



**‘OPEN SKIES FOR AFRICA,’ A PRINCIPLED APPROACH TO THE
IMPLEMENTATION OF THE SINGLE AFRICAN AIR TRANSPORT MARKET
(SAATM).**

by

WILLIAM KIEMA SAMMY (SMMWIL002)

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN
in fulfilment of the requirements for the degree of Doctor of Philosophy (PhD)
FACULTY OF LAW: DEPARTMENT OF PRIVATE LAW

FEBRUARY 2023

Supervisor: Distinguished Professor Philippe-Joseph Salazar

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	II
LIST OF ABBREVIATIONS	IX
LIST OF LEGISLATION AND INTERNATIONAL INSTRUMENTS.....	XIV
DEDICATION	XVI
ACKNOWLEDGEMENT	XVII
DECLARATION	XVIII
PLAGIARISM DECLARATION.....	XIX
ABSTRACT.....	XX
1.0. CHAPTER ONE: INTRODUCTION.....	1
1.1. BACKGROUND OF THE STUDY.....	1
1.2. STATEMENT OF THE PROBLEM.....	6
1.2.1. A general trend towards the liberalisation of the international air transport industry	6
1.2.2. Liberalisation of intra-African air transport, a stalled process	7
1.3. RESEARCH OBJECTIVES.....	10
1.4. RESEARCH QUESTIONS	11
1.5. RESEARCH METHODOLOGY	11
1.6. CONCEPTUALISING DEREGULATION, LIBERALISATION AND OPEN SKIES.....	12
1.7. PRINCIPLES OF THE CHICAGO CONVENTION AND THEIR IMPACTS ON MARKET ACCESS	14
1.7.1. Article 6, the charter of bilateralism	14
1.7.2. National Ownership and Effective Control	18
1.8. APPROACHES TO LIBERALISATION OF THE AIR TRANSPORT INDUSTRY	21
1.8.1. Unilateral Approach to the liberalisation of the air transport	21

1.8.2.	Bilateral approach to the liberalisation of the air transport	21
1.8.3.	Lead sector approach to air transport liberalisation.....	22
1.8.4.	Multilateral approach to air transport liberalisation	22
1.9.	LITERATURE REVIEW	26
1.9.1.	Literature review on benefits of liberalisation of the air transport industry	27
1.9.2.	Literature review on the implementation of the YD.....	29
1.9.3.	Literature review on Regional Integration Arrangements and SAMs	33
1.10.	Purpose and Scope of the Thesis	38
2.0.	CHAPTER TWO: DEVELOPMENT OF AIR TRANSPORT IN AFRICA	40
2.1.	INTRODUCTION	40
2.2.	AIR TRANSPORT IN AFRICA IN THE COLONIAL PERIOD, THE SECOND ‘SCRAMBLE FOR AFRICA,’ 1919- 1939	41
2.2.1.	Imperial air conquest in Africa	42
2.2.2.	Local interests challenge to imperialism	48
2.2.3.	West Africa, the ‘forgotten’ colonies	51
2.2.4.	The arrival of American air power in Africa	52
2.3.	COOPERATION AND COMMERCIALISATION PERIOD 1945–THE 1960S.....	55
2.4.	DECOLONISATION AND NATIONAL PRIDE (1960S–1980S).....	59
2.5.	LIBERALISATION OF AIR TRANSPORT IN AFRICA; THE ROAD TO YAMO USSOUKRO 1980S- 2000.....	67
2.5.1.	Yamoussoukro Declaration.....	68
2.5.2.	The Yamoussoukro Decision.....	73

2.6.	SUSTAINED ECONOMIC GROWTH AND FURTHER PIECE-MEAL LIBERALISATION 2000-2010	74
2.7.	POST-2010 AND THE LONGER TERM	80
2.8.	CONCLUSION	85
3.0.	CHAPTER THREE: LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE IMPLEMENTATION OF THE YD AND OPERATIONALISATION OF SAATM.....	86
3.1.	INTRODUCTION	86
3.2.	THE POLITICAL, JURIDICAL NATURE AND SCOPE OF THE YD AND SAATM.....	86
3.2.1.	Empowerment of the YD and SAATM recognition and effects under national law and policy	86
3.2.2.	Status of the YD and SAATM under the AU framework.....	88
3.2.3.	Status of other Air Service Agreements (ASAs) in the YD and SAATM.	91
3.2.4.	Scope and approach of the YD and SAATM	92
3.3.	REGULATORY AND INSTITUTIONAL TEXTS FOR THE IMPLEMENTATION OF THE YD AND OPERATIONALISATION OF SAATM	94
3.3.1.	The YD, African Civil Aviation Policy, and the SAATM Decision	94
3.4.	OPERATIONAL PRINCIPLES OF THE YD	96
3.4.1.	Grant of the five freedoms of the air.....	96
3.4.2.	Relaxation of restrictions on governmental control and approval of tariffs	
	99	
3.4.3.	Elimination of restrictions on capacity and frequency	100
3.4.4.	Facilitation of multiple designations.....	101

3.4.5.	Assessment of Implementation of YD based on the application of operational principles of the Text	102
3.4.6.	Causes of non-compliance	104
3.5.	PUBLIC POLICY CONSIDERATIONS IN THE IMPLEMENTATION OF THE YD and SAATM.....	106
3.5.1.	Eligibility Criteria	106
3.5.2.	Be legally established in accordance with the regulations applicable in a State Party to the Decision.....	107
3.5.3.	Principal place of business clause in the YD.....	108
3.5.4.	Community of interest clause in the YD.	111
3.5.5.	Effective control within the Yamoussoukro Decision.....	112
3.5.6.	Aviation safety and the YD	113
3.5.7.	Aviation Security and Facilitation	118
3.5.8.	Dispute settlement.....	124
3.5.9.	Competition regulations.....	126
3.5.10.	Consumer protection regulation.....	126
3.5.11.	Cooperation among African Airlines.....	127
3.6.	STAKEHOLDERS INVOLVED IN THE IMPLEMENTATION OF THE YD AND OPERATIONALIZATION OF THE SAATM.....	135
3.6.1.	Supranational Stakeholders.....	135
3.6.2.	National Stakeholders	145
3.6.3.	Development Partners.....	146
3.6.4.	Other Stakeholders in the African aviation industry	147

3.7.	CONCLUSION	148
4.0.	CHAPTER FOUR: IMPLEMENTATION OF THE YAMOOUSSOUKRO DECISION IN REGIONAL ECONOMIC COMMUNITIES.....	149
4.1.	INTRODUCTION	149
4.2.	NORTH AFRICA.....	150
4.2.1.	The Arab Maghreb Union (AMU).....	150
4.3.	WEST AFRICA (ECOWAS, WAEMU, BAG).....	157
4.3.1.	The Economic Community of West African States.....	157
4.3.2.	The West African Economic and Monetary Union	159
4.3.3.	The Banjul Accord Group.....	163
4.4.	CENTRAL AFRICA REGION (CEMAC AND ECCAS)	166
4.4.1.	Air transport in the CEMAC.....	167
4.4.2.	Air transport in the ECCAS Region	173
4.5.	SOUTHERN AND EASTERN AFRICA (COMESA, SADC, AND EAC)	176
4.5.1.	Southern Africa Development Community	176
4.5.2.	The East African Community	179
4.6.	The Common Market for Eastern and Southern Africa	185
4.6.1.	Air Transport Liberalisation in COMESA.....	186
4.7.	CONCLUSION AND OVERALL ASSESSMENT OF THE IMPLEMENTATION OF THE YD IN RECs	189
5.0.	CHAPTER FIVE: LESSONS FROM THE EU AND THE ASEAN.....	193
5.1.	INTRODUCTION	193
5.2.	THE EUROPEAN UNION	194
5.2.1.	Overview of the EU	194

5.2.2.	The road to EU SAM	194
5.2.3.	EU -External policy	199
5.2.4.	EU-SAM and SAATM Compared.....	200
5.3.	THE ASEAN SINGLE AVIATION MARKET	202
5.3.1.	The ASEAN Open Skies.....	203
5.3.2.	Ownership and Control in ASEAN	205
5.3.3.	Implementation of the ASEAN OSP	208
5.3.4.	ASAM and SAATM compared: what are the lessons for SAATM	210
5.4.	CONCLUSION	211
6.0.	CHAPTER SIX: FINDINGS, CONCLUSION AND RECOMMENDATIONS	213
6.1.	INTRODUCTION	213
6.2.	FINDINGS.....	213
6.2.1.	Findings on the Development of Air Transport in Africa	213
6.2.2.	Findings on the Legal and Institutional Framework for the Implementation of the YD and the Operationalisation of SAATM.....	215
6.2.3.	Findings on the Implementation of the YD in Regional Economic Communities.....	217
6.2.4.	Findings on the Lessons from the EU and the ASEAN.....	219
6.3.	RECOMMENDATIONS – TOWARDS A PRINCIPLED APPROACH TO THE IMPLEMENTATION OF SAATM.....	220
6.3.1.	Placing SAATM within the Context of Agenda 2063	220
6.3.2.	The African Continental Free Trade Area (AfCFTA).....	224

6.3.3.	The Free Movement of Person initiatives: The AU African passport and African Development Bank Visa Openness Index	226
6.3.4.	African Outer Space Strategy	228
6.4.	HOLISTIC IMPLEMENTATION OF THE YD.....	228
6.4.1.	The Convention on International Interests in Mobile Equipment (The Cape Town Convention)	229
6.4.2.	The Montreal Convention 1999	231
6.5.	The PRINCIPLE OF VARIABLE GEOMETRY	231
6.6.	OTHER POLICY RECOMMENDATIONS	234
6.6.1.	Recommendations on aviation safety and security gap	234
6.6.2.	Recommendation on the financing gap	235
6.6.3.	Recommendation on the infrastructure gap	236
6.6.4.	Recommendations on other policy gaps	236
6.7.	Conclusion	238
6.8.	Limitations of the Study	239
6.9.	Future Research	239
	BIBLIOGRAPHY	240
	ANNEXURES	265

LIST OF ABBREVIATIONS

AASA	Airlines Association of South Africa
ACAC	Arab Civil Aviation Commission
ACI	Africa Airports Council International Africa
ACS	Association of Caribbean States
AEC	African Economic Community
AEC	ASEAN Economic Community
AFAS	ASEAN Framework Agreement on Services
AFCAC	African Civil Aviation Commission
AFCAP	African Civil Aviation Policy
AfCFTA	African Continental Free Trade Area
AfDB	African Development Bank
AFRAA	African Airlines Association
AFTA	ASEAN Free Trade Area
AHSG	Assembly of Heads of State and Government
AIS	Aeronautical Information Services
AJAS	African Joint Air Services
AMU	Arab Maghreb Union
ANS	Air Navigation Services
AOC	Air Operator Certificate
APEC	Asia Pacific Economic Cooperation
APSA	African Peace and Security Architecture
ASAM	ASEAN Single Aviation Market
ASEAN	Association of Southeast Asian Nations
ASECNA	Aerial Navigation Safety in Africa and Madagascar
AT&T	Atlantic Transport and Travel Company
ATC	Air Transport Command
ATCL	Air Tanzania Company Limited

ATRB	Air Transport Regulatory Board
ATS	Air Transport Services
AU	African Union
AUC	African Union Commission
AUDA	The African Union Development Agency
AVOI	Africa Visa Openness Index
AVSEC	Aviation Security
BAG	Banjul Accord Group
BAGASOO	Banjul Accord Group Aviation Safety Oversight Organisation
BASA	Bilateral Air Service Agreements
BDEAC	Central African States Development Bank
BEAC	Bank of Central African States
BIMP-EAGA	Brunei Darussalam-Indonesia-Malaysia-Philippines, East ASEAN Growth Area
BOAC	British Overseas Airways Association
CAAQ	Central African Airways Corporation
CAAs	Civil Aviation Authorities
CANSO	Civil Air Navigation Services Organisation
CAR	Central African Republic
CASSOA	Civil Aviation Safety and Security Oversight Agency
CATA	Comprehensive Air Transport Agreement
CEAC	Economic Community of Central African States
CEMAC	Communauté économique et monétaire de l'Afrique centrale
CEN-SAD	Community of Sahel-Saharan States
CEPGL	Economic Community of the Great Lakes Countries
CFA	Communauté Financière Africaine
CLAC	Commission Latino Americano de Aviacion Civil
CLMV	Cambodia–Laos– Myanmar–Vietnam bunch
CNS/ATM	Communication Navigation Surveillance/Air Traffic Management
COMESA	Common Market for Eastern and Southern Africa
COSCAP	Co-operative Development of Operational Safety and Continuing Airworthiness Programme

COVID-19	Coronavirus disease 2019
CPCM	Conseil Permanent Consultatif du Maghreb'
CREW	Club of the Ready and the Willing
CRS	Computerised Reservation System
DSM	Dispute Settlement Mechanism
EAAQ	East African Airways Corporation
EAC	East African Community
EACSO	East African Common Services Organisation
EAHC	East African High Commission
EAMAC	African School of Meteorology and Civil Aviation
EASA	East African School of Aviation
EC	European Communities
ECAA	European Common Aviation Area
ECAC	European Civil Aviation Conference
ECC	European Economic Community
ECCAS	Economic Community of Central African States
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
EDF	European Development Fund
EI	Effective Implementation
ENP	European Neighbourhood Policy
ET	Ethiopian Airlines
FAL	Facilitation
FLN	Front de libération nationale
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
HoSG	Heads of State and Government
IATA	International Air Transport Association
ICAO	International Civil Aviation Organisation
IFALPA	International Federation of Airline Pilots' Associations
IFATCA	International Federation of Air Traffic Controllers' Association

IFATSEA	International Federation of Air Traffic Services Engineers' Association
IGAD	Intergovernmental Authority on Development
IMF	International Monetary Fund
IMT-GT	Indonesia, Malaysia, and Thailand Growth Triangle
IOSA	Operational Safety Audit Assessment
IOSA	Operational Safety Audit
JV	Joint Ventures
KQ	Kenya Airways
LCCs	Low-Cost Carriers
LPA	Lagos Plan of Action
MAAS	Multilateral Agreement on Air Services
MAFLAFS	Multilateral Agreements on Full Liberalisation of Air Freight Services
MAFLPAS	Multilateral Agreements on Full Liberalisation of Passengers Air Services
MALIAT	Multilateral Agreement on the Liberalisation of International Air Transport
MASA	Multilateral Air Service Agreement
MFN	Most Favoured Nation
MITA	Multilateral Interline Traffic Agreement
MoC	Memorandum of Cooperation
MoI	Memorandum of Implementation
MOU	Memorandum of Understanding
NEPAD	New Partnership for Africa's Development
NPCA	NEPAD Planning and Coordination Agency
OAU	Organisation of African Unity
OECD	Organisation for Economic Cooperation and Development
PAA	Pan American Airways
PIDA	Programme for Infrastructure Development in Africa
PLF	Passenger Load Factor
PTA	Preferential Trade Area
R.A. F	Royal Air Force
RAIAs	Regional Accident Investigation Agencies
RAM	Royal Air Maroc

RASFG-AFI	Regional Aviation Security /Facilitation Group for Africa and the Indian Ocean Region
REC	Regional Economic Communities
RIATS	Roadmap for Integration of the Air Travel Sector
RSOOs	Regional Safety Oversight Organisations
SAA	South African Airways
SAATM	Single African Air Transport Market
SADC	Southern Africa Development Community
SADCC	Southern African Development Coordination Conference
SAM	Single Aviation Market
SARPs	Standards and Recommended Practices
SASO	SADC Aviation Safety Organization
SGRs	SADC Generic Regulations
STCs	Specialised Technical Committees
STC-TTIET	Specialised Technical Committee on Transport, Transcontinental and Interregional Infrastructure, Energy and Tourism
TFCs	Taxes, Fees, and Charges
UDEAC	Union Douanière des Etats de l’Afrique Centrale
UEMOA	Union économique et monétaire ouest-africaine
UNECA	United Nations Economic Commission for Africa
UNGA	United Nations General Assembly
UNIDROIT	International Institute for the Unification of Private Law
UNSC	United Nations Security Council
USAP	Universal Security Audit Programme
WAAC	West African Airways Corporation
WAEMU	Western African Economic and Monetary Union
WAMU	West African Monetary Union
WTO	World Trade Organisation
YD	Yamoussoukro Decision

LIST OF LEGISLATION AND INTERNATIONAL INSTRUMENTS

United States Legislation

Airline Deregulation Act of 1978.

International Conventions and Agreements

East African Community Treaty 1967.

Abuja Declaration on Civil Aviation Safety in Africa 2012

Agreement between the European Community and the West African Economic and Monetary Union on certain aspects of air services 2010.

Agreement Establishing the African Continental Free Trade Area 2012.

Agreement for the Establishment of the Permanent Tripartite Commission for East African Cooperation 1996.

Agreement on Air Transport of the Economic and Monetary Community of Central Africa 1999.

Agreement on Sub-Regional Air Services (Fortaleza Agreement) of the Southern Common Market 1996.

Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland 1977 (Bermuda II Agreement).

Air Services Agreement between the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland 1946 (Bermuda I Agreement).

Air Transport Agreement of the Association of Caribbean States 2003.

ASEAN-China Air Transport Agreement 2010.

ASEAN-EU Comprehensive Air Transport Agreement 2021.

Banjul Accord Group Agreement 2009.

COMESA Regulations for the implementation of Liberalisation of Air Transport Services- Legal Notice No.2 of 1999.

Constitutive Act of the African Union 2000.

Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal Convention).

Convention on International Civil Aviation 1944 (The Chicago Convention).

Convention Relating to the Regulation of Aerial Navigation 1919 (Paris Convention).

Decision on Integration of Air Transport of the Andean Community 1991.

Decision on the Establishment of a Single African Air Transport Market 2018.

Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa 1999.

East African Community Mediation Agreement 1984.

Euro-Mediterranean Aviation Agreement between the European Union and its Member States and the Republic of Tunisia 2017.

General Agreement on Tariffs and Trade 1947 (GATT).

General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization 1995 ('GATS').

International Air Services Transit Agreement 1944 (Two Freedoms agreement).

International Air Transport Agreement 1944 (Five Freedoms agreement).

Marrakesh Agreement Establishing the World Trade Organization 1994 ('WTO Agreement')

Multilateral Agreements on Full Liberalisation of Passengers Air Services 2010

Sirte Declaration on Reform of the United Nations 2005.

The ASEAN Declaration 1967(Bangkok Declaration).

The Cape Town Convention on International Interests in Mobile Equipment 2001.

The Multilateral Agreements on Full Liberalisation of Air Freight Services 2009.

The Treaty Establishing the African Economic Community 1991 (Abuja Treaty).

The Treaty Establishing the Preferential Trade Area for Eastern and Southern Africa 1981.

Treaty Establishing the Common Market for Eastern and Southern Africa 1993 (COMESA Treaty).

Treaty Establishing the East African Community 1999 (EAC Treaty).

Treaty Establishing the Southern African Development Community 1992 (SADC Treaty).

Treaty Establishing the West African Economic and Monetary Union 1994 (WAEMU Treaty).

Treaty Instituting the Arab Maghreb Union 1989 (AMU Treaty).

Treaty of the Economic Community of West African States 1975 (ECOWAS Treaty).

Treaty of the West African Monetary Union 1994 (WAMU Treaty).

Vienna Convention on the Law of Treaties 1969.

DEDICATION

To my dad Sammy Kiema and Mother Fredinah Sammy.

To my siblings, Vicky Mueni, Justinar Mumba and Stephen Munyao.

To all stakeholders working towards a sustainable African aviation industry.

88587 Words (Excluding Bibliography)

Pages 290 pages

ACKNOWLEDGEMENT

I would like to thank and acknowledge God Almighty for His grace and favour upon my life. In the words of Sir Isaac Newton, “If I have seen further, it is by standing on the shoulders of giants.” I have come thus far, courtesy of several giants. To mention but a few; my supervisor, Distinguished Professor Philippe-Joseph Salazar who has patiently guided me in writing this thesis. I would like to thank the firm of A.F. Gross Advocate for the unwavering support you accorded me, and providing the environment that enabled me write the first four chapters of this thesis. I also wish to express my gratitude to the firm of TLO Advocates LLP, particularly the Managing Partner Mr. Jasper Lubeto, thank you for the camaraderie and giving me space in your chambers from where I wrote the final two chapters of this thesis. To, Dr. Charles Moitui, Dean Kisii University School of Law and the entire faculty, thank you for welcoming me to the academy and giving me an opportunity to hone my pedagogical skills. Special gratitude to my friends in the academia Austine Odaro, Charlotte Chepkemoi and Clinton Nyamongo, who have critiqued and proofread this work. Constraints of space do not allow the mention of everyone who supported me in one way or the other but I am tremendously grateful.

DECLARATION

I, WILLIAM KIEMA SAMMY, hereby declare that the work on which this thesis is based is my original work in both concept and execution and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorize the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

Signature:

PLAGIARISM DECLARATION

1. I know that plagiarism is a serious form of academic dishonesty.
2. I have read the document about avoiding plagiarism, am familiar with its contents and have avoided all forms of plagiarism mentioned there.
3. Where I have used the words of others, I have indicated this by use of quotation marks.
4. I have referenced all quotations and properly acknowledged ideas borrowed from others.
5. I have not and shall not allow others to plagiarise my work.
6. I declare that this is my own work both in concept and execution.
7. I am attaching the summary of the Turnitin match overview.

Signature:

ABSTRACT

The Establishment of an African Single Aviation Market (SAM) is a difficult and evolutionary process, particularly considering the continent's socio-political context and the inherent challenges of integrating a continent as expansive and diverse as Africa. The most significant effort to reform the African aviation industry started with the Yamoussoukro Decision in 1998), which instituted minimum rules for establishing the African SAM. However, the continental implementation of the YD has proved to be Sisyphean. Whereas other regions such as the European Union (EU) and the Association of South East Asian Nations (ASEAN) have successfully established SAMs through evolutionary processes shaped by each of these regions' unique set of values, identities, and circumstances, the realisation of the African SAM has lapsed due to the lack of an approach that appreciates the unique African circumstances as characterised by its vastness and varying national priorities and interests, the continent's aviation history and development, the legal and institutional framework on aviation, and the varying approaches to liberalisation among the continent's Regional Economic Communities (RECs). Similar to other areas, integration and cooperation in the African air transport sector has largely borrowed the EU formalistic, top-down approach and has found itself caught in the straightjacket of supranationalism and a scrupulous timetable of implementation of commitments, without appreciating the flexibilities inherent in Regional Integration Arrangements (RTAs) in Africa. Consequently, the African SAM has failed to replicate the EU success story, leading to further disintegration of the continental efforts into incoherently coordinated sub-regional initiatives, overlap of institutions and paralysis of the Pan-African institutions of the YD.

The gravamen of this thesis is to propose a principled approach to implementing SAATM. This approach foregrounds a holistic implementation of the YD, involves all relevant stakeholders and is within the broader context of Agenda 2063 initiatives and other air law treaties. The approach puts premium on supporting aviation policies such as aviation safety and security, sustainable aviation financing, fair competition, and environmental concerns. The holistic implementation of the YD is to be undergirded by the principle of variable geometry, which is a concept in regional integration that allows countries to be flexible and pursue progressive and differentiated speed towards integration, by allowing a sub-group of countries that are willing and ready to advance to greater levels of integration than the whole. The thesis contextualises the principle of variable geometry in the aviation industry and explains how it

can be used in the implementation of the YD and the operationalisation of SAATM. The thesis concludes with general recommendations on the critical policy gaps identified in the study.

1.0. CHAPTER ONE: INTRODUCTION

1.1. BACKGROUND OF THE STUDY

Africa has been on a concerted journey towards greater integration and connectivity as part of continental socio-economic transformation characterised by such blue prints and master plans as African Union's (AU) Agenda 2063.¹ The AU, alongside regional economic communities (RECs), has led the promotion of integration and cooperation, emphasizing the development of infrastructure to facilitate movement of goods, services, and people across and beyond the continent.² "Aspiration 2 of Agenda 2063 places import on the need for Africa to develop world class infrastructure that criss-crosses Africa and which will improve connectivity through newer and bolder initiatives to link the continent by rail, road, sea and air."³ It follows that transport infrastructure play a pivotal role in connectivity and is a fundamental component of regional integration efforts.

In the context of a continent as vast and diverse as Africa, where physical distances and varied geographical landscapes can pose significant barriers to trade and communication, the development of robust transport infrastructure is crucial as the realisation of interconnected network of roads, railways, ports and airports facilitates regional trade, enhances access to markets and promotes economic diversification.⁴ These networks are both physical connectors and bridges over economic, social, and cultural divides, and fosters unity and cooperation among African states.

Moreover, in the era of globalisation, well-developed transport infrastructure is essential for integrating African economies into the global market. Such infrastructure enables efficient export of goods, attracts foreign investment, and encourages tourism, all of which are vital for intra-African economic growth in line with the tenets of integration.

Nevertheless, the continent comprises of diverse and challenging terrain, ranging from deserts, lakes, tropical forests, and mountains that present unique obstacles for land-based

¹ African Union, 'Agenda 2063 – the Africa We Want' [2018] available at <https://au.int/en/agenda2063/overview>.

² African Union 'Infrastructure and Energy Development' [2018] Addis Ababa: African Union Commission, available at <https://au.int/en/infrastructure-energydevelopment#:~:text=Aspiration%20%20of%20Agenda%202063,pools%2C%20as%20well%20as%20ICT>.

³ Ibid.

⁴ Jean-Paul Rodrigue, *The Geography of Transport Systems* (Fifth edition, Routledge Taylor & Francis Group 2020).

transportation.⁵ This geographical diversity, coupled with the continent's vast size of approximately 30.4 million square kilometres, and the existence of many landlocked nations,⁶ further complicates efficient connectivity. Additionally, the current land-based infrastructure is characterised by underdeveloped roads, ports, and rail networks that significantly constrain intra-African trade and the free movement of people.⁷

As a corollary, air transport has an inherent capability to connect remote and geographically isolated regions by improving the geographical scope and cyclic time on the continent,⁸ and is a quintessential alternative and of great strategic importance in facilitating the economic and physical integration of African states.⁹ It provides a flexible and less infrastructure-intensive alternative to the heavily investment-reliant surface transport modes, which have been identified to be often inadequate or in poor condition.¹⁰ The strategic importance of air transport in Africa is underscored by its ability to offer rapid, reliable, and direct connectivity, which is essential for the continent's socio-economic development and intra-African integration.

Despite the critical role that air transport could play in Africa, the industry remains a minor player on the global air transport industry.¹¹ Interconnectivity among African cities is limited, and their integration into global, transnational urban networks remains weak.¹² Most African national airlines, with the notable exception of Ethiopian Airways (the most profitable and fastest-growing airline on the continent), and Royal Air Maroc, struggle to maintain

⁵Nirit Ben-ari 'On bumpy roads and rails' (*Africa Renewal*, 24 March 2014)

<<https://www.un.org/africarenewal/magazine/april-2014/bumpy-roads-and-rails>> accessed 6 August 2021.

⁶ United Nations Economic Commission for Africa 'Compendium of air transport integration and cooperation initiatives in Africa' at 3, available at <<https://repository.uneca.org/handle/10855/855>>, accessed 10 June 2021.

⁷ Charles E Schlumberger *Open Skies for Africa: Implementing the Yamoussoukro Decision* (The World Bank 2010) at 1.

⁸ Mariya A Ishu kina & R John Hansman 'Analysis of the interaction between air transportation and economic activity: A worldwide perspective' 2011.

⁹ David Bassens & others 'African gateways: Measuring airline connectivity change for Africa's global urban networks in the 2003-2009 period' (2012) 94 *South African Geographical Journal= Suid-Afrikaanse Geografiese Tydskrif* 103 at 103.

¹⁰ Kenneth Button & others 'Connecting African urban areas: Airline networks and intra-sub-Saharan trade' (2015) 42 *Journal of Transport Geography* 84 at 84.

¹¹ Schlumberger *Open Skies for Africa* op op cit note 7 at 11.

¹² Charlotte Lemanski 'Global cities in the south: Deepening social and spatial polarisation in Cape Town' (2007) 24 *Cities* 448.

viability.¹³ African carriers contribute only 2 – 4 per cent of the global air service market,¹⁴ while a staggering 80 per cent of the continent’s air traffic is dominated by non-African airlines.¹⁵ This underperformance is indicative not only of the challenges facing the industry but also reflects broader issues affecting the continent’s aviation industry.¹⁶

For instance, intra-African travel is winding and expensive, subjecting passengers to convoluted flight itineraries that sometimes involve travelling through different states to access other parts of the continent.¹⁷ For example, a passenger flying from Algeria to Cameroon goes through Istanbul, spending 24 hours on the flight with three separate take-offs and landings. Conversely, a direct flight from London to Athens takes three and half hours, covering the same distance (Algeria to Cameroon), and is 80 per cent cheaper.¹⁸

Low intra-African trade and restrictive visa policies is another cause of the continent’s dismal performance in the air transport industry.¹⁹ African countries trade more with the rest of the world than with each other, with statistics indicating that Africa has an intra-region trade of 17 per cent compared to Asia at 59 per cent, and Europe at 69 per cent.²⁰ According to the 2021 Visa Openness Report, 25 per cent of African countries welcome some or all African visitors, 24 per cent of African countries allow some or all African visitors to obtain a visa on arrival, and 51 per cent of African countries require African visitors to obtain a visa before they arrive.²¹ Regrettably, it is much easier for Americans and Europeans to travel within Africa than for Africans to travel internally.

¹³ Nadine A Meichsner, John F O’Connell & David Warnock-Smith ‘The future for African air transport: Learning from Ethiopian airlines’ (2018) 71 *Journal of Transport Geography* 182.

¹⁴ African Union ‘Single African Air Transport Market Flying Agenda 2063: The SATTM handbook’ 2018 available at http://196.41.38.241/bitstream/handle/11671/1997/SAATM%20Handbook_5.pdf?sequence=1.

¹⁵ Joseph Amankwah-Amoah ‘Why are so many African companies uncompetitive on the global stage? Insights from the global airline industry’, in I. Adeleye & M. Esposito (Eds.) *Africa’s competitiveness in the global economy* (Springer 2018).

¹⁶ African Union op cit note 14.

¹⁷ Vivica Brown ‘The road to Yamoussoukro’ (2017) 1 *JCULP* 229 at 234.

¹⁸ Raphael Kuuchi ‘Africa’s potential is sky high – and the airline industry is key’ 2016, available at <https://www.weforum.org/agenda/2016/05/africa-s-potential-is-sky-high-and-the-airline-industry-is-key>, accessed 20 March 2021.

¹⁹ African Union Commission ‘Third African-India ocean (AFI) aviation security & facilitation symposium.’ 27 July 2016), available at <https://www.icao.int/WACAF/AFI-SafetyWeek/Documents/Security%20Symposium/AU%20Paper%20on%20SAATM%20and%20free%20movement%20of%20Persons.pdf>. accessed on 10 February 2021

²⁰ African Development Bank ‘Africa visa openness report 2016,’ 2016 available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Africa_Visa_Openness_Report_2016.pdf. accessed on 10th February 2021

²¹ African Development Bank, ‘Africa Visa Openness Report 2021’ (*African Development Bank - Building today, a better Africa tomorrow*, 9 December 2021) <https://www.afdb.org/en/documents/africa-visa-openness-report-2021> accessed 15 August 2022.

The predominant aviation laws constitute another challenge facing the industry on the continent. The intricate web of restrictive bilateral air service agreements (BASAs) among African countries, as contrasted with more liberal open-skies agreements with external partners like the United States, Europe and the Middle Eastern countries, points to a legacy of protectionist policies on the continent.²² Protectionism has its genesis in the early 1960s when air transport in Africa began burgeoning and most of the newly independent African States created government-owned and subsidized airlines.²³ To eliminate competition, governments implemented measures that politicised the aviation sector, created administrative bottlenecks, and discriminatory practices favouring non-African airlines.²⁴ As a result of the restrictive BASAs, the African air transport market became highly regulated, leading to stifled competition, restrictions on flight frequencies, increased ticket prices, low seat utilisation, and dampening of the air traffic growth.²⁵ African governments were deeply involved in running airlines and airports through their civil aviation authorities, which limited foreign and private investment in the industry.²⁶ The interference stifles the space for competitive and cost-efficient airline management strategies, exposing the airlines to bankruptcies and financial distress.²⁷

Undercapitalisation is another critical issue for African airlines that prevents them from competing with better-resourced international counterparts. This undercapitalisation leads to ageing fleets, higher operational costs, and poorer safety standards.²⁸ The restrictive operating environment hampers the ability of most African airlines to raise capital,²⁹ unlike airlines in other regions who benefit from cooperative arrangements such as code-sharing, alliances, and mergers.³⁰ In Africa such measures remain slogans only echoed within intellectual discourses. Moreover, the disproportionate burden of fuel costs³¹ and excessive government-imposed

²² Brown op cit note 17 at 232.

²³ Charles E Schlumberger 'The implementation of the Yamoussoukro Decision' (McGill University 2009).

²⁴ Schlumberger *Open Skies for Africa* op cit note 7.

²⁵ Schlumberger 'The implementation of the Yamoussoukro Decision' op cit note 23.

²⁶ Hassan El-Houry 'Unlocking Africa's aviation potential,' OECD 2018 available at <<https://oecd-development-matters.org/2018/10/29/unlocking-africas-aviation-potential/>>, accessed 3 April 2021.

²⁷ JN Steyn and O Mhlanga 'The impact of International Air Transport Agreements on Airline Operations in Southern Africa' (2016) 5 AJHTL 1.

²⁸ DI Idrisu *Air transport liberalisation and open skies agreements in Africa—the regulatory and commercial implication for Nigeria* (unpublished PhD thesis, St. Clements University, 2004) at 78.

²⁹ Ibid at 77.

³⁰ Ibid.

³¹ Sabina Valentina De Gove *an assessment of key indicators of sustainable development in the South African airline industry* (University of Johannesburg 2019) at 31.

taxes, charges and fees further escalates operational expenses, making air travel a luxury beyond the reach of many Africans.³²

Additionally, the existing air traffic patterns in Africa, predominantly from the global North to the South, reflect the continent's colonial past and perpetual discriminatory route development.³³ This bias in traffic patterns has disadvantaged African airlines,³⁴ which often find themselves competing in a thin market dominated by European and Asian carriers.³⁵ The low intra-African traffic volume cannot sustain multiple carriers on the same routes, leading to protectionist tendencies,³⁶ perpetual bailouts³⁷ and the neglect of domestic and intra-African routes.

Despite these challenges, the African aviation industry has recently been experiencing exponential growth.³⁸ Before the coronavirus disease 2019 (Covid-19) pandemic, the industry witnessed an average growth rate of five per cent, with passenger traffic expected to grow to approximately 600 million and the total air freight anticipated to rise to 9 million by 2040.³⁹ This growth is mainly attributable to factors other than integration.⁴⁰ These factors include mushrooming urbanisation, burgeoning middle class with an appetite to travel, growing tourism industry, sprouting megacities, thriving extractive sector, and the recent demographic boom.⁴¹ However, it is imperative to harness the full potential of the growth and achieve a truly integrated Single African Air Transport Market (SAATM).⁴²

In light of the foregoing background, this thesis explores a principled approach to the implementation of the SAATM, aimed at overcoming the identified barriers, leverage on the ongoing developments and unlocking the full potential of air transport as a key driver of

³² Ibid.

³³ Schlumberger *Open Skies for Africa* op cit note 7.

³⁴ Margaret N Munene *Liberalisation of air transport in Africa: Case of Kenya's air transport* (University of Nairobi 2012) at 15.

³⁵ E Njoya and Panayotis Christidis 'Potential Impacts of Liberalisation of the EU-Africa Aviation Market' (Joint Research Centre (Seville site) 2017).

³⁶ Megersa Abate 'Economic effects of air transport market liberalisation in Africa' (2016) 92 *Transportation Research Part A: Policy and Practice* 326.

³⁷ Brown op cit note 17.

³⁸ Heinrich C Bofinger 'Air transport in Africa: A portrait of capacity and competition in various market segments' (WIDER Working Paper 2017).

³⁹ African Union Commission op cit note 19.

⁴⁰ Eric Tchouamou Njoya, 'Africa's single aviation market: The progress so far' (2016) 50 *Journal of Transport Geography* 4.

⁴¹ Button and others op cit note 10.

⁴² Simon Peter Njoroge and Prof. Eyden Samunderu, 'Africa aviation: Challenges and opportunities' In *Bode, Umuferri (Eds.): Universities, Entrepreneurship and Enterprise Development in Africa—Conference Proceedings* (2020) at 110-133.

African integration and connectivity. The approach seeks to address the critical issues of protectionism, undercapitalisation, and restrictive BASAs that have historically impeded the growth and efficiency of the African airline industry. The proposed approach also aligns with broader continental initiatives, such as the establishment of the African Continental Free Trade Area (AfCFTA) and the African Passport, which aim to stimulate intra-African trade and ease movement across the continent. By advocating for a clear implementation framework for the liberalisation of African air services and cooperation among African states, the principled approach aims to realise a more competitive, financially viable, and accessible air transport market. The ultimate goal is to provide a pathway for leveraging African transport as a strategic tool for socio-economic development, enhancing mobility, fostering regional integration, and contributing the realisation of the African Union's Agenda 2063 aspirations. This thesis, therefore, critically examines the pathways and strategies necessary to transform the SAATM from a visionary concept into a tangible reality that benefits African states and their citizens.

1.2. STATEMENT OF THE PROBLEM

The core of the problem the thesis seeks to address is the complex and uneven efforts towards liberalisation of the air transport industry within the African continent. Although there is a general trend towards the liberalisation of the international air transport industry, the process of liberalising intra-African air transport remains significantly hindered. This challenge stems from the interplay of historical and development legacies of imperial and colonial regimes, complex and spaghetti-like legal and institutional frameworks, and varying regional priorities and practices in aviation. The entrenched reliance on restrictive BASAs continues to stymie efforts towards a more open and competitive air transport sector in Africa. Despite initiatives like the YD and the SAATM aiming to foster liberalisation, their implementation has been uneven and slow, plagued by institutional weakness, protectionist policies, and a lack of cohesive regional strategy for 'open skies for Africa'.

1.2.1. A general trend towards the liberalisation of the international air transport industry

The governance of international air transportation is anchored on the 1944 Chicago Convention.⁴³ The legal regime operates under a web of BASAs⁴⁴ that often impede efficiency

⁴³ Convention on Civil Aviation 1944.

⁴⁴ Kirsten Bohmann 'The ownership and control requirement in US and European Union air law and US maritime law-policy; consideration; comparison' (2000) 66 J. Air L. & Com. 689 at 692.

due to restrictions on airline frequencies, capacities and crucial competition.⁴⁵ These BASAs, historically rooted in national security concerns following the post-war period, are characterised by the principle of substantial ownership and effective control (SOEC).⁴⁶ States continue to use this principle as a tool of protectionism and market access negotiations.⁴⁷ Despite the global efforts since the 1970s and 80s to liberalise and deregulate air transport at the bilateral, regional, and multilateral levels,⁴⁸ these have met with limited success⁴⁹ due to diverse interests and the inherent uncertainties of the liberalisation process, even in cases where there has been a strong political will.⁵⁰ The situation is more pronounced in Africa, where most countries are still reliant on the BASAs.⁵¹

1.2.2. Liberalisation of intra-African air transport, a stalled process

Following the foreign aviation liberalisation policies, particularly in the U.S and Europe, and the limited levels of success of many state-owned airlines in Africa,⁵² African countries joined the bandwagon of air transport liberalisation when they signed the Yamoussoukro Declaration of 1988. After a decade of non-implementation, the Yamoussoukro Declaration was superseded by the Yamoussoukro Decision of 1998 (YD), currently the most critical reform policy initiative of the African air transport sector.⁵³ The YD concerns the liberalisation of the intra-African air transport service, granting state parties the free exercise of rights on passenger, cargo, and or mail flights.⁵⁴ The YD envisions a gradual reform process that would allow the

⁴⁵ Ibid.

⁴⁶ Isabelle Lelieur *Law and policy of substantial ownership and effective control of airlines: Prospects for change.* (Routledge 2016).

⁴⁷ Rigas Doganis *Flying off course: The economics of international airlines* (Psychology Press 2002).

⁴⁸ E Chingosho *45th AFRAA annual general assembly report of the Secretary General* (Kenya 2013). Available at <https://afraa.org/wp-content/uploads/2018/11/AGA-45-Report-of-the-Secretary-General.pdf>.

⁴⁹ Xiaowen Fu, Tae Hoon Oum and Anming Zhang 'Air transport liberalisation and its impacts on airline competition and air passenger traffic' 2010 *Transportation Journal* 24.

⁵⁰ Ibid.

⁵¹ Svetlana Surovitskikh and Berendien Lubbe 'The air liberalisation index as a tool in measuring the impact of South Africa's aviation policy in Africa on air passenger traffic flows' (2015) 42 *Journal of Air Transport Management* 159.

⁵² Gianmaria Martini and Davide Scotti 'Air transport in Africa' In *Air Transport Liberalisation* (Edward Elgar Publishing 2017).

⁵³ Ethiopia 'Implementation of the Yamoussoukro Decision. Progressing or stalled?' in ICAO/ATAG/WB Development Forum Maximizing Civil Aviation's Economic Contribution Safe, Secure and Sustainable Air Transport in Open Skies Challenges and Potential, Montreal, Canada, 24 May 2006). Available at <https://www.icao.int/Meetings/wrds2011/Documents/DevelopmentForum2006/YamousoukroDecision.pdf>

⁵⁴ R Abeyratne 'The Future of African Civil Aviation' (1998) 3 *Journal of Air Transportation World Wide* 30 at 31.

steady liberalisation of scheduled and non-scheduled intra-African traffic subject to the principles of fair competition and in compliance with international safety standards.⁵⁵ The 44 signatory States to the YD should by now have liberalised air transport services within and among themselves.

However, the implementation of the YD has stalled leading some scholars to refer to the YD as a ‘still-birth aviation treaty’⁵⁶ Although the YD is often cited on several BASAs, it is hardly factored during the negotiation of traffic rights.⁵⁷ Though the principles of the YD have achieved considerable success in some of the regional economic communities (RECs) and influenced several African countries in their national air transport policies, the continental implementation has proven to be lethargic, fragmented, and heterogeneous.⁵⁸

The slow progress in the implementation of the YD can be attributed to several factors. Key among the factors is the reluctance of countries with smaller carriers to fully liberalise their airlines for fear of exposure to higher operational standards,⁵⁹ and the diverse level of air transport development across the continent.⁶⁰ Additional impediments include the varying level of air transport development in Africa, the perceived negative impact of liberal market access rules on particular local interests,⁶¹ institutional weaknesses, lack of political will, excessive taxation, restrictive visa regime,⁶² and inadequate measures by the African countries to promote competition, especially during the critical transition periods.⁶³ Consequently, major carriers

⁵⁵ Schlumberger *Open Skies for Africa* op cit note 7.

⁵⁶ Rexter Ndhlovu and Andy Ricover ‘Assessment of potential impact of implementation of the Yamoussoukro Decision on open skies policy in the SADC region’ [2009] GS 10F-0277P). Gaborone: USAID Southern Africa 80.

⁵⁷ Steer Davies Gleave ‘Opening up aviation services in Africa; Implementing air transport liberalisation – benefits & opportunities’ (Infrastructure Consortium for Africa (ICA) 2014), available at <https://www.icafrica.org/fileadmin/documents/Publications/Opening_up_Aviation_Services_in_Africa_-_Phase_1_Review_Report.pdf>, accessed 3 March 2021.

⁵⁸ Stephan Heinz and John F O’Connell ‘Air transport in Africa: Toward sustainable business models for African airlines’ (2013) 31 *Journal of Transport Geography* 72.

⁵⁹ Button and others op cit note 10.

⁶⁰ Ndhlovu & Ricover op cit note 56 at 80.

⁶¹ Gleave op cit note 57.

⁶² ICAO ‘Agenda Item 39: Economic regulation of international air transport —policy; Air transport liberalisation in Africa.’ (Assembly— 39th session economic commission) available at <https://www.icao.int/Meetings/a39/Documents/WP/wp_149_rev1_en.pdf>.

⁶³ J Vermooten ‘Competition rules within bi-Lateral air service agreements (BASAs) for the purposes of developing a liberal regional transport policy within Africa’, *Second Competition Commission, Tribunal and Institute Conference on Competition Law, Economics and Policy, WITS, South Africa* (2008).

like Ethiopian Airlines, have relied on traditional BASAs to access other African markets.⁶⁴ However, these BASAs have remained restrictive and failed to conform to the YD.⁶⁵

Notwithstanding the drawbacks on the liberalisation process, there has been significant efforts to liberalise the African aviation industry led the AU. In 2013, the AU included civil aviation market liberalisation as a key initiative under Agenda 2063 that aims to propel the political and economic integration of the continent.⁶⁶ The initiative culminated in the launch of the SAATM in January 2018 to expedite the implementation of the YD.⁶⁷ SAATM seeks to unify African air transport market through the liberalisation of civil aviation, support for economic integration,⁶⁸ elimination of the traditional BASAs and setting the standard that should be complied with by the current and future BASAs.⁶⁹ SAATM has received backing from the International Air Transport Association (IATA), which contends that liberalisation will stimulate growth and boost economic integration and intra-regional connectivity.⁷⁰

When fully implemented, SAATM will transform the African aviation market into a single aviation market (SAM) which in many respects will be similar to the ASEAN SAM, established in 2016, but less advanced than the world's most developed SAM, the EU SAM, established in 1992. However, the establishment of the African SAM remains a difficult and evolutionary process particularly considering the continent's socio-political context and the inherent difficulties of integrating a continent as diverse as Africa. While EU and the ASEAN SAMs have also been established through difficult evolutionary processes, these processes have largely been shaped by these regions' unique set of values, identity and circumstances. Similar to other areas of integration, integration and cooperation in the African air transport sector has largely borrowed the EU formalistic, top-down approach that establishes institutions and strict timetable of implementation of commitments without the flexibilities inherent in regional trade agreements (RTAs) in Africa, which are based on less scrupulous and

⁶⁴ An Adeyeye 'Understanding Africa's slow growth in intra-regional air transport' [2016] *Africa Business*.

⁶⁵ Ibid.

⁶⁶ African Union Commission op cit note 19.

⁶⁷ African Union 'The single African air transport market—an Agenda 2063 Flagship Project' [2018] Addis Ababa: African Union Commission. Available at https://au.int/sites/default/files/newsevents/workingdocuments/33100-wd-6a_brochure_on_single_african_air_transport_market_english.pdf.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ International Air Transport Association, 'The Single African Air Transport Market (SAATM)', available at <https://www.iata.org/en/about/worldwide/ame/saatm>.

rigorously formal commitments. Consequently, the African SAM has failed to replicate the European success story, leading to further disintegration of the continental efforts into sub-regional efforts that have been incoherently coordinated resulting in overlaps of institutions and mandates and causing paralysis to the Pan-African institutions of the YD. The implementation of SAATM calls for new approaches that avoids doing the same thing the same way and expecting different results.

1.3. RESEARCH OBJECTIVES

The overarching objective of the thesis is to delineate a principled approach for the implementation of the SAATM through an in-depth analysis and evaluation of the evolutionary development, the legal and institutional framework governing its implementations, and insights gleaned from both regional and international experiences in air transport liberalisation.

The specific objectives of the thesis are to:

- i. To establish the context and significance of the African air transport liberalisation under SAATM.
- ii. To analyse the historical development and evolution of air transport in Africa and assess its impact on the current state and future prospects of the continent's air transport liberalisation efforts.
- iii. To evaluate the legal and institutional frameworks that underpin the YD and SAATM and determine their effectiveness and challenges in achieving air transport liberalisation in Africa.
- iv. To investigate the implementation of the YD across various RECs in Africa, and identify the successes and barriers in various regional contexts and their correlation with the continental efforts at liberalisation
- v. To draw comparative insights from the experiences of the European Union (EU) and the Association of Southeast Asian Nations (ASEAN) in air transport liberalisation, and identify lessons and strategies that can be applied to the African context.
- vi. To consolidate the research findings and insights from the preceding chapters and provide conclusions and recommendations for a principled approach to the effective implementation of SAATM.

1.4. RESEARCH QUESTIONS

- i. What are the contextual significance and overarching impact of the African Air Transport Liberalisation under the SAATM framework?
- ii. How has the historical development and evolution of air transport in Africa influenced the current status and future prospects of the continent's air transport liberalisation initiatives?
- iii. What is the legal and institutional frameworks underpinning the YD and the SAATM?
- iv. To what extent have the RECs in Africa implemented the YD and what are the experiences and outcomes of the implementation at the sub-regional level?
- v. What are the lessons on the practices and strategies for air transport liberalisation in the EU and ASEAN air transport markets?
- vi. What conclusions and recommendations can be made on a principled approach for effective implementation of the SAATM?

1.5. RESEARCH METHODOLOGY

The thesis adopts an interdisciplinary research methodology. At its core is the doctrinal legal research, which involves examination of legal texts such as international treaties, regional agreements, and national legislation relevant to air transport liberalisation.⁷¹ Doctrinal research has been described as ‘a synthesis of rules, principles, norms, interpretive guidelines and values, which explains makes coherent, or justifies a segment of the law as part of the larger system of law.’⁷² Doctrinal method is foundational in the interpretation of the legal framework governing the YD and SAATM as it facilitates a thorough understanding of legal provisions and their application across different jurisdictions. Primary legal sources like treaties, laws and secondary sources like legal commentaries, journal articles, forms the backbone of the analysis.

The legal analysis is complemented by historical legal research, that provides essential context and background to the study.⁷³ The application of historical legal research in this context is both positional and for perspectives for it is written that, ‘if every yesterday is a bequest for today, and if every today is a cause of action for tomorrow, neither is the past dead

⁷¹ P Ishwara Bhat, ‘Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles’ in P Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford University Press 2020) 143.

⁷² Ibid at 145.

⁷³ P Ishwara Bhat, ‘Historical Legal Research: Implications and Applications’ in P Ishwara Bhat (ed), *Idea and Methods of Legal Research* (Oxford University Press 2020) 198

not is the future unborn.’⁷⁴ By tracing the evolution of air transport in Africa and the development of policies like the SAATM, historical analysis sheds light on the origins of current policies, the evolution of legal and institutional frameworks and the challenges in the implementation of the liberalisation policies. This dimension relies on historical documents, archival records, and academic papers that chronicle the history of African air transport and is quintessential for a comprehensive understanding of the previous factors that has shaped the African aviation landscape and how they relate to the current and future doctrines and policies in this area, including efforts towards an African SAM.

Additionally, the thesis employs a comparative analysis to draw on lessons from other regions, such as the EU and ASEAN, whose experiences in air transport liberalisation are valuable for the African context. This approach identifies best practices, successful strategies, and cautionary tales, that help to contextualise African experience within global framework. Studies on EU and ASEAN air transport policies, as well as academic research papers, are critical sources for this component.

Notably, the thesis integrates both qualitative and quantitative data to enrich the research. Qualitative data, such as legal texts, policy documents, and historical narratives, provides depth and context, while quantitative data, including statistics on air transport and economic indicators, offer empirical evidence to support the analysis. This use of multiple sources and data allows for triangulations, and enhances the reliability and validity of the conclusions that the author draws and the justifies the recommendations for a principled approach to liberalisation of air transport on the continent.

1.6. CONCEPTUALISING DEREGULATION, LIBERALISATION AND OPEN SKIES

The aviation industry has undergone significant transformations over the past few decades, moving from overt protectionism to a broader acceptance of free trade in air services. The US pioneered this paradigm shift with the introduction of the Airline Deregulation Act of 1978.⁷⁵ This Act marked the beginning of deregulation in the US domestic aviation industry, and aimed to ensure to make air services more affordable and accessible to the American public. Its success lay in promoting competition by easing restrictions on pricing, market entry, and

⁷⁴ Ibid 198.

⁷⁵ Ibid.

routes.⁷⁶ Building on this domestic success, the US extended these principles to the international plane through a quasi-regulatory policy – ‘Open Skies’,⁷⁷ effectively exporting its regulation experience globally, where it became more commonly known as ‘liberalisation’.⁷⁸

‘Open Skies’, in its broadest sense, refers to an international policy concept that advocates for the liberalisation of air transport and the reduction of government intervention.⁷⁹ The policy liberalises the air transport sector by ensuring ‘open entry on routes, unrestricted capacity and frequency on routes, and unrestricted air traffic rights.’⁸⁰ More narrowly, it denotes the specific form of bilateral agreements that the US uses to negotiate with other nations.⁸¹

Deregulation connotes government withdrawal or removal of regulation over economic conduct.⁸² Deregulation in air transport entails the withdrawal of State restrictions on pricing, entry, and exit, enabling new players to enter an industry, select routes, and set fares independently.⁸³ Liberalisation, on the other hand, refers to the relaxation of government restrictions by opening up economic sectors to market forces.⁸⁴ In air transport, this means relaxing limits on aspects like designation, capacity, frequency, and tariff,⁸⁵ and in international aviation, it involves easing restrictions on market access, ownership, and control.⁸⁶ Though conceptually different, deregulation and liberalisation ultimately achieve the same results.⁸⁷

⁷⁶ Seth M Warner ‘Liberalise open skies: Foreign investment and cobotage restrictions keep noncitizens in second class’ (1993) 43 *Am. UL rev.* 290.

⁷⁷ Brian F Havel *Beyond Open Skies: A New Regime for International Aviation* (Kluwer Law International BV 2009) at 12.

⁷⁸ Bruce Stockfish ‘Opening closed Skies: The prospects for further liberalisation of trade in international air transport services’ (1991) 57 *J. Air L. & Com.* 599.

⁷⁹ E Saefullah Wiradipradja ‘Open skies policy: The developing countries point of view’ (2010) 8 *Indonesian J. Int’l L.* 1.

⁸⁰ Geoffrey Baldock ‘Some legal aspects of an ‘open skies’ aviation policy for Australia’ at 2.

⁸¹ Defining ‘Open Skies’, D.O.T. Order No. 92 – 8 – 13 at 1 (1992)

⁸² Adebukola Daramola and Chioma Jaja ‘Liberalisation and changing spatial configurations in Nigeria’s domestic air transport network’ (2011) 19 *Journal of Transport Geography* 1198; Baldock at 2.

⁸³ Myriam Velia, Cornel van Basten and Arthur Dykes ‘Mozambican air transport liberalisation report’ at 16.

⁸⁴ *Ibid* at 16.

⁸⁵ Anton Richman and Chris Lyle ‘The economic benefits of liberalising regional air transport: A review of global experience’ (Dubai, 18 September 2006), available at

<https://www.icao.int/Meetings/LiberalisationSymposium/Documents/2006-Symposium-Dubai/ComMark_IP.pdf>, accessed 3 September 2021.

⁸⁶ Alan Khee-Jin Tan ‘Prospects for a single aviation market in Southeast Asia’ (2009) 34 *Annals of Air and Space Law* 253 at 267

⁸⁷ Idrisu op cit note 28 at 25.

1.7. PRINCIPLES OF THE CHICAGO CONVENTION AND THEIR IMPACTS ON MARKET ACCESS

The principles of the Chicago Convention, particularly those articulated in Articles 1 and 6, have profoundly impacted market access in the aviation industry. Article 1 recognises the principle of ‘exclusive national sovereignty over airspace’, implying that the overflight or entry of foreign aircraft into another state’s territory without permission constitutes a breach of sovereignty.⁸⁸ This principle inherently renders state airspace *de jure* closed unless they are *de facto* opened, thereby significantly influencing market access by necessitating express permission for access to foreign markets.⁸⁹ Such permission may be granted either through bilateral or multilateral agreements. The agreements can vary in their terms, leading to patchwork of access rights that can hinder the creation of a unified, liberalised market.

Article 6 introduces the principle of ‘economic sovereignty over the airspace,’ dictating that the commercial exchange of scheduled international air transport services is contingent on special permission, typically granted reciprocally through BASAs.⁹⁰ This article is fundamental in establishing a concessionary regulatory regime, where access to a foreign state’s airspace is dependent on government-to-government aero-diplomacy, laying the foundation for the economic regulation of air services.⁹¹

1.7.1. Article 6, the charter of bilateralism

Termed the ‘charter of bilateralism,’ Article 6, while not explicitly endorsing bilateral exchange of traffic rights, has been instrumental in shaping the so-called ‘Chicago system’⁹² Under this system, ‘Government barter, not the entrepreneurial acumen of airline managements, has been the sole instrument of new transnational market development in this most technologically precocious industry.’⁹³ Governments in the ‘Chicago system’ trade in specialised air traffic and operational rights referred to as ‘freedoms of the air’ that are

⁸⁸ Hanaa Fayed and John Westlake ‘Globalization of air transport: The challenges of the GATS’ (2002) 8 *Tourism Economics* 431 at 437.

⁸⁹ Havel op cit note 77 at 103.

⁹⁰ Pablo Mendes De Leon *Introduction to air law* (Kluwer Law International BV 2017) at 45.

⁹¹ Andrea Trimarchi ‘The laws of ownership and control of airlines: Selected jurisdictions’ (2017) 12 *J. Comp. L.* 198.

⁹² Brain F Havel ‘Preparing for a new era in international aviation: A transatlantic common aviation union takes shape’ (2004) 11 *Irish J. European L.* 5 at 7.

⁹³ *ibid*

fashioned in ascending order of liberty and market access.⁹⁴ These freedoms are international commercial aviation rights that grant a country's airlines the privileges to enter and land in another country's airspace. The freedoms are crucial in the liberalisation agenda as they define the nature and scope of relationships in the aviation industry.

The first and second freedoms concern the right of an airline to fly over a foreign country without landing and to land for non-traffic (technical) purposes, respectively.⁹⁵ These are basic rights that facilitate international air travel, particularly for long-haul flights that may require passage over or stops in multiple countries to refuel or maintenance.

The third and fourth freedoms are reciprocal rights that allow an airline to carry traffic from its home country to another country, and vice versa.⁹⁶ These freedoms form the backbone of most international air services, facilitating direct flights between two nations and are usually granted simultaneously in bilateral agreements.

The fifth freedom, perhaps one of the more economically significant rights, allows an airline to carry traffic between two foreign countries as part of service that originates or terminates in its own country.⁹⁷ This freedom opens up numerous commercial opportunities, and enables airlines to optimise route networks and offer services to countries beyond their immediate bilateral partners.

The sixth freedom is an extension of the third and fourth freedoms.⁹⁸ It allows an airline to transport passengers or cargo between two foreign countries via its home country. This freedom is crucial for airlines operating major transit hubs and forms the basis of the hub-and-spoke model used by many carriers.

The seventh freedom permits an airline to operate between two foreign countries without continuing service to one's home country.⁹⁹ This freedom is less commonly granted as it can directly impact domestic carriers of the countries involved, potentially leading to significant competitive pressures.

⁹⁴ Ananya Singh 'Understanding aviation law through the evolving concept of sovereignty beyond the traditional deep blue skies' 2019 at 2 available at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3615130.

⁹⁵ ICAO, 'Manual on the Regulation of International Air Transport' [2016] ICAO Doc 9626, available at https://www.icao.int/Meetings/a39/Documents/Provisional_Doc_9626.pdf

⁹⁶ Ibid.

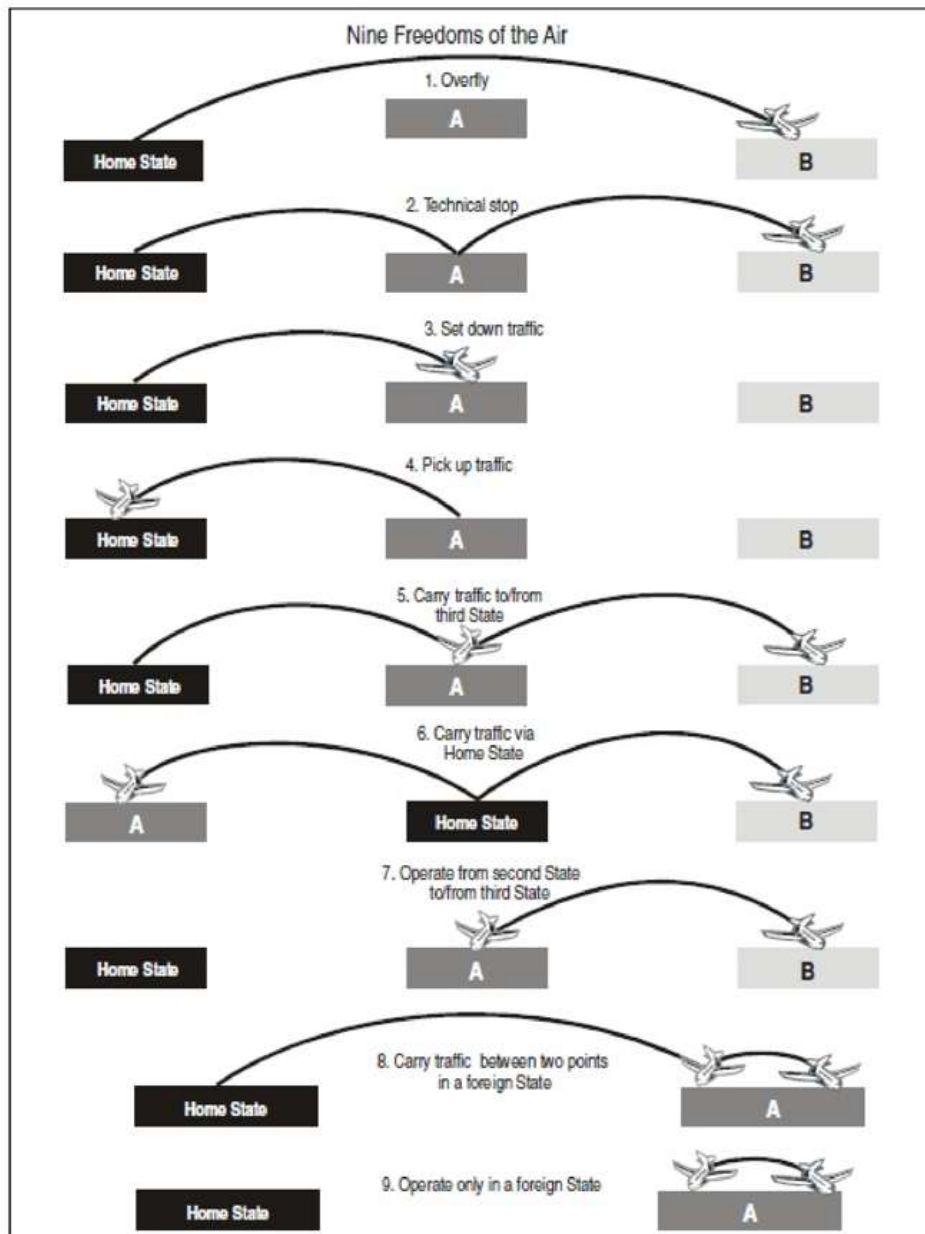
⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

The eighth freedom, often referred to as ‘cabotage’, allows an airline to operate domestic flights within a foreign country.¹⁰⁰ This freedom is rarely granted due to the sensitive nature of allowing foreign carriers to compete with domestic airlines within a country’s internal market.

Finally, the ninth freedom further extends the eighth freedom, allowing an airline to operate domestic flights in a foreign country independent of its international services.¹⁰¹ This freedom is even rarer than the eighth, give the impact on domestic aviation market. The nine freedoms are illustrated below.



¹⁰⁰ Ibid.

¹⁰¹ Ibid.

Figure 1: Nine Freedom Rights.

The nine freedoms collectively structure the operational and commercial possibilities in international aviation liberalisation. The grant of any or more of the freedoms balances the need for connectivity with the protection of national interests and market competitiveness. While the first five freedoms are integral to the global aviation network, the latter four offer more nuanced and specific operational rights, often reflecting deeper levels of trust and cooperation between countries.

Eminent scholars have, however, envisioned the nomenclature of freedoms of the air as a misnomer and visualised these ‘freedoms’ as ‘privileges.’¹⁰² Brain F Havel describes the freedoms as ‘a protectionist artifice to imprint government control on every conceivable means of access to the national airspace.’¹⁰³

According to Professor Bin Cheng, ‘every newborn ‘freedom of the air’ has become in reality an additional shackle on the right to fly of foreign carriers, to be removed only at a price; the trading of the ‘freedoms of the air’ under the Chicago system takes place ‘ in a resolutely bilateral fashion, with each side committed to a kind of ‘aero-politics’ of restriction and artful compromise, classic zero-sum diplomacy, in defense of the market shares of one or more domestic carriers.’¹⁰⁴To create an international air network under the Chicago system, governments must enter into a complex web of BASAs resulting in a situation aptly described by Professor Bin Cheng as a ‘labyrinthine legal grotto.’¹⁰⁵This bilateral concessionary regime has, since 1945, withstood the neoliberal trade winds and the geopolitical and economic paradigm shifts heralded by trade liberalisation, technological advancement, and globalisation.¹⁰⁶ With more than 7,000 BASAs worldwide, bilateralism is the rule, and multilateralism is the exception in the international exchange of traffic rights.¹⁰⁷

¹⁰² Havel & Sanchez *The principles and practice of international aviation law* (Cambridge University Press, 2014) at 72; Trimarchi op cit note 91.

¹⁰³ Havel ‘Preparing for a new era in international aviation: A transatlantic common aviation union takes shape’ op cit note 92.

¹⁰⁴ Ibid at 8.

¹⁰⁵ Bin Cheng, *The Law of International Air Transport* (Stevens 1962) at 491.

¹⁰⁶ Sarah Jane Fox ‘Borderless skies! Sovereign dominance, regionalism: Lessons from Europe’ (2017) 34 *International Journal on World Peace* 19 at 34.

¹⁰⁷ Alain Lumbroso ‘Aviation liberalisation: What headwinds do we still face?’ (2019) 74 *Journal of Air Transport Management* 22 at 23.

1.7.2. *National Ownership and Effective Control*

A crucial aspect of the economic sovereignty principle, as reflected in Article 6 of the Chicago Convention, is the stringent application of the nationality rule, or the ‘citizen purity rule.’ The rule mandates that market access under a BASA is granted only to airlines substantially owned and effectively controlled by nationals of the state party to the BASA.¹⁰⁸ This requirement, though not explicitly stipulated in the Chicago Convention, is a product of post-World War II air transport instruments, namely the Two Freedoms and Five Freedoms agreements that both stipulate, ‘Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that the substantial ownership and effective control are vested in nationals of a contracting State.’¹⁰⁹ The provisions were entrenched in almost all post-Chicago BASAs.¹¹⁰ Accordingly, market access under a BASA can only be granted to a designated airline substantially owned and effectively controlled by the other contracting State or its nationals.¹¹¹

The nationality requirement does not impose any obligation upon States to withhold or revoke a certificate or permit of a designated carrier that does not satisfy the substantial ownership and effective control test but only enables States to exercise discretionary powers in that respect.¹¹² The nationality clauses have mainly served as a strategic trade policy of curtailing flags of convenience in international air transport that would enable States not a party to an air service agreement to freeride on traffic tariff concession without reciprocating the benefits derived from these concessions.¹¹³

1.7.2.1. *The application of ownership and control clauses*

The application of the nationality rule is two-pronged; an external lock that takes the form of treaty provisions contained in virtually all BASAs requiring substantial ownership and

¹⁰⁸ Havel op cit note 77 at 2.

¹⁰⁹ International Air Services Transit Agreement 1944 (Two Freedoms agreement); International Air Transport Agreement 1944 (Five Freedoms agreement).

¹¹⁰ Petrus PC Haanappel ‘Airline ownership and control, and some related matters’ (2001) 26 *Air and Space Law*.

¹¹¹ Christopher Finlay and Andrea Goldstein ‘Liberalisation and foreign direct investment in Asian transport systems: The case of aviation’ at 42.

¹¹² Yu-Chun Chang and George Williams ‘Changing the rules—amending the nationality clauses in air services agreements’ (2001) 7 *Journal of Air Transport Management* 207 at 08.

¹¹³ Lykotrafiti ‘Consolidation and rationalization in the transatlantic air transport market—prospects and challenges for competition and consumer welfare’ (2011). *J. Air L. & Com.* 76, 661–732. 673.

effective control (SOEC) of the designated airline to be in the hands of a specific State or the citizens of that State.¹¹⁴ The external lock is complemented by the internal lock that forms domestic legislation limiting foreign ownership in airlines.¹¹⁵ These two aspects of the nationality rule are interwoven in that the limit on foreign ownership (the internal lock) in the designated airlines by domestic law ensures compliance with nationality clauses in the ASAs (the external lock).¹¹⁶ The external lock consists of two aspects: the quantitative aspect, ‘substantial ownership,’ and the qualitative aspect, ‘effective control.’¹¹⁷

Interestingly, neither the Two Freedoms Agreement nor the Five Freedoms Agreement defines the term ‘substantial ownership and effective control.’¹¹⁸ The term substantial ownership is generally understood to refer to ownership of the airline voting shares.¹¹⁹ The adjective substantial is, however, not a term of art and lacks the legal value itself, with the vast majority of states adopting a 50 per cent plus one minimum national ownership and, in some instances, the percentage ranging from 75 per cent to 85 per cent.¹²⁰ Whereas substantial ownership is a *de jure* criterion and therefore readily ascertainable, effective control is a *de facto* criterion that is more ambiguous and whose interpretation depends on the case-to-case aero political interests of the States.¹²¹ In determining effective control, aviation regulators scrutinise the minority shareholding of the non-citizens to ascertain whether these minorities have the power to determine the airlines' decisions.¹²²

1.7.2.2. The impact of ownership and control clauses in the air transport industry

As a result of the nationality rule, the concept of global airlines remains strange in the aviation industry even in the 21st century.¹²³ Despite its inherent international character and

¹¹⁴ Brian F Havel and Gabriel S Sanchez ‘The emerging Lex aviatica’ (2010) 42 *Geo. J. Int’l L.* 639 at 641.

¹¹⁵ Lelieur op cit note 46 at 3.

¹¹⁶ H Peter van Fenema ‘Ownership restrictions: Consequences and steps to be taken’ (1998) 23 *Air & Space L.* 63; Stefanie Hörstke ‘Air carrier ownership and control revisited’ (McGill University Libraries 2003) 8.

¹¹⁷ Brian F Havel and Gabriel S Sanchez ‘Restoring global aviation’s cosmopolitan mentalite’ (2011) 29 *BU Int’l LJ* 1 at 14.

¹¹⁸ Lykotrafiti ‘Consolidation and rationalization in the transatlantic air transport market-prospects and challenges for competition and consumer welfare’ op cit note 113.

¹¹⁹ Ibid; Lelieur op cit note 46 at 3.

¹²⁰ Scott and Trimarchi ‘Fundamentals of international aviation law and policy’ (Routledge 2019) at 108.

¹²¹ Lykotrafiti, ‘A Comprehensive Study of Air Transport Liberalisation Through the Lens of Strategic Airline Alliances’ (2019) *Air and Space Law* 44 at 4.

¹²² Scott and Trimarchi op cit note 120 at 110.

¹²³ Havel & Sanchez ‘Restoring global aviation’s cosmopolitan mentalite’ op cit note 220 at 2. Though there are examples of multi-national airlines such as SAS, Air Afrique (now defunct) and Gulf Air, but these are exceptions

cosmopolitan nature, the aviation industry has remained inextricably tied to the nation-state.¹²⁴ The nationality rule is responsible for restricting airlines from accessing global equity markets, acquiring foreign subsidiaries, taking part in cross-border mergers, and hence denying one of the most global industries the benefits of globalisation.¹²⁵ Whereas globalisation has led to access to global equity markets, the establishment of foreign subsidiaries, and the consummation of cross-border mergers in industries such as telecommunication, finance, and pharmaceuticals, the aviation industry remains a conspicuous oddity, as its participation in the global markets is highly circumscribed by the nationality rule.¹²⁶

One of the reasons for the preservation of the anachronistic nationality rules in the aviation industry is the desire by States to protect their national carriers.¹²⁷ This is because the dissolution of the national carrier or the acquisition of a national carrier by foreigners will not only lead to the loss of the international prestige associated with flag carriers but also place States in a position where they have to depend on foreign carriers to provide pertinent public services and national security functions performed by the airline industry such as emergency evacuations.¹²⁸ To protect their flag carriers from the competition, States have often engaged in predatory practices by abusing their dominant positions to threaten new entrants.¹²⁹ SOEC clauses are particularly detrimental to the interest of the developing and the least developed countries because of the few investors in their capital markets that can sustain the capital-intensive aviation industry.¹³⁰ Whereas there have been significant steps in the liberalisation of the market access through liberal bilateral and multilateral open skies treaties, the SOEC aspect of liberalisation has primarily remained as the relic of protectionism in the aviation industry.¹³¹

The significance of these principle in the context of liberalisation efforts in Africa cannot be overstated as they have dictated continental approaches to market access, often

¹²⁴ Jason Remington Bonin 'International Air Transport Liberalisation in East Asia: A regional approach to reform' (LL.M thesis University of Singapore 2012) at 6

¹²⁵ ZJ Gertler 'Nationality of Airlines: A Hidden Force in the International Air Regulation Equation. *J. Air L. & Com.* 48 at 160.

¹²⁶ Wasim Zaidi 'Breaking the shackles: Foreign ownership and control in the airline industry' (McGill University 2008) at 11.

¹²⁷ Yu-Chun Chang and George Williams 'Prospects for changing airline ownership rules' (2002) 67 *J. Air L. & Com.* 233.

¹²⁸ Jason R Bonin 'Regionalism in international civil aviation: A re-evaluation of the economic regulation of international air transport in the context of economic integration' (2008) 12 *SYBIL* 113 at 116.

¹²⁹ Hamza Hameed 'Liberalisation without privatization: A perspective from aviation industry' (2016) 3 *LUMS LJ* 16 at 16.

¹³⁰ Yu-Chun Chang and George Williams 'Prospects for changing airline ownership rules' op cit note 233.

¹³¹ Jan Walulik 'At the core of airline foreign investment restrictions: A study of 121 countries' (2016) 49 *Transport Policy* 234 at 234.

resulting to the labyrinthine web of agreements that the continent still struggle to dismantle.. Efforts to implement policies such as SAATM requires a nuanced understanding of the constraints and opportunities that these principles shape as they provide the historical, legal and practical context that shape the issues that guide the development of more liberal and open skies policies that navigate, and where possible, transcend the entrenched norms to achieve more open, competitive, and accessible air transport markets on the continent.

1.8. APPROACHES TO LIBERALISATION OF THE AIR TRANSPORT INDUSTRY

The international air transport community has pursued various approaches to air transport liberalisation. These approaches are either complementary or parallel efforts to realize liberalisation of the industry. The approaches are categorised into unilateral, bilateral, lead sector, and multilateral, with each offering unique pathways to liberalisation.

1.8.1. Unilateral Approach to the liberalisation of the air transport

The unilateral approach to liberalisation involves elimination of the nationality requirement through domestic laws and allowing unlimited foreign investment in the local airline.¹³² This is the rarest and most exceptional form of liberalisation, with few countries such as Australia, Chile, Columbia, and New Zealand adopting it. However, this approach's impact on international air transport is not significant since it is limited to domestic air services.¹³³

1.8.2. Bilateral approach to the liberalisation of the air transport

The bilateral approach involves renegotiation of the restrictive BASAs to incorporate more liberal terms, such as, open route exchange, multiple designations, pricing freedom, capacity freedom, and open third and fourth freedom rights.¹³⁴ This method maintains the structural integrity of existing arrangements while allowing for incremental liberalisation.¹³⁵

¹³² Leejae Woon, 'Regional Liberalisation in international air transport: towards Northeast Asian open skies' (LL.M thesis, McGill University 2015) at 252.

¹³³ Ibid at 253.

¹³⁴ International Chamber of Commerce 'ICC Policy Statement, 'The need for greater liberalisation of international air transport International at 5 available at <<https://iccwbo.org/content/uploads/sites/3/2016/10/The-need-for-greater-liberalisation-of-international-air-transport.pdf>>, accessed 14 March 2021.

¹³⁵ Ibid.

The shortcoming of this approach is that ‘there may be few common concepts of practical importance which all or a significant number of countries would accept on a purely bilateral basis.’¹³⁶ BASAs are the principal instrument of liberalisation of air services between States. This is evidenced by the significant increase of bilateral ‘Open Skies’ ASAs ‘which provide full market access without restrictions on third, fourth, and fifth freedom traffic rights, designation, capacity, frequencies, code sharing, and tariffs.’¹³⁷

1.8.3. Lead sector approach to air transport liberalisation

The lead sector approach targets specific sectors, such as the cargo services, for initial liberalisation, setting a precedent for subsequent sectors. This strategy has enhanced efficiency in areas with common ground for agreement and demonstrated the benefits of liberalisation of the aviation industry, which could inform further liberalisation in other sectors.¹³⁸

1.8.4. Multilateral approach to air transport liberalisation

The multilateral approach, subdivided into phased multilateralism, regional approach, and full multilateralism,¹³⁹ involves multiple states liberalising air transport through treaties or international organisation frameworks.¹⁴⁰

1.8.4.1. Phased multilateralism

Phased multilateralism, also referred to as the plurilateral approach, allows like-minded States to branch out and liberalise their markets.¹⁴¹ These states avoid the inertia caused by the reluctant States, who can later join whenever appropriate. Plurilateral agreements ordinarily contain transitional clauses stipulating the basic minimum requirements for the accession of new States and are devoid of burdensome preconditions. Phased multilateralism is exemplified by the Multilateral Agreement on the Liberalisation of International Air Transportation

¹³⁶ International Civil Aviation Organisation ‘Overview of trends and developments in international air transport’ available at <<https://www.icao.int/sustainability/documents/overviewtrends.pdf>>, accessed 12 March 2021.

¹³⁷ Fu, Oum and Zhang op cit note 49 at 25.

¹³⁸ International Chamber of Commerce op cit note 134.

¹³⁹ Woon op cit note 132 at 40.

¹⁴⁰ International Civil Aviation Organisation ‘Manual on the regulation of international air transport (Doc 9626) (Third Edition -2016)’ available at <https://www.icao.int/Meetings/a39/Documents/Provisional_Doc_9626.pdf>, accessed 10 March 2021.

¹⁴¹ International Chamber of Commerce op cit note 136.

(MALIAT), also known as the Kona ‘Open Skies’ Agreement, concluded in 2000 five members of Asia Pacific Economic Cooperation (APEC) (i.e., Brunei, Chile, New Zealand, Singapore, and the United States).¹⁴²

1.8.4.2. Regional approach to multilateralism

The regional approach focuses on states with shared political, economic interests and geographical proximity, and whose membership is closed to states in a certain region.¹⁴³ This approach forms the core of the thesis.

1.8.4.3. Full multilateralism

Full multilateralism, also referred to as the global multilateral approach, represents the ultimate goal of globally competitive free market,¹⁴⁴ achieved through frameworks like ICAO or the World Trade Organisation (WTO).¹⁴⁵

1.8.4.3.1 Multilateralism within the auspices of ICAO: A stalled process?

One of the critical functions of the Chicago Convention is that it serves as a charter for ICAO, a specialised agency of the United Nations (UN) that is charged with ‘developing the principles and techniques of international air navigation and fostering the planning and development of international air transport.’¹⁴⁶ Ruwantissa Abeyratne notes that ICAO has ‘aims and objectives’ but not a ‘mandate or responsibility.’¹⁴⁷ Ruwantissa notes that ‘while ICAO can develop principles and techniques of air transport (through adopting Annexes to the Chicago Convention), it can only ‘foster’ the development of air transport.’¹⁴⁸ The term foster (meaning promoting or encouraging) deprives ICAO of its leadership role in the development of air

¹⁴² International Civil Aviation Organisation, ‘Overview of trends and developments in international air transport’ op cit note 136 at 3.

¹⁴³ Woon op cit note 132 at 41.

¹⁴⁴ Ibid.

¹⁴⁵ International Chamber of Commerce ICC Policy Statement, ‘The need for greater liberalisation of international air transport.’ available at <<https://iccwbo.org/content/uploads/sites/3/2016/10/The-need-for-greater-liberalisation-of-international-air-transport.pdf>>, accessed 14 March 2021.

¹⁴⁶ Convention on International Civil Aviation 1944 (Chicago Convention) Art. 44.

¹⁴⁷ Ruwantissa Abeyratne *Regulation of air transport: The slumbering sentinels* (Springer Science & Business Media 2013) at 1.

¹⁴⁸ Ruwantissa Abeyratne *Convention on international civil aviation, A Commentary*, (2014) Switzerland 5 at 515.

transport, reducing its responsibility to mere development of guidance.¹⁴⁹ This responsibility has been confirmed by Assembly Resolution A37-20, which stipulated that ‘The Assembly reaffirms the primary role of ICAO in developing guidance on the regulation of international air transport and in assisting and facilitating liberalisation as necessary.’¹⁵⁰ ICAO does not draft or conclude treaties but only provides a forum for discussions, debates, and information sharing.¹⁵¹

While ICAO is one of the largest and most successful specialised agencies of the UN, its success is attributed to its exemplary technical and safety functions and not its economic objectives.¹⁵² ICAO’s authority in the economic field is highly circumscribed. The only objectives that have economic implications are Article 44(d) ‘meet the needs of the people of the world for safe, regular, efficient and economical air transport,’ 44(e) ‘Prevent economic waste caused by unreasonable competition,’ 44(f) ‘ensure that the rights of contracting State are fully respected, and every contracting State has a fair opportunity to operate international airlines.’ These objectives are nevertheless hortatory and are not specified by ICAO in binding standards.¹⁵³ ICAO is therefore powerless in the economic regulation and liberalisation fields, with the stewardship of this role left to the Member States.¹⁵⁴

1.8.4.3.2 Multilateralism within the auspices of the WTO: a missed opportunity?

The WTO is a fully-fledged international organisation and a multilateral trading system concerned with trade rules between nations.¹⁵⁵ Through the General Agreement on Trade in Services (GATS),¹⁵⁶ the WTO offers the liberalisation of trade in services.¹⁵⁷ The WTO and the GATS are products of the Uruguay Rounds of negotiations between 1986 and 1994 within

¹⁴⁹ Ruwantissa Abeyratne ‘Should ICAO have a role as an economic regulator of air transport’ (2014) 27 *Air & Space Law*. 8 at 3.

¹⁵⁰ Abeyratne *Convention on international civil aviation* op cit note 148 at 102.

¹⁵¹ The International Transport Forum ‘Liberalisation of air transport’ 22 <https://www.itf-oecd.org/sites/default/files/docs/liberalisation_air_transport.pdf> accessed 15 July 2022 at 5; Woon op cit note 132 at 24.

¹⁵² Abeyratne ‘Should ICAO have a role as an economic regulator of air transport’ op cit note 149 at 3; *ibid* 56.

¹⁵³ De Leon op cit note 90 at 34.

¹⁵⁴ Havel & Sanchez *the principles and practice of international aviation law* op cit note 102 at 57.

¹⁵⁵ Marrakesh Agreement Establishing the World Trade Organization 1994 (WTO Agreement).

¹⁵⁶ General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex IB, Legal Instruments 1995 (GATS) Annex 1B, Legal Instruments.

¹⁵⁷ M Rafiqul Islam ‘Pressing issues of global free trade in services’ in Chen, Jianfu and Walker, Gordon (Eds.) *Balancing Act: Law, policy and politics in globalisation and global trade*. (2004) 21 *Law in Context* 271.

the auspices of the General Agreement on Tariffs and Trade (GATT).¹⁵⁸ The Uruguay Rounds presented an opportunity for multilateral trade liberalisation in air transport services.¹⁵⁹ However, the negotiators in the Uruguay Rounds were unwilling to tinker with the bilateral system.¹⁶⁰

While some negotiators considered the GATS as the perfect opportunity to achieve a multilateral liberalisation of the air services, others believed that the mandate to liberalise air transport should be left to the already established framework of ICAO, which had more technical expertise in air transport services.¹⁶¹ As a compromise between the divergent views in the Uruguay negotiations, the Annex on Air Transport Services (Annex ATS) of GATS was adopted. The Annex ATS exclusively applies ‘to measures affecting aircraft repair and maintenance services, computer reservations system services and the selling and marketing of air transport services.’¹⁶²

According to paragraph 2 of Annex ATS, ‘traffic rights or what are known as hard rights are excluded from the scope of application of the Annex ATS. Traffic rights, the most pertinent aspects of air transport services, were to be governed by the BASAs.¹⁶³ The exclusion of traffic rights resulted from the challenge of reconciling BASAs, which are based on the principle of reciprocity (fair and equal exchange), with the GATS’ non-discrimination principles of the most favoured nation (MFN) and national treatment.¹⁶⁴ The MFN principle stipulates that ‘Each member State accord immediately and unconditionally to services and service suppliers of any other Member State treatment no less favourable than it accords to the like services and service suppliers of any other country.’ A strict application of the MFN principle to air transport services would universalise the most liberal ASA concessions to all

¹⁵⁸ T. P. Stewart *the GATT Uruguay Round: A negotiating history (1986–1992). Volume II: Commentary* (Kluwer Law and Taxation Publishers 1993) at 2342.

¹⁵⁹ Wolfgang Hubner ‘Liberalisation scenarios for international air transport’ (2001) 35 *Journal of World Trade* 975.

¹⁶⁰ Drg Van Calster ‘The ambiguous relationship between air transport services and the WTO’ (LL.M thesis, KU Leuven 2019) at 24.

¹⁶¹ Fayed and Westlake op cit note 88 at 446.

¹⁶² Paragraph 3 Annex ATS

¹⁶³ Sumangal Narendra, ‘General agreement on trade in services and aviation ground handling services-A theoretical perspective.’ 2014 *IOSR Journal of Business Management* 36; Christopher Findlay and David K Round ‘The three pillars of stagnation: Challenges for air transport reform’ (2006) 5 *World Trade Rev.* 251.

¹⁶⁴ Peter Bossche & Werner Zdou, *The law and policy of the World Trade Organization: Text, cases and materials*, vol 3 (Cambridge University Press 2008) at 306.

WTO State parties.¹⁶⁵This would, however, create a ‘free rider’ problem in which free riders would benefit from the most liberal ASAs whilst protecting their markets.¹⁶⁶

Though the GATS was able to resolve the challenges presented by the MFN principle in other equally complex sectors such as telecommunications and maritime, the air transport sector proved to be unique because of the extent of the network of BASAs. The national treatment principle provides that;

‘In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.’

A strict application of the NT principle would prohibit the most discriminatory elements of air transport, such as the reservation of cabotage to national airlines and the nationality rule.¹⁶⁷

The various approaches to air transport liberalisation, each with their distinct advantages, challenges and implications, offer a comprehensive view of the global landscape of aviation liberalisation. This conceptual understanding is crucial in the greater context of SAATM, as it provides a diverse array of strategies and lessons that inform a more tailored and effective approach to liberalisation of air transport in Africa.

1.9. LITERATURE REVIEW

The literature review examines the body of research that has previously explored various facets of aviation in Africa. This review is anchored on the fundamental premise that the evolution and advancement of air transport on the continent and the call for liberalisation is both a policy advancement and a reflection of broader socio-economic and normative dynamics of the continent. Consequently, contributions of past research, both from within and beyond the continent, are appraised based on their ability to elucidate the dynamics of the research area. The thesis is positioned within the field and builds on the previous findings and recommendations while bridging the gap identified in the previous studies. This is particularly pertinent in the context of SAATM which represents an underexplored, yet significant aspect

¹⁶⁵ Havel & Sanchez *the principles and practice of international aviation law* op cit note 102 at 110.

¹⁶⁶ Antigoni Lykotrafiti ‘Liberalisation of international civil aviation’ (OECD Discussion Paper 2015).

¹⁶⁷ Havel & Sanchez *the principles and practice of international aviation law* op cit note 102 at 111.

of Africa's aviation policy and practice. The thesis therefore contributes to the existing aviation literature by offering novel perspectives and insights on the future of air transport development on the continent.

1.9.1. Literature review on benefits of liberalisation of the air transport industry

The past decades have witnessed a burgeoning corpus of research that examine the various benefits of air transport liberalisation for the aviation industry and the economy. Empirical research illustrates that liberalisation catalyses suitable regulatory ecosystem and competitive dynamics in the aviation sector. Stephen Morrison and Clifford Winston have shown that the liberalisation increases the number of carriers competing in the market, improves service quality and pricing for passengers.¹⁶⁸ On the other hand, effective regulatory environment enhances air traffic growth, resulting in the elimination of restrictions on pricing, route entry, and enhanced competition. Kenneth Button provides a salient example of deregulation of the U.S domestic air transport industry between 1978 and 1988 which stimulated a 55 per cent increase in passenger traffic, and increased scheduled revenue passenger miles by over 60 per cent. The cost of travel was reduced by approximately 17 per cent on major routes, and employment in the air transport industry grew by 32 per cent.¹⁶⁹

Anton Richman also reaches similar conclusions in the European context. The period from 1992 and 2000 marked a remarkable phase of liberalisation, characterised by a 75 per cent increase in scheduled flights, an 88 per cent growth in total flights, and a doubling aviation seat.¹⁷⁰ ICAO has also determined that the creation of the EU-SAM intensified competition on major European routes, emergence of new routes, and a 34 per cent decline in discount fares.¹⁷¹

In a landmark study in 2006, InterVISTAS Consulting underlined the substantial traffic growth of between 12 per cent and 35 per cent in countries that embraced liberalisation. The study notes, 'In a number of situations, growth was at rates exceeding 50 per cent, and in some

¹⁶⁸ Steven Morrison and Clifford Winston, *the economic effects of airline deregulation* (Brookings Institution Press 2010).

¹⁶⁹ Kenneth John Button *Opening US skies to global airline competition* (Center for Trade Policy Studies, Cato Institute 1998) at 3.

¹⁷⁰ Anton Richman and Chris Lyle 'The economic benefits of liberalising regional air transport: A review of global experience' 2005 *Johannesburg: ComMark Trust* at 12.

¹⁷¹ ICAO 'European experience of air transport liberalisation' Joint Presentation by the European Union and the European Civil Aviation Conference to the 5th Worldwide Air Transport Conference 2003

cases reached almost 100 per cent of the pre-liberalisation rates.¹⁷² The study stimulated the likely effect of liberalising 320 country pairs (320 bilateral agreements) that had hitherto not liberalised their air transport markets, projecting approximately 63 per cent increase in traffic, the creation of 24.1 million jobs and an additional 490 billion U.S dollars in GDP. It also highlighted that EU-SAM in 1993 was instrumental in creating approximately 1.4 million jobs and an average annual growth rate in traffic between 1995 and 2004 that was almost double the growth rate from 1990 to 1994.¹⁷³

A collaborative study in 2007 by InterVISTAS, and IATA,¹⁷⁴ focusing on 48 developing and developed countries, examined the relationship between a country's connectivity to the global air transport network and its level of productivity or what is commonly referred to as the 'catalytic impacts' or the 'wider economic benefits' of liberalisation of the air transport industry from 1996 to 2005. The study found that liberalisation plays a fundamental role in a country's economic development and enhances long-term economic growth through the creation of employment in aviation and aviation-related industries, promoting the tourism industry, enhancing access to international markets, facilitating direct foreign investment and stimulating general economic growth.

Regionally, a study on EAC countries¹⁷⁵ (Burundi, Kenya, Rwanda, Tanzania, and Uganda) projected that liberalisation between these countries would result in a nine per cent average reduction in passenger fares and a 41 per cent increase in flight frequencies. This would, in turn, generate 46, 320 new jobs and contribute 202.1 million U.S dollars annually to the GDP. The survey found that the liberalisation of just 12 African countries would create 5 million new passengers, generate a Gross Domestic Product (GDP) of more than 1.3 billion dollars, and create 155 000 jobs.¹⁷⁶

A 2006 study of liberalisation within the South African Development Community (SADC) determined that liberalised routes experienced an 18 per cent reduction in air fares

¹⁷² InterVISTAS Consulting 'The economic impact of air service liberalisation' (2006) available at <http://www.intervistas.com/downloads/Economic_Impact_of_Air_Service_Liberalisation_Final_Report.pdf>, accessed 4 October 2021.

¹⁷³ Ibid.

¹⁷⁴ InterVISTAS Consulting 'Aviation economic benefits; Measuring the economic rate of return on investment in the aviation industry' (2007) available at <<https://www.iata.org/en/iata-repository/publications/economic-reports/aviation-economic-benefits/>>, accessed 23 March 2021.

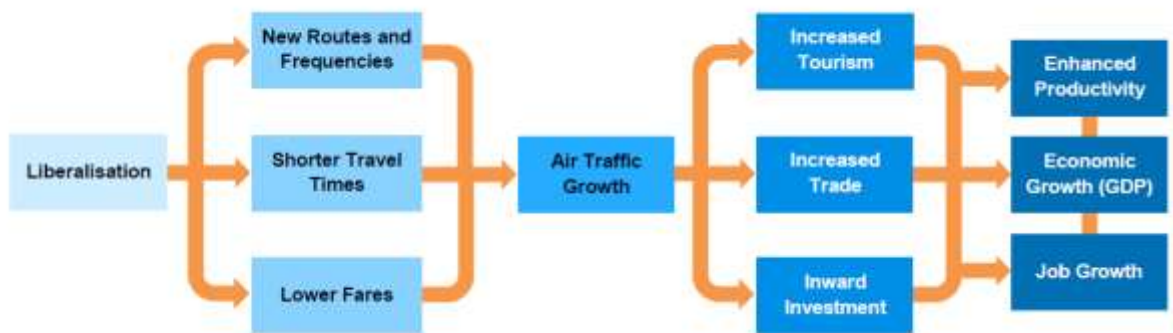
¹⁷⁵ InterVISTAS Consulting 'What are the costs and benefits of 'Open Skies' in the East African Community (EAC)?' (East African Research Fund 2016) available at <https://assets.publishing.service.gov.uk/media/594ce88240f0b60a4400002a/InterVISTAS_EARFOpensSkies_FinalReport_Sept2016.pdf> accessed 11 April 2021.

¹⁷⁶ Ibid.

and, a 23 per cent increase in passenger volumes for routes to and from Johannesburg. Furthermore, complete liberalisation of the SADC aviation market could potentially attract an additional 500,000 foreign tourist annually, contribute more than 500 million U.S dollars in tourism spending and generate more than 35,000 new jobs in the travel and tourism industry, alongside an additional 37,000 jobs in other economic sectors within SADC.¹⁷⁷

The figure below summarises the benefits of liberalisation.

Figure 2: Benefits of liberalisation



Source: InterVISTAS Consulting

In sum, the literature on liberalisation acknowledges advantages of liberalisation of air transport industry and its impact on aviation and the economy. The body of research in this area has yielded significant findings that demonstrate that liberalisation of the aviation sector results in a surge of competing carriers, improved service quality, fare pricing for passenger, and improved conducive regulatory framework that supports air traffic growth. continental literature on implementation of YD and SAATM remains thin.

1.9.2. Literature review on the implementation of the YD

In ‘Open Skies for Africa: Implementing the Yamoussoukro Decision,’ Charles Schlumberger lays the foundation for understanding the dynamics of implementation of the YD. Published in 2010, Schlumberger’s seminal work evaluates the 20-year progress of liberalisation of air services on the continent. He distinguishes between two dimensions of implementation: implementation as a matter of public policy and as application of the operational principles. He conceptualises public policy implementation as ‘rule-making, rule-administration, and rule

¹⁷⁷ Andrew Myburgh & others ‘Clear skies over Southern Africa’ 2006 Woodmead, South Africa: ComMark Trust.

adjudication.¹⁷⁸ At a state level, implementation has undoubtedly been affected (positively or otherwise) by factors such as ‘the legislative intent and administrative capacity of the implementing government, interest group activity and opposition, and presidential or executive support.’¹⁷⁹ At the pan-African level, implementation of the YD as a public policy refers to the provisions of the YD that prescribe formal principles of the YD and the institutional framework, such as regulations (Articles 7, 8, 9 of the YD and Annexes 2, 3, 4, 5, 6 of the YD).¹⁸⁰

Implementation as application of the operational principles is enshrined in Articles 3 on grant of traffic rights, Article 4 on tariffs, Article 5 on capacity and frequency, and Article 6 on designation and authorisation. Using the criteria of applying the principles of the YD, Schlumberger groups State Parties to the YD into three categories. The first category involves states with small and often struggling national airlines – these States have restrictive BASAs and are generally opposed to implementation. The second category are states with strong and often market-dominant national airlines that can compete on an operational and financial level. These states mainly grapple with the challenge of sufficient capital due to the fragmented, underdevelopment and thinness of the African capital markets. To grow their markets, these airlines pursue liberal BASAs and are generally supportive of the implementation. The third category are states that lost or have never had a significant carrier and are typically keen to attract air traffic to serve their national air transport market and are not concerned with foreign domination and competition. These States are generally supportive of the implementation of the operational principles.¹⁸¹ The categorisation of states into the three groups is crucial in identifying classifying states in terms of their likelihood to adopt the principled approach to the implementation of the SAATM.

Using Ethiopian Airlines as a case study Schlumberger concludes that when the implementation is understood ‘as the application of the principles of the YD, then it can be done successfully on a purely operational basis and as such is not depend on carrying out public policy based on a law or treaty.’¹⁸² Put differently, even in the absence of public policy elements such as competition regulations, consumer regulation and dispute resolution mechanisms, and elaborate powers of institutions, the implementation of the YD can

¹⁷⁸ Schlumberger, *Open skies for Africa* op cit note 7 at 31.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid at 38.

¹⁸² Ibid.

successfully be achieved between two or more States on a bilateral basis. Schlumberger further opines that a bilateral understanding can substitute these public policy elements.¹⁸³

This perspective underscores the flexibility of the YD and the potential of bilateral agreements to substitute certain public policy aspects. Suffice to note at the time of his writing, the legal and regulatory texts of the YD, such as competition regulations, consumer protection, and the revised duties of the Executing Agency, were still pending, Schlumberger's analysis remains true even in the present context in which these public policy elements have been adopted. Schlumberger's findings also find support in the 2014 IATA study on the economic benefits of implementing the YD with a focus on the operational elements of the YD such as frequencies, frequency, and capacity in; Algeria, Angola, Ethiopia, Egypt, Ghana, Namibia, Nigeria, Kenya, Tunisia, Uganda, Senegal, and South Africa.¹⁸⁴ The study surveyed the possible effect of liberalising the African air markets between the 12 countries. It showed that passengers would enjoy reduced fares of between 25 per cent to 35 per cent, liberalisation would result in new routes and greater frequencies and shorten the flight time between African cities. The study found that implementing these operational elements can generate an additional 4.9 million passengers, stimulate an additional 1.3 billion U.S dollars in economic activity and create 155,000 additional jobs. The traffic impacts on the countries ranged from 51 per cent in Nigeria to 141 per cent in Algeria, with the total traffic flows between the 12 countries projected to grow by 81 per cent. This, therefore, shows that the operational principles of the YD as provided for in Articles 3, 4, 5, and 6 are critical to the implementation of the YD, while the public policy aspects as provided for in Articles 7, 8, 9, 10, and 11 and the Annexes to the Decision are supportive to the operational principles.¹⁸⁵ Further support for Schlumberger's findings can be found in the Infrastructure Consortium for Africa Report, which gives an example of Ethiopia which has previously entered into, have provided for greater liberalisation than envisaged in the Decision despite lacking institutional and supervisory frameworks.¹⁸⁶

However, in the context of SAATM, it becomes evident that operational principles alone are insufficient for the renewed impetus of implementing the YD towards operationalising the SAATM, whose avowed objective is to replace bilateralism with multilateralism. This realisation leads to the proposal of a principled approach that extends beyond market provisions and encompasses broader continental initiatives.

¹⁸³ Ibid.

¹⁸⁴ Gleave op cit note 57.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

There has also been a proliferation of literature on the challenges that have faced the implementation of the YD since its inception. IATA Continental study identifies two key impediments to implementation. These impediments are a culture of non-prioritisation of aviation and a survival policy hinged on protectionism.¹⁸⁷ Regarding the culture of non-prioritisation of aviation, the study analyses the aviation enabling policies of 21 African States whose safety standards as of December 2020 fell below the ICAO recommended safety standard mark of 60 per cent 'Effective Implementation' (EI) mark.¹⁸⁸

A holistic analysis of these countries indicates that these States generally do not prioritise aviation policies or generally have weak political will to implement the YD and, as such, do not adhere to the ICAO SARPs, they lack a strong national carrier, or they have small airlines that do not meet the IATA Operational Safety Assessment (IOSA). These States have a poor airport and airspace infrastructure, rank poorly in terms of the AU/AfDB Visa Openness ranking, are slow to sign and ratify Air Law treaties, and generally have thin air transport markets. These factors derail implementation of the YD and the SAATM and are a stumbling block to the state's aviation sector and general economic growth.

On the culture of protectionism, the study notes that at least 28 of the 55 AU States have a flag carrier, with approximately 14 of these carriers struggling to survive, and plans are underway in several other States to establish their flag carriers further making the African aviation heterogeneous and fragmented. The study notes that protectionism has been deployed to constrain the implementation of the YD in order to keep the underperforming African airlines afloat.¹⁸⁹

Svetlana Surovitskikh and Berendien Lubbe attribute the slow implementation to the underdeveloped institutional and supervisory frameworks, such as the lack of establishment of competition rules, a dispute settlement mechanism, and an operational monitoring body.¹⁹⁰ In the context of SAATM, apart from the dispute settlement, which is still pending at the time of writing this thesis, all the other relevant legal, regulatory, and institutional framework is now in place. The Infrastructure Consortium for Africa Report notes that the main stumbling block to the liberalisation of the African air transport sector is the disparities in the economic and political size of African countries and the fear that the relaxation of rules on ownership and

¹⁸⁷ IATA, 'Continental Study on the Benefits of the SAATM and Communication Strategy for SAATM Advocacy.' 2021 at 98.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Surovitskikh and Lubbe op cit note 51.

control will adversely affect the national carriers.¹⁹¹ In the context of SAATM, the different level of development across the continent remains a formidable challenge, with several States refusing to sign up for the SAATM because of this concern.

1.9.3. Literature review on Regional Integration Arrangements and SAMs

Regional air transport liberalisation initiatives are not stand-alone endeavours but are enmeshed within the broader context of regional integration arrangements (RIAs). RIA and SAMs are intrinsically linked, principally because of aviation's critical role in enhancing intra-regional connectivity.¹⁹² Michelle Dy posits that RIAs across diverse geographies such as Africa, ASEAN, EU and South America have integrated the establishment of SAMs within their broader economic integration agendas.¹⁹³ The correlation between air transport and RIA implies that the developmental trajectories and efficacy of RIAs are often mirrored in the progress and challenges of respective SAMs.

For instance, Eriksen Oddvar's analysis of EU integration highlights the EU integration process as a puzzle for established theories, where EU States have voluntarily ceded sovereignty to supranational institutions without compromising their national identities.¹⁹⁴ In this context, Rizkia Amelia contends that the EU SAM stands out as the most advanced globally, facilitated by strong supranational institutions, primacy of community laws, and the common European identity that have facilitated the coalescing of European States without much intransigence.¹⁹⁵ Thomas Lawton posits that the EU's supranational institutions have increasingly asserted their policy-making mandate in the air transport sector and largely dismantled the authority of the Member States in air transport matters, ultimately replacing intergovernmentalism with supranationalism.¹⁹⁶

This contrasts with the ASEAN model, where the concept of supranationalism is foreign. Instead, as Dy notes, ASEAN has developed a unique form of diplomacy dubbed the 'ASEAN way' based on the Malay cultural practices of *musjawarah* and *mufakat* that embrace consensus

¹⁹¹ Gleave op cit note 57 at 91.

¹⁹² Michelle Dy, 'Opening ASEAN's Skies, The ASEAN Way: Lessons from The European Experience and The Prospects of An Integrated Aviation Market' [2014] Available at SSRN 2426438 3.

¹⁹³ Ibid 3.

¹⁹⁴ Erik Oddvar Eriksen, 'Reflexive supranationalism in Europe—on the cogs and wheels of integration' [2006] *Law and Democracy in the Post-National Union*, Oslo: ARENA 1.

¹⁹⁵ Rizkia Amelia Sania Putri, *Regional Open Skies Regime in Southeast Asia and Its Relevance to Air Transport Deregulation in Indonesia* (McGill University (Canada) 2017) at 22.

¹⁹⁶ Thomas C Lawton, 'Governing the Skies: Conditions for the Europeanisation of Airline Policy' (1999) 19 *Journal of Public Policy* 91 at 99.

building, politeness, consultation, non-intervention, and non-confrontation.¹⁹⁷ This approach affords sufficient flexibility, with integration and cooperation in all sectors pursued at a pace that all states are comfortable with.¹⁹⁸ Therefore unlike the EU SAM, the ASEAN SAM is a negotiated initiative with its progress dependent on intergovernmental consensus between the Member States as opposed to supranational institutions.¹⁹⁹ The ASEAN States have established a SAM in the region through a flexible differentiated mode of integration referred to as the ASEAN minus X that accommodates different interests based on the ‘ASEAN way’ diplomacy.

In Africa, Babatunde Fagbayibo observes that the AU normative framework espouses supranational aspirations and represents a shift from its predecessor, the Organisation of African Unity OAU which was purely an inter-governmental organisation. Babatunde further argues that the rationale behind the transition from the OAU to AU was the need to establish supranational institutions that are capable of exercising binding powers over member States, thus placing the continent's integration process within the context of supranationalism.²⁰⁰ Babatunde notes that despite the AU espousing supranational aspirations, the reality on the ground has been different, with the AU institutions seriously lagging in the attainment of supranational objectives.²⁰¹ Babatunde further argues that just like its predecessor, the OAU, the AU is an intergovernmental organization in which States, as opposed to the normative supranational institutions of the AU, exercise competence and political authority.²⁰²

Trudi Hartzenberg posits that, unlike in Europe and North America, RTAs in Africa are characterized by ambitious targets with unrealistic timelines, dismal implementation records, and a lack of sanctions for non-implementation.²⁰³ James Thuo Gathii notes that African RTAs are flexible development frameworks devoid of scrupulous formal commitments and sanctions.²⁰⁴ Gathii argues that although virtually all African RTAs are based on binding treaty obligations and rigorous formal compliance with time-bound liberalisation

¹⁹⁷ Jiakai Jeremy Chua, ‘The Heavens Were Not Free: Towards Airline Deregulations and Multilateral Open Skies in the US, EU, and ASEAN Cases’ (Vanderbilt University Dept of History 2013) at 62.

¹⁹⁸ Siow Yue Chia, ‘The ASEAN Economic Community: Progress, Challenges, and Prospects’ [2014] A World Trade Organization for the 21st century 269 at 5.

¹⁹⁹ Prayoga Permana, Herman W Hoen and Ronald L Holzhaecker, ‘Political Economy of ASEAN Open Skies Policy: Business Preferences, Competition and Commitment to Economic Integration’ (2020) 2 *Journal of Asian Economic Integration* 44 at 51.

²⁰⁰ Babatunde Fagbayibo, ‘From OAU to AU: Rethinking Supranational Governance in Africa’, *The Palgrave Handbook of African Politics, Governance and Development* (Springer 2018).

²⁰¹ *Ibid* at 414.

²⁰² *Ibid*.

²⁰³ Trudi Hartzenberg, ‘Regional Integration in Africa’ [2011] Available at SSRN 1941742 at 18.

²⁰⁴ James Thuo Gathii *African Regional Trade Agreements as Legal Regimes* vol 6 (Cambridge University Press 2011) at 5.

commitments, flexibility in these RTAs is not necessarily contrary to the legal commitments that State Parties have assumed. Rather African States assume these legal commitments on the understanding that ‘compliance will not be stringently enforced because the commitments are balanced against a variety of safety valves, such as the principles of variable geometry and the equitable sharing of the benefits of regionalisation.’²⁰⁵Gathii further contents that strong supranational institutions do not thrive in Africa, with States preferring weak intergovernmental institutions that accord states ample space to exercise their sovereignty.²⁰⁶Gathii further argues that ‘flexibility does not make African RTAs any less significant than those agreements in other parts of the world that are thought of as more rule-bound. Indeed, highly legalized legal regimes are now not necessarily thought of as superior to those that are not highly legalized.’²⁰⁷

Gathii gives an example of the the1967 EAC as one of the first generations of post-colonial RTAs in Africa that collapsed because its implementation was legislated from above, ‘ex nihilo’ without appreciating that African RTAs needed to be understood on their terms.²⁰⁸ This thesis extrapolates Gathii's argument into the regional integration and cooperation in the African aviation industry and argues that the implementation of the YD has stalled because it has been caught up in the straightjacket of the AU supranationalism and unrealistic timeframes without appreciating the special circumstances of the African continent and flexible nature of African RTAs that calls for differentiated integration speed.

This position aligns with ICAO 40th Assembly recommendation that encouraged member States to ‘pursue liberalisation of market access at a pace and in a manner appropriate to needs and circumstances, giving due regard to the interests of all stakeholders the changing business environment and infrastructure requirements as well as the principles pertaining to safeguard measures designed to ensure the sustained and effective participation of all States, including the principle of giving special considerations to the interests and needs of developing countries.’ The study acknowledges that although the YD calls for a gradual liberalisation of the African air transport industry, it did not provide a clear pathway that appreciates the inequalities inherent in the maturity of markets and developmental asymmetries that characterise African economies and aviation industries. This is evidenced by the eight years’ timeline within which the Yamoussoukro Declaration was supposed to be implemented and the

²⁰⁵ Ibid.

²⁰⁶ Gathii op cit note 204 at 4.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

two-year transition period after which the YD was expected to take full effect and thereafter be implemented, neither of which was realised. Even in the context of SAATM, some African countries such as Uganda have been reluctant to fully embrace the initiative because a ‘big bang’ approach, as opposed to a flexible and gradual approach, will only benefit the continental aviation hegemonies to the detriment of their national carriers.²⁰⁹

Taye Sewagegnehu argues that integration of the highly heterogeneous and diverse African continent with the same speed and on similar terms presents a formidable challenge.²¹⁰ Taye further posits that decades of economic integration in Africa have shown that integration and cooperation is a more complex and difficult endeavour in Africa than elsewhere.²¹¹ According to Venturi, Bernardo and Anna, deeper integration in regions characterized by high levels of heterogeneity and development disparities, such as the ASEAN and the African regions, has only been feasible through a differentiated integration (DI) approach. This approach foregrounds more pragmatism and less rigidity in regional integration and pursues integration and cooperation between states flexibly and incrementally, accommodating the diversities existing among the participating states.²¹²

Venturi, Bernardo and Anna further argue that unlike in Europe and North America, RIAs in the global south economies are not based on strong supranational institutions but on state sovereignty that has been entrenched by the colonial legacy and the past interferences on their affairs, particularly by the developed nations.²¹³ DI has therefore been applied in RIAs in the global south since it allows states to preserve the space to exercise sovereignty and intergovernmentalism, while at the same time enabling the formation of pathfinder groups that can circumvent the paralysis brought about by consensus decision-making process inherent in intergovernmentalism.²¹⁴ In the ASEAN region, for instance, DI has been part and parcel of the ASEAN integration journey where it has been pursued through the ‘ASEAN Minus X formula,’ which also underpinned the establishment of the ASEAN SAM. However, Venturi, Bernardo and Anna argue that although DI is a pragmatic tool for addressing heterogeneity and

²⁰⁹ ‘African Union Launches a Single African Air Transport Market to Boost Air Travel’

<https://lab.movinonconnect.com/s/article/African-Union-launches-a-Single-African-Air-Transport-Market-to-boost-air-travel-1543269329822?language=en_US> accessed 26 August 2022.

²¹⁰ Sewagegnehu D Taye ‘Variable geometry of African integration and its implication on AfCFTA’ (University of Pretoria 2019) at 5.

²¹¹ Ibid.

²¹² Bernardo Venturi and Anna Ayuso, ‘Differentiation in ASEAN, ECOWAS and MERCOSUR: A Comparative Analysis Bart Gaens’ [2020] Policy at 3.

²¹³ Ibid.

²¹⁴ Ibid.

development disparities in RIAs, it can create an ‘elite’ tier of states that can exacerbate the existing development asymmetries; if not properly executed, it can result in fragmentation, further undermining community efforts.²¹⁵ This is particularly true when the ‘elite’ states pursue interests that favour them and try to impose their agenda on the weaker states, further resulting in intra-regional cleavages.²¹⁶

According to Warleigh-Lack, DI takes three forms depending on time and political choice; multi-speed differentiation, concentric circles (also known as variable geometry), and *à la carte* differentiation.²¹⁷ Su Hungdah defines multi-speed differentiation as ‘the mode of integration in which all member states pursue the same objectives but at different times.’²¹⁸ Warleigh-Lack, on the other hand, posits that ‘in a multi-speed differentiation, there is no fundamental departure from a uniform process of integration because all that varies is the time taken by particular states of a region to reach the shared collective goal.’²¹⁹ Su defines concentric circles ‘as a mode of differentiated integration which allows permanent or irreversible separation between a core of members and lesser developed or simply unwilling units.’²²⁰ Warleigh-Lack adds to this definition by stating that concentric circles result into the region being ‘divided up into de facto leagues from those states at the top which implement the whole set of regional measures, to those at the bottom which implement the smallest bundle possible.’²²¹ Lastly, Su defines *à la carte* differentiation as ‘where member states are free to pick-and-choose which policy area they would like to participate in, while at the same time holding only a minimum number of common objectives.’²²² Warleigh-Lack refers to this mode of differentiation as the most controversial since it permanently leads to a region's differentiation without clearly delineating the core members or policies.²²³ In Africa, DI has been mainly pursued through variable geometry.

The extant body of literature commendably underscores the significance of liberalisation, the dynamics of YD implementation, and the close association between RIAs and SAMs. It highlights that liberalisation has positive economic and operational outcomes such as increased

²¹⁵ Ibid at 16.

²¹⁶ Ibid.

²¹⁷ Alex Warleigh-Lack, ‘Differentiated Integration in the European Union: Towards a Comparative Regionalism Perspective’ (2015) 22 *Journal of European Public Policy* 871 at 876.

²¹⁸ Hungdah Su, ‘Politics of Differentiation: Enhanced Cooperation in the EU and the Pathfinder in APEC’ (2007) 5 *Asia Europe Journal* 51 at 56.

²¹⁹ Warleigh-Lack op cit note 217 at 876.

²²⁰ Su op cit note 218 at 56.

²²¹ Warleigh-Lack op cit note 217 at 877.

²²² Su op cit note 218 at 56.

²²³ Warleigh-Lack op cit note 217 at 876.

competition, improved services and economic growth resulting from liberalisation efforts, as evidenced in regions like the US, EU, ASEAN and various African countries. This scholarly position underscores a consistent trend where liberalisation is associated with enhanced market competition, lower fares, and increased flight frequencies, job creation, and overall economic growth. The literature further reveals various implementation strategies of the YD, influenced by different factors such as legislative intent, administrative capacity, and executive support. It underpins implementation as a matter of public policy and application of operational principles.

Elsewhere, the interplay between RIAs and SAMs revealed that SAMs are influenced by the broader context of RIAs. Drawing parallels between the EU and the ASEAN models and their correlation with the African approaches, the literature determines that the success of the EU model, which emphasizes supranational governance, contrasts with the ASEAN reliance on a consensus-based approach and highlights the struggles within the African context to establish supranational structures. This juxtaposition illustrates the significant role of regional normative contexts in shaping SAMs and RIAs. However, the literature lacks in-depth analysis of how these regional approaches directly impact the effectiveness and efficiency of SAMs, particularly in the African context. This thesis aims to bridge the gap by employing comparative regionalism, drawing parallels from the EU and the ASEAN experiences to understand how their unique regional identities, values, and circumstances have shaped their respective SAMs. The comparative regionalism will justify the conclusion for a principled approach to the implementation of the SAATM.

1.10. PURPOSE AND SCOPE OF THE THESIS

The gravamen of this thesis is to propose a ‘principled approach’ to the implementation of the SAATM. This approach emphasizes a holistic implementation of the YD, involving all relevant stakeholders and aligns with the broader initiatives like Agenda 2063 and key aviation treaties such as the 2001 Convention on International Interests in Mobile Equipment and the 1999 Montreal Convention. The holistic implementation of the YD, as stipulated in Article 8(v) of the SAATM Decision, which recognises that the operationalization of SAATM is not to be only premised on the market access provisions of the YD but calls upon Member States to ‘go beyond the market access provisions of the Yamoussoukro Decision in order to accelerate the attainment of the objectives of the SAATM.’ The approach is undergirded by the principle of ‘variable geometry’ which allows for flexibility in regional integration. This principle permits a subset of countries to advance towards deeper integration at a different pace than the entire group.

The second chapter delves into historical evolution of air transport in Africa, and provides the crucial context that highlights how past developments in the industry, policy shifts, and regulatory changes have influenced the current state and future prospects of the continent's air transport liberalisation. Building on the historical foundation, the third chapter analyses the legal and institutional frameworks that underpin the YD and SAATM. The analysis identifies the strengths, weaknesses and limitations within the existing frameworks, thereby informing the development of a more effective and holistic approach to deregulation and liberalisation. The legal and institutional review further pinpoints the necessary policy adjustments, legal reforms, and institutional strategies required for the successful implementation of SAATM.

The fourth chapter focuses on the implementation of the YD across various African RECs and offers the diverse array of regional experiences, successes and challenges, and illustrates the practical aspects of implementation of air transport liberalisation policies in differing African contexts. The insights flowing from the chapter further highlight the nuanced variations in regional compliance and adaptation, which are vital in shaping the principled approach that is flexible and adaptable to the unique circumstances of each REC.

Chapter five extends the analysis beyond the African continent by drawing comparative insights from the experiences of the EU and the ASEAN in air transport liberalisation. This comparative perspective is invaluable in identifying the successful strategies and practices that could be adapted or modified for the African context. The lessons from the two regions provide a global perspective, and offers a broader understanding of how different geopolitical, economic, and regulatory environments influence the outcomes of air transport liberalisation efforts.

Finally, the sixth chapter synthesises the research findings from the preceding chapters and formulates conclusions and recommendations. The chapter also articulates the principled approach to the implementation of SAATM by integrating the historical, legal, regional and international dimensions of air transport liberalisation while addressing the specific challenges and opportunities identified throughout the thesis.

2.0. CHAPTER TWO: DEVELOPMENT OF AIR TRANSPORT IN AFRICA

2.1. INTRODUCTION

Dual influences of extrinsic and intrinsic factors have collectively shaped the trajectory of African air transport. The extrinsic factors are primarily rooted in two historical developments. First, the imperialist endeavours of European powers in Africa played a significant role, as these powers sought to exploit the novel technology of aircraft to further their imperial ambitions. This involvement significantly impacted the early infrastructure and operational frameworks of air transport on the continent. Secondly, the global changes in the regulatory environment of the international air transport industry, particularly following the deregulation of the US domestic air transport industry and the liberalisation of the EU air transport sector, which stretched the established Chicago system to its limits. These changes introduced new paradigms and regulatory models that influenced the development of air transport globally, including in Africa.

In contrast, the intrinsic factors are a result of six decades of deliberate, incremental efforts by African states to foster economic, political, and social integration across the continent. These efforts reflect the unique challenges and aspirations of African nations and their endeavour to develop an integrated and robust air transport sector that serves the continent's needs. This chapter delves into the intricate aero-politics of African states, exploring how political and economic manoeuvres within the continent's aviation industry has been influenced by the chequered history of the international air transport industry. It provides a critical examination of how these dynamics have played out in the context of African countries. The chapter culminates by tracing the chronological developments that led to the adoption of the YD and the SAATM. The historical analysis is crucial for the in-depth understanding of the current state of aviation transport regulation on the continent, and its future prospects. It ties together the historical narrative with contemporary initiatives to

highlight how past experiences and developments have set stage or impeded the current liberalisation efforts under the SAATM.

2.2. AIR TRANSPORT IN AFRICA IN THE COLONIAL PERIOD, THE SECOND 'SCRAMBLE FOR AFRICA,' 1919- 1939

The interwar period between 1919 and 1939 represents the early stages of civil aviation development in Africa as the field of air travel became a new frontier in the imperial ambitions of European states.²²⁴ The technological advancements in aircraft during World War I laid the foundation for the post-war evolution of the industry. Under the stimulus of the military activities, the aircraft had evolved from a scientific marvel to a practical mode of communication. The equipment in use in the first decade of the industry had been an improvement of the military aircraft, which itself had emerged from the aircraft of the pioneering era.²²⁵ It was not until 1925 that aircraft technology was sufficiently advanced to meet the specific demands of imperial and colonial objectives.²²⁶ This era witnessed a significance escalation of air activities, driven predominantly by the British, the Belgian, French, German, and South African airlines, each vying to establish and operate long-haul air routes across the African continent. This period, often referred to as the 'second scramble for Africa,' was instrumental in transitioning aviation from a military innovation to a civil utility, albeit initially limited in its practicality due to the challenging African climate and terrain.²²⁷

The growth of the aviation industry in its nascent stages was significantly driven by the military efforts of industrialised European nations, notably, France, Germany, and the UK, where defence budgets were historically substantial.²²⁸ Following the war, civil aviation emerged as a key by-product of military aviation, quickly assuming a political character that would undeniably influence its future trajectory.²²⁹

The European powers, particularly those involved in imperial conquest, recognised the strategic potential of the novel aircraft technology. They sought to utilise aircraft to bolster

²²⁴ Peter W Brooks 'The development of air transport' [1967] *Journal of Transport Economics and Policy* 164 at 165.

²²⁵ Ibid at 165.

²²⁶ Robert L McCormack 'Imperialism, air transport and colonial development: Kenya, 1920-46' (1989) 17 *The Journal of Imperial and Commonwealth History* 374 at 377.

²²⁷ H Burchall 'Imperial air routes' (1938) 83 *Royal United Services Institution Journal* 247 at 247.

²²⁸ Brooks op cit note 224 at 164.

²²⁹ Robert McCormack 'War and change: air transport in British Africa, 1939-1946' (1989) 24 *Canadian Journal of History* 341 at 341.

their control over distant colonies and as a means of exerting foreign policy.²³⁰ Improved transport and communication networks became essential to the survival and consolidation of empires.²³¹ In this context, aviation emerged as a vital tool for reinforcing imperial dominance and was seen as a measure of technological prowess of the home country.²³²

In Africa, aviation promised to revolutionise the continent's previously inadequate transport and communication networks. As Sir Samuel Hoare, Britain's longest-serving air minister in the interwar period highlighted 'distance was a great enemy of imperial solidarity.'²³³ While not totally ignoring the commercial and economic potential of the aviation industry, prestige and the overseas realisation of political capital became the holy grail in the aviation industry.²³⁴

2.2.1. *Imperial air conquest in Africa*

The inter-war period between 1919 and 1939 saw a crescendo of air activities driven by the imperial ambitions of European states, notably the British, Belgian, French, German, and South African airlines competing to operate long-haul air routes on the continent.²³⁵ These European states organised their aeroplanes into government-subsidised airlines and assigned them the role of empire building. The introduction of airlines heralded the dawn of a new dimension to the imperial assault on the African continent, described by McCormack as the second 'scramble for Africa.'²³⁶ While the prize of the first scramble for empire-building in Africa had been the African territory, the prize for this new dimension of empire building would be power and prestige, the creation of international air routes, ports of call, and mail, passengers and cargo traffic.²³⁷

²³⁰ Ibid.

²³¹ Marc LJ Dierikx 'Struggle for prominence: Clashing Dutch and British interests on the colonial air routes, 1918—42' (1991) 26 *Journal of Contemporary History* 333 at 333.

²³² Ibid at 335.

²³³ Robert McCormack 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919–1939' (1976) 10 *Canadian Journal of African Studies/La Revue canadienne des études africaines* 87 at 89.

²³⁴ McCormack 'War and Change: Air transport in British Africa, 1939-1946' op cit note 229 at 341.

²³⁵ Ibid.

²³⁶ McCormack 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919–1939' op cit note 233 at 89.

²³⁷ Sean H Seyer 'An empire policy must be formed': 'The development of British imperial air routes in the interwar period' 2008 *The Psi africanus Historian* 44 at 44.

The vanguards of the second ‘scramble for Africa’ would be Britain, France, and Belgium, who by 1939 had achieved considerable success in establishing their air routes.²³⁸ They were, however, not without competition from Germany, Dutch, Italy, America, and the local aviation interest, particularly from Kenya, Southern Rhodesia, and the Union of South Africa.²³⁹ Of these rivals, stakes were high for Britain due to the substantial size of its African colonies and the need to respond to the challenge by her rivals.²⁴⁰ However, despite the imminent threat from her rivals on the vast overseas empire, Britain lacked a firm civil aviation strategy during the interwar period and was slow to respond to the air transport needs of its colonies, until shortly before the World War II.²⁴¹ As observed by McCormack, ‘the fact that Great Britain was slow to rise to the challenge of the air ‘scramble’ remains one of the fascinating features of the period, one that calls for careful study and an understanding of the problems which had to be overcome.’²⁴² For several reasons, Britain adopted a parsimonious approach in its African air transport policy. First, the vastness of its colonies throughout the world in which Africa was but a part, meant that it had to spread the imperial air policy throughout the empire. Accordingly, the development of air transport routes in Africa, the Cairo-Cape Town air route, fell in the shadow of the air transport route to India, considered to be the ‘jewel of the empire.’²⁴³ Additionally, its geographical location, as an island nation, posed additional challenges in establishing air routes in Africa. Unlike its continental rivals, Britain had to negotiate aerial sovereignty with other European countries, which were often reluctant to grant access without reciprocal benefits.²⁴⁴ This situation was compounded by Britain’s earlier opposition to the theory of the freedom of the air as advocated by French and Germany at the Paris Conference of 1910, a stance that ironically hindered its own aspirations in later years.²⁴⁵ Due to the lack of foresight at the Conference Britain had hoisted herself by her own petard because. Arguably

²³⁸ McCormack ‘Airlines and empires: Great Britain and the ‘scramble for Africa,’ 1919–1939’ op cit note 233 at 90.

²³⁹ Ibid.

²⁴⁰ Peter Lyth ‘The empire’s airway: British civil aviation from 1919 to 1939’ (2000) 78 *Revue belge de philologie et d’histoire* 865 at 865.

²⁴¹ Seyer op cit note 237 at 45.

²⁴² McCormack ‘Airlines and empires: Great Britain and the ‘scramble for Africa,’ 1919–1939’ op cit note 233 at 91.

²⁴³ Patrick Fitzgerald ‘Lost horizons: The British government and civil aviation between the wars, 1919-1939’ at 55.

²⁴⁴ McCormack ‘Airlines and empires: Great Britain and the ‘scramble for Africa,’ 1919–1939’ op cit note 233 at 92.

²⁴⁵ Seyer op cit note 237 at 46.

but for Britain's rejection of the theory of the freedom of the air, the theory of state sovereignty might have disappeared in air law in 1910.²⁴⁶ The lack of foresight resulted in difficulties in negotiating air route concessions with France, Italy and Spain, further derailing the development of British Empire routes in Africa.²⁴⁷ British passengers, for instance, had to disembark in Paris, take a train to Italy, and then resume their air journey, a situation that lasted until the late 1930s when France and Italy began to allow Britain aerial access to their imperial territories in Africa.²⁴⁸

As a result of the challenges faced in Europe, Britain was compelled to endure the incongruity of using Egypt as the nerve centre of British air imperialism and Cairo as the hub as opposed to London.²⁴⁹ Egypt, hoping to become the 'Clapham Junction' of the empire owing to its strategic position to serve Britain's interest in Africa as a point of departure to the east, south to Cape Town, and West Africa via Khartoum, also challenged the British imperial quest because of its uncertain political future.²⁵⁰ The Anglo-Egyptian relations were fraught with challenges, particularly regarding the 1922 agreement that provided Britain *de facto* control over aviation activities in Egypt and Suez, a power that Britain never exercised until 1939, notwithstanding Egyptian protestation of the infringement of the agreement.²⁵¹ The agreement allowed Egypt to exercise *de jure* control over aviation activities, notwithstanding the British over-lordship.²⁵² Throughout the inter-war decade, Britain grappled with the conundrum of whether to stand by the 1922 agreement or renounce it and therefore risk the Egyptian authorities giving control to their European rivals, the French, Italians, and the Germans, who had already expressed an interest to develop civil aviation in Egypt to which British found a threat to her strategic interests in Egypt and the Suez.²⁵³ This led to a prolonged negotiations and delays in establishing imperial air routes in Africa.²⁵⁴

²⁴⁶ Ibid.

²⁴⁷ Seyer op cit note 237 at 48.

²⁴⁸ McCormack 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919–1939' op cit note 233 at 93.

²⁴⁹ Seyer op cit note 237 at 56.

²⁵⁰ Fitzgerald op cit note 243 at 55.

²⁵¹ McCormack 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919–1939' op cit note 233 at 93.

²⁵² Ibid.

²⁵³ Burchall op cit note 227 at 83.

²⁵⁴ McCormack 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919–1939' op cit note 233 at 93.

The other pernicious factor that delayed the establishment Britain's air routes in Africa was the reluctance of the British government to provide financial assistance and subsidies to the civil aviation industry, largely considered as the step child of the Air Ministry.²⁵⁵ Winston Churchill's famous dictum 'civil aviation must fly by itself,' in his address in the House of Commons as the Air Minister in 1920, succinctly captured the government's parsimony in civil aviation.²⁵⁶ The Churchillian dictum would reverberate in the Air Ministry for almost two decades, with the successive Air Ministers treating civil aviation as a commercial proposition to be developed by private enterprise while the government left to provide aerodromes navigational facilities, issue mail carriage contracts, and enforce aviation standards and regulations.²⁵⁷ The hands-off approach flew in the face of the realities of post-war civil aviation in which subsidies were the norm in industry.²⁵⁸

With civil aviation being a highly unprofitable venture, subsidies were a prerequisite for the airlines' survival.²⁵⁹ By the winter of 1920-21, the British aviation industry had reached the nadir of its success, with British airlines such as the Atlantic Transport and Travel Company (AT&T), Handley Page, Instone Air Line, and Daimler on the brink of bankruptcy as a result of the stiff competition from the highly subsidised French and German airlines.²⁶⁰ Facing this grim reality, Britain had to reconsider its initial policy on civil aviation, with the Lord Weir's Committee pushing for active government involvement in the British civil aviation industry.²⁶¹ Consequently, the British government established the Air Ministry's Civil Air Transport Subsidy Committee, which produced a report in 1923 recommending the establishment of one subsidised state-sponsored monopoly that would compete at the international level.²⁶²

This led to the forced merger of the surviving British airlines on 31st March 1924 to form Imperial Airways, with the government investing an initial capital of £1 000 000 and guaranteeing an equal subsidy over ten years.²⁶³ Although the British government increasingly

²⁵⁵ Seyer op cit note 237 at 50.

²⁵⁶ McCormack 'Imperialism, air transport and colonial development: Kenya, 1920-46' op cit note 226 at 377.

²⁵⁷ Robin DS Higham 'The British government and overseas airlines, 1918-1939, a failure of laissez-faire' (1959) 26 J. Air L. & Com. 1 at 2.

²⁵⁸ Seyer op cit note 237 at 51.

²⁵⁹ Dierikx op cit note 369 at 231.

²⁶⁰ Seyer op cit note 237 at 51.

²⁶¹ McCormack 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919-1939' op cit note 233 at 94.

²⁶² Dierikx op cit note 231 at 337.

²⁶³ Lyth op cit note 240 at 869.

granted subsidies to British air transport operators from 1921 to 1924 and Imperial Airways from 1924 onwards, Churchill's dictum would remain the touchstone for the British subsidy program, with the support expected to be temporary until such time, civil aviation could attain self-sufficiency.²⁶⁴ The disparities in subsidies offered are telling; the civil aviation expenditure in Great Britain in 1927-28 was £481000 compared to France and Germany's expenditure of £1 571 157 and £2 136 756 respectively. In 1933, 1934, and 1935 the average subsidies by the British government to the air transport industry was £550 000 while those given by France, Germany, and Italy were £1465 000, £850 000, and £766 000 respectively.²⁶⁵ This half-hearted and reactionary policy by the British government further derailed the establishment of imperial air routes in Africa.²⁶⁶

By 1925, France, Britain's fiercest rival in Africa, had extended its Toulouse – Casablanca air mail service to Dakar, with plans for an inland service connecting Dakar with Niamey.²⁶⁷ Belgium established a 1400-mile air service through the Congo, the first scheduled air service on the continent.²⁶⁸ Meanwhile, Britain was keenly monitoring Belgian activities on the continent, for it was apprehensive that Belgium would try to reach out to the French, who were likely to oblige, for a partnership to establish a trans-Saharan route connecting the Congo with Europe.²⁶⁹ Franco-Belgium cooperation would threaten the British ambitions of connecting the Congo traffic to the Cape Service and also threatened to tap the South African air traffic by establishing air communications with South Africa to the detriment of Britain.²⁷⁰ Britain's fears materialised in 1928 when France and Belgium developed the trans-Saharan route, though its operation would stall due to the financial difficulties of the post-war period.²⁷¹ In October 1929, the French successfully operated Madagascar's experimental airmail service. By 1934 the Franco-Belgian trans-Saharan service had been established, linking Europe, West Africa, the Congo, and Madagascar.²⁷²

²⁶⁴ Burchall op cit note 227 at 83.

²⁶⁵ McCormack 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919–1939' op cit note 233 at 95.

²⁶⁶ Burchall op cit note 227 at 86.

²⁶⁷ McCormack, 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919–1939' op cit note 233 at 100.

²⁶⁸ Ibid at 102.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid.

Germany was also in the race for air supremacy, with the Deutsche Lufthansa and the Junkers companies leading the German imperial assault in Africa. In 1925 the Junkers negotiated with the Egyptian authorities for air rights and submitted a bid for a tender to offer air mail services.²⁷³ In 1930 the Junkers won a tender to provide air mail services in South-West Africa, a move that left Britain jittered. In 1931 the Junkers facilitated the South-West African Airways to offer the Windhoek-Grootfontein-Keetmanshoop-Kimberly weekly passenger and mail service, further linking the service to the imperial service in 1932.²⁷⁴ From 1931 to 1935, when Union took over the service, the Junkers company operated on the route with remarkable consistency.²⁷⁵ In 1932, the Junkers effectively shut the British hopes of establishing an air presence in the Union of South Africa when it obtained a controlling stake in Union Airways, a private airline established in 1929 by Major Alistair Miller. Although Oswald Pirow took over Union Airways to form South African Airways in 1934, the Junkers' activities in the Union continued with Pirow by 1939, fully equipping the South African Airways (SAA) with Junkers aircraft, to the consternation of the British aircraft manufacturers.²⁷⁶

Germany also advanced its imperial assault in West Africa, albeit more peripherally. In 1930 Deutsche Lufthansa commenced its Stuttgart-Rio de Janeiro air service, and in 1933, it opened an air station at Bathurst (presently Banjul). The Gambia became the first British West African colony to have a direct air link with Europe. It was not until 1938 that Great Britain started focusing on the Gambia and, a year later, established a short-lived air service linking Bathurst to Freetown.²⁷⁷

The Italians were also not left behind in the scramble for Africa's air supremacy. By 1928 they were in negotiations with the British and the Egyptians for the Libya-Egypt air rights with the ultimate goal of operating an air service via Sudan to their East African colonial empire.²⁷⁸ The Dutch, through their airline K.L.M, was, until 1937, negotiating for a service

²⁷³ Robert L McCormack 'Man with a mission: Oswald Pirow and South African airways, 1933–1939' (1979) 20 *The Journal of African History* 543 at 546.

²⁷⁴ Ibid.

²⁷⁵ McCormack 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919–1939' op cit note 233 at 102.

²⁷⁶ McCormack 'Man with a mission: Oswald Pirow and South African airways, 1933–1939' op cit note 273 at 546.

²⁷⁷ McCormack 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919–1939' op cit note 233 at 103.

²⁷⁸ Ibid.

route to link South Africa with Holland, while the Americans, through the Fokker Aircraft Company, showed an interest in South Africa; however, neither plan materialised.²⁷⁹

2.2.2. *Local interests challenge to imperialism*

Lastly, the air-minded settler societies and local air enthusiasts in British East Africa, Southern Rhodesia, and the Union of South Africa are worth mentioning. The societies' interest in modernising the local and regional air transport services was at odds with the British imperial policy that was animated by the imperial aims of power, prestige, and development of long-haul air routes across the continent to the detriment of the African air transport needs.²⁸⁰

In 1925 Tony Gladstone, a representative of the North Sea Aerial and General Transport Company, a subsidiary of Blackburn Aircraft, proposed an experimental service between Khartoum and Kisumu.²⁸¹ The colonial governments of Kenya, Uganda, Tanganyika, and Sudan offered to support the project, with Kenya contributing £3,500 to the initiative. Though experimental service was not successful, these governments supported the establishment of a consortium known as the Cobham-Blackburn Air Lines. The consortium was formed from a merger of Alan Cobham Aviation Company and Blackburn Aircraft in 1928 to pursue a joint proposal for Egypt–East Africa air service.²⁸² The establishment of the Cobham-Blackburn Air Lines was a response to the decision to prioritise the Indian route at the expense of the Cairo–Cape air route. The airline had demonstrated the potential to fill the vacuum created by the delay by a local initiative, something that did not sit well with the imperial authority.²⁸³

Kenya was the most air-minded of the British colonies, and best illustrates the cleavage of imperial aims and local interests in British East Africa.²⁸⁴ Kenya's settler community and governors were generally impatient with the British lethargy in addressing the local air transport needs. They were warming up to challenge the hegemony of Imperial Airways in the region.²⁸⁵ By 1927 the Aero Club of Kenya had already been established and attracted 300

²⁷⁹ Ibid at 90.

²⁸⁰ McCormack 'War and change: Air transport in British Africa, 1939-1946' op cit note 229 at 341.

²⁸¹ McCormack 'Imperialism, air transport and colonial development: Kenya, 1920–46' op cit note 226 at 378.

²⁸² Fitzgerald op cit note 243 at 64.

²⁸³ Ibid at 65.

²⁸⁴ McCormack 'Imperialism, air transport and colonial development: Kenya, 1920–46' op cit note 36 at 375.

²⁸⁵ Ibid at 377.

members, including Beryl Markham, an internationally celebrated aviatrix.²⁸⁶ In 1929, Wilson Airways was established as a private airline and later became Kenya's 'chosen instrument.'²⁸⁷

In 1930 Imperial Airways moved in and acquired the Cobham-Blackburn concern for an amount of 30,000 pounds amidst protest by the local interest, especially in Kenya, who had hoped the airline would be a source of regional prestige and power.²⁸⁸ Imperial Airways pursued a similar move of obtaining control of Rhodesian and Nyasaland Airways (RANA) in Southern Rhodesia, drawing the ire of the local interests.²⁸⁹ These actions by Imperial Airways in British East Africa and Southern Rhodesia demonstrated a questionable aspect of its mandate. While responsible for developing imperial routes, Imperial Airways seemed to be a stumbling block to developing the local and regional air routes.²⁹⁰

It was in the Union of South Africa where the British government would pay the price for the delay of the Cairo Cape air route. Here, the renascent Afrikaner nationalism of the 1930s led by Oswald Pirow, the Minister of Defence of the Union, mounted severe opposition to the imperial aspirations and the British hegemony in air transport from Sudan southwards.²⁹¹ Pirow, described by Sir Christopher Lloyd Bullock, the permanent secretary at the Air Ministry and Britain's chief negotiator in air matters, as a 'notoriously difficult personality,' had by 1932 adopted air policy as the imperial policy of the Union of South Africa and was making claims for air rights on the entire part of the continent south of Nairobi.²⁹² Following the European trend, Pirow formed SAA as the Union's 'chosen instrument' to build an African air empire.²⁹³ SAA was charged with carrying the Union's prestige and influence aloft and afar. SAA would serve the objectives of enhancing communication between the far-flung European settler communities in East, Central, and Southern Africa to the Union, promoting a sense of white community consciousness amidst the emerging African nationalism.²⁹⁴

South Africa's dominion status afforded it autonomy and the latitude to engage Britain in diplomatic negotiations in air matters on a *quid pro quo* basis. Therefore, unlike elsewhere

²⁸⁶ Ibid at 378.

²⁸⁷ Ibid at 375.

²⁸⁸ Fitzgerald op cit note 243 at 65.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Seyer op cit note 237 at 61.

²⁹³ McCormack 'Man with a mission: Oswald Pirow and South African airways, 1933–1939' op cit note 273 at 544.

²⁹⁴ Ibid at 545.

in British Africa, where imperial authority could enforce a 'buy British' policy, South Africa, under Pirow's leadership, equipped SAA with the German Junkers, to the consternation of the British aircraft manufacturers. In a quest to embarrass the British, Pirow openly belittled British aircraft by referring to them as 'antiquated' and 'a joke' that were no match to the superior German Junkers. As McCormack aptly puts it, 'the problem faced by Great Britain was straightforward; either answer Africa's needs or step aside and allow the Union to take charge.'²⁹⁵Pirow's expansionist air policy in Africa is evidenced by the SAA acquisition of the Junkers-equipped South-West African Airways for R14,000 in February 1935. These moves cemented SAA's monopoly of air services in the Southern African region.

Pirow's quest to make SAA a dominant player in the Union and north of Limpopo thrust him into a series of talks with the British Air Ministry. In June 1935, Pirow met with Sir Christopher Bullock, a British Air Ministry's representative, in Lusaka and proposed the operations of the SAA as far as Nairobi, arguing that British interests were better off in SAA hands than in the hands of the other European powers.²⁹⁶The British government opposed this idea because the British would have to breach its agreements with the colonial governments in Kenya and Southern Rhodesia, who were keen on developing their local airlines. It was also clear that Wilson Airways and RANA would not survive the stiff competition from SAA with its fleet of aircraft Junkers JU-52/3m that could carry up to seventeen passengers.²⁹⁷

To avert the above situation, the Air Ministry proposed that the Kisumu-Johannesburg services be operated on a 'pooling basis.' On 31 May 1937, a subsequent meeting was held in Nairobi; the Air Ministry accepted Pirow's request to operate on the Kisumu as part of what came to be referred to as the 'Nairobi Resolutions' on a 70/30 'pooling basis' between Wilson's and SAA on the Kisumu- Lusaka route.²⁹⁸ Despite the seemingly good compromise procured through the 'Nairobi Resolutions,' Pirow would not rest. Dissatisfied with the SAA weekly service to Kisumu and a bi-weekly service through Johannesburg-Pietersburg-Bulawayo, Pirow made further demands. He sought and secured a weekly Johannesburg-Kisumu service for SAA and service operation beyond Kisumu- Entebbe –Congo –Angola.²⁹⁹ By 1939 Pirow's mission to frustrate British imperialism through his expansionist air policy in Africa was nearly

²⁹⁵ Ibid at 552.

²⁹⁶ Ibid at 550.

²⁹⁷ McCormack 'Imperialism, air transport and colonial development: Kenya, 1920–46' op cit note 226 at 382.

²⁹⁸ McCormack 'Man with a mission: Oswald Pirow and South African airways, 1933–1939' op cit note 273 at 554.

²⁹⁹ Ibid at 556.

getting accomplished, but for the break of World War II, which saw his plans set aside and SAA taken over by the South African Air Force.³⁰⁰

2.2.3. *West Africa, the 'forgotten' colonies*

During the interwar period, British West Africa air transport industry was the most underdeveloped of all the British African colonies.³⁰¹ Before World War II, British West Africa had limited interaction with the aeroplane. The region did not attract a white settler community that had predominantly settled in Kenya and Southern Rhodesia because of their strategic position along the empire route to Cape Town. Therefore, West Africa was a *'forgotten'* colony in terms of air transport.³⁰² Unlike the sister colonies in East and Central Africa, British West Africa neither had local airlines nor was Imperial Airways interested in operating local services, denying the region the air transport experience in the other colonies.³⁰³ Civil aviation in British West Africa effectively started in January 1936 with the air service of Imperial Airways from Khartoum to Kano using D.H. 86s.³⁰⁴ In the early summer of 1939, Elders Colonial Airways launched a short-lived experimental service between Bathurst and Freetown.³⁰⁵ Though the late 1930s witnessed considerable interest in establishing local air services, especially in Nigeria, British policy for the region was preoccupied with extending the Khartoum –Takoradi empire service to the Gambia with plans to connect the service with England with South America.

In collaboration with its Belgian partner, Sabena, Air France was already encroaching the British traffic in the region for their trans-Sahara route to Europe and the air service from Dakar and Pointe Noire.³⁰⁶ More embarrassing was the award of an air mail contract to the German in 1933, making Deutsche Lufthansa the transporter of British air mail from the Gambia.³⁰⁷ Besides the existing route via Khartoum and Cairo, Imperial Airways had considered establishing a trans-Saharan air route linking West Africa to the UK. However, they were apprehensive that France would demand too much in exchange for this transit right and

³⁰⁰ McCormack 'War and Change: Air transport in British Africa, 1939-1946' op cit note 229 at 341.

³⁰¹ Ibid at 347.

³⁰² Ibid at 354.

³⁰³ Ibid.

³⁰⁴ Hubert Walker 'Some problems in the development of air transport in West Africa' (1953) 57 *The Aeronautical Journal* 477.

³⁰⁵ McCormack 'War and change: Air transport in British Africa, 1939-1946' op cit note 229 at 347.

³⁰⁶ Ibid at 348.

³⁰⁷ Ibid.

the possibility of another war breaking out in Europe, thus rendering the trans-Saharan service otiose.³⁰⁸ The Air Ministry, therefore, chose to improve the hitherto underdeveloped infrastructure along the Sudan-West Africa route with the prudence of this decision realised in the summer of 1940 when Italy entered the war, and the fall of France resulted in the blockage of Britain's trans-Mediterranean air link to Cairo, the east and the south.³⁰⁹ Though first used by R.A.F in 1926 and by Imperial Airways from 1936 on a scheduled basis, the Sudan-West Africa service was, until 1939, a pioneer route with poor safety standards, a dearth of operating facilities, inadequately equipped navigational aids, poorly maintained runways and inadequate storage facilities for petrol and other supplies.³¹⁰

By the time WW II started, it was only in Nigeria where the colonial administration had formulated a blueprint for establishing a network of airfields that would meet the local air transport needs and link with the Sudan service. However, the implementation pace of the blueprint remained slothful.³¹¹ The limited flying range performance of the British-manufactured aircraft further exacerbated the delay in developing air transport in the West Africa. By the start of the war, only a few British aircraft could cover the 1,349 kilometres between Bathurst and Takoradi and the distance between England and Bathurst. This limited performance by the British aircraft had resulted from the Anglo-American agreement made during the war in which the British aircraft industries would concentrate on the manufacture of fighters and bombers, leaving the manufacture of aircraft suited for air transports to the Americans.³¹²

2.2.4. *The arrival of American air power in Africa*

The arrival of American air power in Africa during the 1940s marked a pivotal shift in the continent's aviation landscape. This period saw the establishment of the British Overseas Airways Corporation (B.O.A.C.) in 1940 through a merger of Imperial Airways and British Airways. Unlike its predecessor, B.O.A.C was not restricted to using British-made aircraft and began acquiring American Douglas DC 3 in 1940.³¹³ However, the steady supply of American

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid

³¹³ Ibid at 349.

aircraft was disrupted when America entered World War II in December 1941.³¹⁴ The scarcity of suitable aircraft adversely affected B.O.A. C's operations in Africa, particularly during the war years.

This gap presented an opportunity for American carriers, notably, Pan American Airways (P.A.A), America's 'chosen instrument,' and S.A.A to use their efficient and more advanced aeroplanes to capitalize on the opportunity to serve the African routes.³¹⁵ The inadequacy of the British aircraft was particularly felt along the West Africa-Cairo route. In 1942, the British could not meet the Allied forces' demand for approximately 25,000 pounds of military supplies, mail, and passengers in North Africa and the Middle East.³¹⁶ B.O.A.C and R.A.F could only offer a combined weekly load capacity of about 10,000 pounds. As such, 60 per cent of the traffic of this critical route, the West Africa-Cairo route, was left to American carriers, particularly P.A.A, Trans-World, and Air Transport Command (A.T.C).

British officials were particularly concerned about P.A.A., fearing its advanced equipment, advanced equipment, growing familiarity with African air transport routes and its aggressive marketing approach which were likely to arouse a commercial interest in the post-war era. P.A.A activities in Africa were further – bolstered by the 1941 'Pink Agreement' between British and American officials that granted it extensive access to the region,³¹⁷

With the arrival of the American air power in West Africa, Britain became apprehensive that the Americans, with their matchless aviation industry, would be pernicious to the British prestige and threaten the future sales of British-manufactured aircraft in Africa.³¹⁸ Britain's apprehension was not altogether unfounded as by 1946 American war aircraft particularly DC 3 and DC 4 dominated the international air transport market with a universal acceptance outside the Soviet bloc.³¹⁹ As a response to the 'scramble' Britain operationalised the trunk route to Cape Town, with the first scheduled Imperial Airways service leaving Croydon for Cape Town on 20th January 1932.³²⁰ Though the journey took eleven days, five different aircraft, and two trains, the service was Britain's most significant effort in responding to the challenge by its

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ Ibid at 356.

³¹⁸ Ibid at 349.

³¹⁹ Brooks op cit note 224 at 173.

³²⁰ McCormack 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919–1939' op cit note 233 at 104.

imperial rivals.³²¹ In Africa, the route started at Alexandria-Cairo-Assiut-Aswan-Wadi-Halfa-Atbara-Khartoum-Kosti-Malakal-Juba-Kampala-Kisumu-Nairobi-Moshi-Dodoma-Mbeya-Mpika-Broken-Hill-Salisbury-Bulawayo-Pietersburg-Johannesburg-Kimberley-Victoria West-Cape Town. The British Somaliland and West Africa colonies were left out of the service, but the service would in 1936 be extended from Khartoum to Nigeria and in 1937 to the Gold Coast.³²²

The Cape route marked the foundation upon which Britain would build its efforts in Africa and assured its presence in the continent and guaranteed Imperial Airways the bulk of air traffic from Africa to Europe. It also cemented Britain's air paramountcy and political prestige in Africa and largely contributed to Britain emerging victorious in the second 'scramble for Africa.'³²³ The 'scramble' and empire-building heralded the beginning of air transport in Africa and irrevocably ushered the continent into the world of aviation and aerial communication.³²⁴ Furthermore, by 1939 the blueprint of the future of air transport had been precisely developed. Imperial powers had established the foundations in the form of air routes and terminals, wireless and meteorological communications, navigational services, and experienced personnel.³²⁵

Influence of American airpower on the continent cannot be gainsaid. The introduction of advanced American aircraft technology, particularly the Douglas DC 3 and DC 4 models, was a game changer. These planes were more efficient, reliable and had greater capacity compared to their British counterparts, thus raising the standards for aircraft performance on the continent.

The American foray both challenged the existing British dominance on the continent and spurred competition in the African aviation market. The presence of the PAA, equipped with superior technology and aggressive marketing strategies, pressured British and other European carriers to innovate and improve their services. Also, strategic agreements such as the 'Pink Agreement', allowed American carriers extensive access to African routes, effectively globalising the continent's aviation sector and filling some of the gaps that Britain had left following its lackadaisical approach to aviation on the continent. This competitive

³²¹ Ibid.

³²² Ibid.

³²³ McCormack 'Airlines and empires: Great Britain and the 'scramble for Africa,' 1919-1939' op cite not 233 at 104.

³²⁴ Ibid at 89.

³²⁵ Ibid.

environment fostered a more dynamic and consumer-oriented industry, setting the stage for cooperation and commercialisation of the 40s until the 60s.

2.3. COOPERATION AND COMMERCIALISATION PERIOD 1945–THE 1960S

World War II decisively altered the course of air transport in Africa and unimaginably opened the continent.³²⁶ During the war, the African continent witnessed a proliferation of airmen, aircraft, and airfields. A more significant number of people never like before travelled by air and used air mail, with aviation becoming the embodiment of development, modernity, and technology transfer. Technological innovation during the war resulted in better-performing military aircraft that opened new routes. It further resulted in the construction of new and better aerodromes, night-flying facilities, enhanced ground services, and improved meteorological navigational.³²⁷ The entry of the advanced American long-range aircraft, most notably the Douglas DC-4 and Lockheed Constellation, was significant in the African market. When the war ended, several African airlines equipped their aircraft with Lockheed Lodestars with the dominance of American carriers, leaving B.O.A.C. as the primary user of the British flying boats.³²⁸

The fierce competition in the African air transport witnessed during the interwar period gave way to cooperation and commercialisation as profitable operations became possible as from the 1950s.³²⁹ Most importantly, World War II heralded a fundamental shift in the British air policy in Africa, abandoning the interwar orthodoxy of colonial self-sufficiency for policy centered on colonial assistance. The change of the British air policy in Africa resulted from the heightened competition owing to the Americans' entry, further exacerbating the already competitive environment.³³⁰ There was a need to respond to the competition, secure a market for British aircraft manufacturers and service providers, and develop local, inter-colonial and regional air routes in Africa. Consequently, Lord Cranborne, the Secretary of State, issued a circular unequivocally stating that the local air transport needs must be seriously considered.³³¹ The Cranborne circular supplemented the existing initiatives in Kenya and

³²⁶ Duncan Cumming 'Aviation in Africa' (1962) 61 *African Affairs* 29 at 34.

³²⁷ Ibid.

³²⁸ Ibid at 34.

³²⁹ Brooks op cit note 224.

³³⁰ Kenneth Button, Gianmaria Martini & Davide Scotti 'African decolonisation and air transportation' (2015) 49 *Journal of Transport Economics and Policy (JTEP)* 626 at 21.

³³¹ McCormack 'War and change: Air transport in British Africa, 1939-1946' op cit note 229 at 354.

Southern Rhodesia, and by 1943 the establishment of public statutory enterprises based on the B.O.A.C model, with regional air transport authorities responsible for all the air matters, was in the advanced stages.³³² Just like in Europe and the Union of South Africa, nationalisation was perceived as a sure way to best serve national and colonial aims. This led to the establishment of two public enterprises, the East African Airways Corporation (EAAQ), in 1945, as a replacement for the then-defunct Wilson Airways, to serve Kenya, Uganda, and Tanzania, and the Central African Airways Corporation (CAAQ) 1946 to serve the three territories of the Central African Federation. Passenger traffic by EAAQ grew exponentially from 9500 in 1946 to 150,000 in 1960, while that of CAAQ grew by 7,200 per cent from 1948 to 1957, with both airlines operating profitably.³³³

It was in West Africa, more than anywhere else in British Africa, where the gains of the war in the air transport industry would be realised the most. With the outbreak of the war, air transport activities in West Africa increased with B.O.A.C, the R.A.F, and local administrators in a quest to serve the reserve route to Khartoum and Cairo.³³⁴ So feverish were the air transport activities in West Africa that the B.O.A. C's resident manager in Nigeria in early 1940 started touting Lagos as an upcoming nerve centre for British air routes in Africa, to challenge the hitherto 'Clapham Junction' of British imperial air routes, Cairo.³³⁵ During the war, American carriers, B.O.A.C. and the R.A.F. worked on a pertinent air supply route, linking West Africa to far-flung cities in North America, Asia, and Europe. This air route was established by thousands of West Africans, with the P.A.A Accra base alone employing 350 West Africans. By 24 November 1943, B.O.A.C. had local full-time employees of 2,522 spread across different occupations. With R.A.F. and B.O.A.C. having their presence across the British West Africa colonies. With more than 8,000 American civilian and military personnel in the region, West Africa was effectively ushered into the air age and placed on the global air map.³³⁶ Lord Swinton, the Resident Minister in West Africa, commissioned a study on the post-war organisation of air transport in West Africa to ensure that the progress made during the war would not be abandoned during peacetime and to counter the American invasion of the West African region. The study was chaired by Lord Swinton's chief of staff, F.H Sandford and in January 1944, the team reported similar findings as the East and Central Africa initiatives. It

³³² Ibid.

³³³ Cumming op cit note 326 at 37.

³³⁴ McCormack 'War and change: Air transport in British Africa, 1939-1946' op cit note 229 at 355.

³³⁵ Ibid.

³³⁶ Ibid.

proposed the establishment of a regional air transport organisation and a regional air carrier supported by the four British West Africa colonies and whose focus would be the provision of internal and inter-colonial air services.³³⁷ Following the recommendations of the Sandford Report, the British government, in May 1946, enacted the West African Territories (Air Transport) Order in Council, which established the West African Air Transport Authority and provided for the incorporation of a publicly-owned airline whose objective would be ‘to secure the fullest development consistent with the economy and efficiency of air transport services within West Africa.’³³⁸ In 1947, the West African Airways Corporation (W.A.A.C) was established to serve the Gambia, Gold Coast, Sierra Leone, and Nigeria.

The formation of airlines in British colonies as public enterprises and prioritisation of the local air transport needs epitomised the decisive shift of the pre-war *laissez-faire* approach.³³⁹ Air transport was now viewed as an instrument of colonial development and would later play a critical role in preparing the African countries for their independence.³⁴⁰ The colonial powers, through their national carriers, provided the emerging African carriers with financial, technical, and management support and negotiated partnerships for them, with these partnerships operating within the context of a rigid BASAs that appeared more favourable to the more prominent European carriers.³⁴¹ The much-anticipated competition from the American carriers, particularly the P.A.A, would fail to materialise on the African air transport scene, with the American carriers shifting their focus elsewhere in a peace-time world of abundant aviation opportunities. However, the American aircraft manufacturers triumphed over British counterparts, with the DC 3s edging British aircraft as the aircraft of choice for the domestic African by the late 1950s.³⁴² The ‘threat’ by S.A.A on the African air transport market would also disappear due to the increasing political pressure arising from the apartheid regime in South Africa.

Towards the end of World War II, the US sponsored the Chicago Conference in 1944, bringing together the Allied and the Neutral forces.³⁴³ 54 countries, including, Egypt, Ethiopia, Liberia, and the Union of South Africa, attended the Conference. The Conference confirmed

³³⁷ Ibid at 356.

³³⁸ Ibid at 357.

³³⁹ McCormack ‘Imperialism, air transport and colonial development: Kenya, 1920–46’ op cit note 226 at 375.

³⁴⁰ Ibid.

³⁴¹ Button, Martini & Scotti op cit note 330 at 23.

³⁴² McCormack ‘War and change: Air transport in British Africa, 1939-1946’ op cit note 229 at 359.

³⁴³ Sand, Freitas & Pratt ‘An historical survey of international air law before the second world war’ (1960) 7 McGill LJ 135 at 26.

the State's sovereignty over their airspace and the bilateral system of negotiating traffic rights that had been in use prior to the war.³⁴⁴ For the African colonies, protectorates, and territories, state sovereignty would be exercised by the European powers, which also claimed the traffic between the territories and the home country.³⁴⁵ During the Chicago negotiations, colonial possessions, protectorates, and zones of influence were often used as bargaining chips with the major powers at the conference, successfully 'selling' or denying transits rights to others.³⁴⁶ As Robert Thornton notes, the underlying assumption of the significant negotiating powers at the Conference and the post-Chicago bilateral negotiations was that the imperial system would remain a permanent feature. Robert further argues that the results of the negotiations would almost certainly be different had the negotiating powers bargained in the present-day post-imperial structure.³⁴⁷ The absence of the emerging African states from the Chicago negotiations would mean that these States would be the biggest losers from the overall compromise.³⁴⁸

With the Chicago Conference participants failing to reach a compromise on the economic role of ICAO, 31 countries met in Havana in 1945 and established IATA, a body charged with the economic rules of engagement, left unresolved by the Chicago Conference.³⁴⁹ IATA member airlines made recommendations on tariffs and related matters. This tariff-setting environment of IATA, in which governments that had bilaterally negotiated traffic rights had to approve the recommendations by IATA, resulted in the holding of most of the airlines on the international routes below their profitability levels, making them dependent on government subsidies. In pursuit of profitability, most European long-haul airlines entered into pool agreements and partnerships with African airlines. For example, B.O.A.C entered into a partnership with EAAQ, CAAQ, and SAA on the east and south African air routes to London and established a formula in which revenue would be pooled, expenses deducted, and surplus shared.³⁵⁰ There was also a similar arrangement between B.O.A.C with Nigerian Airways and Ghana Airways. These partnerships and pool agreements led to high frequencies, convenient

³⁴⁴ Eugene Sochor 'International civil aviation and the third world: How fair is the system?' (1988) 10 *Third World Quarterly* 1300 at 1304.

³⁴⁵ Cumming op cit note 326 at 34.

³⁴⁶ Sochor op cit note 344 at 1304.

³⁴⁷ Robert L Thornton *International airlines and politics: A study in adaptation to change* (Program in International Business, University of Michigan 1970) at 72.

³⁴⁸ Sochor op cit note 344 at 1307.

³⁴⁹ Ibid.

³⁵⁰ Cumming op cit note 326 at 36.

timetables, and increased traffic on the African continent. For instance, traffic on the Britain-Cape route grew from ten per cent in 1955 to twenty-four per cent in 1960.³⁵¹

However, with most of the IATA activities having economic implications, large carriers always sought to dominate the IATA's closed-door conference system, with the ambitions of the Chicago conference aviation powers being inherited by 'dozen larger carriers' within the auspices of IATA where their opinions dominated. Consequently, during the IATA's tariff recommendation process, a 'determined carrier' would vote under the IATA's unanimity rule to push its agenda. For instance, Kenya particularly expressed her concern over using the unanimity rule, which, despite its ostensible potential to facilitate intense bargaining and consensus building, raised rates on certain routes beyond what they might otherwise be. The concern was that the unanimity rule favoured the international aviation hegemonies.³⁵²

2.4. DECOLONISATION AND NATIONAL PRIDE (1960S–1980S)

The post-World War II period saw increased agitation and pressure for independence in the colonial territories.³⁵³ All British and French territories were independent by the end of 1968, with Portugal withdrawing from Angola and Mozambique by 1975.³⁵⁴ The effect of decolonisation meant that as soon as colonial territories attained independence, the new States became entitled to accede, in their names, to the Chicago Convention and exercise sovereignty over their airspace.³⁵⁵ The accession of the newly independent African States to the Chicago Convention necessitated a considerable readjustment for the newly formed African airlines.³⁵⁶ One particular readjustment was that the former colonial powers entered into agreements with the newly independent African states to provide capital and technical assistance to the newly established national airlines. For example, following the split of WAAQ into Ghana Airways and Nigerian Airways, B.O.A.C provided capital investment for these new airlines.

Meanwhile, with the cost of 'political aviation,' the use of national carriers for political prestige, becoming burdensome on the already scarce resources, and airlines incurring disproportionate losses due to the international oversupply of air transport services, several

³⁵¹ Button, Martini & Scotti op cit note 330 at 22.

³⁵² Ibid.

³⁵³ Button, Martini & Scotti op cit note 330 at 23.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ Cumming op cit note 326 at 35.

African countries decided to reduce their aviation-related costs and external dependency. Due to the strain on resources several African countries established joint air services to capitalise on economies of scale that would accrue from the wide spread of routes.³⁵⁷ For example, ten former French colonies in West and Central Africa signed the Treaty on Air Transport in Africa (the Yaoundé Treaty) in 1961.³⁵⁸ This Treaty was the first multilateral air law instrument in Africa and was deemed by many as a turning point in African civil aviation history that would facilitate the integration of the States involved.³⁵⁹ Based on Articles 77 and 79 of the Chicago Convention, that allowed the setting up by two or more States of joint or international operating organisations, the Treaty established Air Afrique to operate international air services between the contracting States' territories and from their territories to non-contracting states' territories and domestic air services within the contracting States' territories.³⁶⁰ Air Afrique operated for over 40 years, flying to many destinations in Africa and Europe before liquidation in 2002.³⁶¹ The other significant regional collaborative effort among African States was a multi-state government agency known as the Agency for Air Navigation Safety in Africa and Madagascar (ASECNA). The Agency was established in 1959 to manage the air space of eighteen African countries and overcome the challenge of small economies of scale by jointly pursuing safety, air transport navigation, joint training of crew staff, and aircraft maintenance.³⁶²

Collaboration in the African aviation industry was also pursued at the first Pan-African Conference on air transport on African soil, held from 9th to 17th November 1964, Addis Ababa, Ethiopia. The Conference was a joint initiative of the United Nations Economic Commission for Africa (UNECA) and ICAO to develop intra-African air transport and its linkages to the outside world.³⁶³ The Conference was particularly important since it was the inaugural meeting of the African civil aviation policymakers, laying the foundation for continental aero political relations. The conference primarily focused on the economic regulation of the African aviation industry, with the technical aspects left to be dealt within the well-established ICAO

³⁵⁷ Ibid at 36.

³⁵⁸ Button, Martini & Scotti op cit note 330 at 23.

³⁵⁹ United Nations Economic Commission for Africa op cit note 6.

³⁶⁰ Ibid.

³⁶¹ Joseph Amankwah-Amoah and Yaw A Debrah 'Air Afrique: The demise of a continental icon' (2014) 56 *Business History* 517 at 56.

³⁶² Button, Martini & Scotti op cit note 330 at 65.

³⁶³ United Nations Economic Commission for Africa 'Report of the African air transport conference' 1964 available at <<https://repository.uneca.org/handle/10855/27064>> accessed 23 August 2021.

framework.³⁶⁴ Three proposals on the pathways to airline integration and cooperation were discussed at the conference. The first proposal advocated the formation of one or several smaller airlines that would be internationally controlled and authorised to perform special flight services.³⁶⁵ The participants, however, rejected this proposal. The second proposal was the establishment of sub-regional airlines controlled by States at the level of each sub-region.³⁶⁶ This proposal appeared to be acceptable at the conference, with States requesting further elaborate studies on the feasibility of sub-regional airlines. The Conference encouraged the African States to consult at the sub-regional levels and explore the options available on the ideal sub-regional groupings they would join. States were to decide, with assistance from UNECA and ICAO, on their appropriate sub-regional grouping and inform UNECA and ICAO through the OAU by no later than 31 March 1965 on the necessary policy action taken to form such airlines.³⁶⁷ There was no official report on any subsequent action taken heralding the start of rhetoric in the integration of the African air transport industry. The third proposal was to establish a Pan-African airline to operate on the intra-African routes and connect the African continent to the rest of the world. However, this proposal was considered premature and therefore shelved to be revisited later, with no further evidence that this proposal was ever discussed. Although no meaningful fruits were realised from the airline collaboration and cooperation perspective, the conference laid the basis for the harmonious development of civil aviation in Africa. In particular, the Conference requested UNECA and ICAO to consult with the OAU and establish a permanent body in charge of civil aviation matters on the continent. This recommendation and the resultant consultations became the brainchild of the African Civil Aviation Commission (AFCAC), which was subsequently established in 1969.

The clamour for independence in British Central Africa led to the dissolution of the Central African Federation on 31st December 1963, with Malawi (Nyasaland) and Zambia (Northern Rhodesia) becoming independent on July 6th, 1964, and October 24th, 1964, respectively. Subsequently, Air Malawi and Zambia Airways were established in 1964 as subsidiaries of CAAQ, with Air Rhodesia joining as the third subsidiary in 1965. In 1967 Air Rhodesia, Air Malawi, and Zambia Airways became independent, leading to the collapse of CAAQ.³⁶⁸ A similar narrative is observed in British West Africa, where the four colonial

³⁶⁴ Ibid.

³⁶⁵ United Nations Economic Commission for Africa op cit note 6 at 28.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Cumming op cit note 326 at 14.

governments had founded WAAQ.³⁶⁹The political disagreements between the governments of the newly established independent countries led to the disintegration of the consortium in 1958 and the subsequent establishment of national airlines, namely Ghana Airways, Gambia Airways, Nigeria Airways, and Sierra Leone Airlines.³⁷⁰

At the dawn of 1960s, the African skies were flooded with international and African air carriers. Approximately forty-three airlines offered scheduled air services and numerous small local charter airlines. According to a survey conducted in 1959, 35 airlines of diverse types were registered and based in Africa. The survey noted that 1800 aircraft were registered, with only 383 offering scheduled passenger services.³⁷¹ Some of the non-scheduled operators, such as Africair Ltd., a subsidiary of the General Mining and Finance Corporation Ltd, used by the Witwatersrand Native Labour Association to transport African workers from the Central African Federation and Tanganyika to Bechuanaland, had a more extensive fleet than most of the African national carriers³⁷² African airlines carried a higher proportion of traffic on international routes compared to the local routes. However, internal airlines were increasingly bolstering their local and regional services throughout the continent, with the former French territories in West Africa being particularly more comprehensive.³⁷³ However, the airlines on the continent operated parallel routes with little or no coordination leading to inefficiency and poor load factors in the air transport industry on the continent.³⁷⁴

Air transport also significantly increased political activities on the African continent by facilitating the meeting and exchange of ideas amongst the African leaders and consequently contributing to political change on the African continent.³⁷⁵Airlines became an instrumental tool for the leaders of the independent African States to broaden their knowledge of other places and connect to other countries besides their former colonial masters. The continent also witnessed a bewildering upsurge in the number of African conference delegates attended by air, with Ghana and Nigeria particularly witnessing an increase in official travels.³⁷⁶The establishment of embassies, consulates, the UNECA in Addis Ababa, the Afro-Asian Peoples Solidarity Council headquarters in Cairo, and the missions to the UN and its specialised

³⁶⁹ United Nations Economic Commission for Africa op cit note 6 at 3.

³⁷⁰ Ibid.

³⁷¹ Cumming op cit note 326 at 37.

³⁷² Ibid.

³⁷³ Ibid.

³⁷⁴ Ibid

³⁷⁵ Ibid at 35.

³⁷⁶ Ibid.

agencies further generated considerable traffic on the African skies. As Duncan Cumming aptly describes

‘Travel to places in Europe that were only names to most Africans a few years ago and to places behind the Iron Curtain have become commonplace. Tokyo and Peking are certainly not too far away. It is much easier for land-locked Czechoslovakia to contact Guinea or for Peking to send experts to West Coast by using aeroplanes. Air transport has played an important part in the Congo problem during the past year.’³⁷⁷

Most newly independent African nations adopted the general European approach of government-owned national airlines, shielding their airlines from competition.³⁷⁸ These airlines were operated as extensions of public service, with airline managers as political appointees.³⁷⁹ Few of these airlines were economically viable, and as such, they had to depend on subsidies from the government.³⁸⁰ The continued government subsidies depressed the urge for airlines to cooperate.³⁸¹ The newly established state-owned airlines also pursued a business model which utilised profitable international routes to cross-subsidise the costly domestic routes.³⁸² The African states also inherited an international route network based on the colonial system in which traffic flow was focused to and from the former colonial masters.³⁸³ Consequently, domestic travel became the ‘Cinderella’ of civil aviation, with the African countries continuing to prioritise the profitable international routes predominantly to European capitals.³⁸⁴ It was not until the 1970s that the intra-African route network started receiving some attention.³⁸⁵

During the first two decades after independence, African airlines encountered restrictive market access on the intra-African routes, with African countries entering into 78 BASAs among themselves compared to 172 BASAs signed with European states between 1960 and 1980.³⁸⁶ Although 55 per cent of the BASAs signed between 1960 and 1980 provided for the third, fourth, and fifth freedom rights, these rights were quite restrictive. As a result, the

³⁷⁷ Ibid.

³⁷⁸ Button, Martini & Scotti op cit note 330 at 25.

³⁷⁹ United Nations Economic Commission for Africa op cit note 6 at 11.

³⁸⁰ Ibid at 12.

³⁸¹ United Nations Economic Commission for Africa op cit note 6.

³⁸² Charles E Schlumberger *Open skies for Africa: Implementing the Yamoussoukro Decision* op cit note 7 at 2.

³⁸³ Button, Martini & Scotti op cit note 330 at 631.

³⁸⁴ Moulaye Ahmed Boukhary, ‘Air transport in Africa: A case study of’ MAGHREB Airlines’ (Massachusetts Institute of Technology 1981) at 6.

³⁸⁵ Button, Martini & Scotti, op cit note 330 at 62.

³⁸⁶ Ibid.

national airlines operated within a restrictive BASA environment with the typical BASA of the 1960s on what is known as traditional predetermination.³⁸⁷ The intra-African BASAs were particularly more restrictive than global average in a manner that bordered on ‘parochial nationalism.’³⁸⁸ National airlines were cherished political and diplomatic assets and recognised as essential trappings of modernity, virility, and independence regardless of the economic consequences. The words of Kwame Nkrumah, Ghana’s Prime Minister in 1964, illustrate the aero political thinking of the day;

‘In connection with the founding of Ghana Airways, it was maintained that there were enough international airlines to serve our needs and that the formation of a new one was unnecessary multiplication which would only satisfy our national pride. Even if this were true, which it is not, it was an argument that did not appeal to us. Naturally, it increases our self-confidence to observe our people, helping to control the intricate mechanisms involved in the functioning of our airway services. We certainly experience a glow of pride in seeing our flag flying on planes and ships travelling to other countries.’³⁸⁹

The historiography of SAA during this period is unique and deserves special mention. SAA had emerged as the continent’s most robust airline with an extensive international route network serving several countries in and outside Africa.³⁹⁰ The ascendance of SAA into the global air transport arena in the late 1950s happened without geopolitical restrictions, notwithstanding the adoption of apartheid policies in South Africa in 1948.³⁹¹ However, in the early 1960s, the international distaste for apartheid grew, leading to the isolation of South Africa as an international pariah state. For example, at its fifteenth session in June/July 1965, through Resolution A15-7—Condemnation of the Policies of Apartheid and Racial Discrimination of South Africa- the ICAO Assembly recognised that South Africa’s Apartheid policies were a flagrant breach of the principles enshrined in the Preamble of the Chicago Convention. The Assembly also warned South Africa that the continual application of the Apartheid policies meant that it would be denied participation in ICAO meetings.³⁹²

³⁸⁷ Charles E Schlumberger ‘The implementation of the Yamoussoukro Decision’ op cit note 23 at 7.

³⁸⁸ Ibid

³⁸⁹ David Warnock-Smith and Eric Tchouamou Njoya, ‘The development of air service agreements in Africa’, *The Economics and Political Economy of African Air Transport* (Taylor and Francis 2017) 25.

³⁹⁰ Gordon Pirie, ‘‘Africanisation’ of South Africa’s international air links, 1994–2003’ (2006) 14 *Journal of transport geography* 3 at 232.

³⁹¹ Ibid.

³⁹² Ruwantissa Abeyratne ‘Convention on international civil aviation’ 2014 *A Commentary, Switzerland* 5.

South Africa's geographical isolation and remoteness, not being on a route to any central transport hub and consequently most direct routes to European capitals only possible by over-flying other African countries, made SAA vulnerable to the imposition of aerial sanctions. SAA was therefore forced to distort its international routes by using a circuitous and costly route around the bulge of West Africa. A non-stop flight plying the route took 13 hours 20 minutes over about 5,900 nautical miles as opposed to a shorter 'direct' route from Johannesburg to London, which would take 11 hours 45 minutes over about 5,250 nautical miles.³⁹³ Most of the independent African countries implacably opposed to the apartheid regime in South Africa would be one of the most vociferous proponents of the imposition of sanctions, air blockage, and the strangulation of air traffic to and from South Africa.³⁹⁴ In 1963 the possibility of South African aircraft being banned from the African Skies became more apparent. Kenya was particularly unequivocal that, notwithstanding the loss in ticket sales, handling fees, and landing charges, its airspace and aerodromes would be closed immediately upon independence.³⁹⁵

Kenya was at the forefront in mobilising a continent-wide blockage on South African air traffic, with this matter being on the agenda of the OAU Summit meetings.³⁹⁶ In July 1964, the OAU Summit at a meeting in Cairo refused to endorse a total ban of air traffic to and from South Africa partly because of South Africa's geographical position on the world map as well the partial dependence of the African states on nine major international airlines (Alitalia, BOAC, EL AL, KLM, Lufthansa, Pan Am, Sabena, SAS, UTA). These airlines still had profitable operations across the black African states to South Africa, and a total ban would only be but good rhetoric. No African country was willing to lose reciprocal landing, traffic rights, and financial support from the European States.³⁹⁷ The demise of the apartheid regime heralded the end of aerial sanctions on South Africa, enabling SAA to revive its services on the significant international routes in an environment primarily determined by economic considerations rather than geopolitical factors.³⁹⁸

³⁹³ Ieuan LI Griffiths 'Airways sanctions against South Africa' [1989] *Area* 249 at 250.

³⁹⁴ *Ibid* at 257.

³⁹⁵ Gordon H Pirie 'Aviation, apartheid and sanctions: Air transport to and from South Africa, 1945–1989' (1990) 22 *GeoJournal* 231 at 234.

³⁹⁶ *Ibid*.

³⁹⁷ *Ibid*.

³⁹⁸ Pirie 'Southern African air transport after apartheid' (1992) *The Journal of Modern African Studies* 30497 at 341.

It follows that the ‘second scramble for Africa’ was a significant development in air transport on the continent. The establishment of air routes and infrastructure by European powers introduced commercial aviation to the continent. Airports, airfields, and navigational aids built to facilitate these routes served as the primary aviation infrastructure on the continent. Many of these facilities remained pivotal in the continent’s aviation network long after the end of colonial rule. These routes also influenced the initial patterns of air connectivity in Africa, often reflecting colonial ties more than intra-African connections.

Additionally, it is evident that the European-led development of aviation in Africa mirrored the colonial power dynamics, where control and access to air freedoms of the air were largely in the hands of the colonial states. African states would have limited say in the development and management of their airspace and aviation policies. It also meant that the growth of local African airlines was significantly stifled, as the market was dominated by European carriers, whose industries had tremendously benefited from the investment during the war period.

The legacies of colonial powers would further impact the way aviation policies were formulated and implemented in independent African states. For instance, the colonial powers had established the basic infrastructure and air route networks that largely served their imperial interests. This established a precedent where the primary air routes were internationally oriented, connecting African cities to Europe capitals rather than fostering intra-African connectivity. As African nations would later gain independence, they inherited these infrastructures and networks, which were often not optimised for the continent’s internal needs, thereby influencing subsequent policy decisions towards restructuring and developing Afrocentric air transport networks.

The competitive nature of the imperial powers in establishing air routes in Africa also led to uneven development of aviation infrastructure across the continent. Regions of strategic or economic importance to the colonial powers received more attention, leading to disparities in the quality and extent of aviation infrastructure across different parts of Africa.

Moreover, the reliance on European technology and expertise for the maintenance and operation of aircraft and aviation infrastructure meant that there was little development of local capacity in the aviation sector. This dependence has continued to affect the development of the aviation industry on the continent, where there is often reliance on foreign expertise and technology.

Finally, the imperial conquest in the aviation sector also set a precedent for the regulatory framework in African aviation. Many of the regulatory structures, mostly characterised by bilateral agreements and limited open skies, were initially set up by colonial powers, and while independent African states would later develop their own aviation authorities and regulations, some of the legacy issues persisted. This necessitated the calls for liberalisation of the industry – the flight to Yamoussoukro.

2.5. LIBERALISATION OF AIR TRANSPORT IN AFRICA; THE ROAD TO YAMOOUSSOUKRO 1980S- 2000

The 1980s were marked by far-reaching changes in the international air transport industry design starting from deregulation in the U.S in 1978 and the subsequent liberalisation in Europe.³⁹⁹ Despite these drastic changes to the international civil aviation industry, air transport in Africa continued operating under the restrictive regulatory environment.⁴⁰⁰ This is despite the air transport liberalisation efforts on the continent, starting with the 1964 Mbabane Conference organised by UNECA with collaboration with the OAU and AFCAC to discuss why African airlines found it challenging to obtain traffic rights in the other African States.⁴⁰¹ The Mbabane Conference was a epoch-making event in the annals of the African aviation sector because it was the pioneer conference in which the issue of traffic rights in Africa was extensively discussed, marking the road to Yamoussoukro .⁴⁰² The Conference culminated with adopting the Mbabane Declaration on the Freedoms of the Air, which called for ‘creating a technical committee that would develop a common African approach for the exchange of third and fourth freedom rights’ and ‘encourages the exchange of fifth freedom rights.’⁴⁰³ Moreover, the Declaration proposed additional measures primarily focused on fostering closer cooperation between African carriers.⁴⁰⁴

A key contribution of the Mbabane Declaration to the African air transport industry was that AFCAC used the Principles of the Declaration to develop 3 model multilateral

³⁹⁹ United Nations Economic Commission for Africa ‘Implementation of the Yamoussoukro Declaration assessment, lessons and proposed amendments for the establishment of an appropriate legal framework’ 1 available at <<https://repository.uneca.org/handle/10855/13778>> accessed 19 August 2021.

⁴⁰⁰ Ibid.

⁴⁰¹ United Nations Economic Commission for Africa 1984 ‘Report of the African conference on freedoms of the air: Mbabane Swaziland 19 To 23 November 1984’.

⁴⁰² United Nations Economic Commission for Africa op cit note 6 at 32.

⁴⁰³ Button, Martini & Scotti op cite not 330 at 25.

⁴⁰⁴ Ibid.

agreements. The agreements were subsequently endorsed by the 11th Plenary of AFCAC in Blantyre as model agreements⁴⁰⁵ to be used by the African States to exchange traffic rights. However, these model agreements only performed a standardisation and harmonisation role and did not meaningfully contribute to the relaxation of granting traffic rights.⁴⁰⁶ The outcome of the Mbabane conference was presented at the African Ministers of Transport and Communication conference held at Kinshasa in March 1987 and greatly informed the basic structure of the Yamoussoukro Declaration.

2.5.1. *Yamoussoukro Declaration*

Concerned by the lack of enthusiasm by the African countries to respond to the regulatory changes and the low levels of traffic in the African aviation industry, UNECA prepared a study and presented its findings to the working group on air transport established with the framework of the Mbabane Declaration.⁴⁰⁷ The working group examined the report by UNECA and presented the report at the sixth meeting of the Conference of African Ministers of transport and communication held in Kinshasa in March 1987. At this Ministerial Conference, the Ministers passed a resolution requesting UNECA, with the assistance of representatives from civil aviation authorities, airlines, and sub-regional organisations, to organise a special conference of the Ministers in charge of civil aviation in Africa to scrutinise the recommendations of the report further.⁴⁰⁸ The Ministers decided that the special conference would be held in 1989. However, because of the urgency of the issues to be resolved, the date was advanced to an earlier date.⁴⁰⁹

The special conference of the African ministers in charge of civil aviation took place on October 6th and 7th, 1988, in Yamoussoukro Cote d' Ivoire. At the conference, three main issues were discussed; 1) the potential effects of deregulation of the U.S aviation industry and the subsequent air transport liberalisation in Europe, 2) the biased use of the computerised reservation system (CRS) owned by the foreign airlines and 3) the aircraft noise restrictions

⁴⁰⁵ These were the Model Multilateral Agreement among African Countries, which is a group agreement, the Model Air Transport Agreement between Two Groups of States, which is a group-to-group agreement and the Model Air Transport Agreement between a Group of States and One State

⁴⁰⁶ United Nations Economic Commission for Africa op cit note 6 at 34.

⁴⁰⁷ United Nations Economic Commission for Africa op cit note 399 at 1.

⁴⁰⁸ Ibid.

⁴⁰⁹ United Nations Economic Commission for Africa 'Report of the special conference of ministers of civil aviation: Yamoussoukro, Côte d'Ivoire 6-7 October 1988' 2 available at <https://repository.uneca.org/handle/10855/11514> accessed 19 August 2021.

imposed by the European countries and the U.S which predominantly affected the African airlines.⁴¹⁰ Addressing the Conference, the Assistant Secretary-General of the OAU noted that deregulation in the US and liberalisation in Europe had resulted in airlines' mergers. He noted that this had led to new, larger, efficient, and highly competitive airlines and that the solution to countering the effects of these drastic changes was through the integration of African airlines. The liberalisation of the European aviation policies notably presented a significant threat to the African airlines because of the close ties between Europe and Africa in civil aviation matters, as Europe was the leading market for Africa's long-haul traffic.⁴¹¹

The second issue discussed at the Conference was the prohibitive ownership of the CRS and the biased use of these systems by the airlines that owned them to the detriment of African airlines. The CRS was predominantly owned by a consortium of mega European airlines or American carriers. The entrenchment of CRS in international airline operations meant that African airlines could not ignore them, yet they did not have a stake in the system.⁴¹² The European airlines had responded to the threat caused by the American airlines by forming a consortium, and the South East Asian airlines were in the process of forming a similar consortium.⁴¹³ Therefore, the delegates at the conference stressed the need for the African airlines to jointly establish their own CRS to safeguard their share of the international traffic.⁴¹⁴

The third issue discussed at the Conference was the application of noise standards that resulted in banning most African airlines in European airports. Because of the high cost of replacing obsolete aircraft with a new generation of wide-bodied aircraft that would meet the standards, most Africans would be cut off from accessing the primary international air transport markets.⁴¹⁵ Given the above challenges, the only solution for the African airlines would be the integration of the African airlines or face extinction.⁴¹⁶ The discussions at the conference culminated in the adoption of a new African air transport policy, the Yamoussoukro Declaration. The Declaration committed the member States to work individually and collectively to enhance cooperation and solidarity for the development of civil aviation in

⁴¹⁰ Ibid at 1.

⁴¹¹ Ibid at 2.

⁴¹² United Nations Economic Commission for Africa op cit note 399.

⁴¹³ United Nations Economic and Social Council 'Explanatory note on the meeting and annotated agenda' 2 available at <<https://repository.uneca.org/handle/10855/21684>> accessed 18 August 2021.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

⁴¹⁶ United Nations Economic Commission for Africa op cit note 399 at 3.

Africa within a time frame of eight years .⁴¹⁷ The main elements of the Declaration were information exchange, technical and commercial cooperation, traffic rights, funding of aeronautical activities, improvement of management, joint operations and joint use of facilities, aircraft noise, and product sale by a computerised reservation system.⁴¹⁸

The conference also explored two options on the appropriate strategy for the implementation of the Declaration. These were the i) integration and cooperation through the merger of airlines and ii) integration and cooperation through the establishment of single markets.⁴¹⁹ The first option would be realised through the establishment of a consortium or joint companies or the merger of the existing airlines. The second option would be realised by creating a single intra-African air transport market that would be realised through the continental liberalisation of traffic rights. The single market was expected to stimulate cooperation between the airlines and establish a common external aviation policy to grant traffic rights to operators outside the African continent. Influenced by the experience of EAAQ and Air Afrique, the Ministers adopted the first strategy, which is the integration and cooperation through the merger of airlines. Integration and cooperation were seen as a panacea for the need to exchange traffic rights due to designating a single airline to use such rights.⁴²⁰ The Conference established a follow-up mechanism consisting of OAU, AFCAC, AFRAA, and other concerned organizations. The role of the body was to follow up on the implementation of the Declaration on the continental level, while Tunisia, the United Republic of Tanzania, Cote d'Ivoire, Gabon, and Mozambique were to coordinate the implementation of the Declaration at the sub-regional level.⁴²¹

Though considerable progress was made in implementing the Yamoussoukro Declaration by some sub-regional organisations, the overall implementation of the Declaration remained a challenge, with the air transport market on the continent remaining heterogeneous, fragmented, and operating in a restrictive regulatory environment.⁴²² Little progress had been

⁴¹⁷ United Nations Economic Commission for Africa 'Report on the implementation of the Yamoussoukro Declaration on a new African air policy' 1 available at <<https://repository.uneca.org/handle/10855/3079>> accessed 19 August 2021.

⁴¹⁸ United Nations Economic Commission for Africa 'Report to the tenth meeting of the conference of African ministers of transport and communications on the special meeting of ministers in relation to the implementation of the Yamoussoukro Declaration' (2021) 1 available at <<https://repository.uneca.org/handle/10855/10280?show=full>>.

⁴¹⁹ Ibid at 2.

⁴²⁰ Ibid.

⁴²¹ Ibid at 3.

⁴²² Button, Martini & Scotti op cit note 330 at 26.

made by the end of 1996, the deadline set by the Declaration for its implementation.⁴²³ The non-implementation of the Declaration was mainly attributed to its non-binding nature owing to its status as a statement of general principles as opposed to a treaty, denying it the requisite legal force at the domestic level.⁴²⁴ The other factor was an institutional weakness, as the institutions that the Declaration provided were only accorded a coordinating role. The other challenge was that during the conception of the Declaration, African governments but not airlines, had been accorded the responsibility of pursuing the integration and merger of the airlines.⁴²⁵

In a report presented at the ninth meeting of the African Ministers of Transport and Communication conference in Addis Ababa, Ethiopia, in March 1993, UNECA highlighted the slow progress in cooperation and the integration of African aeronautical activities.⁴²⁶ The Ministers requested that UNECA organise a Conference of Ministers of Civil Aviation to craft a solution to the impulse. The conference was held on 9th September 1994 at Grand Bay and preceded by the experts meeting on 7th and 8th September 1994.⁴²⁷ After considering regional reports prepared by UNECA and reports prepared by five sub-regional organisations, the Ministers established a working group to deal with the challenges that assailed the implementation of the Declaration.⁴²⁸ The meeting noted that there was a need to take remedial action to speed up the implementation of the Declaration and came up with several proposals, including the need for the States to incorporate the principles of the Declaration into their domestic transport policies, the preparation of a legal instrument in the form of an internal treaty to be ratified by States, and the need to fast track the setting up multinational airlines.⁴²⁹

During the lifetime of the Declaration, African air traffic experienced a slower growth compared to the other regions of the world. From 1985 to 1995, Africa experienced a growth rate of less than three per cent per annum, with revenue earning passenger kilometres growing

⁴²³ United Nations Economic Commission for Africa, 'Report to the Tenth Meeting of the Conference of African Ministers of Transport and Communications on the Special Meeting of Ministers in Relation to the Implementation of the Yamoussoukro Declaration' op cit note 418 at 2.

⁴²⁴ Ibid at 8.

⁴²⁵ Ibid.

⁴²⁶ Ibid at 1.

⁴²⁷ Ibid.

⁴²⁸ Ibid.

⁴²⁹ United Nations Economic Commission for Africa 'Report of the meeting of African ministers responsible for civil aviation: 9 September 1994 available at <<https://repository.uneca.org/handle/10855/10190>> accessed 19 August 2021.

from 43,037 in 1985 to 57,178 in 1995.⁴³⁰ However, from the mid-1990s, the African air traffic exponentially grew, mainly because of the lifting of aerial sanctions in South Africa following the demise of the apartheid regime and the revival of several sub-Saharan African international airports that had stagnated.⁴³¹ Additionally, intra-African traffic fell from 21 per cent in 1985 to 15 per cent in 1996, resulting in the collapse of several African carriers. Of the eighteen airlines that were in operation in 1997, only nine operated with a load factor exceeding 60 per cent, while the rest operated at 40 per cent. Liberalisation and privatization of African airlines in the 1990s resulted in a decline in their international and domestic route networks. For instance, in Nigeria, the domestic route network declined from 63 in 1985 to 15 in the mid-1990s, followed by a slight decline in passenger movement.⁴³²

In contrast to the 1960s and 1970s, the 1980s and 1990s were marked by an increase in external pressure. The pressure was mainly from International Monetary Fund (IMF) and the World Bank through the Washington Consensus. These institutions called for the gradual State divestiture from economic activities, increased private sector participation, the liberalisation of the economies, the withdrawal of subsidies, and the dismantling of monopolies.⁴³³ The Washington Consensus enumerated ten pre-conditions referred to as Williamson's ten points. These points were imposed on the African countries as structural adjustment economic programmes that had to be implemented as a condition precedent for the African countries to obtain loans and loan guarantees from international financial institutions. Consequently, African countries could only receive external funding for capital injections to their national airlines and the improvement of aviation infrastructure upon their commitment to implement the Washington Consensus. For example, in 1994, the World Bank IDA granted Zambia a loan of \$13 million, with the first tranche of the loan required to be used for restructuring Zambia Airways and the second disbursement to be made upon the Zambian government's commitment to establishing a financial plan to avoid any future public subsidy to the national carrier.⁴³⁴ The structural adjustment programme resulted in positive and negative outcomes for the African air transport industry. On the positive side, they resulted in the domestic aviation industry

⁴³⁰ Button, Martini & Scotti, op cit note 330 at 26.

⁴³¹ Ibid.

⁴³² Ibid.

⁴³³ United Nations Economic Commission for Africa 'The evaluation report on air transport sub-sector: The third and final evaluation report on the second United Nations transport and communications decade in Africa (UNCTADA II)1991-2000' 3 available at <<https://repository.uneca.org/handle/10855/18566>> accessed 24 August 2021.

⁴³⁴ Button, Martini & Scotti, op cit note 330 at 66.

deregulation and watering of the traditional attachment to the notion of flag carriers.⁴³⁵ The program also laid the basis for the progressive liberalisation in some African countries, such as Nigeria, which privatised its airlines and ground handling companies in the 1990s⁴³⁶ Moreover, Kenya, which in 1995 privatised its hitherto struggling national carrier, attracted capital from domestic and foreign investors.⁴³⁷

On the negative side, the structural adjustment programmes led to a realignment of government policies and priorities and inadequate budgetary allocation to the aviation industry.⁴³⁸ As a result of the withdrawal of government support, several African carriers, such as Air Chad, Uganda Airlines, Royal Swazi, Lesotho Airways, and Nigeria Airways were liquidated.⁴³⁹ However, some African countries-maintained state support for the national airlines while simultaneously liberalising their BASAs. For example, in 2000, South Africa negotiated liberal BASAs with some countries such as Kenya while ignoring the privatisation of its flag carrier SAA.⁴⁴⁰

2.5.2. *The Yamoussoukro Decision*

The UNECA Working Group, in preparation for the special conference to be held in Yamoussoukro, held a meeting on 20th to 23rd October 1998 in Nairobi, Kenya, to explore various mechanisms that were available to make the outcome of the forthcoming meeting binding.⁴⁴¹ The Working Group considered three alternatives,; i) the drafting of a stand-alone treaty not linked to any existing legal arrangement, ii) the drafting of a Protocol to the Abuja Treaty, and iii) the use of the existing mechanism within the Abuja Treaty.⁴⁴² The option of drafting a stand-alone treaty was eliminated because of the lengthy and cumbersome procedures associated with treaty signature, ratification, and the subsequent exchange or deposit of instruments of ratification. The option of a protocol to the Abuja Treaty by virtue of Article 66 of the Abuja treaty was also eliminated for two reasons; the protocol would still be subject to the cumbersome procedures of signature and ratification as provided by Article 100

⁴³⁵ United Nations Economic Commission for Africa op cit note 433 at 3.

⁴³⁶ InterVISTAS., 'Transforming Intra-African Air Connectivity: The Economic Benefits of Implementing the Yamoussoukro Decision'.

⁴³⁷ Button, Martini and Scotti op cit note 330 at 68.

⁴³⁸ United Nations Economic Commission for Africa op cit note 433 at 3.

⁴³⁹ United Nations Economic Commission for Africa op cit note 6 at 42.

⁴⁴⁰ Button, Martini & Scotti op cit note 330 at 68.

⁴⁴¹ United Nations Economic and Social Council op cit note 433 at 1.

⁴⁴² Ibid.

of the Abuja Treaty and secondly, Article 66 of the Abuja anticipated the Protocol on Transport, Communications, and Tourism as the only protocol that was to be adopted under the Abuja Treaty. The Working Group opted to use the third alternative of the existing mechanism within the Abuja Treaty as provided for in Article 10 of the Abuja Treaty.⁴⁴³

The Ministers responsible for civil aviation met from 13th to 14th November 1998 at Yamoussoukro for the Conference to examine the African air transport industry within the context of the drastic changes brought about by deregulation and liberalisation in the international aviation industry.⁴⁴⁴ At the end of the conference, the Ministers adopted the YD, which represented a pragmatic shift from integrating African airlines through mergers, shared exploitation, and consortia embodied in Yamoussoukro Declaration to the gradual liberalisation of intra-African air transport. It also captured an optimal regulatory framework that would engender private sector participation and enable African airlines to get into alliances and code-sharing arrangements. To give a legal imprimatur to the YD, the Heads of State and Government of the OAU, on July 12th, 2000, met in Lomé, Togo, and endorsed the YD. Pursuant to Article 10 of the Abuja Treaty, the YD was on 12th July 2000 published in the OAU/ECA Official Gazette No. 6 of July 2000 and entered into force on 12 August 2000 after the lapse of a two years' transitional period. As of 12th July 2000, there were 44 Member States to the Abuja Treaty; therefore, the YD became legally binding to the 44 countries as a treaty obligation. However, despite the numerous joint declarations, statements of good intention, and verbal commitments by the African governments and international bodies such as AFCAC, ICAO, and AFRAA, little was achieved in translating the rhetoric of a continental implementation of the YD into a reality.

2.6. SUSTAINED ECONOMIC GROWTH AND FURTHER PIECE-MEAL LIBERALISATION 2000-2010

May 26th, 2001 marked a new dawn in the history of the African continent's economic, political and social integration. On this date, the Constitutive Act of the African Union entered into force, ushering in a new organisation referred to as the African Union (AU).⁴⁴⁵ The adoption of the AU Constitutive Act in 2000 in Lomé, Togo, was preceded by the adoption of the Sirte Declaration on 9 September 1999 at Sirte, Libya. The Sirte Declaration was an initiative of the

⁴⁴³ Ibid at 2.

⁴⁴⁴ United Nations Economic Commission for Africa op cit note 433.

⁴⁴⁵ Corinne AA Packer & Donald Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365 at 365.

OAU to reinvigorate the quest for economic, political, and social integration of the African continent and position the continent to respond to the challenge posed by globalisation.⁴⁴⁶ The new entity, the AU, amalgamated the OAU's political objectives and the AEC's economic objective, officially becoming the successor to both the OAU and the AEC.

Consequently, the legal and institutional framework supporting the YD was carried over into the new regime, with the AU organs taking centre stage on integration matters in air transport industry. During the first decade of the 21st century, the African continent generally experienced exponential economic growth with an annual growth rate of more than five per cent, doubling the previous decade's average annual growth rate. Countries such as Angola, Ethiopia, Ghana, Kenya, Morocco, and Nigeria toppled the economic growth tables. According to the Official Airline Guide, in 2012, this sustained economic growth stimulated an annual air passenger traffic growth of six per cent between 2000 and 2010. In 2014, the air passenger traffic carried by African airlines was 76.7 million, which was 100.3 per cent from 38.3 million passengers in 2000, while the freight shipment was 781,000 tons, a 53.1 per cent increase from 510,000 tons in 2000. The intra-African market share of the number of passengers carried by African carriers increased from 21.3 per cent in 2000 to 32.4 per cent in 2014. The African airlines had a combined fleet size of 690 aircraft, half the size of American Airlines.⁴⁴⁷

This growth was mainly been attributed to increased urbanisation and mega-city sprouting, increased intra-African trade, and cross-border investment, the growth of the African middle class, enhanced macroeconomic and political stability, liberalisation of the aviation industry, growth in tourism, demand for natural resources, and political stability on the continent.⁴⁴⁸ The Western African region particularly witnessed the most significant growth in air passenger traffic on the continent, with the region's share of African seats increasing from 13 per cent in 2000 to 19 per cent in 2010.⁴⁴⁹ This growth has been attributed to the increase in capacity as the result of new entrants such as Arik Air, Air Mali and ASKY. Additionally, the signing of the horizontal agreement between the European Commission and WAEMU in 2009 and the concurrent liberalisation of the air transport market in the region is also recognised as one of the most liberal air transport markets in Africa contributed to the growth.⁴⁵⁰

⁴⁴⁶ Tiyanjana Maluwa 'The Constitutive Act of the African Union and institution-building in postcolonial Africa' (2003) 16 *Leiden Journal of International Law* 157.

⁴⁴⁷ Button, Martini & Scotti op cit note 330 at 28.

⁴⁴⁸ Ibid at 72.

⁴⁴⁹ Ibid at 73.

⁴⁵⁰ Ibid.

African airlines also experienced turbulence in the first decade of the 21st century as witnessed by the air turnover of several airlines. Between 2002 and 2012, 37 airlines were launched across Africa, and all failed.⁴⁵¹ During this decade, African airlines also continually lost their share of intercontinental traffic to and from the continent, losing a capacity of 16 per cent compared to non-African airlines, whose market share increased from 42 per cent in 2002 to 58 per cent in 2012. Airlines from the Middle East doubled their capacity, increasing their market share by 125 per cent during this decade, while European airlines' capacity grew by 18 per cent during the same decade.⁴⁵² The loss of market share could partly be attributed to the collapse of some carriers during the decade, the takeover of traffic by non-African airlines, and the restrictive regulatory environment that frustrated the exercise of fifth freedom rights from the other African countries.⁴⁵³

However, between 2004 and 2010, passenger numbers carried by African airlines incrementally grew yearly, from less than 40,000,000 passengers in 2004 to over 61 000,000 passengers in 2010, representing cumulative growth of 52.5 per cent and annual growth of 8.75 per cent. The significant traffic growth experienced in 2010 resulted from the strong performance of African airlines, an increase in tourists, mainly because of the 2010 FIFA Football World Cup, growth in intra-African and domestic traffic, and substantial growth in foreign direct investment and infrastructure development on the continent.⁴⁵⁴ In 2011 however, the total number of passengers carried dropped from 61,000,000 to 56,000,000, representing an 8.2 per cent drop.⁴⁵⁵ This traffic drop was attributed to the economic and financial crisis in Eurozone and the political instability in North Africa arising from the Arab Spring.⁴⁵⁶ African airlines however successfully navigated the 2009 financial crisis, emerging from the crisis with a cumulative net profit of US\$137 million. Notably, KQ emerged as the fifth most profitable airline in the world in 2009.⁴⁵⁷ Passenger markets continued to defy the economic crisis arising from the Eurozone and political instability in North Africa by expanding, with African airlines establishing 44 new routes in 2012, growing by 12.5 per cent. As of 2012, African airlines'

⁴⁵¹ Button, Martini & Scotti op cit note 330 at 631.

⁴⁵² African Airlines Association '2012 annual report' available at <<https://afraa.org/wp-content/uploads/2018/11/AFRAA-Annual-Report-2012.pdf>> accessed 3 June 2022.

⁴⁵³ African Airlines Association '2010 annual report' 10 available at <<https://afraa.org/wp-content/uploads/2018/11/AFRAA-Annual-Report-2010.pdf>> accessed 4 February 2022.

⁴⁵⁴ African Airlines Association '2011 annual report' available at <<https://afraa.org/wp-content/uploads/2018/11/AFRAA-Annual-Report-2011-1.pdf>> accessed 3 April 2022.

⁴⁵⁵ African Airlines Association '2012 annual report' op cit note 589 at 8.

⁴⁵⁶ Ibid.

⁴⁵⁷ African Airlines Association '2010 annual report' op cit note 453.

total number of passengers stood at 62.9 million. African airlines operated a total of over 690 aircraft, with an average age of 14 years, and forecasts from Boeing indicated that Africa would require 1070 new airlines over the next 20 years to meet the growing demand and replace the ageing aircraft.⁴⁵⁸

Political interference in the management of airlines became commonplace and started haunting the Aviation industry. For example, during 2010/2011, 50 per cent of AFRAA member airlines made changes in the office of Chief Executive Officers on political rather than competence grounds, with some occupying the position for less than a year.⁴⁵⁹ Additionally, African airlines adopted unsustainable business practices such as excessive gauges for services and the use of large aircraft on routes more suited for medium or medium-sized aircraft. These practices led to a 69.7 per cent load factor for African-based passenger services compared to the global average of 79.2 per cent.⁴⁶⁰ A common practice of the African governments between 2000 and 2010 was limiting the number of flights by stifling competition. Approximately twenty countries deployed their already stretched resources to bolster their inefficient flag carriers. Approximately half of the continent's airlines were 51 per cent state-owned, suppressing the growth of low-cost carriers that had been a stimulus for growth in other macro-regional markets. Consequently, African airlines found it challenging to compete with non-African airlines, which carried 80 per cent of intra-Africa and inter-continental traffic involving Africa. African governments also heavily invested in the major international gateway airports by 'gold plating them' with revenues from the domestic airports, notwithstanding the demand for their services.⁴⁶¹ Similarly, except for South Africa, African countries neglected the domestic feeder services offered by low-cost carriers elsewhere and focused on trunk-haul services. A poor safety record also saddled the continent in 2010, with 23 per cent of the world's jet hull losses occurring in Africa. In 2012, African carriers were involved in one in every 270,000 flights compared to the global average of one accident in every 5 million flights.⁴⁶²

The poor state of aviation safety had the effect of putting off potential customers from patronizing African carriers. This led to higher insurance premiums resulting in higher

⁴⁵⁸ African Airlines Association '2013 annual report' available at <<https://afraa.org/wp-content/uploads/2018/11/AFRAA-Annual-Report-2013.pdf>> accessed 4 February 2022.

⁴⁵⁹ African Airlines Association '2011 annual report' op cit note 454.

⁴⁶⁰ African Airlines Association '2013 annual report' op cit note 458.

⁴⁶¹ Button, Martini & Scotti op cit note 330 at 632.

⁴⁶² Ibid at 631.

operating costs for the African airlines.⁴⁶³ The cost of air travel per Revenue Passenger Kilometres (RPK) on the continent in 2010 remained the highest in the world, 65 per cent and 20 per cent more expensive than in the USA and Asia, respectively. The high cost was also attributed to the significantly higher fuel cost and the exorbitant taxes, charges, and fees charged on the aviation industry on the continent.⁴⁶⁴ Some African countries such as South Africa, Kenya, and Ethiopia embraced air transport liberalisation and implemented the YD. For instance, South Africa liberalised its domestic market in the early 2000s and, as of 2010, had signed 45 BASAs with other African states, 22 of which were compliant with the YD.⁴⁶⁵ In 2003 South Africa also signed liberal agreements with Kenya liberalising the Nairobi-Johannesburg route, resulting in a 69 per cent increase in passenger traffic between 2003 and 2005.⁴⁶⁶ Operation of LCCs between South Africa and Zambia led to a 38 per cent reduction in fares and a 38 per cent rise in passenger traffic. Ethiopia also signed liberal BASAs that reduced fares between 10 per cent and 21 per cent and a 35 per cent to 38 per cent frequency increase compared to the restricted intra-African routes.⁴⁶⁷

Liberalisation led to market consolidation and the subsequent building of hubs by the major airlines in Africa; Egypt Air, Royal Air Maroc, SAA, Ethiopian Airlines, and Kenya Airways, which in 2012 accounted for approximately 80 per cent of all scheduled capacity within the continent.⁴⁶⁸ According to FlightStats, from 1994 to 2013, a lot of route consolidation occurred on the African route network due to the abandonment of low-frequency and small aircraft routes. The routes flown within the continent went down from 1088 in 1994 to 719 in 2013. However, this resulted in an increase in frequency in the consolidated routes by one flight per day, with an average capacity of 91 seats per flight in 1994 to an average frequency of 1.3 flights per day and 103 seats per aircraft. Consequently, an average annual increase of 4 per cent of seats offered on intra-African routes led to a doubling of the total number of seats offered on the intra-African routes from 35.4 million in 1994 to 71.8 million in 2012.⁴⁶⁹ The five significant carriers have since 1994 continuously added the number of

⁴⁶³ African Airlines Association, '2011 annual report' op cit note 454.

⁴⁶⁴ Ibid.

⁴⁶⁵ Surovitskikh & Lubbe op cit note 51.

⁴⁶⁶ Button, Martini & Scotti op cit note 330 at 73.

⁴⁶⁷ Ibid at 27.

⁴⁶⁸ FlightGlobal, 'Analysis: Evolution of the African airline market' (*Flight Global*)

<<https://www.flightglobal.com/analysis-evolution-of-the-african-airline-market/109929.article>> accessed 12 August 2022.

⁴⁶⁹ Ibid.

destinations served from their respective hub airports and expanded their share of the local market from 58 per cent in 1994 to 69 per cent in 2013.

Four of the top five airlines on the continent, with the exception of Air Maroc, entered into global alliances to secure new markets through code-sharing and interlining; EgyptAir, Ethiopian Airlines, and SAA joined Star Alliance, while Kenya Airways joined the Sky Team. The market concentration of these five airlines resulted in a disproportionate distribution of intra-African passenger traffic, particularly on the routes connecting the main cities to these five hubs. The concentration led to the development of hub and spoke networks, particularly in Eastern and Southern African regions, to neglect the Central and Western African regions, which have less developed hub systems.⁴⁷⁰ However, despite the market concentration, the number of African-based scheduled services operating from or within the continent in 2013 increased to 70, doubling the number in 1994. While theoretically, the low-cost carriers (LCCs) were thought to be ideal for the African continent, the restrictive regulatory environment and foreign competition presented a formidable challenge to the LCCs, except for South Africa, where Kulula and Mango Airlines established themselves as successful LCCs.⁴⁷¹

The impact of the YD started getting felt in 2004. The five major airlines solidified their presence on the continent, further consolidated their networks, and developed fifth freedom rights, particularly in the regions that did not have solid local airlines. They also improved market access through increased third and fourth freedoms rights and the edging out of weak carriers.⁴⁷² To further facilitate the implementation of the YD at the continental level, which had only been implemented at the sub-regional economic blocs, the AU passed a resolution on 29th June 2007 entrusting AFCAC with the responsibility of the Executing Agency.⁴⁷³ AFRAA was also quite instrumental in mobilizing the continent-wide implementation of the YD through its initiative of the 'Club of the ready and willing states' established in 2006 to advocate for higher-level liberalisation and collaboration in the aviation industry.⁴⁷⁴ These efforts greatly enhanced connectivity on the African continent and facilitated the growth of the air transport industry in Africa. For example, the African aviation industry witnessed the growth of LCCs,

⁴⁷⁰ Button, Martini & Scotti op cit note 330 at 31.

⁴⁷¹ FlightGlobal op cit note 468.

⁴⁷² Button, Martini & Scotti op cit note 330 at 27.

⁴⁷³ African Union *Addis Ababa Resolution on Entrusting the Functions of the Executing Agency of the Yamoussoukro Decision to the African Civil Aviation Commission, Third African Union Conference of Ministers responsible for Air Transport* (Addis Ababa, Ethiopia; 2007) [AU, *Addis Ababa AFCAC Resolution 2007*].

⁴⁷⁴ Button, Martini & Scotti op cit note 330 at 73.

with four LCCs; Fastjet Zimbabwe, Flyafrica.com Namibia, FlyEgypt, and Skywise, launched in 2015.⁴⁷⁵ According to the Official Airline Guide (2012), LCCs' contribution to market share to/from and within Africa increased by six per cent between 2000 and 2010.⁴⁷⁶ Moreover, according to Boeing, 2015⁴⁷⁷ African LCCs in 2013 contributed nine per cent of annual seats in Africa.

The African air transport industry also witnessed increased private sector participation. As a result, a new breed of private airlines serving local and regional markets has emerged. Several African countries, such as Botswana, Cote d'Ivoire, Ghana, Nigeria, and South Africa, have successfully attracted private investors in their main airports. A recent phenomenon in the African air transport industry has been the emergence of intra-African airline cooperation and alliances. For example, in 2015, Daalo Airlines, Djibouti's privately-owned national airline, cooperated with the Kenyan-registered Jubba Airways, operating out of Somalia.⁴⁷⁸ In 2016, Ethiopian airlines and RwandaAir also signed a partnership agreement that allows fifth freedom air service operations for the respective flag carriers, allow code sharing, and use Kigali and Addis Ababa as a hub for passenger traffic to any third country in Africa. Ethiopian airlines also partnered with other African airlines, such as Malawi Airlines and Togo's ASKY. Most recently, Kenya Airways (KQ) and SAA have signed a Strategic Partnership Framework to establish a Pan-African Airline Group by 2023, in which the governments of Kenya and South Africa will have a minority stake in the venture.⁴⁷⁹ The two partners are seeking to recruit a third member from West Africa, most likely Nigeria, Ghana, Ivory Coast, or Senegal. The partnership is expected to enhance the exchange of knowledge, expertise, innovation, and digital technologies to offer competitive prices to customers and enhance the viability of the participating airlines.

2.7. POST-2010 AND THE LONGER TERM

The decade between 2010 -2020 neatly dovetails into several significant events that have indelibly affected the African aviation industry, heralded by the renewed call for the

⁴⁷⁵ Ibid at 31.

⁴⁷⁶ Official Airline Guide (2012) Africa Aviation Market Analysis. Accessed at www.oag.com/market-analysis.

⁴⁷⁷ Boeing 'Current market outlook: 2015–2034.' 2015 available at <https://aidat.in/wp-content/uploads/2016/09/Boeing-Current-Market-Outlook-2015.pdf>

⁴⁷⁸ Button, Martini & Scotti op cit note 330 at 31.

⁴⁷⁹ Times Aerospace 'Kenya Airways and South African Airways sign strategic partnership framework' 24 November 2021 available at <https://www.timesaerospace.aero/news/air-transport/kenya-airways-and-south-african-airways-sign-strategic-partnership-framework>.

implementation of the YD at the continental level, and the COVID-19 pandemic. Starting with the former, In 2013, the AU included the liberalisation of the civil aviation market as one of the 12 flagship projects under Agenda 2063 aimed at propelling the political and economic integration of the African continent.⁴⁸⁰ This was followed by a meeting of Experts and States in September 2014 held in Nairobi, which approved the regulatory text of the YD comprising the competition rules, consumer protection rules, dispute settlement mechanism, and the powers and functions of the Executing Agency. These regulatory texts were approved by the AU Summit at its Twenty-Fourth Ordinary Session on 31st January 2015 in Addis Ababa, Ethiopia. At this session, the Heads of State also adopted a Declaration to accelerate the Decision's implementation by establishing SAATM by 2017. Eleven states (Benin, Cape Verde, Republic of Congo, Cote d'Ivoire, Egypt, Ethiopia, Kenya, Nigeria, Rwanda, South Africa, and Zimbabwe) immediately signed a 'Solemn Commitment' to realise the Decision marking a momentous step to the concrete implementation of the SAATM as a flagship project of the AU Agenda 2063.⁴⁸¹

SAATM aims at creating a unified air transport market on the continent. Its primary goal is to liberalise air transport in Africa. This involves easing restrictions on the airline ownership, reducing fares, improving connectivity and increasing the frequency of flights across the continent, and enhance the efficiency of air services, foster competition, and make air travel more accessible and affordable for more people. It is therefore an initiative designed to implement the YD with a potential to transform air travel within Africa significantly. By allowing African airlines to operate more freely across the continent, it aims to increase connectivity between different countries, thereby facilitating business, trade, tourism, and cultural exchange. This could in turn, substantially impact on economic growth, job creation, and integration across the continent.

The Summit also established a Ministerial Working Group comprising the ministers of transport of the eleven countries that had signed the Solemn Commitment. The Summit charged the working group with overseeing the concrete implementation of the YD, providing

⁴⁸⁰ African Union Commission 'Session 3: The single African air transport market and the free movement of people in Africa.' (Third African-Indian Ocean (AFI) Aviation Security & Facilitation Symposium, Malabo, Equatorial Guinea, 27 July 2016) available at <<https://www.icao.int/WACAF/AFI-SafetyWeek/Documents/Security%20Symposium/AU%20Paper%20on%20SAATM%20and%20free%20movement%20of%20Persons.pdf>>.

⁴⁸¹ African Union 'Concept note 4th Meeting of the ministerial working group on the single African air transport market' available at https://au.int/sites/default/files/newsevents/conceptnotes/34188-cn-3-concept_note_final_fourth_meeting_of_the_ministerial_working_group_lome_togo_25-28_may_2018.pdf +&cd=1&hl=en&ct=clnk&gl=ke accessed 23 August 2021.

guidance, and leading the advocacy campaign of recruiting the rest of the AU member states to join the initiative. In 2015, the Working Group adopted an eighteen Activity Roadmap in preparation for the launch of SAATM during the June 2017 Session of the AU's Heads of State and Governments. In its second meeting on 20th October 2016, the Ministerial Working Group highlighted the challenges that faced the implementation of the YD and updated its Activity Road Map.⁴⁸² SAATM was officially launched during the 30th Ordinary session of the Summit, which was held on 28th January 2018 in Addis Ababa, Ethiopia.

The Summit also approved the regulatory texts of the YD comprising Annex 4 on Regulations on the Powers, Functions, and Operations of the Executing Agency, Annex 5 on Regulations on Competition in Air Transport Services within Africa, and Annex 6 on Regulations on the Protection of Consumers of Air Transport Services.⁴⁸³ Annexe 3 on Dispute Settlement Mechanism was incomplete, so it would be adopted later.

Before concluding with the impact of COVID-19, a synopsis of the performance of the African aviation industry before the pandemic is necessary. The number of passengers carried by African airlines' scheduled operations increased from 56 million in 2011 to 95.64 million in 2019. Although Africa has witnessed a steady growth in passenger and cargo operations since 2012, the performance of the African airlines globally has remained dismal during the decade, with a pre-COVID contribution of 2.11 per cent of the global passenger number and 1.73 per cent of the global cargo operations.⁴⁸⁴ The continent has also witnessed growth in domestic passenger numbers, with African airlines carrying 36.468 million passengers on domestic routes in 2019 compared to 19.4 million in 2012. The growth in the domestic market is attributable to the proliferation of LCCs in these markets, especially in South Africa (the leading country in domestic traffic with eight over ten on the top 10 busiest domestic routes in Africa), Kenya, Egypt, Morocco, Nigeria, and Tanzania. These states have stimulated demand by increasing competition, lowering fares, and improving customer service. In terms of international traffic, there has been a steady growth in the total traffic carried by African airlines, with African operators carrying 61.87 per cent of the total traffic, in absolute figures 59.18 million passengers in 2019, compared to 42.4 per cent of the total traffic in 2012.⁴⁸⁵

⁴⁸² Ibid.

⁴⁸³ African Union 'Single African air transport market flying agenda 2063: The SATTM handbook' op cit note 14.

⁴⁸⁴ African Airlines Association '2020 annual report' 9 available at <https://afraa.org/wp-content/uploads/2020/11/Annual-Report_2020_web.pdf> accessed 4 October 2021.

⁴⁸⁵ Ibid.

During this decade, the African air transport industry has made significant progress on safety. Although the African airlines experienced two fatalities in 2019, the fatal one that caused 157 fatalities was the manufacturers' fault instead of the operator.⁴⁸⁶ The reduction in the number of accidents involving jets and turboprops and the continuing trend of improvement in safety standards has been attributed to the efforts of several stakeholders on the continent, such as AFRAA, governments, civil aviation authorities, airlines, ground handlers, ICAO, IATA, AFCAC, among others. From 2012 to 2019, there was a year-on-year increase in domestic and intra-African passenger numbers resulting from the high rate of urbanisation, growing middle class to use other, and aggressive route expansion by some African carriers. Though the African average passenger load factor (PLF) experienced a marginal year-to-year growth from 69.7 per cent in 2012 to 71.6 per cent in 2019, the African PLF still compared unfavourably to the global average and is 10 per cent lower than the industry average as of 2019.⁴⁸⁷ The low PLF on the continent is due to an imbalance of capacity and demand arising from the use of high-capacity aircraft on low and mid-density markets, inadequate cooperation between airlines, low intra-Africa connectivity, and poor coordination of networks.⁴⁸⁸

The Covid-19 pandemic has had an unprecedented impact on the African aviation and tourism industries due to travel bans and lockdown measures imposed by virtually all countries globally. African Development Bank estimated that the continent's GDP contracted by 2.1 per cent in 2020, the first recession in the last fifty years. Like in other regions, the African airline industry was one of the most hit by the pandemic, with a drop in passenger traffic from 95.64 million in 2019 to 34.7 million passengers in 2020, a drop of 63.7 per cent. Cargo activity experienced a drop of 3.3 per cent to 960 thousand tonnes of cargo. The share of African airlines' traffic reduced from 2.11 per cent in 2019 to 1.9 per cent, and African airlines posted a net post-tax loss of 2 billion U.S dollars and 44.6 U.S dollars per passenger.⁴⁸⁹ With the gradual reopening of borders, the reduction in traffic continued until June before reversing with the gradual reopening of borders and the growing vaccination rate.⁴⁹⁰ According to Boeing, Africa as of 2021 had an approximate fleet of 1,030 aircraft comprising 54 per cent of single-aisle type, 8 per cent of freighters, 20 per cent of wide-body aircraft, and 18 per cent of regional

⁴⁸⁶ Ibid.

⁴⁸⁷ African Airlines Association '2020 annual report' op cit note 484.

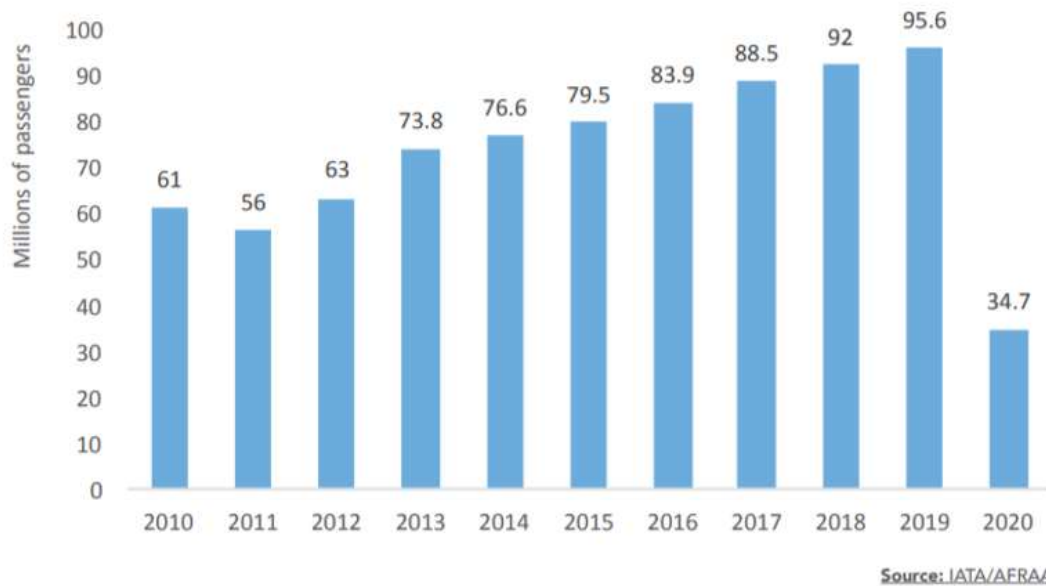
⁴⁸⁸ Ibid at 9.

⁴⁸⁹ African Airlines Association '2021 annual report' 11 available at <https://afraa.org/wp-content/uploads/2021/11/Annual-Report_2021-final.pdf> accessed 4 October 2022.

⁴⁹⁰ Ibid.

jets. The fleet is expected to increase by 3.6 per cent over the next twenty years representing 740 new deliveries.⁴⁹¹

Figure 3: Passengers carried by the African airlines scheduled operations from 2010-2020



Despite these developments, the African air transport industry still faces the challenge of market restrictions, fragmentation, exorbitant charges and taxes and high fuel cost. In the absence of formidable home-based carriers, several African countries have in the recent past opened their skies to Middle East carriers such as Emirates, Qatar, Etihad, Turkish Airlines, and European airlines and have easily granted these carriers up to six freedom rights because of the inexpensive long-haul fares and the ability of these foreign carriers to stimulate trade and tourism between the African states and these carriers' country of origin.⁴⁹²

Nevertheless, notwithstanding the devastating impact of the COVID-19 pandemic, air traffic and passenger numbers are expected to grow in the coming years due to population growth and the GDP per capita growth. The recently minted continental initiatives such as the SAATM, the AfCFTA, and the improved liberal visa openness are also expected to stimulate intra-African connectivity and traffic. It is most likely that these initiatives will further mount

⁴⁹¹ Ibid at 19.

⁴⁹² African Airlines Association, 'AFRAA Annual Report – 2021' op cit note 489.

pressure on the African governments to implement the YD at the Pan-African level. It is also likely that because of the fragmented and disjointed nature of the African air transport market, the implementation of the YD will, at least in the short run, be implemented on a bilateral and regional basis.⁴⁹³ This will be a step towards overcoming the historical barriers, aligning the diverse interests, and embracing innovation and regional cooperation.

2.8. CONCLUSION

The chapter has explored the evolution of air transport in Africa and reveals the complexities of colonial legacies, post-colonial initiatives and gradual steps towards liberalisation. The history, from the colonial-era focus on external connectivity and evolution through post-independence era with reliance on restrictive BASAs, highlights the initial challenges faced in creating an African air transport market. The decision of European powers to primarily develop air routes to serve their interests, often neglecting intra-African connectivity left a legacy of fragmented infrastructure and policy frameworks that continued into the post-colonial periods, where many nations struggle to develop robust national carriers and air transport policies. Additionally, the reliance on restrictive BASAs following independence under American-led Chicago system that were often favoured established airlines, further entrenched the challenges that African states would face during harmonisation efforts. The YD and the subsequent SAATM initiative represent significant efforts to overcome these historical barriers. Yet, the lingering effects of disparate national interests, infrastructure gaps, and varying degrees of economic and political stability continue to shape the landscape of liberalisation. Despite these challenges, SAATM represents a significant step towards greater integration and cooperation in African aviation. The next chapter discusses the legal and institutional framework for the implementation of the YD and SAATM and assesses its overall implementation at the continental level.

⁴⁹³ Ibid at 77.

3.0. CHAPTER THREE: LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE IMPLEMENTATION OF THE YD AND OPERATIONALISATION OF SAATM

3.1. INTRODUCTION

This chapter discusses the legal and institutional framework for the implementation of the YD and SAATM. The discussion is crucial in understanding the how the law and institutions have shaped air transport sector on the continent. The chapter first establishes the legal status of the YD and the SAATM Decision, situating them within the broader context of legal and policy instruments that collectively form the normative framework for the liberalisation of the Africa air transport industry. Part two discusses the elements (principles) of the YD as contained in the 12 Articles that underpin the African Single Aviation Market. Part two bifurcates the YD elements into operational elements (market access principles) that are enshrined in in Articles 3,4,5 and 6 of the YD and public policy elements of the YD as provided for in Articles 7,8,9,10,11 and assesses the implementation of these two elements at the continental level. Part three concludes the chapter by analysing the effectiveness of the institutional framework for the implementation of the YD and operationalisation of SAATM.

3.2. THE POLITICAL, JURIDICAL NATURE AND SCOPE OF THE YD AND SAATM

3.2.1. *Empowerment of the YD and SAATM recognition and effects under national law and policy*

As discussed in the second chapter, the YD was placed under the umbrella of the Abuja Treaty.⁴⁹⁴ The signing of the Abuja Treaty was a culmination of over three decades of arduous efforts toward the continent's economic emancipation. Article 1(c) and 99 of the Treaty enshrined the African Economic Community (AEC) as a fundamental component of the OAU. The distinction between OAU and AEC was that the former pursued political integration of the continent, while the later would pursue economic integration of African States within the OAU framework. These two organisations were, inextricably linked, functioning as complementary facets of a singular vision.⁴⁹⁵ They shared key organs like the Assembly of Head of

⁴⁹⁴ Bankole Thompson 'Economic integration efforts in Africa: A milestone-The Abuja Treaty' (1993) 5 Afr. J. Int'l & Comp. L. 743 at 744.

⁴⁹⁵ Christof Heyns, Evarist Baimu & Magnus Killander 'The African Union' (2003) 46 German YB Int'l L. 252 at 263.

Governments and the Council of Ministers, leading to their common reference as the OAU/AEC.⁴⁹⁶

The Abuja Treaty's relevance to the YD is encapsulated in Article 61, concerning the integration of transport and communication, and Article 10, detailing the authority of the Assembly of Heads of Government and States in decision-making. Article 12.1 of the YD explicitly aligns with the Abuja Treaty, stipulating that the decision shall become effective 30 days after the signature by the Chairman of the Assembly of Heads of States and Government. This provision echoes Article 10 of the Abuja Treaty, which mandates that decisions are binding and enforceable 30 days after endorsement by the Assembly Chairman.

The endorsement of the YD by the OAU Summit on July 12th, 2000 signified a crucial step in its empowerment. This endorsement rendered the YD a binding and enforceable instrument,⁴⁹⁷ equivalent to a treaty obligation under international law, thus superseding national legal frameworks and pre-existing agreements.

One of the cardinal principles of the international law of treaties is '*pacta sunt Servanda*', outlined Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT). The principle dictates that treaties are to be interpreted in good faith, according to their ordinary meaning, and in the context of their objectives and purposes. Consequently, State Parties have an obligation to ensure full implementation of treaty principles and refrain from actions that undermine their objectives.⁴⁹⁸ They are also expected to harmonise their domestic legislation and policy with treaty obligations, without resorting to domestic legal provisions to justify non-compliance. This principle is further embodied in Article 93 of the Abuja Treaty, which mandates Member States to resolve any inconsistencies with prior agreements.

By providing for automatic enforceability of the decisions 30 days following the date of the signature, Article 10 of the Abuja Treaty underscores the self-executing nature of the decisions of the Assembly. Similarly, Article 12.1.1 of the YD specifies the automatic enforcement of the decision, affirming its immediate binding effect. Consequently, the YD automatically bound the 44 African countries that had signed and ratified the Abuja Treaty. The 10 African states not party to the YD included Eritrea and Morocco (non-signatories of the Abuja Treaty), Djibouti, Gabon, Madagascar, and Somalia (Signatories but did not ratify

⁴⁹⁶ Ibid.

⁴⁹⁷ United Nations Economic Commission for Africa 'Clarification of issues and articles of the Yamoussoukro Decision' (2002) Working paper 8 <<https://repository.uneca.org/handle/10855/5157>> accessed 15 November 2021.

⁴⁹⁸ Ibid at 5.

the Treaty), Equatorial Guinea, Mauritania, South Africa, and Eswatini (ratified and/or deposited the instruments of ratification after the African Union entered into force).⁴⁹⁹ Despite its formal empowerment through Assembly endorsement, ambiguity regarding the legal status, enforcement, and domestic law impact persists, posing challenges to its implementation by States and airlines.⁵⁰⁰

3.2.2. *Status of the YD and SAATM under the AU framework*

On May 26, 2001, a significant milestone was reached in the history of Africa's economic, political and social integration. This date marked the entry into force of the Constitutive Act of the AU, thereby inaugurating a new organisation that would replace the OAU.⁵⁰¹ Article 33(1) of the Act explicitly states that it supersedes the OAU Charter, and Article 33(2) establishes the Act's precedence over any inconsistent or contrary provisions of the Abuja Treaty. Consequently, the AU emerged as a unifying body, integrating the political goals of the OAU with the economic ambitions of the AEC, effectively becoming the successor to both while nullifying any incompatible provisions within the AU framework.

A critical distinction between the AU and the AEC, particularly concerning the YD, lies in the binding nature of the Assembly's decision. Unlike the Abuja Treaty, the Constitutive Act of the AU does not stipulate automatic binding and enforceability of these decisions. Article 7 of the Act, which parallels Article 10 of the Abuja Treaty, specifically omits the phrase 'automatically binding.' This omission implies that, under the AU framework, States reserve the discretion to ratify the decisions of the Assembly.⁵⁰² In essence, Article 10 of the Abuja Treaty is among the provisions not incorporated into the AU framework. As such, Assembly decisions are non-binding on the now 55 member States of the AU. Article 59 of the Vienna Convention further supports the latter interpretation by providing that a treaty is considered terminated if a subsequent treaty on the same subject matter is incompatible with it, thereby making concurrent application impractical. The AU's approach thus transitions from a purely legalistic and theoretical approach of 'automatic enforceability' to a more pragmatic approach that considers the realities at the grass-root level.

⁴⁹⁹ Charles E Schlumberger *Open Skies for Africa: Implementing the Yamoussoukro Decision* op cit note 7 at 23.

⁵⁰⁰ United Nations Economic Commission for Africa op cit note 497 at 8.

⁵⁰¹ Corinne AA Packer & Donald Rukare op cit note 497.

⁵⁰² Schlumberger op cit note 7 at 23.

In January 2018, during its 30th Ordinary Session, the Assembly of the AU adopted the SAATM Decision, situating the implementation of the YD within the framework of Agenda 2063. To make the SAATM Decision binding and enforceable, the 55 African States are now required to executive definitive steps, including signing a Solemn Commitment to implement the SAATM and implement eight Concrete Measures. As of February 2024, 2022, 37 of the 55 AU Member States, representing more than 89 per cent of intra-African air transport and a combined GDP of more than 80 per cent of the continent's total GDP, had signed the Solemn Commitment to implement the SAATM Decision. These States are; Angola, Benin, Botswana, Burkina Faso, Cape Verde, Cameroon, Central African Republic, Chad, Congo Republic, Côte d'Ivoire, Chad, the Democratic Republic of the Congo, Egypt, Equatorial Guinea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea Conakry, Guinea Bissau, Kenya, Lesotho, Liberia, Mali, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao tome et Principe, Senegal, Sierra Leone, South Africa, Togo, Zambia, and Zimbabwe.⁵⁰³

Figure 4: Signatories to SAATM

⁵⁰³ African Union, 'AUC and Kingdom of Morocco sign the revised Constitution of the AFCAC and the MoI of the SAATM' (2022). available at https://au.int/sites/default/files/pressreleases/41605-pr-PR-SAATM_Signing_March_2022_rv.pdf

3.2.3. Status of other Air Service Agreements (ASAs) in the YD and SAATM

A pivotal aspect of the YD and the SAATM pertains to the status of other ASAs. Crucial in this discourse is the supremacy of the YD and reconciliation of any incompatibilities between these agreements. Article 2 of the YD unequivocally states that it takes ‘precedence’ over any conflicting ASAs. Provisions within these ASAs that align with the YD principles remain valid and are to augment the YD until explicit YD provisions are formally adopted as replacements. Further, Article 10.5 prohibits State Parties from entering into more restrictive ASAs than provided for in the YD, while permitting more liberal arrangements than the YD provisions. The import of Articles 2 and 10.5 of the YD is that all ASAs between the YD Partner States that contradict the Decision are automatically replaced and superseded by the Decision as of the effective date without any further formalities. According to UNECA, ‘in respect to matters expressly covered by the Decision, there appears no need for amendments of bilateral agreements at a formal meeting of the parties which would not achieve any useful purpose other than perhaps a desire to re-negotiate the Decision on a bilateral basis.’⁵⁰⁴ State parties have assumed a similar obligation under Article 93 of the Abuja Treaty.

By preserving compatible provisions of the ASAs, the Decision essentially establishes the minimum set of rules on liberalisation of air services in Africa. However, despite the legal clarity on the status of the YD *visa vis* other ASAs, Partner States have persistently maintained restrictive BASAs. The prevalence of restrictive BASAs arguably stems from insufficient recognition of the YD at the national levels, leading some States and airlines to assume that the BASAs will remain in effect until amended to align with the YD.⁵⁰⁵ This presumption erroneously prioritizes the BASAs over the YD, contradicting the tenets of the YD, the Abuja Treaty, and the principles of international law of treaties.

The practical impact of the operationalisation of SAATM is eliminating the need for traditional bilateralism and introducing a regional multilateral regime that will transform Africa into a single air transport market. Under the single market, any current or future ASAs between the Member States must adhere to the YD principles.⁵⁰⁶ The operationalisation of the SAATM, therefore, represents a paradigm shift in the governance of air service agreements, driving forward a more integrated and liberalised air transport sector across the continent.

⁵⁰⁴ United Nations Economic Commission for Africa op cit note 497 at 11.

⁵⁰⁵ Ibid at 11.

⁵⁰⁶ African Airlines Association ‘The Single African Air Transport Market (SAATM) towards a virtuous cycle of air transport development in Africa’ at 11.

3.2.4. Scope and approach of the YD and SAATM

The scope and approach of the YD is discernible from Articles 2, 3, and 10.6 of the YD. Article 2 defines the YD as an ‘arrangement among State Parties for the gradual liberalisation of scheduled and non-scheduled intra-Africa air transport services.’ This characterisation underscores the YD’s multilateral nature, indicating that its implementation relies on collective action and agreement among participating African states.

Article 3 delineates the extent of liberalisation, limiting the free exercise of air traffic rights to the ‘first, second, third, fourth, and fifth freedoms of the air on scheduled and non-scheduled passenger, cargo and /or mail flights performed by an eligible airline.’ These freedoms are foundational in facilitating cross-border movement of passenger, cargo, and mail services.

Article 10.6 clarifies that the YD does not obligate State Parties to grant cabotage privileges. These two provisions make the YD a ‘limited regional open skies’ regime, restricting market access in the intra-African air transport to fifth freedom rights, without contemplating further rights such as cabotage.⁵⁰⁷ This limitation may be attributed to the need to balance between opening up the skies to enhance connectivity and competition, while still protecting national carriers and markets from excessive competition. Comparatively, the YD shares similar scope and thrust to the ASEAN single aviation market but remains less advanced than the EU single aviation market, which is the *locus classicus* of a comprehensive regional open Skies Agreement.

The approach to liberalisation under the YD is ‘gradual’. This is captured under Article 2 and reinforced in its preamble, which acknowledges the varied levels of air transport development across Africa that necessitates special and transitional approach for full liberalisation. The YD, therefore, adopted a ‘gradual and progressive liberalisation’ approach in the liberalisation of the intra-African air transport services as opposed to a ‘big bang approach’ that pursues immediate reform. ICAO interprets this approach as allowing each state to ‘determine its path and pace of change in international air transport regulation with a general goal of the gradual, progressive, orderly, and safeguarded change towards market access.’⁵⁰⁸ ICAO further notes that States are responsible for determining what constitutes a ‘gradual and

⁵⁰⁷ Ruwantissa Abeyratne ‘Implications of the Yamoussoukro Decision on African aviation’ (2003) 28 Air Space Law 291.

⁵⁰⁸ ICAO ‘Report of the worldwide air transport conference: Challenges and opportunities of liberalisation’ (2003) 6 <https://www.icao.int/Meetings/atconf6/Documents/Doc9819_en.pdf> accessed 5 May 2022.

progressive liberalisation.’ The approach accounts for the disparities in the level of air transport development in terms of airline size, competitiveness, financial resource, and aviation infrastructure. The gradual and progressive approach seeks effective and sustained participation of all States through ‘fair competition’ as opposed to ‘free competition.’⁵⁰⁹

However, the gradual liberalisation while conceptually sound, faces challenges in its practical application. It lacks a clear roadmap that accounts for the inequalities inherent in the maturity of markets and developmental asymmetries that characterise African economies and aviation industry. The only practical evidence of the gradual liberalisation in the YD is found in the preamble, and the transitional provision and in Articles 3 and 10(1) of the YD. Article 10(1) of the YD introduced a transitional period of two years during which State Parties had the option not to grant and receive obligations in Articles 3 on unrestrained fifth freedom rights and on liberal tariff regime. The two-year transitional period however expired on 12 August 2002, and at that date, no State Party had utilised the exemption as provided in Articles 10(1) and 3.⁵¹⁰ Since the implementation of the YD was considered pending during the first five years after coming into force, the transitional measures, which are the only evidence of the gradual liberalisation approach in the YD, only remained theoretical.⁵¹¹

The State Parties to the SAATM Decision, on the other hand, declares under Article 5, ‘Solemn Commitment to the immediate implementation of the Yamoussoukro Decision towards the establishment of SAATM’, aiming for a more accelerated approach implementation of the YD. This stance is at variance with the gradual reform under the YD.⁵¹² The SAATM approach may not adequately address the disparities in aviation sector development on the continent.

A more fitting approach to effectively operationalise SAATM is one that balances the vision for immediate implementation with the pragmatic reality of varying development stages in African aviation. This approach should involve a commitment from States to a clear, competitive, and actionable timeline for market integration.⁵¹³ Such a strategy, as defined in

⁵⁰⁹ Ibid at 6.

⁵¹⁰ International Civil Aviation Organization ‘First meeting of Directors General of civil aviation’ (2002) <https://www.icao.int/WACAF/Documents/Meetings/dgca1/wp14_eng.pdf> accessed 10 November 2021.

⁵¹¹ Schlumberger op cit note 1 at 15.

⁵¹² Tina Blazquez-Lopez & others ‘Under African skies – The liberalisation of civil aviation in Africa’ (9 August 2019) <<https://www.bclplaw.com/en-US/insights/under-african-skies-the-liberalisation-of-civil-aviation-in.html#>> accessed 1 August 2021.

⁵¹³ IATA op cit note 187 at 86.

the final chapter would allow for flexibility, while also ensuring a structured and coherent path towards achieving the goals of SAATM – a blend of ambition and realism.

3.3. REGULATORY AND INSTITUTIONAL TEXTS FOR THE IMPLEMENTATION OF THE YD AND OPERATIONALISATION OF SAATM

3.3.1. *The YD, African Civil Aviation Policy, and the SAATM Decision*

The regulatory and institutional framework for the implementation of the YD and operationalisation of SAATM is embedded in several instruments enacted to support liberalisation. By joining SAATM, States are, in essence, accepting to gradually or immediately review BASAs to ensure compatibility with the YD.

At the heart of these reforms is the YD, the central policy initiative for liberalising air transport services in Africa. Its adoption was a strategic response to the restrictive and protectionist regulatory environment. The 2018 AU Summit's formal adoption of the YD, including its initial 1998 version and subsequent annexes, underscores the commitment to the comprehensive overhaul of the African aviation industry. These annexes encompass duties and responsibilities of the monitoring body, a draft dispute settlement mechanism, regulations on the powers, functions, and operations of the executing agency, competition rules, and consumer protection regulations in air transport services.

The second key instrument is the African Civil Aviation Policy which complements the YD by providing an overarching policy framework for civil aviation in Africa. It articulates the policy statements, strategic objectives, and political commitments aimed at sustainable development of the air transport sector, emphasising harmonisation in safety, security, and environmental protection as encapsulated under Article 2.2.1. The policy provides a wide range of recommendations in areas such as aviation policy, aviation security, environmental protection, human resource development, aviation financing, intermodal transport system, airport development and management, air navigational services and meteorology and linkage of civil aviation with other socio-economic sectors. The AFAC is currently reviewing the policy to align it with the SAATM.

The third regulatory instrument is the SAATM Decision. The practical implications of SAATM are that the intra-African market will operate, subject to safety and security concerns, without the need of the BASAs, and the eligible African airlines will serve the market based on a simple notification ('file and fly') procedure that is based on economic considerations and

without any further hindrance.⁵¹⁴ Most importantly, the SAATM Decision recognises that the operationalisation of SAATM is not to be only premised on the market access provisions of the YD but calls upon the Member States to ‘go beyond the market access provisions of the Yamoussoukro Decision in order to accelerate the attainment of the objectives of the SAATM’ (Article 8 v). As such Operationalisation of the YD should be based on the principles of the YD and the broader context of Agenda 2063, boosting intra-African trade and the AfCFTA. Article 8 vi of the SAATM Decision identifies establishing the single African sky architecture by 2023 as a project that will complement SAATM in safety, security, and the efficient and harmonized seamless air navigational and communications system. Article 8 vii calls upon the African Development Bank (AfDB) and other funding partners to expedite the mobilisation of resources for the Executing Agency's operationalization to enable it to adequately carry out its functions in the management and supervision of the established SAATM. The implementation framework for SAATM consists of the Concrete Measures, the Prioritized Action Plan, and the Memorandum of Implementation (MoI).

In pursuit of actualising the Solemn Commitments, several immediate measures have been outlined to guide the operationalisation process at the national level. These measures are, in essence, a national blueprint to be implemented by the State representatives responsible for civil aviation, such as the ministers in charge of civil aviation matters and civil aviation authorities. As of February 2024, only ten States had implemented the eight concrete measures. The States are Benin, Burkina Faso, Cape Verde, Ghana, Mozambique, Niger, Republic of Congo, Rwanda, and The Gambia, and Togo. At the same time, 18 AU Member States have signed a MOI to ensure the removal of any air service agreement restrictions that are not in compliance with the YD. Furthermore, 10 Member States have signed new BASAs that are compliant with the YD. States have been slow in implementing and reporting on the Concrete Measures primary because of the complex local procedures and prevalent protectionism among the SAATM States.⁵¹⁵ They fear that granting traffic rights under SAATM will expose their national carriers to excessive competition.⁵¹⁶ The concrete measures are captured in the first annexure.

⁵¹⁴ IATA op cit note 187 at 41.

⁵¹⁵ NEPAD, ‘Single Africa Air Transport Market (SAATM)’ available at <https://www.nepad.org/agenda-2063/flagship-project/single-africa-air-transport-market-saatm>

⁵¹⁶ ‘The Single African Air Transport Market (SAATM) towards a virtuous cycle of air transport development in Africa’ op cit note 506.

The Joint Prioritised Action Plan complements the Concrete Measures. The Action Plan is a collaborative and comprehensive practice program that brings together a diverse stakeholder across the aviation value chain in Africa to articulate key priority actions necessary for the operationalisation of SAATM. The program has a buy-in of key players on the continent, such as the AUC, AFCAC, AFRAA, ICAO, IATA, ACI – Africa, RECs, AUDA – NEPAD, OEMs, Airline CEOs, Ministries, CAAs, and the World Bank, among others. (Annexure III identifies the six pillars of the JPAP).

Another critical element in this framework is the Memorandum of Implementation. The Memorandum seeks to accelerate the removal of any restrictive provision in ASAs to ensure conformity with the principles of the YD.⁵¹⁷ As of February 2024, 20 states were signatories to the Memorandum, namely; Benin, Burkina Faso, Cape Verde, Central African Republic, Congo, Cote d’Ivoire, Ethiopia, Gambia, Ghana, Guinea, Liberia, Mali, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sierra Leone, Togo, and Morocco.⁵¹⁸ The resistance of additional states to subscribe to the Memorandum again reflects concerns over increased competition. This reluctance is indicative of the broader challenges faced in fully realising the SAATM goals, as states grapple with the need to protect their national carriers while also committing to the broader vision of a liberalised air transport market.

3.4. OPERATIONAL PRINCIPLES OF THE YD

The operational principles of the YD define the guidelines and rules that govern the liberalisation of air transport service in African countries. The principles are designed to facilitate the deregulation of the African skies, enhance connectivity, and promote competition among airlines within the continent. The core operational principles are discussed in the subsequent sections.

3.4.1. *Grant of the five freedoms of the air*

Central to the YD is the grant of the five freedoms of the air, which grant African airlines the power exercise up to the fifth freedom in relation to scheduled and non-scheduled passenger,

⁵¹⁷ ICAO, ‘Agenda item 32: Economic regulation of international air transport-policy’, *The Single African Air Transport Market: Sustainable Regulatory System* 32 <https://www.icao.int/Meetings/a40/Documents/WP/wp_186_en.pdf>.

⁵¹⁸ African Union ‘AUC and Kingdom of Morocco sign the revised Constitution of the AFCAC and the MoI of the SAATM’ op cit note 503.

cargo, and or mail.⁵¹⁹ The exercise of these rights enables an airline to fly between two other African States on a flight originating or ending in its State. For example, in Kenya, Ethiopia, and Rwanda, the fifth freedom right will allow Ethiopian Airways, the designated embark passengers traffic in Ethiopia, to fly to Kenya and drop off some traffic and embark some other traffic headed for Kigali Rwanda. The third, fourth, and fifth freedoms rights (the so-called hard rights) enable African airlines to carry intra-African traffic commercially. Their utilisation is instrumental in facilitating network planning for airlines and enhancing intra-African air connectivity.⁵²⁰

Most intra-African capacity has mainly been offered under the third and fourth traffic rights. These rights have primarily been used in direct services between a carrier's State of registration and a second State. It is also possible to utilise the third and fourth traffic rights in combination to enhance connectivity between the two states through a hub network in the carrier's State of origin. For example, from Jomo Kenyatta International Airport in Nairobi, Kenya via Ethiopia Addis Ababa Bole International Airport hub to Kigali in Rwanda.

Article 3.2 of the YD accorded States a maximum transitional period of two years during which they could limit the free exercise of the fifth freedom rights. However, despite these provisions, the actual utilisation of these rights, particularly the fifth freedom, remains dismal.⁵²¹ This restriction inhibits the development of more competitive routes and diverse options for African consumers.⁵²² The limited exercise of the fifth freedom, underscores the persistent reluctance among African states to fully embrace liberalisation.

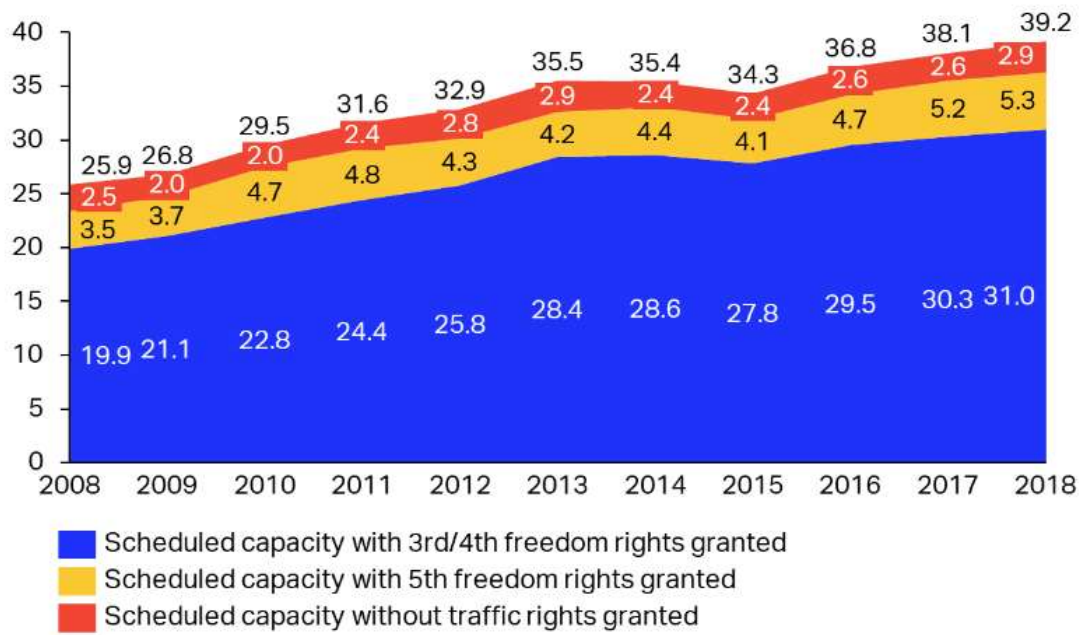
Figure 5: Scheduled capacity by freedom utilised (million seat)

⁵¹⁹ Yamoussoukro Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa (Yamoussoukro Decision) art. 3.1.

⁵²⁰ IATA op cit note 187 at 109.

⁵²¹ Ibid at 110.

⁵²² Ibid at 109.

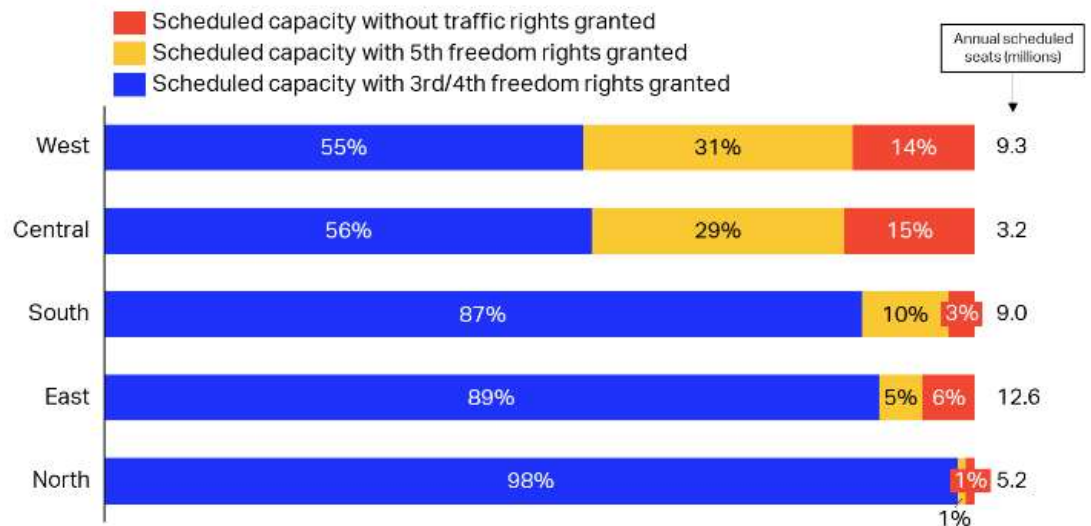


Source: AfDB

Although the utilisation of the fifth freedom rights is less prominent at the continental level, the utilisation of these rights has been higher in West and Central African regions, with approximately a third of capacity in these regions utilising them. As discussed in the fourth chapter, the prominence of the fifth freedom rights in West Africa is attributed to the highly liberalised WAEMU aviation market. Similarly, in Central Africa, the lack of strong national carriers and a thin route network has made it possible for other African airlines to utilise the fifth freedom rights.⁵²³

Figure 6: Scheduled capacity by freedom utilisation and sub-region (2018)

⁵²³ Ibid at 110.



Source; IATA

3.4.2. Relaxation of restrictions on governmental control and approval of tariffs

Article 4 of the YD provides for a liberal tariff regime in which designated airlines are not required to seek approval from aeronautical authorities to increase their tariffs.⁵²⁴ This relaxation represents a theoretical move towards more liberal and permissive tariffs. Airlines on intra-African routes, in principle, can determine their airfares without requiring double approval or disapproval. In double approval, the proposed pricing is only permitted once the aeronautical authorities of both states approve it and are therefore considered restrictive. In contrast, for double disapproval, the proposed pricing is permitted unless vetoed by both states and, as such, is considered liberal. However, as a matter of procedure, the airlines must file the tariff increases with the competent authorities 30 working days before the tariffs are implemented.⁵²⁵ The 30-day period is, however, not needed in lowering tariffs, and therefore airlines have the liberty to give effect to the reduction of the tariff immediately.⁵²⁶ However, in practice, a significant number of BASAs, 131 BASA representing 35 per cent of continental BASAs require such approvals, indicating a reluctance to relinquish governmental control over fare pricing.⁵²⁷ African states are still engaged in the anachronistic practice of determining fare pricing instead of allowing the market forces to determine such pricing. This contradiction

⁵²⁴ Yamoussoukro Decision op cit note 519 art. 4.1.

⁵²⁵ Yamoussoukro Decision op cit note 519 art. 4.1.

⁵²⁶ Ibid art. 4.2.

⁵²⁷ IATA op cit note 187 at 63.

between policy and practice highlights the challenges in shifting from a traditionally protectionist approach to a more market-driven one.

3.4.3. *Elimination of restrictions on capacity and frequency*

On the issues of capacity and frequency, the YD provides that ‘there shall be no limit on the number of frequencies and capacity offered in air services linking any city pair combination between State parties concerned.’⁵²⁸ Therefore, designated airlines are accorded the discretion to determine their frequency and capacity. Additionally, State Parties are prohibited from unilaterally limiting ‘the volume of traffic, the type of aircraft to be operated or the number of flights per week, except for environmental, safety, technical or other special consideration.’⁵²⁹ Environmental safety and technical consideration are standard features in most ASAs, and therefore, they do not present any difficulties in their application. This is because these considerations are not commercial or economic and are not susceptible to use as measures of advancing protectionism.⁵³⁰ However, the inclusion of ‘other special considerations’ as a caveat for imposing limitations introduces a level of ambiguity that can be exploited to revert to protectionist practices.

The Monitoring Body, established in Article 9, issued a directive that attempted to clarify this by providing that such considerations should be technical and devoid of commercial considerations that confer an advantage to any particular carrier.⁵³¹ These other considerations should include fuel shortages, runway repairs in progress, or security issues. The directives further clarified that any limitations on capacity and frequency should be; ‘non-discriminatory of any carrier, have limited duration, not excessively affect the objectives of Yamoussoukro Decision, not distort competitive forces among carriers and not being too restrictive in relation to their cause of application’⁵³² Pursuant to Article 5.2 State Parties are however given the discretion to decline an increase in capacity if such increase is a breach of the rules of fair competition as provided for in Article 7 of the Decision.⁵³³ Nevertheless, the practical

⁵²⁸ Ibid art. 5.1.

⁵²⁹ Ibid art. 5.1

⁵³⁰ United Nations Economic Commission for Africa op cit note 15 at 17.

⁵³¹ Charles E. Schlumberger *Open Skies for Africa: Implementing the Yamoussoukro Decision* op cit note 7 at 12.

⁵³² Charles E Schlumberger ‘The implementation of the Yamoussoukro Decision’ op cit note 23 at 30.

⁵³³ Yamoussoukro Decision op cit note 519 art. 5.2.

application of these rules still face challenges, as evidenced by the prevalence of capacity and frequency restrictions in BASAs between African states.⁵³⁴

3.4.4. *Facilitation of multiple designations*

The facilitation of multi designations, as outlined in Article 6 of the YD, offers states the liberty to designate multiple carriers to serve the intra-African air transport market. State Parties are afforded the liberty to designate at least one carrier by way of a written notification through diplomatic channels to the other State Party or, in case of the fifth freedom instance, to the two other State Parties.⁵³⁵ Therefore, there is no limit on the number of airlines a State Party can designate, provided such airlines meet the eligibility criteria outlined in Article 6.9 of the YD.

The YD allows a State Party to designate an eligible airline from another State Party to serve the intra-African market on its behalf.⁵³⁶ It is also notable that the YD envisages the designation and authorisation of an eligible African multinational airline by the State Party that is a stakeholder in such an airline and obligates the other State Parties to accept the designation of such an airline.⁵³⁷ The YD further obligates State Parties, in accordance with their domestic legislation, to expedite the authorisation and to license the designated airline with the approval required within 30 days.⁵³⁸ However, the designated airline should submit its proposed schedule of flights to the appropriate authority for approval.⁵³⁹ The designated airline may revoke its authorisation if a State Party is convinced that the airline has not met the eligibility criteria in Article 6.9.⁵⁴⁰ However, the State that designated the airline may request consultations with the State that revokes the authorisation. Such consultations should not commence later than 30 days from when the State revoking the authority receives the request.⁵⁴¹

⁵³⁴ IATA op cit note 187 at 63.

⁵³⁵ Yamoussoukro Decision op cit note 519 art. 6.1.

⁵³⁶ Ibid art. 6.2.

⁵³⁷ Ibid art. 6.3.

⁵³⁸ Ibid art. 6.4.

⁵³⁹ Ibid.

⁵⁴⁰ Ibid art. 6.5.

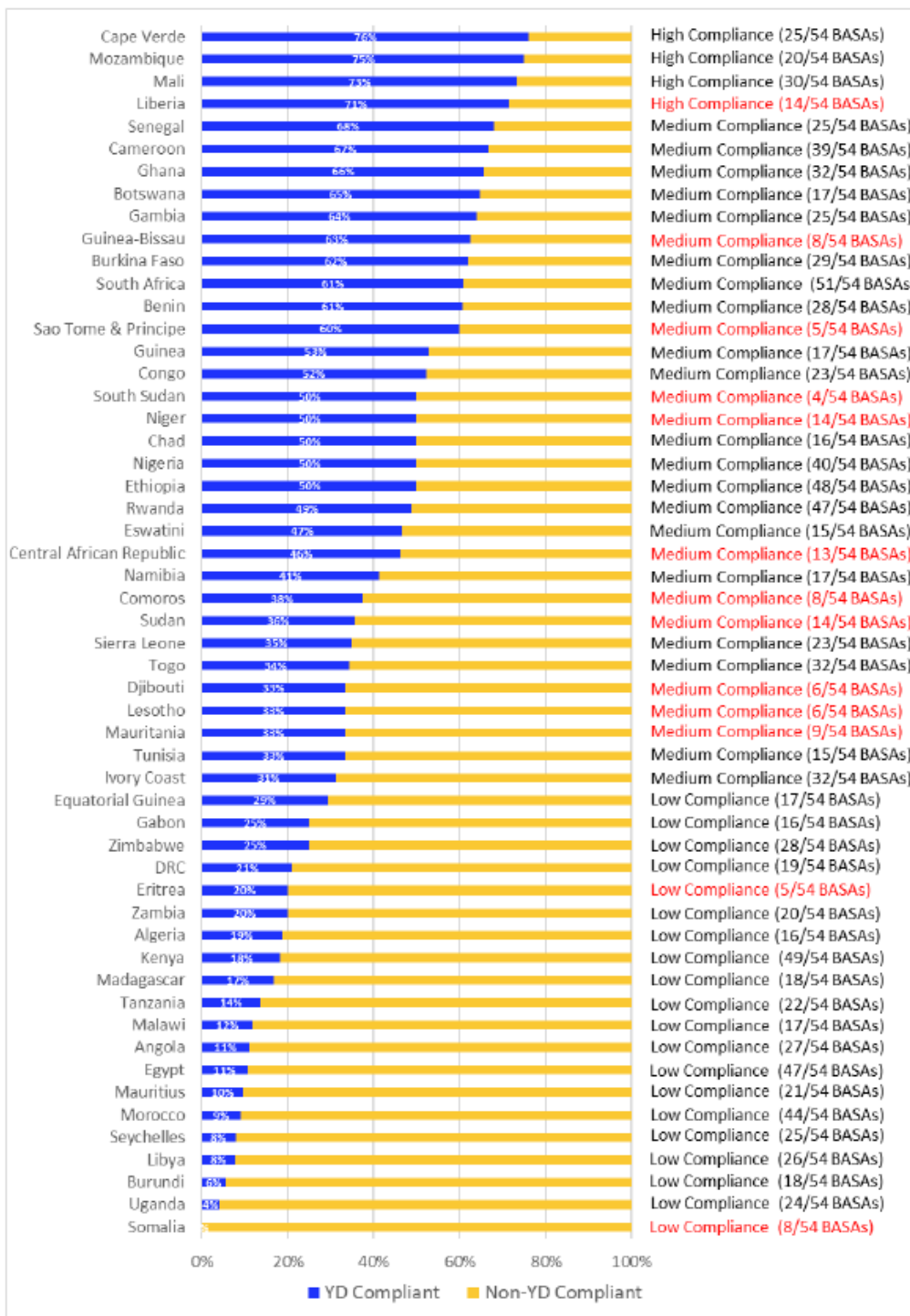
⁵⁴¹ Ibid.

3.4.5. *Assessment of Implementation of YD based on the application of operational principles of the Text*

In June 2021, IATA undertook a continental study on the benefits of the SAATM to assess the status of the implementation of the operational principles of the YD. The study involved 607 BASAs between AU 55 member States with the exception of the Saharawi Republic, where no information on BASAs was available.⁵⁴² The study found that leading countries in the proportion of YD compliant BASAs were Cape Verde at 76 per cent, Mozambique at 75 per cent, Mali at 73 per cent, Senegal at 68 per cent, and Cameroon at 67 per cent, while the countries with the least proportion of compliance were Uganda at 4 per cent, Burundi at 6 per cent, Libya at 8 per cent, Seychelles at 8 per cent, and Morocco at 9 per cent.

Figure 7: YD Compliance by African BASA coverage (Known /Total BASAs)

⁵⁴² IATA op cit note 187 at 7.



Source; IATA

Six of the top 10 compliant countries are in west Africa. This is attributable to the liberal air transport agreements, particularly in the WAEMU region, which even allows granting cabotage rights. The following countries lead in terms of the number of BASAs, indicating the extent of openness to enter into BASAs regardless of their restrictiveness; South Africa (51), Kenya (49),

Ethiopia (48), Egypt (47), Rwanda (47), Morocco (44) and Nigeria (40).⁵⁴³The countries leading in terms of the number of YD-compliant BASAs are South Africa (31), Cameroon (26), Ethiopia (24), Rwanda (23), Mali (22), Ghana (21), and Nigeria (20).⁵⁴⁴

The study categorised a BASA as compliant if it provided for the following operational principles; free exercise of traffic rights as provided in Article 3 of the YD, a liberal tariff regime that either provides for dual disapproval or free pricing as provided in Article 4, elimination of restriction on capacity and frequency in line with Article 5 and if it provided for the facilitation of multiple designations in line with Article 6 of the YD. A BASA was categorised as non-compliant if it failed to meet all of the above operational principles of the YD.⁵⁴⁵The study found that out of the 607 BASAs reviewed, 235 BASAs representing 39 per cent, were classified as YD compliant, while 372 BASAs (61 per cent) were found to be YD non-compliant.⁵⁴⁶

From the study, there is significant disparities in YD compliance among African states. While some nations like Cape Verde, Mozambique, and Mali have a high proportion of YD-compliant BASAs, others like Uganda, Burundi, and Libya have very low compliance rates. This variation indicates uneven commitment and capacity among African states in embracing liberalisation.

The study also reveals the regional variations in compliance with the operational principles. The higher compliance in West Africa, particularly in the WAEMU region, is attributed to more liberal air transport agreements that align with the principles of the YD. Consequently, RECs are fundamental in shaping air transport policies including the SAATM. A detailed discussion on the regional approaches to implementation of the YD is captured in the next chapter.

3.4.6. *Causes of non-compliance*

The study also analysed the factors that made the 372 BASAs non-compliant. It found that out of the 372 non-compliant BASAs, 105 (28 per cent) BASAs were non-compliant because of failing to meet the operational principles of the YD. In comparison, 267 BASAs were non-compliant because of falling short of two or more operational principles of the YD. Only 65

⁵⁴³ Ibid at 59

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid at 58.

⁵⁴⁶ Ibid.

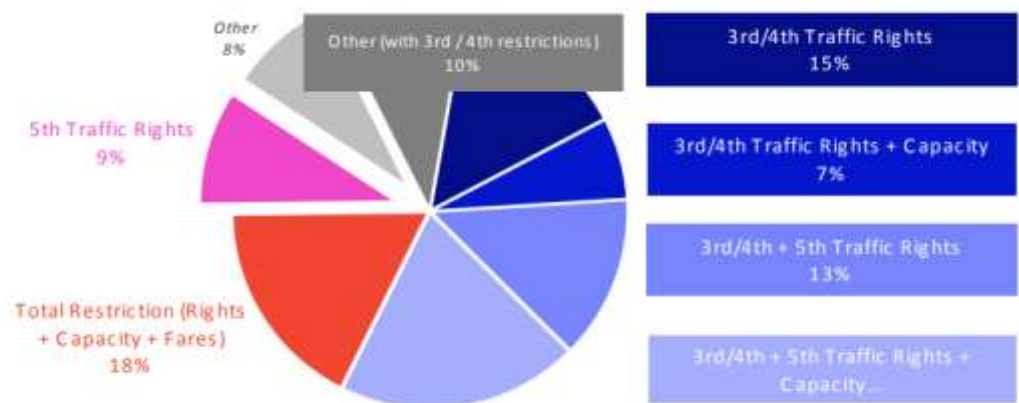
BASAs (18 per cent) were found to have all the operational elements as restrictive. Almost all of the non-compliant BASAs, 327 BASAs (88 per cent) had restrictive provisions on third, fourth, and fifth traffic rights, while 306 BASAs had restrictive provisions on the third and fourth traffic rights. Out of the 306 BASAs that restrict third and fourth traffic rights, 187 BASAs were restrictive because they imposed constrained on the entry points for designated carriers.

The study further debunks the misconception that non-compliant BASAs are restrictive solely based on fifth freedom rights when its findings show that only 70 BASAs (9 per cent) are deemed non-compliant solely on fifth freedom rights. At the same time, another 200 BASAs (54 per cent) included restrictive fifth freedom rights as one of a multitude of restrictions.⁵⁴⁷ The study concludes that restrictive provisions on traffic rights in most of the continent's BASAs are one of the main stumbling blocks toward the full implementation of the YD.⁵⁴⁸ The study noted that restrictions on capacity and frequency are also common in the non-compliant BASAs, with 180(48 per cent) of BASA containing such restrictions. Lastly, the study found that 131 BASAs (35 per cent) have a restrictive double approval tariff regime.⁵⁴⁹

Figure 7 summarises the causes of non-compliance in the non-compliant BASAs

Figure 8: Causes of non-compliance

Figure 2: Cause of YD non-compliance among non-compliant BASAs



Source: Country Survey, ICAO WASA Database, secondary research, IATA Analysis

⁵⁴⁷ Ibid at 63

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid at 72.

3.5. PUBLIC POLICY CONSIDERATIONS IN THE IMPLEMENTATION OF THE YD AND SAATM

Implementation of the YD and SAATM as public policies implies integration of their principles into the national legal and regulatory frameworks of individual countries, including eligibility to provide air transport services under the YD. The process involves translating the principles and objectives of these agreements into actionable policies and regulations at country level. Key regulatory principles that define public policy include competition, consumer protection, dispute settlement, and safety and security. Additionally, the Decision establishes key institutions to supervise and support liberalisation.

3.5.1. *Eligibility Criteria*

Article 6.9 of the YD outlines the specific eligibility criteria for airlines to be designated by state parties to operate under the liberalised air transport regime. The criteria determine which airlines can benefit from the liberalised market access and traffic rights established by the YD to ensure legal, operational, and financial compliance with established international standards. First, the airline should be legally established according to the regulations applicable in a State Party to the decision. Secondly, the airline's headquarters, central administration, and principal place of business must be physically located in the State concerned. Additionally, the airline must be duly licensed by a State Party as defined in Annex 6 of the Chicago Convention. There should also be ownership or a long-term lease exceeding six months on an aircraft, along with technical supervision of the aircraft. Also, there should be adequate insurance, particularly concerning passengers, cargo, mail, baggage, and third parties. The airline should also be capable of maintaining standards at least equal to those set by ICAO. Lastly, the airline must be effectively controlled by a State Party. Notably, these conditions are cumulative and failure to meet any of these criteria constitutes a legal ground for refusal or withdrawal of the authorisation.⁵⁵⁰

⁵⁵⁰ United Nations Economic Commission for Africa op cit note 15 at 19.

3.5.2. *Be legally established in accordance with the regulations applicable in a State Party to the Decision*

This is one of the criteria that States have used to frustrate the relaxation of airline ownership and control, particularly because of its vague formulation and inelegant draftsmanship. For instance, in several countries such as Nigeria, South Africa, Rwanda, and Kenya, domestic laws require that an airline be majority owned by the nationals or persons resident in these countries or in the case of a company, that the company is substantially owned by their respective nationals or persons resident in these countries for them to be granted an operating license by their respective Civil Aviation Authorities. As a matter of domestic law, for an airline to be designated by any of these countries to provide air services under any BASA, such an airline must comply with the requirement of ownership and control. By complying with their domestic laws on air establishment, States introduce the SOEC requirement, that runs afoul of the letter and spirit of the YD and these States' treaty obligations under the Abuja Treaty.⁵⁵¹

An ordinary construction of Article 6.9 (a) can result in a conclusion that State Parties' domestic legislation that upholds the SOEC requirement are compliant with Article 6.9 (a) since such States have complied with their domestic legislation in designating the airline to provide intra-African services under the YD.⁵⁵² Some State Parties have adopted this interpretation of the YD and have maintained that their domestic law requirement of SOEC is in line with the criterion established in Article 6.9 (a).⁵⁵³ This argument has been proffered under the guise of the state's sovereignty to determine its national policies without external interference. This is however contrary to the good faith principle that abhors the use of domestic law to frustrate an international treaty obligation. The interpretation of Article 6.9 (a) that supports States to uphold the traditional SOEC clauses is therefore erroneous and is at variance with the good faith interpretation requirement. It is not in the ordinary meaning in light of the objects and purpose of the YD and the Abuja Treaty as required by Article 31 (1) of the Vienna Convention on the Law of Treaties. As mentioned earlier, the objective and purpose of the YD is to liberalise intra-African air transport by enhancing market access rules and relaxing ownership and control rules. In light of the objective of relaxing ownership and control rules

⁵⁵¹ Christoph Seimelo 'Which problems and which benefits result from the Yamoussoukro decision of the African Economic Community is it worthwhile to implement this decision?' (LLM thesis, University of Pretoria, 2019) 39.

⁵⁵² Ibid at 39.

⁵⁵³ Ibid.

by adopting the ‘principal place of business and control test,’ the aim and purpose of the YD is to enable African airlines to access the need for international capital and to allow airlines to serve the intra-African air transport regardless of whether Africans own the airline or not.

The domestic law SOEC requirement makes the access to foreign equity capital and frustrates the cross-border mergers and acquisitions in the African air transport industry and is therefore contrarily to the Decision's purpose of relaxing ownership and control rules. It is, therefore, trite law this requirement contradicts Article 6.9(a) of the Y.D. As a corollary of the breach of Article 6.9 (a) of the YD, the leading airlines serving intra-African air transport are majorly 100 per cent State-owned; these include Air Algeria, Egypt Air, Ethiopian Airlines, Royal Air Morocco, Tunis Air, and SAA.⁵⁵⁴ Among the top five airlines on the continent, it is only Kenya Airways which the government does not fully own as it privatised in 1996.

3.5.3. *Principal place of business clause in the YD*

While the YD retained ‘effective control,’ requirement, the traditional clause of ‘substantial ownership’ was replaced by ICAO's proposed clause of ‘principal place of business.’⁵⁵⁵ Adopting the ‘principal place of business test created an opportunity for African airlines to access foreign equity and participate in cross-border mergers and acquisitions.⁵⁵⁶ The shift from SOEC to the principal place of business is a relatively recent phenomenon in the aviation industry. The principal place of business traces its origin in ASAs of the former British colony of Hong Kong, which used the concept to secure the designation of its flag carrier, Cathay Pacific, a British Swire Group owned airline. Several countries accepted the nationality free clause provided that the carrier designated by Hong Kong had been incorporated and had its principal place of business in Hong Kong. This departure from the SOEC clause to the nationality free clause gained prominence in the 1980s when it found its way into the Chicago Convention within the context of safety and security, particularly in Article 3 *bis* and Article 83 *bis* of the Convention and Annex 6 thereto which made references to the principal place of business or the permanent residence of the operator.⁵⁵⁷

The ICAO Secretariat introduced the clause at the fourth World Air Transport Conference (ATConf/4) in 1994 with the proposal for the Member States to depart from the

⁵⁵⁴ ICAO ‘Relaxing the rules for airline designation’.

⁵⁵⁵ ICAO, ‘Relaxing the Rules for Airline Designation’ op cit note 554.

⁵⁵⁶ Ibid.

⁵⁵⁷ Jan Walulik *Progressive Commercialization of Airline Governance Culture* (Routledge 2016) at 154.

SOEC clause to the principal place of business clause. Although the ATConf/4 failed to reach a consensus on the issue, its discussions were in 1997 taken up by the ICAO Air Transport Regulation Panel (ATRP), which in Recommendation in ATRP/9-4 of 1997 encouraged Member States to allow market access in their ASAs to a designated carrier ‘that has its ‘principal place of business and permanent residence ‘in the territory of the designating state and has and maintains a ‘strong link’ to the designating state.’ This recommendation was adopted by several regional multilateral ASAs, such as the European Civil Aviation Conference (ECAC), the 2002 OECD draft Multilateral Agreement for the Liberalisation of Air Cargo Services, and the 2001 Multilateral Agreement on the Liberalisation of International Air Transport.⁵⁵⁸ The YD which was also in the offing at that time, also adopted the principal place of business, evidently in vogue in multilateral ASAs of the late 90s and early 2000s.

Liberalisation of SOEC clauses was also high on the agenda of *ATConf/5 held in March 2003*. At Conference, the ICAO Secretariat proposed the alternative criteria of principal place of business and effective regulatory control to replace the substantial traditional SOEC clauses.⁵⁵⁹ Opinions on the proposal among the ICAO Contracting States were quite divergent, with 53 African States, Barbados, Singapore, and Cuba supporting reforms to the nationality clauses, while Latin America Civil Aviation Commission, South Korea, Arab *Civil Aviation Commission*, International Federation of Airline Pilots’ Associations (IFALPA) and the International Transport Workers’ Federation (ITF) strongly advocating for the status quo.⁵⁶⁰ Despite their cleavages, the delegates at the Conference agreed on an optional non-mandatory ‘Declaration of Global Principles for the Liberalisation of Air Transport,’ that included a ‘Model Clause’ on authorisation and designation. This clause makes a distinction between economic and regulatory control. In terms of economic control, the traditional substantial ownership clause was replaced by the ‘principal place of business.’ In place of effective control, the clause introduced the concept of ‘effective regulatory control,’ which underscores the responsibility of the designating State to exercise regulatory control over the designated carrier. The ‘Model Clause,’ however, faced the challenge in terms of the definition of the ‘principal place of business’ and ‘effective regulatory control.’ Neither the Chicago Convention nor the Model Clause defined the ‘principal place of business’ concept. Waluk

⁵⁵⁸ Rigas Doganis *The Airline Business* (Routledge 2005) at 60.

⁵⁵⁹ Yu-Chun Chang, George Williams & Chia-Jui Hsu ‘The evolution of airline ownership and control provisions’ (2004) 10 *Journal of Air Transport Management* 161 at 166.

⁵⁶⁰ ICAO op cit note 508.

argues that there is no need for a binding universal definition of the concept. States are better placed to elaborate on the concept in a manner compatible with their domestic law on corporate law on incorporation, establishment, and headquarters.⁵⁶¹ However according to the ICAO Secretariat; principal place of business;

‘Includes such factors as: the airline is established and incorporated in the territory of the designating Party in accordance with relevant national laws and regulations, has a substantial amount of its operations and capital investment in physical facilities in the territory of the designating Party, pays income tax, registers and bases its aircraft there, and employs a significant number of nationals in managerial, technical and operational position’⁵⁶²

While effective regulatory control;

‘includes but is not limited to: the airline holds a valid operating licence or permit issued by the licensing authority such as an Air Operator Certificate (AOC), meets the criteria of the designating Party for the operation of international air services, such as proof of financial health, ability to meet public interest requirement, obligations for assurance of service; and the designating Party has and maintains safety and security oversight programmes in compliance with ICAO standards.’⁵⁶³

The ATConf/5 also arrived at a consensus that the ‘Model Clause’ would not necessitate ICAO member States to amend their existing domestic investment or establishment laws’, ‘the internal lock.’ However, its objective is to liberalise the ‘external lock’ aspect of restrictions of foreign ownership by means of a withholding policy that authorises a partner to BASA to designate a third-party owned carrier.⁵⁶⁴ The 53 African States supported the adoption of the Model Clause on airline designation and authorisation, provided that States had the leeway in their national laws and regulations to prescribe the conditions for the principal place of business and effective regulatory control.⁵⁶⁵

⁵⁶¹ Walulik op cit note 557 at 157.

⁵⁶² ICAO op cit note 508.

⁵⁶³ Ibid.

⁵⁶⁴ Ibid

⁵⁶⁵ ICAO op cit note 508 at 17.

3.5.4. *Community of interest clause in the YD.*

At the regional level, States have also pursued the liberalisation of ownership and control by using the ‘community of interest’ criteria, while maintaining the traditional nationality clauses in BASAs with third parties. The ‘community of interest’ criteria facilitate airlines in a regional arrangement to access capital at the regional level. In the YD, this clause is found in Article 6.3, which gives State Parties the right to ‘designate an eligible African multinational airline in which it is a stakeholder.’ Therefore, the YD contains the ‘community of interest’ clause that allows airlines to access regional capital and the ‘principal place of the business clause’ that creates additional opportunities to access capital not available at the regional level.⁵⁶⁶ However despite the liberal provisions of the YD that liberalise ownership and control, most of the African States, as is evident from the sample of BASAs in the table in Annexure IV still maintain the traditional clause of substantial ownership and effective control.

One of the reasons why most African countries are stuck with the traditional SOEC clause is the fear that foreign investors will dominate the African air transport and take advantage of the liberalised ownership and control clauses to the detriment of African carriers.⁵⁶⁷ However, due to SOEC clauses in BASAs between African countries, African airlines have limited access to foreign capital markets, making them chronically undercapitalised.⁵⁶⁸ Unlike their counterparts in the US, Europe, and Asia, which have the advantage of the highly developed domestic capital markets that can raise the requisite equity capital to sustain their airlines, majority of African airlines are unable to mobilise equity capital at their domestic capital markets due to the underdeveloped nature of their markets.⁵⁶⁹ Brian Havel notes that even in countries with colossal capital markets, such as the US and Europe, the domestic market is not usually sufficiently flexible to support the airline industry during its periodic downturns.⁵⁷⁰ Start-up airlines in Africa also experience poor credit ratings and consequently experience a higher cost of debt capital than airlines from the U.S., E.U., and Asia.⁵⁷¹

Therefore, African airlines should take advantage of the principal place of the business and the community of interest clauses and exploit the capital available on the African continent.

⁵⁶⁶ Ibid at 118.

⁵⁶⁷ Gleave op cit note 57.

⁵⁶⁸ ICAO ‘Relaxing the rules for airline designation’ op cit note 554.

⁵⁶⁹ Ibid.

⁵⁷⁰ Brian F Havel op cit note 226.

⁵⁷¹ ICAO ‘Relaxing the rules for airline designation’ op cit note 554.

A recent trend in circumventing the restrictive SOEC clauses in African BASAs is through cooperative airline arrangements. As further elaborated in the fifth chapter, airline cooperative arrangements have been successfully employed in the ASEAN single aviation market to overcome SOEC clauses. This is one of the lessons the African airlines industry can learn from the ASEAN. Although several airline cooperative arrangements in the form of cross-border investments in the airline industry have been witnessed in the past, the extent of foreign investments is in most cases limited to less than 50 per cent equity. Examples of these include; the formation of Asky Airlines, a West African airline based in Lomé, Togo, in which Ethiopian Airlines holds a 49 per cent equity, Precision Air, a Tanzanian private airline where Kenya Airways holds an equity stake of 41.23 per cent, The Aga Khan Fund for Economic Development has through equity capital established several airlines on the African continent such as Air Uganda, Air Mali, Air Burkina, and Air Cote D'Ivoire.⁵⁷²

3.5.5. *Effective control within the Yamoussoukro Decision*

Article 6.9 (g) departs from how the 'effective control test' is usually framed by virtually all ASAs, which ordinarily requires the control exercised by the State Parties, or their nationals. It is not easy to ascertain why Article 6.9 (g) only limits effective control to States Parties, especially considering that at the time of drafting the YD, both States and their nationals were involved in the ownership of airlines.⁵⁷³ However, suffice to note that Article 1 of the YD defines effective control as;

'a relationship constituted by rights, contracts or any other means which, either separately or jointly confer the possibility of a State Party or Group of State Parties or their nationals to directly or indirectly exercise a decisive influence on the running of the business of the airline or the right to use all or a substantive part of the assets of the air carriers.'⁵⁷⁴

The definition clause in Article 1 does not limit effective control to State Parties but also includes a group of State parties or their nationals and goes further than Article 6.9(g). However, considering Article 31(2) of the Vienna Convention which establishes the canon that a treaty should be interpreted as a whole, taking into account the preamble and the definitive clauses, a holistic interpretation of Article 6.9 (g) would therefore result in the conclusion that

⁵⁷² Ibid.

⁵⁷³ Seimelo op cit note 551 at 41.

⁵⁷⁴ Yamoussoukro Decision op cit note 519 art.1.

effective control is to be exercised by both State Parties and/or their nationals.⁵⁷⁵ As mentioned in chapter one, establishing the effective control test is a subjective and complex task involving aeropolitical considerations. There are, however, generally accepted factors that States usually consider in establishing the effective control test. These include determining the exercise of decisive influence on the airline's operations through the financial and management tests. In the financial test, states consider who exercises decisive influence in using all or part of the airline's assets. In contrast, in the management test, states consider the questions of the exercise of decisive influence in the composition, voting, or decision-making process of the top organ of the airline and who exercises decisive influence in the running and management of the airline.⁵⁷⁶

3.5.6. *Aviation safety and the YD*

The YD contains several provisions that directly and indirectly touch on aviation safety and security. Under Article 5(1) of the YD, safety considerations are justifications that State Parties can employ to unilaterally restrict traffic volume, type of aircraft, and frequency. Under Article 6.9, one eligibility criteria is that an airline must 'be capable of demonstrating its ability to maintain standards at least equal to those set by ICAO and respond to any query from any State to which it provides air services.'⁵⁷⁷ Consequently, failure to adhere to the above provision on safety is one of the grounds for any State Party to revoke or suspend the authorisation of a designated airline.⁵⁷⁸ Article 6.11 obligates State Parties to 'recognise as valid the Air Operating Certificate, Certificate of Airworthiness, Certificate of Competency and the licenses issued or validated by the other State Party and still in force provided that the requirements for such certificate of license are at least equal to the minimum standards set by ICAO.'⁵⁷⁹ Article 6.12(a) of the YD calls upon State Parties to 'conform to the provisions of the various conventions on air safety in accordance with ICAO provisions and especially with Annex 17 of the Chicago Convention on International Civil Aviation.' Pursuant to Article 6.12 (c), State Parties to the YD 'reaffirm their obligation to comply with the civil aviation safety standards and practices recommended by ICAO.'

⁵⁷⁵ Seimelo op cit note 551 at 42.

⁵⁷⁶ ICAO 'Relaxing the rules for airline designation' op cit note 554.

⁵⁷⁷ Yamoussoukro Decision op cit note 519 art. 6.9(f).

⁵⁷⁸ Ibid art. 6.10.

⁵⁷⁹ Ibid art. 6.11.

3.5.6.1. Safety, the Achilles' heel of the African aviation industry

Although the YD has robust provisions for aviation safety, safety implementation on the African continent falls below the world average.⁵⁸⁰ Although the African continent contributes three per cent to the global air traffic, its airlines have the highest regional accidents accounting for 19 per cent of the international.⁵⁸¹ Whereas there has been a noticeable decrease in the rate of accident incidences in other regions in the recent past, the African continent continues to be a conspicuous oddity in aviation safety.⁵⁸² According to the African Development Bank, in 2011, the African accident incidents were nine times more than the global average.⁵⁸³ In the same year, African carriers were involved in approximately one-third of the worldwide air traffic accidents. Consequently, the European Union banned 108 African airlines from its airspace.⁵⁸⁴ As a result of these statistics, the African Development Bank 2011 classified aviation safety as the most pressing issue bedevilling the African air transport industry.⁵⁸⁵ The State of African aviation safety has also been considered the main stumbling block to the implementation of the YD.⁵⁸⁶

Some commentators have attributed the worrisome State of aviation safety in Africa to the aged African aircraft fleet, which is predominantly made up of more than 20 years ex-Soviet aircraft.⁵⁸⁷ However, while the old Soviet-built turboprop aircraft were said to have contributed to most of the casualties in 2006, recent incidents have been attributed to the Western-built aircraft.⁵⁸⁸ Statistics from around the globe also indicate that both the ex-Soviet built and Western-built aeroplanes are equally safe as long as they are properly maintained and

⁵⁸⁰ Vivien Foster & others (eds) *Africa's infrastructure: A time for transformation* (Agence Française de Développement: World Bank 2010) at 263.

⁵⁸¹ European Union 'Action document for EU-Africa safety in aviation' 3 available at https://ec.europa.eu/international-partnerships/system/files/pan-africa-programme-annexe-3_en.pdf accessed at 15 November 2021; Jacob Shila & Amadou Anne 'Promoting aviation safety in Africa: Analysis of air accidents in the region between 2004 and 2013' [2015] 18th International Symposium on Aviation Psychology 43.

⁵⁸² European Union op cit note 581 at 3.

⁵⁸³ African Development Bank 'Africa's aviation industry: Challenges and opportunities.' (2012, October). AfDB Africa Economic & Financial Brief 3(40), 1–2 available at <http://www.acismoz.com/wp-content/uploads/2017/06/AEFB%20Oct%2001%20to%2005%20V1.pdf> accessed on 15 November 2021.

⁵⁸⁴ Nathan Michael Woods 'Taking off in Africa: Critical elements of aircraft engine manufacturer engagement that can affect airline safety performance' (PHD dissertation, Antioch University, 2020) at 6.

⁵⁸⁵ Ibid.

⁵⁸⁶ Oswald Mhlanga 'Liberalisation initiatives of the airline industry in Southern Africa: Progress achieved and hindrances to implementation.' [2018] Afr. 13.

⁵⁸⁷ Heinrich Bofinger *Africa's transport infrastructure: Mainstreaming maintenance and management* (World Bank Publications 2011) at 174.

⁵⁸⁸ Ibid.

operated.⁵⁸⁹ The U.S National Transportation Board investigations into several flight accidents on the African continent have also revealed that poor pilot training and assessment contribute to aircraft accidents on the continent.⁵⁹⁰ However, the main contributing factor to the high rate of flight accidents on the African continent has been considered insufficient adherence by African countries to the international safety standards and the lax enforcement of these standards by the national civil authorities.⁵⁹¹

As a result of the poor safety record, several African carriers have been banned by the E.U and the US. The E.U pursuant to Regulation (E.C.) No 2111/2005 came up with the E.U Safety list that contains a list of airlines that are blacklisted from operating in the E.U airspace for want of adherence to the internationally accepted safety standards.⁵⁹² According to the E.U. banning an airline from European airspace does not necessarily mean that the airline is necessarily unsafe but is mainly because of the failure of a country's aviation authorities to enforce safety standards and poor safety oversight systems. By August 2021, Angola, Congo Brazzaville, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Liberia, Libya, Nigeria, Sao Tome and Principe, Sierra Leone, Sudan, and Zimbabwe were on the E.U. blacklist.⁵⁹³

3.5.6.2. Efforts to address aviation safety concerns in Africa

Realising the challenges posed by the state of aviation safety on the African continent, the African ministers in charge of civil aviation adopted the Abuja Aviation Safety Targets in 2012.⁵⁹⁴ These targets aim to progressively reduce the accident rates in Africa to acceptable levels and match the rate with the global averages.⁵⁹⁵ This would be attained by enhancing Africa's compliance with the SARPS. However, most of the African States have not been able

⁵⁸⁹ Foster & others op cit note 580 at 263; Bofinger op cit note 587 at 174.

⁵⁹⁰ Bofinger op cit note 587 at 174.

⁵⁹¹ Woods op cit note 584 at 5.

⁵⁹² 'Aviation Safety: EU Commission adopts new air safety list – Insight EU monitoring' <https://portal.ieu-monitoring.com/editorial/aviation-safety-eu-commission-adopts-new-air-safety-list/?utm_source=ieu_monitoring&utm_medium=web&utm_campaign=portal> accessed 16 November 2021.

⁵⁹³ Ibid.

⁵⁹⁴ African Civil Aviation Commission 'Abuja safety targets' <<https://afcac.org/en/index.php/programmes-activities-safety/abuja-safety-targets>> accessed 16 November 2021.

⁵⁹⁵ ICAO 'Aviation safety targets for Africa' <[https://www.icao.int/safety/DashboardsDocumentation/Aviation%20Safety%20Targets%20and%20ANS%20Performance%20Indicators%20for%20Africa%20\(Africa\).pdf](https://www.icao.int/safety/DashboardsDocumentation/Aviation%20Safety%20Targets%20and%20ANS%20Performance%20Indicators%20for%20Africa%20(Africa).pdf)> accessed 16 November 2021.

to conform to the ICAO SARPs and the Abuja Aviation Safety Targets.⁵⁹⁶ The failure to match the targets is attributed to several factors such as; lack of adequate technical expertise, insufficient operational budgets of the aviation authorities, a dearth of qualified safety inspectors, and inadequate primary aviation legislation and technical regulations.

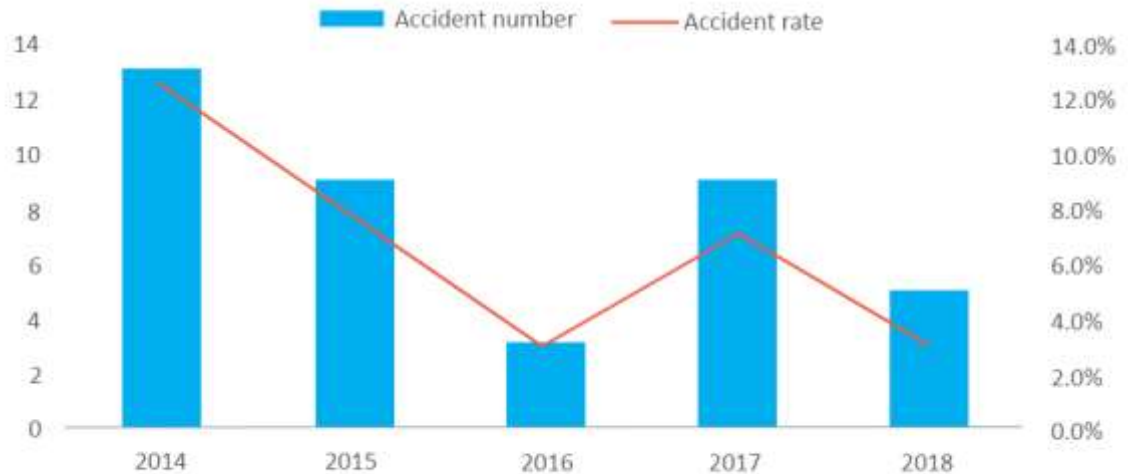
In response to the pressing safety challenges in the African airspace, the ICAO Council established the Comprehensive Regional Implementation Plan for Aviation Safety in Africa (AFI Plan). The AFI Plan was adopted during the 36th ICAO Assembly (Assembly Resolution A36-1) and charged with aviation safety issues in the African Indian Ocean (AFI) region.⁵⁹⁷ In 2008 The Secretary-General of ICAO established the AFI Comprehensive Implementation Programme (ACIP), which subsequently came up with its work programme with three areas of focus facilitating a sustainable safety oversight system, helping countries expeditiously tackle identified safety deficiencies, and promoting safety culture among the African aviation operators. AFAC has also established the AFI Cooperative Inspectorate Scheme (AFI-CIS), a program to help African countries enhance their Effective Implementation (E.I.) of the ICAO SARPs. Through this programme, African countries will be assisted in the capacity building of the national safety inspectors and benefit from a pool of highly qualified and experienced aviation safety inspectors drawn from the entire African continent.⁵⁹⁸ As a result of these collaborative efforts, there has been a tremendous improvement in aviation safety. Figure 8 shows the trend of accident rates in Africa.

Figure 9: The accident rate in Africa (2014-2018)

⁵⁹⁶ Nelson K Mwikya & Mulwa S Angeline 'Implementation of aviation safety standards and performance of air transport industry: A conceptual perspective' (2018) 4 Ajbuma Journal.

⁵⁹⁷ Ibid at 22.

⁵⁹⁸ Ibid at 750.



Source: IATA Safety report

According to the ICAO audit, as of December 2020, 21 of the AU States were below the ICAO 60 % ‘Effective Implementation’ (EI) threshold for safety. Of the 21 States, 10 are SAATM members; Tchad, Central African Republic, Democratic Republic of Congo, Eswatini, Guinee, Guinea Bissau, Lesotho, Liberia, Sierra Leone, Zimbabwe, while 11 were non-SAATM members -Burundi, Comoros, Djibouti, Eritrea, Libya, Malawi, Sao Tome, and Principe, Seychelles, Somalia, South Sudan and Western Sahara.⁵⁹⁹ The EI is the litmus test by ICAO to measure the State’s compliance with the ICAO SARPs with a minimum of 60 % EI. IATA has also developed a yardstick known as the IATA Operational Safety Audit Assessment (IOSA), which measures airline safety compliance. Using these two yardsticks, African airlines have been found wanting, and the safety levels in the 21 States pose a significant challenge to the implementation of the YD and the operationalization of SAATM.⁶⁰⁰ The inability of the States to comply with safety is also an indicator of the non-prioritisation of the aviation industry by these 21 States. This is because these States have also been found to have no major airline or their airlines operate below the IOSA standard; have underdeveloped airport and airspace infrastructure, low AU/AfDB Visa Openness ranking, small aviation markets, and are slow to ratify air law treaties.⁶⁰¹

⁵⁹⁹ IATA op cit note 187 at 9.

⁶⁰⁰ Ibid at 33.

⁶⁰¹ Ibid at 11.

3.5.7. Aviation Security and Facilitation

Under Article 6.12 of the YD, ‘State Parties reaffirm their obligations to each other to protect the security of civil aviation against unlawful interference...’ and conform to Annex 17 Chicago Convention.⁶⁰² The YD also obligates the State Parties to ‘give consideration to any request from the other State Party for special security measures to meet a particular threat.’⁶⁰³ Aviation security (AVSEC) is the deployment of a combination of measures and human and material resources to safeguard civil aviation against unlawful interference.⁶⁰⁴ Most importantly, ICAO defines Aviation security oversight as

‘a function by means of which States ensure the effective implementation of the security-related SARPs and associated procedures contained in the Annexes to the Chicago Convention (primarily Annex 17, but including the security-related provisions of Annex 9) and related ICAO documents.’

Annexe 17 to the Chicago Convention embodies the SARPs pertaining to the aviation industry's security. At the same time, Annex 9 to the Chicago Convention contains the SARPs relating to the facilitation of border control formalities. ICAO defines facilitation in aviation as ‘... a wide range of issues and activities and the development of Standards, in connection with the clearance of aircraft, people and goods through the formalities required at international borders.’⁶⁰⁵

Safeguarding international civil aviation security against unlawful interference has been a critical concern of the ICAO for more than 70 years. The preamble to the Chicago Convention captures this concern when it states, ‘the future development of international civil aviation can greatly help create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security ...’⁶⁰⁶ ICAO adopted Annexure 17 in 1974, which obligates each Contracting State to establish a government agency to ensure aviation security at the national level by implementing a national

⁶⁰² Yamoussoukro Decision op cit note 519 art. 6.12 (a).

⁶⁰³ Ibid art. 6.12(b).

⁶⁰⁴ International Civil Aviation Organization *Aviation Security Oversight Manual* (2015).

⁶⁰⁵ ICAO ‘The facilitation manual (Doc 9957)’ (ICAO) <<https://store.icao.int/en/the-facilitation-manual>> accessed 16 November 2021.

⁶⁰⁶ Convention on Civil Aviation 1944.

security program.⁶⁰⁷ The government agency is also supposed to protect the airports by security checks and screening aircraft, passengers, and cargo.⁶⁰⁸

The civil aviation industry was, until 2001, considered relatively safe from unlawful interference, hijacking, and sabotage.⁶⁰⁹ Before 2000, aviation security programmes were conducted through a mechanism comprising approximately 140 States. States would request to be assessed on their AVSEC compliance and consequently benefit from technical assistance, seminars, and workshops.⁶¹⁰ However, on September 11, 2001, the terrorist attack by Al-Qaeda in the USA jolted the international community on the need for a global AVSEC mechanism in international civil aviation. As a consequence of the attack, the ICAO Assembly passed a Resolution requiring all the contracting States to, among other things, apply Annex 17 to the domestic aviation industry, upgrade their security controls at the airports and ensure adequate security in their territories.⁶¹¹

Since the September 11 incident, the international aviation industry has experienced a wave of novel and brutal forms of terrorism, including using aircraft as instruments of terror. For instance, in 2016 only, four airports were attacked, two planes were hijacked, and one was bombed.⁶¹² Today, the air transport industry is considered a vulnerable target of terror because of its ability to facilitate large-scale destruction, mass casualties, and economic ramifications, especially in this era in which suicide bombing has emerged as the preferred mode of executing acts of terror. The growth of the aviation industry into a global activity and the complexity of the modern aviation industry further confounds aviation stakeholders as every aspect of the industry presents a unique security challenge.⁶¹³ The cross-border nature of the aviation industry makes aviation security a global concern. As observed by ICAO, ‘the level of protection deriving from the implementation of security standards is only as strong as the weakest link in the global aviation network.’⁶¹⁴

⁶⁰⁷ Evaristus Irandu ‘Air transport security in Kenya’, *Air Transport Security* (Edward Elgar Publishing 2018) 192.

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid at 194.

⁶¹⁰ Ibid.

⁶¹¹ Ibid

⁶¹² Ibid.

⁶¹³ Ibid.

⁶¹⁴ International Civil Aviation Organization *Aviation Security Oversight Manual* op cit note 604.

3.5.7.1. Aviation Security and facilitation are two sides of the same coin

For a long time, aviation Facilitation (FAL) as provided for in Annex 9 had been overshadowed and neglected, with much emphasis on Annex 17 on AVSEC.⁶¹⁵ The ICAO Assembly, during its 38th Session established an equal footing between AVSEC and FAL, effectively putting the two Annexes on the same level and recognising them as two sides of the same coin.⁶¹⁶ Facilitation procedures have been found to improve security by providing a controlled environment for security threat identification that allows a discriminative approach to the enforcement of security procedures.⁶¹⁷ However, the combination of AVSEC and FAL should be efficient to provide a safe environment for passengers and cargo does not unnecessarily jeopardize their comfort.⁶¹⁸

3.5.7.2. Aviation security and facilitation in Africa, a weak link to the international security

Audits conducted by the ICAO's Universal Security Audit Programme (USAP) have revealed that aviation security and facilitation on the African continent is below the global average.⁶¹⁹ AVISEC and FAL programmes on the continent are plagued by perpetual systematic deficiencies in the regulatory oversight and implementation of the ICAO AVISEC and FAL programmes.⁶²⁰ The systematic flaws are a result of inadequate technical, financial, and human resources, weak domestic legislation, regulations, and governance structures, inadequate aviation security and facilitation infrastructure, weak enforcement powers on the relevant government authorities, lack of political commitment, and failure to prioritize AVISEC and FAL programmes and the absence of a security culture.⁶²¹

⁶¹⁵ Cornelia Ludorf 'Aviation security and facilitation: Two sides of a coin - Facilitation in the EUR/NAT Office' (*Uniting Aviation*, 1 May 2018) available at <https://unitingaviation.com/news/security-facilitation/aviation-security-and-facilitation-two-sides-of-a-coin-facilitation-in-the-eur-nat-office/> accessed on 16 November 2021.

⁶¹⁶ Ibid.

⁶¹⁷ Ibid.

⁶¹⁸ Ibid

⁶¹⁹ International Civil Aviation Organization 'Comprehensive regional implementation plan for aviation security and facilitation in Africa (AFI SECFAL PLAN)' available at <https://www.icao.int/ESAF/AFISECFAL/Pages/default.aspx> accessed on 16 November 2021.

⁶²⁰ International Civil Aviation Organization 'Current aviation security and facilitation situation in Africa' available at <https://www.icao.int/ESAF/AFI-Aviation-Week/Documents/SECFAL/SF101-%20Current%20Situation%20in%20Africa.pdf> accessed on 16 November 2021.

⁶²¹ Ibid.

The situation of aviation facilitation in African airports also falls short of the recommended standards in Annex 9 of the Chicago Convention with inadequate infrastructural facilities and prevalent bureaucratic procedures.⁶²²The main factors contributing to the worrisome state of aviation facilitation include poor coordination and harmonization of operations at the airports by the various State departments, such as customs, immigration and quarantine, national security consideration, fraud and theft prevention, and currency control.⁶²³ These deficiencies generally undermine confidence in global aviation security, making aviation security in the African continent a weak link to the international civil aviation security system.⁶²⁴The poor State of aviation facilitation on the African continent significantly hampers the efficiency and quality of aviation services. The attenuated state of security further exacerbates the situation, the increase of insurgents and transnational criminal activities, the upsurge of political and social unrest, proliferation of weapons, and the presence of terror groups such as Boko Haram in Nigeria, Al-Shabab in Somalia, and ISIS in the several North African States.⁶²⁵Due to the global nature of the aviation industry, the poor state of aviation security and facilitation in most African countries threatens the African countries and the global economies.⁶²⁶

3.5.7.3. Corroborative initiatives on AVISEC and FAL in Africa

Corroborative initiatives to address the deficiencies of aviation security and facilitation on the African continent started with the Agadir Seminar organized by ICAO and AFCAC in May 2000.⁶²⁷The seminar's objective was to establish a special coordinating authority for AVSEC at the airport level.⁶²⁸The seminar was followed by the Third AU Conference of Ministers in charge of air transport in Addis Ababa, Ethiopia, held from 7th to 11th May 2007, organised by the AU, AFCAC, and ICAO. This conference adopted the Declaration on the development of an African Aviation Security Roadmap, Addis Ababa, 2007, that would deal with the security

⁶²² United Nations Economic Commission for Africa op cit note 6.

⁶²³ Ibid.

⁶²⁴ Irandu op cit note 607.

⁶²⁵ Woods op cit note 584 at 5.

⁶²⁶ Ibid.

⁶²⁷ Irandu op cit note 607 at 195.

⁶²⁸ Ibid.

deficiencies of the African air transport industry.⁶²⁹The AU subsequently endorsed this Declaration in Accra, Ghana, on June 29th, 2007, vide Decision EX.CL/Dec.359 (XI).⁶³⁰

On 25th December 2009, Umar Farouk Abdulmutallab, a 23-year-old terrorist linked to the Al-Qaeda and whose itinerary had originated from Nigeria, attempted to ignite chemical explosives sewn to his underwear while on-board Airbus A330-323 E' with 290 passengers on board as the airline approached its destination in the US .⁶³¹ Fortunately, the suicide bomber failed to detonate the explosive properly, thereby sustaining injuries on his body while only injuring two other passengers.⁶³² This incidence jolted a further political commitment, with the African Ministers responsible for aviation security; in corroboration with regional and international organisations meeting on 13th April 2010, in Abuja adopting the Abuja Declaration on Civil Aviation Security in Africa.⁶³³ The Declaration affirmed the commitment of the African countries to improving the level of aviation security by preventing all forms of unlawful interference with civil aviation, with keen emphasis placed on the terrorist threats directed at the civil aviation industry.

In August 2010, the AFCAC AVSEC Working Group was established and charged with implementing the African Roadmap on civil aviation.⁶³⁴ However, the Roadmap implementation faced significant challenges and failed to attain the intended outcome.⁶³⁵ The African States held a regional conference on aviation security in Dakar, Senegal, on 17th 18th October 2011. They acknowledged ICAO's leadership role in aviation security and resolved to enhance their collaborative efforts to tackle aviation security on the continent.⁶³⁶ Another watershed event was the meeting of the African transport ministers in Luanda, Angola, held from 21st to 25th November 2011. The ministers agreed on the need to establish a Regional

⁶²⁹ African Union 'Ministerial conference on aviation security and facilitation in Africa' (2016) available at https://au.int/sites/default/files/documents/32186-doc-minister_session_-_afi_secfal-e.pdf accessed on 16 November 2021.

⁶³⁰ Ibid.

⁶³¹ Irandu op cit note 607.

⁶³² 'Underwear bomber Abdulmutallab sentenced to life - BBC news' available at <https://www.bbc.com/news/world-us-canada-17065130> accessed on 16 November 2021.

⁶³³ African Civil Aviation Commission 'Regional aviation security and facilitation group for Africa and Indian Ocean region' available at <https://www.icao.int/ESAF/AFISECFAL/Documents/2nd%20Steering%20Committee%20Meeting/DP03%20-%20DRAFT%20TERMS%20OF%20REFERENCE%20-%20RASFG-AFI-%20ANNEX%20B.pdf> accessed on 16 November 2021.

⁶³⁴ Irandu op cit note op cit note 607 at 196.

⁶³⁵ Ibid.

⁶³⁶ International Civil Aviation Organization 'Current aviation security and facilitation situation in Africa' op cit note 620.

Aviation Security Group and a Counter-Terrorism Research Unit within the African Centre for Study and Research and Terrorism. These two institutions would be responsible for coordinating and implementing the Abuja Declaration and the Roadmap on Aviation Security.⁶³⁷

To address the international community's concerns on aviation security and facilitation in Africa, AFCAC approached ICAO for technical assistance to help African countries reduce their lack of Effective Implementation. In response, ICAO established the comprehensive African Aviation Security and Facilitation (AFI SECFAL) plan.⁶³⁸ The AFI SECFAL was unanimously adopted by States at the AFI Aviation Security Meeting in Dakar, Senegal, on 28th May 2014, and endorsed by AFCAC at its 24th Extraordinary Plenary Session held from 1st to 4th July 2014, in Dakar, Senegal. The ICAO Council subsequently approved the AFI SECFAL in its 203rd Session on 29th October 2015; vide Decision C-DEC 203/2 as an ICAO programme.⁶³⁹ During its first meeting in Maputo, Mozambique, on May 18th 2015, the AFI SECFAL Plan Steering Committee endorsed establishing the African Regional Aviation Security /Facilitation Group for Africa and the Indian Ocean Region (RASFG-AFI) under the auspices of AFCAC.⁶⁴⁰

The other watershed event was the Ministerial Conference on Aviation Security and Facilitation held in Windhoek, Namibia, from 4th to 7th April 2016, with the principal objective of reinforcing the political commitment of the African States toward the effective implementation of the AFI SECFAL Plan.⁶⁴¹ This ministerial conference resulted in the Windhoek Declaration and the establishment of aviation security and facilitation targets pursued by all AFI States. The AFI SECFAL Plan has provided an appropriate forum to coordinate aviation security and facilitation activities in the AFI Region and support these states to comply with Annex 9 and 17 of the Chicago Convention. This is realised by, *inter alia*, ensuring effective implementation of the Global Aviation Security Plan (GASP) and the

⁶³⁷ African Civil Aviation Commission op cit note op cit note 633.

⁶³⁸ Ibid.

⁶³⁹ African Union 'Ministerial conference on aviation security and facilitation in Africa' op cit note 633.

⁶⁴⁰ International Civil Aviation Organization 'Support to the continuation of the comprehensive regional implementation plan for aviation security and facilitation in Africa' available at http://www.icscc.org.cn/upload/file/20191107/wp_288_rev1.en.pdf accessed on 14 November 2021.

⁶⁴¹ African Union 'Ministerial conference on aviation security and facilitation in Africa' op cit note 633.

Windhoek Declaration and Targets and establishing National Civil Aviation Security Programmes and National Air Transport Facilitation Programmes.⁶⁴²

Since its establishment in 2015, African countries have made great strides in implementing the AFI SECFAL Plan. One notable milestone is intensified collaborative efforts that have bolstered the capacity of the African States to comply with the ICAO SARPs under the initiative of ‘No Country Left Behind’.⁶⁴³ Consequently, the AFI Region has experienced tremendous improvement in the E.I. with a 59.12 per cent implementation of critical elements and 70.62 percent compliance with Annex 17 to the Chicago Convention. However, ICAO USAP audits indicate that there is still much to be done in aviation security. The most significant stumbling block to implementing the AFI SECFAL Plan is inadequate funding.⁶⁴⁴ The AFI SECFAL is funded by the ICAO regular budget and voluntary contributions by several States under the aegis of the NCLB campaign. However, these resources have not matched the budget estimates for the programme, especially with the emergency of novel security threats such as cyber security, which have further exacerbated the strain on the dearth of resources.⁶⁴⁵

3.5.8. *Dispute settlement*

Article 8 of the YD provides for a two-tier dispute settlement mechanism to be used by the State Parties to interpret or apply the YD. Article 11.4 provide that ‘A State Party may, at any time, request consultation with other State Party (ies) in respect to the interpretation or application of this Decision. Such consultation shall begin at the earliest possible date but not later than 30 days from when the other Party receives the request.’

Accordingly, pursuant to Article 8 of the YD, disputing State Parties are obligated to resolve their disputes by negotiation.⁶⁴⁶ Suppose they cannot arrive at a settlement within 21 days; either party can refer the dispute to arbitration pursuant to the dispute settlement procedures provided in Appendix 3 to the YD⁶⁴⁷ Article 8 of the YD mentions negotiation and arbitration as the only mechanisms for dispute settlement. Note that when the YD was adopted, negotiation and arbitration were the best-suited modes of dispute resolution on the African

⁶⁴² International Civil Aviation Organization ‘Support to the continuation of the comprehensive regional implementation plan for aviation security and facilitation in Africa’ op cit note 640.

⁶⁴³ Ibid.

⁶⁴⁴ International Civil Aviation Organization op cit note 640.

⁶⁴⁵ Ibid.

⁶⁴⁶ Yamoussoukro Decision op cit note 519 art. 8.1.

⁶⁴⁷ Ibid art. 8.2.

continent.⁶⁴⁸ The choice of these two modes of dispute resolution suits the commercial nature of the air transport industry, which demands the expeditious but elaborate mode of dispute resolution.⁶⁴⁹ Concerns have been raised whether the YD by only providing for negotiation and arbitration by implication, excludes the use of the other modes of dispute settlement such as courts, mediation, and other appeal mechanisms.⁶⁵⁰ Considering that the choice of dispute resolution is an inalienable right of the disputants, an interpretation that the YD by implication, excludes the other dispute resolution mechanism is untenable. As such, disputants can utilise other suitable modes of dispute resolution.⁶⁵¹

Whereas Article 8.2 of the YD provides that arbitration between State Parties is to be conducted with arbitration procedures outlined in Annex 3 of the Decision, this Annex is, as of the time of writing this chapter, the only Annex envisioned by the YD which has not entered into force. Annex 3 was withdrawn from the regulatory text of the YD following the advice of the legal counsel of the African Union Commission on the ground that the Annex faced a legal implementation challenge.⁶⁵² The legal challenge arose from the fact that draft Annex 3 established a African Aviation Tribunal and an Appeal Board, which are to be operationalised within the auspices of the AU, with questions arising as to whether the instrumentality of regulations can legally establish these two institutions.⁶⁵³ So far there is no evidence that the YD institutional and regulatory text has been subjected to any judicial or quasi-judicial forum for interpretation or in the context of dispute resolution, which is also an indicia of the lack of implementation of the YD at the multilateral level. The application of the YD regulatory text at the bilateral level in Africa does not foster the use of a judicial mechanism to resolve disputes, but facilitates the unilateral suspension of flights and the subsequent retaliation by the other State party to the BASA.

⁶⁴⁸ African Union ‘Study on competition rules, dispute settlement mechanism and consumer protection’ (Third Session of the African Union Conference of African Ministers of Transport Malabo, Equatorial Guinea 7 - 11 April 2014) 32 available at http://www.afcac.org/fr/images/Air_Transport/1.4.pdf.

⁶⁴⁹ Ibid.

⁶⁵⁰ Ibid 32.

⁶⁵¹ Ibid.

⁶⁵² Peter Amaleboba ‘Regulatory and institutional instruments of the Yamoussoukro decision’ (2018 ICAO Air Services Negotiation Event) available at <https://www.icao.int/Meetings/ican2018/Documents/Presentation%20by%20Mr.%20Amaleboba%20-%20AFCAC.pdf> accessed on 14 November 2021.

⁶⁵³ Ibid.

3.5.9. Competition regulations

Article 7 of the YD provides that ‘State Parties shall ensure fair opportunity on a non-discriminatory basis for the designated African airline, to effectively compete in providing air transport services within their respective territory.’ Article 9.5 of the YD bestows upon the Executing Agency the responsibility to enforce competition rules and regulations to guarantee fair and equal opportunity to all eligible airlines and enhance healthy competition. Elaborate competition rules are a fundamental ingredient for the successful liberalisation of the aviation industry. Recognising this, African States at the ICAO meeting in March 2003 noted that the YD provisions on competition were inadequate because they do not prohibit malpractices by the continental aviation hegemonies.⁶⁵⁴ The situation has been inimical to the liberalisation of the intra-African air transport market resulting from the well-founded fears of small airlines whose survival is threatened by the vagaries of unregulated competition. As a panacea to this situation, three RECs, COMESA, EAC, and SADC, drafted joint competition rules that adopted them in their respective regions.⁶⁵⁵ The COMESA-EAC -SADC regulations served as a foundation for the continent-wide competition regulations adopted in 2014 as Annex 5, titled Regulations on Competition in Air Transport Services within Africa.⁶⁵⁶

3.5.10. Consumer protection regulation

Consumer protection in the YD is provided for in the preamble and article 9.6 of the YD. Paragraph 10 of the preamble provides that ‘Considering the importance of enhancing cooperation among African airlines to stimulate the development of inter-African air transport and the need to improve the quality of service to the consumers.’ Article 9.6 of the YD bestows upon the Executing Agency the mandate to ensure that consumer rights are protected.

Most air transport service consumers in Africa either do not enjoy institutional protection against poor service delivery in the aviation industry or are unaware of consumer protection rights against service providers in the aviation industry.⁶⁵⁷ Even when there is

⁶⁵⁴ ICAO ‘Background to experiences of liberalisation in Africa’ 2003 available at https://www.icao.int/sustainability/CaseStudies/StatesReplies/AfricaBackground_En.pdf

⁶⁵⁵ Ibid.

⁶⁵⁶ African Union ‘Study on competition rules, dispute settlement mechanism and consumer protection’ op cit note 648 at 37.

⁶⁵⁷ International Civil Aviation Organization ‘Air transport and the protection of the consumer’ (2013) available at https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-WP47_en.pdf accessed on 14 November 2021.

awareness of these rights, consumers often face the challenge of enforcing them mainly due to institutional incapacity or the lack of information on the appropriate forum to raise their concerns.⁶⁵⁸ The Montreal Convention of 1999 remains the only legal regime for most consumers of air transport services on the African continent to get redress against airlines. Whereas few African countries have established consumer protection regulations or departments within their civil aviation authorities that specifically address consumer protection, some use the general consumer protection legislation to protect the rights of consumers in the aviation industry. Most African countries have neither general nor specialised regulations on consumer protection.⁶⁵⁹

To give effect to Article 9.6 of the Y.D., the AU Assembly of Heads of State and Government at the 30th Ordinary Session, held 28th -29th January 2018 in Addis Ababa, Ethiopia, adopted Annex 6 (Regulations on the protection of Consumer of Air Transport Services) as part of the regulatory instruments of the YD. According to Article 3 of Annex 6, the objectives of the regulations are to protect the consumer in the aviation industry against unfair treatment by the service providers, provide a basis for compensation, and a mechanism for the consumers to seek redress. Article 4 prohibits unfair and deceptive practices, including misleading advertising, failure to disclose ticket conditions, persistent boarding denials, abuse of the free-seating policy, discriminatory compensation application under the Warsaw/Montreal Convention, and chronically delayed flights.

3.5.11. Cooperation among African Airlines

Article 11.3 of the Decision titled ‘cooperative arrangements’ provides that ‘in operating the authorised services on the agreed routes, a designated airline of one State Party may enter into cooperative marketing arrangements such as blocked-space, code sharing, franchising or leasing arrangement, with an airline or airlines of the other State Party.’

One of the recent global trends in the airline industry is the emergence of ‘cooperative arrangements’ between airlines (also known as airline alliances). Airlines enter into cooperative arrangements for several reasons: one is to circumvent legal and economic barriers. The first chapter noted how market access barriers in BASAs restrict basic third, fourth, and fifth traffic rights and beyond such as cabotage and how ownership and control restrictions

⁶⁵⁸ African Civil Aviation Commission ‘African air transport and the protection of the consumer’ (30-31 October 2012) available at <https://www.afcac.org/legacy/en/documents/conferences/october2012/wp8.pdf>.

⁶⁵⁹ Ibid.

prevent airlines from establishing foreign subsidiaries. A practical way of circumventing these restrictions is using cooperative arrangements.⁶⁶⁰ Cooperative arrangements also serve an economic purpose, such as increasing revenue due to the airline's load factors and the ability to penetrate new markets and take advantage of the marketing activities.

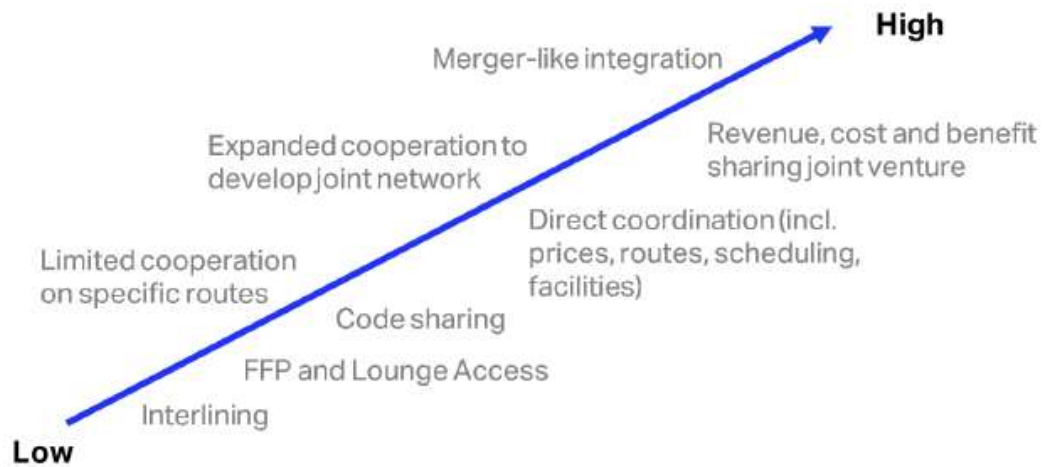
Cooperative arrangements also enable airlines to cut costs by enabling them to leverage the increased economies of scale and scope. In a capital-intensive industry, airlines can capitalise on synergies of shared labour, shared capital equipment and facilities, shared purchases in aircraft and fuel, and eliminate redundant operations.⁶⁶¹ Lastly, Cooperative arrangements enable the airline to reduce competition by enhancing their ability to exercise market power with airlines that previously used to compete now entering into alliances and result in greater choice and convenience for consumers resulting from lower fares.⁶⁶² In a continent where airlines have the highest load factors, low profitability, low connectivity, and operate in a restrictive market access and ownership and control environment, 'cooperative arrangements' are the much-needed panacea that will generate economies of scale and enhance the operational efficiency of the African airlines. The spectrum of alliances ranges from limited coordination on specific routes to fully integrated merger-like arrangements, as seen in the figure below.

Figure 10: The spectrum of airline cooperation

⁶⁶⁰ Woon op cit note 132 at 276.

⁶⁶¹ Ibid at 279.

⁶⁶² IATA op cit note 187 at 112.



Source: US DOT and European Commission
'Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches'. (2010)

The following arrangements in the spectrum of airline cooperation have emerged in Africa; interlining, code-sharing, alliance membership, and merger-like integration.

3.5.11.1. Interlining

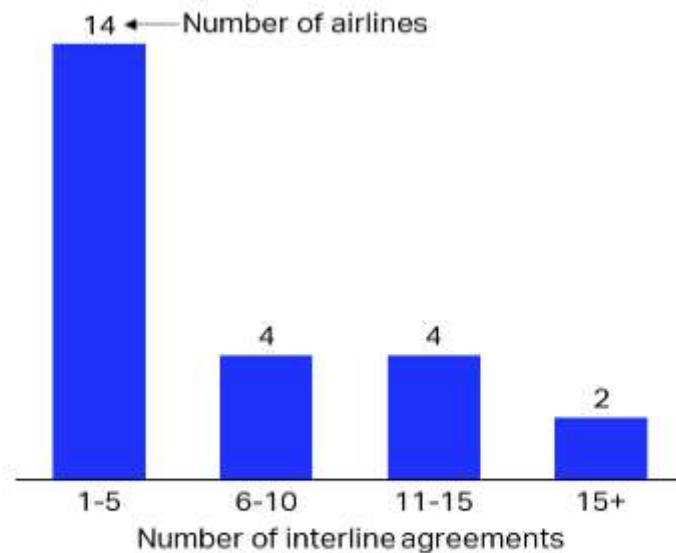
Interlining is the longest-standing and most basic form of airline cooperation that enables a passenger to use one ticket to travel on an itinerary involving multiple airlines.⁶⁶³ Ordinarily, airlines use multilateral arrangements such as the IATA-coordinated Multilateral Interline Traffic Agreement (MITA) or enter into bilateral interlining agreements with other airlines.⁶⁶⁴ As indicated in the IATA MITA, as of February 2021, most African airlines using this framework are party to five or fewer interline cooperation arrangements, while only two larger carriers with expansive route networks and extensive international connections are each party to more than 15 agreements.⁶⁶⁵ This illustrates the low level of interline cooperation amongst African airlines despite their potential for enhancing connectivity and the associated convenience to the consumers.

Figure 11: Distribution of Multilateral Interline Traffic Agreements (MITA)-February 2021

⁶⁶³ Luca Formenti 'Aviation alliances impact in African aviation market development' (Universitat Politècnica de Catalunya 2021) at 14.

⁶⁶⁴ IATA op cit note 187 at 113.

⁶⁶⁵ Ibid.

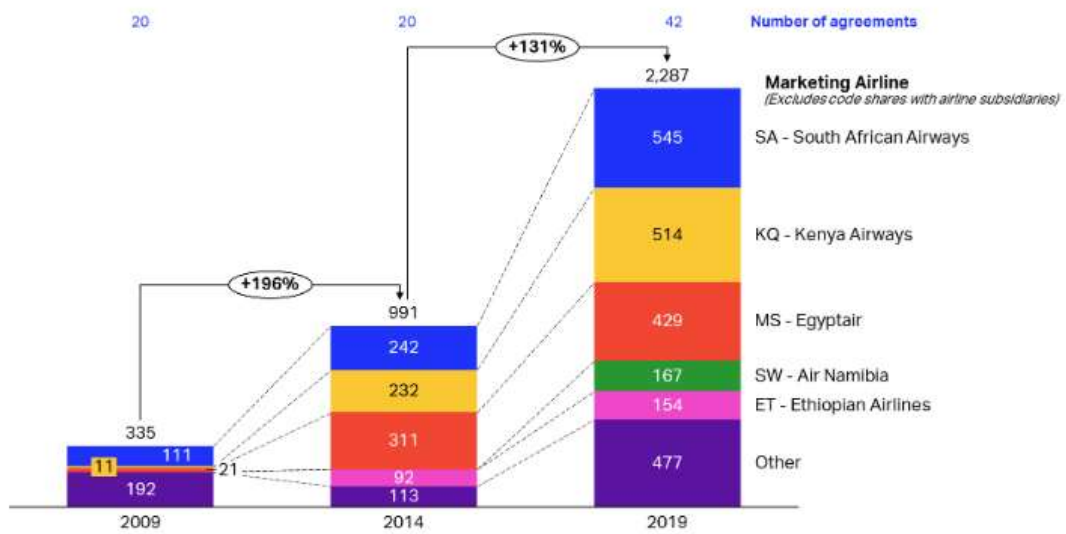


Source: IATA MITA database

3.5.11.2. Code-sharing

Code-sharing offers a higher quality of service than interlining by allowing one or several marketing airlines to market, under their airline code(s), the seats flown on another carrier operated by a partner airline (the operating carrier). Code-sharing enables airlines to increase the number of potential destinations and offers convenient services to consumers through coordinated scheduling. As illustrated in the figure 11 below, code-sharing arrangements among African airlines have increased over the years, with the number of code-sharing agreements and capacity substantially growing to approximately 2.3 million seats in 2019. It should be noted that only around one in five African-based airlines offering scheduled services in 2019 was party to code-sharing arrangements. The leading airlines in terms of most seats offered on code-sharing partnerships in Africa in 2019 were (excluding code share seats flown on partners that are subsidiaries or where the marketing airline holds a significant stake in the operating airline); South African Airways at 545,000, Kenya Airways at 514,000 and EgyptAir at 429,000.

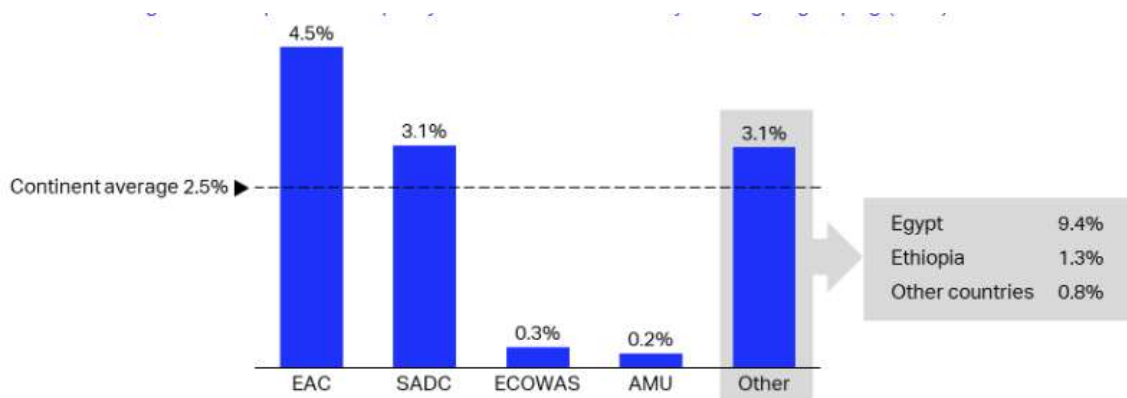
Figure 12: Progression of code share capacity within Africa via African airline collaboration (seats in thousands)



Source: IATA analysis based on SRSAnalyser data

African-based airlines marketed a continental average of 2.5 seats per hundred using code-sharing agreements in 2019, with the airlines in the East Africa region leading with 4.5 seats per hundred, thanks to the KQ code-share agreements, followed closely by the SADC rate of 3.1 seats per hundred, thanks to SAA extensive codeshare partnerships.⁶⁶⁶

Figure 13: Proportion of capacity offered via code share by sub-region grouping (2018)



⁶⁶⁶ Ibid at 114.

3.5.11.3. Alliance membership

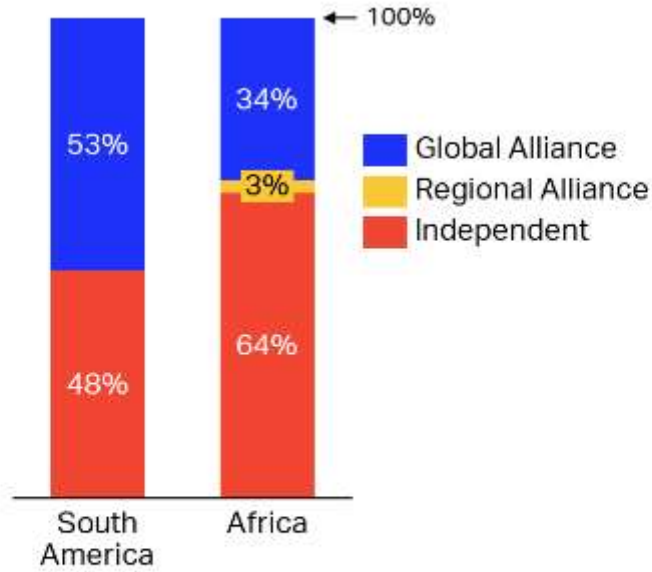
There two main global alliances are the Star Alliance and Sky Team. Ethiopian Airways, SAA, and EgyptAir are members of Star Alliance, while Kenya Airways is a member of Sky Team.⁶⁶⁷ There is also the Vanilla Alliance that was established in 2015 as a regional alliance for airlines operating in the Indian Ocean whose membership includes, Air Mauritius, Air Seychelles, and Air Madagascar. Approximately 37 percent of intra-African seat capacity is offered by the four airlines participating in global alliances and 3 percent by airlines participating in regional alliances. In comparison, the remaining 64 percent is offered by independent African airlines.⁶⁶⁸ As shown in figure 13 participation of African airlines in airline alliances is comparatively lower compared to other regions such as South America. This is because of the prohibitive membership fees, high operational requirements, and service standards that these alliances demand of airlines wishing to join them.⁶⁶⁹ The participation of African airlines in global and regional alliances is a fundamental prerequisite if they wish to expand their global network of destinations and grow their share of global traffic currently is a paltry 2 -4 percent of the global traffic.

Figure 14: Proportion of intra-regional seat capacity by airline membership

⁶⁶⁷ Ibid at 117.

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.



Source: IATA analysis based on SRSAnalyser data and published alliance membership. Excludes operations by airlines registered outside of region.

3.5.11.4. Merger-like integration in Africa

These forms of cooperation represent closer cooperation between airlines through subsidiary operations, franchising, joint ventures, and minority ownership holdings /equity partnerships. Ethiopian Airways has recently been aggressive in supporting intra-African connectivity through minority ownership in several African airlines. The rarest form of cooperation in Africa is the Joint Ventures (JV) which closely mirror full mergers by way of revenue and cost-sharing between the partners and mainly occur as means of financial survival. Examples of merger-like integration in Africa include;

Table 3: Examples of African airline cooperation via ownership stake or other mechanism.

Initiative	Type	Details	Country
SA Airlink	Franchise	South African Airways (SA) franchise operation representing a third of SA capacity in 2019; franchise agreement discontinued in 2020	South Africa
SA Express	Common ownership	Collaboration with SA via common government ownership	South Africa
Mango Airlines	Subsidiary / code share	SA is a low-cost subsidiary also significant codeshare collaboration with the parent	South Africa
ASKY	Strategic partnership/minority ownership	Ethiopian Airlines (ET) has a 40 per cent ownership stake and is a technical/strategic partner	Togo
Tchadia Airlines	Minority Ownership	ET has a 49 per cent holding in Tchadia and provides fleet	Chad
Ethiopian Mozambique	<i>Subsidiary</i>	ET subsidiary with operations in Mozambique	Mozambique
Malawi Airlines	Minority ownership	ET operates the airline under a management contract and holds a 49 per cent ownership stake	Malawi
Zambia Airways Relaunch	Minority ownership	According to 2019 announcements, ET is to have 45 per cent holding in a relaunched Zambia Airways	Zambia
Jambojet	Subsidiary / code share	Kenya Airways (KQ) is a low-cost subsidiary; also, significant code share collaboration with the parent	Kenya
Precision Air	Minority ownership/codeshare	KQ held approx. 40 per cent stake (as of 2016)	Tanzania
AF-KLM / KQ Joint Venture	Joint Venture	Air France – KLM and KQ have operated a revenue and cost-sharing Joint Venture on intercontinental routes between Africa and Europe for several years; this agreement was suspended in 2020	Kenya
Royal Air Maroc Express	Subsidiary	Royal Air Maroc (AT) subsidiary operation representing approx. 10 per cent of AT capacity in 2019	Morocco
Tsadaria	Subsidiary / code share	Air Madagascar subsidiary; also, significant code share collaboration with parent	Madagascar

Source: IATA analysis based on press search, company websites

3.6. STAKEHOLDERS INVOLVED IN THE IMPLEMENTATION OF THE YD AND OPERATIONALIZATION OF THE SAATM

The implementation of the YD and the operationalisation of SAATM call for concerted efforts and alignment of the activities of all stakeholders in the African air transport industry. These stakeholders can broadly be categorised into Supranational, National, Development Partners, and Regional Industry Stakeholders.

3.6.1. *Supranational Stakeholders*

These are ‘policymakers’ at the continental level and are the vision bearers of YD and SAATM. They are responsible for making policies for the African continent aimed at the implementation of the YD and the operationalisation of SAATM. These stakeholders include;

3.6.1.1. *The African Union*

The AU is a premier institution of 55 members charged with the overall responsibility of supporting the political and socio-economic integration of the African continent.⁶⁷⁰ The main organs of AU involved in the policy formulation are; the Assembly of the Union, the Executive Council, and the Specialised Technical Committees.

3.6.1.2. *The AU Assembly*

The Assembly is the highest decision-making organ of AU and comprises all the Heads of State or Governments of the Member States. The functions of the Assembly that are relevant to the air transport industry include ‘to determine the common policies of the Union,⁶⁷¹ to receive, consider and take decisions on reports and recommendations from the other organs of the Union,⁶⁷² and to monitor the implementation of policies of the Union as well as ensure compliance by all Member States.’⁶⁷³ Article 8 of the AU Constitutive Act mandates the Assembly to adopt its own Rules of Procedure, and in July 2002, the Assembly adopted the abovementioned rules. Rule 34 categorises the Decisions of the Assembly into a) Regulations, b) Directives, and c) Recommendations, Declarations, Resolutions, and Opinions, among

⁶⁷⁰ Constitutive Act of the African Union 2001 art.3.

⁶⁷¹ Ibid art. 9(a).

⁶⁷² Ibid art. 9(b).

⁶⁷³ Ibid art. 9(e).

others. According to Rule 35(1), ‘Regulations and directives shall be automatically enforceable thirty (30) days after the date of the publication in the ‘Official Journal of the African Union’ or as specified in the Decision.’ The Regulations and directives of the Assembly are binding on the Member States, AU organs and the responsibility of the Assembly are implemented through the African Union Commission (AUC). Some of the notable Decisions of the Assembly include;

✓ Decision Relating to The Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa [AHG/OUA/AEC/DEC.1(IV)]

✓ Decision On the Establishment of a Single African Air Transport Market Doc. EX.CL/1067(XXXII)

✓ The Declaration on the Establishment of a Single African Air Transport Market (Assembly/AU/Decl.1(XXIV))

3.6.1.1 *The Executive Council*

The Executive Council of the AU is established by Article 10 of the AU Constitutive Act. The council comprises Ministers of Foreign Affairs or such other Ministers or Authorities as may be designated by the AU Member States. The functions of the Executive Council that have a nexus with the African air transport industry include coordinating and taking policy decisions on transport and communications matters.⁶⁷⁴ It also monitors the implementation of the policies, including policies in the African air transport industry, that the Assembly of the AU formulates.⁶⁷⁵

The Executive Council is answerable to the Assembly. It supports the Assembly by drafting the session agendas and decisions for consideration by the Assembly and performing any duties that the Assembly delegates. The Decision and regulations of the Executive Council, upon their approval by the Assembly, become binding on the States, subordinate organs of the Union, and the R.E.Cs. One of the most pertinent Decisions by the Executive Council in the air transport industry in Africa was Decision EX.CL/Dec.821 (XXV) placed the implementation of the YD within the context of the AU Agenda 2063.⁶⁷⁶

⁶⁷⁴ Ibid art 13(1)(f).

⁶⁷⁵ Ibid art.13(2).

⁶⁷⁶ African Union. Declaration on the establishment of a single African air transport market Doc.EX.CL/871(XXVI) available at <http://aasa.za.net/downloads/news-articles/AU-Agenda-2063_The-Single-African-Air-Transport-Market.pdf> accessed 10 October 2021.

3.6.1.3. Specialised Technical Committees (STCs)

The (STCs) were initially established by Article 25 of the Abuja Treaty. The relevant committee responsible for air transport matters was the Committee on Transport, Communication, and Tourism, as established by Article 25(e) of the Abuja Treaty.⁶⁷⁷ With the transition from OAU to AU, AU Constitutive Act retained and reconfigured the structure of the STCs.⁶⁷⁸ The STCs are presently established by Article 14 of the AU Constitutive Act and are answerable to the Executive Council.⁶⁷⁹ The STCs are comprised of Ministers or senior officials in charge of their respective fields of competence.⁶⁸⁰ The relevant STC for the African air transport industry is the Specialised Committee on Transport, Communications, and Tourism, as established by Article 14(1) (e) of the A.U. Constitutive Act.

Article 14(2) of the AU Constitutive Act empowers the Assembly to restructure or establish other Committees whenever it finds appropriate. By this power, the Assembly, vide Decision Assembly/A.U./Dec.227 (XII), restructured the Specialised Committee on Transport, Communication and Tourism into the Specialised Technical Committee on Transport, Transcontinental and Interregional Infrastructure, Energy and Tourism (STC-TTIET) in February 2009. The STC-TTIET performs the critical function of preparing projects and programs of the AU and submits them to the Executive Council⁶⁸¹. It also supervises, follows up, and evaluates the implementation of the YD of the other organs⁶⁸² and ensures the coordination and harmonisation of the projects and programmes of the AU⁶⁸³

Therefore, the STC-TTIET is the Ministerial decision-making sectoral organ of the AU in the transport, infrastructure, energy, and tourism sectors.⁶⁸⁴ Evidently, under the new AU

⁶⁷⁷ According to Article 25(4) of the Abuja Treaty, this committee is empowered to set up subsidiary committees to assist it executing its mandate. Pursuant to the above-mentioned provision, the Yamoussoukro Decision in Article 9.1 established the Sub-Committee on Air Transport of the Committee on Transport, Communication and Tourism that is charged with the mandate of overall supervision, follow up and implementation of the YD.

⁶⁷⁸ African Union ‘Concept note on the First Ordinary Session of the African Union Specialized Technical Committee on Transport, Intercontinental and Interregional Infrastructures, Energy and Tourism’ <<https://www.tralac.org/images/docs/10736/first-stc-on-transport-intercontinental-and-interregional-infrastructures-draft-concept-note-october-2016.pdf>> accessed 12 September 2021.

⁶⁷⁹ Constitutive Act of the African Union art 14(1).

⁶⁸⁰ Ibid art. 14(3).

⁶⁸¹ Ibid art. 15(a).

⁶⁸² Ibid art. 15 (b).

⁶⁸³ Ibid art.15(c).

⁶⁸⁴ African Union ‘Concept note of the Second Ordinary Session of The African Union Specialized Technical Committee on Transport, Transcontinental & Interregional Infrastructure, Energy and Tourism STC-TTIET’

institutional arrangement, there has been a paradigm shift from previous sector-specific Ministerial conferences to using the STCs. This shift was informed by the desire to engender multi-stakeholder participation in the private sector and other non-state actors in the policy formulation and legitimise such policies.⁶⁸⁵

In 2017, the STC-TTIET held its first ordinary Session in Lomé, Togo, and pursuant to its Rules of Procedure, created three sub-committees: the sub-committee on Transport, the sub-committee on Tourism, and the sub-committee on Energy and adopted plans of actions for each of the sub-sectors. The transport sub-sector entails the air, road, rail, and maritime modes of Transport. Each subsector has several ongoing infrastructural projects under its watch to support the integration of the African countries. Under the air transport sub-sector, the operationalisation of SAATM has been identified as a priority transport project under the AU Agenda 2063.

3.6.1.4. African Civil Aviation Commission (AFCAC)

AFCAC was birthed at a Constitutive Conference organised by ICAO and the OAU in Addis Ababa in 1964 and became fully established and operational in 1969.⁶⁸⁶ AFCAC was adopted as the AU Specialised agency in civil aviation during the then OAU Summit of 1975 in Kampala, Uganda, and officially became the OAU/AU Specialised Agency on 11th May 1978. AFCAC was financially dependent on the ICAO for most of its program activities and administrative operations from its formation.⁶⁸⁷ The agreement between AFCAC and ICAO for financial support expired in 2006, and with ICAO declining to renew the agreement, AFCAC became financially autonomous from ICAO in 2007.⁶⁸⁸ AFCAC has two primary responsibilities. The first is in the capacity of the specialised agency of the AU on matters of aviation, and the other is as the Executing Agency of the YD and SAATM. As the Specialised agency of the AU on aviation issues, AFCAC enhances aviation safety and security in the African air transport market by encouraging the implementation of the ICAO's SARPs. As the

<<https://docplayer.net/148784035-Concept-note-the-second-ordinary-session-of-the-african-union.html>> accessed 20 November 2021.

⁶⁸⁵ Ibid.

⁶⁸⁶ George Farag Selim, 'The African Civil Aviation Commission, AFCAC' (LLM, McGill University 1980).

⁶⁸⁷ African Union 'Report of the meeting of African ministers responsible for air transport, 16-19 May 2005 Sun City, South Africa'

<https://archives.au.int/bitstream/handle/123456789/4331/EX%20CL%20189%20VII_E.PDF?sequence=5&isAllowed=y> accessed 28 August 2021.

⁶⁸⁸ Ibid.

Executing Agency of the YD and SAATM, AFCAC is responsible for supervising and managing the liberalised African air transport industry and drafting rules and regulations that align with the global best practices.⁶⁸⁹

The membership of AFCAC is currently composed of 54 African States with a triennial Plenary, consisting of representatives of all the Member States, as its supreme organ. AFCAC also has an organ called the Bureau comprised of a President and five Vice-Presidents, each representing a geographical region of the African Union (The Northern, Western, Eastern, Central, and Southern regions), and the Coordinator of the African Group at the ICAO. The Bureau oversees the activities of the AFCAC on behalf of the plenary. The day-to-day operations of AFCAC are entrusted to the secretariat headed by a Secretary-General appointed by the Plenary on the recommendation of the Bureau for a three-year term, renewable once. AFCAC is mainly saddled by the challenge of inadequate funding, arising from arrears in the financial contribution by some of the Member States, and human resource constraints, with the results of these constraints being the crippling of most of AFCACs work programmes and administrative activities.⁶⁹⁰

3.6.1.5. The Executing Agency

Article 9(4) of the YD provides for the establishment of the Executing Agency (EA), responsible for supervising and managing the continent's liberalised air transport industry. One of the principles undergirding the YD is that liberalisation of the intra-African air transport market should be a safeguarded process instead of laissez-faire liberalisation.⁶⁹¹ To that end, the YD mandated the EA to adopt and enforce the appropriate competition rules and regulations to ensure healthy competition and consumer protection regulations that would protect the interests of the liberalised intra-African air transport market.⁶⁹²

Though the YD states that the EA was to be established as soon as possible, no efforts were made to establish it, nor were its functions assigned to any other entity.⁶⁹³ It was not until 11th March 2007, that the Third African Union Conference of Ministers in charge of civil

⁶⁸⁹ Ibid.

⁶⁹⁰ African Union 'Report of the meeting of African ministers responsible for air transport, 16-19 May 2005 Sun City, South Africa' op cit note 687.

⁶⁹¹ ICAO 'Relaxing the rules for airline designation' op cit note 554.

⁶⁹² Yamoussoukro Decision op cit note 519 art. 9.6.

⁶⁹³ African Union 'Study on competition rules, dispute settlement mechanism and consumer protection' op cit note 648.

aviation matters in Addis Ababa, Ethiopia decided to entrust the responsibilities of the EA to AFCAC. To accommodate the new mandate, the AFCAC constitution was revised at a meeting of Plenipotentiaries on December 16th, 2009, in Dakar, Senegal, and officially entered into force on 11th May 2010.⁶⁹⁴

The decision to entrust the responsibilities of the EA to AFCAC was justified by the need to avoid the financial burden that would arise as a result of establishing a completely new institution and was seen as a way of avoiding duplication of roles since most of the mandates of AFCAC and the EA overlap.⁶⁹⁵ Considering the financial challenges that have previously crippled the functions of AFCAC, there is a need for the African States to ensure that AFCAC is sufficiently funded in order for it to successfully execute its additional mandate as the EA of the YD and SAATM.

3.6.1.6. The Monitoring Body (MB)

The MB is established by Article 9 of the YD and is charged with supervision and follow-up on the implementation of the YD.⁶⁹⁶ The body is an ad-hoc group of organisations consisting of the representatives of the AFCAC, UNECA, AU, and AFRAA. It is on a case-to-case basis, assisted by the representatives of the sub-regional organizations.⁶⁹⁷ The MB assists the Subcommittee on Air Transport [currently the STC-TTIET] in following up on the implementation of the YD. Pursuant to Article 9.3 of the Decision, UNECA is tasked with providing secretariat services to the MB. The duties and responsibilities of the MB, as provided for in Annex 2 of the Decision, were approved by the Assembly of the Heads of States and Governments in Lomé, Togo 2000 as part of the YD.

As a result of the changes and new policy developments in air transport in Africa marked by the adoption of the regulatory text of the YD, the revision of the AFCACs Constitution, and the establishment of the SAATM initiative, a need arose to review the duties and responsibilities of the MB.⁶⁹⁸ The MB discussed this revision during the Second Ministerial

⁶⁹⁴ African Union ‘Study on competition rules, dispute settlement mechanism and consumer protection’ op cit note 648.

⁶⁹⁵ IATA op cit note 187 at 76.

⁶⁹⁶ Yamoussoukro Decision op cit note 519 art 9(2).

⁶⁹⁷ Ibid.

⁶⁹⁸ African Union ‘Concept note on revision of the duties and responsibilities of the monitoring body of the Yamoussoukro decision’ 3 available at https://au.int/sites/default/files/documents/32186-doc-concept_note_on_the_draft_duties_and_responsibility_of_monitoring_body-e.pdf accessed on 24 August 2021.

Working Group to establish SAATM held in October 2016. It noted an overlap between its functions and the revised functions of the Executing Agency of the YD. Therefore, the MB recommended that the Ministerial Working Group revise its terms of reference.⁶⁹⁹ The Ministerial Working Group (MWG) established a task force comprising the AUC, UNECA, and AFCAC responsible for drafting the revised terms of reference.

The MWG provided the task force with a guideline that would clearly distinguish the operational duties to be performed on a routine day-to-day basis, such as convening meetings, research, and rulemaking and oversight functions as provided for in Annex 2 of the YD. The oversight duties were to be entrusted to the Monitoring Body, whereas the operational responsibilities were to be entrusted to the EA. The revision of the terms of reference would also clearly demarcate the responsibility of the UNECA as the Secretariat of the MB.⁷⁰⁰ The revised terms of reference of the MB now include being an oversight body on behalf of the ministers responsible for civil aviation, advisory responsibility to all stakeholders, and reporting and monitoring responsibility to ensure seamless implementation of the SAATM.⁷⁰¹ Some of the previous obligations of the MB that were transferred to the EA include formulation of proposals on studies, seminars, workshops, use of experts to conduct investigations, duties touching on dispute resolution, and the implementation of competition and consumer protection regulations. The new Annex 2 also provides for elaborate responsibilities of UNECA as the Secretariat of the MB.⁷⁰²

3.6.1.7. International Civil Aviation Organization

ICAO is a UN specialised agency established by States in 1944 to manage the administration and governance of the Chicago Convention.⁷⁰³ Amongst other vital functions, ICAO provides support to States through its No Country Left Behind initiative in aviation safety, air navigation capacity and efficiency, and most recently, aviation security. ICAO has a quasi-legislative mandate to formulate SARPs found in the nineteen technical Annexes to the Chicago Convention that address aviation's technical and operational aspects. ICAO has three regional offices in Cairo-Egypt, Dakar-Senegal, and Nairobi-Kenya.

⁶⁹⁹ Ibid at 4.

⁷⁰⁰ Ibid.

⁷⁰¹ Ibid at 7.

⁷⁰² African Union 'Concept note on revision of the duties and responsibilities of the monitoring body of the Yamoussoukro Decision' op cit note 698 at 7.

⁷⁰³ *Abeyratne Convention on International Civil Aviation* op cit note 392.

3.6.1.8. United Nations Economic Commission for Africa

The UNECA was established in 1958 by the Economic and Social Council (ECOSOC) of the UN as one of its five regional commissions to promote economic and social development and foster intra-African integration and development.⁷⁰⁴ UNECA performs the twin roles of being the decentralised arm of the UN in Africa and a fundamental component of the African institutional landscape. UNECA comprises 54 African States, with its headquarters in Addis Ababa, Ethiopia. As evidenced in the second chapter, UNECA has been a conspicuous player in the historical development of air transport in Africa, acting as a 'think tank' for the inception of the Yamoussoukro Declaration and the YD, commissioning studies and clarification on air transport policies on the African continent.⁷⁰⁵ UNECA continues to play a critical role as the Secretariat of the MB of the YD and organising pertinent conferences that shape air transport policy in Africa.⁷⁰⁶

3.6.1.9. Regional Economic Communities (RECs)

- The RECs are regional groupings of the African countries that facilitate regional economic integration between members in the individual regions.⁷⁰⁷ The RECs facilitate the implementation of the YD among their member states and have representatives in various sub-committees such as the MWG, STC-TTIIET and the MB. The role of the RECs in implementing the YD and the extent of liberalisation in the RECs are discussed in the fourth chapter.

3.6.1.10. African Airlines Association

AFRAA is a continental trade association established in 1968 as a forum for African inter-airline cooperation to advocate for its members' interests and general welfare.⁷⁰⁸ Since its formation, AFRAA has been at the forefront of developing standard aviation policies at the

⁷⁰⁴ United Nations. Economic Commission for Africa op cit note 6 at 5.

⁷⁰⁵ Ibid.

⁷⁰⁶ Ibid.

⁷⁰⁷ African Union 'Regional Economic Communities' <<https://au.int/en/recs>> accessed 5 April 2022.

⁷⁰⁸ African Union 'African civil aviation policy (AFCAP)' 7

<<https://www.afcac.org/en/index.php/programmes-activities-legal/african-civil-aviation-policy-afcap>> accessed 29 August 2021.

continental level by seeking to create consensus.⁷⁰⁹ AFRAA has also been instrumental in spearheading the implementation of the YD by forming a group of like-minded States referred to as the ‘Club of the Ready and the Willing (CREW)’ to implement the YD on a multilateral level.

As a member of the MB, AFRAA represents the voice of its member airlines in advising the relevant stakeholders on implementing the YD and operationalising SAATM. AFRAA has also collaborated with the key stakeholders to spearhead the African air transport market liberalisation and the creation of the SAATM through its various capacity-building workshops.⁷¹⁰ However, the activities of AFRAA are constrained by a lack of legal imprimatur owing to its status as a private association of African airlines whose activities are devoid of official endorsement by the State parties to the YD.⁷¹¹ AFRAA however occupies a strategic position as a member of the MB, which is one of the avenues which it can use to influence aviation policies. AFRAA currently has a membership of 46 airlines representing over 85 percent of international traffic carried by all African airlines.⁷¹²

3.6.1.11. The Airlines Association of South Africa (AASA)

AASA is the leading representative airline in Southern Africa, established in 1970 and whose membership currently consists of 20 airlines and 36 associate members. AASA leads and coordinates the region’s position on aviation issues such as consumer protection concerns, environmental issues, financial matters, tourism, safety and security, and sustainability in the aviation industry.⁷¹³ AASA represents the SADC-based airlines in the SADC Civil Aviation Committee and is a key participant in the activities of ICAO and IATA. Its membership is open to airlines based in countries south of the equator Indian Ocean islands, and its headquarters are in Johannesburg, South Africa.⁷¹⁴

⁷⁰⁹ United Nations Economic Commission for Africa op cit note 6 at 6.

⁷¹⁰ AFRAA ‘Better skies for Africa’ AFRAA position paper- Liberalisation of the African Skies’ 2020 available at <https://afraa.org/wp-content/uploads/2020/02/AFRAA-Position-paper-Liberalisation-Of-the-African-Skies.pdf> accessed on 26th July 2021.

⁷¹¹ Schlumberger op cit note 7 at 53.

⁷¹² African Airline Association ‘Press release – AFRAA Secretary General receives leadership changemaker award – AFRAA’ <<https://afraa.org/press-release-afraa-secretary-general-receives-leadership-changemaker-award/>> accessed 20 November 2021.

⁷¹³ CAPA ‘Airlines Association of Southern Africa’ (5 June 2022) <<https://centreforaviation.com/data/profiles/industry-associations/aasa>>.

⁷¹⁴ Ibid.

3.6.1.12. The International Air Transport Association

IATA is a trade association of 290 airlines, comprising 83 per cent of total air traffic, that advocates for the interests of the airlines across the globe and formulates policies on critical aviation issues. IATA has since 1945 established global standards upon which the aviation industry is built, particularly through the IATA Operational Safety Audit (IOSA) Program, which is one of the most reputable benchmarks for airline safety. Most African airlines are listed on the IOSA Registry. In collaboration with other stakeholders such as AUC, AFRAA, and AFCAC, IATA has been at the forefront of SAATM advocacy by sponsoring some of the ground-breaking materials

3.6.1.13. Airports Council International Africa (ACI Africa)

ACI Africa, the ‘Voice of African Airports,’ is a self-governing regional association of African airports established in 1991 headquarters in Casablanca, Morocco. The principal objective of ACI Africa is to advocate for the African airports' collective interests and enhance excellence in the management of airports to ensure the safety, security, and sustainability of the African air transport industry.⁷¹⁵ As of February 2022, ACI Africa comprised 70 regular members from 52 African states, managing more than 260 airports and 46 Business Partners.⁷¹⁶

One of the fundamental prerequisites for the operationalisation of SAATM is aviation safety, security, and standardised aviation facilitation procedures throughout the continent. Less than 35 per cent of the international airports in Africa are certified; a large proportion of international airports in Africa are not ready to operationalize SAATM.⁷¹⁷ As previously noted, aviation facilitation in African airports also falls short of the recommended standards in Annex 9 of the Chicago Convention with inadequate infrastructural facilities and prevalent bureaucratic procedures.⁷¹⁸ The main factors contributing to the worrisome state of aviation facilitation include poor coordination and harmonisation of operations at the airports by the various State departments, such as customs, immigration and quarantine, national security consideration, fraud and theft prevention, and currency control.⁷¹⁹ Safe, secure, and unified air

⁷¹⁵ ACI ‘ACI Africa Magazine, The Voice of African Airports’ (2022) <<https://www.aci-africa.aero/files/ACI-AFR-Magazine-eng.pdf>> accessed 5 April 2022.

⁷¹⁶ Ibid.

⁷¹⁷ Ibid.

⁷¹⁸ United Nations Economic Commission for Africa op cit note 6.

⁷¹⁹ Ibid.

travel experiences throughout the continent are fundamental prerequisites for sustainable airport activities. With SAATM expected to catalyse air traffic growth, there is a need to enhance the infrastructure and ensure safe, secure, and seamless airport operations.

3.6.1.14. Air Navigation Operators

Air Navigation Operators mainly provide air navigation services (ANS), Aeronautical Information Services (AIS), air traffic services, accident investigation, and coordination of aeronautical search and rescue. Air navigation operators are, in most instances, provided by departments of the national Civil Aviation Authorities. However, few African states have pooled resources and developed sub-regional air navigation service providers. For instance, the Agency for Aerial Navigation Safety in Africa and Madagascar (ASECNA), headquartered in Dakar, Senegal, has 17 countries and Roberts FIR that provides air navigation services to Guinea, Liberia, and Sierra Leone.⁷²⁰ The Air navigation service providers are members of a global organisation referred to as the Civil Air Navigation Services Organisation (CANSO), which advocates for the interests of the air navigation providers on the international plane.⁷²¹

3.6.2. National Stakeholders

National Stakeholders are policy makers at the domestic level and are key stakeholders in the implementation of the YD and operationalisation of SAATM. Under SAATM, national stakeholders are primarily responsible for signing the Solemn Commitment, executing the SAATM Memorandum of Implementation, and implementing the SAATM Concrete Measures. The national stakeholders include;

3.6.2.1. Civil Aviation Authorities (CAAs)

CAAs principally regulate and oversight the domestic air transport industry. They also perform the pertinent role of ensuring that the players in the civil aviation industry comply with the domestic aviation policies and the ICAO SARPs.⁷²² CAAs exercise their functions on behalf of their States. Regional Safety Oversight Organizations (RSOOs) have emerged due to pooling their synergies and resources to strengthen their capacity to regulate the aviation industry

⁷²⁰ European Union op cit note 581 at 5.

⁷²¹ African Union ‘African Civil Aviation Policy (AFCAP)’ op cit note 708 at 7.

⁷²² Ibid.

effectively. These include the EAC through establishing the Civil Aviation Safety and Security Oversight Agency (CASSOA) and the Banjul Accord Group, which has established the Banjul Accord Group Aviation Safety Oversight Organisation (BAGASOO).⁷²³

3.6.2.2. Air Ports Authority

African Airport Authorities are principally involved in developing, maintaining, and managing airports and airdromes. They also perform the critical role of ensuring safety, security, and smooth operation at their airports.⁷²⁴

3.6.2.3. Other government ministries

There are other government ministries whose activities greatly impact the operationalisation of SAATM. These include the Ministry of Foreign/Internal Affairs, responsible for policy formulation concerning the Visa regime and intra-African travel, Ministry of Finance, Budget, and National Planning, whose budgetary allocation and policies on taxes and charges affect the aviation industry. Ministry of Tourism, whose policies have a direct correlation with the demand for air travel; Ministry of Trade and Industrialisation, which is responsible for the implementation of the AfCTA and other multilateral and bilateral agreements that are made to spur intra-African trade and the Ministry of Justice which is responsible for the ratification of Air Law treaties such as the YD, Cape Town Convention and the Montreal Convention.

3.6.3. Development Partners

3.6.3.1. African Development Bank (AfDB)

The AfDB is a multilateral development financial institution established in 1964 to support economic development and social progress, thus contributing to poverty reduction in Africa.⁷²⁵ AfDB mobilises resources from within and outside the continent to finance development projects by providing loans, grants, and technical support. Through its department of ‘The Air Transport division of the Infrastructure, Cities and Urban Development department, the AfDB has been a key stakeholder in implementing the SAATM, and a Joint Prioritised Action Plan.

⁷²³ European Union op cit note 581 at 5.

⁷²⁴ African Union ‘African Civil Aviation Policy (AFCAP)’ op cit note 708 at 7.

⁷²⁵ IATA, op cit note 187 at 79.

⁷²⁶For example, in 2019, the AfDB gave AFCAC a grant of 6.85 million US dollars to reinforce AFCAC's institutional capacity as the Executing Agency of the YD and SAATM and the sustainable development of the African aviation industry through improved safety, security, and environmental concerns.⁷²⁷ For the decade between 2010 -2020, the AfDB invested nearly 1 billion US dollars in the African aviation industry to finance airports infrastructure, fleet acquisition by African airlines, and regional safety, security, and air navigational projects such as the CO and COMESA Upper Airspace.⁷²⁸

3.6.3.2. Africa Union Development Agency- New Partnership for Africa's Development (AUDA-NEPAD)

AUDA-NEPAD) is a development agency of the AU whose main mandate is to coordinate and execute priority regional and continental projects in order to accelerate the implementation of Agenda 2063.⁷²⁹ AUDA-NEPAD established the Programme for Infrastructure Development in Africa (PIDA) as one of its projects that seeks to accelerate infrastructural projects such as SAATM.⁷³⁰ Other development partners include the World Bank Group, which has extensively financed airports and airlines in Africa, and the European Union, which has supported the African aviation industry in areas such as airport infrastructure financing, safety, and security.⁷³¹

3.6.4. Other Stakeholders in the African aviation industry

The other stakeholders in the African aviation industry include the Aviation Training Organizations such as the African School of Meteorology and Civil Aviation (EAMAC) and the East African School of Aviation (EASA). Civil aviation service providers, aircraft maintenance organisations, ground handling companies, catering companies, and professional organisations such as the International Federation of Air Traffic Controllers' Association

⁷²⁶ 'Multinational - Institutional Support to the African Civil Aviation Commission (AFCAC) for the Implementation of the Single African Air Transport Market (SAATM)' 7
<<https://projectsportal.afdb.org/dataportal/VProject/show/P-Z1-DA0-015>> accessed 30 August 2022.

⁷²⁷ Ibid.

⁷²⁸ Ibid.

⁷²⁹ African Union Development Agency, 'African Union Development Agency-NEPAD Annual Report 2019' (2019) <https://au.int/sites/default/files/documents/38048-doc-2019_auda_nepad_annual_report_en_final7_31.1.2020_web_version.pdf>.

⁷³⁰ Ibid.

⁷³¹ European Union op cit note 581.

(IFATCA), International Federation of Air Traffic Services Engineers' Association (IFATSEA), and the International Federation of Airline Pilots Association (IFALPA), Young African Aviation Association, among others.

3.7. CONCLUSION

This chapter set out to discuss legal and institutional framework for the implementation of the YD and SAATM in order to understand how the law and institutions have shaped air transport sector on the continent. The chapter first established the legal status of the YD and the SAATM Decision, situating them within the broader context of legal and policy instruments that collectively form the normative framework for the liberalisation of the Africa air transport industry. Part two discussed the elements (principles) of the YD as contained in the 12 Articles that underpin the African Single Aviation Market. Part two bifurcates the YD elements into operational elements (market access principles) that are enshrined in in Articles 3,4,5 and 6 of the YD and public policy elements of the YD as provided for in Articles 7,8,9,10,11 and assesses the implementation of these two elements at the continental level. The chapter noted that the status of their implementation falls short of the expected rate as far as BASAs are concerned, with only a few states having high compliance. The chapter further reveals that even in the context of SAATM, States continue to cherry-pick the States they would like to enter into YD-compliant BASAs with and the aspects of the YD they wish to liberalise. This has resulted in a patchwork of implementation with a knock-on effect that continues to stall the process. In the absence of a continent-wide effort to implement the YD, some African states, for example, Rwanda and Ethiopia, have been breaking ranks' and implementing the provisions of the YD at a bilateral level.

The chapter has also established the contributions of the key stakeholders and partners in the evolutionary process, among them, the African Union, the African Union Assembly, African Airlines Association, AfDB and African Union Development Agency. These stakeholders and development partners remain central to the liberalisation efforts as they contribute to the actualisation and engagement with the various legal, policy and practical frameworks to keep the efforts going – they are the jet fuel for African aviation on the continent. The next chapter discuss the air transport liberalisation efforts at the RECs level and assesses the level of implementation of the YD in the identified RECs.

4.0. CHAPTER FOUR: IMPLEMENTATION OF THE YAMOOUSSOUKRO DECISION IN REGIONAL ECONOMIC COMMUNITIES

4.1. INTRODUCTION

As earlier discussed, the coming into force of the YD was not accompanied by the requisite zeal to implement it. To ensure continental implementation, Article 9(4) of the YD provided for the establishment of the Executing Agency (EA) to supervise and manage the continent's liberalised air transport industry. The EA was also expected to formulate appropriate rules and regulations to ensure fair competition and consumer protection in the liberalised intra-African air transport market.⁷³² Although the EA was to be established as soon as possible, no concrete measures were taken to this effect, leaving the continental implementation of the YD in the doldrums for seven years.⁷³³ As a corollary of the long period of absence of the EA, the RECs stepped in to implement the YD within their respective regions.⁷³⁴

Article 12.2 of the YD specifically assigned the RECs the mandate to pursue and intensify the implementation efforts. To that end, on 14th November 1999, during the launch of the YD, ECOWAS and CEMAC signed a collaboration agreement to implement the YD and address aviation safety in the two regions.⁷³⁵ Similarly, in 2001 COMESA, EAC and SADC decided to collaborate on the implementation of the YD. During a Tripartite Summit held in October 2008, the COMESA, EAC, and SADC adopted the Joint Competition Authority (JCA) on Air Transport Liberalisation and established competition regulations that would facilitate the implementation of the YD among them.⁷³⁶ The COMESA-EAC-SADC regulations have subsequently been used as a template by ECOWAS and CEMAC.⁷³⁷ The AU has also supported the RECs in implementing the YD and SAATM by signing a Memorandum of Cooperation (MoC) between the RECs and the EA as part of the activities of the roadmap developed for the implementation of SAATM.⁷³⁸ So far, COMESA and EAC have each signed

⁷³² Yamoussoukro Decision op cit note 519 art 9.6.

⁷³³ African Union 'Study on competition rules, dispute settlement mechanism and consumer protection' op cit note 648.

⁷³⁴ Ibid.

⁷³⁵ James Thuo Gathii *African Regional Trade Agreements as Legal Regimes* vol 6 (Cambridge University Press 2011) at 383.

⁷³⁶ Ibid.

⁷³⁷ African Union 'Study on competition rules, dispute settlement mechanism and consumer protection' op cit note 648.

⁷³⁸ *Africa Union 'The Single African Air Transport Market and the Free Movement of People in Africa' (2016) 3 <<https://www.icao.int/WACAF/AFI-Safety->*

an MoC with AFCAC and are jointly participating in implementing an eight million euros Eastern and Southern Aviation programme funded under the 11th European Development Fund (EDF 11).⁷³⁹The AU presently recognises eight RECs; the Arab Maghreb Union (AMU), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern Africa Development Community (SADC).

4.2. NORTH AFRICA

4.2.1. *The Arab Maghreb Union (AMU)*

AMU is a pan-Arab REC comprising five neighbouring North African states; Algeria, Libya, Mauritania, Morocco, and Tunisia.⁷⁴⁰ Article 2 of the AMU Treaty stipulates the main objectives of the Union as the strengthening of all forms of ties to ensure regional stability and enhance policy coordination, and the gradual free movement of goods, services, and factors of production among the Member States. The Treaty is underpinned by the principles of common defence and non-interference in the partners' domestic affairs.

Despite their cultural, historical, and linguistic predilections, the AMU States have overly focused on their cleavages, resulting in slow economic cooperation and reduced intra-regional movement of goods and persons.⁷⁴¹ Integration of the AMU States in all sectors, including the air transport sector, has been frustrated by political differences and rivalry, especially between Algeria and Morocco, resulting in closing of borders and restrictive visa requirements.⁷⁴² The movement of persons between Algeria and Morocco, the region's two largest countries, has in the past taken place through daily flights between Casablanca and

Week/Documents/Security%20Symposium/AU%20Paper%20on%20SAATM%20and%20free%20movement%20of%20Persons.pdf.

⁷³⁹ COMESA 'COMESA to intensify lobbying its members to sign air transport commitment' <<https://www.comesa.int/comesa-to-intensify-lobbying-its-ms-to-sign-air-transport-commitment/>> accessed 2 February 2022.

⁷⁴⁰ Mr Mohamad Ali Finaish and Eric Bell *the Arab Maghreb Union* (International Monetary Fund 1994) at 2.

⁷⁴¹ Asmita Parshotam 'Regional integration for the Arab Maghreb Union: Looking beyond the horizon,' *Regional Program Political Dialogue South Mediterranean* (2020) <https://www.kas.de/documents/282499/282548/Regional+Integration+AMU_MED+Dialogue+Series+No+30.pdf/6254393e-f24f-a887-65ac-6a24a271789c?version=1.0&t=1605693929096> accessed 2 February 2022.

⁷⁴² Hassan Benabderrazik 'Opportunities for logistical improvements through Maghreb integration' [2008] *Maghreb Regional and Global Integration*. Peterson Institute for International Economics, Washington 139 at 144.

Algiers. Cross-border movement of goods between these two countries has in the past only been possible through the French port of Marseilles instead of simply crossing the land frontier between these countries.⁷⁴³ The political instability in Libya since 2011, the differences in the status of Western Sahara, the Middle East crisis of 1991, and the political instability in Algeria have further exacerbated the strained relations in the region.⁷⁴⁴ The AMU region has also operated under harsh external environment with one of its member States, Libya having sanctions imposed on it by the United Nations Security Council (UNSC), the US, and the UK. For example, through resolutions 748 (1992) and 883 (1993), the UNSC imposed aerial sanctions against Libya in connection with the bombing of Pan Am flight 103 (the Lockerbie aeroplane crash) in 1988 and Union de Transports Aeriens flight 772 in 1989. These sanctions included a ban on; ‘all international flights to and from Libya, ‘supply of aircraft and aviation components, aircraft engineering and maintenance services, the closure of all Libyan Airlines offices in all UN Member countries, and a ban on all transactions; with the carrier.’⁷⁴⁵

The AMU States are also torn between Euro-Mediterranean, Pan-Arab, and Pan-African integration initiatives that are incoherently coordinated.⁷⁴⁶ AMU's geographical configuration further exacerbates the situation; Libya and Mauritania are geographically located at the outer limits of the Union, and as such, Libya is torn between AMU and the eastward Arab solidarity towards Egypt, while the majority of the Mauritanian population is in the southern part of the country and as such its economic relations are more inclined to Sub-Saharan Africa. The Sahara Desert also presents a formidable challenge between Mauritania and the AMU. Because of these challenges, the AMU is considered the least performing trade bloc globally.⁷⁴⁷

⁷⁴³ World Economic Forum ‘The Maghreb Union is one of the world’s worst-performing trading blocs. Here are five ways to change that.’ (1 June 2017) <<https://www.weforum.org/agenda/2017/06/five-ways-to-make-maghreb-work/>> accessed 2 February 2022.

⁷⁴⁴ Ibid.

⁷⁴⁵ Ibid.

⁷⁴⁶ Parshotam op cit note 741 at 2.

⁷⁴⁷ Oscar Oliver i Cristia ‘The airports of the Maghreb face the new century’ IEMed Mediterranean Yearbook 2020 <<https://www.iemed.org/publication/the-airports-of-the-maghreb-face-the-new-century/>> accessed 2 February 2022.

4.2.1.1. Air transport in the AMU

The Maghreb States had, even before the formation of AMU, recognised the transport sector as a prerequisite for the integration of the region.⁷⁴⁸ In 1969 the Maghreb States created the 'Maghreb Coast Line' shipping company that collapsed seven years later because of financial challenges.⁷⁴⁹ The air transport committee of the Maghreb States in 1970 approved the establishment of a jointly owned 'Air Maghreb.' However, this idea was never acted upon mainly because of the political differences over the status of Western.⁷⁵⁰ Strategically located between Europe, the Middle East, and Sub-Saharan Africa, the AMU States have the potential to liberalise their air transport sector with the neighbouring European States within the frameworks of the European Neighbourhood Policy (ENP), the Arab League Open Skies agreement with the Arab countries, and the YD with the Sub-Saharan African region.⁷⁵¹ Of these mechanisms, only the ENP has provided the impetus to air transport liberalisation in the Maghreb region.⁷⁵²

4.2.1.2. AMU and the YD

Cognisant of the need to liberalise the air transport industry in the Maghreb region, the AMU ministers organised a meeting in Skhirat, Morocco, in April 2007.⁷⁵³ An essential outcome of this ministerial conference was the establishment of a committee to review a proposal by Morocco to establish an 'Open Skies' agreement among the AMU States. After the meeting, Karim Ghellab, Morocco's transport minister, is quoted to have said, 'For certain Maghreb countries, the liberalisation of air transport will require a period of reflection, but I think the 2008 date is reasonable.'⁷⁵⁴ However, despite the recognition by the ministerial meeting and the establishment of the committee, no action has been taken to liberalise the AMU air transport

⁷⁴⁸ The World Bank Group 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 7 at 138.

⁷⁴⁹ Ibid.

⁷⁵⁰ Moulaye Ahmed Boukhary 'Air transport in Africa: A case study of' MAGHREB airlines'' (Massachusetts Institute of Technology 1981) at 50.

⁷⁵¹ Charles E Schlumberger & Nora Weisskopf's 'Open Skies in North Africa: Is Tunisia the next Morocco?' [2012] IEMed: Mediterranean yearbook at 247.

⁷⁵² Ibid.

⁷⁵³ The World Bank Group 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 7 at 65.

⁷⁵⁴ Ibid.

market within the auspices of the YD.⁷⁵⁵ Interestingly, Morocco, the only AMU State not a signatory to the YD, is the only AMU State that has signed the SAATM Memorandum of Implementation(MOI) and the Revised Constitution of AFCAC as of 1st December 2022.⁷⁵⁶ Through its flag carrier, Royal Air Maroc (RAM), Morocco has been very proactive in liberalising and expanding its air services in Sub-Saharan Africa.⁷⁵⁷ In 2006 RAM grew approximately 75 per cent when it partnered with Air Senegal International and Air Gabon International to form the *Groupe Royal Air Maroc*. In the same year, RAM also acquired 51 per cent of Air Mauritania.⁷⁵⁸ Recently RAM has also signed a code-sharing agreement with Air Tanzania Company Limited (ATCL), allowing direct flights between Dar es Salaam and Rabat.⁷⁵⁹

4.2.1.3. AMU and The Arab League Open Skies

The Arab League Open Skies Agreement, also known as the Damascus Convention, is a multilateral agreement for the regional liberalisation of air transport services between countries in the Arab League.⁷⁶⁰ The Arab League is comprised of 22 States; Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.⁷⁶¹ Within the aegis of the Arab League is a specialised organisation known as the Arab Civil Aviation Commission (ACAC), established in 1996 to foster cooperation in civil aviation and providing a common framework for the development and safety of the civil aviation in the Arab World.⁷⁶² ACAC has been instrumental in advocating for cooperation and liberalisation of air transport services in the Arab League region. Under the leadership of ACAC, thirteen Arab League States, Bahrain, Egypt, Iraq, Jordan, Lebanon, Oman, Palestine (West Bank and Gaza), Somalia, Sudan, Syria, Tunisia, and the Republic of Yemen, signed the Damascus

⁷⁵⁵ Ibid.

⁷⁵⁶ Africa Union ‘AUC and Kingdom of Morocco sign the revised Constitution of the AFCAC and the MoI of the SAATM’ op cit note 503.

⁷⁵⁷ István Tarrósy, Loránd Szabó & Göran Hydén *the African State in a Changing Global Context: Breakdowns and Transformations* vol 42 (LIT Verlag Münster 2011) at 153.

⁷⁵⁸ Ibid.

⁷⁵⁹ CH-Aviation ‘Royal Air Maroc to Partner Air Senegal?’ (11 September 2016) <<https://www.ch-aviation.com/portal/news/50788-royal-air-maroc-to-partner-air-senegal>> accessed 2 February 2022.

⁷⁶⁰ Ali Al Khalifa *Towards a single Arab aviation market* (GRIN Publishing 2017) at 16.

⁷⁶¹ Ibid.

⁷⁶² Ibid.

Convention on 19th December 2004.⁷⁶³ The Convention entered into force in 2007 after ratification by eight States; Jordan, Lebanon, Morocco, Oman, Palestine, Syria, Yemen, and the UAE.⁷⁶⁴

Though the five AMU States are also members of the Arab League, only Morocco is a party to the Damascus Agreement. Besides Morocco and Tunisia, which have signed Open Skies Agreements with the EU, the other AMU states are generally not receptive to air transport liberalisation.⁷⁶⁵ This is evidenced by the fact that none of these three African Arab States has ratified the Damascus Convention despite the Convention providing an opportunity for the States' airlines to serve the prominent Middle East air transport market.⁷⁶⁶

4.2.1.4. AMU and the European Neighbourhood Policy (ENP)

The ENP was established in 2004 to ‘avoid the emergence of new dividing lines between the enlarged EU and ... [its] neighbours and instead of strengthening the prosperity, stability, and security of all.’⁷⁶⁷ ENP comprises sixteen countries geographically proximate to the EU; Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia, and Ukraine.⁷⁶⁸ In civil aviation, the ENP pursues the establishment of a more comprehensive European Common Aviation Area intended to liberalise the EU air transport market with the neighbouring Mediterranean countries.⁷⁶⁹ As provided for in an action plan established in 2011, the collaborative efforts in the ENP entail the negotiation of elaborate ASAs, assistance in modernising the air traffic management systems, support in adhering to the EU’s safety and security requirements and the integration of the neighbouring States into the Single European Open Sky initiative.⁷⁷⁰

⁷⁶³ Charles E Schlumberger & Nora Weisskopf ‘Is the Arab take-off imminent? Opportunities for the development of the North African air transport sector following the Arab Spring’ (2012) 37 *Annals of Air and Space Law* 245 at 254.

⁷⁶⁴ *Ibid.*

⁷⁶⁵ The World Bank Group ‘Open skies for Africa – Implementing the Yamousat 70.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ Schlumberger & Weisskopf ‘Is the Arab take-off imminent? Opportunities for the development of the North African air transport sector following the Arab Spring’ *op cit* note 938 at 249.

⁷⁶⁸ *Ibid.*

⁷⁶⁹ Valeria Bernardo & Xavier Fageda ‘The effects of the Morocco-European Union open skies Agreement: A difference-in-differences analysis’ (2017) 98 *Transportation Research Part E: Logistics and Transportation Review* 24 at 3.

⁷⁷⁰ Schlumberger & Weisskopf ‘Open skies in North Africa: Is Tunisia the next Morocco?’ *op cit* note 751.

A discussion between the Maghreb States and the European States was initiated in 1995 at a conference held in Paris attended by ministers of six Mediterranean States (Algeria, France, Spain, Italy, Morocco, and Tunisia).⁷⁷¹ This conference established a joint policy to harmonise and integrate the European transport network with the Maghreb transport network. In the air transport sector, the conference agreed to harmonise air traffic control systems between the Mediterranean States and increase cooperation in the air transport industries of the six countries.⁷⁷² The discussions between the Maghreb States and their European counterparts were later taken over by the EU, which took over the mandate of negotiation ASAs on behalf of the EU Member States. In May 2005, the European Commission entered into negotiations with Morocco, resulting in an Open Skies agreement between the EU and Morocco, the EU's first aviation agreement with a non-EU country, considered as a novel EU aviation policy test case.⁷⁷³

The Open Skies agreement between the EU and Morocco resulted in an influx of LCCs in Morocco, such as EasyJet, Ryanair, and Aigle Azur, leading to tremendous growth in traffic and capacity competition and a decrease in fares.⁷⁷⁴ RAM had to restructure and expand its networks to European cities to survive in this competitive environment. As a result, RAM continues to be a significant player in the African and international air transport industry. Following the success of the EU-Morocco Open Skies test case, the European Council, on 9th December 2008, authorised the European Commission to commence negotiations with Tunisia for a Euro-Mediterranean Open Skies agreement within the auspices of ENP.⁷⁷⁵ The negotiations would, however, be put on hold because of the political events and social unrest of 2011, which resulted in a sharp decline in the Tunisian tourism industry with a more than 30 per cent decline in passenger arrivals and adversely affected the Tunisian aviation industry with air traffic decreasing by more than 50 per cent.⁷⁷⁶ Negotiations between the parties were also stalled by the lack of a clear position, particularly from Tunisia, which was in a dilemma as to whether to defend its flag carrier, Tunisair, hitherto controlling 63 per cent of the market

⁷⁷¹ Ibid.

⁷⁷² The World Bank Group 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 7 at 139.

⁷⁷³ Schlumberger & Weisskopf 'Open skies in North Africa: Is Tunisia the next Morocco?' op cit note 751.

⁷⁷⁴ CAPA 'Tunisair's sluggish attitude towards change makes it ill-prepared for open skies' (21 August 2012) <<https://centreforaviation.com/analysis/reports/tunisairs-sluggish-attitude-towards-change-makes-it-ill-prepared-for-open-skies-80772>> accessed 2 February 2022.

⁷⁷⁵ Schlumberger & Weisskopf 'Open skies in North Africa: Is Tunisia the next Morocco?' op cit note 751.

⁷⁷⁶ Ibid.

and enjoying government protection from competition, against the influx of the European LCCs or open its skies and boost its tourism industry.⁷⁷⁷

It was not until May 2012 that the newly elected government revived the negotiations, which resulted in the signing of a comprehensive Euro-Mediterranean agreement between the EU and Tunisia on 11th December 2017 in Tunis.⁷⁷⁸ The EU-Tunisia Open Skies agreement was projected to generate a GDP growth of 2.7 per cent, generate an annual increase in air traffic of 13 per cent per annum in Tunisia, and result in 800,000 growths in passengers over five years.⁷⁷⁹ With the EU-Morocco Open Skies agreement being a success and the promising projections of the EU-Tunisia agreement, the other AMU States are most likely to liberalise their air transport industry within the auspices of ENP in the foreseeable future.⁷⁸⁰ Besides Morocco and Tunisia, Algeria and Libya also fall within the ENP. As such, there is a likelihood that all the AMU States, except for Mauritania, will in the future be bound by a similar air liberalisation arrangement that allows the European carriers to exercise fifth freedom rights in the Maghreb region.⁷⁸¹ Therefore, should the Maghreb States fail to liberalise their intra-regional air transport market, the European LCCs are likely to capitalise on the fifth freedom rights to compete against AMU carriers that are still operative within of restrictive BASAs environment.⁷⁸²

Therefore, it can be concluded that despite recognising the need to liberalise the civil aviation industry in the Maghreb region, the AMU States have had little regard for the YD as an avenue to liberalise the air transport industry among themselves and sub-Saharan Africa. The AMU States have been more inclined to liberalise their air services with the neighbouring European States within the framework of the ENP and not amongst themselves or with sub-Saharan Africa. The air transport industry of the AMU States has also historically had a

⁷⁷⁷ CAPA op cit note 774.

⁷⁷⁸ Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part, and the Republic of Tunisia 2017.

⁷⁷⁹ European Commission 'Aviation: EU concludes negotiations with Tunisia for a new aviation agreement' <https://transport.ec.europa.eu/news/aviation-eu-concludes-negotiations-tunisia-new-aviation-agreement-2017-12-11_en> accessed 3 February 2022.

⁷⁸⁰ The World Bank Group 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 7 at 64.

⁷⁸¹ Ibid at 65.

⁷⁸² Ibid.

lacklustre performance mainly due to nationalistic overtones arising from political differences among the AMU States that adversely affect intra-regional travel and tourism.⁷⁸³

4.3. WEST AFRICA (ECOWAS, WAEMU, BAG)

States in the West African region can be categorised into several economic and political organizations. ECOWAS is the largest organisation among the region in terms of membership, comprising 15 states.⁷⁸⁴ However, in terms of air transport liberalisation and the implementation of the YD, the region is bifurcated into the WAEMU, consisting of the Francophone West African States and the Banjul Accord Group (BAG) of States, predominantly comprised of the Anglophone West African States.⁷⁸⁵

4.3.1. *The Economic Community of West African States*

ECOWAS was established on 28th May 1975 through the signing of the Treaty of ECOWAS by eleven Heads of State and four plenipotentiaries representing fifteen West African States; Republic of Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and the Republic of Togo.⁷⁸⁶ Cape Verde joined ECOWAS in 1976 and made the Member States sixteen; however, the number was reduced to fifteen, with Mauritania, often more associated with North Africa than West Africa, leaving the bloc in 2002.⁷⁸⁷ The ECOWAS Treaty provided for the progressive establishment of a customs union, common external tariff, and the gradual harmonisation of economic and fiscal policies of the Member States that were to be attained over fifteen years.⁷⁸⁸

The ECOWAS Secretariat was established in Lagos, Nigeria, and the first meeting of the Council of Ministers was held in July 1976 in Accra, Ghana. During this meeting, Members got into a deadlock on the assessment of revenue losses due to implementing the provisions of the ECOWAS Treaty. This deadlock was never fully resolved, resulting in the waning of the

⁷⁸³ Schlumberger and Weisskopf 'Is the Arab take-off imminent? Opportunities for the development of the North African air transport sector following the Arab Spring' op cit note 767 at 247.

⁷⁸⁴ The World Bank Group 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 7 at 72.

⁷⁸⁵ Ibid.

⁷⁸⁶ Aguibou Y Yansane 'West African Economic Integration: Is ECOWAS the Answer?' (1977) 24 Africa Today 43 at 50.

⁷⁸⁷ Charles Schlumberger op cit note 23 at 72.

⁷⁸⁸ Sunday Kachima McDonald Anadi 'Regional integration in Africa: The case of ECOWAS' (University of Zurich 2005) at 45.

initial integration enthusiasm.⁷⁸⁹ This was accompanied by the lack of political will evidenced by the Member State's failure to ratify several ECOWAS protocols. In May 1990, a committee was established and reviewed the ECOWAS Treaty, culminating in adopting the Revised ECOWAS Treaty in July 1993 at the ECOWAS Summit meeting at Cotonou Benin.⁷⁹⁰ The revised Treaty reiterated the original objectives of enhancing integration and economic cooperation. It called upon the Member States to harmonise and coordinate their national policies, key among them the transport and communications policies.⁷⁹¹ The most pertinent provision of the revised Treaty was that the decisions of the Heads of State of the ECOWAS and the regulations by the Council of Ministers are binding on the Member States and the institutions of the Community. The revised Treaty specifically addressed matters of air transport among the ECOWAS Member States in Article 32,

ARTICLE 32 TRANSPORT AND COMMUNICATIONS

1. For the purpose of ensuring the harmonious integration of the physical infrastructures. of Member States and the promotion and facilitation of the movement of persons, goods and services within the Community, Member States undertake to:

....

⁷⁸⁹ The World Bank Group 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 911 at 73.

⁷⁹⁰ Ibid.

⁷⁹¹ Ibid.

f) encourage co-operation in flight-scheduling, leasing of aircraft and granting and joint use of fifth freedom rights to airlines of the region;

g) promote the development of regional air transportation services and endeavour to bring about the merger of national airlines in order to promote their efficiency and profitability;

h) facilitate the development of human resources through the harmonization and coordination of their national training programmes and policies in the area of transportation in general and air transport in particular;

i) endeavour to standardize equipment used in transport and communications and establish common facilities for production, maintenance and repair.

2. Member States also undertake to encourage the establishment and promotion of joint ventures and Community enterprises and the participation of the private sector in the areas of transport and communications.

The above objectives of airline cooperation, promotion of regional development of air services, and granting the fifth freedom rights to the region's carriers greatly mirrored the principles of the YD's predecessor, the Yamoussoukro Declaration.⁷⁹² With the new Treaty clearly articulating policy objectives in the air transport sector and bestowing new powers upon the Summit and the Council of Ministers, one would have expected that ECOWAS would play a leading role in the implementation of the YD, which came into force six years after coming into force of the revised ECOWAS Treaty.⁷⁹³ However, this is not the case as neither the Summit has adopted any binding decision nor has the Council of Ministers passed any binding regulation related to the YD implementation. Air transport liberalisation and the YD implementation have been pursued within the sub-regional framework of WAEMU and BAG.

4.3.2. The West African Economic and Monetary Union

The WAEMU is a custom and Monetary Union of eight West African States (Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo) established by the WAEMU Treaty.⁷⁹⁴ WAEMU was established to continue the legacy of its predecessor, the West African Monetary Union (WAMU), established by a Treaty signed on 12th May 1962 and

⁷⁹² Ibid at 74.

⁷⁹³ Ibid.

⁷⁹⁴ UEMOA 'West African Economic and Monetary Union' <<http://www.uemoa.int/en/about-uemoa>> accessed 3 February 2022.

entered into force on 2nd November 1962. The 1962 WAMU Treaty established the legal basis for using the Communauté Financière Africaine (CFA) franc as a common currency that France had introduced to all her colonies in 1948.⁷⁹⁵ WAMU was initially comprised of seven members—Côte d’Ivoire, Dahomey (now Benin), Mauritania, Niger, Senegal, Togo, and Upper Volta (now Burkina Faso) though Mauritania withdrew from WAMU in 1973, and Mali joined the Union in 1984.⁷⁹⁶

During its early stages, WAMU was generally considered a success because of the stable economy of Côte d’Ivoire, which contributed approximately 40 percent of WAMU’s economic output. However, WAMU started to disintegrate in the mid-1980s due to the deterioration of the WAMU States’ economies that resulted from the sharp decline in commodity prices and the devaluation of the CFA Franc.⁷⁹⁷ Due to these economic challenges, WAMU Member States dissolved the Union and established WAEMU. On 10 January 1994, seven Heads of State and Governments representing Benin, Burkina Faso, Côte d’Ivoire, Mali, Niger, Senegal, and Togo met in Dakar, Senegal. They signed the Treaty establishing WAEMU, which entered into force on 1st August 1994. Guinea Bissau acceded to the Treaty on 2nd May 1997, bringing the membership of the Union to eight States. The WAEMU Treaty was revised in 2003, introducing minor administrative and procedural changes.⁷⁹⁸

4.3.2.1. Air transport liberalisation among the WAEMU States

The legal basis for air transport liberalisation among the WAEMU States is Article 4 of the WAEMU Treaty which outlines one of the objectives of the Union as the ‘coordination of national sectoral policies in transport and telecommunications.’ In pursuit of this objective, the WAEMU Council of Ministers, on 27th June 2002, established a common air transport program whose first objective was opening the WAEMU block to the rest of the world.⁷⁹⁹ For this to be realised, the WAEMU block endeavours to put in place a safe, secure, orderly, and efficient air transport environment that would engender an efficient air transport management system and

⁷⁹⁵ Ibid.

⁷⁹⁶ Ibid.

⁷⁹⁷ The World Bank Group ‘Open skies for Africa – Implementing the Yamoussoukro Decision’ op cit note 7 at 76.

⁷⁹⁸ Ibid.

⁷⁹⁹ Ibid at 78.

promote the competitiveness of the region's civil aviation industry.⁸⁰⁰ The air transport program also pursues the internal objective of ensuring that the Member States and their citizenry have access to an affordable air transport system that can stimulate the integration of the WAEMU States, facilitate cross-border movement of goods and persons, and enhance tourism and support commercial exchanges within the region.⁸⁰¹

However, the program has acknowledged two significant challenges that need to be dealt with: the marginalisation of the WAEMU States in the continent's civil aviation industry and the inability to ensure the safety of the region's air transport activities.⁸⁰² The program identified four areas of concern to address these challenges. The first concern was improving the air transport infrastructure and equipment to match ICAO's SARPs.⁸⁰³ This includes improving the air navigation and aviation meteorology infrastructure, search and rescue infrastructure, aviation security and facilitation infrastructure, bird hazard control, and environmental protection measures. Of critical importance for the WAEMU region is the implementation of the ICAO's Regional Air Navigation Plan and the Cooperative Development of Operational and Continuous Airworthiness Project (COSCAP), the regional aviation safety oversight organisation.

The second area of concern is harmonising civil aviation laws and regulations that pursue the adoption of a common legal regime that governs market access, safety, security, consumer protection regulations, and competition rules. This area will also pursue compliance with the ICAO SARPs by signing and ratifying the relevant recommended air law instruments.⁸⁰⁴ The third area of concern is the improvement of the air transport systems that are to be realised through the adoption of common civil aviation legislation that will ensure that the civil aviation authorities are legally and financially autonomous entities. This item also strengthens cooperation in the civil aviation sector with ECOWAS, IATA, ICAO, CEMAC, and donor communities such as the US and French governments and the EU. Other initiatives under this rubric are enhancing investment in WAEMU's civil aviation industry, establishing a civil aviation development fund, and developing human resources in the aviation sector.

The fourth area of concern and the most relevant in terms of the implementation of the YD is the liberalisation of the civil aviation industry of the WAEMU Member States. Air

⁸⁰⁰ Ibid.

⁸⁰¹ Ibid.

⁸⁰² Ibid.

⁸⁰³ The World Bank 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 7 at 78.

⁸⁰⁴ Charles Schlumberger 'The Implementation of the Yamoussoukro Decision' op cit note 23 at 79.

transport liberalisation among the WAEMU States has been pursued through two mechanisms; a) state divestiture from the civil aviation industry, including airlines, aerodromes, ground handling, and catering services; and b) full liberalisation of market access in the form of granting eight freedom privilege or cabotage to the designated WAEMU airlines. The WAEMU States have taken additional steps to abolish restrictions on the free movement of persons and goods and adopt consumer protection and competition regulations to further support the liberalisation process.⁸⁰⁵

Five years following the adoption of the common air transport program, WAEMU had made tremendous progress by promulgating several aviation-related laws and regulations that comply with the requirements of the YD, and some aspects exceed the liberalisation requirements of the YD.⁸⁰⁶ The most notable regulations are Regulation 24/2002 on traffic rights, which contains liberalising market access provisions by granting up to eight freedoms of the air (cabotage). Regulation No.07/2002 on tariffs allows the WAEMU designated carriers to freely fix tariffs that should be filed only 24 hours in advance. This regulation is more liberal than the YD, which requires filing at least 30 days in advance.⁸⁰⁷ The other regulations that have been adopted include Regulation No. 2/2002, which addresses competition within the WAEMU air transport market and implements Article 6 of the YD that mandates State Parties ensure competition in the implementation of the YD. Regulation No. 03/2003 deals with consumer protection concerns such as flight cancellation and denial of embarkation. Regulation No. 02/2003 on-air carriers' liability in the event accident is informed by the Montreal Convention of 1999, the international legal regime that deals with air carriers' liability.

WAEMU has also promulgated over ten safety and security regulations; however, despite the promulgation of these regulations, aviation safety and security in the region remains a stumbling block to the development of the air transport industry in the region.⁸⁰⁸ The WAEMU Commission, in partnership with ICAO, has sought to deal with aviation safety and security concerns through a regional safety oversight agency. Although WAEMU has adopted the requisite legal framework for the implementation of the YD and even, in some instances, gone further than some of the liberalisation provisions of the YD, the integration of WAEMU's civil aviation industry with the rest of the African continent has not been pursued with the same

⁸⁰⁵ The World Bank Group 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 7 at 79.

⁸⁰⁶ Ibid.

⁸⁰⁷ Ibid at 79.

⁸⁰⁸ Ibid.

fervency.⁸⁰⁹ Despite mentioning the YD in their preamble, each WAEMU promulgated aviation regulations is largely limited to WAEMU.⁸¹⁰

WAEMU has not only liberalised the intra-community air transport services but is also the first REC in Africa to sign an external aviation agreement as a bloc. On 30th November 2009, WAEMU and the EU signed an aviation agreement in Brussels,⁸¹¹ bringing several provisions of the 47 existing BASAs between the EU and WAEMU in conformity with the EU law as established by the European Court of Justice in the ‘Open Skies’ judgment of 5th November 2002.⁸¹² This agreement was an important step in fostering the EU-Africa aviation ties and enhancing cooperation between the EU and WAEMU in fundamental areas such as aviation safety and security. Article 2 of the aviation agreement replaces the nationality clauses contained in the traditional designations clauses of the earlier BASAs with a community designation clause that grants all community carriers to exercise the right of establishment. This allows any WAEMU or EU carriers to operate between any EU Member State and any WAEMU State, increasing the carriers' opportunities from the two blocs. The implementation of this agreement presents a challenge, particularly for the WAEMU States, whose carriers may find it difficult to compete fairly with the European LCCs. Senegal has, for instance, written to the WAEMU Commission that it would be applying the horizontal agreement and would require the agreement to be reviewed.⁸¹³

4.3.3. *The Banjul Accord Group*

The BAG was established by seven West Africa States (Cape Verde, The Gambia, Ghana, Guinea, Liberia, Nigeria, and Sierra Leone), who, on 29th January 2004, signed the BAG Agreement.⁸¹⁴ The BAG Agreement is the predecessor of the Banjul Accord that was signed on 3rd April 1997 to accelerate the implementation of the Yamoussoukro Declaration.⁸¹⁵ Consequently, the Banjul Accord embodied the spirit of the Yamoussoukro

⁸⁰⁹ The World Bank Group ‘Open skies for Africa – Implementing the Yamoussoukro Decision’ op cit note 7 at 82.

⁸¹⁰ Ibid.

⁸¹¹ Agreement between the European Community and the West African Economic and Monetary Union on certain aspects of air services 2010.

⁸¹² World Trade Organisation ‘The member countries of the West African Economic and Monetary Union (WAEMU)’ (2017) 72 <https://www.wto.org/english/tratop_e/tpr_e/s362-00_e.pdf> accessed 2 February 2022.

⁸¹³ Ibid.

⁸¹⁴ The World Bank Group ‘Open skies for Africa – Implementing the Yamoussoukro Decision’ op cit note 7 at 83.

⁸¹⁵ Ibid at 82.

Declaration by pursuing the integration of airlines, the cooperation of airlines, and the formation of multinational carriers among the Member States.⁸¹⁶ According to the Banjul Accord preamble, airlines would cooperate in providing and managing air traffic services, ensure safety oversight, and establish a multilateral approach in air traffic rights negotiations.

Like the Yamoussoukro Declaration, the Banjul Accord did not provide for the liberalisation of traffic rights. Instead, it focused on the airlines' integration and cooperation, hoping that an integrated air transport industry would eliminate the need to exchange traffic rights.⁸¹⁷ The Banjul Accord would later form the basis of a memorandum of understanding between four states of the Banjul Accord (Cape Verde, The Gambia, Ghana, and Nigeria) and nine airlines (Cape Verde Airlines, Ghana Airways, MUK Air, Far Airways, Bellview Airlines, Gambia International Airlines, Mahfooz Aviation Ltd. and Nigeria Airways) in an attempt to establish airline cooperation. However, there is no evidence on whether the memorandum of understanding was ever implemented.⁸¹⁸

Article 3.1 of the BAG stipulates that one of the objectives of BAG is to implement the provisions of the Yamoussoukro Declaration and the YD. Additionally, BAG Member states are to establish a joint venture or cooperative arrangements to spur the growth of international air transport among the BAG Member States and other States.⁸¹⁹ While the YD adopted the approach of liberalisation of air traffic rights, the BAG Agreement seems to emphasise the collaboration of airlines, an approach that the Yamoussoukro Declaration pursued. Furthermore, by Article 3.1 of BAG stipulating the objective of implementing both the Yamoussoukro Declaration and the YD was indeed a great convolution of the approaches in the development of civil aviation among the member States of BAG. This mixes up ignores the significant pragmatic shift in approaches from the cooperation and integration approach pursued by the Yamoussoukro Declaration to the liberalisation and competition focused approach that underpins the YD.⁸²⁰

Besides the BAG Agreement, the BAG Plenary has also adopted two other pertinent legal instruments, the Multilateral Air Services Agreement (MASA) and the Memorandum of Understanding for the implementation of the Co-operative Development of Operational Safety

⁸¹⁶ Ibid at 83.

⁸¹⁷ Ibid.

⁸¹⁸ Ibid at 89.

⁸¹⁹ Ibid at 83.

⁸²⁰ Ibid.

and Continuing Airworthiness Project for the Banjul Accord Group (COSCAP-BAG).⁸²¹The MASA was on 29th January 2004 signed by all the BAG Member States and contains provisions that are substantially identical to the provisions of the YD. For instance, MASA provisions on Traffic rights, designation of carriers, tariffs, and capacity and frequency are essentially a replica of the similar provisions of the YD.⁸²² However, in the area of safety and security, MASA goes beyond the YD's edicts in that while the YD only reaffirms the State parties' obligation to adhere to the ICAO SARPs in the area of safety and security, the MASA in Article VII enables State Parties to request consultations concerning safety standards of the other State Parties in the areas of air transport infrastructure and services, crew and the aircraft. MASA also enables a State Party to withhold, revoke or constrict a designated airline's operating authorisation or technical permission when the designating State fails to take the appropriate remedial action. The strong emphasis on aviation safety also enables any BAG State to revoke or cancel the operating certificate carriers from countries outside BAG.⁸²³

The MASA also has more elaborate aviation security provisions than the YD. Whereas the YD in Article 6.12 only provides that ' State Parties must reaffirm their obligation to protect the security of the aviation in accordance with Annex 17 of the Chicago Convention,' MASA categorically makes it imperative for the Contracting States to adhere to the provisions of the Convention on Offences and Certain Other Acts Committed on Board Aircraft, the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, all of which have been signed and ratified by all the BAG States.⁸²⁴The strong focus on aviation security by MASA compared to the YD can be attributed to the fact that MASA was adopted two years after the 11th September 2001 bombing, and as such it benefited from the renewed international commitment to aviation security.⁸²⁵

Lastly, on dispute resolution mechanism, MASA places primacy on the use of negotiations in disputes concerning the interpretation or application of the Agreement. Suppose disputants fail to resolve their differences by negotiation, they may either use the arbitration mechanism provided for in Article XVII of the MASA or utilise any other arbitration mechanism available within the auspices of the AU. MASA has an elaborate arbitration

⁸²¹ Ibid.

⁸²² Ibid.

⁸²³ Ibid.

⁸²⁴ Ibid at 85.

⁸²⁵ Ibid.

procedure that includes rules of appointment of arbitrators and rules of procedure. The articulation of an elaborate arbitration procedure with an option to use the arbitration mechanism of the AU was crucial because BAG, unlike WAEMU, is not an institutional body and, as such, does not have the requisite infrastructure and resources.⁸²⁶In conclusion, BAG has fully implemented the YD provisions through the MASA legal framework and established a liberalised air transport market among the BAG States supported by elaborate safety and security framework and dispute resolution mechanism. Indeed, the liberalisation of the BAG States aviation market is evidence that implementation of the YD by the African States does not necessarily require an expensive and overly complicated institutional framework.⁸²⁷

4.4. CENTRAL AFRICA REGION (CEMAC AND ECCAS)

The Central African region is made up of three sub-regions; the Central African Economic and Monetary Community (CEMAC), Economic Community of Central African States (ECCAS); and the Economic Community of the Great Lakes Countries (CEPGL).⁸²⁸CEMAC and ECCAS have overlapping memberships, comparable mandates, and the same origin.⁸²⁹ CEMAC was established on 16th March 1994 by the Treaty of N'Djamena and was the successor to the Central African Customs Union or the Union *Douanière des Etats de l'Afrique Centrale* (UDEAC) that the Treaty of Brazzaville had established on 8th December 1964, which itself was also a post-colonial configuration of the Equatorial Customs Union or *Union douanière équatoriale* (UDE) established in 1959.⁸³⁰

CEMAC comprises six countries; Cameroon, Central African Republic (CAR), Chad, Congo, Equatorial Guinea, and Gabon. ECCAS, on the other hand, owes its existence to a combination of the six CEMAC States and five other states in the Central African region; Angola, Burundi, DRC, Rwanda, and São Tomé and Príncipe. With eleven members, ECCAS is the largest economic community in the Central Africa region, established in 1983 under the auspices of the Lagos Plan of Action as an initiative of the then OAU. As opposed to CEMAC, which is more built upon the region's colonial heritage, ECCAS is considered a Pan-African integration initiative expected to spearhead a continent-wide economic integration. ECCAS

⁸²⁶ Ibid at 86.

⁸²⁷ Ibid.

⁸²⁸ ICGLR has since its establishment in 2003 remained inactive.

⁸²⁹ B Byiers 'Understanding regional economic policies in Central Africa: Struggling to integrate in an intertwined region' [2017] European Centre for Development Policy management.

⁸³⁰ Terry M Mays & Mark W DeLancey *Historical Dictionary of International Organizations in Sub-Saharan Africa*, vol 21 (Scarecrow Press 2002) at 49.

became operational in 1985, but in 1992 it became dormant, particularly because of financial constraints that paralysed its functions and the region's conflict proneness with some of the ECCAS States taking opposites in the conflict in the DRC.⁸³¹

However, during the extraordinary summit in Libreville in 1998, ECCAS was revived, giving a fresh impetus to the integration of the ECCAS States. In October 1999, the AU formally designated ECCAS as one of the eight pillars of the African Economic Community.⁸³² Be that as it may, CEMAC is a more established economic grouping and enjoys a greater political legitimacy among its member States than the ECCAS.⁸³³ Most of the countries in the Central Africa region are members of two or more RECs, with countries such as the CAR and Congo being a member of three. This leads to duplication and membership overlapping, resulting in unsustainable resource strain.

4.4.1. *Air transport in the CEMAC*

The principal objective of CEMAC is the creation of an economic and monetary union among the CEMAC States through the harmonisation of legal, financial, economic, and political policies.⁸³⁴ One fundamental attribute of the CEMAC Treaty is its superiority over all the national laws of the CEMAC States.⁸³⁵ The logical consequence of this superiority is that it is imperative for all the CEMAC States to automatically apply the community laws in their jurisdictions without any additional rulemaking procedure. CEMAC also enjoys a distinct legal entity and is empowered by Article 36 of the CEMAC Treaty to sign cooperation agreements with international, regional, or sub regional organisations. These two attributes are of great significance in the implementation of the YD.⁸³⁶

Since the establishment of CEMAC, the member States have endeavoured to develop the transport sector among themselves. The desire to develop the transport sector was articulated by Article 2 as one of the objectives of the Economic Union as 'coordinating national sectoral policies of Member States in... trade, tourism, transport'. In the air transport

⁸³¹ Byiers op cit note 829.

⁸³² Ibid.

⁸³³ Ibid.

⁸³⁴ Moye Godwin Bongyu 'The Economic and Monetary Community of Central Africa (CEMAC) and the decline of sovereignty' (2009) 44 *Journal of Asian and African Studies* 389 at 389.

⁸³⁵ The World Bank Group 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 7 at 88.

⁸³⁶ Ibid.

sector, the CEMAC States had, even before the enactment of the YD, concluded an Air Transport Agreement among the CEMAC Member States,⁸³⁷ a Community Code of Civil Aviation,⁸³⁸ and a Joint Competition Regulation.⁸³⁹

The Council of Ministers adopted the Air Transport Agreement on 18th August 1999 as a program for developing the intracommunity air transport industry, to enhance greater accessibility within the CEMAC region and bolster economic and commercial cooperation in the Community.⁸⁴⁰ The Agreement also contains a provision for establishing a body whose mandate includes ensuring air transport safety and enhancing the technical and commercial aspects of the airlines in the region.⁸⁴¹ Some of the Air Transport Agreement provisions, such as the traffic rights and the designation of airlines, are similar to the equivalent provisions of the YD.⁸⁴² For instance, on the designation of carriers, Article 4 of the Agreement enables each CEMAC State to designate two airlines to operate in the intracommunity air transport market. The designation can be an airline of another CEMAC State, and all the airlines' designations must be communicated to CEMAC's Executive Secretariat, which publishes such designation in the official bulletin of the Community. Pursuant to Article 5, CEMAC States must ensure that designated carriers enjoy equal treatment in airport infrastructure, equipment, and fees. On traffic rights, Article 11 of the agreement allows the exercise of the first and second freedoms without any restriction.

Pursuant to Article 12, the third and fourth freedom rights are granted for any intracommunity scheduled passengers, cargo, and mail flights. According to Article 13, the fifth freedom rights had initially been restricted to 40 per cent of the previous annual traffic for a transitional period of two years which ended in August 2001, after which CEMAC carriers could operate the full extent of the fifth freedom rights. Though the agreement does not provide for the sixth and seventh freedom rights, article 16 makes it possible for a CEMAC State to specifically allow a designated carrier of another CEMAC State to exercise the eighth freedom right (cabotage).⁸⁴³

⁸³⁷ Règlement n°6/99 /UEAC/-003-CM-02 portant adoption de l'Accord relatif au transport aérien entre les États membres de la CEMAC.

⁸³⁸ Règlement n°10/100-CEMAC-0066-CM-04 portant adoption du Code de l'aviation civile de la CEMAC.

⁸³⁹ Règlement n°1/99/UEDAC/AC-CM-639 portant sur la réglementation des pratiques commerciales anticoncurrentielles.

⁸⁴⁰ The World Bank Group 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 7 at 88.

⁸⁴¹ Ibid.

⁸⁴² Ibid.

⁸⁴³ The World Bank Group 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 7.

Regarding tariff matters, Article 18 of the Agreement allows tariffs to be freely determined commercially. It must be communicated to the aviation authorities of the relevant States at least 60 days in advance. In setting their tariffs, the carriers must adhere to the Competition Regulation. Article 14 of the Agreement allows the CEMAC States to grant the maximum frequencies on capacity and frequency. However, the designated carriers must coordinate their schedules. Article 15 of the Agreement prohibits the restriction of capacity and aircraft type, and carriers must enter into commercial arrangements among themselves in case of significant disparity between capacity and aircraft type. Article 21 of the CEMAC Agreement on Air Transport establishes an Executing Agency to be designated and supervised by the Council of Ministers responsible for civil aviation, which has the mandate of supervising the implementation of the CEMAC liberalised air transport market. Article 23 gives the powers to the Executing Agency to make recommendations to the Council of Ministers on the imposition of sanctions against airlines by means such as the revocation or temporary suspension of traffic rights.

The second aviation legal instrument is the Community Code of Civil Aviation, which the Council of Ministers adopted in July 2000 as a model law to replace all the obsolete civil aviation legislation existing in the CEMAC States, while giving the Member States the leeway to regulate the domains not covered by the code. This code incorporated most of the Air Transport Agreement as well the provisions of the YD. Regarding market access, Article 214 of the Code provides for the liberalisation up to the fifth freedom rights for the intra-community scheduled air services. Article 219 provides for the liberalisation of cargo and on-demand air traffic. The provision of market access is in line with Article 3 of the YD. Tariffs are provided for in Article 219 of the Code, which requires a ‘reasonable’ tariff fixing that should be filed 60 days in advance. The provision on tariffs in the Code is more restrictive than the comparable provisions in the YD, Article 4, which provides that tariffs should be filed 30 days in advance. The other provisions, such as frequency and capacity, designation and establishment, and competition regulation, are similar to the comparable provisions of the YD.⁸⁴⁴ The institutional framework for the management and monitoring of the Code is provided for by the Council of

⁸⁴⁴ Ibid at 91.

Ministers responsible for the air transport industry, assisted by the Follow-up and Monitoring Committee.⁸⁴⁵

Regarding dispute resolution mechanisms, the Code provides arbitration conducted by the Council of Ministers responsible for civil aviation. If either disputant does not accept the decision, the aggrieved party can appeal to the Community Court of Justice as the forum of last resort. In terms of the framework for dispute settlement, follow-up, and monitoring of the liberalisation of the CEMAC air transport, the Code is more elaborate than the YD in that it introduced a structured regulatory framework adequately supervised by CEMAC organs.⁸⁴⁶ The third feature of liberalisation in the CEMAC region is the Joint Competition Regulation adopted on 25th June 1999 by the CEMAC Council of Ministers to ensure fair competition in the liberalised air transport market. This regulation is general in that it covers all industries in the CEMAC common market but with specific provisions that address aspects of the air transport industry such as anti-competitive agreements between suppliers, abuse of dominance, and prohibition of market domination through mergers. This provision is also more elaborate than the equivalent provision of the YD.⁸⁴⁷

According to a study by UNECA, CEMAC States have individually and collectively recognised the primacy of the YD over their national laws, amended their BASAs to conform to the spirit of the YD, and translated the principles of the YD into their domestic policies, practices, and laws.⁸⁴⁸ By way of example, the study notes Gabon, which through a Presidential Decree, has implemented the YD, and Cameroon, which has transposed the principles of the YD into its national legislation. The study also notes that virtually all African countries that have requested to be granted fifth freedom rights, including but not limited to Kenya, Ethiopia, Angola, Guinea, Mali, South Africa, Togo, Benin, Cote d'Ivoire, Sudan, Sao Tome, and Principe, and Nigeria, have been granted. CEMAC States have also recognised multiple designations and have not denied any request for increased capacity from other African airlines subject to the technical considerations of airport facilities and safety considerations. However,

⁸⁴⁵ Economic Commission for Africa 'Evaluation of the implementation of the Yamoussoukro Decision in the CEMAC zone: The Experience of Four Countries: Cameroon, Central African Republic, Congo and Gabon' 8 <<https://repository.uneca.org/handle/10855/2765>> accessed 1 January 2022.

⁸⁴⁶ Ibid at 9.

⁸⁴⁷ Ibid at 8.

⁸⁴⁸ Ibid at 5.

the study notes that the CEMAC States have not readily received the same treatment from some countries, particularly in West Africa and Southern Africa.⁸⁴⁹

CEMAC member States have also enacted several regulations, such as Regulation No. 06/07-UEAC-082-CM-15, enacted in 2007 to govern air carrier liability in the instance of an infringement of rules of boarding procedures of a passenger in the airports in the CEMAC States.⁸⁵⁰ According to Article 2, the scope of this regulation covers ‘: (1) refusal by an aeroplane company to allow on board passengers validly booked; (2) unreasonable delay; and (3) cancellation of flight.’ Article 5 to 9 of the regulation provides compensation mechanisms for passengers at any CEMAC airport regardless of their citizenship or destination.⁸⁵¹ For example, for refusing to embark a passenger, the airline must reimburse the price for the ticket, alter the itinerary to accommodate the passenger’s destination, or change the travel date at the passenger's discretion. Article 9 provides other modes of compensation to the passengers, such as free lodging, free food, and payment for telecommunication to the destination country. Pursuant to Article 10, the enumerated accommodations do not preclude the aggrieved passenger from bringing a civil liability action against the airline.⁸⁵²

There is also Regulation No. 6/10-UAC-204-CM-21 governing aviation safety that was enacted on 28 October 2010. Article 2 of this regulation commits the CEMAC States to adhere to and implement several international conventions:

‘the Convention of Tokyo signed on September 14, 1963, on offenses and certain acts committed on board aircraft; the Hague Convention of December 16, 1970, for the suppression of the unlawful seizure of aircraft; the Montreal Convention signed on September 23, 1971, for the suppression of unlawful acts against the safety of civil aviation; the Montreal Convention of February 24, 1988; the Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation; and the Montreal Convention of March 1, 1991, on plastic explosives.’⁸⁵³

The following instruments in the CEMAC region are also worthy of mentioning:

⁸⁴⁹ Economic Commission for Africa op cit note 845.

⁸⁵⁰ Jean Grosdidier De Matons ‘A review of international legal instruments: Facilitation of transport and trade in Africa’ at 123.

⁸⁵¹ CI Grigorieff, ‘The Regime for International Air Carrier Liability: To What Extent Has the Envisaged Uniformity of the 1999 Montreal Convention Been Achieved?’ at 154.

⁸⁵² De Matons op cit note 850 at 23.

⁸⁵³ Ibid at 123.

‘Decision No. 15/05- UEAC-163-CM-13 on the implementation of the COSCAP Project, a program directed at air transport safety and maintenance of aircraft navigability; Decision No. 13/05-UEAC-066-CM-13 establishing the Air Transport Community Company; Decision No. 03/08-UEAC-066-CM-17 establishing a Steering Committee for the launching of an air transport company in CEMAC; Additional Act No. 15/07-CEMAC-162-CCE-08 establishing a Supervision Agency on Air Transport Safety in Central Africa; Directive No. 01/07-UEAC-082- CM-15 establishing the procurement rules in stopover services assistance in Member State airports; Directive No. 02/07-UEAC-082-CM-15 establishing a legal framework on time slots in Member States’ airports; Regulation No. 06/10-UEAC-204-CM-21 establishing the agreement related to the security of civil aviation of CEMAC Member States; Decision No. 08/10-UEAC-066-CM21 establishing shareholding and distribution of capital of the CEMAC company Air CEMAC; and Regulation No. 01/10-UEAC-066-CM-SE establishing a tax and Customs regime specific to the Air CEMAC’⁸⁵⁴

Even with an elaborate legal and institutional framework to ensure the liberalisation of CEMAC’s air transport industry, the liberalisation process in the sub-region has been handicapped by the poor performance of safety oversight, human and financial resources constraints.⁸⁵⁵To deal with the above challenges, the World Bank, African Development Bank, EU, French Development Bank, and other donors have supported CEMAC within the Co-operative Development of Operational Safety and Continuing Airworthiness Programme (COSCAP) project for the Central and West Africa region.⁸⁵⁶ CEMAC’s air transport market is therefore considered one of the most liberalised in Africa, though minor restrictions remain.⁸⁵⁷These include the non-applicability to non-scheduled services, the obligation to inform aviation authorities of tariff increases within 60 days before the increase, and the requirement for commercial agreement when there is a disparity between capacity offered and the type of aircraft used.⁸⁵⁸

⁸⁵⁴ Ibid at 24.

⁸⁵⁵ Economic Commission for Africa op cit note 845 at 15.

⁸⁵⁶ Ibid at 14.

⁸⁵⁷ Rupa Ranganathan & Vivien Foster ‘ECCAS’s infrastructure: A regional perspective’ at 24.

⁸⁵⁸ Economic Commission for Africa op cit note 845 at 9.

4.4.2. Air transport in the ECCAS Region

Air transport mandate among the ECCAS States is enshrined in Article 47 of the treaty establishing ECCAS, which calls upon State Parties to harmonise their air transport policies and ‘modernize and standardize their equipment so that all Member States may be linked with one another and with the exterior by scheduled flights’⁸⁵⁹ Further, Article 5 of Annex XI, the Protocol on Cooperation in Transport and Communications Between Member States of the ECCAS, establishes the Committee on Transport and Communications as one of the Specialised Technical Committees as envisioned by Article 26 of the Treaty. The air transport market of the ECCAS region is characterised by the striking absence of a robust regional air transportation hub, poor connectivity, particularly between the CEMAC sub-region with the rest of the ECCAS States, and poor air safety standards.⁸⁶⁰ Compared to the other regional markets, the air transport market in Central Africa is relatively small, with CEMAC having the smallest air transport market in Africa, followed by ECCAS.⁸⁶¹ CEMAC and ECCAS also have the smallest number of domestic and international city pairs and the lowest number of seats available per capita on the continent, with the annual number of seats flown in these two regions being one-thirteenth that of Southern Africa.⁸⁶²

To address the region's poor state of air transport, the ECCAS ministers of transport met in Kinshasa in September 2008 and adopted the 2008-15 Action Plan for a safe and secure aviation industry in the ECCAS region.⁸⁶³ However, despite adopting the Action Plan, air services in the region remained irregular, costly, unsafe due to high accident rates, and not liberalised as per the provisions of the YD. As a response, the ECCAS transport ministers met in Kinshasa on 24th October 2009 and agreed to;

‘(1) put in place a policy framework that will create an institutional, legal framework on air transport; (2) improve the services provided; (3) reduce the costs; (4) implement the Yamoussoukro Decision on liberalisation of the air transport market, and (5) guarantee the security and safety of civil aviation.’⁸⁶⁴

⁸⁵⁹ Treaty Establishing the Economic Community of Central African States (1983) art 47 (2) (d).

⁸⁶⁰ Rupa Ranganathan & Vivien Foster ‘East Africa’s infrastructure: A regional perspective’ [2011] World Bank Policy Research Working Paper 31 at 24.

⁸⁶¹ *Ibid* at 25.

⁸⁶² *Ibid*.

⁸⁶³ De Matons *op cit* note 850 at 131.

⁸⁶⁴ *Ibid*.

On 24th October 2009, the Kinshasa Plan of Action was confirmed by a Declaration of ECCAS Heads of State on enhancing air transport in the region and ratified by Decision No. 20/CEEAC/CCEG/XIV/09.

In 2012 seven decisions were adopted, including Decision No. 16/CEEAC/CCEG/XV/12 regarding the duties of an air transport carrier in the ECCAS States which in Article 4 stipulates the eligibility criteria for carriers seeking a license to operate air services in the ECCAS region. Pursuant to Article 3 of the Decision any carrier seeking to operate in the ECCAS region must comply with the cumulative eligibility criteria stipulated in Article 4.⁸⁶⁵ The criterion includes the requirement that the carrier must have its headquarters in the State issuing the license, that the principal activity of the licensee be air transport services exclusively or in combination with other commercial ventures such as operations, repair, and maintenance of aeroplanes, that the majority of ownership and the effective control of the carrier be vested in the Member States or their nationals. The services provided by the carrier should have a starting point, and arrival point at one or several airports of a Member State, and its technical, operational, and management personnel must be mainly constituted by the nationals of the Member States.⁸⁶⁶

Article 6 of the Decision provides that for a carrier to be issued with a license, it should demonstrate that the persons managing the carrier are professionally fit and competent to manage its activities. Article 7 provides for the obligation to insure and stipulates that the insurance company should have its headquarters within the ECCAS region covering, inter alia, risks of accidents on passengers, cargo, mail, and third parties on the ground and be in line with the provisions of international conventions, treaties, and protocols. The rest of the requirements are similar to Annex 6 related to the certification of air transport and leasing of airplanes. Article 15 of the Decision provides that the provisions of the Decision shall not be understood as contrary to the provisions of the YD, except in the instances where the Decision is more favourable than the YD.⁸⁶⁷

Decision No. 17/CEEAC/CCEG/XV/12 also stipulates the requirements for access to the ECCAS air transport market, with Articles 10 and 12 of this Decision calling upon States to adhere to the ICAO SARPS. Decision No. 18/CEEAC/CCEG/XV/12 provides tariffs for passengers, cargo, and mail for air transport services within, from, and entering the ECCAS air

⁸⁶⁵ Ibid.

⁸⁶⁶ Ibid at 132.

⁸⁶⁷ Ibid at 133.

transport market. Article 3 of this Decision gives airlines the freedom to set up their tariffs for passengers, cargo, and mail and further provides that this freedom may be suspended when the tariff is excessively high or low.⁸⁶⁸

Decision No. 19/CEEAC/CCEG/XV/12 on airlines' liability in instances of accidents in the ECCAS sub-region refers to the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage. According to this Decision, the liability applies in the instance of death, physical injuries, or any other injuries provided that the accident resulting in the injury occurred on board or at the time of entering or exiting the aeroplane on the ECCAS sub-region. Article 3 of the Decision provides strict liability for air carriers, similar to the 1999 Montreal Convention. Decision No. 20/CEEAC/CCEG/XV/12 on competition in air transport services in the ECCAS sub-region ensures equality of opportunity, transparency, and fair competition to contribute to the sub-region's development. Article 3.2 of the Decision enumerates a non-exhaustive list of anti-competitive behaviours, with Article 4 proscribing abuse of dominance and defining what amounts to abuse of dominance practices. Article 5 establishes a regional agency constituted by the General Secretary of ECCAS responsible for monitoring competition practices in the sub-region.⁸⁶⁹

Decision No. 22/CEEAC/CCEG/XV/12 establishes a Steering and Coordination Committee for implementing the 2008-2015 Kinshasa Plan of Action. The Committee is also tasked with liaising with the Heads of State on important air transport issues, mobilising resources, ratifying international instruments relevant to the aviation industry, and ensuring the implementation of community rules.⁸⁷⁰

The Committee comprises the Ministers responsible for air transport and the General Secretary of ECCAS. The Committee is assisted by a Technical Commission comprising of General Directors of the civil aviation administrations, airport General Directors, weather broadcast service General Directors of Member States, General Directors of public and private airlines or their representatives, and experts from ECCAS, CEMAC, Central African States Development Bank (BDEAC), and Bank of Central African States (BEAC)⁸⁷¹ The Technical Commission prepares for the meetings of the Committee, follows up on the implementation of the YDs of the Committee, decides on the practical steps of implementing the action plan, and

⁸⁶⁸ Ibid.

⁸⁶⁹ Ibid.

⁸⁷⁰ Ibid at 134.

⁸⁷¹ Ibid.

reviews reports and documents by the various institution that touches on the aviation industry.⁸⁷² Therefore, the ECCAS region has put in place the requisite framework to liberalise the region's air transport industry and comply with the principles of the YD.⁸⁷³ However, despite the efforts, air transport in the ECCAS region is still liberalised, with aviation safety being one of the most formidable challenges.

4.5. SOUTHERN AND EASTERN AFRICA (COMESA, SADC, AND EAC)

4.5.1. *Southern Africa Development Community*

SADC comprises 15 Member States Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia, and Zimbabwe.⁸⁷⁴ The supreme decision-making organ of SADC is the Summit, composed of the Heads of State or Government of all the Member States. Pursuant to Article 10(2), 'the Summit shall be responsible for the overall policy direction and control of SADC functions.' The Summit makes its Decision by consensus, and its decisions are unless otherwise stipulated by the Treaty, binding on all the Member States and organs of SADC. Decision-making by consensus is also replicated in all the major institutional organs of SADC. Article 21 of the SADC Treaty identifies the key areas of cooperation in which the Member States are 'through appropriate institutions of SADC, coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes, and projects.' These areas of cooperation are inter alia; infrastructure and services, industry, trade, investment and finance, politics, diplomacy, international relations, peace, and security. The Council may decide upon additional areas of cooperation by Article 21(4).

Article 22 (1) of the SADC Treaty obligates the Member States to 'conclude such Protocols as may be necessary for each area of co-operation, which shall spell out the objectives and scope of, and institutional mechanism for, co-operation and integration.' Article 22 further provides that the concluded Protocols shall 'be approved by the Summit on the recommendation of the Council, and shall after that become an integral part of this Treaty.' Unlike the Decisions of the Summit, which are generally applicable to the SADC States without ratification, the approved Protocols must be signed and ratified by the SADC Member States.

⁸⁷² Ibid at 135.

⁸⁷³ Ibid.

⁸⁷⁴ bid.

Since the establishment of SADC, Member States have concluded more than 37 Protocols covering various sectors of cooperation. Cooperation in the transport sector is dealt with in the Protocol on Transport, Communications, and Meteorology that was concluded on 24th August 1996 and entered into force on 6th July 1998.⁸⁷⁵ This Protocol seeks to integrate all the transport sectors with its scope covering road transport, railways, maritime and inland waterway transport, and civil aviation.

4.5.1.1. Air transport in the SADC region

Civil aviation is addressed in chapter 9 of the Protocol. Article 9.1 enumerates the objectives for the civil aviation sector. These objectives include ‘safe, reliable and efficient services in accordance with the ICAO SARPs, to improve levels of service and cost-efficiency in support of the region's socio-economic development.’ The Protocol also urges the SADC Member States to foster co-operation within the regional civil aviation market’ to overcome the constraints of small national markets, market restrictions, and small size of some SADC airlines and further ensure the competitiveness of regional air services in a global context.’

Article 9.2 titled ‘Civil Aviation Policy’ provides that the objectives in the air transport sector would be achieved through developing a harmonised regional aviation policy in respect of inter alia ‘ a) the gradual liberalisation of intra-regional air transport market for the SADC airlines, b) regionally owned airlines c) the economic and concomitant institutional restructuring of the SADC airlines, airports and the provision of air traffic and navigation services in a phased and co-ordinated manner.’ d) the expansion and strengthening of Government’s capacity to provide definitive policy frameworks, develop supportive regulatory and investor-friendly legislation and monitor compliance with such policy and legislation, e) the expansion and strengthening of regional capacity in support of Government’s national capacity building which may include the establishment of an appropriate regional institutional mechanism, f) the assessment of the adequacy and optimal utilisation of infrastructure g) the promotion of compliance with ICAO SARPs, h) the promotion of adherence by Member States to the International Air Services Transit Agreement of 1944 and i) the promotion of the establishment of the integrated transport system.

⁸⁷⁵ Economic Commission for Africa ‘Southern Africa sub regional development centre (ECA/SA-SRDC) (2008-09). Trade Development and Transport in Southern Africa’
<<https://repository.uneca.org/handle/10855/15040?locale-attribute=fr>> accessed 2 February 2022.

The SADC Protocol on Transport, Communications, and Meteorology reflects the spirit of the Yamoussoukro Declaration, which emphasised the integration of airlines and cooperation in the civil aviation industry.⁸⁷⁶ Unlike the other RECs, which subsequently established frameworks for the implementation of the YD, the SADC region has not taken any further steps to implement the YD at the intra-regional level. This is despite the fact that all the SADC Member States except Madagascar, South Africa, and Swaziland are State Parties to the YD. The only effort to implement the YD at the regional level that SADC has pursued is the joint COMESA, SADC, and EAC competition regulation and the joint competition authority. Although the SADC Summit has the requisite powers to adopt the YD and make the Decision legally binding on all SADC Member States, the Council has never presented the YD to the Summit for such a decision.

Therefore, the SADC region cannot be said to have implemented the provisions of the YD at the intra-regional level. Though SADC has not formally agreed on a regional framework to liberalise the air transport industry and implement the YD, most SADC States have liberalised their domestic air transport industries and have increasingly implemented the YD.⁸⁷⁷ With the help of ICAO, SADC has also established the COSCAP program for the SADC region to enhance aviation safety and foster technical cooperation and training of the SADC civil aviation authorities.⁸⁷⁸ The COSCAP has been in the process of establishing the SADC Aviation Safety Organization (SASO) pending since 2013 because its draft Charter has yet to be approved by the SADC Council of Ministers.⁸⁷⁹ However, the Council of Ministers established in October 2013 an Interim SASO Secretariat pending the approval of the Charter.⁸⁸⁰ Most importantly, through the COSCAP program, the SADC States are working on modernising and harmonising their civil aviation legislation and regulation through the draft ‘SADC Model Civil Aviation Act’ and SADC Generic Regulations (SGRs) that SADC Council has drafted.⁸⁸¹

⁸⁷⁶ Tsidiso Disenyana & Nkululeko Khumalo ‘Transport services in SACU: Accelerating harmonisation and liberalisation’ at 35.

⁸⁷⁷ Ibid.

⁸⁷⁸ Ibid at 37.

⁸⁷⁹ SADC ‘SADC aviation safety organisation’ <<https://saso.sadc.int/index.php/saso-secretariat/coscap-sadc>> accessed 2 February 2022.

⁸⁸⁰ Ibid.

⁸⁸¹ Ibid.

4.5.2. *The East African Community*

Economic and social integration in the East Africa region dates back to the colonial period, with the colonial administration establishing several institutional mechanisms to institutionalise colonial administration.⁸⁸² These institutional mechanisms included key transport initiatives such as the Kenya-Uganda Railway 1897-1901, and the East African Airways (1946).⁸⁸³ However, a more formal and structured cooperation arrangement, the East African High Commission (EAHC), was established in 1947 to foster economic cooperation between the three countries. EAHC was, on 12th December 1961, restructured into the East African Common Services Organisation (EACSO), which essentially broadened the scope for the administration of common services such as the East African Posts and Telecommunications, the East African Railways and Harbours, the East African Airways, the East African Air Aviation Services, and the East African Development Bank.⁸⁸⁴

On June 6th, 1967, the founding presidents of the three East Africa States, signed the Treaty for the East African Cooperation in Kampala. The Treaty came into force on 1st December 1967, effectively establishing the EAC as the successor to the EACSO.⁸⁸⁵ The 1967 EAC Treaty established one of the most comprehensive regional integration arrangements and was referred to as the ‘world’s most advanced regional trade treaty.’⁸⁸⁶

Integration in the community would be undergirded by the principle of joint ownership of common services, and as such, the EAC Treaty consolidated the services of the defunct EACSO into four independent corporations; the East African Railways Corporation, the East African Harbours Corporation, the East African Ports and Telecommunication Corporation and the East African Airways Corporation.⁸⁸⁷ These corporations were established as commercial institutions within the EAC, with all the Partner States having equal ownership and control, and their headquarters were distributed among the EAC Partner States.⁸⁸⁸

⁸⁸² K Adar *East African Community. First International Democracy Report* (Moncalieri: Center for Studies on Federalism 2011).

⁸⁸³ Treaty Establishing the East African Community 1999 preamble.

⁸⁸⁴ Beatrice B Kiraso ‘EAC integration process and enabling peace and security architecture’ at 2.

⁸⁸⁵ David N Ngari ‘Challenges and prospects of regional integration in Africa: A case study of East African Community’ (University of Nairobi 2016) at 4.

⁸⁸⁶ Joanna Bar ‘East African Communities (1967-1978, 1999-) and their activity for political stability of the region’ (2018) 15 *Politeja-Pismo Wydziału Studiów Międzynarodowych i Politycznych Uniwersytetu Jagiellońskiego* 247.

⁸⁸⁷ Sena Eken ‘Breakup of the East African Community’ (1979) 16 *Finance and Development* 36.

⁸⁸⁸ *Ibid.*

Despite the recognition of the EAC by the international community as a leading example of regional cooperation, the institution collapsed in 1977; the demise of the EAC was attributed to several factors as enumerated in the Preamble to the EAC Treaty;

‘Lack of strong political will, lack of strong participation of the private sector and civil society in the co-operation activities, the continued disproportionate sharing of benefits of the Community among the Partner States due to their differences in their levels of development and lack of adequate policies to address this situation.’

Nevertheless, the collapse of the EAC did not extinguish the aspirations and the desire of the EAC ruling elites to form a viable regional integration arrangement.⁸⁸⁹This aspiration and desire were captured in the EAC Mediation Agreement signed in 1984 for the division of assets and liabilities of the collapsed EAC.⁸⁹⁰Article 14(2) of the Mediation Agreement stipulated that ‘the States agree to explore and identify further areas for future co-operation and to work out concrete arrangements for such co-operation’⁸⁹¹In November 1991, the Heads of State of the three East African States met in Nairobi, Kenya and established a committee of Foreign Affairs Ministers and charged it with the responsibility of identifying and exploring the possible areas of cooperation.⁸⁹²The negotiations by the Ministers ultimately culminated in the signing the Agreement for the Establishment of the Permanent Tripartite Commission for East African Cooperation by the heads of the three countries on 30 November 1993. The Commission was charged with laying the foundation for regional cooperation by coordinating economic, social, cultural, and political issues among the three countries.⁸⁹³

Formal East African cooperation commenced on 14 March 1996 with the launch of the Secretariat of the Permanent Tripartite Commission, headquartered in Arusha, Tanzania. Cognisant of the need for regional cooperation, the Heads of State of the three countries, at their second summit on 29th April 1997, directed the Permanent Tripartite Commission to begin changing the Agreement for the Establishment of Permanent Tripartite Commission for East African Co-operation into a treaty. This was subsequently followed by Treaty-making negotiations that involved the three States and a wide array of stakeholders, which were concluded three years later with the signing of the Treaty Establishing the East African Community on 30th November 1999 in Arusha, Tanzania.

⁸⁸⁹ Adar op cit note 882.

⁸⁹⁰ Ibid.

⁸⁹¹ Ibid.

⁸⁹² Eken op cit note 887.

⁸⁹³ Ibid.

The new EAC Treaty entered into force on 7th July 2000, effectively re-establishing the EAC comprising Kenya, Uganda, and Tanzania. Burundi and Rwanda joined the Community on 1st July 2007, the Republic of South Sudan joined the Community on 16th April 2016, and the DRC was officially admitted to the community on 29th March 2022. Article 5 of the new Treaty provides for the objectives of the EAC, with the primary objective being to ‘develop policies and programs aimed at widening and deepening cooperation among the Partner States in political, economic, security and legal and judicial affairs, for their mutual benefit.’ These objectives are to be realised through the establishment of ‘a Customs Union, a Common Market and subsequently a Monetary Union and ultimately a Political Federation to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner....’

4.5.2.1. Air transport in the EAC

Cooperation in infrastructure and services is addressed in Chapter 15 of the EAC Treaty. Article 89 of the Treaty provides that:

In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty, the Partner States undertake to evolve co-ordinated, harmonised and complementary transport and communications policies; improve and expand the existing transport and communication links; and establish new ones as a means of furthering the physical cohesion of the Partner States, so as to facilitate and promote the movement of traffic within the Community. To this end, the Partner States shall take steps, *inter alia*, to:

Civil aviation as a sector of cooperation is provided for in Article 92(1) of the Treaty, which calls upon the Partner States to ‘harmonise their policies on civil aviation to promote the development of safe, reliable, efficient and economically viable civil aviation to develop appropriate infrastructure, aeronautical skills, and technology, as well as the role of aviation in support of other economic activities.’ According to Article 92(2), ‘The Partner States shall take necessary steps to facilitate the establishment of joint air services and the efficient use of aircraft as steps towards the enhancement of air transportation within the Community.’

Civil Aviation and Civil Air transport

1. The Partner States shall harmonise their policies on civil aviation to promote the development of safe, reliable, efficient and economically viable civil aviation with a view to developing appropriate infrastructure, aeronautical skills and technology, as well as the role of aviation in support of other economic activities.
2. The Partner States shall take necessary steps to facilitate the establishment of joint air services and the efficient use of aircraft as steps towards the enhancement of air transportation within the Community.

66

3. The Partner States shall in particular:
 - (a) adopt common policies for the development of civil air transport in the Community in collaboration with other relevant international organisations including the African Civil Aviation Commission (AFCAC), the African Airlines Association (AFRAA), the International Air Transport Association (IATA), and International Civil Aviation Organisation (ICAO);
 - (b) undertake to make civil air transport services safe, efficient and profitable through, *inter alia*, autonomous management;
 - (c) liberalise the granting of air traffic rights for passengers and cargo operations with a view to increasing efficiency;
 - (d) harmonise civil aviation rules and regulations by implementing the provisions of the Chicago Convention on International Civil Aviation, with particular reference to Annex 9 thereof;
 - (e) establish a Unified Upper Area Control system;
 - (f) establish common measures for the facilitation of passenger and cargo air services in the Community;
 - (g) co-ordinate the flight schedules of their designated airlines;
 - (h) consider ways to develop, maintain and co-ordinate in common, their navigational, communications and meteorological facilities for the provision of safe air navigation and the joint management of their air space;
 - (i) encourage the joint use of maintenance and overhaul facilities and other services for aircraft, ground handling equipment and other facilities;
 - (j) agree to take common measures for the control and protection of the air space of the Community;
 - (k) apply the ICAO policies and guidelines in determining user charges and apply the same rules and regulations relating to scheduled air transport services among themselves;
 - (l) adopt common aircraft standards and technical specifications for the types of aircraft to be operated in the Community; and

Note that some of the obligations enumerated in Article 92(3) are similar to the principles of the YD, which was also concluded in the same year as the new EAC Treaty. However, unlike the YD, which provides for the liberalisation of traffic rights up to fifth freedom rights, the provisions of the new EAC Treaty only mention the liberalisation of traffic

rights for passengers and cargo operations without prescribing the extent of such liberalisation.⁸⁹⁴

Since the EAC Treaty does not incorporate all the elements of the YD, the EAC's Sectoral Council on Transport, Communications, and Meteorology has taken several steps to implement the YD. The first step was taken in 2006 at the 11th meeting of the EAC Council of Ministers through directives requiring all Partner States to amend their existing BASAs to conform to the principles of the YD, liberalise air services between any two points within the EAC region. This would be done by eliminating restrictions capacity and type of aircraft in line with the provisions of the YD, constituting the EAC Air Transport Subcommittee comprising of officials responsible for administering the bilateral, officials from civil aviation authorities, airport authorities and the Attorneys General of each of the EAC Partner States which would be responsible for the implementation of the YD within the EAC region and facilitate the establishment of the East African Safety and Security Oversight Agency (CASSOA).⁸⁹⁵

Pursuant to this directive, during its Extra-Ordinary meeting held on 18th April 2007 in Arusha, the Council of Ministers established the CASSOA as an autonomous self-accounting organ of the EAC to promote safety, security, and efficiency of civil aviation in the region and ensure compliance with the ICAO SARPs. According to the 2018 official Report of the 4th CASSOA, CASSOA was second-ranked as the second-best performing Regional Safety Oversight Organisation (RSOO) globally, with the best being the European EASA which has been in existence for a long time.⁸⁹⁶ Although significant progress has been made in safety and security through the efforts of CASSOA, EAC States have been recalcitrant in amending their BASAs to comply with the principles of the YD.⁸⁹⁷ Except for the Kenya-Uganda, Kenya-Burundi, and Burundi- Rwanda BASAs, BASAs in the region generally restrict traffic rights with no provisions for fifth freedom rights, capacity frequency, and designation.⁸⁹⁸

⁸⁹⁴ Charles E Schlumberger & Nora Weisskopf 'Ready for Takeoff' [2014] The Potential for Low-Cost Carriers In Developing Countries, World Bank Group, Washington 140.

⁸⁹⁵ Ibid at 141.

⁸⁹⁶ CASSOA '4th East African Community Civil Aviation Safety and Security Oversight Agency (CASSOA)' (2018) <<https://www.cassoa.org/wpcontent/uploads/2018/05/Official%20Report%20of%20the%204th%20CASSOA%20Symposium.pdf>> accessed 2 January 2022.

⁸⁹⁷ Emmanuel Butera Mwesigye, Iravo Mike & Olive Karekezi Kemeirembe 'Influence of political regulatory environment on the liberalisation of the air transport industry in East Africa' (2020) 4 Journal of Strategic Management 31 at 32.

⁸⁹⁸ Mary Mbithi 'Assessment of the effects of regulatory regime on the cost of air transport in the East African Community,' *Boosting Intra-African Trade: The Role of Regulation and Policy* (2013) at 4.

As a result of this restrictiveness, there is no direct flight between Bujumbura and Dar es Salaam with passengers having to connect through Nairobi, resulting in a trip time of six hours, a trip that could take approximately 2.5 hours on a non-stop flight; a flight between Arusha and Kigali can also take up to 9 hours because of the unavailability of direct flights.⁸⁹⁹ All the EAC States also have a restrictive foreign investment policy in which foreign investors can only have a 49 per cent ownership stake in airlines.⁹⁰⁰ To liberalise air transport services within the region and implement the EAC Common Market Protocol, the EAC Secretariat 2014 developed the Draft Regulations on the Liberalisation of Air Transport Services.⁹⁰¹

These draft regulations apply to scheduled and non-scheduled air transport services within the EAC and liberalise the restrictive BASAs by providing up to fifth freedom rights and liberalising tariff approval, frequency, and capacity.⁹⁰² However, the draft regulation has not been adopted because of its liberal provisions on national ownership, which Kenya has resisted. Kenya particularly had an issue with Article 8(g) on eligibility criteria which read as follows ‘...is effectively controlled by a Partner State or its nationals and commits to progressively increase the ownership by State Parties or Nationals of EAC.’⁹⁰³ Kenya presented her position during the Extra Ordinary meeting of the Heads of Civil Aviation Authorities held at EAC Secretariat headquarters on 9th February 2016, where she proposed that Article 8(g) should read ‘that an eligible air operator is at least 51 per cent owned and effectively controlled by a State Party or its Nationals or both, and/or State Parties or their Nationals or both.’⁹⁰⁴ Burundi, Rwanda, Tanzania, and Uganda particularly resisted Kenya's position and advocated for the liberal nationality clause.⁹⁰⁵ Consequently, the adoption of the draft regulations has remained pending. The EAC region air transport market is still predominantly reliant on the restrictive BASAs resulting in protectionism and high cost of passenger and cargo flights.⁹⁰⁶

⁸⁹⁹ InterVISTAS Consulting ‘Costs and benefits of ‘Open Skies’ in the East African Community’ op cit note 340.

⁹⁰⁰ Ibid 16.

⁹⁰¹ InterVISTAS Consulting op cit note 340.

⁹⁰² Ibid at 28.

⁹⁰³ EAC ‘The 13th meeting of the Sectoral Council on Transport, Communications and Meteorology’ (2016) 28 <<https://www.gsma.com/subsaharanafrica/wp-content/uploads/2018/10/EAC-Sectoral-Council-of-Ministers-meetings-20-June-1-July-2016.docx>> accessed 2 February 2022.

⁹⁰⁴ Ibid.

⁹⁰⁵ Ibid.

⁹⁰⁶ Ibid.

4.6. THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

The origin of COMESA is traceable to the ministerial conference of the independent Eastern and the Southern African States convened by UNECA in Lusaka, Zambia, in October 1965.⁹⁰⁷The agenda of this conference was to consider proposals for economic cooperation among the States, and the conference recommended the establishment of an Economic Community of Eastern and Southern African States.⁹⁰⁸

The conference was followed by preparatory work that culminated with the meeting of the Heads of State and Government in Lusaka on 21st December 1981, where the Treaty establishing the Preferential Trade Area (PTA) was signed and subsequently entered into force on 30th September 1982, after the ratification of the seven signatories as stipulated by Article 50 of the PTA Treaty.⁹⁰⁹Article 29 of the PTA Treaty envisioned the transformation of the PTA Treaty, after ten years of its entry into force, into a common market, and this was fulfilled on 5th November 1993 when the Treaty establishing COMESA was signed in Kampala, Uganda, and subsequently ratified in Lilongwe, Malawi on 8 December 1994.⁹¹⁰The transformation of PTA into COMESA was in line with the Lagos Plan of Action requirements of the OAU, which envisioned that the RECs were the building blocks for creating the African Economic Community. With 21 Member States, COMESA is currently the largest REC on the African continent, with the Member States consisting of Burundi, Comoros, D.R Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia Zimbabwe.

The organs of the COMESA that have decision-making powers include; the Authority of Heads of State and Government, the Council of Ministers, and the Court of Justice. Other institutional organs of COMESA include the Intergovernmental Committee, the Technical Committees, the Secretariat, and the Consultative Committee of the Business Community. These other organs of COMESA make recommendations to the Council of Ministers responsible for recommending to the Authority of Heads of State and Government. Within this institutional hierarchy, the Transport and Communication Committee is one of the technical committees of COMESA, which is charged with decision-making in the air transport sector,

⁹⁰⁷ Amos Marawa 'The COMESA air transport liberalisation experience,' *ICAO Seminar on Aviation in Transition: Challenges and Opportunities of Liberalisation, Montreal, Canada, March* (2003) at 2.

⁹⁰⁸ Ibid.

⁹⁰⁹ Ibid.

⁹¹⁰ Ibid.

monitoring the implementation of air transport policies, and making recommendations to the Council of Ministers.⁹¹¹

4.6.1. *Air Transport Liberalisation in COMESA*

The air transport liberalisation program in the COMESA is guided by Articles 84 and 87 of the COMESA Treaty. Article 84 of the Treaty calls upon the COMESA States to establish coordinated and complimentary transport and communication policies to facilitate physical cohesion of the region and foster the cross-border movement of people, goods, and services within the Common Market. Pursuant to Article 84(a), ‘Member States shall take all necessary steps to (a) maintain, upgrade, and rehabilitate the roads, railways, airports, and harbours in their territories’. Air transport is addressed explicitly in Article 87 of the Treaty. Article 87(1) provides that

‘In order to promote the provision of better and efficient air transport, the Member States shall promote the establishment of joint ventures for co-operation in the use of equipment, in the pooling of aircraft maintenance and training facilities, in the acquisition and use of fuel and spare parts, in insurance schemes, in the coordination of flight schedules and the improvement of managerial techniques and skills.’

Article 87(2) further provides that; ‘The Member States shall take necessary steps to promote the establishment of joint air services operations by their designated airlines on intercontinental routes and the joint use by them of wide-body aircraft as steps towards the eventual establishment of a Common Market airline.’ These two provisions were evidentially informed by the Yamoussoukro Declaration of 1988, whose main thrust was the cooperation and integration of airlines.⁹¹² However, Article 87(3) of the Treaty goes beyond the spirit of the Yamoussoukro Declaration by calling upon the Member States to. ‘

⁹¹¹ Ibid at 3.

⁹¹² The World Bank Group ‘Open skies for Africa – Implementing the Yamoussoukro Decision’ op cit note 7 at 94.

- (a) adopt common policies for the development of air transport in the Common Market in collaboration with other relevant international organisations including the African Civil Aviation Commission, the African Airlines Association, the International Air Transport Association and the International Civil Aviation Organisation;
- (b) undertake to make air transport services efficient and profitable through, inter-alia, autonomous management;
- (c) liberalise the granting of air traffic rights for passengers and cargo operations with a view to increasing the efficiency and profitability of their airlines;
- (d) harmonise civil aviation rules and regulations by implementing the provisions of the Chicago Convention on International Civil Aviation, with particular reference to Annex 9 thereof;
- (e) establish common measures for the facilitation of passenger and cargo air services in the Common Market;
- (f) co-ordinate the flight schedules of their designated airlines;
- (g) consider ways to develop, maintain and co-ordinate in common, their navigational, communications and meteorological facilities for the provision of safe air navigation and the joint management of their air space;
- (h) encourage the joint use of maintenance and overhaul facilities and other services for aircraft, ground handling equipment and other facilities;
- (i) agree to take common measures for the control and protection of the Common Market air space;
- (j) agree to charge the same rates and apply the same rules and regulations relating to scheduled air transport services among themselves;
- (k) take measures directed towards aircraft standardization including co-operation in the preparation of technical specifications for the type of aircraft to be operated; and
- (l) coordinate measures and cooperate in the maintenance of the high security of air services operations.

The main regulatory instrument for the liberalisation of the air transport industry in COMESA is Legal Notice No. 2 of 1999, adopted by the COMESA Council of Ministers in 1999.⁹¹³ To ensure the successful implementation of Legal Notice No. 2 of 1999, the legal notice established the Air Transport Regulatory Board (ATRB) and charged with the mandate of advising COMESA on all the matters concerning the civil aviation industry, formulating and enforcing civil aviation rules and regulations and setting guidelines to enhance safety and security in the region.⁹¹⁴ Article 2 of the Legal Notice provides a two-phased timetable to implement the liberalised air transport industry in the region. Phase I commenced in October 1999 and would be characterised by the;

⁹¹³ COMESA 'Legal Notice No. 2 of 1999' <<https://www.comesa.int/comesa-infrastructure-development/legal-notice-no-2-of-1999/>> accessed 3 February 2022.

⁹¹⁴ Marawa op cit note 907 at 6.

- 'i) introduction of free movement of intra-COMESA air cargo and non-scheduled passenger services
- ii) introduction of free movement of intra-COMESA scheduled passenger service with frequency limit of up to two daily frequencies between any city pairs. Beyond the two daily frequencies, bilateral air services agreement will apply, and
- ii) adoption of multiple designations and elimination of capacity restrictions.⁹¹⁵

Pursuant to Article 8, States were not obliged to grant traffic rights in Phase I of the liberalisation process. Phase I of the programme ended with twelve countries, Burundi, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Rwanda, Uganda, Sudan, Zambia, and Zimbabwe, implementing the program. At the same time, the other COMESA States expressed challenges in implementing the program and sought derogation pursuant to the COMESA guidelines and procedures for request and grant of derogation.⁹¹⁶ Pursuant to Article 2(b), Phase II of the programme commenced from October 2000 and would be marked by the free movement of intra-COMESA air transport services. The free movement of intra-COMESA air services explicitly includes granting cabotage rights that had been excluded during Phase 1.⁹¹⁷ Article 3 of the Legal Notice stipulates the conditions for market access. These include that for an air carrier to be eligible to serve the intra-COMESA market, it has to be substantially owned and effectively controlled by a State Party or its nationals or combination of COMESA State Parties, be eligible for designation in the state(s) of incorporation and demonstrate financial, managerial and technical capabilities to provides the service applied for.

Therefore, the Legal Notice widens ownership and control by departing from the restrictive national ownership to a more liberal COMESA ownership and takes a different approach from the YD, which requires that traffic rights be notified on a bilateral basis between two States or, in the instances of fifth freedom rights, three States to a more liberal approach where COMESA carriers are allowed to operate between any Intra-COMESA destination.⁹¹⁸ Article 9 of the Legal Notice further provides unrestricted cross-border investment based on national treatment within the COMESA region sectors such as airports, maintenance facilities, air carriers, and ground handling services. Article 6 encourages the COMESA States to pursue intra-COMESA airline alliances and commercial arrangements, provided such arrangements comply with the COMESA rules and regulations. Article 7

⁹¹⁵ Ibid at 1097.

⁹¹⁶ Marawa op cit note 907 at 6.

⁹¹⁷ The World Bank Group 'Open skies for Africa – Implementing the Yamoussoukro Decision' op cit note 7 at 96.

⁹¹⁸ Ibid.

provides that ‘there will be no restrictions on the type and capacity of the aircraft to be used by a COMESA air carrier except as may be dictated by airport operating limitations and air-worthiness requirements.’

In the COMESA region, almost all the prerequisites for a liberalised air transport market have been established. Although Legal Notice No.2 was adopted in parallel with the YD and is more liberal than the Decision, it does not refer to it as its basis or inspiration for liberalisation.⁹¹⁹The implementation of Legal Notice has not been easy, particularly in the granting of fifth freedom rights. Most of the BASAs in the COMESA region are not compliant with the Legal Notice⁹²⁰In December 2001, the COMESA Council postponed the implementation of Phase II of the Legal Notice pending the formulation and implementation of the COMESA air transport regulations.⁹²¹

A COMESA study of 2014, commissioned to determine the extent of and constraints facing the implementation of Legal Notice No. 2, established that granting fifth freedom rights was a significant challenge and that most of the COMESA States still maintained BASAs are not compliant with the Legal Notice.⁹²²The study also identified the challenges facing the implementation as the legal status of the Legal Notice, which most COMESA States perceive as unenforceable without being domesticated, weak follow-up mechanisms, and the absence of region-wide harmonised regulations.⁹²³

4.7. CONCLUSION AND OVERALL ASSESSMENT OF THE IMPLEMENTATION OF THE YD IN RECS

The YD implementation has been occurring at the RECs level, albeit to varying degrees. Though the RECs have been instrumental in implementing the Decision, the overlapping membership of the African States in these RECs has resulted in duplication resulting in a ‘spaghetti bowl’ of a normative and institutional framework with limited authority to implement the YD.⁹²⁴

⁹¹⁹ Ibid at 95.

⁹²⁰ Jan Walulik op cit note 557 at 145.

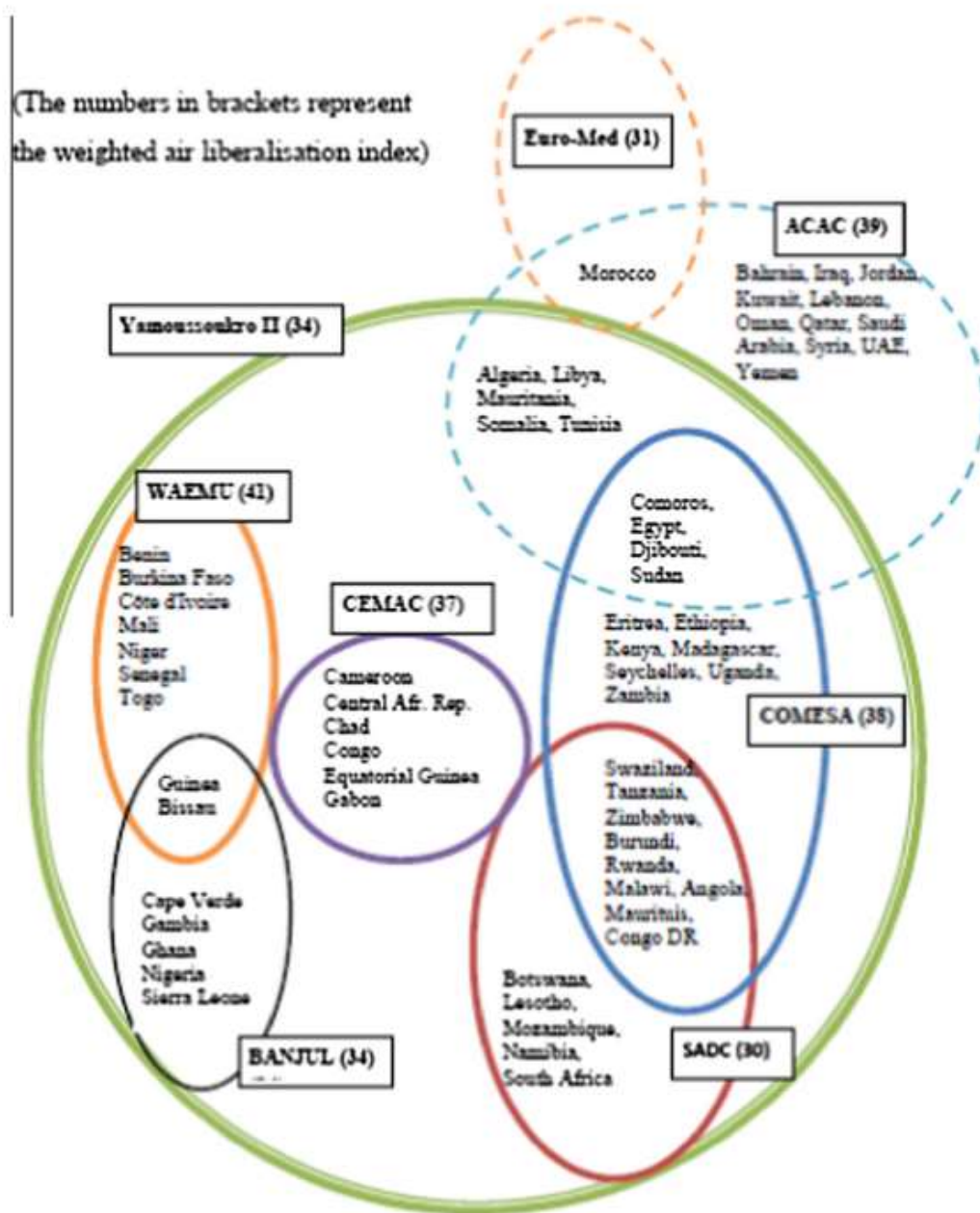
⁹²¹ Marawa op cit note 907 at 6.

⁹²² Julius Okara ‘A study to determine the level of implementation of the Legal Notice No 2 of 1999, on the Common Market for Eastern and Southern Africa Air Transport Liberalisation Programme’ (2013).

⁹²³ Ibid.

⁹²⁴ African Union ‘African Civil Aviation Policy (AFCAP)’ op cit note 708.

Figure 15: Overlapping of membership in African air transport collaborative initiatives



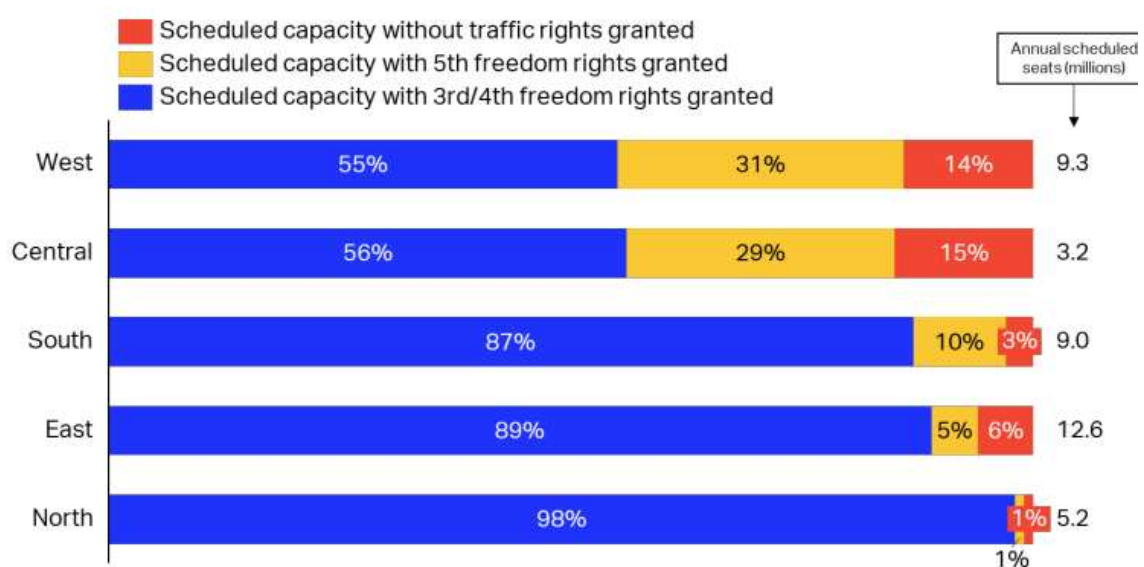
Source: World Trade Organisation

According to an assessment by Rupa Ranganathan and Vivien Foster to determine the implementation of the YD at the RECs level done in 2011, CEMAC and WAEMU were found to have the highest score of five, followed by BAG with a score of four, COMESA and EAC scored three, SADC scored two, and AMU scored one out of five.⁹²⁵ Though ECASS has

⁹²⁵ Rupa Ranganathan & Vivien Foster 'East Africa's infrastructure: A regional perspective' [2011] World Bank Policy Research Working Paper 31.

enacted decisions to implement the YD and shown its will to implement it, there has not been an assessment of the implementation of the YDs in the region.⁹²⁶ These scores in the 2011 assessment by Rupa Ranganathan and Vivien Foster largely remain the same today. Apart from the BAG, which still applies restrictions on capacity, the other RECs have liberal capacity regimes, although implementation remains challenging.⁹²⁷ Except for BAG and COMESA, which require prior approval of tariffs, all the other RECs have free tariff regimes. However, the liberal tariff regimes have not translated into tariff reduction in these other RECs due to the lack of competition on most routes.⁹²⁸ In terms of fifth freedoms rights, the West and Central Africa regions lead in the utilisation of fifth freedom rights as evidenced in figure below.

Figure 16: Scheduled capacity by freedom utilization and sub-region (2018)



Source: AfDB

Although the utilisation of the fifth freedom rights has not been prominent at the continental level, the utilisation of these rights has been higher in West and Central African regions, with approximately a third of capacity in these regions utilising them. The prominence of the fifth freedom rights in West Africa is attributed to the highly liberalised WAEMU air transport market. At the same time, in Central Africa, the lack of strong national carriers and a thin route network has made it possible for other African airlines to utilise the fifth freedom

⁹²⁶ De Matons op cit note 850 at 135.

⁹²⁷ Eric Tchouamou Njoya op cit note 389 at 7.

⁹²⁸ Ibid at 8.

rights. Regions with dominant carriers such as Eastern Africa, with Ethiopian Airways and Kenya Airways, and Southern Africa, with SAA, have shown reluctance to allow the free exercise of fifth freedom rights for the fear of competition from the other strong carriers.⁹²⁹ These dominant carriers in EAC and SADC regions have preferred to use their dominant positions in their respective RECs to negotiate BASAs individually suit their interest rather than pursuing liberalisation at the regional level.⁹³⁰

⁹²⁹ Eric Tchouamou Njoya op cit note 389 at 6.

⁹³⁰ Rupa Ranganathan and Vivien Foster, 'ECCAS's Infrastructure: A Regional Perspective' op cit note 1033.

5.0. CHAPTER FIVE: LESSONS FROM THE EU AND THE ASEAN

5.1. INTRODUCTION

As elaborated in the first chapter, bilateralism is today's principal approach to liberalising air transport services, with countries now entering into bilateral 'Open Skies' agreements. However, the shift from bilateralism to regional multilateralism in air transport services liberalisation marks a significant trend in aviation's regulatory evolution since the 1990s. This transition was spurred by diminishing enthusiasm for global multilateral frameworks under the auspices of ICAO and WTO,⁹³¹ and has fostered regulatory convergence and the creation of SAMs – the most advanced form of regional air transport liberalisation.⁹³² There is an intrinsic link between SAMs and regional economic integration, underscored by the pivotal role of air transport in enhancing connectivity, facilitation of free movement, and fostering of regionalism and economic integration.⁹³³ Consequently, regional economic arrangements such as the AfCFTA, the ASEAN Economic Community (AEC), and the European common market have pursued the establishment of SAMs as part of their broader integration efforts.⁹³⁴

In a SAM, countries consolidated their fragmented air transport markets into unified market under common regulations regarding ownership, control, safety, labour, and a cohesive external policy for air service negotiations, akin to unitary state model.⁹³⁵ The EU is the forerunner and the most advanced SAM, with other regions, such as Africa and the ASEAN, at different stages of developing or implementing similar initiatives. Though the term SAM is commonly used in the EU region, neither the EU Member States nor the EU supranational institutions have given the term an official definition.⁹³⁶ However, in the ASEAN region defines SAM to include the removal of restrictions for designated carriers on the operation of passenger and freight transport and associated commercial activities within the member states of the ASEAN region, the adoption of a common policy for user charges, tariffs, and regulatory matters, and the stipulation that majority ownership and effective control of designated carriers be vested in ASEAN States or nationals in aggregate.

⁹³¹ Haris Zuan, Darren Ellis & Romano Pagliari 'Geopolitics and the ASEAN single aviation market: Aspirations versus realities' (2021) 59 *Transportation Research Procedia* 95 at 96.

⁹³² Woon op cit note 132 at 64.

⁹³³ Dy op cit note 330.

⁹³⁴ Ibid at 3.

⁹³⁵ The International Transport Forum op cite note 151.

⁹³⁶ Woon op cit note 132 at 64.

- ⁹³⁷

The eventual full implementation of the YD will result in a Single African Air Transport Market, which, aligning with the ASEAN classification of a SAM. This chapter provides a comparative analysis of regional SAMs. Although there several regional air transport liberalisation initiatives spread across different regions of the world, the analysis in the chapter majorly focuses on the EU and the ASEAN SAMs. This is because the former is the most developed SAM and serves as the operational template for the other SAMs, while the latter is fairly developed and, in many respects, resembles and offers fundamental lessons to the regional air transport liberalisation efforts in Africa.

5.2. THE EUROPEAN UNION

5.2.1. *Overview of the EU*

The EU traces its origin to the Schuman Plan, which established the European Coal and Steel Community (ECSC) in 1950, to create a common competitive market for coal and steel in Europe and, most importantly, to alleviate concerns about German's dominance in coal and steel which threatened the European reconstruction efforts.⁹³⁸The most outstanding achievement of the ECSC was the entrenchment of a supranational functional approach in integration and the reinforcement of the European identity without detracting from the individual member states' national identity.⁹³⁹The success of the ECSC culminated in deeper European integration through the signing of the Treaty Establishing the European Economic Community (Treaty of Rome), which established the European Economic Community (ECC) in 1957.

5.2.2. *The road to EU SAM*

As discussed in the first chapter, the US Deregulation Act of 1978 tampered with the mechanics of the Chicago system, resulting in market imbalances that reverberated across the

⁹³⁷ Ian Thomas & others 'Developing ASEAN's single aviation market and regional air services arrangements with dialogue partners' [2008] CAPA Consulting, Australia at 2.

⁹³⁸ Karen J Alter & David Steinberg 'The theory and reality of the European coal and steel community' (2007)

8 Making history: European integration and institutional change at fifty 89 at 2.

⁹³⁹ Woon op cit note 132 at 68.

globe.⁹⁴⁰ What had started as an isolated economic reform in the US aviation industry soon unleashed economic tailwinds, invariably stretching the mechanics of the Chicago system beyond its elastic limit.⁹⁴¹ Although the tampering of the Chicago system was never intended to take a political dimension, the spillover effect of the economic deregulation from one polity to another resulted in market imbalances giving rise to (aero)political concerns across the globe.⁹⁴² The spill over would be felt almost immediately in Europe, particularly on the US Origin-Destination (O-D) points where fares plummeted, with some instances disparities between US and European fares being twelve-fold.⁹⁴³

Arguably, deregulation of the US domestic aviation industry caught Europe unawares.⁹⁴⁴ Since the Treaty of Rome entered into force in 1957, the ECC had neither adopted competition regulations for the air transport industry nor was it clear whether the competition provisions of the Treaty of Rome could be applied to the ECC's air transport industry.⁹⁴⁵ Consequently, the air transport industry in the ECC remained heavily regulated and protected, with each member State concluding restrictive BASAs with other States within and without Europe.⁹⁴⁶ The drafters of the Treaty of Rome had been alive to the unique challenges arising from the integration of transportation services within the ECC, particularly sea and air transport, which were accorded a special consideration under the Treaty.⁹⁴⁷

Although Article 61.1 of the Treaty of Rome provided that the freedom to provide services in the transportation services were to be governed by the provisions of the Title relating to transport, Article 84.1 of the Treaty limited the provisions of the Title to rail, road, and the inland waterway. Article 84.2 of the Treaty further accorded special solicitude to sea and air transport by stipulating that the 'Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.' The regulation of air and sea transport was therefore contingent upon unanimous positive action from the Council. Article 84.2, however, resulted in some interpretative

⁹⁴⁰ Chua op cit note 197 at 11.

⁹⁴¹ Ibid at 11.

⁹⁴² Ibid at 6.

⁹⁴³ Paul Stephen Dempsey 'Aerial dogfights over Europe: The liberalisation of EEC air transport' (1987) 53 J. Air L. & Com. 615 at 621.

⁹⁴⁴ Chua op cit note 197 at 11.

⁹⁴⁵ The International Transport Forum op cit note 151 at 53.

⁹⁴⁶ Kenneth Button 'Liberalising European aviation: Is there an empty core problem?' [1996] Journal of transport economics and policy 275 at 280.

⁹⁴⁷ The International Transport Forum op cit note 151 at 53.

controversy as to whether air and sea transport had been excluded from the general competition provisions of the Treaty of Rome as a whole or only from the Common Transport Policy.⁹⁴⁸

The first step towards a common air transport policy in ECC was taken in July 1979 when the European Commission (EC) issued a Memorandum that dealt with air transport services, commonly referred to as Memorandum 1, which enumerated the challenges bedevilling air transport which included, high tariffs, government intervention, limited opportunities for innovation and limited fare flexibilities for holidays.⁹⁴⁹ Memorandum 1 recommended an evolutionary process towards the gradual introduction of competition in the region to enhance flexibility and stimulate innovation in the industry.⁹⁵⁰ In March 1984, the Commission followed with Memorandum 2, titled ‘Progress Towards the Development of a Community Air Transport Policy,’ which focused on maintaining the status quo of BASAs while pursuing modest and gradual liberalisation of capacity and tariff regimes. Memorandum 2 recognised the impact of the US Deregulation Act and identified the need for a unified Community response to the spill over of the deregulation.⁹⁵¹ Although the European Council adopted a formal policy for sea transport in 1986, it failed to adopt both Memorandum 1 and Memorandum 2.⁹⁵² The continued special treatment of air transport was because of the intricate web of BASAs between the ECC Member States and the challenge of liberalising air transport within the ECC while maintaining the integrity of the extra-ECC BASAs.⁹⁵³

A watershed moment in the European air transport liberalisation efforts was on 30 April 1986, when the European Court of Justice (ECJ) issued a landmark judgement in the *Nouvelles Frontières* case that determined that the substantive competition provisions in Articles 85 and 86 of the Treaty of Rome could be used to police anticompetitive practices in the air transport industry.⁹⁵⁴ Through this decision, the European Council circumvented the intransigence of the Council of Ministers and the European States to adopt an air transport competition regulation, giving supranationalism an upper hand over

⁹⁴⁸ Ibid.

⁹⁴⁹ Stacy K Weinberg ‘Liberalisation of air transport: Time for the EEC to unfasten its seatbelt’ (1991) 12 U. Pa. J. Int’l Bus. L. 433 at 439.

⁹⁵⁰ Ibid.

⁹⁵¹ Dempsey op cit note 1127 at 658.

⁹⁵² Ibid at 640.

⁹⁵³ Ibid at 639.

⁹⁵⁴ Paul Stephen Dempsey ‘European aviation regulation: Flying through the liberalisation labyrinth’ (1992) 15 BC Int’l & Comp. L. Rev. 311 at 338.

intergovernmentalism.⁹⁵⁵The ECJ, however, qualified its opinion by holding that Articles 85 and 86 could not be directly enforced without a secondary implementing instrument such as a regulation or directive and therefore establishing a right without a remedy.⁹⁵⁶

Nonetheless, EU Commission used the *Nouvelles Frontières* decision to mount pressure on the Council of Ministers and the Member States to adopt the requisite regulations by instituting legal proceedings against ten airlines because of their non-compliance with the competition rules in the Rome Treaty.⁹⁵⁷The pressure bore fruit the following year when the European Council enacted the Single European Act in 1987, which committed its signatories to establish a Single European Market by 31st December 1992.⁹⁵⁸The SEA amended the Treaty of Rome and strengthened ECC's mandate on the Community's common policies, including policies in the air transport sector, and most significantly introduced three packages of liberalising that were to take effect in 1987, 1990, and 1993.⁹⁵⁹

The first package commenced on 1st January 1988 and was a three-year transition that involved relaxation of rules to allow multiple designations of carriers on the major EU hub routes.⁹⁶⁰ This package also liberalised market access rules by allowing EU carriers to exercise fifth freedom rights within the intra-EU routes at up to 30 percent of total capacity.⁹⁶¹The second package further expanded the liberalisation scope of its predecessor by allowing EU carriers to operate unrestrained third and fourth freedom rights between their home country and another EU country and further eased restrictions on fifth freedom rights to up to 50 per cent of total capacity.⁹⁶²Therefore, the first two packages were a modest and incremental relaxation of the pre-existing regime, indicating that the EU was committed to a well-coordinated gradual liberalisation process, unlike the US approach of immediate or instantaneous change through the Deregulation Act of 1978.⁹⁶³

⁹⁵⁵ Lawton op cit note 196 at 96.

⁹⁵⁶ Werner F Ebke & Georg W Wenglorz 'Liberalizing scheduled air transport within the European community: From the first phase to the second and beyond' (1990) 19 *Transp. LJ* 417 at 432.

⁹⁵⁷ Sveinn Vidar Gudmundsson, 'Liberalisation of Air Transport,' *International Handbook of Network Industries* (Edward Elgar Publishing 2011) at 8.

⁹⁵⁸ Ebke and Wenglorz op cit note 1140 at 433.

⁹⁵⁹ Eddy E Van de Voorde 'European air transport after 1992: Deregulation or re-regulation?' (1992) 37 *The Antitrust Bulletin* 507 at 516.

⁹⁶⁰ Alan Dobson 'Civil aviation and European integration: Creating the seemingly impossible SEAM' (2010) 48 *J. Common Mkt. Stud.* 1127 at 1137.

⁹⁶¹ Ebke and Wenglorz op cit note 1140 at 434.

⁹⁶² Woon op cit note 132 at 70.

⁹⁶³ *Ibid* at 71.

The third package instituted the most radical reform that eliminated virtually all forms of restrictions within the EU, effectively establishing the EU SAM as a fully-fledged common aviation area.⁹⁶⁴ Consequently, Airlines in the EU-SAM could now enjoy the freedom of establishment and all the nine freedoms of the air transforming the EU into a ‘domestic-like’ market.⁹⁶⁵ The third package eliminated the regulatory distinction between charter and scheduled operations within the EU-SAM and, most importantly, replaced the traditional SOEC clause with the concept of a ‘Union carrier,’ which now required that an airline be majority owned and effectively controlled by any of the EU State and/or its citizens.⁹⁶⁶

Table 3: three packages of liberalisation in the EU

Package I (1987)	Package II (1990)	Package III (1992)
<ul style="list-style-type: none"> • Fifth, freedom rights services only on regional routes and were limited to 30 percent capacity. • Multiple designations of carriers were also phased and subjected to thresholds. • Cabotage was initiated by first opening up regional services for flights between category 1 or 2 airports operated only certain types of aircraft. 	<ul style="list-style-type: none"> • Widened the thresholds set in the first package. • Fifth, freedom rights services capacity was increased to 50 percent. • The threshold was further lowered in carrier designation. • Cabotage was expanded but in a limited manner. 	<ul style="list-style-type: none"> • All routes within the single market were opened. • Full cabotage was permitted by 1997. • Fifth, freedom of traffic rights was also permitted. • Carrier designations and capacity distribution limitations were abolished altogether. • The concept of community carrier where it must be owned by majority ownership by EU member states and/or nationals of member states and effectively controlled by such persons

⁹⁶⁴ Cornelia Woll ‘Transatlantic relations as a catalyst to European integration: The activism of the European commission in the case of international aviation’ at 2.

⁹⁶⁵ The International Transport Forum op cit note 151 at 55.

⁹⁶⁶ Ibid.

5.2.3. EU -External policy

After establishing the EU-SAM, the European Commission pursued a coordinated external air transport policy by asserting exclusive competence in external aviation policies.⁹⁶⁷ Through a strategy that Brian Havel calls the ‘encirclement,’ the US had entered into bilateral open skies agreements with the small EU Member States, intending to entice the EU's larger States into similar arrangements.⁹⁶⁸ The open skies agreements resulted in lower fares. They also stimulated traffic on transatlantic routes to the extent that passengers from neighbouring EU States started flying from the Member States which had entered into the open sky's agreements with the US.⁹⁶⁹ This led to an imbalance in the EU's domestic market that mounted pressure on the recalcitrant States such as Germany, Italy, and France to enter into negotiations with the US for similar BASAs.

The proliferation of bilateral open skies agreements between the individual EU States and the US made the Commission worried that the US would cannibalise the EU common aviation market. The EU Member States, through the Council of Ministers, persistently thwarted the EC's efforts to establish a coordinated approach by declining to grant the EC the exclusive mandate on two occasions that the same was sought, in 1993 and 1995.⁹⁷⁰ In 1998, the EC resorted to the ECJ by filing several cases against eight EU Member States,⁹⁷¹ challenging their competence to sign external agreements without the endorsement of the EU.⁹⁷² Before the ECJ, the EC argued that BASAs between the US and individual Member States would fragment the EU'S common aviation market and infringe the principle of non-discrimination and the freedom of establishment.⁹⁷³ This is because the nationality clauses in the BASAs threatened the integrity of the EU common aviation market by discriminating against Community carriers that were majority owned by interest from the other EU Member States.

⁹⁶⁷ Dy op cit note 330 at 8.

⁹⁶⁸ Havel op cit note 75 at 31.

⁹⁶⁹ Dy op cit note 330 at 9.

⁹⁷⁰ Ibid.

⁹⁷¹ Commission v. Denmark: C-467/98; Commission v. Sweden: C-468/98; Commission v. Finland: C-469/98; Commission v. Belgium: C-471/98; Commission v. Luxemburg: C-472/98; Commission v. Austria: C-475/98; Commission v. Germany: C-476/98; Commission v. UK [2002] E.C.R. I-9427.

⁹⁷² Gonzalo Willalta Puig and Cédric Darcis ‘The development of European Union implied external competence: The court of justice and opinion 1/03’ (2009) 25 Anuario Español de Derecho Internacional 501 at 505.

⁹⁷³ Dy op cit note 330 at 10.

On 5th November 2002, the ECJ pronounced a series of judgements, commonly referred to as ‘open skies judgements,’ which established that although the EU Member States had exclusive competence to negotiate external BASAs, the competency of the EU was limited to intra-Community fares, computer reservation systems, and airport slots. Most importantly the ECJ held that the nationality provisions in the BASAs violated the freedom of establishment as stipulated under Article 43 of the Rome Treaty.⁹⁷⁴ Following the ‘open skies judgements,’ the EU transport ministers on 5th June 2003 granted the Commission the mandate to engage in *en bloc* negotiations.⁹⁷⁵ Consequently, the EU entered into ‘horizontal agreements’ with countries such as the US, Morocco, Chile, Iceland, and Switzerland.⁹⁷⁶ A fundamental difference between deregulation in the US and liberalisation in the EU is that whereas the US Deregulation Act was limited to domestic aviation, the EU liberalisation process simultaneously addressed domestic and international aviation.⁹⁷⁷

5.2.4. EU-SAM and SAATM Compared

As discussed in the second chapter, air transport liberalisation in the EU and the establishment of the EU-SAM directly impacted the African air transport industry because of the strong European and African air transport links, greatly informed by the colonial patterns of trade. The liberalisation of the European aviation policies particularly presented a big threat to the African airlines principally because of the close ties between Europe and Africa in civil aviation matters as, Europe was the main market for Africa’s long-haul traffic.⁹⁷⁸ Consequently, the liberalisation process in the EU was the reference point for liberalisation in Africa. The preamble of the Yamoussoukro Declaration aptly captured the reference as;

Aware of the effects of deregulation in the United States and of the consequences it may have on policies of other countries for the regulation of their air transport industry,

Gravely concerned about the potential adverse effects on the African airlines of the European air transport liberalization policies, especially the application by EEC of the Treaty of Rome to air transport services and the creation of a single internal market by 1993,

⁹⁷⁴ Conor C Talbot ‘The battle for the skies: Recent legal developments in the EU and US, and their implications for the consolidation of the airline industry’ [2008] Available at SSRN 1655144 at 14.

⁹⁷⁵ The International Transport Forum op cit note 151 at 55.

⁹⁷⁶ Yu-Chun Chang, George Williams & Chia-Jui Hsu op cit note 559 at 165.

⁹⁷⁷ The International Transport Forum op cit note 151 at 55.

⁹⁷⁸ United Nations. Economic Commission for Africa, ‘Report of the Special Conference of Ministers of Civil Aviation: Yamoussoukro, Côte d’Ivoire 6-7 October 1988’ 6

<<https://repository.uneca.org/handle/10855/11514>> accessed 19 August 2021.

As a response to the liberalisation in the EU, African countries tried to replicate the success of the EU-SAM, albeit with little success. Like the EU, the YD pursued a gradual liberalisation process. However, the gradual liberalisation process in the EU was much more well-coordinated in the form of three well-articulated stages spread over ten years, from 1987 to 1997. This is compared to gradual liberalisation in Africa, which is only captured in the YD in the form of a two-year transitional period as provided for in Articles 10(1) and 3 of the YD. However, since the implementation of the YD was considered pending during the first years after coming into force, the transitional measures only remained theoretical.⁹⁷⁹

Additionally, both State Parties to the YD and the EU Member States were initially reluctant to liberalise their regional air transport services, with States in both regions jealously protecting their domestic carriers through restrictive BASAs. Whereas the situation in Africa has largely remained the same, in the EU, the supranational institutions have increasingly asserted their policy-making mandate in the air transport sector and largely dismantled the authority of the Member States in air transport matters, ultimately replacing intergovernmentalism with supranationalism.⁹⁸⁰

Although African States have on paper established supranational institutions within the auspices of the AU, which are capable of policing the implementation of the YD and the operationalisation of SAATM, supranationalism in Africa has remained but a rhetoric. This is particularly because the continent's post-colonial economic, political and social architecture is based on ideals of independence and sovereignty.⁹⁸¹ Supranationalism in Africa has also been undermined by the lack of political will, political instabilities on the continent, and the high level of financial dependency, which overexposes the supranational institutions to external influence by foreign agencies and States such as China and the US. It is, therefore, highly unlikely that African States will cede their sovereignty to supranational institutions such as AFCAC, which is the Executing Agency of the YD and SAATM.

A fundamental difference between the EU-SAM and the SAATM is that the former is a full open skies regime that allows the exercise of the nine freedoms of the air, and the latter is a limited open skies agreement that only provides for up to fifth freedom rights. Relatedly,

⁹⁷⁹ Charles E Schlumberger *Open Skies for Africa: Implementing the Yamoussoukro Decision* op cit note 7 at 15.

⁹⁸⁰ Lawton op cit note 196 at 99.

⁹⁸¹ Teresa Pinto Nogueira 'Supranational bodies do not thrive in Africa'

<<https://www.gisreportsonline.com/r/supranational-organizations-africa/>> accessed 5 May 2022.

whereas the EU implemented its regional market first and then proceeded to establish a common external aviation policy, African States were, as of August 2022, negotiating a common external air transport policy before implementing the YD and operationalising SAATM amongst themselves.

5.3. THE ASEAN SINGLE AVIATION MARKET

The ASEAN traces its origin to the Bangkok Declaration of 8th August 1967 made by Indonesia, Malaysia, Philippines, Singapore, and Thailand to foster security, peaceful coexistence, and stability in the volatile political-security environment following the outbreak of the Vietnam War.⁹⁸² Although the Bangkok Declaration also contained other objectives such as ‘to accelerate economic growth, social progress, and cultural development,’ these had been inserted as a strategy to dispel the notion that ASEAN was a security pact and a tool of American foreign policy.⁹⁸³ ASEAN was, in essence, a political bloc and security pact by the five founding ASEAN market-based economies against the communist Southeast Asia states during the Cold War.⁹⁸⁴ Brunei Darussalam joined upon attaining political independence in 1984, and Vietnam joined in 1985, while Lao People's Democratic Republic Lao PDR (1997), Myanmar (1997), and Cambodia (1999) joined following the end of the Cold War.⁹⁸⁵

With the ASEAN being established when its member states had just attained their political independence and, therefore, still reeling from the effects of colonial rule, the principle of State sovereignty became entrenched in the ASEAN.⁹⁸⁶ Since the independence of the ASEAN States, the principle of sovereignty has dictated all forms of engagement and cooperation in the region. With a very small Secretariat in place with no powers to enforce ASEAN agreements, the concepts of supranationalism and legalistic structures are alien to the ASEAN States.⁹⁸⁷ In the place of supranationalism, the ASEAN has, over time, developed a unique form of diplomacy dubbed the ‘ASEAN Way’ based on the Malay cultural practices of *musjawarah* and *mufukat* that embrace consensus building, politeness, consultation, non-intervention, and non-confrontation.⁹⁸⁸ Through the ‘ASEAN Way’ diplomacy, the ASEAN

⁹⁸² Colin CH Law & Rungkaew Katekaew ‘COVID-19: ASEAN aviation policy and the significance of intra-regional connectivity’ (2022) 4 Journal of Asian Economic Integration 1 at 3.

⁹⁸³ Rodolfo C Severino ‘Politics of Association of Southeast Asian Nations Economic Cooperation’ (2011) 6 Asian Economic Policy Review 22 at 23.

⁹⁸⁴ Chia op cit note 198 at 5.

⁹⁸⁵ Peter J Forsyth & others *Preparing ASEAN for Open Sky* (ASEAN Secretariat 2004) at 144.

⁹⁸⁶ Chia op cit note 198 at 5.

⁹⁸⁷ Dy op cit note 192 at 12.

⁹⁸⁸ Chua op cit note 197 at 62.

states try as much as possible to arrive at a consensus. If there are any divergences, these are set aside for future deliberations, and the focus is shifted to the points of convergence.⁹⁸⁹ Members are also afforded sufficient flexibility, and integration and cooperation are pursued at a pace that all states are comfortable with.⁹⁹⁰

5.3.1. *The ASEAN Open Skies*

Serious economic cooperation and integration started almost thirty years after the establishment of the ASEAN and was heralded by the 1992 ASEAN Free Trade Area (AFTA) that liberalised trade in goods.⁹⁹¹ AFTA was complemented by the 1995 ASEAN Framework Agreement on Services (AFAS) that liberalised trade in services, including air transportation.⁹⁹² Economic cooperation and integration would be underpinned by the ‘ASEAN Minus X’ formula, which sums up the ‘ASEAN Way’ diplomacy by enabling two or more member states to participate in intra-ASEAN economic arrangements..⁹⁹³ Although one of the services covered by AFAS was air transportation services, the liberalisation of air transportation services was only limited to ‘soft’ rights such as sales and marketing, setting up of airline offices, maintenance, repair, and computer reservation systems, aircraft leasing. In contrast, ‘hard’ rights such as traffic rights, capacity, price-fixing, designation, and frequency were explicitly excluded.⁹⁹⁴

The desire to liberalise air transport services in the ASEAN region was embodied in several declarations. In December 1995, at the Fifth Summit in Bangkok, the ASEAN Leaders adopted the Agenda for Greater Economic Integration, which incorporated an Open Sky Policy (OSP) as an area of cooperation in the Plan of Action for Transport and Communications (1994–1996).⁹⁹⁵ The aspirations for the establishment of the ASEAN OSP were subsequently reinforced at the 7th Air Transport Meeting of the ASEAN Transport Ministers in 2001 Kuala Lumpur, which initiated regional efforts for a phased and progressive liberalisation of air transport services and culminated with the signing of ASEAN Memorandum of Understanding

⁹⁸⁹ Dy op cit note 192 at a11.

⁹⁹⁰ Chia op cit note 198 at 5.

⁹⁹¹ Chia op cit note 198.

⁹⁹² Ibid at 4.

⁹⁹³ Ibid at 11.

⁹⁹⁴ Dy op cit note 192 at 13.

⁹⁹⁵ Chua op cit note 197 at 64.

⁹⁹⁶ on Air Freight Services in 2002 as the first step towards the full liberalisation of ASEAN air freight services.⁹⁹⁷

In the meantime, the ASEAN States pursued limited ‘Open-Skies’ agreements using the ‘ASEAN Minus X’ formula in three ASEAN sub-territories; Brunei Darussalam-Indonesia-Malaysia-Philippines, East ASEAN Growth Area (BIMP-EAGA), Cambodia–Laos–Myanmar–Vietnam bunch (CLMV) and Indonesia, Malaysia, and Thailand Growth Triangle (IMT-GT).⁹⁹⁸ During the 10th ASEAN Transport Ministers' Meeting in Phnom Penh, Cambodia, in 2004, the ASEAN Transport Ministers adopted the 'Action Plan for ASEAN Air Transport Integration and Liberalisation 2005–2015', which outlined strategic actions for the establishment of the ASAM by 2015.⁹⁹⁹ The ministers also endorsed the Roadmap for Integration of the Air Travel Sector (RIATS), which laid down specific actions and milestones to liberalise cargo and passenger services.¹⁰⁰⁰ The RIATs commitments for passenger services included;

- I. for air freight (cargo) services, significant liberalisation by 2006, and full liberalisation by 2008
- II. for scheduled passenger services-
 - unlimited third and fourth freedom flights for all designated points within ASEAN sub-regions by 2005, and for at least two designated points in each country between the ASEAN sub-regions by 2006
 - unlimited fifth freedom traffic between designated points within the ASEAN sub-regions by 2006 and at least two designated points in each country between the ASEAN sub-regions by 2008
 - unlimited third and fourth freedom flights between the capital cities by 2008
 - unlimited fifth freedom flights for the capital cities by 2010.¹⁰⁰¹

⁹⁹⁶ Ibid.

⁹⁹⁷ Forsyth & others op cit note 985 at 144.

⁹⁹⁸ Rizkia Amelia Sania Putri *Regional open skies regime in Southeast Asia and its relevance to air transport deregulation in Indonesia* (McGill University (Canada) 2017) at 39.

⁹⁹⁹ Isabelle Laplace, Nathalie Lenoir & Chantal Roucolle ‘Economic impacts of the ASEAN single aviation market: Focus on Cambodia, Laos, Myanmar, The Philippines and Vietnam’ (2019) 25 *Asia Pacific Business Review* 656 at 656.

¹⁰⁰⁰ Muheto Darcy Dominique ‘The impact of open-sky agreements on regional integration. Focused on case studies of the EU and ASEAN’ (부경대학교 2021) at 46.

¹⁰⁰¹ Alan Khee-Jin Tan ‘The ASEAN multilateral agreement on air services: En route to open skies?’ (2010) 16 *Journal of Air Transport Management* 289 at 290.

These commitments were subsequently formalised by three multilateral agreements that would underpin the ASEAN OSP; the Multilateral Agreement on Air Services (MAAS); the Multilateral Agreements on Full Liberalisation of Air Freight Services (MAFLAFS), and the Multilateral Agreements on Full Liberalisation of Passengers Air Services (MAFLPAS).¹⁰⁰² The MAAS was adopted on 20th May 2009 and allowed for liberalisation of the third, fourth, and fifth freedom rights among the ASEAN capitals.¹⁰⁰³ The MAFLAFS was adopted on 10th December 2009 to liberalise air freight services. The MAFLAFS eliminates restrictions on all ASEAN air freight services' third, fourth and fifth freedom rights. MALPAS was adopted on 10th November 2010 to liberalise passenger air services by eliminating restrictions on the third, fourth, and fifth freedom in all ASEAN secondary international airports.¹⁰⁰⁴ The MAFLPAS supplements the MAAS by providing additional access points to the non-capital points in the ASEAN territories. Therefore, the ASEAN OSP is a relatively modest endeavour that falls short of a true open skies policy since it only provides for third, fourth, and fifth freedom rights where cabotage is not envisioned.¹⁰⁰⁵

5.3.2. *Ownership and Control in ASEAN*

Articles 3(2)(a) of MAAS, MAFLPAS, and MAFLAFS liberalise ownership and control rules by providing three alternative ownership and control options. These are;

¹⁰⁰² AABNA Surya Putra 'Competition law and policy harmonisation: Its relation to fair competition realisation in ASEAN single aviation market' (2019) 3 Udayana Journal of Law and Culture 164 at 165.

¹⁰⁰³ Dodik Setiawan Nur Heriyanto & Yaries Mahardika Putro 'Challenges and opportunities of the establishment ASEAN open skies policy' (2019) 6 PADJADJARAN JURNAL ILMU HUKUM (JOURNAL OF LAW) 466 at 470.

¹⁰⁰⁴ Dexter Lee 'The European and Southeast Asian single aviation markets. EU centre, Background Brief No. 15, July 2015' at 10.

¹⁰⁰⁵ AKJ Tan 'The ASEAN single aviation market: Liberalizing the airline industry' [2014] ERIA Policy Brief 5.

- a) (i) substantial ownership and effective control of that airline are vested in the Contracting Party designating the airline, nationals of that Contracting Party, or both; or
- (ii) subject to acceptance by a Contracting Party receiving such application, the designated airline which is incorporated and has its principal place of business in the territory of the Contracting Party that designates the airline, is and remains substantially owned and effectively controlled by one or more ASEAN Member States and/or its nationals, and the Contracting Party designating the airline has and maintains effective regulatory control; or
- (iii) subject to acceptance by a Contracting Party receiving such application, the designated airline is incorporated in and has its principal place of business in the territory of the Contracting Party that designates the airline in which the Contracting Party designating the airline, has and maintains effective regulatory control of that airline, provided that such arrangements will not be equivalent to allowing airline(s) or its subsidiaries access to traffic rights not otherwise available to that airline(s); and

The first option represents the traditional restrictive SOEC clause met by the State or the nationals of the Contracting State. This option maintains what had previously been provided for by the BASAs between the ASEAN States. Option (ii), on the other hand, retains the SOEC requirement but further provides that this requirement can be met 'by one or more the ASEAN Member States and/or its nationals.' This, in essence, spread out the SOEC requirement throughout the ASEAN region, making it possible to establish an ASEAN 'Community Carrier,' which should adhere to the ICAO proposed 'principal place of business and effective regulatory control' clause.¹⁰⁰⁶ The second option is, however, constrained by the qualification 'that subject to acceptance by a Contracting Party,' meaning that each State must approve the operations of a designated Community Carrier, unlike the EU, where a community carrier operates automatically without the need to seek for approval. This qualification presumably

¹⁰⁰⁶ Ibid at 7.

gives states the discretion to reject a designated community carrier to protect their airlines from the competition.¹⁰⁰⁷

The requirement for approval is a serious bureaucratic bottleneck for investors wishing to establish an ASEAN Community carrier, since they have to approach each of the ten ASEAN States to obtain permission which may be denied at any State's sole discretion. Additionally, establishing a community carrier under the second option is constrained by the fact that all three ASEAN agreements are silent on the need to change the 'internal lock' of the SOEC requirement. Therefore, the second option presupposes that the domestic law of a designating State allows majority foreign control of airlines which is far from the reality on the ground, with some countries like the Philippines capping foreign investment at 40 per cent.¹⁰⁰⁸ This explains why a community carrier does not exist in the ASEAN region despite being provided for in the three agreements.

The third option is the most liberal of the three alternatives because it eliminates the traditional SOEC requirement, with airlines only expected to meet the 'principal place of business and effective regulatory control' requirement. The import of the third option is that foreigners, even those from outside the ASEAN region, can wholly own an airline that operates in the ASEAN region. Like the second, the third option is not unfettered as it is 'subject to acceptance by a Contracting Party. An Additional constrain exists in the third option in that 'such arrangements will not be equivalent to allowing airline(s) or its subsidiaries access to traffic rights not otherwise available to that airline(s),' meaning that airlines outside of the ASEAN region cannot buy into an ASEAN carrier and start using it to access intra-ASEAN routes that were not previously available to them. The impact of the third option is that only foreign investment from non-airline interests is welcomed in the ASEAN region.¹⁰⁰⁹

In conclusion, although the three ASEAN agreements provide options for liberalising ownership and control, the region continues to rely on the traditional restrictive SOEC requirement. However, airlines in the ASEAN region resorted to the use of a mechanism referred to as 'institutional arbitrage' to bypass the restrictive SOEC requirement. 'Arbitrage' is a finance concept that allows investors to capitalise on the differences in legal regimes in

¹⁰⁰⁷ Ibid at 291.

¹⁰⁰⁸ Ibid at 7.

¹⁰⁰⁹ Ibid at 291.

various jurisdictions to maximise their profits.¹⁰¹⁰ In the air transport industry context, ‘institutional arbitrage’ takes the form of franchising, alliances, and joint ventures to establish new airlines that are considered nationals of the target country and which are subject to the country's domestic law on the maximum foreign investment. With more than 13 cross-border joint ventures, the ASEAN was the pioneer region in establishing ‘institutional arbitrage’ in the air transport industry leading to the proliferation of LCCs in the region.¹⁰¹¹

5.3.3. *Implementation of the ASEAN OSP*

Although the first phase of the establishment of the ASAM was completed in April 2016 when all the ASEAN States ratified the MAFLPAS, protectionism in the ASEAN region still exists, with some Members restricting access to their domestic air transport markets.¹⁰¹² For example, the Philippines continue to restrict entry to Ninoy Aquino International Airport, while Indonesia has not freed up its secondary cities.¹⁰¹³ Therefore, the ASAM implementation has not gained traction as initially anticipated.¹⁰¹⁴ This can be attributed to several factors, such as political and economic development disparities among the ASEAN States.¹⁰¹⁵ While some ASEAN States such as Brunei, the Philippines, Indonesia, Malaysia, Singapore, and Thailand have high per capita incomes and developed aviation industries, others such as Cambodia, Lao PDR, and Myanmar are amongst the poorest countries in the world with low development in the aviation industry.¹⁰¹⁶

The disparities in aviation policies also result from the region's differences in history, politics, and geographical conditions. The former group has developed aviation industries due to archipelagos, maritime background, and liberal political freedom. In contrast, the late political liberalisation derailed the development of the aviation industry in the latter. Additionally, Lao PDR and Cambodia are landlocked countries and traditionally rely on surface modes of transport for their internal connectivity. In contrast, Myanmar heavily relies on water-based transport for its domestic transport.¹⁰¹⁷

¹⁰¹⁰ Dy op cit note 192 at 23.

¹⁰¹¹ Dominique op cit note 1000 at 9.

¹⁰¹² Law and Katekaew op cit note 982 at 4.

¹⁰¹³ Heriyanto & Putro op cit note 1003 at 471.

¹⁰¹⁴ Zuan, Ellis and Pagliari op cit note 931 at 97.

¹⁰¹⁵ Forsyth & others op cit note 985 at 144.

¹⁰¹⁶ Heriyanto and Putro op cit note 1003 at 143.

¹⁰¹⁷ Law and Katekaew op cit note 982 at 3.

Although practical, particularly in light of disparities in the aviation industry, the 'ASEAN way' is considered ill-equipped to facilitate buy-ins from recalcitrant States due to its aversion to excessive institutionalisation and supranationalism.¹⁰¹⁸ Unlike in the EU, where OSP is placed under the ECJ, The ASEAN OSP is a negotiated initiative with progress dependent on intergovernmental consensus between the Member States as opposed to the ASEAN Secretariat.¹⁰¹⁹ The absence of a supranational institution to spearhead the implementation of the ASEAN OSP has resulted in a maze of fragmented liberalisation strategies with other blocks ahead of the liberalisation of air services in the ASEAN, further derailing the implementation of the ASEAN OSP.¹⁰²⁰ For example, in 2010, the ASEAN and China signed the ASEAN-China Air Transport Agreement – ACATA, which replaced the individual BASAs between the ASEAN States and China.¹⁰²¹

The ACATA allows ASEAN carriers unrestricted third and fourth freedom rights to any international airport in China. Ergo, whereas an Indonesian airline can access all Chinese international airports via only airports in Indonesia, a Chinese airline can access all the ASEAN international airports from any point in China. The ACATA is therefore more favourable to the Chinese carriers as it allows them to establish multiple air hubs and enjoy more connectivity resulting in a lopsided competition in the ASEAN region.¹⁰²²

Additionally, some of the ASEAN States have entered into other liberal open skies agreements ahead of the ASAM with Singapore and Brunei members of the MALIAT Agreement, which is more liberal than the ASAM. Singapore and Brunei also entered into a liberal open skies agreement with Thailand in December 2004 that allows for the unlimited exercise of up to six freedom rights.¹⁰²³ On 2nd June 2021, the ASEAN and the EU signed the ASEAN-EU Comprehensive Air Transport Agreement (AE CATA), the world's first bloc-to-bloc aviation agreement. The AE CATA will enable ASEAN and EU carriers to fly any number of services between the two blocks and facilitate the carriers to fly up to 14 weekly passenger services and unrestricted freight services through and beyond any third state.¹⁰²⁴ This disjointed

¹⁰¹⁸ Heriyanto and Putro op cit note 1003 at 480.

¹⁰¹⁹ Permana & others op cit note 199 at 51.

¹⁰²⁰ Dy op cit note 192 at 21.

¹⁰²¹ Tan op cit note 1005 at 6.

¹⁰²² Lee op cit note 1004 at 11.

¹⁰²³ Ibid at 10.

¹⁰²⁴ European Union 'Aviation: ASEAN and the EU Conclude the World's First Bloc-to-Bloc Air Transport Agreement' <https://www.eas.europa.eu/eas/aviation-asean-and-eu-conclude-world%E2%80%99s-first-bloc-bloc-air-transport-agreement_en> accessed 5 May 2022.

approach that seeks connectivity with external partners ahead of the ASAM is likely to disenfranchise the ASEAN carriers in the future as foreign airlines, similar to China's advantage currently enjoyed by China.¹⁰²⁵

5.3.4. ASAM and SAATM compared: what are the lessons for SAATM

Multilateral air transport liberalisation efforts in Africa and the ASEAN region have striking similarities. First, the two regions share an aversion to supranationalism, as evidenced by the lack of a supranational body like the European Commission to police the implementation of air transport liberalisation. This is because of their shared heritage of European imperialism, which deeply entrenched sovereignty in the post-colonial States. A fundamental difference between them in this aspect is that African States have *dejure* embraced some form of supranationalism within the context of the AU while *defacto* embracing intergovernmentalism. The ASEAN region is both a *dejure* and *defacto* intergovernmental organisation with no intention of embracing any form of supranationalism in the foreseeable future since doing so would be contrary to the ASEAN Way diplomacy.¹⁰²⁶

In terms of approaches, the two regions adopted a gradual approach to liberalisation. However, the ASEAN gradual approach was more incremental and well-coordinated, starting from a sub-region to the entire region, from secondary cities to capital cities, and ultimately to all ASEAN cities. However, in the case of the YD, as earlier explained, the only flexibilities provided were during the two-year period and were never utilised.

Additionally, the two regions have similar aero-political challenges that have derailed the liberalisation process; these include the disparities in the aviation industry, disjointed efforts, and protectionism among some States. Similarly, although the regional agreements for air transport liberalisation in the ASEAN and Africa contain liberal provisions on ownership and control, States in these two regions still maintain BASAs that contain the traditional SOEC clauses. Relatedly, though the concept of Community carriers is envisioned in the multilateral agreements of these two regions, the restrictive SOEC clauses found in virtually all BASAs of the States in these two regions have frustrated the emergence of regional Community carriers. However, African airlines can borrow a leaf from their ASEAN counterparts, who are the pioneers in using 'institutional arbitrage' to bypass the restrictive SOEC requirements.¹⁰²⁷

¹⁰²⁵ Lee op cit note 1004 at 11.

¹⁰²⁶ Dy op cit note 192 at 21.

¹⁰²⁷ Dominique op cit note 1000 at 9.

5.4. CONCLUSION

The chapter has discussed the experiences of supranationalism and intergovernmental models in the EU and ASEAN respectively and how they each relate to SAATM on the mechanisms of successful regional integration and policy implementation. The EU case of supranationalism, where sovereignty in certain policy areas, including air transport liberalisation, is ceded to an authority above the nation-state. The discussion noted that the model is characterised by its ability to enact regulations that are directly applicable across all member states, bypassing the need for individual national legislation. The European Commission and the ECJ exemplifies the institutions charged with supranational governance by enforcing compliance and ensuring uniform application of air transport policies across the EU. This framework facilitated the creation of the Single European Sky, promoting seamless and efficient air transport market within the EU. The success of this model lies in its institutional capacity to arbitrate disputes, enforce compliance, and adapt regulations in response to the evolving needs of the market.

Contrastingly, the ASEAN approach of intergovernmental model emphasizes the sovereignty of the member states in policy-making and implementation. Decisions within ASEAN are made by consensus, reflecting the ‘ASEAN Way’ of diplomacy, characterised by non-interference, consensus-building, and flexibility. This model has resulted to a more gradual and less uniform approach to air transport liberalisation, as seen in the ASAM. While ASEAN has significantly liberalised their markets, the chapter notes that the lack of supranational authority similar to the ECJ means that the enforcement of agreements relies heavily on political will and mutual agreement of member states. This model, while respecting the sovereignty of each state, can be long and time-consuming.

In Africa, the approach to integration, and by extension liberalisation of air transport as captured under SAATM is ostensibly based on a supranational model, with the AU and its specialised agency, the AFCAC, serving as the central authorities. However, the reality is more akin to a *de jure* supranational but *de facto* intergovernmental model. This discrepancy arises from the formal adoption of SAATM and its regulatory framework at the continental level, suggesting commitment to supranational governance principles. Cooperation in the African air transport sector has largely borrowed the EU formalistic, top-down approach and has found itself caught in the straightjacket of supranationalism and a scrupulous timetable of implementation of commitments. Consequently, the African SAM has failed to replicate the EU success story, leading to further disintegration of the continental efforts into incoherently

coordinated sub-regional initiatives. Actual implementation of SAATM policies and regulations, like other regional integration initiatives, remain largely at the discretion of individual member states and RECs, reflecting an intergovernmental mode of operation. As such, the reluctance of states to fully cede regulatory authority to supranational body, variations in national legal and regulatory frameworks, and differing levels of infrastructure and operational capacity, and political and economic consideration that influence national priorities and agendas shape the successful realisation of its SAM.

The de jure supranational but de facto intergovernmental model in Africa impedes the successful implementation of SAATM. One reason for such impediments is the lack of a binding enforcement mechanisms at the continental level. While the AU membership may agree upon policies, their execution remains inconsistent across the states. Additionally, the model's reliance on consensus and respect for sovereignty makes it challenging to address protectionist policies that contradict the liberalisation goals of SAATM. Consequently, while SAATM framework has similar ambitions for SAM as EU and ASEAN, the AU intrinsic model of regionalism creates institutional and operational limitations and impeded its success story. Nevertheless, the ASEAN-SAM is a critical departure point for the realisation of SAATM initiative particularly considering the similarity of environments in which these Open Sky operate. Based on the lesson from the ASEAN-SAM, the next chapter concludes this thesis by contextualising the principle of variable geometry as part of what constitutes the principled approach to implementing SAATM and how it can lead to pursuit of intergovernmental-like aviation liberalisation that ultimately realise supranationalism under Agenda 2063 – especially through the adoption of the principle of variable geometry. The next chapter synthesizes these findings and proposes mechanisms of navigating the challenges associated with de jure supranational and de facto intergovernmental approach to integration and liberalisation of air transport on the continent.

6.0. CHAPTER SIX: FINDINGS, CONCLUSION AND RECOMMENDATIONS

6.1. INTRODUCTION

The preceding chapters have substantively discussed the nature and scope of aviation on the African continent. The history and development in the second chapter captured the foundational milestones and challenges that have shaped the continent's aviation landscape while the legal and institutional framework in the third chapter highlighted the regulatory frameworks and governance structures that define liberalisation of air transport. The subsequent analysis of regional and comparative approaches in the fourth and fifth chapters respectively illuminated the diverse strategies and their applicability to the African continental context. These discussions collectively form the building blocks for a principled approach because they identified the prospects, opportunities and challenges shaping African aviation industry generally, and liberalisation specifically. This chapter synthesizes the above findings and conclusions and recommends the adoption of the principled approach for the implementation of the SAATM as a viable option for continental liberalisation and integration as part of Agenda 2063.

The principled approach, as articulated in the first chapter of the thesis, advocates for a holistic implementation of the SAATM that involves all relevant stakeholders and aligns with the broader objectives of the African Union's Agenda 2063. It emphasises the significance of variable geometry in navigating the diverse realities of African states and regions. Moreover, the principle underscores the necessity of supporting policies in areas such as safety, security, sustainable financing, fair competition, and environmental concerns, alongside adherence to international air law treaties as part of the *acquis*.

6.2. FINDINGS

6.2.1. *Findings on the Development of Air Transport in Africa*

The second chapter sought to analyse how the historical development and evolution of air transport in Africa influenced the current status and future prospects of the continent's air transport liberalisation initiatives. The thesis finds that the development of air transport in Africa has been fundamentally shaped by a confluence of extrinsic and intrinsic factors. Extrinsic influences primarily emerged from the imperialist and colonial endeavours of European nations. The imperialists leveraged the novel technology of aircraft to expand their

ambitions, which significantly impacted the early infrastructure and operational dynamics of African air transport. This period, dubbed as the ‘Second Scramble for Africa,’ while effectively introduced aviation on the continent, witnessed the establishment of air routes principally designed to serve colonial interests, often neglecting the development of intra-African connectivity. The prioritisation of connectivity in some regions more than others due to their strategic location further implicated the disparity in the connectivity and infrastructural development in the RECs as regional favouritism created an uneven infrastructure and policy landscape that persisted into the post-colonial period, significantly impeding the development of robust national or regional air transport systems under the traditional BASAs as Euro-American countries did.

The colonial legacy thus laid a foundation for aviation on the continent that was fundamentally skewed and with lasting implications, particularly in terms of the readiness and capacity of various regions to integrate into a liberalised continental aviation framework. Following the African experience with colonisation and struggle for independence, the capacity for these states to open up their air spaces was diminished, partly due to geopolitical and other strategic foreign policy positions associated with the market – especially during times of conflict. Efforts at liberalisation under the SAATM or other instruments should therefore be cognisant of this background in shaping a more effective approach to liberalisation on the continent.

Intrinsically, post-colonial initiatives and regional cooperation efforts have equally contributed to the development of African air transport. The research findings revealed that the post-colonial period saw African nations grapple with the legacy of colonialism in their effort to develop air transport infrastructures that catered more to domestic and regional needs in what can be viewed as mostly protectionist approach. This period was marked by efforts to establish national carriers, though these efforts were often hampered by such challenges as limited resources, political instability, and the need for regional collaboration. The reliance on restrictive BASAs in the post-independence era, shaped largely by the American-led Chicago Convention framework, favoured established airlines and entrenched challenges, particularly during efforts towards market harmonisation on the continent through such initiatives as the Yamoussoukro Decision.

Nevertheless, the emergent post-colonial cooperative frameworks at the regional and international levels, aimed at enhancing air connectivity within the continent, laid the foundation for future liberalisation efforts, including the YD and the SAATM, with their key

aim being the leveraging on the developments and the evolutionary path to dismantling the historical barriers and creating an Afrocentric approach to aviation based on the unique socio-economic and political realities of the continent under the auspices of Agenda 2063.

Present efforts at liberalisation requires recognition of this difficult and evolutionary process and necessitates concerted efforts to overcome the policy, legal and practical hurdles that have arisen from the creation and liberalisation process on the continent.

The success or otherwise liberalisation, will partly depend on the recognition of these developments and the critical milestones made towards integration and cooperation, and the need for a principled approach for eventual implementation of SAATM and opening African skies. Six decades of aviation development at the national, regional and continental levels should appreciate the impact of the extrinsic and intrinsic factors in an effort to develop a home-grown strategy for a SAM.

6.2.2. Findings on the Legal and Institutional Framework for the Implementation of the YD and the Operationalisation of SAATM

The third chapter evaluated the legal and institutional framework that underpin the implementation of the YD and operationalisation of the SAATM and determine their effectiveness and challenges in achieving air transport liberalisation on the continent. The chapter underscored the significance of understanding the political, juridical nature, and scope of these frameworks, as their empowerment under regional instruments, particularly through the Abuja Treaty and the subsequent AU framework. It noted that the SAATM Decision operationalises the YD by allowing intra-African market operations subject to safety and security concerns, without the need for BASAs, and enabling airlines to serve the market based on a simple notification procedure.

The operational principles of the YD, central to its implementation, include the grant of the five freedoms of the air, allowing African airlines to exercise these rights for passengers, cargo, and mail services. The YD also provides for unrestricted capacity and frequency in air services between state parties, giving designated airlines the discretion to determine their frequency and capacity. Furthermore, the YD facilitates multiple designations, allowing states to designate multiple carriers to serve the intra-African air transport market, provided they meet the eligibility criteria. These principles collectively endeavour to dismantle the erstwhile restrictive and protectionist regulatory barriers. Despite these ambitious, frameworks, the chapter identified the persistence of challenges in the full realisation of their objectives,

notably, the disparities in compliance among African states and the ongoing constraints posed by restrictive BASAs.

The chapter found that public policy considerations within the context of implementation of the YD and operationalisation of SAATM is a nuanced approach by the AU that integrates the YD and SAATM frameworks into national legal and regulatory environments. The discussion underscores the establishment of comprehensive eligibility criteria for airlines, designed to ensure that only carriers meeting specific legal, operational, and financial standards can participate in the liberalised market. These criteria, including legal establishment in accordance with state laws, principal place of business, and adherence to international safety standards, are aimed to foster a competitive yet secure and reliable air transport environment. The eligibility criteria for airlines are especially important under the legal and institutional framework as it seeks to balance liberalisation with the need for regulatory oversight, particularly on areas on safety and security standards. Further discourse on public policy considerations delved into the relationship between aviation safety and the YD, and elucidated the paramount importance of safety in the liberalisation process. Despite the robust provisions within the YD for enhancing safety standards, the chapter reveals a concerning discrepancy between the policy aspirations and the practical realities on the ground, where safety implementation falls short of global averages. This gap is attributed to infrastructural deficiencies, regulatory challenges, and a lack of adherence to international safety standards. Addition, in the context of aviation security and facilitation, the thesis found that despite concerted efforts and international collaboration, there still remain systematic deficiencies that require improvement to align with global benchmarks.

The chapter further found that stakeholders play a significant role in the implementation of the YD and operationalisation of SAATM. The stakeholdership consist of both regional bodies as the AU, RECs, and various national and international organisations. These entities drive the policy agenda, regulatory oversight, and infrastructural development necessary for the realisation of a liberalised air transport market. The chapter highlights the AFCAC as tasked with overseeing the liberalisation process and ensuring compliance with established principles and regulations.

Furthermore, the chapter underpinned the critical role of development partners, such as the AfDB and AUDA-NEPAD, in providing financial and technical support for aviation infrastructure and regulatory capacity building. This support is depicted as crucial for

overcoming the operational and safety challenges that have historically plagued the aviation industry.

In general, the legal and institutional framework reveal an ambitious effort to transform the African air transport sector through the YD and SAATM. Significant progress has been made in policy formulation and regulatory frameworks aimed at liberalisation of the market. However, there are still challenges that persist, such as the slow rate of implementation, compliance with safety and security standards, the need for infrastructural development, and the need for harmonisation of regulatory practices across the continent. The chapter therefore underscores the imperative for continued collaboration among all stakeholders as the successful implementation of the YD and operationalisation of the SAATM requires a concerted and unified approach that addresses the existing challenges while leveraging the opportunities presented by a more open and integrated transport market.

6.2.3. Findings on the Implementation of the YD in Regional Economic Communities

The fourth chapter comprehensively analysed the progress and challenges in the implementation of the YD among the RECs. The findings show an uneven levels of YD implementation across the RECs, reflecting the variations in regional initiatives aimed at liberalising air transport. The efforts of the AMU, WAEMU, BAG, CEMAC, ECCAS, SADC, EAC, and COMESA demonstrate that regional implementation of the YD is a product of an interplay of political, economic, and institutional dynamics that shape air transport landscape in Africa.

The chapter finds that AMU's progress has been stymied by political rifts, notable between Algeria and Morocco, and external pressures, including sanctions against Libya. These developments show that geopolitical realities remain a key consideration in regional aspirations. Despite recognising the need for liberalisation, AMU's efforts have been fragmented, with Morocco emerging as a proactive entity in seeking broader air service expansion within and beyond the region. This shows that political will and external engagement remain key in the liberalisation process.

In Contrast, WAEMU and BAG have made significant strides in liberalising their air transport with WAEMU establishing comprehensive regulations that exceed the liberalisation provisions of the YD. The WAEMU experience illustrates the significance of shared economic and monetary frameworks in fostering a more cohesive approach to air transport liberalisation.

BAG, through its emphasis on airline cooperation and the establishment of MASA, highlights the potential for targeted regulatory frameworks to advance regional air transport objectives, although practical implementation remains a hurdle.

CEMAC's approach, characterised by a robust legal and regulatory framework for air transport liberalisation, demonstrates the potential of legal and supremacy of institutional autonomy in driving regional integration efforts. However, the implementation of liberalisation measures has been hindered by safety oversight challenges and resource constraint, which suggest that legal frameworks alone are insufficient to achieve full liberalisation without corresponding improvement in safety and operational standards.

ECCAS's efforts, marked by the adoption of the Kinshasa Plan of Action and subsequent decisions aimed at liberalisation and security of air transport shows the regions commitment to overcome its air transport challenges. However, the realisation of these goals has been limited by the region's small air transport market, poor connectivity and safety concerns. This experience reveals the need for comprehensive strategies that address both the regulatory and infrastructural deficiencies in the liberalisation process.

The SADC and EAC experiences reveal the complexities of regional air transport liberalisation in contexts where dominant carriers and national interests play a significant role. SADC's lack of a formal regional framework to implement the YD contrasts with individual Member States' efforts to liberalise their air transport sectors. There is therefore a challenge of achieving regional consensus in the presence of strong national carriers. Similarly, EAC's progress, which has been facilitated by the establishment of the CASSOA, points to the importance of safety and security as foundational elements of air transport liberalisation, even as disagreements over national ownership and control provisions stall further regulatory harmonisation.

Finally, COMESA's legal Notice No. 2 of 1999 and the establishment of the ATRB represent an ambitious attempt to liberalise air transport across a broad geographical area. The phased approach to liberalisation that encompass both scheduled and non-scheduled services, highlights the potential for a comprehensive regional strategy to facilitate transport liberalisation. However, the implementation challenges, particularly regarding the fifth freedom rights and compliance with regional regulations, shows the challenges that existing in alignment of national policies with regional ambitions.

In sum, the implementation of the YD across African RECs reveals a diversity of approaches, outcomes and challenges. While some regions have made significant progress in

establishing regulator frameworks and pursuing liberalisation, other have been hampered by political, economic and institutional barriers. Commonalities across the regions include the recognition of the importance of air transport liberalisation for economic development and the challenges of aviation safety and security. Differences arise from the varying degrees of political will, economic integration, and the presence of dominant national carriers. The experiences of These regions underscore the need for a principled approach that considers the unique political, economic and operational realities of each region while striving for the overarching goal of a continental-wide liberalisation and integration.

6.2.4. Findings on the Lessons from the EU and the ASEAN

The fifth chapter analysed comparative approaches in air transport liberalisation in the EU and the ASEAN regions. The findings show that both regions have pursued liberalisation through their unique evolutionary processes, reflective of their distinct political, economic, and historical contexts, with instructive lessons for SAATM.

It revealed that the EU has had a progressive journey towards SAM which began with the wave of deregulation of the 1980s, instigated by the US's domestic aviation deregulation. Europe's response to the competitive pressures and market imbalances created by the US deregulation with a phased liberalisation approach that ultimately dismantled the barriers and established a comprehensive SAM. This process was characterised by a gradual, yet decisive, shift from national regulatory frameworks towards a unified regulatory regime underpinned by supranational governance structures. The chapter further reveal that the establishment and success of the EU SAM was facilitated by the EU Commission's assertive policy-making and enforcement role, supported by the judicial oversight of the EU Court of Justice. This supranational approach enabled the harmonisation of regulatory standards across member states, fostering a competitive and integration of European aviation market. through gradual liberalisation of air services, and the establishment of a common external aviation policy.

In contrast, the ASEAN approach has been marked by a cautious and consensus-based process, a reflection of the region's preference for intergovernmental cooperation over supranationalism. The 'ASEAN Way' of diplomacy, that emphasizes consultation, non-intervention, and flexibility, has shaped the region's liberalisation efforts, leading to the adoption of multilateral agreements that aim to liberalise air transport services incrementally. However, the implementation of the ASEAN OSP has encountered significant challenges, including protectionist policies, disparities in aviation development among member states, and

a fragmented approach to external aviation agreements. These factors have hindered the realisation of a fully liberalised market, which underpins the limitations of a purely intergovernmental approach in achieving comprehensive regional air transport liberalisation.

Comparatively, the SAATM initiative shares several parallels with the ASEAN and EU experiences, including the aspiration for enhanced connectivity and economic integration through liberalisation. Notably, SAATM's progress has been impeded by similar challenges encountered by ASEAN, such as disparities in aviation infrastructure and capabilities among African states, protectionism, and a lack of cohesive supranational authority to drive the initiative forward. The EU experience further underpin the need for phased and coordinated liberalisation strategies that account for the varying degree of political goodwill and cooperation among member states at the national and REC levels.

The advancement of SAATM may benefit from adoption of the principled approach as discussed in detail in the following section.

6.3. RECOMMENDATIONS – TOWARDS A PRINCIPLED APPROACH TO THE IMPLEMENTATION OF SAATM

6.3.1. *Placing SAATM within the Context of Agenda 2063*

In May 2013, the AU celebrated a Golden Jubilee of the formation of the OAU in May 1963.¹⁰²⁸ During this celebration, the Assembly of Heads of State and Government (AU Assembly) took stock of the OAU's past achievements and challenges and adopted the 50th Anniversary Solemn Declaration, which rededicated the AU to the socioeconomic and political transformation of the continent.¹⁰²⁹ The AU Assembly further directed the AUC to prepare a forward-looking 50-year continental development trajectory, known as Agenda 2063, that would outline the 'Africa We Want,' based on the AU vision of 'an integrated, prosperous and peaceful Africa, driven by its citizens and representing a dynamic force in the international arena.'¹⁰³⁰

After 18 months of the people-driven consultation process, the AU Assembly at its 24th Assembly in January 2015 in Addis Ababa, adopted– Agenda 2063 –as Africa's blueprint and

¹⁰²⁸ Agaptus Nwozor, Onjefu Okidu & Solomon Adedire 'Agenda 2063 and the feasibility of sustainable development in Africa: Any silver bullet?' (2021) 52 Journal of Black Studies 688 at 692.

¹⁰²⁹ Ibid.

¹⁰³⁰ Sue Enfield 'Social policies and continental commitments to reducing poverty and inequality in Africa' 2020 at 6.

master plan for the continent's transformation into a global powerhouse of the future.¹⁰³¹ Agenda 2063 is underpinned by seven aspirations, further elaborated by a set of 20 goals and 39 priority areas ranging from national and regional to continental frameworks anchored on the Pan-Africanist ideals of creating a dynamic and people-driven Africa.

The first aspiration envisions a prosperous Africa based on inclusive growth and sustainable development. The key goals under this aspiration are a high standard of living and well-being for all its citizens, well-educated citizens and skills revolutions underpinned by science, technology, and innovation, healthy and well-nourished citizens, transformed economies and jobs, and modern agriculture for increased proactivity and production. Other goals under the first aspiration are blue/ocean economy for accelerated economic growth and environmentally sustainable climate and resilient economies and communities.

Aspiration 2 champions ideals of an integrated continent that is politically united and grounded on the ideals of Pan-Africanism and the vision of Africa's Renaissance. It seeks to realise a united Africa (federal or confederate), with functional continental financial and monetary institutions and a network of world-class infrastructure connecting the expanse of the continent.

The third aspiration focuses on the tenets of good governance, democracy, respect for human rights, justice, and the rule of law. This aspiration aims to entrench democratic values and practices, establish universal principles of human rights, justice, and the rule of law, and foster capable institutions and transformative leadership at all levels.

The fourth aspiration is dedicated to cultivating a peaceful and secure continent. It underlines the importance of maintaining peace, security, and stability, achieving a stable and peaceful Africa, and operationalising functional African Peace and Security Architecture.

The fifth aspiration celebrates Africa's rich cultural identity, common heritage, shared values, and ethics, aiming for an African cultural renaissance that is preeminent on the global stage. Aspiration six is predicated on an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children. The key goals under this aspiration include full gender equality in all spheres of life, and engaged and empowered youth and children.

¹⁰³¹ Nwozor, Okidu & Adedire op cit note 1028 at 692.

Finally, aspiration seven positions Africa as a strong, united, resilient, and influential global player and partner. It envisions Africa as a significant partner in global affairs and peaceful coexistence, taking full responsibility for financing its development.

Table 4: The contribution of SAATM to the AU Agenda 2063

AU Agenda 2063 Goals	Contribution by SAATM
Aspiration 1: A prosperous Africa based on inclusive growth and sustainable development	SAATM is expected to result in direct, indirect, and induced impacts that help realise goal 1 on the high standard of living, quality of life, and well-being of all and goal 4 on transformed economies. According to the IATA continental study, the implementation of SAATM is expected to generate an additional 31,240 direct jobs in the aviation sector throughout the continent, 96,440 indirect and induced jobs and generate an extra US\$ 1.1 billion annually across the AU, including multiplier impacts. ¹⁰³² Additionally, SAATM is expected to boost tourism by an additional 4.0 million tourist visits among the AU countries, spending an annual average of US\$ 1.65 billion resulting in additional 267,530 jobs in tourism and downstream industries further resulting in an additional US\$1.40 billion in GDP per annum. ¹⁰³³ African tourism is expected to be one of the greatest beneficiaries of increased traffic, with tourism spending expected to support tourism-related businesses such as hotels, restaurants, tour guides, theatres, and car rentals. ¹⁰³⁴ SAATM is expected to enhance, connectivity and air access to remote areas of the African continent and ensure good health and wellbeing of the Africans through access to health and medical facilities and other

¹⁰³² IATA op cit note 187 at 185.

¹⁰³³ Ibid at 189.

¹⁰³⁴ Ibid at 188.

	essential supplies and therefore help realise goal 3 on healthy and well-nourished citizens. ¹⁰³⁵
Aspiration 2: An integrated continent, politically united and based on the ideals of Pan Africanism and the vision of Africa's Renaissance	SAATM is expected to stimulate intra-African travel and enhance Pan-Africanism, Africa's Renaissance, and economic and political integration of the African continent. This will facilitate the attainment of goal 8 of a United Africa (Federal or Confederate)
Aspiration 5: An Africa with a strong cultural identity, common heritage, shared values, and ethics.	Intra-African connectivity under SAATM will result in a greater intra-African movement that is expected to solidify the common identity and heritage of the African people and allow African citizens to experience the continent religious and cultural diversity. This will help in attaining goal 16 on the 'African cultural renaissance is pre-eminent.'
Aspiration 6: An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children.	The direct, indirect, and induced impacts under SAATM are expected to result in employment to traditionally marginalised groups such as the youth and women and help realise goals 17 on full gender equality in all spheres of life 18 on engaged and empowered youth and children. As of 2018, about 8 per cent of senior executive positions in the African aviation industry were held by women. This is compared to the more liberalised EU market, where women constitute 41 per cent of the aviation labour force. Liberalisation within SAATM is expected to create employment opportunities and enhance greater workforce diversity.

¹⁰³⁵ Ibid at 21.

<p>Aspiration 7: Africa as a strong, united, resilient, and influential global player and partner.</p>	<p>The economic benefits from SAATM are expected to make Africa a key player in the global air transport industry and help realise goal 24 of making Africa a major partner in global affairs and peaceful co-existence. Africa currently contributes 2-4 per cent of the global. SAATM is expected to make African airlines more competitive at the global level.</p>
---	--

Besides the seven aspirations, the Agenda 2063 initiative identified 15 flagship projects as critical programmes and initiatives that have the potential to propel political and economic integration and promote the common African identity in infrastructure, education, science, technology, arts, and peace.¹⁰³⁶ SAATM and three other closely linked projects, the AfCFTA, the African Passport and free movement of people, and the African Outer Space Strategy, are part of the 15 projects whose implementation was prioritised in the first ten years of the Agenda 2063 initiative.

6.3.2. *The African Continental Free Trade Area (AfCFTA)*

AfCFTA is an ambitious free trade agreement launched on March 21st, 2018, by 44 AU member states during the 10th Extraordinary Summit of the AU in Kigali, Rwanda.¹⁰³⁷ The AfCFTA agreement is set to eliminate 90 per cent of tariffs on goods traded between the 55 Member States by creating a single market for goods and services, facilitated by the free movement of persons to deepen the economic integration of the African continent, and boost intra-African trade by 52.3 per cent.¹⁰³⁸ AfCFTA addresses the long-standing economic fragmentation of Africa by creating the largest free trade area in the world, measured by the number of participating countries with a market comprising 1.3 billion people, a combined gross domestic product of US \$ 3.4 trillion, and a potential to lift 30 million people out of

¹⁰³⁶ African Union ‘Flagship projects of Agenda 2063 | African Union’ <<https://au.int/en/agenda2063/flagship-projects>> accessed 16 August 2022.

¹⁰³⁷ African Development Bank, ‘Africa visa openness report 2021’ (*African Development Bank - Building today, a better Africa tomorrow*, 9 December 2021) <<https://www.afdb.org/en/documents/africa-visa-openness-report-2021>> accessed 15 August 2022.

¹⁰³⁸ ‘African continental free trade area: Questions & answers’ <<https://repository.uneca.org/handle/10855/43253>> accessed 18 August 2022.

extreme poverty.¹⁰³⁹The Agreement officially entered into force on May 30th, 2019, after ratification by 22 countries with trading under the AfCFTA commencing on January 1st, 2021.¹⁰⁴⁰

Intraregional and international trade in Africa has historically been constrained by prohibitive costs and cross-border administrative red tape arising from inadequate reliable, secure, and efficient cross-border transport.¹⁰⁴¹The Africa Transport Policy Programme (SSATP) notes that due to long delays, arbitrary transport tariffs, and cumbersome procedures at the borders, intra-African trade is only a paltry 15 per cent compared to 61 per cent in Asia and 67 per cent in Europe.¹⁰⁴² Additionally, 40 per cent of the final price of goods in Africa is attributed to the prohibitive transport costs, with the cost of importing a container in Africa being 56 per cent above the global average.¹⁰⁴³ The situation is worst in the 16 landlocked African countries, with transport expenses accounting for between 15 per cent to 20 per cent of the import costs. According to SSATP, lowering transport costs in Africa can boost trade on the continent by 25 per cent.¹⁰⁴⁴

As highlighted in the first chapter, since addressing the deficiencies of the African surface modes of transport would require huge costs, air transport presents the ideal alternative.¹⁰⁴⁵This is because of its flexibility and the relatively small amount of infrastructure it requires compared to the other modes of transport.¹⁰⁴⁶Air transport has the potential to virtually bridge the geographically isolated regions in Africa and improve the geographic scope and cyclic time of the continent's economic activity. The industry is also generally well suited for the long-distance transportation of perishable commodities from the African markets.¹⁰⁴⁷ According to the IATA Continental study, SAATM is expected to stimulate an extra US\$ 937 million in trade flows across the continent.¹⁰⁴⁸ SAATM is therefore expected to be a critical

¹⁰³⁹ World Bank, *The African continental free trade area: Economic and distributional effects* (Washington, DC: World Bank 2020) at 1 available at <<http://hdl.handle.net/10986/34139>> accessed 13 August 2022.

¹⁰⁴⁰ African Union 'The African continental free trade area | African Union' available at <<https://au.int/en/african-continental-free-trade-area>> accessed 16 August 2022.

¹⁰⁴¹ 'Regional integration | SSATP' available at <<https://www.ssatp.org/topics/regional-integration>> accessed 15 August 2022.

¹⁰⁴² Ibid.

¹⁰⁴³ Ibid.

¹⁰⁴⁴ Ibid

¹⁰⁴⁵ Evaristus M Irandu & Dawna L Rhoades 'The development of Jomo Kenyatta International Airport as a regional aviation hub' [2006] *Journal of Air Transportation*, Volume 11, No. 1 available at <<https://ntrs.nasa.gov/citations/20060046467>> accessed 23 August 2022.

¹⁰⁴⁶ Button & others op cit note 6.

¹⁰⁴⁷ Mariya A Ishutkina & R John Hansman, 'Analysis of the interaction between air transportation and economic activity: A worldwide perspective' (2011).

¹⁰⁴⁸ IATA op cit note 187 at 205.

facilitator of the integration of African States in the AfCFTA and integrate the African economies into the global value chains.

6.3.3. *The Free Movement of Person initiatives: The AU African passport and African Development Bank Visa Openness Index*

Free movement of persons and a common African passport are fundamental prerequisites for integrating the African continent and boosting intra-African trade. However, despite the political commitments and repeated calls in several AU/OAU fora to bring down borders by relaxing visa requirements, enhancing the use of single visas by the African States, and ultimately the issuance of a single African passport, the laws on the free movement of persons within Africa have historically remained restrictive.¹⁰⁴⁹ Visitors from North America and European enjoy more liberal entry into African countries based on visa-free entry or obtaining visas on arrival than their counterparts in Africa, with Central Africa being the most restrictive among the other RECs. Although EAC and ECOWAS have made tremendous progress by introducing common regional passports, all the other RECs have relatively restrictive free movement of persons regimes and have adopted a country-to-country approach instead of a multilateral approach.¹⁰⁵⁰

To promote free movement of persons , the AU and the AfDB have each initiated related initiatives: the African passport and the Africa Visa Openness Index (AVOI), respectively.¹⁰⁵¹ The African passport is one of the flagship projects of the AU, which falls under Aspiration 2 of Agenda 2063 and has been pursued through the AU Protocol on the ‘free movement of people, right of residence, and right of establishment’ adopted in January 2018.¹⁰⁵² As of August 15th, 2022, 33 countries had signed the Protocol, with only four countries (Mali, Niger, Rwanda, and São Tomé and Príncipe) ratifying it, thus falling short of the required threshold of 15 ratifications for it to enter into force.¹⁰⁵³ The reluctance to ratify the Protocol hampers intra-African connectivity and intra-African air travel under

¹⁰⁴⁹ AUC ‘AGENDA 2063 The Africa We Want first ten-year implementation plan 2013-2023’ (2015) 104 available at <<https://wedocs.unep.org/bitstream/handle/20.500.11822/20823/Agenda%202063%20-%20FIRST%20TEN%20YEAR%20PLAN%20%20%20September%20%202015.pdf?sequence=1&isAllowed=y>> accessed 15 August 2022.

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ Michael Imran Kanu ‘Towards a purposeful economic integration in Africa: Free movement of persons in lieu of illegal migration’ [2020] KANU, MI 165, 180.

¹⁰⁵² *Ibid.*

¹⁰⁵³ African Development Bank op cit note 1037 at 9.

SAATM.¹⁰⁵⁴ There is, therefore, a need for advocacy by the relevant stakeholders to increase the signature and ratifications of the Protocol.

On the other hand, the AVOI is an initiative of the AfDB launched in 2016 that measures the level to which the African States are open to visitors from other African States and whose objective is to promote a continental visa policy reform programme for all of Africa.¹⁰⁵⁵ Through the AVOI, the AfDB seeks to address the challenges of high visa fees and tedious application processes faced by Africans during intra-African travel.¹⁰⁵⁶ The AVOI looks at visa requirements in all African countries to determine which countries are open to African visitors by calculating the number of countries to which Africans are required to obtain a visa before travelling there, the number of countries where visas are granted upon arrival, and the number of countries where visitors from other African countries are granted visa-free entry.¹⁰⁵⁷

According to the 2021 Visa Openness Report, 25 per cent of African countries welcome some or all African visitors, 24 per cent of African countries allow some or all African visitors to obtain a visa on arrival, and 51 per cent of African countries require African visitors to obtain a visa before they arrive.¹⁰⁵⁸ Accordingly, there are great disparities in visa fees, types of entry granted, and visa processing timelines in approximately one-third of African countries making it arduous for intra-African travel.¹⁰⁵⁹ The report also shows that since the AVOI initiative started in 2016, there has been significant improvement in the AVOI scores, with 36 countries improving or maintaining their AVOI score and 24 countries offering eVisas to Africans compared to nine countries that offered the same in 2016.¹⁰⁶⁰ Therefore, the AfDB and other stakeholders need to continue advocating for simplifying visa application procedures, reducing visa fees, and ensuring expeditious processing of visas in order to facilitate intra-regional connectivity. According to the continental study on the benefits of SAATM, the operationalisation of SAATM is expected to boost intra-African passenger travel by 52 per cent.¹⁰⁶¹ The enhanced connectivity will augment the value of the AfCFTA and FMP initiatives; therefore, synergy is needed in these three highly interrelated projects.

¹⁰⁵⁴ Ibid.

¹⁰⁵⁵ Kanu op cit note 1051 at 180.

¹⁰⁵⁶ Ibid.

¹⁰⁵⁷ African Development Bank op cit note 1037.

¹⁰⁵⁸ Ibid 3.

¹⁰⁵⁹ Ibid.

¹⁰⁶⁰ Ibid 3.

¹⁰⁶¹ IATA op cit note 187 at 204.

6.3.4. African Outer Space Strategy

The African Outer Space Strategy seeks to prepare the continent to tap into the benefits of space science and technology to bolster its development agenda.¹⁰⁶² The importance of outer space technology in realising Agenda 2063 cannot be gainsaid with its application in agriculture, satellite communication and navigation, positioning, meteorology, astronomy, earth observation, tackling climate change, disaster management, defence, and security, among others.¹⁰⁶³ The successful operationalisation of SAATM hinges on the safety and security of the African airspace and efficient satellite, communication, surveillance, weather information navigation, and inflight systems, all of which depend on efficient aerial space technologies.¹⁰⁶⁴ The recent developments in space-based technologies are also necessary for efficient route planning that will significantly reduce flight times and noise, and carbon emissions.¹⁰⁶⁵ Therefore, the African Outer Space Strategy must be realised to harness the above-enumerated benefits for SAATM.

Through Agenda 2063, the AU Membership has crafted a visionary path for the continent's future, emphasizing a holistic, inclusive approach to development that seeks to leverage Africa's diverse strengths. Effective implementation of SAATM should therefore be placed within this vision and normative framework.

6.4. HOLISTIC IMPLEMENTATION OF THE YD

Holistic implementation of the YD is the one that goes beyond the market provisions of the YD and includes both the operational and public policy elements of the YD. Holistic implementation of the YD is in line with Article 8(v) of the SAATM Decision, which recognises that the operationalisation of SAATM is not to be only premised on the market access provisions of the YD but calls upon the Member States to 'go beyond the market access provisions of the Yamoussoukro Decision in order to accelerate the attainment of the objectives of the SAATM' and has also been recognised in one of the recitals of the MOI which reads

¹⁰⁶² Francis Wiafe-Amoako, *Africa 2020–2022* (Rowman & Littlefield 2021) 1.

¹⁰⁶³ Yao Nikez Adu, Fridon Ananidze and Svetlana Adu 'African Union outer space program: Chances and challenges', *Supporting Inclusive Growth and Sustainable Development in Africa-Volume II* (Springer 2020) at 145.

¹⁰⁶⁴ Etim Offiong 'Africa has ambitious goals for 2063: Plans for outer space hold the key to success' (*The Conversation*) <<http://theconversation.com/africa-has-ambitious-goals-for-2063-plans-for-outer-space-hold-the-key-to-success-180636>> accessed 15 August 2022.

¹⁰⁶⁵ ICAO 'Third meeting of APIRG infrastructure and information management sub group (IIM/SG/3) virtual meeting, 12-14 October 2020' 2 <<https://www.icao.int/WACAF/Documents/Meetings/2020/IIM-SG3/IPs/IP08%20SBAS%20for%20Africa%20and%20Indian%20Ocean.En.pdf>> accessed 15 August 2022.

‘Mindful of the aspiration of the Member States and the industry to operate within the intra-African market without the need for bilateral air service agreements between the Member States, and to go beyond the market access provisions of the Yamoussoukro Decision.’

One of the ways through which African States can pursue a holistic implementation of the YD is by ratifying other air law-related international treaties. Ratifying other air law treaties will result in the uniformity and harmonisation of rules and significantly reduce the administrative burden and financial impact on African airlines.¹⁰⁶⁶ Due to the multi-jurisdictional nature of air transport, air operators face many cross-border regulations of unprecedented variety. International treaty ratification substantially reduces the degree of unpredictability in world air transport to a tolerable level.¹⁰⁶⁷ This means that air carriers, aircraft users, and potential aircraft victims will be able to predict and calculate their risks with a higher level of certainty and consequently cut costs and contribute to the long-term viability of an airline.¹⁰⁶⁸ The following air law treaties are pertinent to the operationalisation of SAATM.

6.4.1. The Convention on International Interests in Mobile Equipment (The Cape Town Convention)

The Cape Town Convention (CTC) and its Protocol on Matters Specific to Aircraft Equipment were concluded on November 16th 2001, under the joint auspices of ICAO and the International Institute for the Unification of Private Law (UNIDROIT).¹⁰⁶⁹ The main aim of the CTC is to standardise and harmonise private laws on the financing and leasing high-value aviation assets.¹⁰⁷⁰ These assets are mobile and consequently subject to a multiplicity of legal systems resulting in uncertainty for lending institutions due to diverse approaches to securities, title retention agreements, and lease agreements.¹⁰⁷¹ The uncertainty associated with mobile equipment significantly increases the acquisition cost of the already expensive aviation assets.¹⁰⁷²

¹⁰⁶⁶ Ibid at 88.

¹⁰⁶⁷ Ibid.

¹⁰⁶⁸ Ibid.

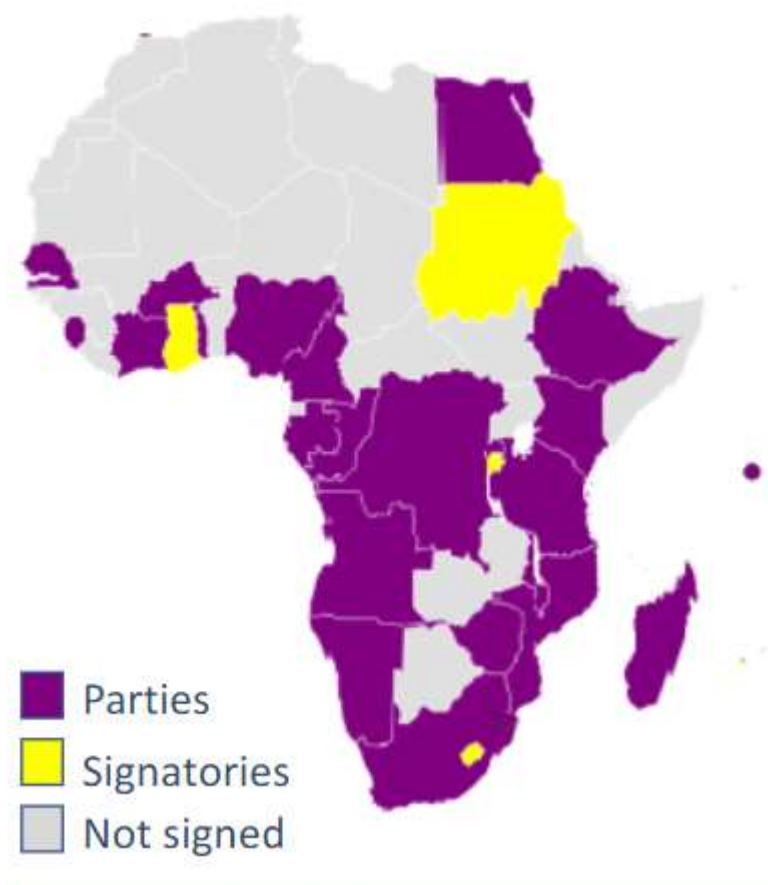
¹⁰⁶⁹ Aviation Working Group, ‘Practitioners’ Guide to the Cape Town Convention and the Aircraft Protocol’ (2020) 1 <<http://awg.aero/wp-content/uploads/2020/12/Practitioners-Guide-December-2020.pdf>>.

¹⁰⁷⁰ Ibid.

¹⁰⁷¹ Sandeep Gopalan ‘Securing mobile assets: The Cape Town Convention and its Aircraft Protocol’ (2003) 29 NCJ Int’l L. & Com. Reg. 59, 61.

¹⁰⁷² Ibid.

The CTC reduces costs for creditors and debtors due to reduced risks associated with enhanced legal certainty. Airlines of the State Parties also enjoy a discount on export credit premiums, making acquiring modern and efficient aircraft relatively cheaper.¹⁰⁷³ The Treaty also facilitates predictability and enforceability through establishing an international electronic interest registration system that facilitates the creation of an international interest recognised by all State Parties, thus facilitating the opposability of the securities and the interests in aviation assets.¹⁰⁷⁴ There is therefore a need for the African States to accede to and ratify the CTC to facilitate the cheaper acquisition of modern and fuel-efficient aircraft fleet. African countries stand to benefit from the CTC because of the current state of poor credit rating and high cost of capital. However, few African States, as evidenced in the figure 16, have either signed or ratified the CTC. Figure 17: African State Parties to the CTC



Source: AFRAA

¹⁰⁷³ Lorne S Clark 'The 2001 Cape Town Convention on International Interests in Mobile Equipment and Aircraft Equipment Protocol: Internationalising asset-based financing principles for the acquisition of aircraft and engines' (2004) 69 J. Air L. & Com. 3, 69.

¹⁰⁷⁴ Ibid.

6.4.2. *The Montreal Convention 1999*

There is need for regulatory convergence, harmonisation and consistent implementation of consumer protection among the SAATM member states to avoid legal uncertainties and conflict.¹⁰⁷⁵ The Montreal Convention is a single, universal regime that seeks to unify all the international treaties in matters of airline liability in death, injury, delay, damage, or loss of baggage or cargo.¹⁰⁷⁶ Article 6.9 of the YD requires eligible airlines to be ‘adequately insured with regard to passengers, cargo, mail, baggage and third parties in an amount at least equal to the provisions of the International Conventions in force,’ which is in line with Article 50 of Montreal Convention.¹⁰⁷⁷ African countries should therefore ratify the Montreal Convention in order to benefit from a harmonised international regime that covers airline liability and consumer protectionism.

Additionally, African countries should sign and ratify the 2014 Montreal Protocol, a uniform international regime to deter unruly and disruptive passenger behaviours that undermine aviation safety and security. By signing and ratifying the Protocol, the African States will be implementing Article 6.12 (a) of the YD, which requires States to ‘re-affirm their obligations to each other to protect the security of civil aviation against acts of unlawful interference. The State Parties will conform to the provisions of the various conventions on air safety per ICAO provisions and especially with Annex 17 of the Chicago Convention on International Civil Aviation’.¹⁰⁷⁸ Ratification of these and other Air law treaties will result in uniformity and harmonisation and reduce the degree of unpredictability of regulations for the African airlines not only in Africa but also on the global stage.¹⁰⁷⁹

6.5. THE PRINCIPLE OF VARIABLE GEOMETRY

The principle of variable geometry has its origin in the aircraft industry. It refers to the process of modifying aircraft wings during flight by sweeping them back and reverting them to the original position to enable the pilot to choose the ideal configuration (i.e., its geometry) suitable

¹⁰⁷⁵ Adejoke O Adediran, ‘Regulatory Convergence of Consumer Protection in the Single African Air Transport Market: How Far, How Well?’ (2022) 47 *Air and Space Law* <<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\AILA\AILA2022022.pdf>> accessed 12 December 2023.

¹⁰⁷⁶ IATA op cit note 187 at 89.

¹⁰⁷⁷ Ibid at 88–9.

¹⁰⁷⁸ Ibid at 89.

¹⁰⁷⁹ Ibid at 88.

for the prevailing speed and altitude conditions.¹⁰⁸⁰ In the context of aerospace, this principle speaks to adaptability, flexibility, and the ability to adopt differentiated speeds in different circumstances to facilitate flying.¹⁰⁸¹

More recently, the principle of variable geometry has been applied in business and political spheres to refer to the ability of public and private entities to adapt and be flexible in different development conditions and dynamics.¹⁰⁸²

In the context of regional integration, variable geometry has been used to refer to an approach that allows countries to be flexible and pursue a progressive and differentiated speed towards integration.¹⁰⁸³ The principle allows a sub-group of countries willing and ready to advance to greater levels of integration than the whole group. It allows decisions to be made by the majority as opposed to consensus.¹⁰⁸⁴

The principle is equally present in African integration arrangements as one of the operational principles of the Treaties establishing the EAC and the AfCFTA respectively.¹⁰⁸⁵ Article 1 of the Treaty establishing the EAC defines variable geometry as ‘the principle of flexibility which allows for progression in co-operation among a sub-group of members in a larger integration scheme in a variety of areas and at different speeds.’ The principle is also not strange in the African aviation industry, with the SADC Council in August 2004 approving the implementation of 2002 COMESA/EAC/SADC Common Regulations for Competition of Air Transport Services based on the principle of variable geometry.¹⁰⁸⁶ The principle is instrumental in the African context to deal with the challenge of overlapping African states’ membership in various RECs.¹⁰⁸⁷ For instance, its proper application would allow UEMOA to perfectly function as a sub-group of ECOWAS or EAC to perfectly function as a sub-group of COMESA in a manner that will alleviate the tension that result from overlap of air transport mandate in these RECs.¹⁰⁸⁸

¹⁰⁸⁰ Pietro Beritelli Thomas Bieger & Christian Laesser, ‘The new frontiers of destination management: Applying variable geometry as a function-based approach’ (2014) 53 *Journal of travel research* 40 at 408.

¹⁰⁸¹ Sewagegnehu D Taye ‘Variable geometry of African integration and its implication on AfCFTA’ (University of Pretoria 2019) at 10.

¹⁰⁸² Beritelli, Bieger & Laesser op cit note 1080 at 408.

¹⁰⁸³ Elisa Tino ‘The variable geometry in the experience of regional organizations in developing countries’ (2013) 2014 *Spanish Yearbook of International Law* 142.

¹⁰⁸⁴ T Ademola Oyejide *Policies for Regional Integration in Africa* (African Development Bank 2000) at 7.

¹⁰⁸⁵ Treaty establishing the African Continental Free Trade Area 2018 art 5.

¹⁰⁸⁶ Disenyana & Khumalo op cit note 876 at 36.

¹⁰⁸⁷ Oyejide op cit note 1084 at 15.

¹⁰⁸⁸ Ibid.

In the context of the implementation of the YD and operationalisation of SAATM, the principle would be characterised by flexible opt-in and opt-out approach that entails identification of States that are ready, willing, and able to proceed with the immediate operationalisation of SAATM. The 18 States that have signed the MOI could, for instance, be considered a ‘Club of the Ready and Willing’(CREW) and proceed to operationalise SAATM at a multilateral level without waiting for the other SAATM signatories and the AU Member States.

AFCAC, in collaboration with other stakeholders, should identify a phased approach for other States to join the CREW consisting of a well-articulated and actionable timeline for the gradual operationalisation of SAATM and one which will allow countries to opt in and opt out of the SAATM initiative. States willing to join the CREW should be able to demonstrate their commitment to comply with the minimum requirements of aviation safety and security standards and other international best practice.

There should also be a mechanism that allows State Parties and airlines of the CREW to seek temporary relief from some of the provisions of the YD when they face undue hardships. The temporary relief could, for instance, involve a restriction on capacity, frequency, or fifth freedom rights on selected routes deemed critical for the survival of the domestic airline. Although neither the YD nor SAATM Decision provides a mechanism to seek temporary relief, no provision in these two decisions categorically prohibits such a mechanism.

The mechanism for seeking temporary relief should be straightforward, transparent, and supervised by the AFCAC. AFCAC, in collaboration with other stakeholders, should establish transparent and straightforward criteria consisting of special conditions that a Party seeking such relief must fulfil before it is granted. Any Party that seeks the relief should have the burden of proof that they have satisfied the special conditions, indicate the duration of the temporary relief sought and the provisions of the YD that they seek to derogate from and be willing to commit to a clear and actionable timeline for dealing with the undue difficult. Once granted, the State Party must prepare an elaborate plan detailing how to deal with the undue hardship and periodically submit it to the AFCAC. As the Executing Agency of the YD and SAATM responsible for supervising the liberalisation process, AFCAC should report progress to all other State Parties. The opt-out mechanism of seeking temporary relief could be pursued

through a ‘Transitional Annex’ to the YD, which should align with the ICAO recommended regulatory arrangement for preferential measures for developing countries.¹⁰⁸⁹

Variable geometry could also be applied at the regional levels with the RECs signing YD-compliant regional ASAs, thus abolishing the need for the BASAs in the region. The regional ASAs would be building block for ASAs between the various RECS and ultimately build up to a continental SAM. For instance, EAC, SADC, and COMESA could sign a tripartite ASA similar to the one they have previously signed in air transport competition regulation.

The pilot implementation of SAATM by the CREW or at the RECs level based on the principle of variable geometry will result in improved interconnectivity and reduced fares amongst the participating States, thus creating a market imbalance on the African continent. Similar to the US deregulation experience, which started as an isolated economic reform, the economic benefits of SAATM will ultimately unleash economic tailwinds that will spill over to the other African States. Using a strategy analogous to the US ‘encirclement’ strategy discussed in chapter five, it is also possible for the African States that will have fully implemented SAATM to induce the recalcitrant African States to forsake restrictive BASAs with passengers from the neighbouring African States taking advantage of the lower fares and enhanced connectivity to fly SAATM routes. This will also result in a market imbalance on the intra-African routes, making airlines and passengers from the recalcitrant States lobby their governments to reform their restrictive BASAs and join SAATM.

6.6. OTHER POLICY RECOMMENDATIONS

6.6.1. *Recommendations on aviation safety and security gap*

Without the uniformity of aviation safety and security measures across Africa, the operationalisation of SAATM will undoubtedly be more difficult. Therefore, all African CAAs should inculcate a culture of safety and security in their operations by striving to attain the ICAO minimum safety standard of 60 per cent EI, the Abuja Safety standards, and the Windhoek aviation security targets. All African airlines should also be encouraged to subscribe to the IOSA certification. Those subscribed should maintain good standing at the registry as proof of compliance with the best industry practice.¹⁰⁹⁰ Because of the transboundary nature of aviation safety and security concerns, there is a need for collaborative efforts in the form of Regional Safety Organisations (RSOOs) and Regional Accident Investigation Agencies

¹⁰⁸⁹ Ndhlovu & Ricover, op cit note 57 at 80.

¹⁰⁹⁰ IATA op cit note 187 at 12.

(RAIAs) that will facilitate regional pooling of resources and provide economies of scale to mitigate financial, technical and human resource constraints, that have traditionally handicapped national safety, security and navigational efforts.

The African governments should also ensure mutual recognition of licenses, certificates, and approvals provided by the RSOOs, eliminating unnecessary restrictions. Most importantly, African governments should work together to ensure that the Single African Sky Architecture project is established, as identified in Article 8 (vi) of the SAATM Decision. Regional collaboration in the oversight of safety, security, and navigational services will create a conducive environment for alliances and mergers on the single air transport market and enhance connectivity on the continent.¹⁰⁹¹

6.6.2. *Recommendation on the financing gap*

Although leasing is a global trend, with more than 30 per cent global fleet being leased, the African continent is still without an aviation leasing platform.¹⁰⁹² Africa also has the highest lease rates in the world, which is at 1.25- 2 per cent of the aircraft's market value plus a security deposit of 2-3 months payments. In contrast, their counterparts from other regions have a rate of less than 1 per cent of the aircraft's market value with little or no security deposit.¹⁰⁹³ The AfDB and other financial institutions should support aircraft financing and the establishment of a leasing entity to facilitate the acquisition of a modern and fuel-efficient fleet for African airlines. These institutions should also support the development of financial instruments such as guarantees, top-up insurance, or adapted leasing facility to support aircraft leasing and financing. African airlines cannot thrive in the current multiple taxation environment characterised by high taxes, fees, and charges which stand at 8 per cent higher than global averages.¹⁰⁹⁴ Concerted efforts must be made to bring down and harmonise the taxes, fees and charges across the continent.

¹⁰⁹¹ European Union 'Action document for EU-Africa safety in aviation' 3 available at <https://ec.europa.eu/international-partnerships/system/files/pan-africa-programme-annexe-3_en.pdf> accessed 15 November 2021.

¹⁰⁹² Amadou Oumarou 'African aviation recovery conference: Coordinating efficient response to the COVID-19 crisis effects on the aviation sector in Africa' (2020) <https://www.afdb.org/sites/default/files/2020/12/07/6-afdb_covid_impact_report_presentation.pdf> accessed 10 August 2022.

¹⁰⁹³ Ibid.

¹⁰⁹⁴ IATA op cit note 187 at 13.

6.6.3. *Recommendation on the infrastructure gap*

There is a need for the governments and development partners to finance national and regional Communication Navigation Surveillance/Air Traffic Management infrastructure to enhance safety and efficiency in the air transport sector.¹⁰⁹⁵ Additionally, the African aviation industry should embrace private sector participation and public-private partnership arrangements to address the infrastructural gap in the African air transport industry. African governments should also embrace regional collaborative efforts to facilitate the pooling of resources and provide economies of scale.

6.6.4. *Recommendations on other policy gaps*

African governments should address the legacy of protectionism that involves propping up the inefficient airlines. The absence of a national carrier should not impede the implementation and operationalisation of SAATM. Countries without national carriers can still position themselves to enjoy the economic benefits of the connectivity brought about by SAATM. There is a need to follow the global trend of privatisation of national carriers prevalent in the thriving liberalised markets and abandon the ‘distressed state airline syndrome,’ which is still prevalent in African countries. African airlines could also borrow a leaf from their ASEAN counterparts, who have entered into cooperative arrangements to overcome the restrictive SOEC requirements. African governments must prioritise aviation and tap into the industry's economic benefits.

The panacea to the fragmented and slow implementation of the YD is a multilateral solution at the Pan-African level that is steered by the supranational stakeholders, national stakeholders, and developmental partners. Multilateral implementation of the YD can be achieved by either state amending their non-compliant BASAs until full compliance is attained. However, this process should be steered by the key stakeholders since experience has shown that when States are left on their own to amend the BASAs, inertia is most likely to creep in the process.

Similarly, a State's YD implementation should not be gauged at the bilateral level but should be considered to have implemented the YD when its BASAs comply with all the States. Alternatively, States should sign a MASA that will abolish the need for the BASAs and enable

¹⁰⁹⁵ Oumarou op cit note 1092.

airlines to operate on a simple notification or ‘file n fly’ procedure. The MASA should be based on the updated institutional and regulatory text of the YD. To avoid the lengthy processes of amendment of BASAs, it should be legally binding and enforceable upon the signature of the State Parties.

States must also recognise the institutional and regulatory text of the YD and SAATM and have a scheduled period to review the institutional and regulatory texts to deal with issues not initially envisaged. Article 11.5 of the YD provides for this mechanism of review which should occur every two years or earlier at the request of two-thirds of State Parties and during which the Monitoring Body is expected to propose measures to eliminate the existing restrictions gradually. There is, however, no evidence of such periodical reviews as provided for in Article 11.5, which, regrettably, speaks to the lack of implementation of the YD at a multilateral level.

There is a need to strike a balance between a competitive environment and a level playing ground to alleviate the concerns of the small African carriers who fear that the continental hegemonies will threaten their survival.¹⁰⁹⁶ The main concern for the flag carriers is that liberalisation of the aviation markets will strengthen the larger and better-capitalised carriers and hedge out the smaller, less-well-funded local carriers.¹⁰⁹⁷ However, contrary to this dogma, new entrants in the aviation industry have been found to stimulate greater competition and ultimately challenge the small and inefficient carriers to be more efficient and compete favourably with the larger players.¹⁰⁹⁸ Liberalisation also presents the ideal opportunity to the hitherto small carriers to restructure and increase profitability by accessing a vast pool of investment and allowing the inflow of private capital that will also enable them to expand to new markets through consolidation.¹⁰⁹⁹ Whereas liberalisation may initially lead to a loss of market share for the flag carriers, other benefits offset this challenge, such as the growth in traffic and the elimination of the abuse of dominance, which will enable customers to get

¹⁰⁹⁶ Muheto Darcy Dominique op cit note 1000 at 19.

¹⁰⁹⁷ InterVISTAS Consulting ‘Costs and Benefits of ‘Open Skies’ in the East African Community’ (2017) <<https://www.gov.uk/research-for-development-outputs/costs-and-benefits-of-open-skies-in-the-east-african-community#contents>>.

¹⁰⁹⁸ Ibid.

¹⁰⁹⁹ Ibid.

quality services at affordable prices and ultimately becomes a win for the economy since airlines become cost-efficient, scales down prices and expands output.¹¹⁰⁰

The implementation of the YD and operationalisation of SAATM should be placed within the African Peer Review Mechanism (APRM), a system that the AU established in 2003 through which the Member States self-monitor their governance and performance.¹¹⁰¹ The objectives of APRM are to provide ‘ a tool for sharing experiences, reinforcing best practices, identifying deficiencies, and assessing capacity-building needs to foster policies, standards, and practices that lead to political stability, high economic growth, sustainable development, and accelerated sub-regional and continental economic integration.’¹¹⁰² The AU Assembly has recently extended the scope of APRM to monitoring the implementation of Agenda 2063; by extension, the implementation of the YD and the operationalisation of SAATM should feature in the APRM mechanism.

There is also a need for continued advocacy for more African States to join the SAATM initiative and to encourage those states that have joined in signing the MOI. Additionally, there is a need to sensitise the SAATM States on the approved SAATM and YD regulatory instruments. The Institutional and Regulatory Texts essential for the successful operation of the SAATM must be recognised by all States. The continued support of the functions of the Executing Agency will enable the application of the Competition regulations, which address issues such as abuse of dominant position, prohibition of discrimination in national regulations, and regulations on other anti-competitive behaviours. There should also be a scheduled period for review of the Institutional and Regulatory Texts to address issues not originally envisaged.

6.7.CONCLUSION

This chapter has captured the key findings of the thesis, placed SAATM within the framework of Agenda 2063 and detailed the principled approach to the implementation of SAATM. In essence, the thesis has proposed a paradigm shift in the pursuit of SAATM, and advocated for a principled, flexible approach underpinned by the tenets of inclusivity, adaptability and sustainability. It champions the principle of variable geometry as a linchpin, allowing for a phased and tailored integration that resonates with the diverse capabilities and aspirations of member states. This approach, together with other policy recommendations, is both a blueprint

¹¹⁰⁰ David Starkie *Aviation markets: Studies in competition and regulatory reform* (Ashgate Publishing Ltd 2008).

¹¹⁰¹ ‘AU Handbook | African Union’ <<https://au.int/en/handbook>> accessed 18 August 2022.

¹¹⁰² ‘African Peer Review Mechanism (APRM) | African Union’ <<https://au.int/en/organs/aprm>> accessed 18 August 2022.

for continental deregulation and a strategic pathway to a unified, efficient, and competitive African air transport market, poised to catalyse the continent's broader economic integration and development aspirations.

6.8. LIMITATIONS OF THE STUDY

This thesis, while comprehensive, acknowledges certain limitations inherent in research of this nature. These limitations include the dynamic and evolving regulatory environment, data availability and reliability, and limitations associated with the principle of variable geometry. For instance, the aviation sector is characterised by rapidly evolving regulatory, economic, and technological environments. As such, the findings and recommendations of the study may be subject to the evolving nature of international aviation agreements and regional commitments. Secondly, the study relies on available data. However, the availability, accuracy and timeliness of data from some African countries can be challenging. Finally, while the principle of variable geometry allows for flexibility in regional integration, enabling a subset of countries to advance towards deeper integration at a different pace, it may also lead to fragmentation and uneven liberalisation across the continent – potentially creating 'islands' of liberalised air markets, complicating the broader goal of continent-wide liberalisation.

6.9. FUTURE RESEARCH

Future research can focus on the implementation of the principled approach, its impact, successes and challenges. The research could empirically address the nature and levels of application of the principle of variable geometry and whether the limitations identified in the above exist, and how to cure them.

BIBLIOGRAPHY

Reports

- African Airlines Association, 2021. African Airlines Association: 2021 annual report.
- African Airlines Association, 2020. African Airlines Association: 2020 annual report.
- African Airlines Association, 2019. The Single African Air Transport Market (SAATM): Towards a Virtuous Cycle of Air Transport Development in Africa.
- African Airlines Association, 2013. African Airlines Association: 2013 annual report.
- African Airlines Association, 2012a. African Airlines Association: 2011 annual report.
- African Airlines Association, 2012b. African Airlines Association: 2012 annual Report.
- African Airlines Association, 2010. African Airlines Association: 2010 Annual Report.
- African Development Bank, 2021. African Visa Openness Report, African Development Bank - Building today, a better Africa tomorrow, African Development Bank.
- African Development Bank, 2016. Africa visa openness report 2016.
- African Development Bank, 2012. Africa's Aviation Industry: Challenges and Opportunities.
- African Union, 2022. AUC and Kingdom of Morocco sign the Revised Constitution of the AFCAC and the MoI of the SAATM.
- African Union, 2020. African regional integration: Contribution to the acceleration of the digitalization in Africa, 4th Specialized Technical Committee (STC) On Finance, Monetary Affairs, Economic Planning and Integration. African Union.
- African Union, 2005. Report of the meeting of African ministers responsible for air transport, 16-19 May 2005 Sun City.
- African Union, n.d. Concept note 4th Meeting of the ministerial working group on the single African air transport market. 2018.
- African Union, n.d. Study on competition rules, dispute settlement mechanism and consumer protection (Third Session of the African Union Conference of African Ministers of Transport). African Union.
- African Union, n.d. The Single African Air Transport Market.
- African Union Commission, 2016a. Session 3: The single African air transport market and the free movement of people in Africa.' (Third African-Indian Ocean (AFI) Aviation Security & Facilitation Symposium. Malabo, Equatorial Guinea.
- African Union Commission, 2016b. Third African-India ocean (AFI) aviation security & facilitation symposium. Malabo, Equatorial Guinea.

African Union Development Agency, 2019. African union Development Agency-NEPAD annual report 2019.

AUC, 2015. AGENDA 2063 The Africa We Want First Ten-Year Implementation Plan 2013-2023.

Aviation Working Group, 2020. Practitioners' Guide to the Cape Town Convention and the Aircraft Protocol.

Boeing, 2015. Boeing current market outlook 2015-2034.

CASSOA, 2018. 4th East African Community Civil Aviation Safety and Security Oversight Agency (CASSOA).

COMESA, 2019. COMESA to intensify lobbying its members to sign air transport commitment – Common Market for Eastern and Southern Africa (COMESA). URL <https://www.comesa.int/comesa-to-intensify-lobbying-its-ms-to-sign-air-transport-commitment/> (accessed 8.13.22).

Dexter, L., 2015. The European and Southeast Asian Single Aviation Markets. EU Centre, Background Brief No. 15, July 2015.

Elijah, C., 2013. 45th AFRAA annual general assembly report of the Secretary General. Kenya.

Ethiopia, 2006. Implementation of the Yamoussoukro Decision. Progressing or stalled?' in ICAO/ATAG/WB Development Forum Maximizing Civil Aviation's Economic Contribution Safe, Secure and Sustainable Air Transport in Open Skies Challenges and Potential, Montreal, Canada, 24 May 2006).

Forsyth, P., King, J., Rodolfo, C., Keith, T., 2004. Preparing ASEAN for Open Sky, AADCP Regional Economic Policy Support Facility Research Project 02/008. ASEAN Secretariat.

Gleave, S.D., 2014. Opening Up Aviation Services in Africa. Infrastructure Consortium for Africa (ICA).

IATA, 2021. Continental Study on the Benefits of the SAATM and Communication Strategy for SAATM Advocacy.

ICAO, 2003a. Background to experiences of liberalisation in Africa.

ICAO, 2003b. Report of the worldwide air transport conference: Challenges and opportunities of liberalisation.

ICAO, n.d. Aviation Safety Targets for Africa.

ICAO, n.d. Overview of trends and developments in international air transport.

International Civil Aviation Organisation, 2002. First meeting of Directors General of civil aviation.

InterVISTAS, 2014. Transforming Intra-African Air Connectivity: The Economic Benefits of Implementing the Yamoussoukro Decision.

- InterVISTAS, 2006. The economic impact of air service liberalisation.
- InterVISTAS Consulting, 2016a. The economic impacts of air service liberalisation updating the landmark 2006 study to reflect the new realities of commercial passenger aviation.
- InterVISTAS Consulting, 2016b. What are the costs and benefits of ‘Open Skies’ in the East African Community (EAC)? East African Research Fund.
- InterVISTAS Consulting, 2007. Aviation economic benefits; Measuring the economic rate of return on investment in the aviation industry.
- Ishutkina, M.A., Hansman, R.J., 2011. Analysis of the interaction between air transportation and economic activity: a worldwide perspective.
- Matons, D., Grosdidier, J., 2014. A Review of International Legal Instruments: Facilitation of Transport and Trade in Africa, Second Edition. World Bank, Washington, DC.
- Myburgh, A., 2006. Clear Skies over Southern Africa: The importance of air transport liberalisation for shared economic growth. ComMark Trust, Woodmead, South Africa.
- Ndhlovu, R., Ricover, A., 2009. Assessment of potential impact of implementation of the Yamoussoukro Decision on open skies policy in the SADC region. Gaborone: US AID SOUTHERN AFRICA.
- Njoya, E., Christidis, P., 2017. Potential impacts of liberalisation of the EU-Africa aviation market. Joint Research Centre (Seville site).
- Okara, J., 2013. A study to determine the level of implementation of the Legal Notice No 2 of 1999, on the Common Market for Eastern and Southern Africa Air Transport Liberalisation Programme’.
- Parshotam, A., n.d. Regional Integration for the Arab Maghreb Union: Looking Beyond the Horizon (30), Regional Program Political Dialogue South Mediterranean.
- Rifai, T., 2013. Secretary General, United Nations World Tourism Organization, keynote address to the sixth ICAO worldwide air transport conference.
- Tan, A., 2014. The ASEAN Single Aviation Market: Liberalizing the Airline Industry. Brunei Darussalam, Cambodia, Indonesia, Japan, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam.
- The Single African Air Transport Market and the Free Movement of People in Africa, 2016. Malabo, Equatorial Guinea.
- Third Meeting of APIRG Infrastructure and Information Management Sub Group (IIM/SG/3) Virtual Meeting, 2020.

- Thomas, I., Stone, D., Tan, A.K.-J., Drysdale, A., McDermott, P., 2008. Developing ASEAN's single aviation market and regional air services arrangements with dialogue partners. CAPA Consulting, Australia.
- United Nations. Economic Commission for Africa; 2008. Trade development and transport in Southern Africa (Working paper).
- United Nations Economic Commission for Africa, 2005. Compendium of air transport integration and cooperation initiatives in Africa (Working paper).
- United Nations Economic Commission for Africa, 2002. Clarification of issues and articles of the Yamoussoukro decision (Working paper).
- United Nations Economic Commission for Africa, 1988. Report of the special Conference of Ministers of Civil Aviation: Yamoussoukro, Côte d'Ivoire 6-7 October 1988.
- World Civil Aviation Report 2016, n.d.
- World Trade Organisation, 2017. Trade policy review report by the Secretariat: The member countries of the West African Economic and Monetary Union (WAEMU) (No. WT/TPR/S/362).

Books

- Abeyratne, R., 2013. Convention on International Civil Aviation: A Commentary. Springer Science & Business Media.
- Adu, Y.N., Ananidze, F., Adu, S., 2020. African Union Outer Space Program: Chances and Challenges, in: Popkova, E.G., Sergi, B.S., Haabazoka, L., Ragulina, J.V. (Eds.), Supporting Inclusive Growth and Sustainable Development in Africa - Volume II: Transforming Infrastructure Development. Springer International Publishing, Cham, pp. 145–157. https://doi.org/10.1007/978-3-030-41983-7_11
- Al Khalifa, A., 2017a. Towards a single Arab aviation market.
- Al Khalifa, A., 2017b. TOWARDS A SINGLE ARAB AVIATION MARKET. GRIN Publishing.
- Amankwah-Amoah, J., 2018. Why are so many African companies uncompetitive on the global stage? Insights from the global airline industry, in: Africa's Competitiveness in the Global Economy. Springer, pp. 195–216.
- Bartsch, R.I.C., 2020. International aviation law: a practical guide.
- Bofinger, H., 2011. Africa's transport infrastructure: Mainstreaming maintenance and management. World Bank Publications.

- Bossche, P.V. den, 2008. *The Law and Policy of the World Trade Organization: Text, Cases and Materials*. Cambridge University Press.
- Button, K., 1998. *Opening U.S. Skies to Global Airline Competition*.
- Button, K., Martini, G., Scotti, D., 2019. *The Economics and Political Economy of African Air Transport*.
- Button, K., Martini, G., Scotti, D., 2017. *The Economics and Political Economy of African Air Transport*. Routledge.
- Cheng, B., 1962. *The law of international air transport*. Stevens.
- Daley, B., 2016. *Air Transport and the Environment*. Routledge, London.
<https://doi.org/10.4324/9781315566320>
- De Gove, S.V., 2019. *An Assessment of Key Indicators of Sustainable Development in the South African Airline Industry*. University of Johannesburg (South Africa).
- Dempsey, P.S., 2008. *Public International Air Law*. Rochester, NY.
- Dempsey, P.S., Jakhu, R.S., 2017. *Routledge handbook of public aviation law*. Routledge Abingdon.
- Dempsey, P.S., Milde, M., 2005. *International air carrier liability: The Montreal Convention of 1999*. McGill University Centre for Research in Air & Space Law, Montreal.
- Dobson, A., 2017. *A history of international civil aviation: from its origins through transformative evolution*. Routledge.
- Doganis, R., 2005. *The Airline Business*. Routledge.
- Doganis, R., 2002. *Flying Off Course: The Economics of International Airlines*. Psychology Press.
- Fagbayibo, B., 2018. From OAU to AU: Rethinking Supranational Governance in Africa, in: *The Palgrave Handbook of African Politics, Governance and Development*. Springer, pp. 771–782.
- Finaish, M.M.A., Bell, E., 1994. *The Arab Maghreb Union*. International Monetary Fund.
- Forsyth, P., 2013. *Economic Evaluation of Air Services Liberalisation: The New Calculus*, in: *Liberalisation in Aviation*. Routledge.
- Foster, V., Briceño-Garmendia, C., 2010a. *Africa's infrastructure: a time for transformation*. World Bank.
- Foster, V., Briceño-Garmendia, C., 2010b. *Africa's infrastructure: a time for transformation*. World Bank.
- Gathii, J.T., 2011. *African regional trade agreements as legal regimes*. Cambridge University Press.
- Havel, B.F., 2009a. *Beyond open skies: a new regime for international aviation*. Kluwer Law International BV.

- Havel, B.F., 2009b. *Beyond Open Skies: A New Regime for International Aviation*. Kluwer Law International B.V.
- Havel, B.F., Sanchez, G.S., 2014. *The Principles and Practice of International Aviation Law*. Cambridge University Press, New York, NY.
- International Civil Aviation Organisation, 2015. *Aviation Security Oversight Manual*. International Civil Aviation Organization.
- Iranu, E., 2018. Air transport security in Kenya, in: *Air Transport Security*. Edward Elgar Publishing, pp. 180–198.
- Larsen, P.B., Sweeney, J., Gillick, J., 2012. Aviation law: Cases, laws and related sources, in: *Aviation Law: Cases, Laws and Related Sources*. Brill Nijhoff.
- Lelieur, I., 2016. *Law and Policy of Substantial Ownership and Effective Control of Airlines: Prospects for Change*. Routledge, London. <https://doi.org/10.4324/9781315250717>
- Leon, P.M. de, 2017. *Introduction to Air Law*. Wolters Kluwer.
- Lubbe, B., Shornikova, S., 2017. The development of African air transport, in: *The Economics and Political Economy of African Air Transport*. Routledge, pp. 16–39.
- Martini, G., Scotti, D., 2017. Air transport in Africa, in: *Chapters*. Edward Elgar Publishing, pp. 185–202.
- Mays, T.M., Delancey, M.W., 2002. *Historical Dictionary of International Organizations in Sub-Saharan Africa*, Second edition. ed. Scarecrow Press, Lanham, Md.
- Milde, M., 2008. *International air law and ICAO*. Eleven International Publishing.
- Morrison, S., Winston, C., 2010. *The Economic Effects of Airline Deregulation*. Brookings Institution Press.
- Organization, I.C.A., 2011. *The Facilitation Manual*. International Civil Aviation Organization.
- Putri, R.A.S., 2017. *Regional open skies regime in Southeast Asia and its relevance to air transport deregulation in Indonesia*. McGill University (Canada).
- Ranganathan, R., Foster, V., 2011. *ECCAS's Infrastructure: A Regional Perspective, Policy Research Working Papers*. The World Bank. <https://doi.org/10.1596/1813-9450-5857>
- Regulation of Air Transport, n.d.
- Rhoades, D.L., 2016. *Evolution of international aviation: Phoenix rising*. Routledge.
- Salazar, J.C., Van Fenema, P., 2017. *Routledge handbook of public aviation law*. ROUTLEDGE, Place of publication not identified.
- Schless, A.L., 1994. *Open Skies: Loosening the Protectionist Grip on International Civil Aviation*. HeinOnline.

- Schlumberger, C.E., 2010. Open skies for Africa: implementing the Yamoussoukro decision. World Bank Publications.
- Schlumberger, C.E., Weisskopf, N., 2014. Ready for Takeoff? The Potential for Low-Cost Carriers in Developing Countries. World Bank Publications.
- Scott, B.I., Trimarchi, A., 2019. Fundamentals of international aviation law and policy. Routledge.
- Starkie, D., 2016. Aviation Markets: Studies in Competition and Regulatory Reform. Routledge, London. <https://doi.org/10.4324/9781315261850>
- State, Sovereignty, and International Governance, 2002. <https://doi.org/10.1093/acprof:oso/9780199245383.001.0001>
- Stewart, T., 1993. Gatt Uruguay Round: A Negotiating History (1986-1992).
- Tarrósy, I., Szabó, L., Hydén, G., 2011. The African state in a changing global context: breakdowns and transformations. LIT Verlag Münster.
- Thornton, R.L., 1970. International Airlines and Politics: a study in adaptation to change. Program in International Business, University of Michigan.
- Truxal, S., 2019. Airspace sovereignty in the Chicago Regime: a reality check, in: Mendes de Leon, P., Buissing, N. (Eds.), Kluwer Law International, The Netherlands, pp. 291–303.
- U.S Government Printing Office, 1948. Proceedings of the International Civil Aviation Conference: Chicago, Illinois, November 1-December 7, 1944. U.S. Government Printing Office.
- Vermooten, J., 2008. Competition rules within bi-lateral air service agreements (BASAs) for the purposes of developing a liberal regional air transport policy within Africa.
- Warnock-Smith, D., Njoya, E.T., 2017. The development of air service agreements in Africa, in: The Economics and Political Economy of African Air Transport. Routledge, pp. 61–79.
- Wassenbergh, H.A., 1957. Post-War International Civil Aviation Policy and the Law of the Air.
- Weber, L., 2017. The Chicago Convention, in: Handbook of Public Aviation Law, Routledge.
- Wiafe-Amoako, F., 2021. Africa 2020–2022. Rowman & Littlefield.
- World Bank, 2020. The African Continental Free Trade Area: Economic and Distributional Effects. World Bank, Washington, DC. <https://doi.org/10.1016/978-1-4648-1559-1>

Journal Articles

- Abate, M., 2016. Economic effects of air transport market liberalisation in Africa. Transportation Research Part A: Policy and Practice 92, 326–337. <https://doi.org/10.1016/j.tra.2016.06.014>
- Abeyratne, R., 2014a. Convention on International Civil Aviation. A Commentary, Switzerland.

- Abeyratne, R., 2014b. Should ICAO Have a Role as an Economic Regulator of Air Transport. *Air & Space Law*. 27, 8–24.
- Abeyratne, R., 2003. Implications of the Yamoussoukro decision on African aviation. *Air and Space Law* 28.
- Abeyratne, R.I.R., 1998. The future of African civil aviation. *Journal of Air Transportation World Wide* 3.
- Adar, K., 2011. East African Community. First International Democracy Report. Moncalieri: Center for Studies on Federalism.
- Ademola, O., 2000. 62 - Policies for Regional Integration in Africa.
- Adeyeye, A., 2016. Understanding Africa's slow growth in intra-regional air transport. *Africa Business*.
- AFRAA, 2020. 'Better skies for Africa' AFRAA Position Paper- Liberalisation of the African Skies.
- African Civil Aviation Commission, 2012. African air transport and the protection of the consumer. Montreal.
- African Union, 2018a. Single African Air Transport Market flying agenda 2063: the SATTM handbook.
- African Union, 2018b. The Single African Air Transport Market—An Agenda 2063 flagship project. Addis Ababa: African Union Commission.
- African Union, 2016. Ministerial conference on aviation security and facilitation in Africa.
- African Union, n.d. 2011c. Capacity building impact of brain drain on African aviation.: Document presented at the second session of the African Union Conference of Ministers Responsible for Transport.
- Aghrout, A., Sutton, K., 1990. Regional economic union in the Maghreb. *The journal of modern African studies* 28, 115–139.
- Ahmed Boukhary, M., 1981. Air transport in Africa: A case study of MAGHREB airlines. Massachusetts Institute of Technology.
- Alter, K., 2006. The Theory and Reality of the European Coal and Steel Community.
- Amankwah-Amoah, J., Debrah, Y.A., 2014. Air Afrique: the demise of a continental icon. *Business History* 56, 517–546. <https://doi.org/10.1080/00076791.2013.809523>
- Anadi, S.K.M., 2005. Regional integration in Africa: the case of ECOWAS. University of Zurich.
- Baldock, G., 2003. Some legal aspects of an 'open skies' aviation policy for Australia.
- BAR, J., 2018. EAST AFRICAN COMMUNITIES (1967-1978, 1999-) AND THEIR ACTIVITY FOR POLITICAL STABILITY OF THE REGION. *Politeja* 56, 247–266.

- Bassens, D., Derudder, B., Storme, T., Witlox, F., Otiso, K.M., 2012. African gateways: measuring airline connectivity change for Africa's global urban networks in the 2003-2009 period. *South African Geographical Journal= Suid-Afrikaanse Geografiese Tydskrif* 94, 103–119.
- Bellot, H.H., 1918. The sovereignty of the air. *Int'l L. Notes* 3, 135.
- BENABDERRAZIK, H., 2008. Opportunities for logistical improvements through Maghreb integration. *Maghreb Regional and Global Integration*. Peterson Institute for International Economics, Washington 139–148.
- Beritelli, P., Bieger, T., Laesser, C., 2014. The New Frontiers of Destination Management: Applying Variable Geometry as a Function-Based Approach. *Journal of Travel Research* 53, 403–417. <https://doi.org/10.1177/0047287513506298>
- Bernardo, V., Fageda, X., 2017. The effects of the Morocco-European Union open skies agreement: A difference-in-differences analysis. *Transportation Research Part E: Logistics and Transportation Review* 98, 24–41.
- Bofinger, H.C., 2018. Air Transport in Africa: A Portrait of Capacity and Competition in Various Market Segments. <https://doi.org/10.1093/oso/9780198821885.003.0006>
- Bohmann, K., 2000. The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law - Policy; Consideration; Comparison. *J. Air L. & Com.* 66, 689–740.
- Bonin, J.R., 2008. Regionalism in International Civil Aviation: A Reevaluation of the Economic Regulation of International Air Transport in the Context of Economic Integration. *S.Y.B.I.L.* 12, 113–132.
- Bonin, R.J., n.d. *International Air Transport Liberalisation in East Asia: A regional approach to reform (LL.M)*. University of Singapore, 2012.
- Boukhary, M.A., 1981. *Air transport in Africa: a case study of MAGHREB Airlines'*. Massachusetts Institute of Technology.
- Brooks, W.P., 1967. The development of air transport. *Journal of Transport Economics and Policy*.
- Brown, V., 2017. The Road to Yamoussoukro. *JCULP* 1, 229.
- Burchall, H., 1938. *Imperial Air Routes*. Royal United Services Institution. *Journal* 83, 247–261. <https://doi.org/10.1080/03071843809422038>
- Button, K., 1996. Liberalising European Aviation: Is There an Empty Core Problem? *Journal of Transport Economics and Policy* 30, 275–291.
- Button, K., Brugnoli, A., Martini, G., Scotti, D., 2015b. Connecting African urban areas: airline networks and intra-Sub-Saharan trade. *Journal of Transport Geography* 42, 84–89. <https://doi.org/10.1016/j.jtrangeo.2014.11.007>

- Button, K., Martini, G., Scotti, D., 2015c. African Decolonisation and Air Transportation. *Journal of Transport Economics and Policy (JTEP)* 49, 626–639.
- Byiers, B., 2017. Understanding regional economic policies in Central Africa: Struggling to integrate in an intertwined region. *European Centre for Development Policy management*.
- Chabrier, P., Mohamed, F., Eric, B., 1994. The Arab Maghreb Union. *IMF Working Papers* 1994.
- Chang, Y.-C., Williams, G., 2002. Prospects for Changing Airline Ownership Rules. *J. Air L. & Com.* 67, 233–240.
- Chang, Y.-C., Williams, G., 2001. Changing the rules—amending the nationality clauses in air services agreements. *Journal of Air Transport Management* 7, 207–216.
[https://doi.org/10.1016/S0969-6997\(01\)00007-2](https://doi.org/10.1016/S0969-6997(01)00007-2)
- Chang, Y.-C., Williams, G., Hsu, C.-J., 2004. The evolution of airline ownership and control provisions. *Journal of Air Transport Management* 10, 161–172.
- Chia, S.Y., 2014. The ASEAN Economic Community: progress, challenges, and prospects. *A World Trade Organization for the 21st Century* 269–315.
- Clark, L.S., 2004. The 2001 Cape Town Convention on International Interests in Mobile Equipment and Aircraft Equipment Protocol: Internationalising Asset-Based Financing Principles for the Acquisition of Aircraft and Engines. *J. Air L. & Com.* 69, 3.
- COMESA, 2019. COMESA to intensify lobbying its members to sign air transport commitment – Common Market for Eastern and Southern Africa (COMESA). URL *<https://www.comesa.int/comesa-to-intensify-lobbying-its-ms-to-sign-air-transport-commitment/>*
- Cooper, J.C., 1965. Backgrounds of international public air law. *YB Air & Space L.* 3.
- Cooper, J.C., 1947. The Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport. *J. Air L. & Com.* 14, 125.
- Craig, D., 1957. National Sovereignty at High Altitudes. *J. Air L. & Com.* 24, 384.
- Cumming, D., 1962. Aviation in Africa. *African Affairs* 61, 29–39.
- Daramola, A., Jaja, C., 2011. Liberalisation and changing spatial configurations in Nigeria’s domestic air transport network. *Journal of Transport Geography* 19, 1198–1209.
- Dempsey, P., 1992. *European Aviation Regulation: Flying Through the Liberalisation Labyrinth*. *Boston College International and Comparative Law Review* 15, 311.
- Dempsey, P.S., 1987. Aerial Dogfights over Europe: The Liberalisation of EEC Air Transport. *J. Air L. & Com.* 53, 615.

- Dempsey, P.S., 1986. Turbulence in the Open Skies: The Deregulation of International Air Transport. *Transp. L.J.* 15, 305–388.
- Diamond, B.R., 1975. The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements. *J. Air L. & Com.* 41, 419–496.
- Dierikx, M.L.J., 1991. Struggle for Prominence: Clashing Dutch and British Interests on the Colonial Air Routes, 1918–42. *Journal of Contemporary History* 26, 333–351. <https://doi.org/10.1177/002200949102600207>
- Dobson, A., 2010. Civil Aviation and European Integration: Creating the Seemingly Impossible SEAM. *J. Common Mkt. Stud.* 48, 1127.
- Dominique, M.D., 2021. The Impact of Open-Sky Agreements on Regional Integration. Focused on case studies of the EU and ASEAN.
- Dy, M., 2014. Opening ASEAN's Skies, The ASEAN Way: Lessons from The European Experience and The Prospects of an Integrated Aviation Market. Available at SSRN 2426438.
- Ebke, W.F., Wenglorz, G.W., 1990. Liberalizing Scheduled Air Transport within the European Community: From the First Phase to the Second and Beyond. *Transp. L.J.* 19, 417.
- Economic Commission for Africa, 2004. Evaluation of the implementation of the Yamoussoukro decision in the Cemac zone: the experience of four countries: Cameroon, Central African Republic, Congo and Gabon.
- Eken, S., 1979. Breakup of the East African Community: Problems of regional integration. *Finance & Development* 16. <https://doi.org/10.5089/9781616353391.022.A010>
- Enfield, S., 2020. Social policies and Continental Commitments to reducing poverty and inequality in Africa. Institute of Development Studies.
- English, J.F., 1933. Air Freedom: The Second Battle of the Books. *Revue Aeronautique Internationale* 3, 191.
- English, J.F., 1931. Air freedom: The second battle of the books. *J. Air L.* 2, 356.
- Eriksen, E.O., 2006. Reflexive supranationalism in Europe—on the cogs and wheels of integration. *Law and Democracy in the Post-National Union*, Oslo: ARENA 1–28.
- Fayed, H., Westlake, J., 2002. Globalization of Air Transport: The Challenges of the GATS. *Tourism Economics* 8, 431–455. <https://doi.org/10.5367/000000002101298214>
- Fiallos Pazmino, L.F., 2019. Legal perspectives on the cross- border operations of unmanned aircraft systems. Leiden.
- Finlay, C., Goldstein, A., 2004. Liberalisation and Foreign Direct Investment in Asian Transport Systems: The Case of Aviation.

- Fitzgerald, P., 1994. Lost horizons: The British government and civil aviation between the wars, 1919-1939.
- Formenti, L., 2021. Aviation alliances impact in African aviation market development. Universitat Politècnica de Catalunya.
- Fox, S.J., 2017. Borderless skies! Sovereign dominance, regionalism: lessons from Europe. *International Journal on World Peace* 34, 19–52.
- Fox, S.J., 2014. THE EVOLUTION OF AVIATION IN TIMES OF WAR AND PEACE: BLOOD, TEARS, AND SALVATION. *International Journal on World Peace* 31.
- FU, X., OUM, T.H., ZHANG, A., 2010. Air Transport Liberalisation and Its Impacts on Airline Competition and Air Passenger Traffic. *Transportation Journal* 49, 24–41.
- Gertler, Z.J., 1982. Nationality of Airlines: A Hidden Force in the International Air Regulation Equation. *J. Air L. & Com.* 48, 51.
- Godwin Bongyu, M., 2009. The Economic and Monetary Community of Central Africa (CEMAC) and the Decline of Sovereignty. *Journal of Asian and African Studies* 44, 389–406.
- Goetz, A.R., Graham, B., 2004. Air transport globalization, liberalisation and sustainability: post-2001 policy dynamics in the United States and Europe. *Journal of Transport Geography, State Intervention in Contemporary Transport* 12, 265–276.
<https://doi.org/10.1016/j.jtrangeo.2004.08.007>
- Gopalan, S., 2003. Securing Mobile Assets: The Cape Town Convention and Its Aircraft Protocol. *N.C.J. Int'l L. & Com. Reg.* 29, 59.
- Griffiths, I.Ll., 1989. Airways Sanctions against South Africa. *Area* 21, 249–259.
- Gwaradzimba, F., 1993. SADCC and the Future of Southern African Regionalism. *African Issues* 21, 51–59. ***<https://doi.org/10.1017/S0047160700501644>***
- Haanappel, P.P.C., 2001. Airline Ownership and Control, and Some Related Matters. *Air and Space Law* 26.
- Haanappel, P.P.C., 1979. Bilateral Air Transport Agreements - 1913-1980. *Int'l Trade L.J.* 5, 241–267.
- Hameed, H., 2016. Liberalisation without Privatization: A Perspective from Aviation Industry. *LUMS L.J.* 3, 16–31.
- Hartzenberg, T., 2011. Regional integration in Africa. Available at SSRN 1941742.
- Havel, B.F., 2004. Preparing for a New Era in International Aviation: A Transatlantic Common Aviation Union takes Shape. *Irish J. European L.* 11, 5–33.

- Havel, B.F., 2001. A New Approach to Foreign Ownership of National Airlines International Relations. *Issues Aviation L. & Pol'y* 2001–2004, 13201–13226.
- Havel, B.F., Sanchez, G.S., 2011. Restoring Global Aviation's Cosmopolitan Mentalite. *B.U. Int'l L.J.* 29, 1–40.
- Havel, B.F., Sanchez, G.S., 2010. The Emerging Lex Aviatica. *Geo. J. Int'l L.* 42, 639–672.
- Hedlund, D.C., 1994. Toward open skies: liberalizing trade in international airline services. *Minn. J. Global Trade* 3, 259.
- Heinz, S., O'Connell, J.F., 2013. Air transport in Africa: toward sustainable business models for African airlines. *Journal of Transport Geography* 31, 72–83. <https://doi.org/10.1016/j.jtrangeo.2013.05.004>
- Heriyanto, D.S.N., Putro, Y.M., 2019. Challenges and Opportunities of the Establishment ASEAN Open Skies Policy. *PADJADJARAN JURNAL ILMU HUKUM (JOURNAL OF LAW)* 6, 466–488.
- Heyns, C., Baimu, E., Killander, M., 2003. The African Union. *German YB Int'l L.* 46, 252.
- Higham, R.D.S., 1959. The British Government and Overseas Airlines, 1918 - 1939, a Failure of Laissez - Faire. *J. Air L. & Com.* 26, 1–12.
- Hiriart, M., 2015. Introduction of metal Neutrality on the transatlantic air market: Antitrust and regulatory concerns. McGill University, Canada.
- Hörstke, S., 2003. Air carrier ownership and control revisited. McGill University.
- Hubner, W., 2001. Liberalisation Scenarios for International Air Transport. *Journal of World Trade* 35.
- Humele, P.F., 1996. The withering of foreign ownership restrictions and the rise of competition in the North American Airline Industry.
- ICAO, 2019. Agenda Item 32: Economic Regulation of International Air Transport-Policy, in: *The Single African Air Transport Market: Sustainable Regulatory System*. Presented at the Assembly-40th Session.
- ICAO, n.d. Agenda Item 39: Economic Regulation of International Air Transport — Policy.
- ICAO, n.d. Manual on the regulation of international air transport (Doc 9626) (Third Edition -2016).
- Idrisu, D.I., 2004. Air Transport Liberalisation and Open Skies Agreements in Africa–The Regulatory and Commercial Implication for Nigeria. Unpublished PhD thesis, St. Clements University.
- International Civil Aviation Organisation, 2013. Air transport and the protection of the consumer. Montreal.

- Irandu, E.M., Rhoades, D.L., 2006. The Development of Jomo Kenyatta International Airport as a Regional Aviation Hub. *Journal of Air Transportation*, Volume 11, No. 1.
- Ishutkina, M.A., Hansman, R.J., 2011. Analysis of the Interaction Between Air Transportation and Economic Activity: A Worldwide Perspective.
- Islam, Mr., n.d. Pressing Issues of Global Free Trade in Services. *Law in Context* 21, 251–282. <https://doi.org/10.3316/ielapa.154796446236156>
- Jacobini, H.B., 1947. A Resume of the International Law of Aviation.
- Jönsson, C., 1981. Sphere of flying: the politics of international aviation. *International Organization* 35, 273–302.
- Kanu, M.I., 2020. Towards a Purposeful Economic Integration in Africa: Free Movement of Persons in Lieu of Illegal Migration. <https://doi.org/10.2139/ssrn.3459837>
- Killander, M., 2008. The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward. *Hum. Rts. Q.* 30, 41.
- Kiraso, B.B. (Hon), 2009. EAC integration process and enabling peace and security architecture. EAC Peace and Security Conference, Kampala, Uganda, 5th October 2009.
- Laplace, I., Lenoir, N., Roucolle, C., 2019. Economic impacts of the ASEAN single aviation market: focus on Cambodia, Laos, Myanmar, The Philippines and Vietnam. *Asia Pacific Business Review* 25, 656–682. <https://doi.org/10.1080/13602381.2019.1652979>
- Law, C.C.H., Katekaew, R., 2022. COVID-19: ASEAN Aviation Policy and the Significance of Intra-Regional Connectivity. *Journal of Asian Economic Integration* 4, 1–23. <https://doi.org/10.1177/26316846221075476>
- Lawton, T.C., 1999. Governing the Skies: Conditions for the Europeanisation of Airline Policy. *Journal of Public Policy* 19, 91–112.
- Lee, B., 1913. Sovereignty of the air. *Am. J. Int'l L* 7.
- Lee, J.W., 2013. Revisiting Freedom of Overflight in International Air Law: Minimum Multilateralism in International Air Transport. *Air and Space Law* 38.
- Lemanski, C., 2007. Global cities in the south: deepening social and spatial polarisation in Cape Town. *Cities* 24, 448–461.
- Lumbroso, A., 2019. Aviation liberalisation: What headwinds do we still face? *Journal of Air Transport Management* 74, 22–29. <https://doi.org/10.1016/j.jairtraman.2018.09.003>
- Lykotrafiti, A., 2019. A Comprehensive Study of Air Transport Liberalisation Through the Lens of Strategic Airline Alliances. *Air and Space Law* 44.

- Lykotrafiti, A., 2015. Liberalisation of international civil aviation – charting the legal flightpath. *Transport Policy, Air Transport Economics* 43, 85–95. <https://doi.org/10.1016/j.tranpol.2015.05.008>
- Lykotrafiti, A., 2011. Consolidation and Rationalization in the Transatlantic Air Transport Market - Prospects and Challenges for Competition and Consumer Welfare. *J. Air L. & Com.* 76, 661–732.
- Lyth, P., 2000. The Empire’s Airway: British Civil Aviation from 1919 to 1939. *Revue belge de Philologie et d’Histoire* 78, 865–887. <https://doi.org/10.3406/rbph.2000.4469>
- Macedo, B.M.S., 2008. A potential open sky agreement between the EU and MERCOSUR Based on the EU-US Agreement.
- Maluwa, T., 2003. The constitutive act of the African Union and institution-building in postcolonial Africa. *Leiden Journal of International Law* 16, 157–170.
- Mbithi, M., 2013. Assessment of the effects of regulatory regime on the cost of air transport in the East African Community, in: ‘Boosting Intra-African Trade: The Role of Regulation and Policy. Presented at the RAPCA 8TH ANNUAL TRADE CONFERENCE, Arusha, Tanzania.
- McCormack, R., 1989. War and Change: Air Transport in British Africa, 1939-1946. *Canadian Journal of History* 24, 341–360. <https://doi.org/10.3138/cjh.24.3.341>
- McCormack, R., 1976. Airlines and Empires: Great Britain and the ‘Scramble for Africa,’ 1919–1939. *Canadian Journal of African Studies / Revue canadienne des études africaines* 10, 87–105. <https://doi.org/10.1080/00083968.1976.10803748>
- McCormack, R.L., 1989. Imperialism, air transport and colonial development: Kenya, 1920–46. *The Journal of Imperial and Commonwealth History* 17, 374–395. <https://doi.org/10.1080/03086538908582798>
- McCormack, R.L., 1979. Man with a Mission: Oswald Pirow and South African Airways, 1933–1939*. *The Journal of African History* 20, 543–557. <https://doi.org/10.1017/S0021853700017539>
- Meichsner, N.A., O’Connell, J.F., Warnock-Smith, D., 2018. The future for African air transport: Learning from Ethiopian Airlines. *Journal of Transport Geography* 71, 182–197.
- Mhlanga, O., 2018. Liberalisation initiatives of the airline industry in southern Africa: progress achieved and hindrances to implementation. *African Journal of Hospitality, Tourism and Leisure*.
- Munene, M.N., 2012. Liberalisation of Air Transport in Africa: Case of Kenya’s Air Transport. University of Nairobi.

- Mwesigye, E.B., Mike, I., Kemeirembe, O.K., 2020. Influence of political regulatory environment on the liberalisation of the air transport industry in East Africa. *Journal of Strategic Management* 4.
- Mwikya, N.K., Angeline, M.S., 2018. Implementation of aviation safety standards and performance of air transport industry: A conceptual perspective. *Ajbuma Journal* 4.
- Myers, D.P., 1914. The Practical Solution of the Problem of Sovereignty in Aërial Law. *Green Bag* 26, 57.
- Narendra, S., 2014. General Agreement on Trade in Services and Aviation Ground Handling Services -A Theoretical Perspective. *IOSR Journal of Business Management* 16, 36–46. <https://doi.org/10.9790/487X-16413646>
- Ngari, D.N., 2016. Challenges and Prospects of Regional Integration in Africa: A Case Study of East African Community (Thesis). University of Nairobi.
- Njoroge, S.P., Samunderu, E., 2021. Africa Aviation: Challenges and Opportunities. Presented at the Bode, Umuerrri (Eds.): *Universities, Entrepreneurship and Enterprise Development in Africa – Conference Proceedings 2020*, pp. 110–133. https://doi.org/10.18418/978-3-96043-083-4_110
- Njoya, E.T., 2016. Africa’s single aviation market: The progress so far. *Journal of Transport Geography, Air transport liberalisation and airline network dynamics: Investigating the complex relationships* 50, 4–11. <https://doi.org/10.1016/j.jtrangeo.2015.05.009>
- Nwozor, A., Okidu, O., Adedire, S., 2021. Agenda 2063 and the Feasibility of Sustainable Development in Africa: Any Silver Bullet? *Journal of Black Studies* 52, 688–715. <https://doi.org/10.1177/00219347211021099>
- Onuma, T., 1998. The Future Regulatory Scheme of the International Civil Aviation Industry Special Issue on International Civil Aviation and the Law: Section I: Main Articles. *World Bull.* 14, 20–36.
- Oumarou, A., 2020. African Aviation Recovery Conference: Coordinating Efficient Response to the COVID-19 Crisis Effects on the Aviation Sector in Africa.
- Packer, C.A.A., Rukare, D., 2002. The New African Union and Its Constitutive Act. *American Journal of International Law* 96, 365–379. <https://doi.org/10.2307/2693932>
- Parshotam, A., n.d. Regional Integration for the Arab Maghreb Union: Looking Beyond the Horizon (30), *Regional Program Political Dialogue South Mediterranean*.

- Permana, P., Hoen, H.W., Holzacker, R.L., 2020. Political Economy of ASEAN Open Skies Policy: Business Preferences, Competition and Commitment to Economic Integration. *Journal of Asian Economic Integration* 2, 44–61. <https://doi.org/10.1177/2631684620910520>
- Piermartini, R., Fache Rousová, L., 2008. Liberalisation of Air Transport Services and Passenger Traffic. <https://doi.org/10.2139/ssrn.1315204>
- Piermartini, R., Rousová, L., 2013. The Sky Is Not Flat: How Discriminatory Is the Access to International Air Services? *American Economic Journal: Economic Policy* 5, 287–319. <https://doi.org/10.1257/pol.5.3.287>
- Pirie, G., 2006. ‘Africanisation’ of South Africa’s international air links, 1994–2003. *Journal of Transport Geography* 14, 3–14.
- Pirie, G.H., 1992. Southern African Air Transport After Apartheid. *The Journal of Modern African Studies* 30, 341–348. <https://doi.org/10.1017/S0022278X00010752>
- Pirie, G.H., 1990. Aviation, apartheid and sanctions: Air transport to and from South Africa, 1945–1989. *GeoJournal* 22, 231–240. <https://doi.org/10.1007/BF00192821>
- Putra, A.A.B.N.A.S., 2019. Competition Law and Policy Harmonisation: Its Relation to Fair Competition Realisation in ASEAN Single Aviation Market. *Udayana Journal of Law and Culture* 3. <https://doi.org/10.24843/ujlc.2019.v03.i02.p03>
- Ranganathan, R., Foster, V., 2011. East Africa’s Infrastructure: A Regional Perspective. Regional aviation security and facilitation group for Africa and Indian Ocean region, 2015.
- Richman, A., Lyle, C., 2005. The economic benefits of liberalising regional air transport: a review of global experience. Johannesburg, ComMark Trust.
- Richman, A., Lyle, C., n.d. The Economic Benefits of Liberalising Regional Air Transport – A Review of Global Experience Headline Report 19.
- Rizkia, P., 2017. Regional open skies regime in Southeast Asia and its relevance to air transport deregulation in Indonesia (LL.M). McGill University, Canada.
- Rynerson, S.D., 2001. Everybody Wants to Go to Heaven, but Nobody Wants to Die: The Story of the Transatlantic Common Aviation Area. *Denv. J. Int’l L. & Pol’y* 30, 421–457.
- Sand, P.H., Freitas, J. de S., Pratt, G.N., 1960. An historical survey of international air law before the second world war. *McGill LJ* 7, 24.
- Schlumberger, C., 2009. The implementation of the Yamoussoukro decision.
- Schlumberger, C.E., Weisskopf, N., 2012a. Is the Arab take-off imminent? Opportunities for the development of the North African air transport sector following the Arab Spring. *Annals of Air and Space Law* 37, 245–275.

- Schlumberger, C.E., Weisskopf, N., 2012b. Open Skies in North Africa: Is Tunisia the Next Morocco? *IEMed: Mediterranean yearbook* 247–253.
- Severino, R.C., 2011. Politics of Association of Southeast Asian Nations Economic Cooperation. *Asian Economic Policy Review* 6, 22–38. <https://doi.org/10.1111/j.1748-3131.2011.01175.x>
- Seyer, H.S., 2008. An empire policy must be formed: The development of British imperial air routes in the interwar period. *the Psi Historian*.
- Shila, J.J., Anne, A., 2015. Promoting Aviation Safety in Africa: Analysis of Air Accidents in the Region Between 2004 and 2013, in: 18th International Symposium on Aviation Psychology. p. 43.
- Singh, A., 2019. Understanding Aviation Law Through the Evolving Concept of Sovereignty Beyond the Traditional Deep Blue Skies. <https://doi.org/10.2139/ssrn.3615130>
- Sochor, E., 1988. International civil aviation and the Third World: How fair is the system? *Third World Quarterly* 10, 1300–1322. <https://doi.org/10.1080/01436598808420108>
- Steyn, J.N., Mhlanga, O., 2016. The impact of international air transport agreements on airline operations in southern Africa.
- Stockfish, B., 1991. Opening closed skies: the prospects for further liberalisation of trade in international air transport services. *J. Air L. & Com.* 57, 599.
- Su, H., 2007. Politics of differentiation: enhanced cooperation in the EU and the pathfinder in APEC. *Asia Europe Journal* 5, 51–66.
- Sun, M., Tian, Y., Zhang, Y., Nadeem, M., Xu, C., 2021. Environmental Impact and External Costs Associated with Hub-and-Spoke Network in Air Transport. *Sustainability* 13, 465. <https://doi.org/10.3390/su13020465>
- Surovitskikh, S., Lubbe, B., 2015. The Air Liberalisation Index as a tool in measuring the impact of South Africa's aviation policy in Africa on air passenger traffic flows. *Journal of Air Transport Management* 42, 159–166. <https://doi.org/10.1016/j.jairtraman.2014.09.010>
- Talbot, C.C., 2008. The Battle for the Skies: Recent Legal Developments in the EU and US, and their Implications for the Consolidation of the Airline Industry. <https://doi.org/10.2139/ssrn.1655144>
- Tan, A.K.-J., 2010. The ASEAN multilateral agreement on air services: En route to open skies? *Journal of Air Transport Management* 16, 289–294.
- Tan, A.K.-J., 2009. Prospects for a single aviation market in Southeast Asia. *Annals of Air and Space Law* 34, 253–284.

- Thompson, B., 1993. Economic Integration Efforts in Africa: A Milestone-The Abuja Treaty. *Afr. J. Int'l & Comp. L.* 5, 743.
- Tino, E., 2014. THE VARIABLE GEOMETRY IN THE EXPERIENCE OF REGIONAL ORGANIZATIONS IN DEVELOPING COUNTRIES. *Spanish Yearbook of International Law* 18, 115–162.
- Trimarchi, A., 2017. The Laws of Ownership and Control of Airlines: Selected Jurisdictions. *J. Comp. L.* 12, 198–230.
- Tsie, B., 1996. States and markets in the Southern African development community (SADC): beyond the neo-liberal paradigm. *Journal of Southern African Studies* 22, 75–98. <https://doi.org/10.1080/03057079608708479>
- United Nations. Economic and Social Council, 1988. Explanatory note on the meeting and annotated agenda.
- United Nations Economic Commission for Africa, 2019. African Continental Free Trade Area: Questions & Answers.
- United Nations Economic Commission for Africa, 2001. The evaluation report on air transport sub-sector: the third and final evaluation report on the second United Nations transport and communications decade in Africa (UNCTADA II)1991-2000.
- United Nations Economic Commission for Africa, 1995. Report to the tenth meeting of the Conference of African Ministers of Transport and Communications on the special meeting of ministers in relation to the implementation of the Yamoussoukro declaration.
- United Nations Economic Commission for Africa, 1994. Report of the meeting of African ministers responsible for civil aviation: 9 September 1994.
- United Nations Economic Commission for Africa, 1991. Report on the implementation of the Yamoussoukro declaration on a new African air policy.
- United Nations Economic Commission for Africa, 1964. Report of the African air transport conference.
- Van De Voorde, E.E., 1992. European Air Transport after 1992: Deregulation or Re-Regulation? *The Antitrust Bulletin* 37, 507–528. <https://doi.org/10.1177/0003603X9203700209>
- van Fenema, H.P., 1998. Ownership Restrictions: Consequences and Steps to Be Taken. *Air & Space L.* 23, 63–66.
- Velia, M., van Basten, C., Dykes, A., 2008. Mozambican air transport liberalisation report.
- Venturi, B., Ayuso, A., 2020. Differentiation in ASEAN, ECOWAS and MERCOSUR: A Comparative Analysis Bart Gaens. Policy.

- Walker, H., 1953. Some Problems in the Development of Air Transport in West Africa. *The Aeronautical Journal* 57, 477–490. <https://doi.org/10.1017/S0368393100125623>
- Walulik, J., 2016. At the core of airline foreign investment restrictions: A study of 121 countries. *Transport Policy* 49, 234–251. <https://doi.org/10.1016/j.tranpol.2016.05.006>
- Warden, J.A., 2003. Open Skies at a Crossroads: How the United States and European Union Should Use the ECJ Transport Cases to Reconstruct the Transatlantic Aviation Regime Comment. *Nw. J. Int'l L. & Bus.* 24, 227–256.
- Warleigh-Lack, A., 2015. Differentiated integration in the European Union: towards a comparative regionalism perspective. *Journal of European Public Policy* 22, 871–887.
- Warner, S.M., 1993a. Liberalise Open Skies: Foreign Investment and Cobotage Restrictions Keep Noncitizens in Second Class. *Am. UL rev.* 43, 277.
- Warner, S.M., 1993b. Liberalise Open Skies: Foreign Investment and Cobotage Restrictions Keep Noncitizens in Second Class. *Am. UL rev.* 43, 277.
- Weinberg, S., 1991. Liberalisation of Air Transport: Time for the EEC to Unfasten Its Seatbelt. *University of Pennsylvania Journal of International Law* 12, 433.
- Willalta Puig, G., Darcis, C., 2009. The Development of European Union Implied External Competence: The Court of Justice and Opinion 1/03. *Anuario Espanol de Derecho Internacional* 25, 501.
- Williams, R.F., 1926. Developments in aerial law. *University of Pennsylvania Law Review and American Law Register* 75.
- Wiradipradja, E.S., 2010. Open Skies Policy: The Developing Countries Point of View. *Indonesian J. Int'l L.* 8, 1.
- Woll, C., 2003. Transatlantic Relations as a Catalyst to European Integration: The Activism of the European Commission in the Case of International Aviation.
- Woon, L., 2015. Regional Liberalisation in international air transport: towards Northeast Asian open skies (LL.M). m, McGill.
- Yansane, A.Y., 1977. West African economic integration: Is ECOWAS the answer? *Africa Today* 24, 43–59.
- Yu, G., 2009. US-EU Open Skies Deal and Its Implication for the Liberalisation of International Air Transport Services: A Chinese Perspective. *JE Asia & Int'l L.* 2, 129.
- Zaidi, W., 2008. Breaking the shackles: Foreign ownership and control in the airline industry. McGill University.

Zuan, H., Ellis, D., Pagliari, R., 2021. Geopolitics and the ASEAN single aviation market: Aspirations versus realities. *Transportation Research Procedia*, 10th International Conference on Air Transport – INAIR 2021, TOWARDS AVIATION REVIVAL 59, 95–104. <https://doi.org/10.1016/j.trpro.2021.11.101>

Websites and other secondary sources

ACI Africa Magazine, The Voice of African Airports, 2022.

African Airlines Association, 2021. Press Release – AFRAA Secretary General Receives Leadership Changemaker Award – AFRAA. URL <https://www.afraa.org/press-release-afraa-secretary-general-receives-leadership-changemaker-award/> (accessed 8.12.22).

African Civil Aviation Commission, n.d. Abuja Safety Targets [WWW Document]. URL <https://www.afcac.org/en/index.php/programmes-activities-safety/abuja-safety-targets>

African Union, n.d. African Civil Aviation Policy (AFCAP) [WWW Document]. URL <https://www.afcac.org/en/index.php/programmes-activities-legal/african-civil-aviation-policy-afcap>

African Union, n.d. Concept note on the First Ordinary Session of the African Union Specialized Technical Committee on Transport, Intercontinental and Interregional Infrastructures, Energy and Tourism.

African Union, n.d. Concept note on revision of the duties and responsibilities of the monitoring body of the Yamoussoukro decision.

African Union, n.d. Concept note of the Second Ordinary Session of the African Union Specialized Technical Committee on Transport, Transcontinental & Interregional Infrastructure, Energy and Tourism STC-TTIET.

African Union, n.d. Flagship Projects of Agenda 2063 | African Union [WWW Document]. URL <https://au.int/en/agenda2063/flagship-projects>

African Union, n.d. Regional Economic Communities | African Union [WWW Document]. URL <https://au.int/en/recs>

African Union, n.d. The African Continental Free Trade Area | African Union [WWW Document]. URL <https://au.int/en/african-continental-free-trade-area>

Amaleboba, P., 2018. Regulatory and institutional instruments of the Yamoussoukro decision.

Aviation Safety: EU Commission adopts new Air Safety List – INSIGHT EU MONITORING, n.d. URL https://portal.ieu-monitoring.com/editorial/aviation-safety-eu-commission-adopts-new-air-safety-list/16849/?utm_source=ieu-portal

- Aviation Security and Facilitation: Two Sides of a Coin - Facilitation in the EUR/NAT Office - Uniting Aviation [WWW Document], n.d. URL <https://unitingaviation.com/news/security-facilitation/aviation-security-and-facilitation-two-sides-of-a-coin-facilitation-in-the-eur-nat-office/>
- Ben-Ari, N., 2014. On bumpy roads and rails [WWW Document]. Africa Renewal. URL <https://www.un.org/africarenewal/magazine/april-2014/bumpy-roads-and-rails>
- CAPA, 2012. Tunisair's sluggish attitude towards change makes it ill-prepared for Open Skies | CAPA [WWW Document]. URL <https://centreforaviation.com/analysis/reports/tunisairs-sluggish-attitude-towards-change-makes-it-ill-prepared-for-open-skies-80772>
- CAPA, n.d. Airlines Association of Southern Africa [WWW Document]. URL <https://centreforaviation.com/data/profiles/industry-associations/aasa>
- Ch-aviation, 2022. Kenya Airways, SAA hunt for investor for Pan-African plans [WWW Document]. ch-aviation. URL <https://www.ch-aviation.com/portal/news/114448-kenya-airways-saa-hunt-for-investor-for-pan-african-plans>
- Ch-aviation, 2016. Royal Air Maroc to partner Air Senegal? [WWW Document]. ch-aviation. URL <https://www.ch-aviation.com/portal/news/50788-royal-air-maroc-to-partner-air-senegal>
- COMESA, 2019. COMESA to intensify lobbying its members to sign air transport commitment – Common Market for Eastern and Southern Africa (COMESA). URL <https://www.comesa.int/comesa-to-intensify-lobbying-its-ms-to-sign-air-transport-commitment/>
- Department for International Development, 2017. Costs and Benefits of 'Open Skies' in the East African Community [WWW Document]. GOV.UK. URL <https://www.gov.uk/research-for-development-outputs/costs-and-benefits-of-open-skies-in-the-east-african-community>
- Disenyana, T., Khumalo, N., 2009. Transport Services in SACU: Accelerating Harmonisation and Liberalisation [WWW Document]. Africa Portal. URL <https://www.africaportal.org/publications/transport-services-in-sacu-accelerating-harmonisation-and-liberalisation/>
- EAST AFRICAN COMMUNITIES (1967-1978, 1999-) AND THEIR ACTIVITY FOR POLITICAL STABILITY OF THE REGION on JSTOR [WWW Document], n.d. URL https://www-jstor-org.ksl.idm.oclc.org/stable/26662003#metadata_info_tab_contents
- European Commission, 2017. Aviation: EU concludes negotiations with Tunisia for a new aviation agreement [WWW Document]. URL https://transport.ec.europa.eu/news/aviation-eu-concludes-negotiations-tunisia-new-aviation-agreement-2017-12-11_en

European Union, 2021. Aviation: ASEAN and the EU conclude the world's first bloc-to-bloc Air Transport Agreement | EEAS Website [WWW Document]. URL https://www.eeas.europa.eu/eeas/aviation-asean-and-eu-conclude-world%E2%80%99s-first-bloc-bloc-air-transport-agreement_en

European Union Aviation Safety Agency, 2020. EU-Africa Safety in Aviation (EU-ASA) Project - improving aviation safety in Sub-Saharan Africa [WWW Document]. EASA. URL <https://www.easa.europa.eu/domains/international-cooperation/technical-cooperation-projects/eu-africa-safety-aviation-eu-asa>

FlightGlobal, 29, 2013. Analysis: Evolution of the African airline market [WWW Document]. Flight Global. URL <https://www.flightglobal.com/analysis-evolution-of-the-african-airline-market/109929.article>

Hamza, A. W., 2017. The Maghreb Union is one of the world's worst-performing trading blocs. Here are five ways to change that [WWW Document]. World Economic Forum. URL <https://www.weforum.org/agenda/2017/06/five-ways-to-make-maghreb-work/>

Hörstke, S., n.d. Air carrier ownership and control revisited [WWW Document]. URL <https://escholarship.mcgill.ca/concern/theses/wh246s641>

IATA, n.d. Continental Study on the Benefits of the Single African Air Transport Market and Communication Strategy for SAATM advocacy | Union Africaine [WWW Document]. URL <https://au.int/fr/node/37943>

ICAO, n.d. Proceedings of the International Civil Aviation Conference [WWW Document]. URL <https://www.icao.int/chicagoconference/pages/proceed.aspx>

Institute for Security Studies, n.d. Profile: Arab Maghreb Union (AMU) [WWW Document]. ISS Africa. URL <https://issafrika.org/profile-arab-maghreb-union-amu>

International Civil Aviation Organisation, n.d. Comprehensive Regional Implementation Plan for Aviation Security and Facilitation in Africa (AFI SECFAL PLAN) [WWW Document]. URL <https://www.icao.int/ESAF/AFISECFAL/Pages/default.aspx>

InterVISTAS Consulting, n.d. Costs and Benefits of 'Open Skies' in the East African Community [WWW Document]. GOV.UK. URL <https://www.gov.uk/research-for-development-outputs/costs-and-benefits-of-open-skies-in-the-east-african-community>

Koga, 2022. RwandAir cancels flights to DR Congo. The East African.

Kuuchi, R., 2016. Africa's potential is sky high – and the airline industry is key [WWW Document]. World Economic Forum. URL <https://www.weforum.org/agenda/2016/05/africa-s-potential-is-sky-high-and-the-airline-industry-is-key/>

- Ludorf, C., 2018. Aviation Security and Facilitation: Two Sides of a Coin - Facilitation in the EUR/NAT Office. Uniting Aviation. URL <https://unitingaviation.com/amp/news/security-facilitation/aviation-security-and-facilitation-two-sides-of-a-coin-facilitation-in-the-eur-nat-office/>
- Offiong, E., n.d. Africa has ambitious goals for 2063: plans for outer space hold the key to success [WWW Document]. The Conversation. URL <http://theconversation.com/africa-has-ambitious-goals-for-2063-plans-for-outer-space-hold-the-key-to-success-180636>
- Oliver i Cristià, O., 2020. The Airports of the Maghreb Face the New Century [WWW Document]. URL <https://www.iemed.org/publication/the-airports-of-the-maghreb-face-the-new-century/>
- Pinto, T., 2021. Supranational bodies do not thrive in Africa. GIS Reports. URL <https://www.gisreportsonline.com/r/supranational-organizations-africa/>
- Post-War International Civil Aviation Policy and the Law of the Air | SpringerLink [WWW Document], n.d. URL <https://link.springer.com/book/10.1007/978-94-017-6044-7>
- SADC, n.d. COSCAP-SADC: SADC Aviation Safety Organisation (SASO) [WWW Document]. URL <https://saso.sadc.int/index.php/saso-secretariat/coscap-sadc>
- Southern African Air Transport After Apartheid | The Journal of Modern African Studies | Cambridge Core [WWW Document], n.d. URL <https://www.cambridge.org/core/journals/journal-of-modern-african-studies/article/abs/southern-african-air-transport-after-apartheid/D7D75D42A1938D5DC6305161CE085AC9>
- SSATP, n.d. Regional Integration | SSATP [WWW Document]. URL <https://www.ssatp.org/topics/regional-integration>
- The African Continental Free Trade Area: Economic and Distributional Effects [WWW Document], n.d. URL <https://openknowledge.worldbank.org/handle/10986/34139>
- The Law and Policy of the World Trade Organization: Text, Cases and Materials - Peter Van den Bossche - Google Books [WWW Document], n.d. URL [https://books.google.co.ke/books?hl=en&lr=&id=4PYZ7q3uDr8C&oi=fnd&pg=PA2&dq=Peter+Bossche+and+Werner+Zdouc,+The+law+and+policy+of+the+World+Trade+Organization:+Text,+cases+and,+materials,+vol+3+\(Cambridge+University+Press+2008\)+at+306.&ots=Ubik4HVMS&sig=2m0fmugEKj4pnM79zvXNRUuciP0&redir_esc=y#v=onepage&q&f=false](https://books.google.co.ke/books?hl=en&lr=&id=4PYZ7q3uDr8C&oi=fnd&pg=PA2&dq=Peter+Bossche+and+Werner+Zdouc,+The+law+and+policy+of+the+World+Trade+Organization:+Text,+cases+and,+materials,+vol+3+(Cambridge+University+Press+2008)+at+306.&ots=Ubik4HVMS&sig=2m0fmugEKj4pnM79zvXNRUuciP0&redir_esc=y#v=onepage&q&f=false)

- The World Bank Group, 2010. Open Skies for Africa – Implementing the Yamoussoukro Decision [WWW Document]. World Bank. URL <https://www.worldbank.org/en/topic/transport/publication/open-skies-for-africa>
- Times Aerospace, 2021. Kenya Airways and South African Airways sign strategic partnership framework | Times Aerospace [WWW Document]. URL <https://www.timesaerospace.aero/news/air-transport/kenya-airways-and-south-african-airways-sign-strategic-partnership-framework>
- UEMOA, West African Economic and Monetary Union. West African Economic and Monetary Union [WWW Document]. URL <http://www.uemoa.int/en/about-uemoa>
- Wilson, S., 2015. Air Service Agreement Liberalisation and Airline Alliances [WWW Document]. ITF. URL <https://www.itf-oecd.org/air-service-agreement-liberalisation-and-airline-alliances>

ANNEXURES

Annexure I: Concrete Measures

IMMEDIATE MEASURES TOWARDS ACTUALISING THE DECLARATION OF SOLEMN COMMITMENT BY AFRICAN UNION MEMBER STATES TO THE IMPLEMENTATION OF THE 1999 YAMOOUSSOUKRO DECISION AND THE ESTABLISHMENT OF A SINGLE AFRICAN AIR TRANSPORT MARKET BY 2017

In compliance with the Declaration of the Assembly of Heads of States and Government (Assembly/AU/Decl.1(XXIV)) and in particular the declaration of solemn commitment (Assembly/AU/Commitment(XXIV)) made by pioneering Member States to open their respective air transport markets immediately and without conditions, State Parties need to take the following steps:

1. States shall publish or gazette in accordance with their national laws:
 - i) That they are committed to the immediate implementation of the Yamoussoukro Decision under the terms of the Declaration of Solemn Commitment in line with the AU Agenda 2063; and
 - ii) That named signatories of the Declaration of Solemn Commitment have been notified of their action under point 2 below.
2. States shall notify other State Parties and especially signatories to the Declaration of Solemn Commitment that their skies are liberalised in accordance with the Yamoussoukro Decision.
3. Review of BASAs to ensure conformity with the Yamoussoukro Decision:
 - i) Removal of all restrictions on traffic rights under the 3rd, 4th and 5th freedoms, frequencies, fares, and capacity; and
 - ii) Ensure that all national Laws, Regulations, Rules, Policies are in conformity with the express provisions of the Yamoussoukro Decision.
4. States shall propose to the Executing Agency (AFCAC) at least one airline established in their state for international air services for consideration under the eligibility criteria article 6.9 of the Yamoussoukro Decision. The proposed airline can also be from another State Party or a multi-national African airline in accordance with article 6 of the Yamoussoukro Decision.
5. States shall immediately constitute their National Implementation Committees for the Yamoussoukro Decision and the establishment of a Single African Air Transport Market, designate a dedicated focal point and notify the RECS and the Executing Agency (AFCAC).
6. States are encouraged to organise public awareness activities/advocacy on YD and the Single African Air Transport Market.
7. States shall celebrate the YD (1999) on the anniversary of its signing on 14th November as part of advocacy for the promotion of AU Agenda 2063 in consultation with AFCAC.
8. States shall sign the Memorandum of Implementation of the Yamoussoukro Declaration, adopted in May 2018 by the Ministerial Working Group on the establishment of the Single African Air Transport Market.

Pillar 1: Advocacy for the effective implementation of the SAATM

- Develop and implement effective advocacy and communication strategies
- More states to subscribe to the SAATM by 2019
- SAATM Member States to implement SAATM "concrete measures"

Pillar 2: Enhancing the SAATM Regulatory Text – harmonisation and domestication of existing text

- Ensure availability of appropriate regulations for the oversight of the SAATM
- Member States and RECs are sensitized on the YD Texts

Pillar 3: Operationalization of the SAATM –focus on operationalization of the EA

- Facilitate the execution of a continent-wide study on benefits of aviation to Africa's socio-economic landscape and audio-visual material
- Capacity strengthening of implementing entities
- Facilitate Airline cooperation and adoption of SAATM Harmonization of policies on aeronautical related taxes and charges and other non-tariff barriers
- Monitoring and Evaluation of the SAATM

Pillar 4: Planning for future growth: SAATM Infrastructure

- Planning for future traffic growth
- Single African Sky Architecture is established

Pillar 5: Enhancing Safety and Security –ensuring all countries attain the minimum standard (at least 60% EI)

- All SAATM countries meet the Abuja safety targets
- Windhoek security and facilitation targets implemented
- Improve continental safety oversight
- All airlines meeting minimum safety standards

Pillar 6: Financing the aviation industry

- Access to sustainable Funding

Annexure III: Sample of African BASAs on ownership and control

Date of BASA entering into force	Country A	Country B	Liberalisation Regime	ICAO number of the BASA
20/01/2017	South Africa	Chad	Traditional	05842
14/06/2011	Cameroon	South Africa	Full Liberalisation	05175
06/11/2013	Cameroon	South Africa	Traditional	06042
10/04/2017	Congo	Nigeria	Traditional	05917
22/11/2011	Rwanda	Congo	Traditional	05918
10/03/1964	Congo	Mali	Traditional	02083
26/06/1963	Guinea	Ivory Coast	Traditional	01717
01/02/2008	Namibia	Ethiopia	Traditional	10443
25/05/2016	Rwanda	Ethiopia	Traditional	06048
07/08/1984	Comoros	Malawi	Traditional	03350
29/08/1960	Egypt	Ghana	Traditional	01556
20/06/2000	The Gambia	Namibia	Traditional	10098
26/12/1965	Morocco	Egypt	Traditional	01855
29/10/2014	Mozambique	Kenya	Traditional	05760
10/05/2002	Mozambique	South Africa	Traditional	04610
20/06/1980	Benin	Burkina Faso	Traditional	03461
15/03/1968	Benin	Ghana	Traditional	02169
07/12/2016	Benin	Cape Verde	Full Liberalisation	010812
23/05/2018	Rwanda	Angola	Traditional	06040
19/12/2003	Botswana	Zimbabwe	Traditional	10027
12/12/2003	Botswana	Tanzania	Traditional	10028
16/08/2013	Burundi	Rwanda	Full Liberalisation	06046

01/05/2017	Burundi	Tanzania	Traditional	05890
13/05/1973	The Central African Republic	Mauritius	Traditional	02580
04/11/2015	Rwanda	Central African Republic	Traditional	06049
09/04/2007	Morocco	Central African Republic	Traditional	05860
12/02/1974	Mali	Chad	Traditional	02474
12/12/2003	Rwanda	Chad	Traditional	06050