The Utility of Air Services Agreements in the Regulation of Civil Aviation in Nigeria

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Abstract

Civil aviation is an important global business and a significant driver of the global economy. As a transnational and border crossing phenomenon, civil aviation facilitates the movement of goods and persons from one point to another, as well as helps in advancing international trade and tourism. Before an airline can operate international air service to another country, the Government of such an airline must negotiate with the Government of the destination country. Such negotiation is done under the terms of a bilateral or multilateral air service agreement. Bilateral and multilateral air services agreements, therefore, play a significant role in international aviation industry as instruments of negotiation and cooperation between and among states parties. Through the instrumentality of such agreements, states parties mutually establish a regulatory mechanism for the performance of scheduled air services between them. Nigeria has not only entered into bilateral air services agreements with over ninety countries spanning all continents of the world, but is also signatory to a number of multilateral air services agreements; both with a view to ensuring and providing easy and accessible means of transportation to Nigerian travelling public, and other nationals coming to Nigeria. The central issue is whether Nigeria has adequately positioned herself, with the requisite regulatory, and infrastructural wherewithal to utilize the benefits of Bilateral and Multilateral air services agreements. It was against the backdrop of the foregoing that this article, using the doctrinal research method, examined the utility of air services agreements, both bilateral and multilateral, in the regulation of civil aviation in Nigeria. The article found that apart from the fact that there was no effective regulatory framework in Nigeria to support and complement the regulatory machinery of air services agreements, Nigeria did not have a national carrier or a strong indigenous airline to operate the Nigerian side of the agreements on capacity and designation in order to effectively utilize the economic and other benefits associated with such agreements. The article recommended that Nigeria should put in place a sound regulatory framework that would support and complement the regulatory machinery of air services agreements. It was also recommended that Nigeria should establish a sound national air carrier that would enable the effective operation of the Nigerian side of air services agreements on capacity and designation.

Key Words: civil aviation, regulation, air services agreements, freedoms of the Air, Nigeria

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Introduction

Civil aviation, otherwise referred to as air transportation, is an important global business and a significant driver of the global economy. As a transnational and border crossing phenomenon, civil aviation facilitates the movement of goods and persons from one point to the other, as well as helps in advancing international trade and tourism. But before an airline can operate international air services to another country, the Government of such an airline has to necessarily negotiate with the Government of the destination country. The philosophical basis for such negotiation is predicated on the principle of state sovereignty, which recognizes that each state exercises sovereign authority over the land area constituting it, the adjacent territorial waters and the airspace above it. This is an established principle of customary international law which was confirmed in the Convention on the Regulation of Air Navigation, 1919 (Paris Convention)[1] and reiterated in the Convention on International Civil Aviation, Chicago, 1944 (Chicago Convention)[2]. By the principle of state sovereignty, each state, to the exclusion of all others, has unilateral and absolute right to permit or deny entry into its territory, and to control all movements therein[3]. The operational implication of state sovereignty, therefore, precludes the operation by one state of scheduled international air services over or into the territory of another state without its permission or special authorization. What this translates to is that the whole operation of international civil aviation regulation is anchored on formal consent of states. Such formal consent, permission or special authorization required to be obtained is made possible through Air Services Agreements. Air Services Agreements, therefore, play a prominent role in international aviation industry as instruments of negotiation and co-operation between and among states parties. Such agreements cover items such as traffic rights, capacity, tariffs, designation, ownership and control, safety and security, and so forth. Through the instrumentality of such agreements, states parties mutually

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1 Paris Convention, article 1

2 Chicago Convention, article 1

3 Orwell George, 'Multilateral Conventions' (2007) 1 Public International Air Law Journal, 19

establish a regulatory mechanism for the performance of scheduled air services between them. Air Services Agreements help states parties to influence the growth of international air transport as well as expand their carriers' access to new and emerging markets, and consequently increase their revenue generation for airport, air navigation and other service providers. Air Services Agreements further encourage employment, transfer of technology as well as enhance Foreign Direct Investment. The agreements constitute instruments used by countries to establish international air link between them and to ensure that countries collectively maximize their potential in international air transport.

Nigeria has entered into bilateral air services agreements with over ninety countries across the globe, and signed a number of multilateral air service agreements with some countries, both with a view to ensuring and providing easy and accessible means of transportation to Nigerian travelling public and other nationals coming to Nigeria, as well as to harness the other benefits associated with such agreements. Unfortunately, out of the over ninety bilateral agreements which Nigeria has concluded, only about 29 of such agreements are active, while the remaining ones are inactive[4]. It is also reported that at present, on the basis of bilateral agreements concluded by Nigeria with other countries, twenty five foreign airlines operate flights into Nigeria, some daily, from multiple destinations. Funnily, only one Nigerian airline operates internationally, and one or two others operate on regional routes[5]. It is against this background that this article examines the utility of air services agreements in the regulation of civil aviation in Nigeria, with a view to identifying the problem areas in the implementation of air services agreements entered into by Nigeria with other countries, and making the necessary recommendations. The article is divided into seven parts. Part one is the introduction. Part two deals with the

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4 See Shola Adekola, 'Nigeria and Benefits of Air Travel Agreements' < tribuneonlineng.com/nigeria-and-benefits-of-air>accessed 28 March, 2020; George Etomi, 'Review of the Bilateral Air Services Agreements within the Nigerian Civil Aviation Context' <www.lexology.com/library /detail.aspx?>accessed 11/2/2020.

5 Africa Inc, 'Nigeria's air space to be dominated by Foreign Airlines as Bilateral Air Services Agreements rise to 92'< africainmag.com/2019/10/18/Nigeria-air-space->accessed 4/4/2020.

nature of Air Services Agreement. In part three, the regulatory fulcrum of air services agreements is examined. Part four treats Freedoms of the Air. Part five is on Scheduled Air Services. In part six, implementation of air services agreements in Nigeria is treated. Part seven is the conclusion.

The Nature of Air Services Agreements

Air Services Agreements are international trade agreements that allow international commercial air transport services between the parties thereto. According to Odubayo[6] air services agreements appear in three forms, namely, intergovernmental agreement; exchange of notes between Foreign Ministries or aeronautical authorities which is usually useful in amending, modifying or clarifying an earlier agreement; and adhoc arrangement whereby a foreign government or its designated airline is granted provisional permit or license to engage in international air transportation to or from a territory.

Air services agreements provide the basis for airlines of the countries which are parties thereto to provide international air services for passengers, freight, and mail. They provide the legal basis under international law for international scheduled air services. Once concluded, Air Services Agreements become binding on the parties thereto, and none of the parties can unilaterally resile therefrom. Air Services Agreements are divided into Bilateral Air Services Agreement and Multilateral Air Services Agreement.

Bilateral Air Services Agreement (BASA)

The word 'bilateral' in its ordinary usage connotes involvement of two persons. A bilateral agreement represents an agreement between two persons or two countries. By Article 6 of the Chicago Convention, before a country's airline can operate international air services to another country, there must be a negotiated treaty agreement with the destination country. This is premised on the concept of sovereignty which postulates that each state has complete and exclusive sovereignty over the airspace above

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6 Wilberforce Oladele Odubayo, 'Air Transport Bilaterals of Nigeria: A Study in Treaty Law' (1969) Unpublished LL.M Thesis, McGill University, Montreal, Canada, 26 – 28.

its territory, and no foreign aircraft may enter its airspace or land in its territory for traffic or non-traffic purposes, except as authorized.

When it was apparent, against the backdrop of the concept of sovereignty, during the Chicago Conference, that achieving more freedom in a multi-lateral Convention was impossible, the only way out was for states to turn to reciprocity as a basis for granting each other traffic rights. In practice, such reciprocity is consummated by a bilateral agreement. In other words, because every state has exclusive sovereignty over the airspace above its territory, international agreements become a prerequisite of international air services.

According to Haanappel[7] BASAs are 'international trade agreements in which governmental authorities of two sovereign states attempt to regulate the performance of air services between their respective territories and beyond'. This means that BASAs facilitate the exchange of reciprocal rights and privileges regarding air traffic between two states, with the implication that through the instrumentality of BASAs, two states mutually establish a regulatory mechanism for the performance of scheduled air services between them. Such agreements are usually comprehensive. A Bilateral Air Services Agreement (BASA) is, therefore, an agreement between two states under which the respective designated airlines of the states involved are to operate commercial air services into and out of their states under mutually accepted terms and conditions.

BASA appears to be the major air transport regulatory device utilized by states. Accordingly, international air transport is regulated by a complex web of numerous interlocking BASAs. Through BASAs, states influence the growth of international air transport as well as expand their carriers' access to new and emerging markets. BASAs increase revenue generation for airports, air navigation and other service providers. They encourage employment and transfer of technology. By them, Foreign Direct Investment (FDI) is enhanced thereby impacting on states' Gross National Product and Economic Development generally. They

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7 PPC Haanappel, 'Bilateral Air Transport Agreements: 1913-1980' [1980], 5 Maryland Journal of International Law, 241

promote international link between states thereby supporting and enabling the movement of persons, cargo, trade and tourism.[8]In BASAs, the text of certain Articles of the Chicago Convention is often incorporated[9]. BASAs are negotiated on the basis of the five freedoms prescribed under the International Air Transport Agreement.

The States represented at the Chicago Conference appeared to have contemplated that bilateral treaties would be widely used, and Final Act of the conference incorporated an agreed form of standard agreement to be used in such treaties[10]. Under this standard form of agreement 'the contracting parties grant the rights specified in the Annex thereto necessary for establishing the international civil air routes and services therein described'.[11] The annex 'will include a description of the routes and of the rights granted whether of transit only, of non-traffic stops or of commercial entry as the case maybe, and the conditions incidental to the granting of the rights'.[12] Where rights of non-traffic stops or commercial rights are granted, the Annex will include a designation of the parts of call at which stops can be made, or at which commercial rights for the embarkation and disembarkation of passenger, cargo and mail are authorized[13]. Each state is entitled to 'designate' the carrier by which the rights granted are to be exercised, and the other state is bound to give 'the appropriate operating permission' to the designated carrier subject to the proviso that the carrier 'may be required to qualify before the competent aeronautical authorities of the contracting party granting the rights under the laws and regulations normally applied by those authorities'.[14]

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8 Olaseinde Morenike, '15 Countries Sign Bilateral Air service with Nigeria… 13 others to renegotiate'<@www.ncaa.gov.ng> accessed 24th December, 2015

9 Diedericks – Verschoor, IH, *Introduction to Air Law* (8th edn, Kluwer Law International, 2006), 61

10 Shawcross and Beaumont, *Air Law* (4th edn, Vol.1, Butterworth & Co. [Publishers] Ltd, 1977), 210

11 Ibid

12 Ibid

13 Ibid

14 Ibid

According to Dempsey and Gesell[15], typical bilateral air transport agreements address six broad issues, namely, entry, capacity, rates, discrimination and fair competition, dispute resolution, and safety and security. As regards Entry, the learned authors posit that in most bilateral agreements, specific city pair routes are designated for third, fourth and fifth freedoms of the Air. Most nations limit the number of carriers to one of each flag per route. By capacity, is meant inclusion of a predetermination of capacity offered on the routes (including frequency, seats, or scheduling of flights), or reciprocity, or a sharing of revenue and/or costs. Relating to Rates, it means calling for rates to beset individually by carriers, and filing in tariffs with the aeronautical authorities of each government. The provision with respect to 'Discrimination and Fair Competition means requiring a 'fair and equal opportunity to operate' in the market. It entails specifying duties of reasonableness, non-discrimination and most favoured nation treatment with respect to a wide variety of so called 'soft-rights' including taxes, customs duties, inspection fees and restrictions, fuel, lubricating oil, spare parts, ground handling, tickets sales, Computer Reservation System (CRS), and currency conversion and remittance. Dispute Resolution provision imposes the requirement of consultation by governments over disputes before any retaliatory action is taken. Early bilateral agreements called for an advisory report by International Civil Aviation Organization (ICAO), or adjudication by ICAO. Modern bilateral agreements, however, have replaced ICAO as a dispute resolution forum with ad-hoc arbitration, usually with three arbitrators. Provisions relating to 'Safety and Security' usually require parties to act in conformity with relevant safety and security legal instruments.[16]

The first air navigation agreement was concluded between France and Germany in 1913.[17]However, the post-World War II era witnessed explosive proliferation of bilateral air transport

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15 Paul Stephen Dempsey and Lawrence E. Gesell, *Air Transportation: Foundations for the 21st Century* (Coast Aire publications, 1997), 306-308

16 Ibid, 308

17 Ibid, 305

agreements, beginning with the Bermuda I Agreement between the USA and the UK in 1946.

BASAs are of different types. The commonly known types are: British type, Chicago type, Bermuda type, and the US Open Skies Agreements. These shall now be examined to discern their general patterns and significant variations.

i) **British Type:** This is also called predetermined, restricted or protectionist agreement. This type of bilateral agreement is a model based on the BASA signed between the UK and the Union of South Africa on the 26th October, 1945.[18] It became the prototype for a series of bilateral agreements which became known as the British Type. Some of the basic characteristics of this type of BASA include: frequencies are to be determined between the operators (the designated airlines) subject to the approval of the contracting states; total route capacity is to be divided equally between the designated airlines of the contracting parties with provision for revision should such equality prove to be not justifiable, and complementary agreements between designated airlines go into administrative details, for example, pooling of traffic revenue (excluding air mail revenue), access to information, statements of account and currency arrangements. It is worthy of note that subsequent UK agreements retained some of the above features but in general it was outclassed by other developments.[19]

ii) **Chicago Type:** This represents BASAs that follow the general framework of the model standard format incorporated in the Final Act of the Chicago Conference. The main characteristics[20] of this type of BASA are that: rights granted and routes are detailed; each state is entitled to designate the carrier by which the rights granted are to be exercised; states are bound to give appropriate operating permission to the designated carrier, subject to satisfaction of the requirements, rules and regulations of the aeronautical authorities of the contracting party granting

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18 Shawcross and Beaumont (n, 10), 211.

19 Ibid

20 Calistus E. Uwakwe, *Introduction to Civil Aviation Law in Nigeria* (Aviation Publishing and Consultancy Co. Ltd, 2006), 111-112

the rights; provisions are made for a non-discrimination in airport charges and in custom duties on petrol, exemption from custom duties of aircraft fuel, equipment, stores, retained on board; mutual recognition of certificates of airworthiness and licenses; and compliance with the national laws and regulations of the state flown over; and absence of capacity and tariff provisions, suggesting that they are not to be regulated.

Most of the bilateral agreements concluded by the UK and indeed by most ICAO members since the Chicago Conference have been in the Chicago Standard Form.[21]Consequently, there seem to be considerable uniformity in the administrative clauses of BASAs.

iii) **Bermuda Type:** This type of BASA has two forms, the Bermuda I and the Bermuda II. Bermuda I is a product of an agreement concluded between the UK and the USA at Bermuda on the 11th February, 1946. Most BASAs followed the pattern of Bermuda I. The reason was that, the Bermuda I Agreement provided a sound basis for the development of international air transport. The agreement consisted of three parts, namely, a Final Act, an Agreement and an Annex. The agreement was generally based on the following principles[22]:air transport available to the traveling public should bear a close relationship to the requirements of the public for such transport; fair and equal opportunity to operate in any international route; in the operation of the trunk services provided for in the agreement, the interests of the air carriers of the other governments shall be taken into consideration so as not to affect unduly the services which the latter provide on all or part of the same routes; and adjustment of fifth freedom traffic with reference to traffic requirement in the country of origin and the countries of destination; to the requirements of the area through which the airline passes after taking into account local and regional services; to the elimination of formulae to predetermine

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21 Shawcross and Beaumont (n, 10), 211.

22 Ibid, 212

frequencies and to the creation of machinery to obviate unfair competition by unjustifiable increases of frequency or capacity.

Under the agreement, effect was given to the above principles by inclusion of relevant provisions addressing capacity, rates or tariffs, determination of rates or tariffs and modifications as to routes.[23] Specifically, the issues regulated in the text of the Bermuda I Agreement included: Exchange of Traffic Rights (the extent of such rights, the conditions attached to them, the routes on which they may be exercised, and the rights of over-flight and transit rights clearly specified); Designation of Air Carriers (each state party designates one air carrier to operate the route(s) specified in the agreement); Substantial Ownership and Effective Control (the air carriers designated under the agreement must comply with the requirement that substantial ownership and effective control must be in the hands of nationals of the designating state); Compliance with National Aviation Regulations (each state party undertakes to ensure that its designated air carriers will fully comply with the aviation laws and regulations of the other state party); Mutual Recognition of Airworthiness Certificates; Exemption from Customs and Duties; Principles Governing Regulation of Capacity (state parties state how many seats and how much cargo space each party may offer on a given route within a given time); Principles Governing the Establishment of Tariffs (the procedure to be used for setting air fares and rates to be charged on the routes covered by the Agreement); Consultation and Information (regulator government contracts are provided to review the operation of the agreement); Settlement of Disputes (either by way of arbitration or a special consultation procedure); and Registration of the Agreement in Conformity with Article 83[24]of the Chicago Convention.[25]

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23 Ibid, 212

24 Article 83 of the Chicago Convention mandates any contracting state which has entered into an arrangement with another state to register such an agreement with the ICAO Council, after which the Council is obligated to make the agreement public as soon as possible.

25 See generally, Ludwig Weber, 'Air Transport Agreements' in Bernhardt, R. (ed), *Encyclopedia of Public International Law, Installment 1* (1981), 15-16.

About thirty years after the Bermuda I Agreement, the British eventually felt that Bermuda I permitted more flights on each route than were needed to meet the demand; planes flew with empty seats and passengers had to be charged higher rates.[26] Upon a notice duly served on the USA by the UK on the 22nd June, 1976, a second Bermuda Agreement (Bermuda II) was signed on the 23rd July, 1977 after a period of extensive negotiations. Bermuda II Agreement replaced the Bermuda I Agreement.

Bermuda II Agreement did not depart much from the Bermuda I Agreement. According to Haanappel[27], 'the key areas of capacity, frequency and tariffs, in Bermuda II reiterate Bermuda I with some elaborations and minor restrictions. As regards capacity, attention is drawn to the obligation of the contracting parties to avoid over capacity and under capacity'. The major feature of Bermuda II Agreement which made it different from Bermuda I was the inclusion of a security clause. The parties incorporated a security clause and pledged to each other to provide 'maximum aid to each other' in preventing threats to the civil aviation and even went to the extent of agreeing to give 'sympathetic consideration' to any request for special security measures by each other.[28] Notwithstanding the adjustments made in the Bermuda II Agreement, it did not receive the acceptance enjoyed by Bermuda I.

iv) **US Open Skies Agreements:** This form of BASA is of liberal character, and fashioned by the USA in line with its policy of deregulation introduced in 1978. It represents the specie of BASAs between the USA and many developing countries of the world.[29] Its main features[30] are multiple designation of airlines by the parties; determination of frequencies and capacity by designated airlines, that is, the airlines are free to determine the number/regularity of flights and the type of aircraft to be used for the operations; determination of prices by designated airline,

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26 LE Gasell, *Aviation and the Law* (3rd edn, Coast Aire Publications), 788.

27 Haanappel (n, 7), 260

28 Gertler, JZ. 'Obsolescence of Bilateral Air Transport Agreements: A Problem and a Challenge' [1988] XIII *Annals of Air and Space Law,* 46.

29 Uwakwe (n, 20), 112

30 Ibid, 113

subject to intervention by the state authorities in cases of unreasonably discriminatory prices, protection of consumer from abuse of dominant position and protection of airlines from artificially low prices arising from direct or indirect government subsidies; and parties are free to choose their point or points of entry into the other parties' territory, that is, no restriction as to designated entry point(s).

Generally, open skies agreements liberalize the rules for international aviation markets and minimize government intervention. By such agreements, therefore, government's interference in scheduled fares is removed except by mutual agreement, and traffic is internationalized.

Multilateral Air Services Agreement (MASA)

Traditionally, air transport services were mainly carried out between states through the instrumentality of BASAs concluded between pairs of states. With the adoption of MASA, it is now possible for a group of states to exchange air transport services. The word 'multilateral' literally connotes more than two. Accordingly, a MASA may ordinarily be construed as an air service agreement involving more than two countries by which the countries involved exchange air transport services rights on basis of which air transport services are carried out among the contracting states. MASA is the most popular method of exchange of air transport services among regional and sub-regional groups.

A typical example of a MASA is the MASA for the Banjul Accord Group. It was adopted by the member states of the Banjul Accord Group on the 29th January, 2004. The Banjul Accord Group (BAG) is a child of Banjul Accord for an accelerated implementation of the Yamoussoukro Declaration of April, 1997. The BAG was signed by seven states, to wit: Gambia, Ghana, Guinea Bissau, Liberia, Nigeria, Cape Verde and Sierra-Leone. The agreement is broadly divided into two parts, namely, the preamble and the main body of the agreement. The preamble establishes the general principles and objectives of the agreement.

The BAG requires the member states to harmonize their policies and procedures on civil aviation and foster the development of international civil aviation through cooperative arrangements between the states. The basic principles of the MASA-BAG are stated in the preamble to include: the cooperation and facilitation of the expansion of international air transport opportunities within the group; the cooperation by airlines within the group with a view to offering the travelling public a variety of service options; ensuring the highest degree of safety and security in international air transport.

The main body of the MASA-BAG deals with issues relating to grant of rights, designation and authorization, validity of certificates (that is, an undertaking by contracting states to recognize certificates and licenses issued by member states); cooperative arrangements (such as blocked-space, code sharing, franchising or leasing arrangement); and tariffs. It is hoped that when eventually necessary infrastructure is put in place for its implementation, the MASA-BAG will be of tremendous help to Nigeria.

Another example of a MASA is the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT), which is also known as the Kona 'Open Skies' agreement. It was concluded in the year 2000 by five 'like-minded' members of the Asia Pacific Economic Cooperation (APEC), namely, Brunei, Chile, New Zealand, Singapore and the United States). The agreement entered into force on 1st May, 2001[31] . The principal objective of this agreement is the promotion of liberalized air service arrangements between the contracting parties. Its main features include: open route schedule, open traffic rights including Seventh Freedom, cargo services, open capacity, airline investment provision which beam searchlight on effective control and principal place of business but offers protection against flag of convenience carriers; third country code sharing, and a minimal traffic filling regime[32].

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31 ICAO Secretariat, 'Overview of Trends and Developments in International Air Transport' (2009) <http://www.icao.int/icao/en/atb/emp/index.html>accessed, 5th December, 2019.

32 Ibid

The Regulatory Fulcrum of Air Services Agreements: The Convention on International Civil Aviation, Chicago, 1944

The Convention on International Civil Aviation was signed on the 7th December, 1944[33]. It is the basic and fundamental legal instrument governing rights and obligations of states with respect to international civil aviation. It constitutes the regulatory fulcrum of air services agreements. It is not only a multilateral legal instrument that sets out basic principles of air navigation and air transport but also serves as a moral compass that brings the peoples of the world together. It is in fact the constitution of international civil aviation. Nigeria acceded to the Chicago Convention on the 14th November, 1960[34], shortly after her independence.

In the final stages of the World War II, several prominent members of the international community expressed concern over the post-war development of international civil aviation. The motivation was primarily because international civil aviation had largely collapsed due to hostilities. Members of the international community realized that the postwar era, as a brave new world, would require solutions that were a product of multilateral negotiations, to a growing number of problems – political, economic and technical. In response to these concerns, the USA took the initiative to convene a conference with the aim of extending the basic legal framework of the Paris Convention worldwide while achieving a system in which the economic principle of freedom of traffic and transport would be better realized.[35] The hope, therefore, was that the conference would

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33 It should be noted that the first multilateral convention on civil aviation is the Paris Convention. This convention was concluded after the World War I. Its main purpose was to ensure better control over international civil aviation through an international legal framework on the basis of the principle of sovereignty. Furthermore, the legal framework was to ensure that the aviation relations between states in the post-war era could be developed peacefully. The United States of America (USA) was absent at the Paris Convention. While the United States was committed to the legal principle of air sovereignty and other convention principles, it however, took the view that the Paris Convention did not sufficiently allow for the economic concept of freedom of air commerce. Consequently, the USA never adhered to the Paris Convention. See generally, Ludwig Weber, 'Chicago Convention' in Rudolf Bernhardt (ed), (n 25), 54; Ludwig Weber, 'Chicago Convention' in Paul Stephen Dempsey and Ram S. Jakhu (eds), Routledge Handbook of Public Aviation Law (Routledge, 2017), 9

34 Uwakwe (n, 20), 6

35 Ibid

lay the foundation for the future growth of the industry. Besides the fact that the convention has established the core principles permitting international transport by air, it has also led to the creation of ICAO.

Although the Chicago Convention was well attended by fifty four (54) out of the fifty five (55) invited states, it was eventually signed by fifty-two (52) States[36]. It was signed along with the International Air Services Transit Agreement (otherwise known as the Two Freedoms Agreement) and the International Air Transport Agreement (otherwise known as the Five Freedoms Agreement).The Chicago Conference where at the Chicago Convention was signed also adopted a number of resolutions.[37]One of the resolutions was that certain studies on technical matters of the kind dealt with in the annexes in the Paris Convention, which had been carried on at Chicago but not completed, be accepted as models for the annexes to the new Chicago Convention.

Furthermore, the conference in recognition of the part that bilateral agreements would have to play in developing international civil aviation, prepared a 'Form of Standard Agreement for Provisional Air Routes'. It was recommended that the state parties to such agreements set out in an annex thereto should provide 'a description of the routes and of the rights granted whether of transit only, of non-traffic stops or of commercial entry as the case may be, and the conditions incidental to the granting of the rights'[38]; and that the agreements themselves provide for such matters as equality of treatment in airport charges and the right to bring in fuel, lubricating oil and spare parts. Further, the agreements provide for exemption from customs duties of 'fuel, lubricating oil, spare parts, regular equipment and aircraft stores retained on board civil aircraft of the airlines of the contracting parties authorized to operate the routes and

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36 Jiefang Huang, *Aviation Safety and ICAO* (Kluwer Law International, 2009), 1; Proceedings of the International Civil Aviation Conference Vol.1 (United State Government Printing Office, Washington, 1948); Paul Stephen Dempsey and Lawrence E. Gesell, (n 14), 303. It should be pointed out that though the convention was signed by 52 states, a number of scholars on international air law posit that the convention was signed by 50 states. See Diederiks-Verschoor (n, 9), 14; Uwakwe (n, 20), 59

37 Johnson, DHN, *Rights in Airspace* (Manchester University Press, 1965),59

38 Ibid, 59

services described in the annex'[39].The agreements also allowed contracting parties to revoke a permit granted to an airline or another state in cases where such parties are not satisfied that 'substantial ownership and effective control' of the airline in question are vested in nationals of a party to the agreement, or in case of failure of an airline to comply with the laws of the state over which it operates or to perform its obligations under the agreement[40].

On 24th September, 1968 a protocol was concluded at Buenos Aires and attached to the Chicago Convention, whereby French and a Spanish text were added with the status of authentic language[41]. In 1977 the same status was accorded to a Russian text resulting in four texts of equal authenticity[42]. Since then an Arabic and a Chinese text of the Chicago Convention have also been given authentic status. At present, there are six texts with equal standing which are contained in the protocol on the Authentic Six-Language Text of the Convention on International Civil Aviation, Chicago, 1944[43].

The Two Freedoms Agreement and the Five Freedoms Agreement were targeted at regulating, on a multilateral basis, transit rights and commercial rights respectively, for international air services. The purpose of the provisional agreements was to bridge the period until the Chicago Convention would come into force[44], that is, on the thirtieth day after the deposit of the twenty-sixth instrument of ratification thereof and notification of adherence thereto in accordance with Article 91(b) of the Convention. The Convention came into force on the 4th day of April, 1947 upon sufficient ratifications. As at January, 2020, it had 193 signatories.

Freedoms of the Air

A state exercises sovereign authority over the land area constituting it, the adjacent territorial waters and the airspace above

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39 Ibid
40 Ibid
41 Diederiks-Verschoor (n, 9), 14
42 Ibid
43 See Protocol on the Authentic Six-Language Text of the Convention on International Civil Aviation, Chicago, 1944 signed at Montreal on 1st October, 1998
44 Ludwig Weber, 'Chicago Convention' in Bernhardt, R (edn) (n, 25)

it. This principle was recognized under the Paris Convention[45] and restated under the Chicago convention[46]. Article I of the Chicago Convention expressly provides that 'every state has complete and exclusive sovereignty over the airspace above its territory'.

One of the fundamental consequences of a state sovereignty over its airspace is the fact that no foreign aircraft can fly over or land in the territory of that state for any reason without its consent and authority. Accordingly, a foreign aircraft's rights of over flight and landing are ordinarily within the discretion of the state in question. That was, in the main, the position in the pre-World War II era. After the World War II, there was rapid increase in interstate travel by air and remarkable achievements in science and technology. These forces brought with them new problems as to freedom of air transit and landing rights for international airlines. Thus, states operating regular international airlines which did not possess convenient air strips in other parts of the world clamored for such rights as against states which did have such landing grounds. As between the states which desired to maintain their own scheduled air services, even to distant countries, there was problem of the allocation of air traffic[47].

It was against the backdrop of the foregoing that the Chicago Conference was convened, and the above issues and other allied matters formed the crux of deliberations. At the Chicago Conference, five freedoms of the air were identified. However, due to disagreements among the participating states, especially between the USA and the United Kingdom (UK)[48], the Conference drew up two agreements, namely, the International Air Services Transit Agreement and the International Air Transport Agreement. It is these sets of agreements that are commonly referred to as freedoms of the air. In any case, there are other provisions of the Chicago Convention

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45 Paris Convention , article 1

46 Chicago Convention, article 1

47 Uwakwe (n, 20), 19

48 The USA favoured greater commercial freedoms for airlines engaged in international air transport and therefore called for standardized set of separate air rights which may be negotiated between states but, the UK and most other states favoured greater governmental control and regulation of international air transport. The fear was that the size of the USA airlines would dominate all world air travel if there were not strict rules.

that are construed as creating 'freedoms' or 'rights' in favour of contracting states.

By freedoms of the air, therefore, is meant a set of commercial aviation rights granting a country's airline the privilege to enter and land in another country's airspace[49]. They constitute the fundamental building blocks of the international commercial aviation route network. It is worth pointing out, however, that the 'freedoms' or 'rights' only confer entitlement to operate international air services within the scope of the multilateral and bilateral treaties that allow them.

Besides the 'Two Freedoms Agreements' and the 'Five Freedoms Agreements', several other freedoms have since been added. Although most of those added are not officially recognized under international treaties, they have been agreed by a number of countries. At present, there are nine freedoms of the Air. They are:[50]

a) *First Freedom of the Air:* The right or privilege in respect of scheduled international air services, granted by one state to another state or states to fly across its territory without landing;
b) *Second Freedom of the Air:* The right or privilege, in respect of scheduled international air services, granted by one state to another state or states to land in its territory for non-traffic purposes;
c) *Third Freedom of the Air:* The right or privilege in respect of scheduled international air services, granted by one state to another state to put down in the territory of the first state, traffic coming from the home state of the carrier;
d) *Fourth Freedom of the Air:* The right or privilege, in respect of scheduled international air services, granted by one state to another state to take on, in the territory of the first state, traffic destined for the home state of the carrier;
e) *Fifth Freedom of the Air:* The right or privilege, in respect of scheduled international air services, granted by one state to another territory of the first state, to another state to put down

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[49] Arpad Szakal, 'Freedoms of the Air Explained'. <www.aviationlaw.eu/.../freedomsofthe...> accessed 24th January, 2016.

[50] The Freedoms of the Air <www.icao.int/pages/freedomsair.aspx>accessed 24th January, 2016.

and to take on, in the territory of the first state, traffic coming from or destined to a third state;

f) *Sixth Freedom of the Air:* The right or privilege, in respect of scheduled international air services, of transporting, via the home state of the carrier, traffic moving between two other states;

g) *Seventh Freedom of the Air:* The right or privilege, in respect of scheduled international air services, granted by one state to another state, of transporting traffic between the territory of the granting state and any third state with no requirement to include on such operation any point in the territory of the recipient state, that is, the service needs not connect to or be an extension of any service to or from the home state of the carrier.

h) *Eight Freedom of the Air:* The right or privilege, in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting state on a service which originates or terminates in the home country of the foreign carrier or (in connection with the so-called seventh freedom of the Air) outside the territory of the granting state. This freedom is also known as 'consecutive cabotage'.

i) *Ninth Freedom of the Air:* The right or privilege of transporting cabotage traffic of the granting state on a service performed entirely within the territory of the granting state. This is also known as 'stand alone' cabotage.

The First and Second Freedoms of the air constitute what is called the International Air Services Transit Agreement (IASTA) otherwise called the 'Two Freedoms Agreement', while the First, Second, Third, Fourth and Fifth Freedoms constitute what is called the International Air Transport Agreement (IATA), otherwise called the 'Five Freedoms Agreement'. While the former, that is, the 'Two Freedoms Agreement' was signed by majority of the states represented at the Chicago Conference, the later, the Five Freedoms Agreement, was signed by less than half of the states represented at the conference. The ICAO characterizes all 'freedoms' beyond the Fifth (that is, the Sixth, Seventh, Eighth and Ninth Freedoms) as the

'so called' freedoms. The reason is that only the first five Freedoms have been officially recognized by international treaty.[51]

International Air Services Transit Agreement

The International Air Services Transit Agreement is otherwise known as the 'Two Freedoms Agreement'. It is one of the Agreements signed by majority of contracting states to the Chicago Convention. Article 1(1) of the 'Two Freedoms' Agreement provides that each contracting state shall grant to the other contracting states the following freedoms of the air in respect of scheduled international services:

- The privilege to fly across its territory without landing;
- The privilege to land for non-traffic purposes.

The tenor of these freedoms is that they relate to 'transit' rights as opposed to 'traffic' rights. The first privilege allows derogation from the principle of sovereignty by allowing flight across the territory of another state without landing. Where landing becomes necessary, the second privilege insists that such landing be for non-traffic purposes. This implies that such landing should not be for the purpose of taking or disembarking passengers, mail or cargo. The landing should be limited to stoppages for purpose of, say, refueling or emergency maintenance checks.

By Article 1(2) of the 'Two Freedoms' Agreement the exercise of these two privileges is subject to the provisions of the Chicago Convention. The implication is that the enjoyment of these privileges can be denied where to allow same would result to a derogation of the provisions of the Chicago Convention. Also, by Article 4 of the 'Two Freedoms' Agreement, each state is permitted to designate routes, airports and impose reasonable charges for services, and each state reserves the right to revoke authorizations where it is not satisfied that substantial ownership and control reside in nationals of the state or for non-compliance with state laws and

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[51] Ibid

obligations.[52] Nigeria acceded to the 'Two Freedoms' Agreement on the 25th day of January, 1961.

International Air Transport Agreement:

The International Air Transport Agreement is otherwise known as the Five Freedoms Agreement. It is also one of the Agreements that was signed at the Chicago Conference. It was signed by less than half of the states represented at the Chicago Conference. Article 1(1) of the Five Freedoms Agreement requires that each contracting state should grant to the other contracting state the following freedoms of the air in respect of scheduled international air services: the privilege to fly across its territory without landing; the privilege to land for non-traffic purposes; the privilege to put down passengers, mail and cargo taken on in the territory of the state whose nationality the aircraft possesses; the privilege to take on passengers, mail and cargo destined for the territory of the state whose nationality the aircraft possesses and the privilege to take on passengers, mail and 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.

Like the Two Freedoms Agreement, the exercise of the Five Freedoms Agreement is, pursuant to Article 1(2) of the International Air Transport Agreement, made subject to the provisions of the Chicago Convention. Also, each state may, pursuant to Article 1(5) of the Agreement, designate routes, airports, impose reasonable charges, and may by virtue of Article 1(6) of the Agreement, revoke authorizations for lack of substantial ownership and control by nationals of a contracting state.

Article 1(4) of the Agreement gives discretion to each contracting state 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, that is, cabotage. It should be noted, however, that the right of cabotage is usually reserved for domestic carriers.

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52 The Two Freedoms Agreement, article 4(5)

Scheduled Air Services

The Chicago Convention recognizes two distinct types of international air services, namely, scheduled and non-scheduled international air services. These differ in the sense that non-scheduled air services are not carried out according to a published timetable, and not subject to the rates and tariffs applicable to regular scheduled air traffic. Non-scheduled air transport is effected by aircraft not then engaged in the operation of regular air services[53]. While Article 5 of the Chicago Convention deals with non - scheduled air services, Article 6 of the Convention deals with scheduled air services. Curiously, however, the Chicago Convention has nowhere in its 96 Articles defined any of these.

Article 6 of the Chicago Convention provides that 'no scheduled international air services may be operated over or into the territory of a contracting state, except with the special permission or other authorization of that state, and in accordance with the terms of such permission or authorization'. The implication is that no scheduled international air services may be operated over or into the territory of a contracting state without express permission of that state. Such permission usually takes the form of bilateral air transport agreements between states granting such permissions by way of traffic rights and regulating the terms and conditions for the international scheduled air services between the respective states. Accordingly, each state is free to impose such limitations as it deems fit on the aircraft of a foreign state[54]. Article 68 of the Convention also relates to scheduled air services. It provides that 'each contracting state may, subject to the provisions of this Convention, designate the route to be followed within its territory by any international air service and the airports which any such service may use'. In defining an air service, Article 96(a) of the Convention provides that it is 'any scheduled' air services performed by aircraft for the public transport of passengers, mail or cargo.

Although the Chicago Convention does not expressly define 'scheduled international air service' as used in the Convention, it can

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53 Diedericks – Verschoor (n, 9), 20

54 Ibid

be inferred from Article 96 of the Convention that, an international air service is a service which passes through the air space over the territory of more than one state, and which is undertaken by aircraft for the public transport of passengers, mail or cargo[55]. Reasoning along this line, and with the intention of providing guidance to the contracting states, the ICAO Council adopted a definition of the phrase, 'scheduled international air service' in the following words:

> A scheduled international air service is a series of flights that possesses all the following characteristics:
>
> a) It passes through the airspace over the territory of more than one state;
> b) It is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;
> c) It is operated so as to serve traffic between the same two or more points either-
> i. according to a published timetable, or
> ii. with flights so regular or frequent that they constitute a recognizable systematic series.[56]

As regards the application of the definition reproduced above, the ICAO Council[57] added comprehensive notes as highlighted hereunder:

1) That the main elements of the definition are cumulative in their effect. Thus, if for a series of flights, any of the characteristics (a), (b) or (c) is missing, the series must be classified as non-scheduled.
2) That the distinction made by the definition between scheduled and non-scheduled international air services is independent of whether the rates charged are lower than or equal to or higher than comparable rates charged on scheduled services; of whether the route flown over is a scheduled service route or not; of

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55 Chicago Convention, article 96(a) and (b)

56 This definition was adopted on the 28th day of March, 1952. See ICAO Doc. 7278-C/841 of 1952

57 Ibid

whether the load carried consists of passengers, cargo, or mail; or of the country of origin or destination of the loads carried.

3) That as regards the meaning of a 'series' of flights used in the definition, it portends that a scheduled international air service must in the first place consist of a series of flights. A single flight by itself would thus not constitute a scheduled international air service, although it might form part of such a service. The definition does not state how many flights are necessary as a minimum to constitute a 'series' in this sense. For the purpose of considering whether any series of flights constitutes a scheduled international air services, any flight or flights not fulfilling those conditions can be excluded.
4) That where the existence of a scheduled international air service, as defined, has been established, all extra flights associated with that particular service and open to use by members of the public are part of the same service. The 'non-revenue' flights of commercial operators are, however, classified by the definition as non-scheduled even if operated in close association with a scheduled international air service.
5) That the definition does not state that all the flights of a series constituting a scheduled international air service must be operated by a single operator, since it is possible for more than one operator to participate in the operation of such a service. In sub-paragraph (c) of the definition, however, it is stated that a scheduled international air service is a series of flights that is operated in a certain way so that a number of unrelated flights, not operated as a series, cannot be classified as a scheduled international air service.
6) That in relation to the concept of being a 'transport service', it means a series of flights must be performed by aircraft 'for the transportation of passengers, cargo, or mail' in order to constitute a scheduled international air service according to the definition. Thus, a series of flights performed for other purposes, such for example as training or crop spraying, could not be regarded as a scheduled international air services, even if it fulfilled the other elements of the definition.

7) That as to the meaning of 'Remuneration', it means any kind of remuneration, whether monetary or other, which the operator receives from someone else for the act of transportation, and 'remuneration' as used in Article 5 of the Chicago Convention means the same.
8) That as regards the phrase 'Open to use by members of the public', it entails that in order to constitute a scheduled international air service, a series of flights must be performed in such a manner that each flight 'is open to use by members of the public'. This does not mean that all the flights of a series can be classified as non-scheduled if one of them is not open to the public, since that one could be excluded from consideration and the remainder might then form a series that could be classified as scheduled. The fact that each flight of a scheduled international air service is open to the public distinguished such a service from a charter service operated under special arrangements whereby flights are booked *intoto* and are thereafter not open to members of the public. A scheduled international air service serves the normal day to day demand of the public for transportation and members of the public may travel or send their goods on any flight of such a service where space is available.
9) That two important categories of commercial air transport operation not open to use by members of the public in the sense of this element of the definition may be distinguished-
    a) Where an aircraft is wholly chartered for one or more flights by one person or undertaking for the use of that person or undertaking, including the carriage of their employees and goods, without the resale of space or seats on the aircraft to members of the public;
    b) where an aircraft is chartered for one or more flights by an organized group of individuals (such as a club) or of firms (such as a trade association) and separate seats are sold or space made available to those individuals or firms, provided that the group in question has a genuine existence with defined objects independent of the need for the transport and is not so large as to be in effect a substantial section of the public.

10) That the refusal on the part of the operator of an air service to carry special and limited categories of traffic would not of itself prevent that service from being element of the definition. Restrictions placed by governments on the classes of traffic permitted to be carried by international air services would also not of themselves prevent such services from being so considered.
11) That in respect to the concept of 'systematic' series, the definition does not indicate what degree of regularity or frequency of flights in a service should cause it to be regarded as a recognizably systematic series, and borderline cases will have to be decided on their merits taking into account such other factors as the attitude of the public toward the service and whether individual flights are operated irrespective of the pay load available or not. In such borderline cases, where it is reasonable to assume that the public will believe from the carrier's assertions, advertisements, or the conduct of his operations that his flights will depart according to some pre-arranged schedule rather than at times dependent upon the availability of loads, this would support the conclusion that the service should be classed as scheduled. Conversely, in such borderline cases, where it is reasonable to assume that the impression created is that the timing of flights depends upon the availability of loads, this would support the conclusion that the service should be classed as non-scheduled.
12) That the term charter is used here in the special sense that it has acquired in the air transport field, to indicate the purchase of the whole capacity of an aircraft for a specific flight or flights for the use of the purchaser (individual or group). The term has covered a wide variety of specialized air transport operations from the taxi flight where one or two passengers may be carried, to a large scale operation carrying passengers or freight over a long period on a private or governmental contract.

It can be discerned from the foregoing that the ICAO Council does not leave anyone in doubt as to what constitutes a scheduled international air service. For a fuller appreciation,

therefore, it is important to briefly turn to non-scheduled international air service.

A non-scheduled international air service may be defined in a residuary or default manner as any service that does not possess the characteristics of a scheduled international air service. Thus, where an aircraft is not engaged in a 'scheduled' international air service, a number of possibilities are open to it. Such possibilities are captured in Article 5 of the Chicago Convention which is entitled 'Right of non-scheduled Flight'. For avoidance of doubt, Article 5 of the Chicago Convention provides as follows:

> 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, and subject to the right of the state flown over to require landing. Each contracting state nevertheless reserves the right for reasons of safety of flight to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.
> Such aircraft, if engaged in the carriage of passengers, cargo or mail for remuneration or hire on other than scheduled international air services, shall also subject to the provision of Article 7[58], have the privilege of taking on or discharging passengers, cargo, or mail, subject to the flight of any state where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.

Over the years, the interpretation of Article 5 of the Chicago Convention reproduced above has been subject of intense academic

[58] Article 7 of the Chicago Convention reserves the 'cabotage right' for the subjacent state exclusively.

polemics[59]. Superficially, the Article gives 'reasonably extensive rights of flight to purely private aircraft'[60]. Thus, for non-scheduled flights, aircraft of contracting states substantially enjoy the Two Freedoms Agreement. The enjoyment of the Two Freedoms Agreement is, however, subjected to a number of conditions, to wit- the observance of other terms of the Convention; for safety reasons; with the reservation of the right to require permission or to follow prescribed routes over regions which are accessible or without adequate navigation facilities; and to impose regulations, conditions or limitations on the privilege to take on or discharge passengers, cargo or mail when carried for remuneration or hire. Be that as it may, the real controversy is whether companies which operate 'chartered' or 'taxi' services for remuneration but on a non-scheduled basis, are or are not expected to obtain the permission of the states into which they fly. When the Chicago Convention was made, it did not seem to have been thought that these activities would be of much significance.[61]

In any case, it appears in practice that states frequently insist that prior permission be obtained from them for non-scheduled flights, and this reduces the efficacy of Article 5 of the Chicago Convention. In many jurisdictions, in order to eliminate unnecessary restrictions on the exercise of the right of non-scheduled flight, bilateral and multilateral agreements are entered into by states.

In the end, whether scheduled or non-scheduled international air services, prior permission or authorization is required. With reference to scheduled international air services, such permission or authorization may be granted by one or more of the following, by the 'Two Freedoms' Agreement; or 'Five Freedoms' Agreement; Bilateral Air Services Agreement, or Multilateral Air Services Agreement.

It remains to be pointed out that as between states which are parties to the Chicago Convention, but not parties to the Two

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59 The controversies exist notwithstanding the fact that the ICAO Council has undertaken an extensive analysis of Article 5 of the Convention in ICAO Doc. 7278 (n, 56)

60 Johnson (n, 37), 63

61 Ibid

Freedoms or Five Freedoms Agreements, the method of granting 'permission or authorization' required for scheduled international services by the Convention is by Bilateral Air Services Agreements. This method is also used as between states which are parties to the Two Freedoms Agreement and wish to make a mutual grant of additional rights.[62] As between states which are not all parties to the Chicago Convention, apart from temporary or formal arrangements, a bilateral treaty is required for granting of rights of either scheduled or non-scheduled flights. Three or more states may also decide to regulate the exchange of air services by means of multilateral air services agreement[63].

Implementation of Air Services Agreements in Nigeria

Nigeria, as one of ICAO's member states, has also entered into several BASAs and a number of MASAs in order to exploit and utilize their benefits. The country's policy framework in the negotiation of BASAs and MASAs is well captured in the National Civil Aviation Policy, 2013. Thus, Article 8.1 of the National Civil Aviation Policy, 2013, which is a reproduction of Article 5.2 of the African Civil Aviation Policy, 2012, envisages that the negotiation of air service agreements with third countries in air transport will be guided largely by economic consideration and the principles of reciprocity, that will ensure fair and equal opportunities. The strategies that will be deployed in achieving this policy are stated as including: air services agreement negotiation amongst member states will be in accordance with Yamoussoukro Decision[64] and NCAP; air services agreement negotiation by Nigeria with third countries in air transportation will be in accordance with the Guidelines on External Negotiation; Slot Committees shall be established at airports with high density activities; and in order to ensure fair and equal

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62 Shawcross and Beaumont (n, 10), 210

63 Ibid

64 Yamoussoukro Decision is a declaration that was signed by the African Civil Aviation Ministers in Yamoussoukro, the Republic of Cote d'Ivoire on the 6th and 7th October, 1988 which contained the strategies considered by the Africans as inherent in their aviation philosophy. The declaration liberalizes the African air space by adopting the liberal exchange of air rights by African States and encouraging African Airlines to market themselves competitively.

opportunities for Nigerian airlines, all Air Services Agreements signed with third countries should include Option 2 of the ICAO guidelines on Slot Allocation.

Against the backdrop of the foregoing policy statement, Nigeria has at present, signed BASA with over ninety countries allowing international air traffic between them[65]. Twenty nine of Nigeria BASAs are active; sixteen in Africa, seven in Europe, five in Middle East/Asia, and in the Americas.[66] Fifty one of the BASAs are inactive because they are yet to designate their airlines and the designated ones are yet to commence operations.[67] Besides, many countries have indicated interest and preparedness to sign BASA with Nigeria, while a number of other countries are on the threshold of renegotiation.

What is clear from the above is that Nigeria has remarkably featured in bilateral commitments. The question is whether Nigeria has effectively utilized the air services agreements she has concluded with other countries to reposition her aviation industry for better service delivery. In words, how has the implementation of air services agreements fared in Nigeria?

Generally, the implementation of air services agreements into domestic law is done in accordance with the laws of each contracting party[68]. In countries where air services agreements have the status of treaties, and are ratified by the parliament, they either form part of domestic law automatically or they do so once implementing legislation has been passed[69]. In Nigeria, though, there appears to be no clear provision on the issue, it is submitted that air services agreements have the status of intergovernmental (executive) agreements, signed under the executive power of the President and not submitted to the National Assembly for domestication. A number of reasons would justify this position. First, air services agreements are supplementary to the Chicago Convention[70], and therefore do not

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65 Adekola (n, 4)
66 Morenike (n, 8)
67 Ibid
68 Gertler; 'Bilateral Air Transport Agreements: Non Bermuda Reflections' (1976) 42 Journal of Air Law and commence, 807.
69 Haanappel (n, 7), 263.
70 Civil Aviation Act, 2006 , section 30 (1) (a)

require separate domestication. Second, the frequency with which such agreements are concluded does not admit of bureaucratic procedure of domestication[71]. Third, air services agreements do not qualify as law making treaties as contemplated under the Treaties (making procedure, etc) Act[72], since such agreements do not generally have the effect of altering or modifying existing legislation or affecting the legislative powers of the National Assembly[73].

The Nigerian Civil Aviation Act vests in the Ministry of Aviation, the responsibility of formulating policies and strategies, among others, to assist with ensuring that Nigeria's obligations under international agreements are implemented and adhered to[74]. Under section 2(1) of the CAA, 2006, the Nigerian Civil Aviation Authority (NCAA) is established as the regulatory authority for Civil Aviation in Nigeria. Section 30 (1) of the CAA, 2006, provides that the NCAA may by regulation, make such provision as expedient for carrying out: the Chicago Convention and its annexes and any amendment of the Convention or of any such annex; any other treaty or agreement in the field of Civil Aviation to which Nigeria is a party; and for regulating air navigation, among others. By section 28 of the CAA, 2006, the Minister of Aviation may, after due consultation with the NCAA, give such directions, not inconsistent with the provisions of the Act to the NCAA on matters of policy in order to discharge or facilitate the discharge of an obligation binding on Nigeria by virtue of its being a member of an international organization or a party to an international agreement[75]; in order to attain or facilitate the attainment of any object of which is in his opinion appropriate in view of the fact that Nigeria is a member of an international organization or a party to an international agreement[76]; in order to enable Nigeria become a member of an international organization or a party to an international agreement[77].

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71 Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 12
72 Treaties (Making Procedure, etc) Act, Cap T20 LFN, 2004
73 Ibid, section 3(1) (a)
74 Civil Aviation Act (CAA), 2006, section 1
75 CAA, 2006, section 28 (1) (c)
76 CAA, 2006, section 28 (1) (d)
77 CAA, 2006, section 28 (1) (e)

It can be discerned from the above provisions of the CAA, 2006 that the primary responsibility of ensuring the implementation of air services agreements falls upon the NCAA under the guidance and directives of the Minister of Aviation. In practice, it is the Ministry of Aviation that negotiates air services agreements in Nigeria. The Ministry usually goes into such negotiation after due consultation with Nigerian Aviation regulatory authorities, and other relevant institutions such as Ministry of Foreign Affairs, Ministry of Justice, Nigerian Immigration Service, Nigeria Customs Service and others. When all administrative procedures are concluded, the final text of an air service agreement is signed by the Minister of Aviation on behalf of the Nigerian Government. The enforcement of such agreements is a function which is performed by the aviation regulatory agencies, on the directives of the Ministry of Aviation, and in conformity with International best practices. The issue, however, is that there are no clear cut provisions detailing the respective roles to be played by the aviation regulatory institutions in the implementation of air services agreements. Also, there is no clear provision vesting the power to implement air services agreements in any aviation authority. The implication here is that there is no strong regulatory framework in Nigeria that would support and complement the regulatory machinery of air services agreements. Such a regulatory framework is needed in Nigeria, where air services agreements take the form of executive agreements; a regulatory framework which is consistent with the bilateral agreements and vice versa, and a regulatory framework which is strong enough to give aviation authorities the power to implement the provisions of such agreements[78]. Without such a sound domestic regulatory framework conferring express powers of implementation on the aviation authorities, the powers conferred on such authorities under such agreements cannot be exercised[79].

Another problem confronting the implementation of air services agreements in Nigeria is the fact that Nigeria neither has a National carrier nor a strong indigenous airline to operate the

[78] Haanappel (n, 7), 264
[79] Ibid

Nigerian side of the agreement on capacity and designation. This has resulted to a gross underutilization of bilateral and multilateral air services agreements entered into by Nigeria, due to low capacity of indigenous airlines. It is reported that out of the over ninety BASAs signed by Nigeria with other countries, only about 29 of the agreements are active, while the rest are inactive[80]. Moreover, most of such agreements are only beneficial to the countries and their foreign carriers without any reciprocal benefits to Nigeria[81]. It is also reported that at present twenty five foreign countries operate flights into Nigeria; some of such flights are daily from multiple destinations, while it is only one Nigerian airline that operates internationally, and one or two others operate on regional routes[82]. Another source[83] puts the unfortunate position thus:

> Since the exit of Arik and Medview airlines on the London route, no Nigerian airline has been operating there, while two carriers from Britain… are smiling home with huge profit. The same story applies to America where Delta Airlines operate between Nigeria and the country with no reciprocation on the Nigeria side. The agreement between the Middle East and Nigeria, three airlines from the United Arab Emirates (UAE), Qatar Airways, Emirates and Etihad dominate the Nigerian/UAE routes for years until Nigeria's Air peace recently, commenced flights into Dubai/Sharjah route.

What is needed to rewrite the gloomy picture painted above is for Nigeria to establish a sound National carrier or support the emergence of a strong indigenous airline. A National carrier usually enjoys preferential rights or privileges accorded by the government for international operations. Adekola[84] reports that:

> "Foreign carriers" enjoy "preferential treatment"… in the hands of the Nigerian

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80 Adekola (n, 4)
81 Ibid
82 Africa Inc. (n, 5)
83 Adekola (n, 4)
84 Ibid

> government through multiple entry points or unlimited frequencies doled out to them which has been the bane of domestic airline business in Nigeria. Many foreign airlines are allowed to fly into upto three points in Nigeria as against one point as obtainable in other climes. This has reduced the strength of the local airlines who now struggle with the foreign airlines to share domestic airlines passengers.

With a National carrier, Nigeria would likely enjoy similar treatment in foreign countries. In addition, with the new Single African Air Transport Market (SAATM), a multilateral open sky treaty, establishing a National carrier would better position Nigeria to take advantage of the airspace liberalization and agreements for the benefit of Nigeria as a country and her own people. Such a National carrier would also facilitate the growth of aviation industry in Nigeria and domestic airlines through infrastructure, and traffic and routes expansion. It will also enhance manpower development. It should be noted that the existence of a vibrant National carrier would also necessarily require a well thought out legal framework that would grant the carrier the needed independence for effective and efficient operations. By establishing a National carrier and a complementary legal framework, therefore, Nigeria will be better positioned to perform her own side of the agreements on capacity and designation, and thus effectively utilize the economic and other benefits of air services agreements.

Finally, it remains to be pointed out that Nigeria is not committed in her investment in the aviation industry. This is clear from poor funding of the sector, infrastructural decay at airports, and lack of genuine commitment in the training and retraining of her aviation personnel, among others. Until these challenges and the others hereinbefore examined are addressed, Nigeria will continue to suffer economic losses and be denied of such other benefits associated with air services agreements.

Conclusion

Air services agreements are very central, and thus play a significant role, to the development of international aviation industry generally, and the Nigerian Civil Aviation in particular. They constitute viable instruments of negotiation and cooperation between and among states parties. For effective utilization of such agreements in the regulation of civil aviation in Nigeria, Nigeria must be strategic in her investment in the aviation industry. Consequently, Nigeria should establish a sound national air carrier, or encourage and support the growth of a strong indigenous airline in order to be well positioned to effectively operate her own side of air services agreements on capacity and designation. Moreover, there is need for a sound regulatory framework that would support and complement the regulatory machinery of bilateral and multilateral air services agreements. Until then, air services agreements would remain mere fanciful adornments in the regulatory framework of civil aviation in Nigeria.