ensure that tourism policies do not result in the destruction of the environment and nature in Africa, since any damage done is irremediable,

A.43 Ensure that the problems of environmental protection are seen within the context of the economic and social development of the African countries whose development policies should accordingly pay greater attention to questions of natural resource conservation and management, the improvement of physical and human conditions in urban and rural areas, and the eradication of endemic diseases which have been extensively eliminated in many parts of the world,

A.44 Ensure that African countries are always guided by the principles adopted by the Stockholm Conference on Human Environment.

TOURISM

A.45 Set up joint organizations for the promotion of the tourist trade through such measures as joint advertising, the establishment of agreed tariffs for excursions and holiday travel, and the simplification of frontier formalities to facilitate inter-State tours.

TRADE AND DEVELOPMENT FINANCING

B.1 INTRA-AFRICAN TRADE

1. (a) intensify efforts to establish procedures and mechanisms for co-ordinating trade policies;

(b) intensify efforts to promote co-operation in the fi eld of the general integration of economic infrastructure, particularly through the restructuring of production structures distribution systems and market integration on a subregional basis;

(c) establish common trade and development institutions to consider, co-ordinate and supervise, where necessary, the implementation of agreements and arrangements among African countries on co-operation, trade and development.

II. Adopt modern marketing techniques in respect of African products with a view to promote intra-African trade;

B.2 INTERNATIONAL TRADE

1. Take the necessary precautions in international negotiations to ensure that they take place within international institutions, and that, whether they concern relations between Africa and groupings of developed countries or simply, relations with these countries individually, they are in no case treated as a pretext to subject Africa to any foreign economic power.

2. Concert and organize plan action, in advance of all negotiation with the developed countries, and in order to assess all the implications which the proposed agreements might have on the future of their economic independence, (regarded as an inviolable principle).

3. Act collectively in multilateral trade negotiations in order to safeguard the following objectives:

(i) The adoption of effective concerted measures a definite and to the constant deterioration in the terms of trade of the African countries;
[sic - a line appears to have been omitted]

(ii) The adoption of effective measures for the stabilization of relative prices of African commodities and for the dynamic stabilization of export earnings, in the light of the increasing needs of African countries for development financing,

(iii) The adoption of effective measures designed to lead to the vertical diversification of production so that the African countries can process their products through as many stages as possible before exporting them, it being considered that horizontal diversification consisting of the substitution of a number of primary products for a single one merely postpones the day of reckoning without solving any of the real problems;

(iv) The abolition by the developed countries of all tariff and non-tariff barriers, and the restrictive trade practices which those countries have hitherto placed in the way of the penetration of their markets by products from the African countries;

(v) Non-reciprocity in trade and tariff concessions accorded to African countries by the developed countries;

(vi) The adoption and effective implementation by all the developed countries of the generalized system of preferences, the suppression of all escape clauses, the extension of the system to cover all escape clauses, the extension of the system to cover all African exports and its adoption by all countries that have not yet done so.

(vii) the conduct of negotiations by groups of products and not individual product;

(viii) the completion of negotiations within a reasonable period.

B.3 DEVELOPMENT FINANCING

(i) Mobilize Africa's domestic resources rapidly and effectively so as to serve as the main basis of African development;

(ii) Encourage, in every way, efforts directed towards African participation in investment in all sectors, so as to ensure effective national control of the economy; take direct charge of the creation and development of key sectors of the economy to ensure their effective control in the interests of national development;

(iii) promote the establishment of continent-wide insurance and reinsurance institutions and a Pan-African Insurance and Reinsurance Company;

(iv) take measures to ensure that foreign private investment respects national priorities drawn up by the African States;

(v) Co-ordinate national legislations in the field of investment policy to avoid competition among African countries in offering foreign investors conditions for establishment and tax concessions that are liable to be prejudicial to African economies with the aim of preparing the elements for a single investment code for all African countries;

(vi) Take measures to reduce expenditure on research and studies provided by the developed countries which absorb a very large proportion of foreign aid and ensure that the costs of such studies are borne by donor countries and not counted as part of the credit element of the aid granted.

(vii) To participate actively and directly in the research currently being conducted on the reform of the international monetary system with a view to establishing a more equitable international monetary system designed to provide African countries with resources for development in addition to international liquidities;

(viii) Promote measures through general or specific agreements to limit the harmful effects of monetary developments outside the continent on African economies and, where possible, seek compensation for resultant losses by African countries and at the same time strengthen intra-African monetary co-operation to counteract the harmful effects of external monetary developments;

(ix) Defend a common African stand in all international economic and monetary negotiations.

C.1 INTERNATIONAL CO-OPERATION

Take all necessary measures, side by side with efforts at the international level, to promote intra-African co-operation within the context of a strategy for development which should be the primary responsibility of the African peoples themselves.

.2 Africa's relations with the countries of the Third World

(i) Constant consolidation of the front formed by the Group of 77 in order to defend the principles laid down in the Algiers Charter and the principles of action in the Lima Declaration; [*]

(ii) Constant harmonization of the positions of developing countries within the common institutions they have established for the defence of their common interests;

(iii) Encouragement by all possible means, of the exchange of information on development and scientific and technical co-operation between developing countries and between their respective national or regional institutions;

(iv) Encouragement of the associations of producers in developing countries, for the defence of their common products.

C.3 Relations with the developed market economy countries and their economic groupings:

(i) Co-ordination and harmonization of their stand during all negotiations in order to safeguard the interests of African countries and refraining from actions prejudicial to African economies and inter-African co-operation;

(ii) conclusion of trade agreements on the basis of mutual interest and the assistance duly made available to

Africa by the developed market economy countries and their economic groupings;

(iii) Taking all necessary measures to ensure that no special form of relationship with the developed market economy countries, or their economic groupings are an impediment to access to financial and technical aids;

(iv) ensuring that multilateral and bilateral financial and technical assistance agreements are adapted to the development requirements of African countries;

(v) Taking concrete measures to regulate the repatriation of profits which considerably reduces the investment resources of African countries and limits the positive effects of aid to Africa;

(vi) Taking measures to facilitate the transfer of appropriate technology to African countries on easy terms, and to control the restrictive practices which militate against such transfers;

Relations with the Socialist Countries

(i) co-ordination of the stand and information on the possibilities for trade, co-operation and assistance between African countries and the Socialist countries;

(ii) promotion of all measures to intensify trade and facilitate payments between African countries and the Socialist countries;

(iii) Taking steps to encourage the Socialist countries to facilitate the mobilization of credits granted to African countries, in particular as regards the use of such credits to finance the local cost component of projects and to purchase goods from other Socialist country;

(iv) Taking steps to facilitate the sale of African products in Socialist countries within the framework of long-term agreements at contractually negotiated and periodically readjust prices to take account of the changes in market conditions;

(v) intensification of industrial, scientific and technical co-operation between African countries and the Socialist countries, and measures to facilitate the transfer of technology from such countries, to the African countries.

IN FAITH WHEREOF, We, African Heads of State and Government call upon African governments, African economic co-operation organizations, African institutions and African representatives in all international organizations, institutions and bodies to be guided in their actions by the provisions of the present Declaration on Co-operation, Development and Economic Independence;

TO WHICH WE have appended our signatures.

ALGERIA	EGYPT
BOTSWANA	EQUATORIAL GUINEA
BURUNDI	ETHIOPIA
CAMEROON	GABON
CENTRAL AFRICAN REPUBLIC	GAMBIA
CHAD	GHANA
CONGO	GUINEA
DAHOMEY	IVORY COAST

KENYA

LESOTHO

LIBERIA

LIBYA

MADAGASCAR

MALAWI

MALI

MAURITANIA

MAURITIUS

MOROCCO

NIGER

NIGERIA

RWANDA

SENEGAL

SIERRA LEONE

SOMALIA

SUDAN

SWAZILAND

TANZANIA

TOGO

TUNISIA

UGANDA

UPPER VOLTA

ZAIRE

ZAMBIA

DONE at .. ..May 1973.

Source: 12 I.L.M. 996 (1973).

AGREEMENT BETWEEN THE ORGANIZATION OF AFRICAN UNITY (OAU) AND THE AFRICAN CIVIL AVIATION COMMISSION (AFCAC) ESTABLISHING AFCAC AS A SPECIALIZED AGENCY OF OAU

The Organization of African Unity (OAU) and the African Civil Aviation Commission (AFCAC),

Considering paragraph 2 of Article II of the Charter of the Organization of African Unity, which stipulates that Member States shall co-ordinate and harmonize their general policies in all fields, including matters relating to economic co-operation, transport and communications;

Considering Article 3 of the Constitution of the African Civil Aviation Commission, which stipulates the objectives of the Commission, including, inter alia, promotion of co-ordination, better utilization and orderly development of African air transport system;

Considering Resolution CM/Res.357 (XXIII) of the Twenty-Third Session of the OAU Council of Ministers relating to AFCAC;

Considering Recommendation S3-19 of the Third Plenary Session of AFCAC adopted as a follow-up on the above-mentioned OAU Resolution;

Considering Resolution CM/Res.439 (XXV) of the 25th Session of the OAU Council of Ministers relating to AFCAC;

Conscious of the common concern of the parties hereto for the development of air transport in Africa;

Determined to give AFCAC and OAU relationship a formal framework for the promotion of a common African policy in civil aviation matters;

HEREBY AGREE as follows:

..2/

Article I
STATUS OF AFCAC

AFCAC shall be the OAU Specialized Agency in the field of civil aviation working towards the achievement of the objectives as stipulated in the Constitution of AFCAC.

Article II
MEMBERSHIP AND EXCLUSION

1. Any application for membership submitted to AFCAC by a non-OAU Member State shall be forwarded to the Assembly of Heads of State and Government of OAU through the Council of Ministers for consideration. The Assembly's decision shall be binding to AFCAC.

2. Pursuant to a decision of the OAU Assembly of Heads of State and Government to exclude any AFCAC Member State from AFCAC, the same shall be excluded.

Article III
MEETINGS

1. OAU shall attend and participate in all AFCAC Bureau Meetings and Plenary Sessions. For this purpose AFCAC shall notify OAU of such meetings.

2. AFCAC shall make available to OAU for possible comments all draft agenda and working documents of the meetings aforesaid.

3. OAU shall invite AFCAC to attend its Sessions and to participate in all OAU Meetings dealing with civil aviation matters included on the agenda.

4. OAU shall communicate to AFCAC the agenda and the relevant working documents for the above-mentioned sessions and meetings.

Article IV
AGENDA

1. AFCAC shall include on the Agenda of its Plenary Sessions and its other meetings any item or items proposed to it by OAU, which shall prepare a working paper on each of these items.

2. OAU shall include on the Agenda of the meetings of its Specialized Commissions and of its sessions any item or items relating to civil aviation as may be proposed to it by AFCAC, which shall prepare a working paper on each of these items.

Article V
REQUESTS FOR STUDIES

1. OAU may request AFCAC to undertake studies and to prepare reports on civil aviation matters.

2. Subject to any difficulties mutually acknowledged, AFCAC shall carry out studies and submit reports as requested by the OAU.

Article VI
EXCHANGE OF INFORMATION AND DOCUMENTS

OAU and AFCAC hereto undertake to exchange in confidence information, statistics and documents on matters of common interest.

Article VII
REPORT

AFCAC shall submit a report on its activities to the relevant political organs of the OAU every two years and shall have the right to take part, in accordance with Article III, paragraph 3 in any discussion of such report.

Article VIII
AGREEMENTS

AFCAC shall consult with OAU on the nature and extent of any agreement it wishes to conclude with any inter-governmental and/or non-governmental organizations.

Article IX
BUDGETARY AND FINANCIAL ARRANGEMENTS

1. In order to permit the establishment of an autonomous Secretariat of AFCAC, a detailed study of the financial implications shall be prepared and submitted to the Plenary of AFCAC and then to the OAU Advisory Committee on Budgetary and Financial Matters for appropriate recommendation to the appropriate political organs of the OAU, which shall decide on the aid to

2. Once that objective is attained, the OAU shall annually contribute to AFCAC a financial grant. In addition, Member States may make voluntary contributions to AFCAC.

Article X
JOINT CO-ORDINATION COMMITTEE

1. There shall be a joint AFCAC/OAU Co-ordination Committee which shall meet in principle twice a year.

2. The agenda and arrangements for each Committee meeting shall be the subject of a prior exchange of correspondence between AFCAC and OAU.

3. Other relevant African Organization may be invited to attend the meetings of this Committee.

Article XI
AMENDMENT

This Agreement may be amended by consent of the parties hereto.

Article XII
ENTRY INTO FORCE

This Agreement and any subsequent modifications thereto pursuant to Article XI thereof shall come into force after approval by the OAU Council of Ministers and Assembly of Heads of State and Government and the Plenary Session of AFCAC. It shall become effective on the thirtieth day after the latter's approval.

Article XIII
INTERPRETATION OF THE AGREEMENT

Any dispute arising out of this Agreement relating to interpretation shall be finally disposed of by the Joint Co-ordination Committee referred to in Article X.

Article XIV
LANGUAGES

This Agreement has been drawn up in six original copies, two in English, two in French and two in Arabic, all three texts being equally authentic.

GENERAL PROVISIONS

Article XV

RELATIONS WITH AFRICAN LIBERATION MOVEMENTS

AFCAC shall co-ordinate within its competence with African Liberation Movements as recognized by OAU.

Article XVI

AGREEMENT BETWEEN AFCAC AND THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

AFCAC shall, with the participation of OAU, negotiate with the International Civil Aviation Organization (ICAO) a co-operation agreement defining the relationship between AFCAC and ICAO.

Article XVII

PRIVILEGES AND IMMUNITIES

1. AFCAC shall have a flag depicting AFCAC crest against a background of OAU colours in the order in which they appear on the OAU flag.

2. Notwithstanding the Agreement between AFCAC and the Republic of Senegal on establishing the Seat of AFCAC, OAU Member States shall grant to AFCAC personnel such privileges and immunities as will enable them to carry out their functions in their respective territories.

3. A special travel document shall be issued by the OAU to AFCAC personnel to enable them to travel into the territories of Member States to carry out their functions.

Signed, sealed and delivered at ADDIS ABABA (ETHIOPIA)
on this day of .....

IN WITNESS WHEREOF the undersigned Administrative Secretary-General of the Organization of African Unity and the President of the African Civil Aviation Commission duly authorized, have deposited their hand and seal to this Agreement, respectively.

President of the
AFRICAN CIVIL AVIATION COMMISSION

.....

Moussa Maïga

Administrative Secretary-General of
THE ORGANIZATION OF AFRICAN UNITY

.....

William Eteki Mboumoua

WORKING ARRANGEMENTS BETWEEN ICAO AND AFCAC

The President of the Council of the International Civil Aviation Organization and the President of the African Civil Aviation Commission, acting under the authority delegated to them by their respective organizations, have agreed as follows regarding the relationship between the two organizations.

General

1. ICAO and AFCAC shall maintain close liaison and co-operate with each other to facilitate the discharge of their respective responsibilities without overlaps.

2. ICAO shall, in conformity with the general policy established by its Assembly and the practice established by it with similar regional organizations, assist and support the work of AFCAC.

3. AFCAC shall, in carrying out the functions outlined in its Constitution, give regard to the work of ICAO so as to avoid unnecessary duplication.

SYS

Co-ordination

4. The ICAO officials designated on an ad hc basis by the ICAO Secretary General will keep themse fully informed of the relevant activities, plans and requirements of AFCAC particularly in the air transpor air navigation and technical assistance fields and, as necessary, will bring them to the attention of the appropriate body of ICAO. The Secretariat of AFCAC will transmit to ICAO the documentation necessary to permit implementation of this paragraph.

5. The Secretary of AFCAC and the AFCAC officials designated by him will keep themselves fully informed of the activities, plans and requirements of ICAO that are related to or may affect or require co-ordination with the activities, plans and requirements of AFCAC. The ICAO Secretariat will transmit to AFCAC the documentation necessary to permit implementation of this paragraph.

6. ICAO will be invited to attend AFCAC Plenary Sessions and AFCAC will be invited to attend sessions of the ICAO Assembly.

Secretariat services and financial matters

7. ICAO will provide, as far as possible, pursuant to the decisions and resources made available by its Assembly and Council, secretariat services as may be required by AFCAC.

8. The Secretariat services referred to in the preceding paragraph shall be provided by ICAO through personnel assigned on a regular basis and personnel assigned on an ad hoc basis. As regards the latter, ICAO will endeavour to make available staff qualified for the specific tasks included in the AFCAC Work Programme, for meetings of the Plenary and, as required, for the committees that may be established pursuant to paragraph 10 of AFCAC's Constitution.

9. The personnel mentioned in paragraph 8 above will carry out their work for AFCAC only as directed by the authority designated by AFCAC. However, from an administrative point of view all those personnel will come under the authority of the ICAO Secretary General in accordance with the ICAO Service Code.

10. The emoluments and benefits paid by ICAO to some of the personnel assigned to AFCAC on a regular basis may be fully or partly reimbursed by AFCAC in conformity with arrangements made between the two organizations.

11. Regarding other direct and indirect costs of AFCAC, the practice of ICAO in the joint financing field under Chapter XV of the Chicago Convention will be followed, namely, that ICAO shall bear the cost of the emoluments and benefits paid to personnel assigned on an ad hoc basis, as well as the production at ICAO Headquarters of certain advance documentation for AFCAC meetings. The direct costs, such as travel and subsistence of personnel assigned on a regular or an ad hoc basis when on mission or at meetings shall be charged to AFCAC. The cost of meeting rooms and conference facilities, supplies and temporary personnel for AFCAC meetings will also be charged to AFCAC.

TRADUCTION

EC 12/6.2. — 206
EC 12/6.8

29 December 1977

Dear Sir,

I have the honour to acknowledge receipt of and to thank you for your letter of 31 August 1977, in which you transmitted to me the draft Working Arrangements between the International Civil Aviation Organization (ICAO) and the African Civil Aviation Commission (AFCAC), adopted by AFCAC at its Fifth Plenary Session held in Lomé.

I am pleased to impart to you my agreement on the provisions of these arrangements and would suggested the 1st of January 1978 as the effective date of the arrangements. It is however understood that these arrangements only govern the relationships between ICAO and AFCAC within the framework of their respective present constitutional regimes.

Please, accept, Sir, the assurances of my highest consideration.

Assad Kotaite
President of the Council

Mr. M. Maïga
President of AFCAC
BP. 2356
DAKAR, Senegal

TERMS OF REFERENCE

CONSULTATION MACHINERY FOR GRANTING OF TRAFFIC RIGHTS

(Established by AFCAC Resolution S7-11 on May 1981 and approved by AFCAC Bureau 29th Meeting on March 1982)

Article 1

DEFINITION

The Consultation Machinery is a consultative body which will examine issues relating to the granting of traffic rights.

Article 2

OBJECTIVE

The objective of the Consultation Machinery is to provide the Civil Aviation Authorities in AFCAC Member States with a framework within which they can consult and solve any problem relating to traffic rights in Africa especially fifth freedom traffic rights, in order to :

a) Improve the intra African air services network;

b) Meet the need of the people for better connections within Africa;

c) Promote generally the air transport services in Africa and avoid unreasonable competition between African Airlines

550

Article 3

COMPOSITION

The Consultation Machinery shall be composed as follows:

- The President of the African Civil Aviation Commission as Chairman;
- The AFCAC Bureau Members;
- Two Members choosen by AFCAC President in consultation with the Secretariat, from the list kept by AFCAC Secretariat of persons having suitable qualifications and experience nominated by Member States".

Article 4

FUNCTIONS

The Consultation Machinery shall examine and make recommendations on:

a) Any disagreement between two or more AFCAC Member States relating to the negotiation of fifth freedom traffic rights;

b) Any dispute referred to it, relating to traffic rights between two or more AFCAC Member States concerning points situated in Africa which was not settled by direct negotiations and before submitting the case to arbitration;

c) Any situation which an AFCAC Member States consider it impeding the advancement of adequate economic and efficient air transport in Africa;

d) Any air transport matter within Africa of subregional or continental nature referred to it from an AFCAC Member State for its recommendation and/or advise.

Article 5

RULES OF PROCEDURES

1) Any AFCAC Member States submitting a disagreement or complaint to the Consultation Machinery (hereinafter referred to as "the applicant") shall file an application to the AFCAC Secretariat to which shall be attached a memorial containing:

a) The name of the applicant and the name of any AFCAC Member States with which the disagreement exists (the latter hereinafter referred to as "the respondent");

b) A statement of relevant facts;

c) Supporting data related to the facts;

d) A statement of law;

e) The relief desired by action of the Machinery on the specific points submitted;

f) In case of disagreement and/or dispute, a statement that negotiations to settle them had taken place between the parties but were not successful.

2) Upon receipt of the application, the Secretary of AFCAC shall:

a) Verify that it complies in form with the requirement of paragraph (1) above, and if necessary, require the applicant to supply any deficiencies appearing therein;

b) Notify and forward copies of the application and the supporting documentation to the President of AFCAC, the Bureau Members and the two selected Members;

c) Notify and forward copies of the application and the supporting documentation to the respondent and to all other parties in the case with an invitation to file a counter-memorial within a time limit fixed by him.

3) a) The counter-memorial referred to above shall contain answer to points raised in the applicant's memorial, any additional facts and supporting data and a statement of law;

b) In the counter-memorial there may be presented a counter claim directly connected with the subject matter of the application;

c) The Secretary of AFCAC shall forward copies of the counter-memorial and its supporting documentation to the President of AFCAC, the Bureau Members and the two selected Members as well as to the applicant.

4) The Secretary of AFCAC shall, after consultation with the President, inform all parties concerned of the date of the consideration of the application and invite them to participate, such data should be related to the earliest AFCAC Bureau Meeting.

5) The Consultation Machinery shall deal with application in closed meetings; it may conduct an oral hearing or proceed to examine the case in the light of all documents submitted in accordance with the provisions of this article.

6) The Consultation Machinery may at any time entrust any person, body on institution with the task of carrying out an inquiry or giving an expert opinion. In such cases it shall define the subject of inquiry or expert opinion and prescribe the procedure to be followed.

7) Each party involved is entitled to produce at any time, prior to the decision of the Machinery, any new evidence, data or statement in addition to those previously submitted by him.

8) No Member of the Consultation Machinery shall be involved in the consideration of any application which his country is a party; in such case he will be replaced by another Member selected from the list kept by the AFCAC Secretariat as provided in Article (2) of this terms of reference. In case the country of which the President is a national is involved, the Bureau Members shall select one of them to act as a Chairman of the Machinery.

Article 6

DECISIONS

1) After hearing the parties and/or examining the documents submitted by all parties, the Consultation Machinery shall render its conclusions and recommendations.

2) The conclusions and recommendations of the Machineray shall contain:

a) The date on which it is delivered;

b) A list of the Members of the Machinery participating;

c) The names of the parties involved;

d) The conclusions and/or recommendations of the Machinery together with its reasons for reaching them.

3) The conclusions and recommendations by the Machinery shall be taken by "simple majority vote".

4) The Secretary of AFCAC shall notify all parties concerned of the conclusions and/or recommendations of the Machinery which shall be subject to the acceptance by the concerned AFCAC Member States.

5) If at any time before a conclusion or recommendation is agreed upon, the parties conclude an agreement on the subject matter, or agree to discontinue the proceedings, they shall so inform the Secretary of AFCAC who will immediately inform the President and all other Members and officially record the agreement reached or the discontinuance of the proceedings.

Article 7

GENERAL PROVISIONS

1) All documents submitted as well as the record of proceedings shall be considered of a confidential nature and shall be kept only by the Secretary of AFCAC;

2) These terms of reference may, at any time, be amended by the Bureau. No amendment shall apply to a pending case except with the agreement of the parties.

COMMON AFCAC POLICY ON REGULATIONS FOR NON-SCHEDULED OPERATIONS

(Adopted by the Commission at its Third Plenary Session, Kampala, April 1975 - under Recommendation S3-4 -)

Standard Application Forms for authorization to operate Inclusive Tours or Affinity Group Charter Flights

1. This Form is the basic document for harmonization of the procedure to be followed in any request for flight authorizations. It is divided into three parts:

- Part I : Application for authorization to operate inclusive tour or Affinity Group Charter Flights.
- Part II : Declarations required for inclusive tour Charter Flights.
- Part III : Declarations required for Affinity Group Charter Flights.

2. Both the importance of facilitation and the need to obtain appropriate information for an orderly operation and control of inclusive tours or affinity group charter flights have been taken into consideration in the Standard Form (attached hereto).

Procedure for submission of Application Forms

3. The Commission considers that any delay in the follow-up of applications for authorization to operate inclusive tour or group charter flights could be prejudicial to the planning of such flights and consequently to the interests of operators and the general public. It therefore recommends the following time limits for submission of the application forms concerned:

1) Application Forms for authorization to operate long series of inclusive tour charter flights shall be received by the Government authorities concerned at least 90 days before commencement of the first flight. Any changes thereto shall be received within 30 days prior to commencement of the flight concerned.

2) Short series flights are understood to mean a series of two or three flights taking place within a period of 90 days. For this type of flight the same limit for submission of the Application Form as for affinity charter flights shall apply, i.e. 30 days for submission of the Application Form and 14 days for submission of any changes thereto.

3) Application Forms for authorization to operate affinity charter flights shall be received by the Government departments concerned at least 30 days before the date scheduled for the first flight and any changes thereto shall be received not later than two weeks prior to commencement of the flight concerned.

Note: Any Government authority may however entertain applications submitted to it within shorter periods than those stipulated above, having regard to the particular circumstances of the applications.

Duration of inclusive tours

4. In order to discourage passengers from taking inclusive tour charter flights rather than scheduled services, the duration of any inclusive tour should not be less than six nights (exclusive of flight duration).

Control of affinity group charter flights

5. The criteria presently applicable to this type of flight, i.e. those specified in IATA Resolution 045 shall apply. However AFCAC should keep under constant review the Advance Booking Charter system (ABC) in order to determine its relevance to African States.

Student charter flights

6. Conditions under which student charter flights are operated at the moment are covered in IATA Resolution 045; this situation should be maintained. However it is realized that there are at least two types of student charter flights:

a) those meeting inclusive tour charter flight requirements

b) those meeting affinity charter flight requirements

These charter flights shall be controlled on the basis of the requirements applicable to a) or b).

AFCAC Member States shall apply such checks and inspection on the identity and entitlement of passengers on student flights so as to ensure that there are no abuses.

Co-ordination between Civil Aviation Departments

7. a) Enforcement of this regulation

States should co-operate in order to ensure that the approved regulation is enforced. In this connection, they should inform each other through AFCAC Secretariat of the enforcement measures taken.

b) Fare structure

In consultation with AFRAA, IATA, IACA and AACO, African States should consider establishing a fare structure with a view to protecting scheduled air carriers, while promoting the development of tourism.

c) Requirements for Group Travels

States should ensure that all participants in an inclusive tour or Affinity Group charter flight travel as a group over the route specified in the application. To this end, they should discourage enroute stop-overs. However, in order to promote air travel between two or several African countries, States may wish to establish more flexible rules with regard to "stop over" privileges in connection with charter flights.

d) Non-scheduled Air Transport Bilateral Agreements

States should endeavour to extend existing agreements to cover provisions concerning non-scheduled operations. In so doing, States should ensure that the level of non-scheduled operations is not such as to adversely affect scheduled air services.

e) Privilege travel (free of charge) on charter inclusive tours by representatives of travel agencies or tour operators

Representatives of tour operators or travel agencies may be permitted to travel free of charge on inclusive tour flights; competent authorities will be responsible for setting up the requirements for the granting of this privilege which should not be subject to abuse.

f) Use of inclusive tours by AFCAC States nationals residing abroad

AFCAC States nationals residing abroad may travel on inclusive tour flights subject to their fulfilling the requirements for this type of flight.

APPLICATION FOR AUTHORIZATION TO OPERATE INCLUSIVE TOUR OR AFFINITY GROUP CHARTER FLIGHTS

1. Name and address* of the operator
2. Name and address of the aircraft owner
3. a) Type and model, registration marks, call sign and maximum take-off weight of the aircraft
   b) Estimated number of passengers to be embarked and disembarked
4. Itinerary (showing all places to be served and ultimate destination of flight)
5. Date(s) and time of arrival at, and departure from the airport or airports concerned
6. Name and address of aircraft operator's local representative or agent
7. For Charter Inclusive Tour, please give the following information:
   a) Minimum price payable by passenger - give cost of air transport, accommodation, surface transport and other surface components
   b) Name(s) of hotel(s)
   c) Duration of stay
   d) Any other pertinent information.
8. For Affinity Group Charter Flights, please give information on type of Tour (e.g. hunting, photography, leizure, sight seeing, game viewing)
9. Name and business address of charterer and name and address of his local representative or agent
10. Provide evidence** that adequate provision has been made, either by insurance or other means, to meet third party liability on the surface as well as your liabilities as a carrier of passengers.
11. <u>To be attached to the form:</u>
   - <u>For Charter Inclusive Tour</u>: Charter agreement and declaration from the tour operator or from his duly authorized representative or agent.
   - <u>For Group Charter</u>: Charter agreement and declaration from authorized official(s) of the group and travel agent.
   - <u>For all Charters</u>: Declaration from the aircraft operator.
12. Date and signature of the operator.

* Registered or business address
** Information to be given in English or French

Part II

DECLARATION REQUIRED FOR INCLUSIVE

TOUR CHARTER FLIGHTS

DECLARATION BY THE TOUR OPERATOR

PART II - A

I(we) the undersigned certify on behalf of ..... represented by me (us) that:

a) The information given in Part I above is correct,

b) The aircraft for the flight(s) has been chartered by me(us),

c) Adequate arrangements covering the flight(s) and ground services in ..... have been made(certified copies of documents confirming these arrangements to be attached)

Signed .....

Name .....

(in block letters)

Position .....

Address .....

On behalf of .....

Date .....

DECLARATION BY THE AIRLINE

PART II - B

I (we) the undersigned certify that:

a) The information given in Parts I and II - A above is correct,

b) The aircraft for the flight(s) has been chartered by .....

c) The total carrying capacity of the aircraft shall be at the disposal of the tour operator,

d) The laws and regulations in force governing the flight(s) will be complied with.

Signed .....

(company seal)

Name .....

(in block letters)

Position .....

DECLARATION BY THE TOUR OPERATOR's LOCAL AGENCY

(if any)

PART II - C

I(we) the undersigned certify that:

a) The information given in Parts I and II - A above is correct,

b) Adequate arrangements concerning ground services have been made (certified copies of documents confirming these arrangements to be attached).

Signed .....

Name .....

(in block letters)

Position .....

On behalf of .....

(name and address of agent)

Date .....

DECLARATIONS REQUIRED FOR AFFINITY GROUP CHARTER FLIGHTS

DECLARATION BY THE CHARTERING GROUP OR ASSOCIATION

PART III - A

I(we) the undersigned certify on behalf of association .... represented by me (us) that:

a) The participants in the trip ..... of..... have been fully paid-up members of the association since (1), (a date at least six months prior to the start of the trip),

b) Information concerning the trip is not disseminated otherwise than in the publications or circulars produced by the association for its members,

c) The association agrees to a duly empowered representative of the aviation administration carrying out a check at the offices of the association to determine whether the participants in the trip meet requirement a) above,

d) The association notes and agrees that only those participants effectively meeting requirement a) may board the aircraft.

I(we) undertake to supply the aviation administration at least 14 days before the departure of the flight with:

(i) A membership list with addresses and dates of joining in alphabetical or chronological order and a certified passenger list, in alphabetical order showing the name and address of each passenger, the date on which he or she joined the group or, as appropriate, the name of the member by whom he or she is being accompanied on the flight and their relationship.

(ii) A copy of the group's constitution and copies of all publications or circulars of the association concerning the flight.

Signed .....

Name .....

(in block letters)

Position .....

Address .....

Date .....

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(1) Such persons may be accompanied by members of their families residing with them.

DECLARATION BY THE AIRLINE

PART III - B

I(we) the undersigned certify on behalf of ..... represented by me(us) that:

a) The information given in Parts I and III - A of this form is correct,

b) The aircraft for the above flight has been chartered by the group or association referred to in Part III - A above,

c) The total carrying capacity of the aircraft shall be at the disposal of the said association or group,

d) The laws and regulations in force governing the operation of the flight will be complied with,

e) All the charges covering the return journey (where applicable) have been paid and .....

(name and address of person or airline)

..... shall be responsible for the return journey. Certified copies of documents confirming return journey arrangements are attached.

Signed .....

(company seal)

Name .....

(in block letters)

Position .....

DECLARATION BY CHARTERER OR HIS DULY ACCREDITED AGENT*

PART III - C

I(we) the undersigned on behalf of ..... represented
(name of the charterer)

by me(us) that:

a) The information given in Parts I and II - A is correct,

b) The aircraft for the above flight has been chartered by me(us) on behalf of the association or group referred to in Part III - A above,

c) The total carrying capacity of the aircraft shall be at the disposal of the association or group,

d) My organization shall be responsible for the group while in ..... (certified copies of documents confirming accommodation arrangements and tour programme should be submitted).

Signed .....

Name .....
(in block letters)

Position .....

On behalf of .....
(name and address of agent)

Date .....

---

* This part should be completed if the charter or his accredited agent is a different person from the group or association referred to in Part III - A.

Source: AFCAC Secretariat

CONSTITUTION OF THE AFRICAN CIVIL AVIATION COMMISSION

ARTICLE I

1. The African Civil Aviation Commission hereinafter referred to as "AFCAC" is the Specialized Agency of the Organization of African Unity (OAU) in the field of civil aviation.

2. Its membership shall be open to any African independant State. However, AFCAC membership of any State not member of OAU shall be submitted for prior approval to the OAU Assembly of Heads of State and Government.

3. On the territory of each Member State it shall enjoy such legal capacity as may be necessary for the performance of its functions.

4. Notwithstanding the Headquarters Agreement, each member State undertakes to grant to AFCAC personnel similar immunities and privileges as granted by them to any other African international organization.

ARTICLE II

1. AFCAC shall adopt recommendations, conclusions and resolutions.

2. Its recommendations and conclusions shall be subject to acceptance by each Member States.

OBJECTIVES

ARTICLE III

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 coordination and cooperation for all their civil aviation activities;

(b) to promote coordination, better utilization and orderly development of African air transport systems

FUNCTIONS

ARTICLE IV

1. The functions of AFCAC shall, in particular, include:

(a) formulating plans at the regional and subregional 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 subregional 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 of passengers, cargo and mail;

(g) fostering arrangements between States whenever this will contribute to the implementation of:

- ICAO regional plans for air navigation facilities and services, and

- 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 subregional requirements for personnel in all fields of civil aviation;

(i) studying the needs 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;

(j) studying all other special problems which might arise in the field of civil aviation

2. AFCAC shall, in the exercise of its functions, work in close consultation and cooperation with OAU, ECA, ICAO and any other governmental or non-governmental international organization concerned with civil aviation

3. AFCAC shall make full use of the experience and assistance of ICAO in conformity with the practice followed by the latter with regard to similar international organizations.

ARTICLE IV BIS

1. The organs of AFCAC shall be:

(a) the Plenary Session
(b) the Bureau
(c) the General Secretariat

2. The Plenary Session shall be composed of all AFCAC Member States.

3. A Secretary General of AFCAC shall be appointed by the Plenary Session. He may be assisted by Directors designated by the Bureau on his suggestions:

The Secretary General shall:

- head the General Secretariat,
- coordinate the implementation of AFCAC programmes,
- organize studies and meetings,
- act as Secretary to Plenary Sessions and to Bureau meetings and keep documents and archives,
- under directives from the Bureau, ensure that Plenary Session decisions are implemented,
- prepare a draft report on AFCAC activities,
- prepare the budgetary estimates and administer the Budget,
- assume all functions assigned to him within AFCAC objectives.

ORGANIZATION AND WORKING ARRANGEMENTS

ARTICLE V

AFCAC shall meet in Ordinary Sessions once every three years.

ARTICLE VI

1. At each Ordinary Plenary Session, AFCAC shall elect its President and Vice-Presidents including one for each subregion.

2. These elected members shall constitute the Bureau of AFCAC.

3. Subregions shall be determined by the Plenary Session upon recommendations of the Bureau.

ARTICLE VII

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.

ARTICLE VIII

1. At each Ordinary Plenary Session, AFCAC shall establish its work programme for the period until the following Ordinary Plenary Session.

2. It shall approve the draft report.

3. It shall deal with all matters within its field of competence which it has not assigned to any of its other bodies.

ARTICLE IX

The steering of the work programme between Ordinary Plenary Sessions shall be the responsibility of the Bureau of AFCAC.

ARTICLE X

The Plenary Session of AFCAC shall determine the AFCAC internal arrangements and procedures, including the establishment of Committees for studying special aspects of civil aviation in Africa and the determination of rules governing the recruitment and conditions of service of AFCAC staff.

ARTICLE XI

Member States shall be represented at AFCAC Plenary Sessions and meetings by delegates duly empowered to represent them and competent to discuss the items included in the Agenda

ARTICLE XII

Subject to the provisions of the OAU/AFCAC Agreement and the ICAO/AFCAC working arrangements, the members of the Bureau of AFCAC, the Secretary General and other staff of the Secretariat shall not seek or receive instructions in regard to the discharge of their functions from any authority external to AFCAC

APPENDIX V

FINANCIAL MATTERS

ARTICLE XIII

1. AFCAC resources shall be constituted by:

(a) contributions from its Member States;

(b) subsidies from OAU under the OAU/AFCAC Agreement;

(c) the financial assistance provided by ICAO within its joint financing field under chapter XV of the Chicago Convention;

(d) other financial assistance from other organizations;

(e) various grants and receipts.

2. At each Ordinary Plenary Session, AFCAC shall approve its annual budgets, annual statements of accounts and estimates of all receipts and expenditures.

3. The Plenary Session shall establish AFCAC's financial rules for the assessment of Member States' contributions and control of expenditure.

SIGNATURE, RATIFICATION, WITHDRAWAL

ARTICLE XIV

1. This Constitution may be signed by all States who attended the AFCAC Constitutive Conference and by any African State who fulfils the conditions indicated in para 2 of Article I.

2. The present Constitution shall be open for the signature of African States as from 17 January 1969 at the Headquarters of the OAU in Addis Ababa.

3. The Constitution shall come into force provisionally as of 17 January 1969 and shall come into force definitively after ratification by Twenty Member States.

4. The instruments of ratification shall be deposited with the

5. Membership shall become effective on the Thirtieth day after the States concerned have deposited their instruments of ratification of the AFCAC Constitution with the OAU Secretariat.

ARTICLE XV

1. To withdraw from AFCAC, a State shall address a notification to that effect to the Secretariat of OAU which shall immediately notify the AFCAC Secretariat and all other Member States.

2. Withdrawal shall take effect one year after receipt of the notification.

AMENDMENT

ARTICLE XVI

1. Any proposal for amendment of the AFCAC Constitution must be approved by two-thirds vote of the Member States represented at the Plenary Session provided that these States are not less than the majority of the Member States of AFCAC.

2. The amendment shall come into force thirty days after the twentieth instrument of ratification has been deposited with the Secretariat of the OAU.

TEMPORARY PROVISIONS

ICAO, during the initial period to be determined by AFCAC, shall have the following responsibilities:

(a) to provide staff to carry out studies, organize meetings and undertake related activities;

(b) to handle minutes, correspondence, etc.

H - TYPICAL EXAMPLES OF BILATERAL AGREEMENTS (CAPACITY CLAUSES) CONCLUDED BETWEEN AFRICAN STATES MEMBERS OF AFCAC, OR BETWEEN THESE STATES AND NON-AFRICAN STATES.

H_1 - EXAMPLES OF BERMUDA-TYPE AGREEMENTS

APPENDIX XI - EXAMPLE OF AGREEMENT REPRODUCING THE "STANDARD" BERMUDA CAPACITY CLAUSE : ALGERIA/GHANA AGREEMENT SIGNED IN ALGIERS ON 23 SEPTEMBER 1963.

Article 5

(1) There shall be fair and equal opportunity for the airlines of both Contracting Parties to operate the agreed services on the specified routes between their respective territories.

(2) In operating the agreed services, the airlines of each Contracting Party shall take into account the interests of the airlines 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 routes.

(3) The agreed services provided by the designated airlines of the Contracting Parties shall bear close relationship to the requirements of the public for transportation for the specified routes and shall have as their primary objective the provision, at a reasonable load factor, of capacity adequate to carry the current and reasonably anticipated requirements for the carriage of passengers, cargo and mail originating from or destined for the territory of the Contracting Party which had designated the airline. Provision for the carriage of passengers, cargo and mail both taken up and put down at points on the specified routes in the territories of States other than that designating the airline shall be made in accordance with the general principles that capacity shall be related to :

(a) traffic requirements between the country of origin and the country of destination ;

(b) traffic requirements of the area through which the airlines pass, after taking account of other transport services established by airlines of the States comprising the area

(c) the requirements of through airline operation.

APPENDIX XII - RECENT BERMUDA-TYPE AGREEMENT INVOLVING PARTIAL OR TEMPORARY PROTECTIONISM : ZAIRE/UNITED STATES AGREEMENT SIGNED IN NEW YORK ON 14 AUGUST 1970

Article 10

A - The air services made available to the public by the airlines operating under this Agreement shall bear a close relationship to the requirements of the public for such services.

B - Services provided by a designated airline under the present Agreement shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such airline is a national and the countries of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in this Agreement shall be applied in accordance with the general principles of orderly development to which both Contracting Parties subscribe and shall be subject to the general principle that capacity should be related :

(1) to traffic requirements between the country of origin and the countries of ultimate destination of the traffic,

(2) to the requirements of through airline operations,

(3) to the traffic requirements of the area through which the airline passes, after taking account of local and regional services.

C - The airline or airlines of both Contracting Parties shall, in keeping with the provisions of paragraphs A and B of this article, have the freedom to determine the capacity, frequency, scheduling, and type of aircraft to be employed in connection with services over any of the routes specified in the route schedule. In the event that one of the Contracting Parties believes that the operations conducted by an airline of the other Contracting Party have been inconsistent with the standards and principles set forth in this article, it may request consultations pursuant to Article 13 of this Agreement for the purpose of reviewing the operations in question to determine whether they are in conformity with said standards and principles.

APPENDIX XIII - AGREEMENT CONTAINING A CAPACITY CLAUSE IN THE BERMUDA SPIRIT, BUT WORDED DIFFERENTLY FROM THE "STANDARD" CLAUSE : TUNISIA/ YUGOSLAVIA AGREEMENT SIGNED IN TUNIS ON 18 NOVEMBER 1966

(translation of the original French text)

Article 11

The designated airlines shall enjoy equal rights for the operation of the agreed services between the territories of the Contracting Parties.

The designated airlines shall take into consideration on the joint sectors their mutual interests, so as not to unduly affect their respective services.

Article 12

On each of the routes appearing in Annex I to the present Agreement, the agreed services shall have as their primary objective the provision, at a reasonable load factor, of capacity adequate to normal and reasonably anticipated international air traffic requirements from or to the territory of the Contracting Party that has designated the airline operating the said services.

The airline(s) designated by one of the Contracting Party may, within the limits of the total capacity provided for in the first paragraph of the present Article, meet traffic requirements between the territories of third States on the agreed routes and the territory of the other Contracting Party, after taking local and regional services into account.

Whenever warranted by a temporary increase in traffic on the same routes, extra capacity may be operated by the designated airlines, in addition to that referred to in the first paragraph of the present Article, subject to the consent of the aeronautical authorities of the two Contracting Parties.

H_2 - EXAMPLES OF AGREEMENTS NOT OF THE BERMUDA TYPE

APPENDIX XIV - TRANSBORDER AGREEMENT THAT IS RESTRICTIVE TOWARDS THIRD PARTIES WITH REGARD TO 3RD AND 4TH FREEDOM TRAFFIC BETWEEN THE TWO PARTNER STATES : ALGERIA/MOROCCO AGREEMENT SIGNED IN RABAT ON 30 APRIL 1963

(translation of the original French text)

The airlines designated by each of the two Contracting Parties shall be given fair and equitable treatment so as to benefit from equal opportunity for the operation of the agreed services.

On the joint sectors they shall take into consideration their mutual interests so as not to unduly affect their respective services.

Article 15

a) The operation of services between Algerian territory and Moroccan territory and vice versa, services operated on the routes appearing in Table I of the Annex to the present Agreement, constitutes for both countries a fundamental and primary right.

b) For the operation of these services :

1) capacity shall be divided equally between the Algerian and Moroccan airlines, taking account of paragraph 3 below,

2) the total capacity operated on each of the routes shall be related to reasonably anticipated requirements.

In order to meet unexpected or transitory traffic demands on these same routes, the designated airlines shall agree between them on such measures as are appropriate to meet this temporary increase in traffic. They shall report these measures immediately to the aeronautical authorities of their respective countries who may consult each other if they deem it expedient.

3) If one of the Contracting Parties should not wish on one or more routes to use in whole or in part the capacity which has been alloted to it, it shall consult with the other Contracting Party with a view to transferring to the latter, for a fixed length of time, the whole or part of the capacity available to it within the set limits.

The Contracting Party which has transferred its rights in whole or in part may recover them at the end of the said period.

Article 16

a) On each of the routes appearing in Table II of the Annex to the Agreement, the agreed services shall have as their primary objective the provision, at a reasonable load factor, of capacity adequate to normal and reasonably anticipated international air traffic requirements from or to the territory of the Contracting Party that has designated the airline operating the said services.

b) However, the airline or airlines designated by one of the Contracting Parties may, within the limits of the total capacity provided for in paragraph a) of the present Article, meet traffic requirements between the territories of third States on the agreed routes and the territory of the other Contracting Party, to the extent that such requirements are not met by local and regional services, which, should the occasion arise, shall be established by consultation between the aeronautical authorities in conformity with Article 20 of the present Agreement.

c) Extra capacity may be operated on an accessory basis, above that referred to in paragraph a), whenever justified by the traffic requirements of the countries served by the route.

Article 17

If a third State should purpose to obtain rights on one of the itineraries listed in the route schedule appearing in the Annex, the two Governements shall consult each other to examine the practical consequences of exercise of such rights.

APPENDIX XV - RESTRICTIVE AGREEMENT IMPOSING QUOTAS APPLICABLE TO 3RD AND 4TH FREEDOM TRAFFIC AND WITHOLDING 5TH FREEDOM RIGHTS ON ALL THE ROUTES GRANTED : TOGO/NIGERIA AGREEMENT SIGNED IN LAGOS ON 5 APRIL 1956

(translation of the original French text)

Article 13

1) The Contracting Parties accept the principle of equality of capacity between the two countries. Nevertheless, as regards this Agreement, the implementation of the agreed services on the specified routes shall be such that it is defined in the Annex to the present Agreement.

This Annex may be amended when it is deemed necessary.

2) The total capacity provided on each of the routes shall be related to reasonably anticipated requirements.

Route Table I : Routes to be operated by the airline designated by Nigeria.

1) The designated airlines may fly over or omit one or other of the specified points.

2) The airlines may stop any of their services on the specified routes.

3) The airline designated by the Federal Republic of Nigeria may serve Cotonou or several other points not included in the route schedule, on the understanding that no traffic rights can be exercised on the one hand between Cotonou and the territory of the Togolese Republic and, on the other, between other points and the territory of the Togolese Republic, unless the Togolese Republic specially grants such rights.

4) The number of passengers picked up and set down at Lomé shall not exceed 4 680 a year.

Route Table II : Routes to be operated by the airline designated by Togo.

1) The designated airlines may fly over or omit one or other of the specified points.

2) The airlines may stop any of their services on the specified routes.

3) The number of passengers picked up and set down at Lomé shall not exceed 4 680 a year.

APPENDIX XVI - RESTRICTIVE AGREEMENT CONTAINING NO PROVISIONS CONCERNING 5th FREEDOM TRAFFIC (1) : GHANA/ARAB REPUBLIC OF EGYPT AGREEMENT SIGNED ON 29 AUGUST 1960

Article 5

(1) There shall be fair and equal opportunity for the airlines of both Contracting Parties to operate the agreed services on the specified routes between their respective territories.

(2) In operating the agreed services, the airlines of each Contracting Party shall take into account the interests of the airlines of the other Contracting Party so as not to affect unduly the services which the latter provides or shall provide on the whole or part of the same routes.

(3) The agreed services provided by the designated airlines of the Contracting Parties shall bear close relationship to the requirements of the public for transportation on the specified routes and shall have as their primary objective the provision, at a reasonable load factor, of capacity adequate to the current and reasonably anticipated requirements for the carriage of passengers, cargo and mail originating from or destined for the territory of the Contracting Party which had designated the airline.

Intermediate points mentioned, however, in the route schedule

For the Ghanaian airline	Beirut, Bagdad, Athens, Belgrade, Vienna, Warsaw, Istanbul, Moscow, Tehran, Sofia, Bucharest	No traffic rights on : Egypt/Khartoum " /Jeddah " /Beirut " / Bagdad
For the Egyptian airline	Monrovia, Freetown, Conakry, Dakar, Kinshasa, (Léopoldville), points in South America	No traffic rights on : Accra/Freetown " / Dakar

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(1) However, the route schedule contains intermediate-point and beyond-point 5th Freedom patterns.

APPENDIX XVII - NON-BERMUDA-TYPE AGREEMENT OF THE "EAST EUROPEAN TYPE" : GHANA/BULGARIA AGREEMENT SIGNED ON 5 OCTOBER 1961

No capacity clause in the text of the Agreement. All technical and commercial questions pertaining to operation are settled by contract at the level of the airlines designated by each Contracting Party.

Article 4, § 2

The conditions of operating the agreed services, airworthiness, frequencies of flights and their schedule(s), as well as the conditions of the mutual cooperation (commercial and technical) between the designated airlines of both Contracting Parties shall be a subject of separate Agreements.

H_3 - "MIXED" - TYPE AGREEMENT

APPENDIX XVIII - AGREEMENT STATING THE BERMUDA GENERAL PRINCIPLES AND INVOLVING PREDETERMINATION OF FREQUENCIES AND CAPACITY: NIGERIA/SWITZERLAND AGREEMENT SIGNED IN LAGOS ON 11 OCTOBER 1965

Article 7

(1) There shall be fair and equal opportunity for the designated airlines of both Contracting Parties to operate the agreed services on the specified routes between their respective territories and beyond.

(2) In operating the agreed services, the designated 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 latter provides on the specified routes or part of the same routes.

(3) The agreed services provided by the designated airlines of the Contracting Parties shall bear close relationship to the requirements of the public for transportation on the specified routes and shall have as their primary objective the provision, at a reasonable load factor, of capacity adequate to carry the current and reasonably anticipated requirements for the carriage of passengers, cargo and mail originating from or destined for the territory of the Contracting Party which has designated the airline.

(4) Provision for the carriage of passengers, cargo and mail both taken up and put down at points on the specified routes in the territories of states other than that designating the airline shall be made in accordance with the general principles that capacity shall be related to:-

(a) traffic requirements to and from the territory of the Contracting Party which has designated the airline;

(b) traffic requirements of the area through which the airline passes, after taking account of the other transport services established by airlines of the States comprising the area; and

(c) the requirements of through airline operation.

(5) Before the inauguration of the agreed services the aeronautical authorities of each Contracting Party shall agree between themselves on the frequency and capacity of the services to be provided by the designated airlines on the specified routes, due regard being given to the principles set out in paragraphs (1) to (4) hereof.

(6) The respective aeronautical authorities shall also agree on any subsequent change of frequency or capacity of such services and, until agreement is reached on any such change of frequency or capacity, the existing entitlements in respect thereof shall remain in force.

AFRICAN AIRLINES ASSOCIATION

Association des Compagnies Aeriennes Africaines

SITA : NBOXAXB
Tele:335528.

P.O. Box 20116.
Nairobi, Kenya.

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ARTICLES OF ASSOCIATION

(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, mortage 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

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.

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.

(a) Should it be brought to the attention of the Executive 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;

(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.

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

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 annualy 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:

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.

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

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

The Secretary General shall prepare a budget fo the fore-

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 [illegible] before the date of the General

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.

a. AIR AFRIQUE

(23) Treaty relating to Air Transport in Africa

Adopted at Yaoundé, 28 March 1961. English translation supplied by the Secretariat of the International Civil Aviation Organization.

-- The Republic of Cameroun
-- The Central African Republic
-- The Republic of the Congo
-- The Republic of the Ivory Coast
-- The Republic of Dahomey
-- The Republic of Gabon
-- The Republic of Upper Volta
-- The Islamic Republic of Mauritania
-- The Republic of Niger
-- The Republic of Senegal
-- The Republic of Chad

Whereas the future development of Civil Aviation and of Air Transport in particular can greatly help to create and preserve friendship and understanding among the contracting States,

Whereas the existence of an instrument of air transport common to their States may serve to improve international relations by enabling all the States to acquire a better knowledge of one another,

Whereas articles 77 and 79 of the Convention on International Civil Aviation signed in CHICAGO on 7 December 1944 aiming at the setting up by two or more States of joint operating organizations or international operating agencies and at the participation of the States in these organizations and agencies,

Have accordingly decided to conclude a Treaty to that end and have agreed on the following provisions.

PART I

ON THE SETTING UP OF A JOINT AIR TRANSPORT CORPORATION (SOCIETE COMMUNE DE TRANSPORTS AERIENS)

CHAPTER I
Purpose of the Corporation

Article 1

With a view to exercising their rights in respect of air traffic between their territories and with outside territories, the contracting States have decided to set up an Air Transport Corporation with an appropriate legal status which shall be referred to hereinafter as "THE JOINT CORPORATION" (LA SOCIETE COMMUNE).

Article 2

The contracting States undertake to designate the joint Corporation (Société commune) as the instrument chosen by each of them for exercising their rights in respect of international traffic and air transport rights.

Article 3

Each contracting State may commit to the joint Corporation (Société commune) the operation of the domestic air services within its territory. The terms and conditions of this operation shall form the subject of a protocol agreement between the contracting States and the joint Corporation (Société commune).

Each contracting State shall nonetheless reserve the right to designate one or more undertakings to operate its domestic transport services. In this event, the State shall take whatever measures necessary to ensure that the activity of said domestic transport undertakings is co-ordinated with that of the Joint Corporation (Société commune).

CHAPTER II
Legal Status of the Corporation

Article 4

The joint Corporation (Société aérienne commune) shall be endowed with the fullest legal capacity recognized 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.

The joint Corporation (Société aérienne commune) shall be set up in the form of a Joint Stock Company legally constituted as an entity with a private statute under common law by the contracting States and a legally constituted undertaking with a private statute under common law considered as apt to contribute its assistance.

Article 5

This treaty and its annexes, including the Articles of Incorporation of the joint Corporation (Société commune), shall determine the legal terms of existence and operation granted to the Corporation by the contracting States by departing, if need be, from the present or future provisions of their national laws.

The Articles of Incorporation of the Corporation may be modified only with the unanimous agreement of the contracting States insofar as the following provisions are concerned

-- Purpose of the Corporation
-- Rules governing the allotment of the authorised capital
-- Terms of admission for new shareholders
-- Majority rules
-- Voting rights or shareholders and members of the board
-- Rules for liquidation.

Article 6

Each of the contracting States shall have an equal part in the Corporation's capital.

Article 7

Failing the possibility of joint registration, each aircraft belonging to the joint Corporation (Société commune) shall be registered in one of the States.

The States shall reach agreement concerning the apportionment among themselves of the registration of the aircraft belonging to the joint Corporation (Société commune), it being specified that the aircraft may be used freely and indiscriminately to perform the Corporation's services, whatever their registration.

PART II

ON THE COMMITTEE OF MINISTERS OF TRANSPORT (Civil and Commercial Aviation)

Article 8

A Committee of Ministers of Transport (Civil and Commercial Aviation) shall be set up, composed by the Ministers responsible for Civil and Commercial Aviation in each of the contracting States or their representatives, within which Committee they shall discuss their common policy, prospects for the development of air transport and programs and, in a general manner, all questions relating to Civil and Commercial Aviation.

The joint Corporation (Société commune) may be represented in an advisory capacity at Committee meetings.

Article 9

The Committee of Ministers shall meet at least once a year either on its own initiative or at the request of one-third of the contracting States.

It shall be presided over by representative of the Government of the contracting State in which it meets and said State shall provide the Secretariat for the Committee.

Article 10

The contracting States undertake to adopt, for the purpose of negotiating air traffic rights within the framework of intergovernmental agreements, a position in coordination with that of the other contracting States, due account being taken of the operation and interests of the joint Corporation (Société commune).

To this effect, each contracting State undertakes to submit to the Committee of Ministers of Transport for its opinion any air traffic draft agreement to be concluded by said State.

Each State shall endeavour to take into the highest consideration the Committee's opinion so as to avoid concluding intergovernmental agreements which may be prejudicial to the interest of the joint Corporation (Société commune).

Article 11

The contracting States shall bring into uniformity their laws and regulations in matters of civil and commercial aviation particularly in respect of the following items:

-- Rights to aircraft
-- Registration and airworthiness of aircraft
-- Air navigation
-- Measures to facilitate carriage by air
-- Contract of carriage by air
-- Technical operation of aircraft for carriage by air
-- Status of professional flight personnel.

The drafts of acts, rules and regulations shall be the subject of recommendations on the part of the Committee of Ministers of Transport.

The contracting States shall bring into uniformity their positions in respect to international conventions on Civil Aviation which shall be submitted for consideration to the Committee of Ministers of Transport which shall formulate recommendations on this matter.

MISCELLANEOUS AND FINAL PROVISIONS

Article 12

The contracting States shall take the legal, financial, fiscal and customs measures enabling the normal carrying out by the corporation of its activities, due account being taken of its special status and of its quality as instrument chosen by each of them for operating their international services.

Article 13

The treaty shall be open to accession by all interested States. The admission of a new State to the provisions of this treaty shall, however, be subject to unanimous agreement on the part of the contracting States. The instrument of adherence shall be deposited with the Government of the Republic of Cameroun which shall notify the Governments of the other signatory and adhering States.

Article 14

This treaty shall be ratified in accordance with the formalities set forth in the Constitution of each State.

The instruments of ratification shall be deposited with the Government of the Republic of Cameroun.

The treaty shall come into force on the first day of the month following the deposit of ratification by the last signatory State to proceed with this formality.

The Government of the Republic of Cameroun shall notify the other signatory States of each deposit of the instrument of ratification and of the date on which the treaty comes into force.

Article 15

Notwithstanding the provisions contained in the preceding article, the signatory States shall agree to put this treaty into effect provisionally on the expiry of a period of three months as from the date of its signature, provided it has been ratified by at least one State and that the full amount of the authorised capital of the joint Corporation (Société commune) has been subscribed.

Article 16

Any State may denounce this Treaty subject to six months' notification being given to the depository State. The depository State shall notify the other States.

On the expiry of this period of notification, the State effecting the denunciation shall cease to be part of the joint Corporation (Société commune) and the shares belonging to said State shall be equally distributed among the other shareholder States. The liquidation of its rights and obligations within the Company shall be effectued by mutual agreement between the withdrawing State and the other States or, failing this, by means of expert appraisement.

The withdrawing State shall accord the joint Corporation (Société commune) all authorizations and facilities for the export, transfer or sale of property and assets possessed or held by said Company in its territory.

Article 17

The disputes between the contracting States relating to the interpretation or application of this Treaty which cannot be settled by consultation shall be submitted to arbitration in conformity with the established rules of international law.

Article 18

In accordance with article 83 of the Convention on International Civil Aviation signed at Chicago on 7 December 1944, this Treaty and its Annexes shall be registered with the Council of the International Civil Aviation Organization by the Government of the Republic of Cameroun.

Annex concerning Fiscal and Financial Provisions Granted to the Joint Corporation.

1. -- The Corporation shall be exempt from all fees and taxes, within the territories of the contracting parties, on its constitution, when its capital is subscribed or increased and on extension of the period fixed for the duration of the corporation as well as from various formalities which its activities may require. Similarly it shall be exempt from all fees, and taxes on its dissolution or winding up.

The Corporation shall be exempt within the territories of the contracting parties from all fees and taxes payable upon the acquisition of immovable property, from inscription and registration fees with the exception of the fees and taxes corresponding to the payment of a service rendered.

The Corporation shall also be exempt, within their territories, from taxes of an exceptional or discriminatory nature and from all fees and taxes involved for issuing loans.

The contracting parties shall determine the terms and conditions of a taxation arrangement of long duration appropriate to the special status and the activity of the Corporation; they shall, in particular, take, insofar as required, the necessary measures to prevent said Corporation from being the subject of double taxation among them.

2. -- The contracting parties undertake to harmonize their respective laws so that the aircraft and the specific aeronautic or non aeronautic equipment destined to be incorporated in the aircraft or to complete their equipment and necessary to the Corporation to ensure its operation, shall be admitted into their territories free of customs duties and of charges on the turnover or of all duties and charges of like effect.

The contracting parties also undertake to harmonize their respective laws so that the equipment mentioned hereinabove and publicity and advertising material shall be allowed to circulate among their respective territories with similar exemptions.

3. -- The contracting parties undertake to accord to the Corporation in accordance with the terms set forth in the applicable national regulations and international agreements, all authorizations and facilities to enable it to perform all transfers of funds and to dispose of all currencies necessary for carrying out its activities (including the issue and service of loans).

(23a) Signatory Protocol

Adopted at Yaoundé, 28 March 1961. English translation supplied by the Secretariat of the International Civil Aviation Organization.

The signatory States,

Desirous, with the signature of the Treaty relating to Air Transport in Africa, of specifying the scope of the provisions of article 2 and the second paragraph of article 10 of said Treaty,

Have agreed on the following provisions which shall be annexed to this Treaty:

I. -- The signatory States may, by agreement between the parties, authorize existing Corporations to pursue their activities within the conditions and limits of these activities as on 1 April 1961. In this event, they shall take the necessary measures to co-ordinate the activities of these Corporations with those of Air Afrique.

II. -- Each of the contracting States, after having referred to the Committee of Ministers and consulted Air Afrique may, while awaiting the Committee's opinion, issue provisional authorizations to the undertakings of an adjacent non-contracting State and receive from said State reciprocal authorizations insofar as said authorizations shall be aimed at performing private inter-States traffic between the State granting the authorization and the adjacent State.

The Airlines of a signatory State which perform the scheduled service on routes of local interest, the natural terminus of which is situated in an adjacent signatory State beyond the frontiers of the signatory State may be authorized, after consultation with the Committee of Ministers of Transport, to operate the scheduled services of inter-State airlines of local interest.

The authorizations granted under the preceding paragraphs shall not constitute diversions of traffic detrimental to Air Afrique nor be prejudicial to its operation.

III. -- Notwithstanding the provisions contained in article 2 of the Treaty, the Government of Chad reserves the right to dispose freely, on behalf of a local Corporation, of its air traffic rights for inter-State links (Equatorial Customs Union, Cameroun) and with adjacent third States, in a proportion which may not exceed fifty per cent of said rights.

(23b) Articles of Incorporation (Statute)

Adopted at Yaoundé, 28 March 1961. English translation supplied by the Secretariat of the International Civil Aviation Organization.

CHAPTER I
GENERAL

Article 1
Form and Name

A joint stock Corporation under the registered name of "AIR AFRIQUE" is hereby constituted and is governed by:

1) The international treaty signed on the twenty-eighth day of March 1961 and by the present articles of incorporation attached thereto.

2) Residuarily and only in so far as they are compatible with the provisions of the treaty and the articles of Incorporation by the principles pertaining to the laws of the signatory States of this treaty.

Article 2
Purpose

The purpose of the Corporation is the operation of scheduled, supplementary or special air transport of passengers, freight and mail. It shall be authorized to conclude any agreements and to engage in all commercial and financial operations serving for the attainment of this purpose.

Article 3
Head Office

The Corporation shall have an establishment having the attributes of a head office in the Capital of every State signatory to this treaty, that is to say in the following towns:

-- Yaoundé
-- Bangui
-- Brazzaville

-- Abidjan
-- Porto Novo
-- Libreville
-- Nouakchott
-- Niamey
-- Dakar
-- Fort Lamy
-- Ouagadougou

Article 4
Duration

The Corporation shall be constituted for a period of 99 years subject to its anticipated dissolution or its extension provided for under the terms of these articles of incorporation.

CHAPTER II
CAPITAL - SHARES

Article 5
Allocation of Capital

a) The authorised capital of the corporation shall be fixed at 500 million francs C.F.A.. It shall be divided into 50,000 shares of 10,000 francs C.F.A. each, which shall have been subscribed as follows:

-- 33,000 shares by the States signatory to the treaty, these shares being divided equally between said States.
-- 17,000 shares by the Corporation signatory to the protocol annexed to the treaty.

b) Any changes which shall occur in the allocation of the capital as a consequence particularly of shares transfers, of any increase or a reduction of capital shall in no circumstance prejudice the principle of the equal participation of each of the States, nor in any way modify the relation between the participation of the States and that of other shareholders.

Article 6
Payment of Shares

The shares shall be paid up for 1/4 of their value at the time of constitution of the Corporation, the balance shall be paid on the decision of the Board of Directors and subject to the conditions decided upon by them.

Article 7
Increase and Reduction of Capital

a) The capital may be increased on one or more occasions either by contributions in kind or in money, or by incorporating all available reserves.

b) Capital increases shall be decided upon or authorized by a general meeting of the shareholders ruling in accordance with the conditions laid down in article 36 of the articles of Incorporation.

The general meeting will determine the conditions of new issues and the procedure for the checking of the Corporation's assets subject only to the provisions set forth in the treaty and by these articles of Incorporation.

c) Except in the case provided for by article 8 hereunder, each shareholder has a preferential right to subscribe for new shares. The conditions covering the rights of a share transfer are laid down in article 10 hereunder.

Article 8
Admission of a New State

The admission of a new State [shall] be effected by the transfer of shares belonging to the other States or by increasing the Corporation's capital.

The shares owned by a State which withdraws from the company shall be bought up in equal parts by the other shareholder States.

Article 9
Type of Shares

The shares shall be registered in the name of the holder.

The Corporation shall maintain a single share register in which the names and addresses of the shareholder shall be entered. The Corporation shall recognize as shareholders only those whose names are entered in this register.

A photocopy of the above mentioned share-register shall be deposited at each of the head offices mentioned in article 3 above.

Article 10
Restriction of Transfers

a) The shares held by a State are non-transferable except when transfer is made to a new State taking up membership in the Corporation in accordance with the provisions of the treaty and of the articles of Incorporation.

b) Those shares which are not held by a State are transferable only with the unanimous agreement of the Board of Directors.

The Corporation shall be notified by registered letter addressed to one of its head offices of the particulars of the proposed shareholder or shareholders and of the sale price and condition of the transfer.

The Board must certify its acceptance or its refusal within a period of 30 days from the date of receipt of the proposed transfer. If within this period no such action has been taken by the Board it shall be considered that the proposal for transfer is accepted. The Board shall not be compelled to give reasons for its acceptance or its refusal of a proposed transfer.

c) The transfer of subscription rights shall be subject to the same restrictions as those applied to the transfers of shares.

Article 11
Method of Transfer

The transfer of shares shall be made exclusively by a declaration of transfer signed by the transferring party or its authorized agent and entered in the share register referred to in article 9 above.

Article 12
Rights and Obligations of Shares

The rights and obligations attached to the shares shall be identical. In particular, each share shall entitle its holder to an equal part in the ownership of the assets of the Corporation. This right shall be exercised only in the case of the winding up and distribution of the Corporation's assets. Furthermore, each share entitled its holder to a part of the profits as is laid down in articles of Incorporation.

The shares entitle their holder to voting rights or to representation at the general meetings according to the conditions laid down by these articles of Incorporation.

Each shareholder may examine the books of the Corporation at each of the head-offices listed in article 3 above.

The rights and obligations attached to a share shall not be affected by any change of holder. Only the transferee shall be entitled to receive current dividend and, if any, to the part of the reserves of the Corporation. The ownership of a share shall establish full legal acceptance of the articles of Incorporation and of the decisions of the general meetings of the Corporation by the shareholder.

The assignees or creditors of a shareholder may in no circumstance demand the affixing of seals to the property and/or the books of the Corporation nor may ask for its distribution or auction or in any way interfere in its administration. In the exercise of their rights they shall be constrained to rely upon the stocktaking and decisions of the general meeting of shareholders.

CHAPTER III
ADMINISTRATION OF THE CORPORATION

Article 13
Board of Directors

The company shall be administered by a Board of Directors. Persons attending Board meetings as representatives of a legal entity with either a private or a public statute shall not be compelled to hold shares themselves in the Corporation.

Article 14
Composition of the Board

The number of members of the Board shall be fixed in such a way that each shareholder shall have a number of seats proportional to the part of the authorized capital he holds in the Corporation, subject to the proviso that in every case each State shall hold two seats.

Article 15
Appointment of Members of the Board

The members of the Board shall be proposed by the shareholders and shall be appointed for a period of 4 years by an ordinary general meeting of the shareholders. They may be reelected.

Any member of the Board ceases to be a member of the Board if the shareholder who had proposed said member's appointment withdraws his proposal and makes this known to the Board or to a meeting of the shareholders.

If a member of the Board discontinues to exercise his duties during the course of his tenure of office, for any cause whatsoever, the Board shall replace him provisionally by appointing a new member for the balance of the term of office still due, which new member shall be proposed by the shareholder who had proposed the appointment of the member to be replaced. A provisional replacement made according to the provisions of the preceding paragraph shall be confirmed by the general meeting of the shareholders at their first reunion following this replacement.

Article 16
Chairman of the Board

The Board of Directors shall elect its chairman by a majority of the votes expressed.

The chairman shall be chosen from among the members of the Board.

He shall be elected for a period of two years. He may be reelected. He may be dismissed by a majority vote of the

Board; should the chairman cease to be a member of the Board, he shall thereby automatically lose his appointment as chairman of the Board.

In the event of a chairman's ceasing to exercise his function for whatever cause, his successor shall be chosen by the Board under the same conditions to serve during the unexpired period of the appointment of the chairman whom he is replacing.

In the event of the temporary incapacity of the chairman, his place shall be taken by the member nominated by him, or failing this, by the oldest member of the Board present at the meeting.

Article 17
Board Meetings

The Board shall meet at the summons of the chairman as often as the affairs of the corporation shall require. The convening notice shall be dispatched at least fifteen days prior to the meeting and shall be accompanied by the agenda.

The chairman shall convene the Board in the event of the written request being made to him by at least 4 members who shall set out the question they wish to have placed on the agenda of this meeting. In these circumstances a meeting of the Board shall be held not later than two weeks after the receipt of this written request.

The Board shall determine the place of each of its meetings at one of the head-offices listed in article 3 above.

Any member prevented from attending a meeting of the Board may arrange to be represented by another member. One member may not represent more than 3 other members.

The Board shall appoint a secretary who need not be a member of the Board.

Article 18
Decisions of the Board

The Board shall not discuss nor take valid decisions unless it has been officially convened and unless the majority of its members are present or represented. However, in the case of urgency, decisions may be taken by letter or by telegram provided

a meeting of the Board has not already been requested by one of the members to discuss the question at issue.

All decisions shall be taken by a majority of the votes expressed.

In the case of an equal decision of votes, the chairman shall decide either to call a second vote on the same meeting, with or without a short period of interruption, or to place the item at issue on the agenda of a new meeting of the Board of which he shall fix the date.

In the event of a second equal division of votes the chairman shall use his casting vote.

Article 19
Powers of the Board

The Board of Directors shall be endowed with full powers to act in the name of the Corporation both in respect of shareholders and of any third party; it shall have power to determine any matter not coming within the competence of another body of the Corporation by the articles of incorporation.

The following lines shall describe but not limit the powers of the Board:

1) The Board shall represent the Corporation in its dealings with Governments, public and private organizations, trading bodies and in general all third parties;

2) The Board shall appoint and dismiss where necessary all trustees, managers, representatives, agents and employees of the Corporation, determine their duties, their conditions of service, their retirement and their salaries;

3) The Board shall establish offices, depots, and branches wherever it may consider necessary, even in any foreign country;

4) The Board shall be responsible for fulfilling all the formalities necessary to enable the Corporation to operate within the terms of the laws and the regulations of the countries in which it shall operate;

5) The Board shall determine the general administrative costs, it shall control all supplies and it shall arrange the operating programmes of the Corporation;

6) The Board shall decide upon all treaties, agreements, tenders, adjudications, contract work or otherwise coming within the framework of the activities of the Corporation;

7) The Board shall receive the moneys due to the Corporation and shall pay its debts;

8) The Board shall sign, and endorse, accept and pay all checks, bills, promissory notes or bills of exchange; it shall stand surety and give guarantee on behalf of the Corporation;

9) The Board shall authorize all purchases, withdrawals, movements and transfers of all movable goods and all rights to movable property and in particular rents, values, credits, patents and licences;

10) The Board shall agree or accept, surrender or rescind any lease and tenancy with or without promise to sell;

11) The Board shall authorize all acquisitions, sales or exchanges of immovable goods and real estates;

12) The Board shall undertake all building and works, set up and install all factories and establishments;

13) The Board shall decide upon the investment of all moneys available and control the use of reserve capital of all kinds including reserve funds and amortization funds;

14) The Board shall authorize all contracted loans and advances or opening of credits with or without guarantee;

15) The Board shall contract all loans whether against established credit or otherwise;

16) The Board shall be responsible for all mortgages, real estates pledges, collateral security, assignments, guarantees, indorsements and other personal and real guarantees on the assets of the Corporation;

17) The Board shall decide the conditions under which deposits and advance accounts shall be opened and operated in all banks and credit establishments of all nationalities including post-office accounts;

18) The Board shall set up or cooperate in the establishment of all companies without reference to nationality; it shall be responsible for all allocation of capital which it may consider advisable to companies incorporated or to be incorporated, it shall underwrite by transfer all shares, obligations, founders-shares, interest-bearing shares and all rights whatsoever; it shall interest the company in all participations and all associations;

19) The Board shall exercise all judicial action whether as plaintiff or defendant;

20) The Board shall authorize all treaties, transactions, compromises, acceptances and waivers, as well as all priorities and substitution with or without guarantee, restoration of registration, attachments, stoppage of payment and other rights before or after payment, with waiver of all rights, actions, privileges and mortgages;

21) The Board shall draw up the financial statements, inventories and accounts to be submitted to the general meeting of the shareholders; it shall decide upon all proposals to be put forward at the general meeting of shareholders and shall draw up the agenda of said meeting;

22) The Board may decide to set up a management committee and shall determine its composition and duties;

23) The Board shall convene the general meetings;

24) The Board shall submit to an extraordinary general meeting all amendments to these articles of Incorporation.

Article 20
Minutes of Meetings

The deliberations and decisions of the Board of Directors shall be recorded in a report signed by the Chairman of the Session and by the Secretary. Copies and extracts shall be signed by the chairman (or failing this, by a member delegated by the Chairman for this purpose), and by the secretary. The minutes shall be recorded in a single register kept in a place determined by the Board. A photocopy of the register shall be deposited in each of the head-offices listed in article 3 above.

Article 21
Delegation of Authority

The management of the Corporation shall be carried out by a Managing Director. The Board of Directors shall delegate to the Managing Director the powers necessary for the exercise of his duties.

The Managing Director may be chosen from among the members of the Board of Directors or elsewhere. He shall be nominated by the Board and may be dismissed by the Board at any time.

Article 22
Remuneration of the Board

The members of the Board shall not receive any remuneration; they may be allowed attendance fees, the overall value of which shall be determined by the general meeting of shareholders and the distribution of which shall be made between its members by the Board of Directors as these may decide.

Article 23
Corporation's Signature

All acts and engagements of the Corporation, the withdrawal of funds and stocks, orders on the bankers, debtors, or trustees, subscriptions, endorsements, acceptances and guarantees or receipts for negociable instruments shall be officially signed either by the Chairman of the Board of Directors, by the Managing Director or by a person endowed with special powers of attorney substituted by the latter, each acting within the limit of his respective powers.

Article 24
Liabilities of the Members of the Board

The members of the Board by virtue of their administration shall not contract any individual obligation or joint liability in relation to the engagements of the Corporation. They shall be held liable only for the execution of their duties.

CHAPTER IV
AUDITORS

Article 25
Designation of Auditors

Three auditors shall be elected for three years by the Ordinary General Meeting of shareholders irrespective of nationality; in the event of death, refusal, resignation or prevention of any kind of one or a number of the auditors, replacement shall be obtained for them by the same procedure.

The following are not eligible as auditors:

1) Family members or relations by marriage, up to the fourth degree inclusive, or the wife or husband of a member of the board;
2) Persons receiving a salary or remuneration in any form whatsoever and for an office other than that of auditor, from the members or from the Corporation or from any firm of which this Corporation shall hold not less than one-tenth of the capital;
3) Persons for whom the performance of the office of Company Director or Member of the Board of a Company is forbidden in a shareholding State, or who have forfeited a right to hold such office in such State;
4) Wives and husbands of persons hereinbefore designated;

Auditors shall have the right to a remuneration to be determined each year by the General Meeting.

Article 26
Authority of Auditors

Auditors shall be empowered to check whether the profit and loss statement and the balance sheet conform to the Corporation's account books, whether the latter are correctly kept and whether the general rules pertaining to company accounts have been implemented.

In the performance of their work the auditors shall be empowered to peruse the Corporation's account books and all supporting documents. The balance sheet and the profit and loss statement shall be submitted to them not less than thirty days prior to the holding of the General Meeting.

They shall furnish to the General Meeting convened to decide on the accounts a written report containing their motions. In the event of disagreement between them, each of them may present a special report.

CHAPTER V
GENERAL MEETINGS

Article 27
Constitution

The General Meeting shall be constituted of all the shareholders, each of whom shall hold a voting right proportional to the number of shares he holds.

Article 28
Convening

The General Meeting shall be convened in ordinary session each year, within the six months following termination of the financial year, at the hour, date and place specified in the notice of meeting.

Extraordinary meetings may be convened, either by the Board of Directors, or by the auditors. The Board of Directors is held to convene the Meeting if requested therefor by one or a number of the shareholders holding not less than 25% of the authorized capital.

Shareholders shall be notified of the General Meeting by the Chairman of the Board of Directors, by a registered letter sent not less than sixteen clear days prior to the date of the meeting. The letter of convening shall comprise the agenda, shall specify if the meeting is ordinary (although possibly convened extraordinarily), or an Extraordinary General Meeting provided under Article 36 hereof, in which case it shall have annexed to it the text of the decisions for submission to the Meeting.

Article 29
Representation

Shareholders may attend the General Meeting without prior formality.

A proxy mandate valid for a particular meeting is valid for any other meeting arising directly therefrom (unless revoked).

The extent and the revoking of powers shall be specified by the Board of Directors. Unless the Board of Directors have

brought to the notice of the shareholders in the notice of meeting any special ruling it may have decided on, no authentification of signatures may be demanded.

Article 30
Quorum

On a meeting of the General Meeting of shareholders being summoned, it shall be entitled to proceed to business as soon as two-thirds of the shares are represented. Should this quorum not be present, a further session shall be convened and shall be entitled to proceed to business whatever may be the number of shares represented save in the case provided under Article 36 hereof.

Article 31
Agenda

The agenda shall be determined by the Board of Directors. No items may be discussed other than those carried on the agenda save such decisions as shall be a direct consequence of discussions arising therefrom. The Board shall be held to carry in the agenda any questions as shall be demanded by shareholders representing not less than 25% of the authorized capital.

Article 32
Holding of Meetings

The General Meeting shall be presided by the Chairman of the Board of Directors, or in his absence by a member to be designated by the Board; or failing such, the Meeting shall elect its own Chairman.

The Chairman of the Meeting shall be assisted by a secretary, who may be selected from outside the members of the Meeting.

An attendance sheet shall be maintained containing the names and addresses of shareholders present and/or represented and the number of shares held by each. This attendance sheet shall be duly initialled and checked by shareholders present or their proxies; it shall be deposited at the place of the meeting and shall be communicated to any shareholder requesting such.

Article 33
Discussions

Unless otherwise provided under Article 36 bereof, the General Meeting shall decide upon a majority of the votes expressed, the President having a casting vote in the event of equality of votes.

Each member of the Meeting shall have as many votes as he holds and/or represents shares, without limit thereto.

Article 34
Minutes of Meeting

Discussions of the Meeting shall be noted in the minutes which shall be signed by the Chairman of the session and the Secretary. They shall be transcribed into a special minute-book of which the original shall be kept in the place determined by the Board of Directors, and copies thereof kept in each of the Corporation's head offices specified under Article 36 hereof.

Copies or abstracts of the minutes shall be validly certified by the Chairman of the Board of Directors and one member of the board.

Article 35
Powers of the Meeting

The General Meeting shall validly discuss and rule on any questions relating to the Corporation. Its powers amongst others cover the following.

1. To appoint members of the Board of Directors, in the conditions provided under Article 15 hereinbefore.
2. To appoint the auditors.
3. To amend the articles of Incorporation.
4. To decide upon any increase or reduction in the authorized capital.
5. To declare the dissolution of the Corporation and appoint the liquidators.
6. To declare the extension of the period fixed for the duration of the Corporation.

7. To consider the auditors' report, to examine and approve the management report, balance sheet and profit and loss account to decide on the allocation of the net profit, and to receive the directors' report on their conduct of the Corporation's business.
8. To decide any other question reserved to it under the Treaty or the Articles of Incorporation submitted to it by the Board of Directors.

Article 36
Extraordinary General Meetings

Any General Meeting called upon either to check holdings in kind, or to decide on or authorize any increase in capital, or to discuss any statutory amendement including those pertaining to the object and constitution of the Company, shall be properly constituted and shall discuss validly only insofar as they comprise shareholders representing not less than one-half of the authorized capital.

Nonetheless the authorized capital which must be represented for checking holdings shall not comprise shares held by persons who have provided the holdings submitted for consideration of the Meeting.

In any meetings provided under this Article, resolutions to be valid shall comprise not less than two-thirds the votes of shareholders present or represented, save in the case of an increase in capital decided on to enable the admission of a new State. The text of the proposed resolutions shall be forwarded to shareholders annexed to the registered letter convening the meeting.

CHAPTER VI
FINANCIAL YEAR - ACCOUNTING - PROFITS

Article 37
Financial Year

The financial year shall begin on January 1 and terminate on December 31.

The first financial period shall comprise the period starting on the date of final constituting of the Company until December 31, 1962.

Article 38
Accounting - Balance Sheet

Upon closing each financial year, the Board of Directors shall establish a single inventory, a single profit and loss account, and a single balance sheet. It shall furthermore draw up a report to shareholders on the operation of the Corporation during the past financial year.

Inventory, balance sheet and profit and loss account shall be placed at the disposal of the auditors not less than thirty days prior to the date of the General Meeting.

The auditors shall draw up a report in which they shall render account to the General Meeting of the performance of the mandate conferred upon them and shall notify any irregularities and/or errors they may have detected.

Discussions of the meeting covering approval of the balance sheet and profit and loss account shall be voided if it has not been preceded by the report or reports of the auditors, in conformity with the provisions hereof.

The balance sheet and profit and loss account presented to the shareholders' meeting established each year in a form which shall have been determined as required by the meeting having constituted the Corporation: methods of evaluating the different items shall be immutable, unless modified by the General Meeting upon advice by the auditors, relative either to the method of presenting the figures, or the methods of evaluating said items.

The annual balance sheet and profit and loss account shall be deposited at the place determined by the Board. A photocopy or a copy duly certified by the Chairman or a member of the board, together with the Board Secretary, shall be deposited at each of the head offices designated under Article 3 hereof.

Any shareholders may at any time of the year take cognisance or a copy at any of the said head offices, either in person or by proxy, of any document submitted to the General Meetings during the past three years and of the minutes of said meetings; he may also, not less than fifteen days prior to the date of the General Meeting, take cognisance of the list of shareholders at the head office.

Article 39
Distribution of Profits

By net profits shall be understood the earnings of the financial year after deduction of overheads, other company expenses, and after the depreciation of company assets and any provisions for commercial and industrial hazards.

Of the net profits, 5 per cent shall be earmarked for the constitution of a reserve fund. This earmarking shall cease to be mandatory as soon as the reserve fund has attained an amount equal to one-tenth of the authorized capital. It shall become effective once more if for any reason the reserve fund should sink below the said one-tenth part.

The Ordinary General Meeting may at any time, if so proposed by the Board of Directors, decide on an earmarking from the available surplus, after constitution of the legal reserve and before any other allocation of the amounts it deems proper. Such amounts shall remain the property of shareholders and shall be carried over into the next financial year or shall be credited to one or a number of extraordinary reserve funds, either general or special, of which the General Meeting shall determine the use and allocation. The remaining profit or loss shall be distributed amongst the shareholders in a manner proportional to the portion of authorized capital which they hold.

Shareholder States may agree among themselves on a different distribution of profits accruing to them, or of the loss they may be called upon to make good, as the case may be. They may to this effect call a special meeting whose powers shall be restricted to the distribution among members of the profits or losses, but which shall have no say in the management of the Corporation.

Article 40
Payment of Dividends

The payment of dividends shall be effected annually on the date and at the place determined by the General Meeting or by the Board of Directors as the case may be. It shall be made validly to the bearer of the nominal share certificate.

CHAPTER VII
CONSTITUTION

Article 41
Formalities

The constitution of the Corporation shall be effected at the date determined under Articles 14 and 15 of the Treaty and shall give rise to the performance of the following actions:

-- Subscriptions in the proportions and amounts determined under Article 5 hereinbefore shall be established in the individual allotment letters signed by each of the shareholders;

-- A subscriber or any number among such, shall take office as founders of the Corporation and shall be designated to this effect to collect all allotment letters and the initial payment amounting to one-quarter of the corresponding capital;

-- Once the whole of the capital shall be thus subscribed and conditional upon one of the States having ratified the Treaty to which these Articles of Corporation are annexed, the founder shareholder or shareholders shall convene by registered letter all of the shareholders to a constituent meeting, at a place agreed between them or in the capital of the State which first ratified the Treaty;

-- The meeting, to which the founder or founders shall make a statement of the operations of subscription, shall have the object of checking this subscription and the payment of one-fourth of the capital, of appointing the first members of the Board and of appointing the auditors for the first financial period. It shall as far as necessary draw up the general rules governing the method of establishing and keeping the Corporation's accounts, methods of evaluating and determining the inventory, the balance sheet and the profit and loss account.

The constituent meeting shall comprise all of the subscribers of the authorized capital or their representatives. It shall rule by a majority of the votes expressed. It shall establish the definitive constitution of the Corporation subject to ratification of the Treaty by all of the signatory States.

Article 42
Termination of the Functions of Founders

After holding the constituent meeting the Company shall be deemed to be legally constituted and an end shall be made to the functions and designation of the founders.

Article 43
Public Notification

Formalities pertaining to registration and public notification of the Articles of Incorporation together with all acts and minutes relating to the constitution of the Corporation in all places where the Corporation has a head office, shall be performed by persons designated therefor by the Board. In regard to third parties, all bearers of a certified copy or abstract of said documents shall be considered valid attorneys in respect of publicity and/or publications.

Article 44
Constitution Costs

Costs and fees in connection with the Articles of Incorporation and with acts and meetings relating to the constitution of the Corporation together with registration and public notification fees, and in a general manner all other expenses that the founder may have been called upon to incur for constituting and organizing the Corporation, shall be borne by said Corporation and carried as initial expenses, and shall be settled as decided later by the Board of Directors.

CHAPTER VIII

Article 45
Dissolution - Liquidation

a) Upon liquidation of the Company whether anticipated or upon expiry of its authorized duration, the General Meeting shall by a two-thirds majority, appoint one or a number of liquidators and determine their powers, remuneration and fees. The appointment of the liquidators shall put an end to the powers of the members of the Board.

The properly constituted General Meeting shall during liquidation hold the same attributions as during the life of the Corporation: it shall in particular have the power to approve the liquidation accounts and give the auditors final discharge. It shall be presided by the person appointed thereto by the shareholders at the commencement of each meeting. It shall be convened by the liquidator or liquidators.

b) Once the liabilities of the Corporation have been satisfied and the amount of the shares, paid up and not paid off, has been repaid, the balance remaining shall be distributed between all the shares in equal portions or proportional to their nominal value in the event that certain shares have a different nominal value.

Article 46
Disputes

1) The following shall be settled by arbitration exclusively.

Any dispute relating to the interpretation and application of these Articles of Incorporation and to rights, obligations and liabilities pertaining thereto;

2) Any disputes between shareholders, or between shareholders and the Corporation, relating to Company affairs or to rights of shareholders;

3) Any disputes between the Corporation and its members of the Board and trustees also between the members of the Board and trustees on the one part and the shareholders on the other part;

4) Any disputes regarding the nullity of the Company or its statutory provisions;

5) Any disputes regarding the nullity and voidability of decisions and acts of the Corporation's bodies;

6) Any disputes regarding dissolution and/or liquidation of the Corporation.

To this effect, each of the parties shall appoint in each case one arbitrator, and the arbitrators shall agree on the appointment of a third arbitrator. In the event one or other of the parties shall not have appointed its arbitrator within two months effective from the date of receipt of the other party's request, or in the event the arbitrators so appointed shall not have agreed within two months on the appointment of a third arbitrator, any party may request the President of the International Court of Justice to perform such appointments.

The arbitral tribunal shall determine its own procedure. It shall pronounce its award in equity (amiable composition).

The awards thus made shall be mandatory on each of the parties and shall be subject to no appeal.

(23c) Changes in the Statute

Articles 16, 21 and 23 of the Statute (No. 23a above) were amended by a resolution adopted by an Extraordinary General Assembly of the Stockholders, held at Libreville, Gabon, on 19 November 1962; Articles 5, 8 and 10 were amended by an Extraordinary General Assembly of Stockholders, held at Abidjan, Ivory Coast, on 4 January 1963. Text from 17 Revue Française de Droit Aérien (1963), pp. 349-52.

(i) 1962 Resolution

L'Assemblée Générale décide que le Président du Conseil d'Administration doit être choisi pour une durée égale à celle de son mandat d'Administrateur, et qu'il assurera la Direction Générale de la Société.

En conséquence, elle modifie de la manière suivante les articles 16, 21 et 23 des Statuts:

ARTICLE 16 (Alinéa 2).
Ancienne Rédaction.

Le Président est choisi parmi les Administrateurs. Il est élu pour deux ans. Il est rééligible. Il est révocable par le Conseil statuant à la majorité; il perd également sa qualité de Président s'il perd son mandat d'Administrateur.

Nouvelle Rédaction.

Le Président est choisi parmi les Administrateurs. Il est élu pour la durée de son mandat d'Administrateur. Il est rééligible. Il est révocable par le Conseil statuant à la majorité.

ARTICLE 21. -- Délégation de Pouvoirs.
Ancienne Rédaction.

La Direction de la Société est assurée par un Directeur Général. Le Conseil d'Administration délégue au Directeur Général les pouvoirs nécessaires à l'exercice de ses fonctions.

Le Directeur Général peut être choisi au sein du Conseil ou en dehors de celui-ci. Il est nommé par le Conseil et peut être révoqué par celui-ci à tout moment.

Nouvelle Rédaction.

Le Président du Conseil d'Administration assure sous sa responsabilité la Direction Générale de la Société.

Le Conseil d'Administration lui délégue les pouvoirs nécessaires à cet effet avec la faculté de substituer partiellement dans ses pouvoirs autant de mandataires spéciaux qu'il avisera.

Sur la proposition du Président, le Conseil peut, pour l'assister, lui adjoindre à titre de Directeur Général, soit un de ses membres, soit un mandataire choisi hors de son sein.

ARTICLE 23.

Ancienne Rédaction.

Tous les actes et engagements de la Société, les retraits de fonds et valeurs, les mandats sur les banquiers débiteurs ou dépositaires, les souscripteurs, endos, acceptations, cautions, avals ou acquits d'effet de commerce sont valablement signés, soit par le Président du Conseil d'Administration, soit par le Directeur Général, soit par un mandataire spécial que ce dernier se sera substitué, agissant chacun dans la limite de leurs pouvoirs respectifs.

Nouvelle Rédaction.

Tous les actes et engagements de la Société, les retraits de fonds et valeurs, les mandats sur les banquiers débiteurs ou dépositaires, les souscriptions, endos, acceptations, cautions, avals ou acquits d'effet de commerce sont valablement signés, soit par le Président du Conseil d'Administration, soit par tout fondé de pouvoir spécial désigné par le Conseil d'Administration ou son Président agissant chacun dans la limite de leurs pouvoirs respectifs.

(ii) 1963 Resolution

L'Assemblée Générale décide que l'entrée d'un nouvel Etat dans la Société se réalise par voie de cession d'actions appartenant à des actionnaires autres que les Etats, ou par voie d'augmentation du capital dont ces actionnaires sont exclus, sans toutefois que leur participation devienne de ce fait inférieure à celle d'un Etat.

L'Assemblée Générale décide également de modifier plus généralement la règle d'intangibilité de la répartition des actions entre les Etats et les autres actionnaires.

En conséquence, elle modifie de la façon suivante les articles 5, 8 et 10 des statuts:

ARTICLE 5 (alinéa b).
Ancienne Rédaction.

b) Les modifications qui interviendraient dans la répartition du capital, notamment à la suite de cessions d'actions, d'augmentation ou de réduction de capital, ne pourront en aucun cas porter atteinte au principe de l'égalité des participation des Etats, ni modifier le rapport entre la participation de l'ensemble des Etats et celle des autres actionnaires.

Nouvelle Rédaction.

b) Les modifications qui interviendraient dans la répartition du capital, notamment à la suite de cessions d'actions, d'augmentation ou de réduction de capital, ne pourront en aucun cas porter atteinte au principe de l'égalité des participations des Etats, ni rendre la participation des actionnaires autres que les Etats inférieure à celle d'un Etat.

ARTICLE 8. -- Admission d'un nouvel Etat.
Ancienne Rédaction.

L'admission d'un nouvel Etat se réalise par voie de cession d'actions des autres Etats ou par voie d'augmentation de capital.

Les actions possédées par un Etat qui se retire de la Société sont rachetées par parts égales par les autres Etats actionnaires.

Nouvelle Rédaction.

L'admission d'un nouvel Etat se réalise:

--soit par voie de cession d'actions consentie par les actionnaires autres que les Etats, ou, lorsqu'il y aura lieu à application des dispositions prévues à l'article 5b), par les Etats, et par les autres actionnaires;

--soit par voie d'augmentation de son capital.

Les actions possédées par un Etat qui se retire de la Société sont rachetées par parts égales par les autres Etats actionnaires et, s'il y a lieu à application des dispositions de l'art. 5b), aussi par les actionnaires autres que les Etats.

ARTICLE 10. -- Restrictions aux transferts.
Ancienne Rédaction.

a) Les actions détenues par un Etat sont incessibles sauf au bénéfice d'un nouvel Etat entrant dans la Société conformément aux dispositions du traité et des présents Statuts.

Nouvelle Rédaction.

a) Les actions détenues par un Etat sont incessibles, sauf dans les conditions prévues à l'article 8.

d. CUSTOMS AND ECONOMIC UNION OF CENTRAL AFRICA (UDEAC)

(42) Treaty Establishing a Customs and Economic Union of Central Africa

Signed at Brazzaville, Congo, 8 December 1964. Translation by the United Nations Economic Commission for Africa, reproduced in M.S. WIONCZEK, ed. Economic Cooperation in Latin America, Africa, and Asia (Cambridge, Mass., 1969), pp. 237-53.

The President of the Federal Republic of Cameroon,
The President of the Central African Republic,
The President of the Republic of the Congo (Brazzaville),
The President of the Gabon Republic,
The President of the Republic of Chad,

Having regard to the Convention regulating economic and customs relations between the States of the Equatorial Customs Union and the Federal Republic of Cameroon, signed at Bangui on June 23, 1961;

Having regard to the Protocol of Agreement signed on February 11, 1964 at Fort-Lamy,

Determined to promote the gradual and progressive establishment of a Central African Common Market,

Convinced that the extension of present national markets, through the removal of barriers to interregional trade, the adoption of a procedure of equitable distribution of industrialization projects and the co-ordination of development programmes for the various production sectors will greatly contribute to the improvement of the living standard of their peoples,

Desirous of strengthening the unity of their economies and of ensuring their harmonious development through the adoption of measures which take into account the interests of each and all while adequately compensating through appropriate measures the special situation of the economically less-developed countries,

Determined to participate through the establishment of such a subregional economic group in the creation of a true African Common Market.

Have decided to establish a Central African Economic and Customs Union

Have agreed as follows:

PART ONE: INSTITUTIONS

ARTICLE 1

By the present Treaty, the High Contracting Parties establish among themselves a Central African Economic and Customs Union (CAECU) hereinafter referred to as the "Union."

The Union shall be open to any independent and sovereign African State requesting admission; the admission of a new State shall require the unanimous consent of the members which make up the Union.

ARTICLE 2

The achievement of the tasks incumbent upon the Union shall be ensured by:

the Council of Heads of State,
the Management Committee,
the General Secretariat.

TITLE I
THE COUNCIL OF HEADS OF STATE

Chapter I: Organization

ARTICLE 3

The Council shall be constituted by the meeting of the Heads of State or of their representatives invested with the power of decision. The Heads of State may be accompanied by Ministers and Experts.

ARTICLE 4

The Council shall meet as often as necessary and at least once a year.

ARTICLE 5

The office of President shall be exercised each year by each of the Heads of States, in rotation, according to the alphabetical order of the States, unless otherwise unanimously decided by the Heads of State. The Presidency shall change at the opening of the first meeting of each calendar year.

Should any new States adhere to the Union, their Heads of State would assume the Presidency of the Council after the State signatory to this Treaty which is last in alphabetical order.

ARTICLE 6

In the event that a national vacancy in government deprives the Council of its President, the Presidency shall be assumed by the Head of State next in alphabetical order of the States.

ARTICLE 7

The President shall set the date and place of meetings and shall convene the members of the Council.

ARTICLE 8

In case of emergency, members of the Council, upon decision of its President, may be consulted in their own country.

Chapter II: Competence

ARTICLE 9

The Council shall be the supreme organ of the Union for the achievement of the objectives laid down in this Treaty and under the conditions herein set forth:

1. it shall determine and co-ordinate the Customs and economic policy of the Member States;

2. it shall have a power of decision and shall supervise the Management Committee;

it shall establish its own rules of procedure and approve the rules of procedure of the Management Committee;

it shall decide upon the headquarters of the Union;

it shall appoint the Secretary-General of the Union;

it shall draw up the budget of the Union and set the annual contribution of each Member State, on the proposal of the Management Committee;

it shall decide upon tariff negotiations with third countries and the application of the general tariff;

it shall decide in the last resort on all questions concerning which the Management Committee has not been able to reach a unanimous decision;

3. it shall arbitrate in disputes arising between member States concerning the application of this Treaty.

Decisions of the Council concerning economic, customs and fiscal legislation shall be taken by the delegation of the powers of the National Legislative Assemblies in accordance with the institutional rules of each State.

Chapter III: Decisions, Notification, Enforcement

ARTICLE 10

The decisions of the Council shall be taken unanimously. They shall be legally enforceable in the member States one full day after the arrival of the Official Gazette of the Union in the capital of each member State.

These decisions shall also be published in the Official Gazettes of the five States.

The Council may decide that its decisions are to be published according to the emergency procedure.

TITLE II
MANAGEMENT COMMITTEE

Chapter I: Organization

ARTICLE 11

The Management Committee shall be composed of two members per State:

the Minister of Finance or his representative;

the Minister responsible for problems of economic development or his representative.

The delegation of each State, which shall be entitled to speak and to vote, must include at least one Minister.

The members of the Management Committee may be accompanied by not more than four Experts per delegation.

ARTICLE 12

The Committee may invite any qualified person to a meeting on a consultative basis but not for deliberative purposes.

The Committee shall meet as often as necessary and at least twice a year.

ARTICLE 13

The Office of Chairman shall be exercised each year by one of the two Ministers of each State, in rotation according to the alphabetical order of the States. The Chairmanship shall change at the opening of the first meeting of each calendar year.

Should any new States adhere to the Union, their Ministers would assume the Chairmanship of the Committee after the State signatory to this Treaty which is last in alphabetical order.

ARTICLE 14

In the event that a national vacancy in government deprives the Management Committee of its Chairman, the Chairmanship shall be assumed by one of the Ministers of the State next in alphabetical order of the States.

ARTICLE 15

The Chairman shall set the date and place of meetings and shall convene the members of the Committee.

ARTICLE 16

In case of emergency, members of the Committee may be consulted in their own country.

Meetings of the Committee are valid only if all the member States are represented by at least one Minister.

Chapter II: Competence

ARTICLE 17

The Committee shall act under the authority conferred on it by the Council. Its competence shall include the following subjects:

tariff and statistical nomenclature,
common external customs tariff,
tariff or duties and fiscal charges on importation,
single tax,
Customs Code,
customs legislation and regulations,
harmonization of internal taxes,
Investment Code,
harmonization of industrialization projects, development plans and transport policy,
consultation regarding exit duties, export information on products of common interest as well as on wage and social systems.

The conditions under which the Committee shall exercise its competence are stipulated in the following titles.

Chapter III: Decisions of the Committee, Notification, Enforcement

ARTICLE 18

The decisions of the Committee shall be taken unanimously. They shall become legally enforceable in the member States one full day after the arrival of the Official Gazette of the Union in the capital of each member State.

Such decisions shall also be published in the Official Gazettes of the five States.

The Committee may decide that its decisions are to be published according to the emergency procedure.

It may also make recommendations and express wishes.

TITLE III
GENERAL SECRETARIAT

ARTICLE 19

The Secretariat of the Council and that of the Committee shall be assured by the Secretary-General of the Union, assisted by administrative staff.

The Secretary-General shall be appointed by a decision of the Council of Heads of State. He shall be placed under the direct authority of the President of the Council.

ARTICLE 20

The General Secretariat shall be made up of the following divisions:

a division for foreign trade, fiscal matters, statistics, and typewriting;
a development and industrialization division.

Other divisions may be established as required by decision of the Council.

ARTICLE 21

In the performance of their duties the Secretary-General and the staff of the Secretariat shall not seek or receive instructions from any government or from any national or international entity. They shall refrain from any action which might reflect on their position as international officials.

The staff rules and regulations of the General Secretariat shall be determined by a decision of the Council.

ARTICLE 22

The Contracting States shall forward to the Secretary-General of the Union, for information, the text of all laws and regulations, decisions of a fiscal, customs or economic character and all decisions concerning the granting of privileged treatment within the internal competence of the States. The Secretary-General shall distribute those texts to the member States.

TITLE IV
LEGAL PERSONALITY

ARTICLE 23

The Union shall have legal personality and in particular the necessary authority to:

(a) contract;
(b) acquire or transfer movable and immovable property as required for the achievement of its objectives;
(c) take out loans;
(d) engage in legal proceedings;
(e) accept donations, legacies and liberalities of any kind.

For this purpose it shall be represented by the President of the Council of Heads of State, who may delegate his powers.

The legal capacity to enter into contracts, to acquire or transfer movable and immovable property and to take out loans shall be exercised by the President, with the prior consent of the Heads of all the Contracting States.

ARTICLE 24

The Council of the Union shall determine the immunities to be granted to the Union, to the representatives of the contracting parties and to the staff of the General Secretariat in the territory of the member States.

TITLE V
FINANCIAL PROVISIONS

ARTICLE 25

The budget of the institutions of the Union shall be drawn up annually by the Council of Heads of State. It shall be made applicable by the President of the Council.

ARTICLE 26

The expenditures of the institutions of the Union shall be covered by equal contributions from each member State.

PART TWO: THE CUSTOMS UNION, HARMONIZATION OF INTERNAL FISCAL SYSTEMS, INVESTMENT CODES

ARTICLE 27

The Union shall constitute a single customs territory within which there shall be free movement of persons, goods, merchandise, services and capital.

TITLE I
CUSTOMS LEGISLATION AND REGULATIONS

ARTICLE 28

The Customs Union established between the five States shall cover the exchange of all goods; subject to the reservations and the conditions fixed in this Title, it shall comprise:

the adoption of a common customs and fiscal import tariff in their relations with third countries;

the prohibition, as between the member States, of all duties and charges on importation and exportation.

ARTICLE 29

The member States shall adopt, apply and maintain common customs legislation and regulations with respect to duties and charges on importation.

Such common legislation and regulations shall essentially consist of the customs code and its implementing texts, the tariff, the customs and statistical nomenclature and the other texts and regulations regarding customs which are required for the proper application of import duties and charges.

At its first meeting the Management Committee shall indicate the particular points of customs legislation and regulations on which unification should be sought first; for this purpose, it shall establish a programme of work and a timetable.

The unification of the systems applied in the member States with respect to exceptional and conditional exemptions from import duties and charges must, in any event, be completed not later than three months after the date of entry into force of this Treaty.

ARTICLE 30

The common customs and fiscal import tariff shall be drawn up by the Management Committee and adopted by the Council before the end of the first six months of 1965, so that it can be put into force simultaneously in the five States not later than 1 January 1966.

It shall include:

(a) the customs duty of the common external tariff instituted by Act. No. 16/62 in the States of Equatorial Africa and Decree No. 62 DF 223 in the Federal Republic of Cameroon;

the common fiscal charge on imports;

the common turnover tax on imports;

(b) the additional import charge, the rate of which may differ from one State to another.

Where the rules governing the computation, levy collection, or dispute of other duties and charges existing in the States are the same as with respect to import duties, they shall be eliminated if need be by incorporation in one or more of the duties and charges listed above, other than the customs duty.

ARTICLE 31

The States shall inform the Management Committee of the rates of the additional import charge provided for in Article 30 (b) and of any variations therein. At the request of a member State, consultations may be held on the matter in the Management Committee.

ARTICLE 32

Products and merchandise originating in member States shall, when transferred from one member State to another member State for consumption therein, be exempt from all import and export duties and charges, except in the event of application of the safeguard clauses provided for in Articles 40 and 41 below.

However, products and merchandise manufactured in the member States shall, when transferred from one member State to another member State for consumption therein, be subject to the single tax system in accordance with the terms of Part IV of this Treaty.

The Management Committee shall establish the list of such products and merchandise.

As from the date of entry into force of this Treaty, the import quotas applicable to the products and merchandise in question shall, in trade between the States of Equatorial Africa on the one hand and the Federal Republic of Cameroon on the other, be eliminated.

ARTICLE 33

Imported merchandise acquired on the consumer market in a member State and transferred to another member State shall be exempt from all duties and charges upon exit from the consigning country and upon admission into the receiving country.

However, in the case of commercial transactions, a statistical check as to the quantity and value of such merchandise shall be made when it crosses the frontiers.

During a transitional period, the duration of which shall not exceed three years as from the date of entry into force of this Treaty, the importing State shall reimburse to the State of actual consumption the amount of the duties and charges corresponding to the transactions recorded.

The procedures for such reimbursements shall be determined by the Management Committee not later than three months following the entry into force of this Treaty.

ARTICLE 34

Export duties and charges shall remain within the competence of each member State.

However, the member States undertake to hold bilateral or multilateral consultations to determine the tariffs and, if necessary, the market values applicable to similar productions or production of common interest.

TITLE II
APPORTIONMENT OF IMPORT AND EXPORT DUTIES

ARTICLE 35

The product of duties and charges paid to the customs upon importation into a member State shall accrue to the budget of the member State in which the merchandise is declared as having entered into consumption.

To this end, declaration forms for delivery of goods to the consumer market shall be made uniform between the five member States and shall provide for a declaration by the country of destination of the merchandise.

The product of export duties and charges collected by the customs when merchandise leaves the member States shall accrue to the budget of the State of origin of the goods.

Certificates of origin shall be produced in support of export declarations; the Management Committee shall draw up a model certificate of origin and determine conditions for its use.

ARTICLE 36

The Management Committee shall draw up a list of the common customs offices in the member States authorized to collect duties and charges for the account of States other than that in which they are situated.

In these offices separate accounts shall be kept for each member State. A duplicate of the accounts shall be forwarded at the end of each month to the

customs administration of the States for whose account collections have been made.

The corresponding revenue shall be transferred by Treasury transaction.

The Management Committee shall establish procedures for keeping the accounts of the customs offices common to the five States and likewise procedures for verifying those accounts and transferring customs revenue from one State to another.

ARTICLE 37

In order to facilitate as much as possible customs declarations in the State of destination of imported goods, the States undertake to make general use of transit régimes for transport by sea, air, land and inland waterways.

ARTICLE 38

In a spirit of solidarity, and to take account of any errors in indicating the State of consumption and of advantages deriving from transit activities, in particular for coastal States, a percentage of the import duties and charges levied by the common customs office of the five States, shall be paid into a Common Solidarity Fund.

The rate of this deduction shall be determined by the Council on a proposal by the Management Committee.

The proceeds of the Solidarity Fund shall be refunded to the member States according to the apportionment percentages to be set annually by the Council on a proposal of the Management Committee.

ARTICLE 39

The Council shall determine the date on which the apportionment procedure for import duties and charges as referred to in Articles 35 to 38 above shall become effective.

TITLE III
SAFEGUARD CLAUSES

ARTICLE 40

In the event that in order to meet its development needs or industrialization requirements, a member State envisages the introduction of quantitative restrictions with respect to products and merchandise imported from third countries, it shall so immediately inform the Management Committee.

If need be, the Management Committee shall decide on any measures necessary to prevent trade diversions.

ARTICLE 41

Should there be disturbances in an economic sector of one or more member States or should difficulties arise which might cause substantial deterioration

in a regional economic situation, the Management Committee may, in derogation from the provisions of this Title, take or authorize the member State or States concerned to take the necessary measures to restore a sound situation.

TITLE IV
HARMONIZATION OF INTERNAL FISCAL SYSTEMS

ARTICLE 42

The Management Committee shall examine the conditions in which the legislation of the five member States in respect of direct taxes and, if necessary, indirect taxes not levied by customs administration, can be harmonized in the common interest.

The Management Committee shall submit proposals to the Council not later than three months following the entry into force of this Treaty.

The Council shall draw up directives for the approximation of laws and regulations.

ARTICLE 43

In its work, the Management Committee shall aim at encouraging the installation and functioning of undertakings, in the same fiscal conditions, in the five States.

In particular, it shall try to achieve the harmonization of the rules determining the basis for computation and, so far as possible, the rates of the following taxes:

tax on industrial and commercial profits;

internal turnover tax;

tax on income from securities.

ARTICLE 44

To this end, the member States undertake to communicate to each other regularly within the Management Committee, all relevant information on their fiscal policy and to consult each other so far as possible before introducing or modifying the basis for computation of taxes or the rate thereof.

TITLE V
INVESTMENT CODES

ARTICLE 45

The Management Committee shall prepare and submit to the Council, not later than 1 July 1965, a draft outline Code to govern the fiscal and financial conditions prevailing on the Union market. With a view to harmonization, the member States shall eliminate or correct, within one year following the entry into force of this Treaty, any provisions in their national Code which are contrary to the provisions of the common outline Code.

ARTICLE 46

The provisions of the national Codes, as submitted to the Management Committee and, where applicable, harmonized according to its directives may not be further modified unilaterally.

PART THREE: APPORTIONMENT OF INDUSTRIALIZATION PROJECTS, HARMONIZATION OF DEVELOPMENT PLANS AND TRANSPORT POLICY

TITLE I
PRINCIPLES

ARTICLE 47

The High Contracting Parties agree to harmonize their industrialization policies, development plans and transport policies with a view to promoting the balanced development and diversification of the economies of the member States of the Union, within a framework which would permit the multiplication of exchanges between the States and an improvement in the living standards of their peoples.

TITLE II
HARMONIZATION OF DEVELOPMENT PLANS AND TRANSPORT POLICIES

The member States decide that, as from the date of entry into force of this Treaty, they will communicate to each other documents indicating on their respective economic situations and, for future years, their development plans or programmes and annual reports on the execution of such plans and programmes.

They shall also keep each other informed of their plans for improving and developing communication routes which may be of interest to one or more other States, as well as of their national regulations on transport and movement.

ARTICLE 49

The above-mentioned documents shall be addressed by each State to the General Secretariat of the Union.

The General Secretariat shall make a comprehensive study thereof with a view to presenting to the Management Committee and to the Council a review of the economic situation of the Union during the period considered.

Such review shall report any distortions which may have been observed, in particular as regards the harmonization objectives defined in Article 47, and shall make proposals for correcting such distortions.

The documents and reviews shall be forwarded to the States by the Secretary-General.

In these tasks he obtains assistance from Experts or study institutes approved by the Committee.

ARTICLE 50

The study of these documents shall be included in the agenda for the ensuing meeting of the Management Committee, which shall give an opinion regarding them. That opinion shall be communicated to the Council which shall decide as to any measures to be taken.

TITLE III
INDUSTRIAL CO-OPERATION

ARTICLE 51

In this field, a distinction shall be made as between the following:

(a) industries mainly devoted to exports outside the Union;

(b) industries affecting the market of a single State for which no economic, fiscal or customs advantages are requested from the other States of the Union;

(c) industrial projects affecting the market of a single State which concern a production existing already in another State of the Union or the creation of which is also envisaged in the development plans or programmes of another State of the Union;

(d) industrial projects, the market for which is and will remain limited to two States, for which harmonization can be sought as between those two States;

(e) industrial projects affecting the market of more than two States and for which harmonization is directly sought within the Union.

The provisions of this Article shall apply to all industrial undertakings including those having the status of joint venture corporations or State agencies.

ARTICLE 52

Industries within categories (a) and (b) may be created in each of the member States concerned without intervention by the Union institutions.

However, and in the absence of prior consent from the Management Committee, the market of industries in category (b) shall remain limited to the State in which they are situated and may not be extended to that of the other member States.

The State concerned shall regularly forward to the General Secretariat a list of the industries thus created, together with all relative economic data, and an exchange of views may take place in the Management Committee on that information.

ARTICLE 53

Industrial projects within category (d) shall be the subject of a joint report and shall be notified jointly by the two States concerned to the other States of the Union, through the intermediary of the General Secretariat.

Investment projects regarding industries in categories (c) and (e) must be communicated to the States of the Union by the State in whose territory the industry is to be situated.

To this end, before any decision is taken to proceed with the plan, and before any definitive undertakings are given to interested third parties, each project shall be notified to the General Secretariat, together with supporting documentation, for forwarding to each member State.

Any member State may request the Secretary-General to make a study of projects in categories (c), (d) and (e), in relation to the harmonization objectives defined in Article 47 of the Treaty.

Such study shall be carried out by experts or study institutes approved by the Committee.

The General Secretariat shall transmit the report to all the States.

ARTICLE 54

The project shall comprise full relevant information of an economic, financial, legal, technical, fiscal, and customs nature.

The Committee shall decide what the file shall include.

ARTICLE 55

The States shall be consulted in their own territory according to the procedure referred to in Article 53 of the Treaty, and must reply within two months as from the date of the communication from the General Secretariat. Failure to reply within the two-month period shall be construed as signifying approval of the project. In case of express disagreement, the project shall be submitted to the Management Committee which may, if appropriate, decide what rate or rates of single tax should be applied to the project, and as regards industries in category (e), what system should be granted under the Investment Code.

ARTICLE 56

As regards category (e) projects, in taking its decision the Management Committee shall base itself on the following criteria:

raw materials situation,

volume of investments already made in the various States of the Union, and comparison of advantages thus granted by each State to its partners,

desirability of compensating the relatively lower degree of economic development of certain States of the Union.

ARTICLE 57

After consulting the Ministries of Planning in the member States, the Secretary-General shall have a general industrialization plan prepared for the Union, covering projects within category (e) of Article 51 above, such plan being drawn up for all industrial sectors in relation to the harmonization objectives defined in Article 47. In this task, he may obtain assistance from study institutes approved by the Committee.

The industrial development plan for the Union shall be submitted for approval to the Council, after the Management Committee has given its opinion, not later than one year following the entry into force of the Treaty.

ARTICLE 58

In the event that, in a member State an industrial production which has not been the subject of a harmonization measure and has not been brought under the single tax system, reaches the market of one or more other member States, the State or States which considers its interests impaired may either prohibit access to its territory for the products in question or may, as a temporary measure, introduce a countervailing charge, the rate of which shall not exceed the overall fiscal charge on similar products when imported from third countries, with the exception, however, of the duties of the common external customs tariff.

The State or States concerned shall, not later than one month following such decisions, notify them to the Management Committee which shall decide on appropriate measures to be taken, subject to consultation of the Council.

The safeguard measures taken by the requesting member State or States shall remain applicable pending the decision of the Committee and the Council which shall be legally enforceable forthwith.

PART FOUR: SINGLE TAX

ARTICLE 59

The "single tax" (*taxe unique*) system shall apply to all domestic industrial production whose market extends or is likely to extend to the territory of several member States.

ARTICLE 60

The single tax shall be exclusive of the following:

duties and charges applicable upon importation on raw materials and essential products used in industry for the preparation of manufactured products in the form in which they enter into trade;

all internal charges on raw materials and essential products used in industry as well as on manufactured products.

ARTICLE 61

The single tax shall be levied and settled in the State in which the manufacturing industry is situated for the account of the State in which the products are consumed, in accordance with the applicable rules regarding customs duties and with the provisions of Article 36 of this Treaty.

The rules for customs disputes shall be applied in establishing infractions and taking proceedings against them.

ARTICLE 62

The Management Committee shall determine the regulations and the rates for the single tax; they shall be subject to review.

During the transitional period, which shall end on January 1, 1972, the rates of the single tax may be different in respect of a like product, according to the place of production.

Thereafter, the Management Committee may, on an exceptional basis and at the request of a member State, authorize the maintenance of different rates according to States, for a given production.

However, subject to any recourse to the provisions of Article 41, the differences existing between the rates of the single tax shall not be increased and shall be progressively reduced following an annual review.

The rates of the single tax shall in particular be calculated on the basis of the following elements:

exemption from duties and charges of all kinds granted on imported or domestic products,

other privileges and protective measures of a customs or fiscal nature granted in the past or still accorded to undertakings in particular by virtue of their admission to priority treatment under Investment Codes,

any disparities in production conditions for similar articles.

Within three months following the entry into force of this Treaty, the Management Committee shall determine the contents of the file to be submitted by undertakings requesting admission to the single tax system.

PART FIVE: FREE MOVEMENT OF PERSONS, SERVICES, AND CAPITAL, RIGHT OF ESTABLISHMENT

ARTICLE 63

The situation of persons and the right of establishment are governed by the Convention signed on September 8, 1961 by the member States of the African and Malagasy Union.

ARTICLE 64

Movements of capital within the Union shall not be subject to any restrictions other than those provided for under the exchange regulations currently in force.

PART SIX: GENERAL AND FINAL PROVISIONS

ARTICLE 65

The rights and obligations resulting from Conventions concluded prior to the entry into force of this Treaty between one or more member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty.

In so far as such Conventions are not compatible with this Treaty, the member State or States concerned shall take all appropriate steps to eliminate any incompatibility found to exist. Member States shall, if necessary, assist each other in order to achieve this purpose and shall, where appropriate, adopt a common attitude.

Member States shall, in the application of the Conventions referred to in the first paragraph, take due account of the fact that the advantages granted under this Treaty by each member State form an integral part of the establishment of the Union and are therefore inseparably linked with the creation of common institutions, the conferring of competences upon such institutions and the granting of the same advantages by all other member States.

This Treaty shall enter into force following its ratification in accordance with constitutional practice by each of the Contracting States.

The instruments of ratification shall be deposited with the Government of the Congo, hereby designated as the depositary Government.

Once the depositary Government has received instruments of ratification, it shall forthwith notify them to all the contracting parties and to the Secretary-General of the Union.

ARTICLE 66

Any modifications to this Treaty must be ratified by each State in the forms required by its internal legislation.

ARTICLE 67

This Treaty may be modified in the forms provided for its adoption.

It may be denounced by any member State. Such denunciation shall take effect in respect of the denouncing State only as from 1 January following its notification to the President of the Council and not earlier than six months following such notification.

Denunciation by one or more Contracting States shall not cause the dissolution of the Union.

Such dissolution may be decided upon only by the Council of Heads of State which shall determine the modalities for apportioning the assets and liabilities.

However, the Council shall determine the principle and modalities for indemnification in the event that a Contracting State withdraws from the Union.

WEST AFRICAN COUNTRIES: TREATY OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES*

[Done at Lagos, May 28, 1975]

TREATY OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS).

The President of the Republic, Head of State, Head of the Revolutionary Military Government, and President of the National Council of the Revolution of Dahomey

The President of the Republic of The Gambia

The Head of State and Chairman of the National Redemption Council of the Republic of Ghana

The Head of State and Commander-in-Chief of the People's Revolutionary Armed Forces, President of the Republic of Guinea

The President of the Republic of Guinea-Bissau

The President of the Republic of Ivory Coast

The President of the Republic of Liberia

The Chairman of the Military Committee of National Liberation, President of the Republic of Mali

The President of the Islamic Republic of Mauritania

The Head of State and President of the Supreme Military Council of the Republic of Niger

The Head of the Federal Military Government, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria

The President of the Republic of Senegal

The President of the Republic of Sierra Leone

The President of the Republic of Togo

The President of the Republic of Upper Volta

Conscious of the overriding need to accelerate, foster and encourage the economic and social development of their states in order to improve the living standards of their peoples;

Convinced that the promotion of harmonious economic development of their states calls for effective economic co-operation largely through a determined and concerted policy of self-reliance;

Recognising that progress towards sub-regional economic integration requires an assessment of the economic potential and interests of each state;

Accepting the need for a fair and equitable distribution of the benefits of co-operation among Member States;

Noting that forms of bilateral and multilateral economic co-operation existing in the sub-region give hope for wider co-operation;

Recalling the Declaration of African Co-operation, Development and Economic Independence adopted by the Tenth Assembly of Heads of State and Government of the Organisation of African Unity; [**]

Bearing in mind that efforts at sub-regional co-operation should not conflict with or hamper similar efforts being made to foster wider co-operation in Africa;

Affirming as the ultimate objective of their efforts accelerated and sustained economic development of their states and the creation of a homogeneous society, leading to the unity of the countries of West Africa, by the elimination of all types of obstacles to the free movement of goods, capital and persons;

Decide for the purpose of the foregoing to create an Economic Community of West African States, and agree as follows:

ARTICLE 1

Establishment and Membership of the Community

1. By this Treaty the HIGH CONTRACTING PARTIES establish among themselves an Economic Community of West African States (ECOWAS), here-inafter referred to as "the Community."

2. The members of the Community, hereinafter referred to as "the Member States", shall be the States that ratify this Treaty and such other West African States as may accede to it.

ARTICLE 2

Aims of the Community

1. It shall be the aim of the Community to promote co-operation and development in all fields of economic activity particularly in the fields of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions and in social and cultural matters for the purpose of raising the standard of living of its peoples, of increasing and maintaining economic stability, of fostering closer relations among its members and of contributing to the progress and development of the African continent.

2. For the purposes set out in the preceding paragraph and as hereinafter provided for in this Treaty, the Community shall by stages ensure:

(a) the elimination as between the Member States of customs duties and other charges of equivalent effect in respect of the importation and exportation of goods;

(b) the abolition of quantitative and administrative restrictions on trade among the Member States;

(c) the establishment of a common customs tariff and a common commercial policy towards third countries;

(d) the abolition as between the Member States of the obstacles to the free movement of persons, services and capital;

(e) the harmonisation of the agricultural policies and the promotion of common projects in the Member States notably in the fields of marketing, research and agro-industrial enterprises;

(f) the implementation of schemes for the joint development of transport, communication, energy and other infrastructural facilities as well as the evolution of a common policy in these fields;

(g) the harmonisation of the economic and industrial policies of the Member States and the elimination of disparities in the level of development of Member States;

(h) the harmonisation, required for the proper functioning of the Community, of the monetary policies of the Member States;

(i) the establishment of a Fund for Co-operation, Compensation and Development; and

(j) such other activities calculated to further the aims of the Community as the Member States may from time to time undertake in common.

ARTICLE 3

General Undertaking

The Member States shall make every effort to plan and direct their policies with a view to creating favourable conditions for the achievement of the aims of the Community; in particular, each Member State shall take all steps to secure the enactment of such legislation as is necessary to give effect to this Treaty.

ARTICLE 4

Institutions

1. The institutions of the Community shall be:

(a) the Authority of Heads of State and Government;

(b) the Council of Ministers;

(c) the Executive Secretariat;

(d) the Tribunal of the Community; and

(e) the following Technical and Specialised Commissions: — the Trade, Customs, Immigration, Monetary and Payments Commission; — The Industry, Agriculture and Natural Resources Commission; — the Transport, Telecommunications and Energy Commission; — the Social and Cultural Affairs Commission; and such other Commissions or bodies as may be established by the Authority of Heads of State and Government or are established or provided for by this Treaty.

2. The institutions of the Community shall perform the functions and act within the limits of the powers conferred upon them by or under this Treaty and by Protocols thereto.[*]

*[Protocols are not reproduced.]

ARTICLE 5

Authority of Heads of State and Government Establishment, Composition and Functions

1. There is hereby established the Authority of Heads of State and Government of the Member States referred to in this Treaty as "the Authority" which shall be the principal governing institution of the Community.

2. The Authority shall be responsible for, and have the general direction and control of the performance of the executive functions of the Community for the progressive development of the Community and the achievement of its aims.

3. The decisions and directions of the Authority shall be binding on all institutions of the Community.

4. The Authority shall meet at least once a year. It shall determine its own procedure including that for convening its meetings, for the conduct of business thereat and at other times, and for the annual rotation of the office of Chairman among the members of the Authority.

ARTICLE 6

Council of Ministers Establishment, Composition and Functions

1. There is hereby established a Council of Ministers which shall consist of two representatives of each Member State.

2. It shall be the responsibility of the Council of Ministers:

(a) to keep under review the functioning and development of the Community in accordance with this Treaty;

(b) to make recommendations to the Authority on matters of policy aimed at the efficient and harmonious functioning and development of the Community;

(c) to give directions to all subordinate institutions of the Community; and

(d) to exercise such other powers conferred on it and perform such other duties assigned to it by this Treaty.

3. The decisions and directions of the Council of Ministers shall be binding on all subordinate institutions of the Community unless otherwise determined by the Authority.

4. The Council of Ministers shall meet twice a year and one of such meetings shall be held immediately preceding the annual meeting of the Authority. Extra-ordinary meetings of the Council of Ministers may be

convened as and when necessary.

5. Subject to any directions that the Authority may give, the Council of Ministers shall determine its own procedure including that for convening its meetings, for the conduct of business thereat and at other times, and for the annual rotation of the office of Chairman among the members of the Council of Ministers.

6. Where an objection is recorded on behalf of a Member State to a proposal submitted for the decision of the Council of Ministers, the proposal shall, unless such objection is withdrawn, be referred to the Authority for its decision.

ARTICLE 7

Decisions of the Authority and the Council of Ministers

The Authority shall determine the procedure for the dissemination of its decisions and directions and those of the Council of Ministers and for matters relating to their coming into effect.

ARTICLE 8

The Executive Secretariat

1. There shall be established an Executive Secretariat of the Community.

2. The Executive Secretariat shall be headed by an Executive Secretary who shall be appointed by the Authority to serve in such office for a term of four (4) years and be eligible for reappointment for another term of four (4) years only.

3. The Executive Secretary shall only be removed from office by the Authority upon the recommendation of the Council of Ministers.

4. The Executive Secretary shall be the principal executive officer of the Community. He shall be assisted by two Deputy Executive Secretaries who shall be appointed by the Council of Ministers.

5. In addition to the Executive Secretary and the Deputy Executive Secretaries, there shall be a Financial Controller and such other officers in the Executive Secretariat as the Council of Ministers may determine.

6. The terms and conditions of service of the Executive Secretary and other officers of the Executive Secretariat shall be governed by regulations that may be made by the Council of Ministers.

7. In appointing officers to offices in the Executive Secretariat due regard shall be had, subject to the paramount importance of securing the highest standards of efficiency and technical competence, to the desirability of maintaining an equitable distribution of appointments to such posts among citizens of the Member States.

8. The Executive Secretary and officers of the Executive Secretariat, in the discharge of their duties, owe their loyalty entirely to the Community.

9. The Executive Secretary shall be responsible for the day to day administration of the Community and all its institutions.

10. The Executive Secretary shall:

(a) as appropriate, service and assist the institutions of the Community in the performance of their functions;

(b) keep the functioning of the Community under continuous examination and, where appropriate, report the results of its examination to the Council of Ministers;

(c) submit a report of activities to all sessions of the Council of Ministers and all meetings of the Authority; and

(d) undertake such work and studies and perform such services relating to the aims of the Community as may be assigned to him by the Council of Ministers and also make such proposals thereto as may assist in the efficient and harmonious functioning and development of the Community.

ARTICLE 9

Technical and Specialised Commissions Establishment, Composition and Functions

(1) There shall be established the following commissions:

(a) the Trade, Customs, Immigration, Monetary and Payments Commission;

(b) the Industry, Agriculture and Natural Resources Commission;

(c) the Transport, Telecommunications and Energy Commission; and

(d) the Social and Cultural Affairs Commission.

2. The Authority may from time to time establish other Commission as it deems necessary.

3. Each Commission shall consist of representatives designated one each by the Member States. Such representatives may be assisted by advisers.

4. Each Commission shall:

(a) submit from time to time reports and recommendations through the Executive Secretary to the Council of Ministers either on its own initiative or upon the request of the Council of Ministers or the Executive Secretary; and

(b) have such other functions as are imposed on it under this Treaty.

5. Subject to any directions which may be given by the Council of Ministers, each Commission shall meet as often as necessary for the proper discharge of its functions and shall determine its own procedure, including that for convening its meetings and the conduct of business thereat and at other times.

ARTICLE 10

External Auditor

1. There shall be an External Auditor of the Community who shall be appointed and removed by the Authority on the recommendation of the Council of Ministers.

2. Subject to the provisions of the preceding paragraph, the Council of Ministers shall make regulations governing the terms and conditions of service and powers of the External Auditor.

ARTICLE 11

Tribunal of the Community

1. There shall be established a Tribunal of the Community which shall ensure the observance of law and justice in the interpretation of the provisions of this Treaty. Furthermore, it shall be charged with the responsibility of settling such disputes as may be referred to it in accordance with Article 56 of this Treaty.

2. The composition, competence, statutes and other matters relating to the Tribunal shall be prescribed by the Authority.

CHAPTER III

CUSTOMS AND TRADE MATTERS

ARTICLE 12

Liberalization of Trade

There shall be progressively established in the course of a transitional period of fifteen (15) years from the definitive entry into force of this Treaty, and as prescribed in this Chapter, a Customs Union among the Member States. Within this Union, customs duties or other charges with equivalent effect on imports shall be eliminated. Quota, quantitative or like restrictions or prohibitions and ad-

ministrative obstacles to trade among the Member States shall also be removed. Furthermore, a common customs tariff in respect of all goods imported into the Member States from third countries shall be established and maintained.

ARTICLE 13
Customs Duties

1. Member States shall reduce and ultimately eliminate customs duties and any other charges with equivalent effect except duties notified in accordance with Article 17 and other charges which fall within that Article, imposed on or in connection with the importation of goods which are eligible for Community tariff treatment in accordance with Article 15 of this Treaty. Any such duties or other charges are hereinafter referred to as "import duties."

2. Within a period of two (2) years from the definitive entry into force of this Treaty, a Member State may not be required to reduce or eliminate import duties. During this two-year period, Member States shall not impose any new duties and taxes or increase existing ones and shall transmit to the Executive Secretariat all information on import duties for study by the relevant institutions of the Community.

3. Upon the expiry of the period of two (2) years referred to in paragraph 2 of this Article and during the next succeeding eight (8) years, Member States shall progressively reduce and ultimately eliminate import duties in accordance with a schedule to be recommended to the Council of Ministers by the Trade, Customs, Immigration, Monetary and Payments Commission. Such a schedule shall take into account, inter alia, the effects of the reduction and elimination of import duties on the revenue of Member States and the need to avoid the disruption of the income they derive from import duties.

4. The Authority may at any time, on the recommendation of of the Council of Ministers, decide that any import duties shall be reduced more rapidly or eliminated earlier than is recommended by the Trade, Customs, Immigration, Monetary and Payments Commission. However, the Council of Ministers shall, not later than one calendar year preceding the date in which such reductions or eliminations come into effect, examine whether such reductions or eliminations shall apply to some or all goods and in respect of some or all the Member States and shall report the result of such examination for the decision of the Authority.

ARTICLE 14
Common Customs Tariff

1. The Member States agree to the gradual establishment of a common customs tariff in respect of all goods imported into the Member States from third countries.

2. At the end of the period of eight (8) years referred to in paragraph 3 of Article 13 of this Treaty and during the next succeeding five (5) years, Member States shall gradually, in accordance with a schedule to be recommended by the Trade, Customs, Immigration, Monetary and Payments Commission, abolish existing differences in their external customs tariffs.

3. In the course of the same period, the above-mentioned Commission shall ensure the establishment of a common customs nomenclature and customs statistical nomenclature for all the Member States.

ARTICLE 15
Community Tariff Treatment

1. For the purposes of this Treaty, goods shall be accepted as eligible for Community tariff treatment if they have been consigned to the territory of the importing Member State from the territory of another Member State and originate in the Member States.

2. The definition of products originating from Member States shall be the subject of a protocol to be annexed to this Treaty.[*]

3. The Trade, Customs, Immigration, Monetary and Payments Commission shall from time to time examine whether the rules referred to in paragraph 2 of this Article can be amended to make them simpler and more liberal. In order to ensure their smooth and equitable operation, the Council of Ministers may from time to time amend them.

ARTICLE 16
Deflection of Trade

1. For the purposes of this Article, trade is said to be deflected if,

(a) imports of any particular product by a Member State from another Member State increase,

(i) as a result of the reduction or elimination of duties and charges on that product, and

(ii) because duties and charges levied by the exporting Member State on imports of raw materials used for manufacture of the product in question are lower than the corresponding duties and charges levied by the importing Member State; and

(b) this increase in imports causes or would cause serious injury to production which is carried on in the territory of the importing Member State.

2. The Council of Ministers shall keep under review the question of deflection of trade and its causes. It shall take such decisions, as are necessary, in order to deal with the causes of this deflection.

3. In case of deflection of trade to the detriment of a Member State resulting from the abusive reduction or elimination of duties and charges levied by another Member State, the Council of Ministers shall study the question in order to arrive at a just solution.

ARTICLE 17
Revenue Duties and Internal Taxation

1. Member States shall not apply directly or indirectly to imported goods from any Member State fiscal charges in excess of those applied to like domestic goods or otherwise impose such charges for the effective protection of domestic goods.

2. Member States shall eliminate all effective internal taxes or other internal charges that are made for the protection of domestic goods not later than one (1) year after the period of two (2) years referred to in paragraph 2 of Article 13 of this Treaty. Where by virtue of obligations under an existing contract entered into by a Member State and such a Member State is unable to comply with the provisions of this Article, the Member State shall duly notify the Council of Ministers of this fact and shall not extend or renew such contract at its expiry.

3. Member States shall eliminate progressively all revenue duties designed to protect domestic goods not later than the end of the period of eight (8) years referred to in paragraph 3 of Article 13 of this Treaty.

4. Each Member State shall, not later than the end of the period of two (2) years referred to in paragraph 2 of Article 13 of this Treaty, notify the

*[Protocol is not

Council of Ministers of any duty it wishes to apply under the provisions of paragraph 3 of the afore-mentioned Article.

ARTICLE 18
Quantitative Restrictions on Community Goods

1. Except as may be provided for or permitted by this Treaty, each of the Member States undertakes to relax gradually and to remove ultimately in accordance with a schedule to be recommended by the Trade, Customs, Immigration, Monetary and Payments Commission and not later than ten (10) years from the definitive entry into force of this Treaty, all the then existing quota, quantitative or like restrictions or prohibitions which apply to the import into that State of goods originating in the other Member States and thereafter refrain from imposing any further restrictions or prohibitions.

2. The Authority may at any time, on the recommendation of the Council of Ministers, decide that any quota, quantitative or like restrictions or prohibitions shall be relaxed more rapidly or removed earlier than is recommended by the Trade, Customs, Immigration, Monetary and Payments Commission.

3. A Member State may, after having given notice to the other Member States of its intention to do so, introduce or continue or execute restrictions or prohibitions affecting:

(a) the application of security laws and regulations;

(b) the control of arms, ammunition and other war equipment and military items;

(c) the protection of human, animal or plant health or life, or the protection of public morality;

(d) the transfer of gold, silver and precious and semi-precious stones; or

(e) the protection of national treasures; provided that a Member State shall not so exercise the right to introduce or continue to execute the restrictions or prohibitions conferred by this paragraph as to stultify the free movement of goods envisaged in this Article.

ARTICLE 19
Dumping

1. Member States undertake to prohibit the practice of dumping goods within the Community.

2. For the purposes of this Article "dumping" means the transfer of goods originating in a Member State to another Member State for sale:

(a) at a price lower than the comparable price charged for similar goods in the Member States where such goods originate (due allowance being made for the differences in the conditions of sale or in taxation or for any other factors affecting the comparability of prices); and

(b) under circumstances likely to prejudice the production of similar goods in that Member State.

ARTICLE 20
Most Favoured Nation Treatment

1. Member States shall accord to one another in relation to trade between them the most favoured nation treatment and in no case shall tariff concessions granted to a third country under an agreement with a Member State be more favourable than those applicable under this Treaty.

2. Copies of such agreements referred to in paragraph, 1 of this Article shall be transmitted by the Member States which are parties to them, to the Executive Secretariat of the Community.

3. Any agreement between a Member State and a third country under which tariff concessions are granted, shall not derogate from the obligations of that Member State under this Treaty.

ARTICLE 21
Internal Legislation

Member States shall refrain from enacting legislation which directly or indirectly discriminates against the same or like products of another Member State.

ARTICLE 22
Re-exportation of Goods and Transit Facilities

1. Where customs duty has been charged and collected on any goods imported from a third country into a Member State such goods shall not be re-exported into another Member State except as may be permitted under a Protocol to this Treaty entered into by the Member States.

2. Where goods are re-exported under such a Protocol, the Member States from whose territory such goods are re-exported shall refund to the Member State into whose territory such goods are imported the customs duties charged and collected on such goods. The duties so refunded shall not exceed those applicable on such goods in the territory of the Member State into which such goods are imported.

3. Each Member State, in accordance with international regulations, shall grant full and unrestricted freedom of transit through its territory of goods proceeding to or from a third country indirectly through that territory to or from other Member States; and such transit shall not be subject to any discrimination, quantitative restrictions, duties or other charges levied on transit.

4. Notwithstanding paragraph 3 of this Article;

(a) goods in transit shall be subject to the customs law; and

(b) goods in transit shall be liable to the charges usually made for carriage and for any services which may be rendered, provided such charges are not discriminatory.

5. Where goods are imported from a third country into one Member State, each of the other Member States shall be free to restrict the transfer to it of such goods whether by a system of licensing and controlling importers or by other means.

6. The provisions of paragraph 5 of this Article shall apply to goods which, under the provisions of Article 15 of this Treaty, fail to be accepted as originating in a Member State.

ARTICLE 23
Customs Administration

Member States shall, upon the advice of the Trade, Customs, Immigration, Monetary and Payments Commission, take appropriate measures to harmonise and standardise their customs regulations and procedures to ensure the effective application of the provisions of this chapter and to facilitate the movement of goods and services across their frontiers.

ARTICLE 24
Drawback

1. Member States may, at or before the end of the period of eight (8) years referred to in paragraph 3 of Article 13 of this Treaty, refuse to accept as eligible for Community tariff treatment, goods in relation to which drawback is claimed or made use of in connection with their exportation from the Member States in the territory of which the goods

have undergone the last process of production.

2. For the purposes of this article:

(a) "drawback" means any arrangement, including temporary duty-free admission, for the refund of all or part of the duties applicable to imported raw materials, provided that the arrangement, expressly or in effect, allows such refund or remission if goods are exported but not if they are retained for home use;

(b) "remission" includes exemption from duties for goods imported into free ports, free zones or other places which have similar customs privileges; and

(c) "duties" means customs duties and any other charges with equivalent effect imposed on imported goods, except the non-protective element in such duties or charges.

ARTICLE 25

Compensation for Loss of Revenue

1. The Council of Ministers shall, on the report of the Executive Secretary and recommendation by the appropriate Commission or Commissions, determine the compensation to be paid to a Member State which has suffered loss of import duties as a result of the application of this Chapter.

2. A protocol to be annexed to this Treaty shall state precisely the methods of assessment of the loss of revenue suffered by Member States as a result of the application of this chapter.[*]

ARTICLE 26

Safeguard Clause

1. In the event of serious disturbances occurring in the economy of a Member State following the application of the provisions of this chapter, the Member State concerned shall after informing the Executive Secretary and the other Member States take the necessary safeguard measures pending the approval of the Council of Ministers.

2. These measures shall remain in force for a maximum period of one year. They may not be extended beyond that period except with the approval of the Council of Ministers.

3. The Council of Ministers shall examine the method of application of these measures while they remain in force.

ARTICLE 27

Visa and Residence

1. Citizens of Member States shall be regarded as Community citizens and accordingly Member States undertake to abolish all obstacles to their freedom of movement and residence within the Community.

2. Member States shall by agreements with each other exempt Community citizens from holding visitors' visas and residence permits and allow them to work and undertake commercial and industrial activities within their territories.

ARTICLE 28

General Principles

For the purposes of this chapter, Member States shall achieve their industrial development and harmonization in the three stages as set out in Articles 29, 30 and 31.

ARTICLE 29

Stage I: Exchange of Information on Major Industrial Projects

Member States undertake to:

(a) furnish one another with major feasibility studies and reports on projects within their territories;

(b) furnish one another, on request, reports on the performance of prospective technical partners who have developed similar projects in their territories;

(c) furnish one another, on request, reports on foreign business groups operating in their territories;

(d) furnish one another, on request, with reports on their experiences on industrial projects and to exchange industrial research information and experts;

(e) commission, where appropriate, joint studies for the identification of viable industrial projects for development within the Community; and

(f) finance, where appropriate, joint research on the transfer of technology and the development of new products through the use of raw materials common in some or all of the Member States and on specific industrial problems.

ARTICLE 30

Stage II: Harmonization of Industrial Incentives and Industrial Development Plans.

Member States undertake to:

(a) harmonize their industrial policies so as to ensure a similarity of industrial climate and to avoid disruption of their industrial activities resulting from dissimilar policies in the fields of industrial incentives, company taxation and Africanisation; and

(b) co-operation with one another by exchanging their industrial plans so as to avoid unhealthy rivalry and waste of resources.

ARTICLE 31

Stage III: Personnel Exchange, Training and Joint Ventures

Member States shall:

(a) exchange, as may be necessary, skilled, professional and managerial personnel in the operation of projects within the Community;

(b) , provide places for training in their educational and technical institutions for Community citizens; and

(c) engage, where appropriate, in joint development of projects including those which entail the execution of complementary parts of such projects in different Member States.

ARTICLE 32

Remedial Measures

1. The Council of Ministers shall keep under constant review in the implementation of the provisions of this Chapter, the disparity in the levels of industrial development of the Member States and may direct the appropriate Commission of the Community to recommend measures to remedy such disparity.

2. In the implementation of the aims of the Community, the Council of Ministers shall recommend measures designed to promote the industrial development of Member States and shall take steps to reduce gradually the Community's economic dependence on the outside world and strengthen economic relations among themselves.

3. The Council of Ministers shall further recommend measures designed to accelerate the industrial integration of the economies of the Member States.

*[Protocol is not reproduced.]

ARTICLE 33

Co-operation among Member States

Member States shall co-operate as set out in this Chapter in the development of their natural resources particularly agriculture, forestry, animal husbandry and fisheries.

ARTICLE 34

Stage I: Harmonisation of Agricultural Policies

1. Member States undertake to work towards the harmonisation of their internal and external agricultural policies in their relations with one another;

2. Member States shall exchange regularly information on experiments and results of research being carried out in their respective territories and on existing rural development programmes; and

3. Member States shall formulate, as appropriate, joint programmes for both basic and in-service training in existing institutions.

ARTICLE 35

Stage II: Evolution of a Common Agricultural Policy

Member States undertake to take all measures necessary for the creation of a common policy especially in the field of research, training, production, processing and marketing of the products of agriculture, forestry, animal husbandry and fisheries. For this purpose, the Industry, Agriculture and Natural Resources Commission shall, as soon as possible, after its establishment meet to make recommendations to the Council of Ministers for the harmonisation and exploitation of natural resources of the Member States.

ARTICLE 36

Co-operation in Monetary and Fiscal Matters

1. It shall be the responsibility of the Trade, Customs, Immigration, Monetary and Payments Commission, among other things, to:

(a) as soon as practicable, make recommendations on the harmonisation of the economic and fiscal policies of the Member States;

(b) give its constant attention to the maintenance of a balance of payments equilibrium in the Member States; and

(c) examine developments in the economies of the Member States.

2. The recommendations of the Trade, Customs, Immigration, Monetary and Payments Commission under this Article shall be made to the Council of Ministers.

ARTICLE 37

Settlement of Payments Between Member States

The Trade, Customs, Immigration, Monetary and Payments Commission shall make recommendations to the Council of Ministers on the establishment, in the short term, of bilateral systems for the settlement of accounts between the Member States and, in the long term, of a multilateral system for the settlement of such accounts.

ARTICLE 38

Committee of West African Central Banks

1. For the purpose of overseeing the system of payments within the Community, there is hereby established a Committee of West African Central Banks which shall consist of the Governors of the Central Banks of the Member States or such other persons as may be designated by Member States. This Committee shall, subject to this Treaty, determine its own procedures.

2. The Committee of West African Central Banks shall make recommendations to the Council of Ministers from time to time on the operation of the clearing system of payments and on other monetary issues of the Community.

ARTICLE 39

Movement of Capital and Capital Issues Committee

1. For the purpose of ensuring the free flow of capital between the Member States consistent with the objectives of this Treaty, there is hereby established a Capital Issues Committee, which shall consist of representatives designated one each by the Member States and shall, subject to this Treaty, determine its own procedure.

2. The Member States, in designating their representatives referred to in paragraph 1 of this Article, shall designate persons with financial, commercial, banking or administrative experience or qualifications.

3. In the exercise of its functions under paragraph 1 of this Article, the Capital Issues Committee shall:

(a) seek to achieve the mobility of capital within the Community through the interlocking of any capital markets and stock exchanges;

(b) ensure that stocks and shares floated in the territory of a Member State are quoted on the stock exchanges of the other Member States;

(c) ensure that nationals of a Member State are given the opportunity of acquiring stocks, shares and other securities or otherwise investing in enterprises in the territories of other Member States;

(d) established a machinery for the wide dissemination in the Member States of stock exchange quotations of each Member State;

(e) organise and arrange the quotation of prices, timing, volume and conditions of issue of securities of new enterprises in the Member States;

(f) ensure the unimpeded flow of capital within the Community through the removal of controls on the transfer of capital among the Member States in accordance with a time-table, to be determined by the Council of Ministers; and

(g) seek to harmonise the rates of interest on loans prevailing in the Member States so as to facilitate the investment of capital from a Member State in profitable enterprises elsewhere within the Community.

4. The capital envisaged in the provisions of this Article is that of Member States or their citizens.

5. With regard to capital other than that referred to in paragraph 4 of this Article, the Capital Issues Committee shall determine its movement within the Community.

ARTICLE 40

Common Transport and Communications Policy

Member States undertake to evolve gradually common transport and communications policies through the improvement and expansion of their existing transport and communications links and the establishment of new ones as a means of furthering the physical cohesion of the Member States and the promotion of greater movement of persons, goods and services within the Community.

ARTICLE 41
Roads

The Transport, Telecommunications and Energy Commission shall formulate plans for a comprehensive network of all-weather roads within the Community with a view to promoting social and unimpeded commercial intercourse between the Member States through the improvemet of existing roads to, and the construction of new ones of international standards. In the formulation of these plans, the Transport, Telecommunications and Energy Commission shall give priority to a network of roads traversing the territories of the Member States.

ARTICLE 42
Railways

The Transport, Telecommunications and Energy Commission shall for the purpose of connecting the railways of the Member States formulate plans for the improvement and reorganisation of such railways.

ARTICLE 43
Shipping and International Waterways

1. The Transport, Telecommunications and Energy Commission shall formulate plans for the harmonisation and rationalisation of policies on shipping and international waterways of the Member States.

2. Member States undertake to do their utmost to form multinational shipping Companies for both maritime and river navigation.

ARTICLE 44
Air Transport

Member States shall use their best endeavour to bring about the merger of their national airlines in order to promote efficiency ad profitability in the air transportation of passengers and goods within the Community by aircarft owned by the Governments of the Member States and/or their citizens. To this end, they shall co-ordinate the training of their nationals and policies in air transport and standardize their equipment.

ARTICLE 45
Telecommunications

1. Member States shall reorganise and improve, where necessary, their national telecommunications network to meet standards required for international traffic.

2. Member States undertake to establish a direct, modern, efficient and national system of telecommunications among themselves.

ARTICLE 46
Pan-African Telecommunications Network

1. The Transport, Telecommunications and Energy Commission shall make urgent recommendations for the rapid realisation in the West African Section of the Pan-African Telecommunications network and, in particular the establishment of links necessary for the economic and social development of the Community. Member States shall coordinate their efforts in this field and in the mobilisation of national and international financial resources.

ARTICLE 47
Postal Services

1. The Transport, Telecommunications and Energy Commission shall study and make recommendations to the Council of Ministers on proposals for speedier, cheaper and more frequent postal services within the Community.

2. Member States undertake to:

(a) Promote close collaboration among their postal administrations;

(b) harmonise routes of mails; and

(c) establish among themselves a system of postal remittances and preferential tariffs which are more favourable than those envisaged by the Universal Postal Union.

ARTICLE 48
Co-operation in Energy and Mineral Resources

1. The Transport, Telecommunications and Energy Commission shall engage in consultations on, and the co-ordination of the policies and activities of the Member States in the field of energy and submit its recommendations to the Council of Ministers.

2. Member States undertake to:

(a) co-operate, consult on and co-ordinate their policies, regarding energy and mineral resources;

(b) harmonise their energy and mineral resources policies especially as regards the production and distribution of energy, research, production and processing of mineral resources;

(c) exchange information on the results of research being carried out;

(d) plan joint programmes for training technicians and personnel; and

(e) formulate a common energy and mineral policy especially in the fields of production, distribution of energy, research, production and processing of mineral resources.

ARTICLE 49
Co-operation in Social and Cultural Matters

Subject to any directions that may be given by the Council of Ministers, the Social and Cultural Affairs Commission shall examine ways of increasing exchange of social and cultural activities among the Member States and of developing them, provide a forum for consultation generally on social and cultural matters affecting the Member States and make recommendations to the Council of Ministers.

ARTICLE 50
Establishment

There is hereby established a Fund to be known as the Fund for Co-operation, Compensation and Development hereinafter referred to as the "the Fund".

ARTICLE 51
Resources of the Fund

1. The Fund shall derive its resources from:

(a) contributions of Member States;

(b) income from Community enterprises;

(c) receipts from bilateral and multilateral sources as well as other foreign sources; and

(d) subsidies and contributions of all kinds and from all sources.

2. The contributions of Member States referred to in subparagraph (a) of the preceding paragraph shall be determined by the Council of Ministers and shall be of such minimum and maximum amounts as the Council of Ministers may determine.

3. The method of determining the contribution to be paid by Member States, the regulations governing the payment and the currencies in which they shall be effected, the operation, organisation, management, status of the funds and matters related and incidental thereto shall be the subject of a protocol to be annexed to this Treaty.[*]

*[Protocol is not

ARTICLE 52
Uses of the Fund

The Fund shall be used to:

(a) finance projects in Member States;

(b) provide compensation to Member States which have suffered losses as a result of the location of Community enterprises;

(c) provide compensation and other forms of assistance to Member States which have suffered losses arising out of the application of the provisions of this Treaty on the liberalisation of Trade within the Community;

(d) guarantee foreign investments made in Member States in respect of enterprises established in pursuance of the provisions of this Treaty on the harmonisation of industrial policies;

(e) provide appropriate means to facilitate the sustained mobilisation of internal and external financial resources for the Member States and the Community; and

(f) promote development projects in the less developed Member States of the Community.

ARTICLE 53
Budget of the Community

1. There shall be established a budget of the Community.

2. All expenditures of the Community, other than those in respect of the Fund for Co-operation, Compensation and Development, established under Chapter XI of this Treaty, shall be approved in respect of each financial year by the Council of Ministers and shall be chargeable to the budget.

3. Resources of the budget shall be derived from annual contribution by Member States and such other sources as may be determined by the Council of Ministers.

4. The budget shall be in balance as to revenues and expenditures.

5. A draft budget for each financial year shall be prepared by the Executive Secretary and approved by the Council of Ministers.

6. There shall be special budgets to meet extraordinary expenditures of the Community.

ARTICLE 54
Contributions by Member States

1. A protocol to be annexed to this Treaty shall state the mode by which the contribution of Member States shall be determined and the currencies in which the contribution is to be paid.[*]

2. The Member States undertake to pay regularly their annual contributions to the budget of the Community.

3. Where a Member State is in arrears at the end of the financial year in the payment of its contributions for reasons other than those caused by public or natural calamity or exceptional circumstances that gravely affect its economy, such Member States may, by a resolution of the Authority, be suspended from taking part in the activities of the institutions of the Community.

ARTICLE 55
Financial Regulations

The Council of Ministers shall make financial regulations for the application of the provisions of this Chapter.

ARTICLE 56
Procedure for the Settlement of Disputes

Any dispute that may arise among the Member States regarding the interpretation or application of this Treaty shall be amicably settled by direct agreement. In the event of failure to settle such disputes, the matter may be referred to the Tribunal of the Community by a party to such disputes and decisions of the Tribunal shall be final.

ARTICLE 57
Headquarters of the Community

The Headquarters of the Community shall be determined by the Authority.

ARTICLE 58
Official Languages

The official languages of the Community shall be such African languages declared official by the Authority and English and French.

ARTICLE 59
Relations with other Regional Associations and Third Countries

1. Member States may be members of other regional or sub-regional associations, either with other Member States or non-Member States, provided that their membership of such associations does not derogate from the provisions of this Treaty.

2. The rights and obligations arising from agreements concluded before the definitive entry into force of this treaty between one or more Member States on the one hand, and one Member State and a third country on the other hand, shall not be affected by the provisions of this Treaty.

3. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

4. In applying the agreements referred to in paragraph I of this Article, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

ARTICLE 60
Status, Privileges and Immunities

1. The Community, as an international organisation, shall enjoy legal personality.

2. The Community shall have in the territory of each Member State:

(a) the legal capacity required for the performance of its functions under this Treaty; and

(b) power to acquire, hold or dispose of movable or immovable property.

3. In the exercise of its legal personality under this Article, the Community shall be represented by the Executive Secretary.

4. The privileges and immunities to be granted to the officials of the Community at its headquarters and in the Member States shall be the same as are accorded to diplomatic persons at the Headquarters of the Community and in the Member States. Similarly, the privileges and immunities granted to the Secretariat at the Headquarters of the Community shall be the same as granted to diplomatic missions at the Headquarters of the Community and in the Member States. Other privileges and immunities to be recognised and granted by the Member States in connection with the Community shall be determined by the Council of Ministers

*[Protocol is not reproduced.]

ARTICLE 61
Setting up of the Institutions

1. The Authority shall at its first meeting after the entry into force of this Treaty:

(a) appoint the Executive Secretary;

(b) determine the Headquarters of the Community; and

(c) give such directions to the Council of Ministers and other institutions of the Community as are necessary for the expeditious and effective implementation of this Treaty.

2. Subject to the provisions of the proceeding paragraph, the Council of Ministers shall, within two months of the entry into force of this Treaty, hold its first meeting to:

(a) appoint persons to offices in the Executive Secretariat in accordance with the provisions of this Treaty;

(b) give directions to other subordinate institutions;

(c) give directions to the Executive Secretary as to the implementation of the provisions of this Treaty; and

(d) perform such other duties as may be necessary for the expeditious and effective implementation of this Treaty:

ARTICLE 62
Entry into Force, Ratification and Accession

1. This Treaty and the protocols which shall be annexed and which shall form an integral part of the Treaty shall respectively enter into force provisionally upon the signature by Heads of State and Government and definitively upon ratification by seven signatory States in accordance with the constitutional procedures applicable for each signatory State. [*]

2. Any West African state may accede to this Treaty on such terms and conditions as the Authority may determine. Instruments of accession shall be deposited with the Government of..... ... ... which shall notify all other Member States. This Treaty shall enter into force in relation to an acceding state of such date as its Instrument of accession is deposited.

ARTICLE 63
Amendments and Revisions

1. Any Member State may submit proposals for the amendment or revision of the Treaty.

2. Any such proposals shall be submitted to the Executive Secretary who shall communicate them to other Member States not later than thirty days after the receipt of such proposals. Amendments or revisions shall be considered by the Authority after Member States have been given one month's notice thereof.

3. Any Amendment or revision of this Treaty shall be by agreement of all the Member States and shall thereupon enter into force.

ARTICLE 64
Withdrawal

1. Any Member State wishing to withdraw from the Community shall give to the Executive Secretary one year's written notice. At the end of this period of one year, if such notice is not withdrawn, such a state shall cease to be a member of the Community.

2. During the period of one year referred to in the preceding paragraph, such a Member State shall nevertheless observe the provisions of this Treaty and shall remain liable for the discharge of its obligations under this Treaty.

ARTICLE 65
Depositary Government

The present Treaty and all Instruments of ratification and accession shall be deposited with the Government of .... and such Government shall transmit certified true copies of this Treaty to all Member States and notify them of the dates of deposits of the Instruments of ratification and accession and shall register this Treaty with the Organisation of African Unity, the United Nations Organisation and such other Organisations as the Council of Ministers shall determine.

IN FAITH WHEREOF WE, THE HEADS OF STATE AND GOVERNMENT

In West Africa, Have Signed This Treaty

Done At..... this ... day of..... in single original in the English and French languages, both texts being equally authentic.

*[Protocols are not

1. AGREEMENT ESTABLISHING THE AFRICAN DEVELOPMENT BANK

Signed at Khartoum, Sudan, 4 August 1963. Text from U.N. Doc. E/CN. 14/ADB/36 (U.N. Publ. 64. II. K. 5).

THE GOVERNMENTS on whose behalf this Agreement is signed;

DETERMINED to strengthen African solidarity by means of economic co-operation between African States;

CONSIDERING the necessity of accelerating the development of the extensive human and natural resources of Africa in order to stimulate economic development and social progress in that region;

REALIZING the importance of co-ordinating national plans of economic and social development for the promotion of the harmonious growth of African economies as a whole and the expansion of African foreign trade and, in particular, inter-African trade;

RECOGNIZING that the establishment of a financial institution common to all African countries would serve these ends;

HAVE AGREED to establish hereby the African Development Bank (hereinafter called the "Bank") which shall be governed by the following provisions:

CHAPTER 1

Purpose, Functions, Membership and Structure

ARTICLE 1

Purpose

The purpose of the Bank shall be to contribute to the economic development and social progress of its members — individually and jointly.

ARTICLE 2

Functions

(1) To implement its purpose, the Bank shall have the following functions:

(a) to use the resources at its disposal for the financing of investment projects and programmes relating to the economic and social development of its members, giving special priority to:

(i) projects or programmes which by their nature or scope concern several members; and

(ii) projects or programmes designed to make the economies of its members increasingly complementary and to bring about an orderly expansion of their foreign trade;

(b) to undertake, or participate in, the selection, study and preparation of projects, enterprises and activities contributing to such development;

(c) to mobilize and increase in Africa, and outside Africa, resources for the financing of such investment projects and programmes;

(d) generally, to promote investment in Africa of public and private capital in projects or programmes designed to contribute to the economic development or social progress of its members;

(e) to provide such technical assistance as may be needed in Africa for the study, preparation, financing and execution of development projects or programmes; and

(f) to undertake such other activities and provide such other services as may advance its purpose.

(2) In carrying out its functions, the Bank shall seek to co-operate with national, regional and sub-regional development institutions

in Africa. To the same end, it should co-operate with other international organizations pursuing a similar purpose and with other institutions concerned with the development of Africa.

(3) The Bank shall be guided in all its decisions by the provisions of Articles 1 and 2 of this Agreement.

ARTICLE 3

Membership and Geographical Area

(1) Any African country which has the status of an independent State may become a member of the Bank. It shall acquire membership in accordance with paragraph (1) or paragraph (2) of Article 64 of this Agreement.

(2) The geographical area to which the membership and development activities of the Bank may extend (referred to in this Agreement as "Africa" or "African", as the case may be) shall comprise the continent of Africa and African islands.

ARTICLE 4

Structure

The Bank shall have a Board of Governors, a Board of Directors, a President, at least one Vice-President and such other officers and staff to perform such duties as the Bank may determine.

CHAPTER II

Capital

ARTICLE 5

Authorized Capital

(1) (a) The authorized capital stock of the Bank shall be 250,000,000 units of account. It shall be divided into 25,000 shares of a par value of 10,000 units of account each share, which shall be available for subscription by members.

(b) The value of the unit of account shall be 0.88867088 gramme of fine gold.

(2) The authorized capital stock shall be divided into paid-up shares and callable shares. The equivalent of 125,000,000 units of account shall be paid up, and the equivalent of 125,000,000 units of account shall be callable for the purpose defined in paragraph (4) (a) of Article 7 of this Agreement.

(3) The authorized capital stock may be increased as and when the Board of Governors deems it advisable. Unless that stock is increased solely to provide for the initial subscription of a member, the decision of the Board shall be adopted by a two-thirds majority of the total number of Governors, representing not less than three-quarters of the total voting power of the members.

ARTICLE 6

Subscription of Shares

(1) Each member shall initially subscribe shares of the capital stock of the Bank. The initial subscription of each member shall consist of an equal number of paid-up and callable shares. The initial number of shares to be subscribed by a State which acquires membership in accordance with paragraph (1) of Article 64 of this Agreement, shall be that set forth in its respect in Annex A to this Agreement, which shall form an integral part thereof. The initial number of shares to be subscribed by other members shall be determined by the Board of Governors.

(2) In the event of an increase of the capital stock for a purpose other than solely to provide for an initial subscription of a member, each member shall have the right to subscribe, on such uniform terms and conditions as the Board of Governors shall determine, a proportion of the increase of stock equivalent to the proportion which its stock theretofore subscribed bears to the total capital stock of the Bank. No member, however, shall be obligated to subscribe to any part of such increased stock.

(3) A member may request the Bank to increase its subscription on such terms and conditions as the Board of Governors may determine.

(4) Shares of stock initially subscribed by States which acquire membership in accordance with paragraph (1) of Article 64 of this Agreement shall be issued at par. Other shares shall be issued at par unless the Board of Governors by a majority of the total voting power of the members decides in special circumstances to issue them on other terms.

(5) Liability on shares shall be limited to the unpaid portion of their issue price.

(6) Shares shall not be pledged nor encumbered in any manner. They shall be transferable only to the Bank.

ARTICLE 7

Payment of Subscription

(1) (a) Payment of the amount initially subscribed to the paid-up capital stock of the Bank by a member which acquires membership in accordance with paragraph (1) of Article 64, shall be made in six instalments, the first of which shall be five per cent, the second thirty-five per cent, and the remaining four instalments each fifteen per cent of that amount.

(b) The first instalment shall be paid by the Government concerned on or before the date of deposit, on its behalf, of the instrument of ratification or acceptance of this Agreement in accordance with paragraph (1) of Article 64. The second instalment shall become due on the last day of a period of six months from the entry into force of this Agreement or on the day of the said deposit, whichever is the later day. The third instalment shall become due on the last day of a period of eighteen months from the entry into force of this Agreement. The remaining three instalments shall become due successively each on the last day of a period of one year immediately following the day on which the preceding instalment becomes due.

(2) Payments of the amounts initially subscribed by the members of the Bank to the paid-up capital stock shall be made in gold or convertible currency. The Board of Governors shall determine the mode of payment of other amounts subscribed by the members to the paid-up capital stock.

(3) The Board of Governors shall determine the dates for the payment of amounts subscribed by the members of the Bank to the paid-up capital stock to which the provisions of paragraph (1) of this Article do not apply.

(4) (a) Payment of the amounts subscribed to the callable capital stock of the Bank shall be subject to call only as and when required by the Bank to meet its obligations incurred, pursuant to paragraph (1) (b) and (d) of Article 14, on borrowing of funds for inclusion in its ordinary capital resources

or guarantees chargeable to such resources.

(b) In the event of such calls, payment may be made at the option of the member concerned in gold, convertible currency or in the currency required to discharge the obligation of the Bank for the purpose of which the call is made.

(c) Calls on unpaid subscriptions shall be uniform in percentage on all callable shares.

(5) The Bank shall determine the place for any payment under this Article provided that, until the first meeting of its Board of Governors provided in Article 66 of this Agreement, the payment of the first instalment referred to in paragraph (1) of this Article shall be made to the Trustee referred to in Article 66.

ARTICLE 8

Special Funds

(1) The Bank may establish, or be entrusted with the administration of, Special Funds which are designed to serve its purpose and come within its functions. It may receive, hold, use, commit or otherwise dispose of, resources appertaining to such Special Funds.

(2) The resources of such Special Funds shall be kept separate and apart from the ordinary capital resources of the Bank in accordance with the provisions of Article 11 of this Agreement.

(3) The Bank shall adopt such special rules and regulations as may be required for the administration and use of each Special Fund; provided always that:

(a) such special rules and regulations shall be subject to paragraph (4) of Article 7, Articles 9 to 11, and those provisions of this Agreement which expressly apply to the ordinary capital resources or ordinary operations of the Bank;

(b) such special rules and regulations must be consistent with provisions of this Agreement which expressly apply to special resources or special operations of the Bank; and that

(c) where such special rules and regulations do not apply, the Special Funds shall be governed by the provisions of this Agreement.

ARTICLE 9

Ordinary Capital Resources

For the purposes of this Agreement, the expression "ordinary capital resources" of the Bank shall include:

(a) authorized capital stock of the Bank subscribed pursuant to the provisions of Article 6 of this Agreement;

(b) funds raised by borrowing of the Bank, by virtue of powers conferred in paragraph (a) of Article 23 of this Agreement, to which the commitment to calls provided for in paragraph (4) of Article 7 of this Agreement applies;

(c) funds received in repayment of loans made with resources referred to in paragraphs (a) and (b) of this Article; and

(d) income derived from loans made from the aforementioned funds; income from guarantees to which the commitment to calls provided for in paragraph (4) of Article 7 of this Agreement applies; as well as

(e) any other funds or income received by the Bank which do not form part of its special resources.

ARTICLE 10

Special Resources

(1) For the purposes of this Agreement, the expression "special resources" shall refer to the resources of Special Funds and shall include:

(a) resources initially contributed to any Special Fund;

(b) funds borrowed for the purposes of any Special Fund, including the Special Fund provided for in paragraph (6) of Article 24 of this Agreement;

(c) funds repaid in respect of loans or guarantees financed from the resources of any Special Fund which, under the rules and regulations governing that Special Fund, are received by that Special Fund;

(d) income derived from operations of the Bank by which any of the aforementioned resources or funds are used or committed if, under the rules and regulations governing the Special Fund concerned, that income accrues to the said Special Fund; and

(e) any other resources at the disposal of any Special Fund.

(2) For the purposes of this Agreement, the expression "special resources appertaining to a Special Fund" shall include the resources, funds and income which are referred to in the preceding paragraph and are — as the case may be — contributed to, borrowed or received by, accruing to, or at the disposal of, the Special Fund concerned in conformity with the rules and regulations governing that Special Fund.

ARTICLE 11

Separation of Resources

(1) The ordinary capital resources of the Bank shall at all times and in all respects be held, used, committed, invested or otherwise disposed of, entirely separate from special resources. Each Special Fund, its resources and accounts shall be kept entirely separate from other Special Funds, their resources and accounts.

(2) The ordinary capital resources of the Bank shall under no circumstances be charged with, or used to discharge, losses or liabilities arising out of operations or other activities of any Special Fund. Special resources appertaining to any Special Fund shall under no circumstances be charged with, or used to discharge, losses or liabilities arising out of operations or other activities of the Bank financed from its ordinary capital resources or from special resources appertaining to any other Special Fund.

(3) In the operations and other activities of any Special Fund, the liability of the Bank shall be limited to the special resources appertaining to that Special Fund which are at the disposal of the Bank.

CHAPTER III

Operations

ARTICLE 12

Use of Resources

The resources and facilities of the Bank shall be used exclusively to implement the purpose and functions set forth in Articles 1 and 2 of this Agreement.

ARTICLE 13

Ordinary and Special Operations

(1) The operations of the Bank shall consist of ordinary operations and of special operations.

(2) The ordinary operations shall be those financed from the ordinary capital resources of the Bank.

(3) The special operations shall be those financed from the special resources.

(4) The financial statements of the Bank shall show the ordinary operations and the special operations of the Bank separately. The Bank shall adopt such other rules and regulations as may be required to ensure the effective separation of the two types of its operations.

(5) Expenses appertaining directly to ordinary operations shall be charged to the ordinary capital resources of the Bank; expenses appertaining directly to special operations shall be charged to the appropriate special resources. Other expenses shall be charged as the Bank shall determine.

ARTICLE 14

Recipients and Methods of Operations

(1) In its operations, the Bank may provide or facilitate financing for any member, political sub-division or any agency thereof or for any institution or undertaking in the territory of any member as well as for international or regional agencies or institutions concerned with the development of Africa. Subject to the provisions of this Chapter, the Bank may carry out its operations in any of the following ways:

(a) by making or participating in, direct loans out of:

(i) funds corresponding to its unimpaired subscribed paid-up capital and, except as provided in Article 20 of this Agreement, to its reserves and undistributed surplus; or out of

(ii) funds corresponding to special resources; or

(b) by making or participating in, direct loans out of funds borrowed or otherwise acquired by the Bank for inclusion in its ordinary capital resources or in special resources; or

(c) by investment of funds referred to in sub-paragraph (a) or (b)

of this paragraph in the equity capital of an undertaking or institution; or

(d) by guaranteeing, in whole or in part, loans made by others.

(2) The provisions of this Agreement applying to direct loans which the Bank may make pursuant to sub-paragraph (a) or (b) of the preceding paragraph shall also apply to its participation in any direct loan undertaken pursuant to any of those sub-paragraphs. Equally, the provisions of this Agreement applying to guarantees of loans undertaken by the Bank pursuant to sub-paragraph (d) of the preceding paragraph shall apply where the Bank guarantees part of such a loan only.

ARTICLE 15

Limitations on Operations

(1) The total amount outstanding in respect of the ordinary operations of the Bank shall not at any time exceed the total amount of its unimpaired subscribed capital, reserves and surplus included in its ordinary capital resources excepting, however, the special reserve provided for in Article 20 of this Agreement.

(2) The total amount outstanding in respect of the special operations of the Bank relating to any Special Fund shall not at any time exceed the total amount of the unimpaired special resources appertaining to that Special Fund.

(3) In the case of loans made out of funds borrowed by the Bank to which the commitment to calls provided for in paragraph (4) of Article 7 of this Agreement applies, the total amount of principal outstanding and payable to the Bank in a specific currency shall not at any time exceed the total amount of principal outstanding in respect of funds borrowed by the Bank that are payable in the same currency.

(4) (a) In the case of investments made by virtue of paragraph (1) (c) of Article 14 of this Agreement out of the ordinary capital resources of the Bank, the total amount outstanding shall not at any time exceed ten per cent of the aggregate amount of the paid-up capital stock of the Bank together with the reserves and surplus included in its ordinary capital resources excepting, however, the special reserve provided for in Article 20 of this Agreement.

(b) At the time it is made, the amount of any specific investment referred to in the preceding sub-paragraph shall not exceed a percentage of equity capital of the institution or undertaking concerned, which the Board of Governors shall have fixed for any investment to be made by virtue of paragraph (1) (c) of Article 14 of this Agreement. In no event shall the Bank seek to obtain by such an investment a controlling interest in the institution or undertaking concerned.

ARTICLE 16

Provision of Currencies for Direct Loans

In making direct loans, the Bank shall furnish the borrower with currencies other than the currency of the member in whose territory the project concerned is to be carried out (the latter currency hereinafter to be called "local currency"), which are required to meet foreign exchange expenditure on that project; provided always that the Bank may, in making direct loans, provide financing to meet local expenditure on the project concerned :

(a) where it can do so by supplying local currency without selling any of its holdings in gold or convertible currencies; or

(b) where, in the opinion of the Bank, local expenditure on that project is likely to cause undue loss or strain on the balance of payments of the country where that project is to be carried out and the amount of such financing by the Bank does not exceed a reasonable portion of the total local expenditure incurred on that project.

ARTICLE 17

Operational Principles

(1) The operations of the Bank shall be conducted in accordance with the following principles :

(a) (i) The operations of the Bank shall, except in special circumstances, provide for the financing of specific projects,

or groups of projects, particularly those forming part of a national or regional development programme urgently required for the economic or social development of its members. They may, however, include global loans to, or guarantees of loans made to, African national development banks or other suitable institutions, in order that the latter may finance projects of a specified type serving the purpose of the Bank within the respective fields of activities of such banks or institutions;

(ii) In selecting suitable projects, the Bank shall always be guided by the provisions of paragraph (1) (a) of Article 2 of this Agreement and by the potential contribution of the project concerned to the purpose of the Bank rather than by the type of the project. It shall, however, pay special attention to the selection of suitable multinational projects;

(b) The Bank shall not provide for the financing of a project in the territory of a member if that member objects thereto;

(c) The Bank shall not provide for the financing of a project to the extent that in its opinion the recipient may obtain the finance or facilities elsewhere on terms that the Bank considers are reasonable for the recipient;

(d) Subject to the provisions of Articles 16 and 24 of this Agreement, the Bank shall not impose conditions enjoining that the proceeds of any financing undertaken pursuant to its ordinary operations shall be spent in the territory of any particular country nor that such proceeds shall not be spent in the territory of any particular country;

(e) In making or guaranteeing a loan, the Bank shall pay due regard to the prospects that the borrower and the guarantor, if any, will be in a position to meet their obligations under the loan;

(f) In making or guaranteeing a loan, the Bank shall be satisfied that the rate of interest and other charges are reasonable and such rate, charges and the schedule for the repayment of principal are appropriate for the project concerned;

(g) In the case of a direct loan made by the Bank, the borrower shall be permitted by the Bank to draw its funds only to meet expenditure in connexion with the project as it is actually incurred;

(h) The Bank shall make arrangements to ensure that the proceeds of any loan made or guaranteed by it are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency;

(i) The Bank shall seek to maintain a reaonsable diversification in its investments in equity capital;

(j) The Bank shall apply sound banking principles to its operations and, in particular, to its investments in equity capital. It shall not assume responsibility for managing any institution or undertaking in which it has an investment; and

(k) In guaranteeing a loan made by other investors, the Bank shall receive suitable compensation for its risk.

'2) The Bank shall adopt such rules and regulations as are required for the consideration of projects submitted to it.

ARTICLE 18

Terms and Conditions for Direct Loans and Guarantees

(1) In the case of direct loans made by the Bank, the contract:

(a) shall establish, in conformity with the operational principles set forth in paragraph (1) of Article 17 of this Agreement and subject to the other provisions of this Chapter, all the terms and conditions for the loan concerned, including those relating to amortization, interest and other charges, and to maturities and dates of payment; and, in particular

(b) shall provide that — subject to paragraph (3) (c) of this Article — payments to the Bank of amortization, interest, commission and other charges shall be made in the currency loaned, unless — in the case of a direct loan made as part of special operations — the rules and regulations provide otherwise.

(2) In the case of loans guaranteed by the Bank, the contract of guarantee:

(a) shall establish, in conformity with the operational principles set forth in paragraph (1) of Article 17 of this Agreement and subject to the other provisions of this Chapter, all the terms and conditions of the guarantee concerned including those relating to the fees, commission, and other charges of the Bank; and, in particular

(b) shall provide that — subject to paragraph (3) (c) of this

Article — all payments to the Bank under the guarantee contract shall be made in the currency loaned, unless — in the case of a loan guaranteed as part of special operations — the rules and regulations provide otherwise; and

(c) shall also provide that the Bank may terminate its liability with respect to interest if, upon default by the borrower and the guarantor, if any, the Bank offers to purchase, at par and interest accrued to a date designated in the offer, the bonds or other obligations guaranteed.

(3) In the case of direct loans made or loans guaranteed by the Bank, the Bank:

(a) in determining the terms and conditions for the operation, shall take due account of the terms and conditions on which the corresponding funds were obtained by the Bank;

(b) where the recipient is not a member, may, when it deems it advisable, require that the member in whose territory the project concerned is to be carried out, or a public agency or institution of that member acceptable to the Bank, guarantee the repayment of the principal and the payment of interest and other charges on the loan;

(c) shall expressly state the currency in which all payments to the Bank under the contract concerned shall be made. At the option of the borrower, however, such payments may always be made in gold or convertible currency or, subject to the agreement of the Bank in any other currency; and

(d) may attach such other terms or conditions, as it deems appropriate, taking into account both the interest of the member directly concerned in the project and the interests of the members as a whole.

ARTICLE 19

Commission and Fees

(1) The Bank shall charge a commission on direct loans made and guarantees given as part of its ordinary operations. This commission, payable periodically, shall be computed on the amount outstanding on each loan or guarantee and shall be at the rate of not less than one per cent per annum, unless the Bank, after the first ten years of its operations, decides to change this minimum rate by a majority of two-thirds of its members representing not less than three-quarters of the total voting power of the members.

(2) In guaranteeing a loan as part of its ordinary operations, the Bank shall charge a guarantee fee, at a rate determined by the Board of Directors. payable periodically on the amount of the loan outstanding.

(3) Other charges of the Bank in its ordinary operations and the commission, fees and other charges in its special operations shall be determined by the Board of Directors.

ARTICLE 20

Special Reserve

The amount of commissions received by the Bank pursuant to Article 19 of this Agreement shall be set aside as a special reserve which shall be kept for meeting liabilities of the Bank in accordance with its Article 21. The special reserve shall be held in such liquid form, permitted under this Agreement, as the Board of Directors may decide.

ARTICLE 21

Methods of Meeting Liabilities of the Bank

(Ordinary Operations)

(1) Whenever necessary to meet contractual payments of interest, other charges or amortization on the borrowing of the Bank, or to meet its liabilities with respect to similar payments in respect of loans guaranteed by it and chargeable to its ordinary capital resources, the Bank may call an appropriate amount of the unpaid subscribed callable capital in accordance with paragraph (4) of Article 7 of this Agreement.

(2) In cases of default in respect of a loan made out of borrowed funds or guaranteed by the Bank as part of its ordinary operations, the Bank may, if it believes that the default may be of long duration, call an additional amount of such callable capital not to exceed in any one year one per cent of the total subscriptions of the members, for the following purposes:

(a) To redeem before maturity, of otherwise discharge, its liability on all or part of the outstanding principal of any loan guaranteed by it in respect of which the debtor is in default; and

(b) To repurchase, or otherwise discharge, its liability on all or part of its own outstanding borrowing.

ARTICLE 22

Methods of Meeting Liabilities on Borrowings for Special Funds

Payments in satisfaction of any liability in respect of borrowings of funds for inclusion in the special resources appertaining to a Special Fund shall be charged:

(i) first, against any reserve established for this purpose for or within the Special Fund concerned; and

(ii) then, against any other assets available in the special resources appertaining to that Special Fund.

CHAPTER IV

Borrowing and Other Additional Powers

ARTICLE 23

General Powers

In addition to the powers provided elsewhere in this Agreement, the bank shall have power to:

(a) borrow funds in member countries or elsewhere, and in that connexion to furnish such collateral or other security as it shall determine provided always that:

(i) before making a sale of its obligations in the market of a member, the Bank shall have obtained its approval;

(ii) where the obligations of the Bank are to be denominated in the currency of a member, the Bank shall have obtained its approval; and

(iii) where the funds to be borrowed are to be included in its ordinary capital resources, the Bank shall have obtained, where appropriate, the approval of the members referred to in sub-paragraphs (i) and (ii) of this paragraph that the proceeds may be exchanged for any other currency without any restrictions;

(b) buy and sell securities the Bank has issued or guaranteed or in which it has invested provided always that it shall have obtained the approval of any member in whose territory the securities are to be bought or sold;

(c) guarantee or underwrite securities in which it has invested in order to facilitate their sale;

(d) invest funds not needed in its operations in such obligations as it may determine and invest funds held by the Bank for pensions or similar purposes in marketable securities;

(e) undertake activities incidental to its operations such as, among others, the promotion of consortia for financing which serves the purpose of the Bank and comes within its functions;

(f) (i) provide all technical advice and assistance which serve its purpose and come within its functions; and

(ii) where expenditure incurred by such a service is not reimbursed, charge the net income of the Bank therewith and, in the first five years of its operations, use up to one per cent of its paid-up capital on such expenditure; provided always that the total expenditure of the Bank on such services in each year of that period does not exceed one-fifth of that percentage; and

(g) exercise such other powers as shall be necessary or desirable in furtherance of its purpose and functions, consistent with the provisions of this Agreement.

ARTICLE 24

Special Borrowing Powers

(1) The Bank may request any member to loan amounts of its currency to the Bank in order to finance expenditure in respect of goods or services produced in the territory of that member for the purpose of a project to be carried out in the territory of another member.

(2) Unless the member concerned invokes economic and financial difficulties which, in its opinion, are likely to be provoked or aggravated by the granting of such a loan to the Bank, that member shall comply with the request of the Bank. The loan shall be made for a period to be agreed with the Bank, which shall be in relation to the duration of the project which the proceeds of that loan are designed to finance.

(3) Unless the member agrees otherwise, the aggregate amount outstanding in respect of its loans made to the Bank pursuant to this Article shall not, at any time, exceed the equivalent of the amount

of its subscription to the capital stock of the Bank.

(4) Loans to the Bank made pursuant to this Article shall bear interest, payable by the Bank to the lending member, at a rate which shall correspond to the average rate of interest paid by the Bank on its borrowings for Special Funds during a period of one year preceding the conclusion of the loan agreement. This rate shall in no event exceed a maximum rate which the Board of Governors shall determine from time to time.

(5) The Bank shall repay the loan, and pay the interest due in respect thereof, in the currency of the lending member or in a currency acceptable to the latter.

(6) All resources obtained by the Bank by virtue of the provisions of this Article shall constitute a Special Fund.

ARTICLE 25

Warning to be Placed on Securities

Every security issued or guaranteed by the Bank shall bear on its face a conspicuous statement to the effect that it is not an obligation of any Government unless it is in fact the obligation of a particular Government in which case it shall so state.

ARTICLE 26

Valuation of Currencies and Determination of Convertibility

Whenever it shall become necessary under this Agreement:

(i) to value any currency in terms of another currency, in terms of gold or of the unit of account defined in paragraph (1) (b) of Article 5 of this Agreement; or

(ii) to determine whether any currency is convertible,

such valuation or determination, as the case may be, shall be reasonably made by the Bank after consultation with the International Monetary Fund.

ARTICLE 27

Use of Currencies

(1) Members may not maintain or impose any restrictions on the

holding or use by the Bank or by any recipient from the Bank. for payments anywhere, of the following:

(a) Gold or convertible currencies received by the Bank in payment of subscriptions to the capital stock of the Bank from its members;

(b) currencies of members purchased with the gold or convertible currencies referred to in the preceding sub-paragraph;

(c) currencies obtained by the Bank by borrowing, pursuant to paragraph (2) of Article 23 of this Agreement, for inclusion in its ordinary capital resources;

(d) gold or currencies received by the Bank in payment on account of principal, interest, dividends or other charges in respect of loans or investments made out of any of the funds referred to in sub-paragraphs (a) to (c) or in payment of commissions or fees in respect of guarantees issued by the Bank; and

(e) currencies, other than its own, received by a member from the Bank in distribution of the net income of the Bank in accordance with Article 42 of this Agreement.

(2) Members may not maintain or impose any restrictions on the holding or use by the Bank or by any recipient from the Bank. for payments anywhere, of currency of a member received by the Bank which does not come within the provisions of the preceding paragraph, unless:

(a) that member declares that it desires the use of such currency to be restricted to payments for goods or services produced in its territory; or

(b) such currency forms part of the special resources of the Bank and its use is subject to special rules and regulations.

(3) Members may not maintain or impose any restrictions on the holding or use by the Bank, for making amortization or anticipatory payments or for repurchasing — in whole or in part — its obligations, of currencies received by the Bank in repayment of direct loans made out of its ordinary capital resources.

(4) The Bank shall not use gold or currencies which it holds for the purchase of other currencies of its members except:

(a) in order to meet its existing obligations; or

(b) pursuant to a decision of the Board of Directors adopted by a two-thirds majority of the total voting power of the members.

ARTICLE 28

Maintenance of Value of the Currency Holdings of the Bank

(1) Whenever the par value of the currency of a member is reduced in terms of the unit of account defined in paragraph (1) (b) of Article 5 of this Agreement, or its foreign exchange value has, in the opinion of the Bank, depreciated to a significant extent, that member shall pay to the Bank within a reasonable time an amount of its currency required to maintain the value of all such currency held by the Bank excepting currency derived by the Bank from its borrowing.

(2) Whenever the par value of the currency of a member is increased in terms of the said unit of account, or its foreign exchange value has, in the opinion of the Bank, appreciated to a significant extent, the Bank shall pay to that member within a reasonable time an amount of that currency required to adjust the value of all such currency held by the Bank, excepting currency derived by the Bank from its borrowing.

(3) The Bank may waive the provisions of this Article where a uniform proportionate change in the par value of the currencies of all its members takes place.

CHAPTER V

Organization and Management

ARTICLE 29

Board of Governors: Powers

(1) All the powers of the Bank shall be vested in the Board of Governors. In particular, the Board shall issue general directives concerning the credit policy of the Bank.

(2) The Board of Governors may delegate to the Board of Directors all its powers except the power to:

(a) decrease the authorized capital stock of the Bank;

(b) establish or accept the administration of Special Funds;

(c) authorize the conclusion of general arrangements for co-operation with the authorities of African countries which have not yet attained independent status or of general agree-

ments for co-operation with African governments which have not yet acquired membership of the Bank, as well as of such agreements with other governments and with other international organizations;

(d) determine the remuneration of directors and their alternates;

(e) select outside auditors to certify the General Balance Sheet and the Statement of Profit and Loss of the Bank and to select such other experts as may be necessary to examine and report on the general management of the Bank;

(f) approve, after reviewing the report of the auditors, the General Balance Sheet and Statement of Profit and Loss of the Bank; and

(g) exercise such other powers as are expressly provided for that Board in this Agreement.

(3) The Board of Governors shall retain full powers to exercise authority over any matter delegated to the Board of Directors pursuant to paragraph (2) of this Article.

ARTICLE 30

Board of Governors: Composition

(1) Each member shall be represented on the Board of Governors and shall appoint one governor and one alternate governor. They shall be persons of the highest competence and wide experience in economic and financial matters and shall be nationals of the member States. Each governor and alternate shall serve for five years, subject to termination of appointment at any time, or to reappointment at any time, or to reappointment, at the pleasure of the appointing member. No alternate may vote except in the absence of his principal. At its annual meeting, the Board shall designate one of the governors as Chairman who shall hold office until the election of the Chairman at the next annual meeting of the Board.

(2) Governors and alternates shall serve as such without remuneration from the Bank, but the Bank may pay them reasonable expenses incurred in attending meetings.

ARTICLE 31

Board of Governors: Procedure

(1) The Board of Governors shall hold an annual meeting and such other meetings as may be provided for by the Board or called by

the Board of Directors. Meetings of the Board of Governors shall be called, by the Board of Directors, whenever requested by five members of the Bank, or by members having one-quarter of the total voting power of the members.

(2) A quorum for any meeting of the Board of Governors shall be a majority of the total number of Governors on their alternates, representing not less than two-thirds of the total voting power of the members.

(3) The Board of Governors may by regulation establish a procedure whereby the Board of Directors may, when it deems such action advisable, obtain a vote of the governors on a specific question without calling a meeting of the Board.

(4) The Board of Governors, and the Board of Directors to the extent authorized, may establish such subsidiary bodies and adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank.

ARTICLE 32

Board of Directors: Powers

Without prejudice to the powers of the Board of Governors as provided in Article 29 of this Agreement, the Board of Directors shall be responsible for the conduct of the general operations of the Bank and for this purpose shall, in addition to the powers provided for it expressly in this Agreement, exercise all the powers delegated to it by the Board of Governors, and in particular:

(a) elect the President and on his recommendation, one or more Vice-Presidents of the Bank and determine their terms of service;

(b) prepare the work of the Board of Governors;

(c) in conformity with the general directives of the Board of Governors, take decisions concerning particular direct loans, guarantees, investments in equity capital and borrowing of funds by the Bank;

(d) determine the rates of interest for direct loans and of commissions for guarantees;

(e) submit the accounts for each financial year and an annual report for approval to the Board of Governors at each annual meeting; and

(f) determine the general structure of the services of the Bank.

ARTICLE 33

Board of Directors: Composition

(1) The Board of Directors shall be composed of nine members who shall not be governors or alternate governors. They shall be elected by the Board of Governors in accordance with Annex B to this Agreement, which shall form an integral part thereof. In electing the Board of Directors, the Board of Governors shall have due regard to the high competence in economic and financial matters required for the office.

(2) Each director shall appoint an alternate who shall act for him when he is not present. Directors and their alternates shall be nationals of member States; but no alternate may be of the same nationality as his director. An alternate may participate in meetings of the Board but may vote only when he is acting in place of his director.

(3) Directors shall be elected for a term of three years and may be re-elected. They shall continue in office until their successors are elected. If the office of a director becomes vacant more than 180 days before the end of his term, a successor shall be elected in accordance with Annex B to this Agreement, for the remainder of the term by the Board of Governors at its next session. While the office remains vacant the alternate of the former director shall exercise the powers of the latter except that of appointing an alternate.

ARTICLE 34

Board of Directors: Procedure

(1) The Board of Directors shall function in continuous session at the principal office of the Bank and shall meet as often as the business of the Bank may require.

(2) A quorum for any meeting of the Board of Directors shall be a majority of the total number of directors representing not less than two-thirds of the total voting power of the members.

(3) The Board of Governors shall adopt regulations under which, if there is no director of its nationality, a member may be represented at a meeting of the Board of Directors when a request made by, or a matter particularly affecting, that member is under consideration.

ARTICLE 35

Voting

(1) Each member shall have 625 votes and, in addition, one vote for each share of the capital stock of the Bank held by that member.

(2) In voting in the Board of Governors, each governor shall be entitled to cast the votes of the member he represents. Except as otherwise expressly provided in this Agreement, all matters before the Board of Governors shall be decided by a majority of the voting power represented at the meeting.

(3) In voting in the Board of Directors, each director shall be entitled to cast the number of votes that counted towards his election, which votes shall be cast as a unit. Except as otherwise provided in this Agreement, all matters before the Board of Directors shall be decided by a majority of the voting power represented at the meeting.

ARTICLE 36

The President: Appointment

The Board of Directors, by a majority of the total voting power of the members, shall elect the President of the Bank. He shall be a person of the highest competence in matters pertaining to the activities, management and administration of the Bank and shall be a national of a member State. While holding office, neither he nor any Vice-President shall be a governor or a director or alternate for either. The term of office of the President shall be five years. It may be renewed. He shall, however, cease to hold office if the Board of Directors so decides by a two-thirds majority of the voting power of the members.

ARTICLE 37

The Office of the President

(1) The President shall be Chairman of the Board of Directors but shall have no vote except a deciding vote in case of an equal division. He may participate in meetings of the Board of Governors but shall not vote.

(2) The President shall be chief of the staff of the Bank and shall conduct, under the direction of the Board of Directors, the current business of the Bank. He shall be responsible for the organization of the officers and staff of the Bank whom he shall appoint and

release in accordance with regulations adopted by the Bank. He shall fix the terms of their employment in accordance with rules of sound management and financial policy.

(3) The President shall be the legal representative of the Bank.

(4) The Bank shall adopt regulations which shall determine who shall legally represent the Bank and perform the other duties of the President in the event that he is absent or that his office should become vacant.

(5) In appointing the officers and staff, the President shall make it his foremost consideration to secure the highest standards of efficiency, technical competence and integrity. He shall pay full regard to the recruitment of personnel among nationals of African countries, especially as far as senior posts of an executive nature are concerned. He shall recruit them on as wide a geographical basis as possible.

ARTICLE 38

Prohibition of Political Activity, the International Character of the Bank

(1) The Bank shall not accept loans or assistance that could in any way prejudice, limit, deflect or otherwise alter its purpose or functions.

(2) The Bank, its President, Vice-President, officers and staff shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member concerned. Only economic considerations shall be relevant to their decisions. Such considerations shall be weighed impartially in order to achieve and carry out the functions of the Bank.

(3) The President, Vice-Presidents, officers and staff of the Bank, in discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.

ARTICLE 39

Office of the Bank

(1) The principal office of the Bank shall be located in the territory of a member State. The choice of the location of the principal office of the Bank shall be made by the Board of Governors at its first meeting, taking into account the availability of facilities for the

proper functioning of the Bank.

(2) Notwithstanding the provisions of Article 35 of this Agreement, the choice of the location of the principal office of the Bank shall be made by the Board of Governors in accordance with the conditions that applied to the adoption of this Agreement.

(3) The Bank may establish branch offices or agencies elsewhere.

ARTICLE 40

Channel of Communications, Depositories

(1) Each member shall designate an appropriate authority with which the Bank may communicate in connexion with any matter arising under this Agreement.

(2) Each member shall designate its central bank or such other institution as may be agreed by the Bank, as a depository with which the Bank may keep its holdings of currency of that member as well as other assets of the Bank.

(3) The Bank may hold its assets, including gold and convertible currencies, with such depositories as the Board of Directors shall determine.

ARTICLE 41

Publication of the Agreement, Working Languages, Provision of Information and Reports

(1) The Bank shall endeavour to make available the text of this Agreement and all its important documents in the principal languages used in Africa. The working languages of the Bank shall be, if possible, African languages, English and French.

(2) Members shall furnish the Bank with all information it may request of them in order to facilitate the performance of its functions.

(3) The Bank shall publish and transmit to its members an Annual Report containing an audited statement of the accounts. It shall also transmit quarterly to the members a summary statement of its financial position and a profit and loss statement showing the results of its operations. The Annual Report and the Quarterly Statements shall be drawn up in accordance with the provisions of paragraph (4) of Article 13 of this Agreement.

(4) The Bank may also publish such other reports as it deems desirable to carry out its purpose and functions. They shall be transmitted to the members of the Bank.

ARTICLE 42

Allocation of Net Income

(1) The Board of Governors shall determine annually what part of the net income of the Bank, including the net income accruing to its Special Funds, shall be allocated — after making provision for reserves — to surplus and what part, if any, shall be distributed.

(2) The distribution referred to in the preceding paragraph shall be made in proportion to the number of shares held by each member.

(3) Payments shall be made in such manner and in such currency as the Board of Governors shall determine.

CHAPTER VI

Withdrawal and Suspension of Members, Temporary Suspension and Termination of Operations of the Bank

ARTICLE 43

Withdrawal

(1) Any member may withdraw from the Bank at any time by transmitting a notice in writing to the Bank at its principal office.

(2) Withdrawal by a member shall become effective on the date specified in its notice but in no event less than six months after the date that notice has been received by the Bank.

ARTICLE 44

Suspension

(1) If it appears to the Board of Directors that a member fails to fulfil any of its obligations to the Bank, that member shall be suspended by that Board unless the Board of Governors at a subsequent meeting, called by the Board of Directors for that purpose, decides otherwise by a decision taken by a majority of the Governors exercising a majority of the total voting power of the members.

(2) A member so suspended shall automatically cease to be a member of the Bank one year from the date of suspension unless a decision is taken by the Board of Governors by the same majority to restore the member to good standing.

(3) While under suspension, a member shall not be entitled to exercise any rights under this Agreement, except the right of with-

drawal, but shall remain subject to all obligations.

ARTICLE 45

Settlement of Accounts

(1) After the date on which a State ceases to be a member (hereinafter in this Article called the "termination date"), the member shall remain liable for its direct obligations to the Bank and for its contingent liabilities to the Bank so long as any part of the loans or guarantees contracted before the termination date is outstanding; but it shall cease to incur liabilities with respect to loans and guarantees entered into thereafter by the Bank and to share either in the income or the expenses of the Bank.

(2) At the time a State ceases to be a member, the Bank shall arrange for the repurchase of its shares as a part of the settlement of accounts with that State in accordance with the provisions of paragraphs (3) and (4) of this Article. For this purpose, the repurchase price of the shares shall be the value shown by the books of the Bank on the termination date.

(3) The payment for shares repurchased by the Bank under this Article shall be governed by the following conditions:

(a) Any amount due to the State concerned for its shares shall be withheld so long as that State, its central Bank or any of its agencies remains liable, as borrower or guarantor, to the Bank and such amount may, at the option of the Bank, be applied on any such liability as it matures. No amount shall be withheld on account of the liability of the State resulting from its subscription for shares in accordance with paragraph (4) of Article 7 of this Agreement. In any event, no amount due to a member for its shares shall be paid until six months after the termination date.

(b) Payments for shares may be made from time to time, upon their surrender by the Government of the State concerned, to the extent by which the amount due as the repurchase price in accordance with paragraph (2) of this Article exceeds the aggregate amount of liabilities on loans and guarantees referred to in sub-paragraph (a) of this paragraph until the former member has received the full repurchase price.

(c) Payments shall be made in the currency of the State receiving payment or, if such currency is not available, in gold or convertible currency.

(d) If losses are sustained by the Bank on any guarantees or loans which were outstanding on the termination date and the amount of such losses exceeds the amount of the reserve provided against losses on that date, the State concerned shall repay, upon demand, the amount by which the repurchase price of its shares would have been reduced, if the losses had been taken into account when the repurchase price was determined. In addition, the former member shall remain liable on any call for unpaid subscriptions in accordance with paragraph (4) of Article 7 of this Agreement, to the extent that it would have been required to respond if the impairment of capital had occurred and the call had been made at the time the repurchase price of its shares was determined.

(4) If the Bank terminates its operations pursuant to Article 47 of this Agreement within six months of the termination date, all rights of the State concerned shall be determined in accordance with the provisions of its Articles 47 to 49.

ARTICLE 46

Temporary Suspension of Operations

In an emergency, the Board of Directors may suspend temporarily operations in respect of new loans and guarantees pending an opportunity for further consideration and action by the Board of Governors.

ARTICLE 47

Termination of Operations

(1) The Bank may terminate its operations in respect of new loans and guarantees by a decision of the Board of Governors exercising a majority of the total voting power of the members.

(2) After such termination, the Bank shall forthwith cease all activities, except those incident to the orderly realization, conservation and preservation of its assets and settlement of its obligations.

ARTICLE 48

Liability of Members and Payment of Claims

(1) In the event of termination of the operations of the Bank, the liability of all members for uncalled subscriptions to the capital

stock of the Bank and in respect of the depreciation of their currencies shall continue until all claims of creditors, including all contingent claims, shall have been discharged.

(2) All creditors holding direct claims shall be paid out of the assets of the Bank and then out of payments to the Bank on calls on unpaid subscriptions. Before making any payments to creditors holding direct claims, the Board of Directors shall make such arrangements as are necessary, in its judgement, to ensure a pro rata distribution among holders of direct and contingent claims.

ARTICLE 49

Distribution of Assets

(1) In the event of termination of operations of the Bank, no distribution shall be made to members on account of their subscriptions to the capital stock of the Bank until:

(i) All liabilities to creditors have been discharged or provided for; and

(ii) the Board of Governors has taken a decision to make a distribution. This decision shall be taken by the Board exercising a majority of the total voting power of the members.

(2) After a decision to make a distribution has been taken in accordance with the preceding paragraph, the Board of Directors may by a two-thirds majority vote make successive distributions of the assets of the Bank to members until all assets have been distributed. This distribution shall be subject to the prior settlement of all outstanding claims of the Bank against each member.

(3) Before any distribution of assets is made, the Board of Directors shall fix the proportionate share of each member according to the ratio of its shareholding to the total outstanding shares of the Bank.

(4) The Board of Directors shall value the assets to be distributed at the date of distribution and then proceed to distribute in the following manner:

(a) There shall be paid to each member in its own obligations or those of its official agencies or legal entities within its territories, to the extent that they are available for distribution, an amount equivalent in value to its proportionate share of the total amount to be distributed.

(b) Any balance due to a member after payment has been made in accordance with the preceding sub-paragraph, shall be paid in its currency, to the extent that it is held by the Bank, up to an amount equivalent in value to such balance.

(c) Any balance due a member after payment has been made in accordance with sub-paragraphs (a) and (b) of this paragraph shall be paid in gold or currency acceptable to that member, to the extent that they are held by the Bank, up to an amount equivalent in value to such balance.

(d) Any remaining assets held by the Bank after payments have been made to members in accordance with sub-paragraphs (a) to (c) of this paragraph shall be distributed pro rata among the members.

(5) Any member receiving assets distributed by the Bank in accordance with the preceding paragraph, shall enjoy the same rights with respect to such assets as the Bank enjoyed before their distribution.

CHAPTER VII

Status, Immunities, Exemptions and Privileges

ARTICLE 50

Status

To enable it to fulfil its purpose and the functions with which it is entrusted, the Bank shall possess full international personality. To those ends, it may enter into agreements with members, non-member States and other international organizations. To the same ends, the status, immunities, exemptions and privileges set forth in this Chapter shall be accorded to the Bank in the territory of each member.

ARTICLE 51

Status in Member Countries

In the territory of each member the Bank shall possess full juridical personality and, in particular, full capacity:

(a) to contract;

(b) to acquire, and dispose of, immovable and movable property; and

(c) to institute legal proceedings.

ARTICLE 52

Judicial Proceedings

(1) The Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers when it may be used only in a court of competent jurisdiction in the territory of a member in which the Bank has its principal office, or in the territory of a member or non-member State where it has appointed an agent for the purpose of accepting service or notice of process or has issued guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members.

(2) The property and assets of the Bank shall, wherever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgement against the Bank.

ARTICLE 53

Immunity of Assets and Archives

(1) Property and assets of the Bank, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action.

(2) The archives of the Bank and, in general, all documents belonging to it, or held by it, shall be inviolable, wherever located.

ARTICLE 54

Freedom of Assets from Restriction

To the extent necessary to carry out the purpose and functions of the Bank and subject to the provisions of this Agreement, all property and other assets of the Bank shall be exempt from restrictions, regulations, controls and moratoria of any nature.

ARTICLE 55

Privilege for Communications

Official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members.

ARTICLE 56

Personal Immunities and Privileges

(1) All governors, directors, alternates, officers and employees of the Bank:

(i) shall be immune from legal process with respect to acts performed by them in their official capacity;

(ii) where they are not local nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations, and the same facilities as regards exchange regulations as are accorded by members to the representatives, officials and employees of comparable rank of other members; and

(iii) Shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members.

(2) Experts and consultants performing missions for the Bank shall be accorded such immunities and privileges as are, in the opinion of the Bank, necessary for the independent exercise of their functions during the period of their mission, including the time spent on journeys in connexion therewith.

ARTICLE 57

Exemption from Taxation

(1) The Bank, its property, other assets, income and its operations and transactions, shall be exempt from all taxation and from all customs duties. The Bank shall also be exempt from any obligation relating to the payment, withholding or collection of any tax or duty.

(2) No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to directors, alternates, officers and other professional staff of the Bank.

(3) No tax of any kind shall be levied on any obligation or security issued by the Bank, including any dividend or interest thereon, by whomsoever held:

(i) which discriminates against such obligation or security solely because it is issued by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Bank.

(4) No tax of any kind shall be levied on any obligation or security guaranteed by the Bank, including any dividend or interest thereon, by whomsoever held:

(i) which discriminates against such obligation or security solely because it is guaranteed by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the location of any office or place of business maintained by the Bank.

ARTICLE 58

Notification of Implementation

Each member shall promptly inform the Bank of the specific action which it has taken to make effective in its territory the provisions of this Chapter.

ARTICLE 59

Application of Immunities, Exemptions and Privileges

The immunities, exemptions and privileges provided in this Chapter are granted in the interests of the Bank. The Board of Directors may waive, to such extent and upon such conditions as it may determine, the immunities and exemptions provided in Article 52, 54, 56, and 57 of this Agreement in cases where its action would in its opinion, further the interests of the Bank. The President shall have the right and the duty to waive the immunity of any official in cases where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Bank.

CHAPTER VIII

Amendments, Interpretation, Arbitration

ARTICLE 60.

Amendments

(1) Any proposal to introduce modifications to this Agreement, whether emanating from a member, a governor or the Board of Directors, shall be communicated to the Chairman of the Board of Governors, who shall bring the proposal before that Board. If the

proposed amendment is approved by the Board, the Bank shall, by circular letter or telegram, ask the members whether they accept the proposed amendment. When two-thirds of the members having three-quarters of the total voting power of the members, have accepted the proposed amendment, the Bank shall certify the fact by formal communication addressed to the members.

(2) Notwithstanding paragraph (1) of this Article, acceptance by all the members is required for any amendment modifying:

(i) the right secured by paragraph (2) of Article 6 of this Agreement;

(ii) the limitation on liability provided in paragraph (5) of that Article; and

(iii) the right to withdraw from the Bank provided in Article 43 of this Agreement.

(3) Amendments shall enter into force for all members three months after the date of the formal communication provided for in paragraph (1) of this Article unless the Board of Governors specifies a different period.

(4) Notwithstanding the provisions of paragraph (1) of this Article, three years at the latest after the entry into force of this Agreement and in the light of the experience of the Bank, the rule according to which each member should have one vote shall be examined by the Board of Governors or at a meeting of Heads of State of the member countries in accordance with the conditions that applied to the adoption of this Agreement.

ARTICLE 61

Interpretation

(1) The English and French texts of this Agreement shall be regarded as equally authentic.

(2) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Board of Directors for decision. If there is no director of its nationality on that Board, a member particularly affected by the question under consideration shall be entitled to direct representation in such cases. Such right of representation shall be regulated by the Board of Governors.

(3) In any case where the Board of Directors has given a decision under paragraph (2) of this Article, any member may require that the question be referred to the Board of Governors, whose decision shall be sought — under a procedure to be established in accordance

with paragraph (3) of Article 31 of this Agreement — within three months. That decision shall be final.

ARTICLE 62

Arbitration

In the case of a dispute between the Bank and the Government of a State which has ceased to be a member, or between the Bank and any member upon the termination of the operations of the Bank, such dispute shall be submitted to arbitration by a tribunal of three arbitrators. One of the arbitrators shall be appointed by the Bank, another by the Government of the State concerned, and the third arbitrator, unless the parties otherwise agree, shall be appointed by such other authority as may have been prescribed by regulations adopted by the Board of Governors. The third arbitrator shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

CHAPTER IX

Final Provisions

ARTICLE 63

Signature and Deposit

(1) This Agreement, deposited with the Secretary-General of the United Nations (hereinafter called the "Depository"), shall remain open until 31 December 1963 for signature by the Governments of States whose names are set forth in Annex A to this Agreement.

(2) The Depository shall communicate certified copies of this Agreement to all the Signatories.

ARTICLE 64

Ratification, Acceptance, Accession and Acquisition of Membership

(1) (a) This Agreement shall be subject to ratification or acceptance by the Signatories. Instruments of ratification or acceptance

shall be deposited by the Signatory Governments with the Depository before 1 July 1965. The Depository shall notify each deposit and the date thereof to the other Signatories.

(b) A State whose instrument of ratification or acceptance is deposited before the date on which this Agreement enters into force, shall become a member of the Bank on that date. Any other Signatory which complies with the provisions of the preceding paragraph, shall become a member on the date on which its instrument of ratification or acceptance is deposited.

(2) States which do not acquire membership of the Bank in accordance with the provisions of paragraph (1) of this Article, may become members — after the Agreement has entered into force — by accession thereto on such terms as the Board of Governors shall determine. The Government of any such State shall deposit, on or before a date appointed by that Board, an instrument of accession with the Depository, who shall notify such deposit and the date thereof to the Bank and to the Parties to this Agreement. Upon the deposit, the State shall become member of the Bank on the appointed date.

ARTICLE 65

Entry into Force

This Agreement shall enter into force upon the deposit of instruments of ratification or acceptance by twelve signatory Governments whose initial subscriptions, as set forth in Annex A to this Agreement, in aggregate comprise not less than sixty-five per cent of the authorized capital stock[1] of the Bank; provided always that 1 January 1964 shall be the earliest date on which this Agreement may enter into force in accordance with the provisions of this Article.

ARTICLE 66

Commencement of Operations

(1) As soon as this Agreement enters into force, each member shall appoint a Governor, and the Trustee appointed for this purpose and for the purpose indicated in paragraph (5) of Article 7 of this Agreement shall call the first meeting of the Board of Governors.

(2) At its first meeting, the Board of Governors:

(a) shall elect nine directors of the Bank in accordance with paragraph (1) of Article 33 of this Agreement; and

(b) shall make arrangements for the determination of the date on which the Bank shall commence its operations.

(3) The Bank shall notify its members of the date of the commencement of its operations.

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[1] The words "authorized capital stock of the Bank" shall be understood to refer to such authorized capital stock of the Bank as is equivalent to 211.2 million units of account and as corresponds to the aggregate initial number of shares to be subscribed by the States that may acquire its membership in accordance with paragraph (1) of Article 64 of the Agreement; see the Memorandum by the Executive Secretary of the United Nations Economic Commission for Africa on the interpretation of Article 65 of the Agreement Establishing the African Development Bank, attached to the Final Act of the Conference.