ECA/RCID/009/02

Nations Unies
Commission économique pour l'Afrique

Clarification Issues

And

Articles of the Yamoussoukro Decision

January 2002

CONTENT

✈✈✈✈✈

1. INTRODUCTION

1. The Decision on the Implementation of the Yamoussoukro Declaration concerning the Liberalisation of Access to Air Transport Markets in Africa (hereinafter the 'Decision') is a major and far reaching regulatory development in the history of African civil aviation, both in its depth and magnitude. It creates an ambitious framework for a regional regulatory regime that would liberalise the African skies, when fully implemented.[1]

2. Nevertheless, constructing a liberalised intra-African air transport market, of necessity, is a difficult and evolutionary process, especially so when one considers the socio-political context of Africa and the difficulties of bringing together a continent as diverse as Africa. Given that the Decision, at this stage, does nothing more than start the process of establishing a minimum set of initial rules. These rules, inevitably, will require additional refinement to make the effort of the liberalisation process more complete.

3. That is the reason why, in the first place, a mechanism for the periodic review of the Decision was included.[2] In some cases, the practical difficulties that may arise in the application of existing provisions have to be examined regularly to reach a level of convergence of views among the stakeholders, an essential ingredient for uniform interpretation and application of the provisions of the Decision.

4. In other cases, new rules need to be developed to complete the liberalisation cycle: for example, competition policy and the refining of the institutional arrangement. Still at some future date, the objectives of harmonisation of the fragmented body of rules existing under the current bilateral regime will require new rules to be elaborated: for example, consumer protection; licensing of carriers; harmonisation of relations with third countries etc.

5. The briefing paper proposes to proceed as follows.

a) Section 2 presents an overview of the major legal issues arising from the Decision and provides the background on the political and juridical framework under which the Decision is intended to operate.

b) In Section 3, consideration is given to some general principles of competition policy that may be relevant to the region, the purpose being to lay the general foundation for subsequent initiatives in defining future policy options.

c) In Section 4, some general thoughts on possible future institutional arrangement and dispute resolution mechanism are presented in Section 4, to lay the ground work for future study and consideration. Given the multilateral nature of the Decision, a special institutional arrangement and a modern dispute resolution mechanism are considered necessary.

[1] The Yamoussoukro Decision, whose official title is "Decision on the Implementation of the Yamoussoukro Declaration concerning the Liberalisation of Access to Air Transport Markets in Africa" was adopted by a conference of African Ministers responsible for Civil Aviation convened under the auspices of the United Nations Economic Commission for Africa in Yamoussoukro, Côte d'Ivoire in November 1999. The Assembly of Heads of State and Government of the African Economic Community subsequently endorsed, in July 2000. The Decision entered into force on 12 August 2000 i.e. thirty (30) days after the date of its signature by the Chairman of the Assembly at which the decision was taken (July 2000).

[2] See Article 11.5

d) Finally the paper summarises the recommendations and draws certain compulsions as a basis for future proposed course of action

6. The Abuja Treaty, the preparatory work that preceded the adoption of the Decision, discussions at the ministerial conference where the Decision was adopted, the Chicago Convention, bilateral practices, the experience of other countries and other source materials have provided the reference point for the exploration of the concepts presented in the briefing paper. The Terms of Reference for this paper are shown at attachment 1.

✈✈✈✈✈

2. Overview of Major Legal Issues: Convergence of Views

2.1 Background

7. The difficulties of achieving convergence of views for a uniform interpretation and application of the Decision and the resultant legal and regulatory uncertainty are, to a large extent, dependent upon a clearer understanding of the political, juridical and institutional framework under which the Decision is intended to operate and the essential principles that constitute the main substructure of the Decision.

2.1.1 Political and Juridical Framework

8. In terms of its political and juridical content, the Decision is an instrument placed under the umbrella and scrutiny of the Abuja Treaty.[3] The Decision was adopted pursuant to Article 61 and Article 10 of the Treaty, the former relating to the integration of air transport and the later relative to the authority of the Assembly of Heads of State and Government to adopt decisions as the supreme policy and legislative body of the African Economic Community.[4]

9. As a treaty obligation, emanating from the Abuja Treaty, the Decision is a legally binding instrument, creating rights and imposing obligations on the 45 African states that are currently parties to the Treaty. These obligations override national rules including pre-existing agreements.

10. A fundamental rule in international law of treaties is the maxim *'pacta sunt servanda'* set out in the Vienna Convention. Under this rule *'Every treaty is binding upon the parties and must be performed in good faith.'* The duty to act in good faith means, in practical terms, that the parties to the Decision

a) must take not only all appropriate measures but also refrain from acts which defeat or jeopardise the attainment of the objectives of the Decision;

b) have the duty to take all appropriate steps to remove or eliminate incompatibilities with the Decision arising from pre-existing agreements between them and may not invoke the provisions of their internal laws as a justification for their failure to perform, observe and implement the Decision. This duty also derives from Article 93 of the Abuja Treaty.[5]

11. The concept of good faith and the resultant observance of treaty obligations are the basis on which the Decision must be performed and implemented.

[3] The Abuja Treaty establishing the African Economic Community was adopted in Abuja, Nigeria on the 3rd day of June, 1991. It came into force on 12 May 1994. It is reported by the OAU that South Africa acceded to the Abuja Treaty with effect from June 2001, bringing the total of ratification to 45 African countries..

[4] Article 61 (Transport and Communication), in part, provides that "2. Member States shall ...(c) harmonise their air transport policies...(e) promote proper integration of air transport in Africa and (f) co-ordinate and harmonise their air transport policies at regional and Community level in order to eliminate non-physical barriers that hamper the free movement of goods, services and persons".

[5] Article 93 of the Abuja Treaty (Agreements concluded by Member States) enunciates a similar principle. It provides in part that in the event of incompatibility of prior agreements. with the provisions of the Treaty, "Member States shall take the appropriate steps to eliminate such incompatibility".

2.1.2 Institutional Framework

12. The sub-regional economic groupings, as the building blocks of the African Economic Community, provide the institutional framework for implementation of the Decision, within the meaning of Article 88 of the Treaty.[6] In terms of that Article, the African Economic Community is to be built through the co-ordination, harmonisation and progressive integration of the activities of the sub-regional economic groupings, by gearing such activities to the final objective of the establishment of the Community. As a result the parties are required to harmonise and co-ordinate the implementation of the Decision at the level of their respective economic groupings. Strengthening of the sub-regional economic groupings will improve the chances of success of the implementation of the Decision, without which an institutional vacuum may be created.

2.1.3 Essential Principles

13. The main elements of the Decision are featured in 12 Articles divided into a number of paragraphs that lay the general framework for the liberalisation process.[7] The Decision defines the modalities for the removal of all traditional (a) restrictions on the granting of the five freedoms of the air[8]; (b) capacity and frequency control[9]; (c) governmental control and approval of tariffs[10]; (d) single airline designation and its replacement by multiple designation[11]; and (e) introduction of greater commercial and operational flexibility[12].

14. The Decision endeavours to institute a regional framework for the exchange of market access right in its widest sense, devoid of *a priori* governmental management of capacity and pricing, as part of the overall efforts at regional economic integration. Air transport services constitute, in may ways, the most frequent and immediately visible form of trade between the members of such economic groupings. The regime thus instituted will replace the tradition of bilateralism resulting from the Chicago Convention.

15. An underlying principle on which the Decision relies heavily is safeguarded liberalisation and the principle that liberalisation is not *laissez faire* or the absence of regulations. A major concern is how to avoid the risk of larger airlines becoming so dominant in a manner as to prevent smaller carriers from benefiting from the liberalisation process and the danger for the industry of becoming highly concentrated in the hands of these bigger airlines. A central issue will be how to weigh the efficiency

[6] Article 88 stipulates in part that "1. The Community shall be established through the harmonisation and progressive integration of the activities of regional economic communities... 4. Member States undertake, through their respective regional economic communities, to co-ordinate and harmonise the activities of their sub-regional organisations, with a view to rationalising the integration process at the level of each region."

[7] The Decision includes the following provisions which have a similar thrust with more recent liberal arrangements: a **preamble** setting the context within which the instrument was prepared; a **definitions** article assigning meaning to essential terms used; **scope of application** article which expresses the main purpose of the Decision; a **grant of rights** article which sets the rights granted; a **tariffs** article which sets the rules governing fares; a **capacity** and frequency article which lays down the agreed principles for the amount of services to be offered; a **designation and authorisation** article specifying the conditions for designation of airlines to operate the services including eligibility criteria; conditions for the revocation of authorisation; recognition of certificate and licenses; an **aviation safety and security** article setting forth procedures for co-operation to deal or avoid acts or threats for the security of civil aviation; a **competition** article which is a fair opportunity article setting forth a general principle designed to ensure non-discrimination; a **settlement of disputes** article intended to establish the agreed mechanism for resolving disputes between the parties; an **institutional arrangement** article which establishes the framework for the running of the system; a **transitional measures** article which specifies the condition under which the parties may limit their commitments; a **miscellaneous provisions** articles which lumps together: a commercial opportunities paragraph, an operational flexibility paragraph, a co-operative arrangements paragraph, a consultation paragraph, a review paragraph, a registration paragraph; a **final provisions** article covering entry into force, role of sub-regional and regional organisations, withdrawal and annexes..

[8] see Article 3 Granting of Rights

[9] See Article 5 Capacity and Frequency

[10] See Article 4 Tariffs

[11] See Article 6 Designation and Authorization

[12] See Article 11 Operational Flexibility

enhancing effects of the liberalisation process against the need for appropriate safeguard that are essential to achieve the objectives of the Decision.

16. Three crucial areas, however, will need to be dealt in the near term, namely competition matters, dispute resolution mechanism and institutional arrangement.

17. In its approach, the Decision has a similar thrust and many resemblance with other liberalisation initiatives, for example, recent liberal bilateral air services agreements (such as the US Open Skies agreements signed by many African countries), the recently signed Multilateral Agreement on the Liberalisation of International Air Transport[13] and the draft OECD Multilateral Agreement for Cargo Liberalisation.

2.2 Overview of Key Legal Issues

18. From a broader legal and regulatory perspective, virtually every aspect of the Decision has generated or has the potential to generate questions, in one form or another, ranging from the title of the Decision to its more sophisticated aspects. These questions emanate as a result of a number of discrepancies and ambiguous provisions observed. When viewed against the totality of the Decision, some of the questions may appear farfetched and often at variance with a good faith interpretation of the Decision. However, the fact that the questions have been posed is, by itself, sufficient indication of the existence of problems which must be addressed in the interest of achieving an acceptable level of convergence of views in the interpretation and application of the Decision.

19. The provisions requiring clarification as to their meaning and scope are grouped under the following general headings.

a) Empowerment of the Decision: recognition and effects under national legal and policy framework;
b) Status of bilateral air services agreements;

c) Transitional measures and deferral of commitments;

d) Capacity limitations: conditions of government intervention and oversight

e) Other Issues

   i. Mechanism for Enforcement of the Decision;
   ii. Exclusivity and allocation of route authority;
   iii. Criteria and selection of airlines;
   iv. Number of Airlines to be designated
   v. Ownership Issues: Foreign Interests and Equity Participation
   vi. Subsidiaries and Franchisee
   vii. Danger of Excess Capacity

20. In each case, an attempt is made to identify the issues and examine their validity vis-à-vis the provisions of the Decision, the Abuja Treaty, discussions at the ministerial conference, the Chicago

[13]The Multilateral Agreement was signed on 1 May 2001 between the United States, New Zealand, Chile, Brunei and Singapore. The agreement is open to other states from the Asia Pacific Economic Co-operation forum.

Convention, bilateral practices, the experience of other countries and from an overall policy standpoint. Recommendations on possible measures to be taken then formulated.

2.2.1 Empowerment of the Decision

21. An overriding issue, often overlooked, around which many other issues seem to gravitate, emanates from the basic question of the status of the Decision - its enforcement and effects under national legal and policy framework. In this regard, two questions stand out prominently:

a) First, given that the Decision has been endorsed by the OAU Summit and is now a part of the Abuja Treaty, whether this action by itself is adequate to preclude the taking of additional measures at the national level? and

b) In the alternative, whether some form of additional measures by the parties would not be desirable to supplement the endorsement of the Decision by the OAU Summit and internalise the Decision within their national framework ?

A. Adequacy of the Empowerment

22. The endorsement of the Decision by the Assembly of Heads of State and Government of the African Economic Community completed the first and important phase in the empowerment of the Decision. This action gave the Decision the status of a legally binding and enforceable instrument, equivalent to a treaty obligation. Despite this empowerment, there still remains, in the minds of many states and airlines, the uncertainty as to the status of the Decision under the national framework of the parties.

23. It may be argued, on the one hand, that, from a strictly legal point of view, recognition at the national level is not necessary or required. Deriving its authority from the Abuja Treaty, the Decision is a self-executing instrument that does not require further recognition at the national level for a number of reasons:

a) First, the Abuja Treaty itself, in terms of its Article 100, does not specifically require decisions taken under Article 10 of the Treaty, to be subject to a process of ratification or approval at the national level before the Decision can take effect on those responsible for its implementation.[14]

b) Secondly, although national constitutional requirements may provide an explicit manner in which a state may express consent to be bound by a treaty, it is clear, under international law, that the parties may decide upon the manner by which they are to be bound. The consent of states to be bound may be given in any form and such consent to be bound by the terms of a treaty is the key factor under international law. Article 10 of the Abuja Treaty itself provides the manner and the procedure for the adoption of binding decisions. The parties to the Abuja Treaty have, thus, explicitly consented that decisions adopted in accordance with the procedures

[14] Article 100 does not include decisions taken under Article 10 in the instruments requiring ratification, such as for example protocols adopted under the Treaty

established under Article 10 of the Treaty will be binding on them. The adoption of the Decision followed the Abuja Treaty procedures.[15]

c) Thirdly, decisions taken under the procedures of Article 10 of the Treaty are "automatically enforceable," by operation of Article 10.3, on member states of the Abuja Treaty. This automatic enforceability is further emphasised by Article 12.1 of the Decision which provides that it "automatically enters into force thirty (30) days after the date of its signature" i.e. 12 August 2000. Automatic enforceability would render, in principle, unnecessary the requirement for additional action being taken by the parties at the national level.

24. The advocates of this position conclude that in terms of the Abuja Treaty, the express provisions of Decision and the principles of international law of treaties strengthen the view that additional measures at the national level are not required.

B. Additional Measures: National and sub-regional Levels

25. Despite the legal elegance of the position, its major drawback derives, in my view, from its purely legalistic and theoretical approach, overlooking the objective realities at the grass root level. A more realistic and pragmatic approach would have taken equally into account these realities.

26. A broader policy consideration based on these realities would suggest the backing of the actions taken by the OAU summit by national measures, the aim of which will be to complement and internalise the Decision at the level of each country.

a) The internalisation would elevate the Decision to a truly binding and enforceable instrument, rather than being perceived as a mere expression of intentions, as so often has happened, in the past, in Africa; it will remove any doubt, at the grass root level; it will clarify the effects of the Decision under national laws to those directly or indirectly involved in its implementation. It will also help clarify the uncertainty as to whether or not the parties have actually complied with their national legal requirements.

b) Considering the effects of the Decision on the overall national air transport policies of the parties, such internalisation would be useful and necessary as a practical measure. The subject matter covered in bilateral air services agreements is radically altered by the Decision. There is a resultant conflict and uncertainty that would justify further action to remove such conflict and incompatibilities; this clarification will again facilitating its implementation at the grass root level.

c) The internalisation of the Decision will give notice to the general public and the bureaucracy in each jurisdiction without which the potential beneficiaries would be unaware of their rights and privileges created thereunder, thereby facilitating the enforcement of the Decision at the national level.

[15] Article 10 in part provides that: "1. The Assembly shall act by decision. 2. Decision shall be binding on Member States and organs of the Community, as well as regional economic communities. 3. Decisions shall be automatically enforceable thirty (30) days after the date of their signature by the Chairman of the Assembly at which the decision was taken.".

d) Such recognition will exteriorise the political intentions of the state to be effectively bound by the Decision. It will not only give higher value benefits but also remove the opportunity for soft pedalling the implementation process.

27. It is submitted that a condition for the implementation of the Decision is the taking of a clear and unambiguous collateral actions by the parties to empower the Decision within their respective countries. It would seem difficult to liberalise intra-African air transport without taking this collateral measure.

C. Recommendation

28. In view of the critical importance of the issue of empowerment of the Decision, it is recommended that (a) the Ministers responsible for civil aviation and the Civil Aviation Authorities who have the ownership of the Decision, should be urged to take all requisite actions (administrative, legal or otherwise) to officially recognise the Decision within their respective jurisdictions, as a minimum through cabinet approval and publication of the Decision; (b) to notify the Monitoring Body as well as the secretariat of the sub-regional organisations and the other parties within a specified period of time of the actions taken and (c) the ECA, OAU, other partners and the sub-regional groupings should exert as much pressure as possible on the parties to ensure the internalisation of the Decision at the national level within a predefined time frame. It has also been reported that some sub-regions and certain countries have or are preparing to take sub-regional and national measures.

2.2.2 Status of Bilateral Air Services Agreements

29. A second cluster of issues in respect of which divergent views have been expressed, relate to the status of the Decision vis-à-vis bilateral air services agreements, in particular the issue of supremacy or precedence, and the related issue of the need for and amendment of bilateral air services agreements.

A. Issue of Precedence

30. The status of the Decision and the issue of precedence as well as the manner of resolving conflicts and incompatibilities between the Decision and pre-existing bilateral air services agreements among the parties is sufficiently dealt with in the Decision itself (Article 2).

31. It is provided in Article 2 that the Decision has "precedence" over any pre-existing multilateral or bilateral air services agreements between the Parties that are incompatible with the Decision. On the other hand, other provisions in existing bilateral air services agreements that are not in conflict with the Decision, will continue to apply between the parties until such time as explicit provisions are adopted under the Decision in substitution thereof.

32. Accordingly, in terms of Article 2, all provisions in such bilateral air services agreements that deal with market access, pricing, capacity, designation, etc. are deemed automatically replaced and superseded by the Decision as of its effective date without any additional formalities. Under Article 93 of the Abuja Treaty, the parties, likewise, have assumed similar obligations.

33. The combination of these provisions makes the issue amply clear. In relation to matters that are governed thereunder, the Decision prevails over bilateral air services agreements. Nothing in these agreements would reduce the obligations assumed by the parties under the Decision. Any other view is intrinsically flawed as it would not be supported or sanctioned by the Abuja Treaty, the Decision itself and international practices. But legality apart, it may still be useful to clarify this issue in a memorandum of clarifications or a joint statement of interpretation.

B. Need and Amendment of Bilateral Air Services Agreements

34. Related to the first issue of national recognition is a second issue of the need for and amendments of bilateral air services agreements. The lack of national recognition may have created the opportunity for some states and airlines to hold the view that bilateral air services agreements will continue to apply until such time as they are officially amended to conform to the Decision. This, in practical terms, would mean that bilateral air services agreements have, in fact, precedence over the Decision, including on matters specifically covered by the Decision, a position difficult to understand and support.

35. It is submitted that in the overall scheme of the Decision, the introduction of regional liberalisation between the parties will replace the traditional bilateralism. In terms of Article 2 of the Decision and Article 93 of the Treaty, this would mean that bilateral air services agreements will, in the long run, be unnecessary and in the short term operate exclusively within a limited boundary comprising exclusively of matters not specifically covered by the Decision.

36. Accordingly, in respect to matters expressly covered by the Decision, there appears no need for amendments of bilateral agreements at 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. Even then, there is a general prohibition that the Parties may not enter into any obligations that would be more restrictive than those assumed under the Decision.[16]

37. If parties and their airlines have serious difficulties with one or another aspect of the Decision, a straight forward and transparent approach would be to seek a temporary relief from the application of those provisions with which they have difficulties for a limited period of time, rather than following the route of amendment of bilateral agreements. It is recognised that the Decision does not expressly provide for this alternative, but it does not, either, prohibit or preclude such alternative course of action. The value of this approach derives from the fact that, if allowed, the binding nature of the Decision would not be questioned, but an exception made, within the framework of the Decision, to the application of certain provisions under specified conditions. The burden of establishing and proving the need for a temporary relief will be on the party seeking such relief.

38. In any event this is a major policy issue and a deviation from the overall structure of the Decision. As such it needs closer examination by all the stakeholders, including the Monitoring Body and sub-regional organisations, in particular the definition of the conditions for the grant of the relief, the procedures to be followed and the body mandated to give the relief. The conditions under which the temporary relief would be allowed would, for example, include (a) a demonstration of unusual hardship

[16] See Article 10.5

resulting from economic, security, environmental, infrastructure, the market situation, the existence of circumstances whereby the opportunities for effective competition do not exist, the financial position of the airline etc., (b) requirement for the submission of a program of action the party intends to put in place and implement for the elimination of the hardship during the period for which the relief is sought, (c) the party seeking the temporary relief would officially inform the secretariat of the Monitoring Body (also the sub-regional body and the other parties) clearly indicating the specific provision of the Decision from which a temporary relief is sought, (d) the period for which such relief is required etc.

C. Recommendations

39. Legality apart, it is recommended that consideration be given to the elaboration of a memorandum of clarifications or a similar document on the above issues at the level. The memorandum of clarifications or a similar document will

a) clarify the question of the status of the Decision vis-à-vis bilateral air services agreements and their possible amendments to conform to the Decision and

b) clarify the other policy issue as to whether or not the introduction of the concept of temporary relief within the framework of the Decision will be a practical and desirable option, if so define the conditions under which the relief would be available and develop appropriate procedures for the application and grant of such relief.

2.2.3 Transitional Measures: Deferral of Commitments

40. A second bundle of issues, going into the heart of the Decision and a potential obstacle to its implementation, arises in respect to transitional measures and the related question of the right of deferral of commitments, namely

a) the scope and extent of the deferral of commitments as a consequence of the interpretation placed by some states and airlines on Articles 3 and 10 relative to traffic rights, on the one hand and the inconsistency between Articles 4 and 10 in regard to tariff matters, on the other hand and

b) the drafting ambiguity surrounding the issue as to who has the right of deferral, in particular whether parties to the Abuja Treaty have such right, taking into account the conflicting provisions of Articles 3, 10 and 12.

A. Traffic Rights Commitments

41. The first issue regarding the scope of the deferral of traffic rights commitment arises as a consequence of a stretched interpretation placed on Articles 3 and 10 of the Decision. Such

interpretation purports to establish that Articles 3 and 10 allow the deferral of all traffic rights, including 5th freedom during the two-year transition period.

42. This position relies on the generality of the provisions of Article 10. Article 10 provides that a party, by a formal declaration, has the option not to grant and receive the rights and obligations provided for in Articles 3 during the transitional period. The rights and obligations referred to are all the freedoms of the air mentioned in paragraph 1 and 2 of Article 3.

43. Article 3 consists of two paragraphs. Paragraph 1 establishes the principle of full liberalisation of the exchange of the five freedoms of the air and paragraph 2 of the same Article makes an exception to this general principle.[17] As an exception to the rule of full liberalisation, paragraph 2 accords the right to a party to carve out the grant of unrestricted fifth freedom from the scope of application of paragraph 1. In terms of this paragraph, a party may limit its commitment under the parameters defined therein, namely (a) unrestricted 5th freedom if there are no third and fourth freedom operators on the sector and (b) a minimum of 20 percent of the capacity offered if third and fourth freedom operators exist on the route concerned.

44. From a drafting point of view the reference to Article 3 should have been qualified to refer to paragraph 2 of that Article. However, the main thrust of Articles 3 is to establish the rule governing the liberalisation of traffic rights and the exception to such rule. Article 10, on the other hand, describes the procedure to be followed by party to express its choices as to the degree of liberalisation it elects in implementing the basic rule; it does not itself lay the basic rule. This would mean that the deferral of commitment has to be made within the governing parameters established by Article 3, namely full commitment in respect to 1st, 2nd, 3rd and 4th freedoms and a limited 5th freedom commitment.

45. When read together, Article 3 and 10 clearly show that the other freedoms of the air except 5th freedom are not affected or captured by the exception stated in the Decision. On the contrary, the parties will continue to assume full commitment in regard to the first four freedoms of the air and a limited commitment in respect to 5th freedom. Any other interpretation will be unreasonable not only because it contradicts an express provisions of the Decision but more importantly because it is contrary to a good faith interpretation of these provisions. Pushed to its logical conclusion, the position would mean that there is no liberalisation of traffic rights at all under the Decision.

46. Above and beyond the interpretation placed on an otherwise clear provisions of the Decision, it may be legitimate to ask the question if it is not, perhaps, the very foundation or justification of liberalisation that may now be in question. Some may still believe that liberalisation has been taken too far to a degree that it is, perhaps, becoming unpalatable.

B. Tariff Matters

[17] Article 3 provides: "1. State Parties grant to each other the free exercise of the rights of 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 to/from their respective territories. 2. Notwithstanding the provisions of paragraph 3.1 of this Article, a State Party may in accordance with the provision of paragraph 10.1 of Article 10 below limit its commitment in respect to fifth freedom traffic for a period no longer than 2 years to the following:(a) grant and receive unrestricted fifth freedom on sectors where, for economic reasons, there are no third and fourth freedom operators; and (b) grant and receive a minimum of 20 percent of the capacity offered on the route concerned during any given period of time in respect to any sector where third and fourth freedom operators exist.

48. The inconsistency between the provisions of Articles 4 and 10 of the Decision raises a second issue as to whether or not the parties have the right of deferral of commitment in respect to the application of Article 4 of the Decision governing tariffs.

49. The initial draft submitted by the Preparatory Committee had proposed that a State be given the right to opt out from full tariff liberalisation. This proposal allowed states to choose the principles of the country of origin rules for the approval of tariff during the two-year transitional period. The ministerial conference substantially amended Article 4 and removed this option from Article 4. However, a corresponding adjustment was not made to Article 10 which retained the original version.

50. Nevertheless as the Decision stands now, Article 10.1 stipulates that a Party has the option to defer its commitment provided for in Article 4, thus inferring that the right of deferral of commitment also includes tariffs.[18] On the other hand, Article 4 itself does not refer to this possibility and does not specify the manner in which a party may defer its tariff commitments, as does Article 3 in respect to traffic rights.

51. In an effort to reconcile this apparent inconsistency, one approach would be to adopt a liberal interpretation by taking into account the totality of the Decision and generally accepted principles of interpretation of agreements. This would mean that, in case of discrepancy or inconsistency between two provisions, the Decision should be interpreted in a manner that would not restrict the rights of the other party relying on such provision.

52. A second reason for such liberal interpretation would be based on the preamble which underlines "the necessity to adopt measures with the aim of progressively establishing a liberalised intra-African aviation market concerning, among other things, traffic rights, capacity, frequency and pricing". It would result from this that the parties intended to recognise the right of deferral of tariff commitment. However the difficulty of this position arise from the absence of provisions in the Decision on the modus operandi of the deferral, similar to the one suggested by the Preparatory Committee, without re-introducing tariff regulation.

53. A better view would be that the ministerial conference took a deliberate action in removing the option recommended by the Preparatory Committee, thus denying a party the right to opt out from full tariff liberalisation. Consequently the discrepancy is more the result of an oversight and a lapse in draughtsmanship than the desire to allow the parties to defer their commitments in respect to tariffs. A corresponding amendment should be made to Article 10 by removing the reference to Article 4 therefrom.

C. Who has the Right of Deferral of Commitments?

54. A further grey area emanates from the inconsistency between the language of Articles 3.1, 10 and 12.1 in regard to the question of who has the right of deferral of commitments. More specifically

[18] Article 10 (Transitional Measures) in part provides that "1. By a formal declaration made in writing to the Depository or the Monitoring Body, as the case may be, through diplomatic channel at the time of adoption of the Decision ... or any time thereafter, a State Party shall have the option not to grant and receive the rights and obligations provided for in Articles 3 and 4 for a transitional period not exceeding two (2) years." Compare also the language of Article 3 and Article 4. which provides that "4.1 In case of tariff increase, there shall be no approval required by the aeronautical authorities of State Parties concerned for tariff to be charged by the designated airlines of State Parties for the carriage of passenger, cargo and mail. The airlines shall in this case file such tariffs before competent authorities 30 working days before they enter into effect. 4.2 This provision is not applicable in the case of lowering tariff which takes immediate effect according to the will of the airline" This may be an indication of the wish of the parties to encourage a generalised downward movement of fares which are often considered to excessive when compared to other regions.

whether or not the right of deferral applies equally to all parties, including states that are parties to the Abuja Treaty.

55. The proposition that all parties have such right of deferral may be supported by the following:

a) the definition of "State Party" embraces both the parties to the Abuja Treaty as well as such other African countries which are not a party to the said Treaty[19] and

b) whenever "State Party", as so defined, is referred to in Article 3 and 10, without a specific exclusion to the contrary, it would mean that it is the clear intention of the parties, when using the term "State Party," not to keep out any other party from exercising a right recognised by the Decision.

56. An opposing view relying on the language of Article 12.1 of the Decision, would argue that the right of deferral is exclusively reserved to non-parties to the Abuja Treaty since it is specifically provided in Article 12.1 that the Decision will "automatically enter into force thirty (30) days after the date of its signature" among Abuja Treaty states and, 30 days after the date on which States that are not parties to the Abuja Treaty have communicated their declarations of commitment, implying that the parties to the Abuja treaty do not have such right of deferral.

57. However, it is submitted that the automatic entry into force of the Decision does not necessarily mean a limitation on the right recognised by the Decision. Article 10 allows the deferral to be exercised at any time after the adoption of the Decision, including at any time thereafter after its entry into force.

D. Recommendations on Transitional Measures

58. In light of the foregoing, it is recommended that a memorandum of clarifications or a joint statement of interpretation (MOC) on transitional measures should be developed to be executed by the Parties clarifying the provisions of Articles 3, 4 10 and 12, the main elements of which will consist in:

a) clarifying the provisions of Articles 3 and 10 in respect to the extent of the right of deferral of traffic rights, by clearly providing that a party has the right to defer only 5th freedom and that the other freedoms of the air outside 5th freedom are not affected or captured by the Decision. This could be achieved by amending Article 10 to specifically refer to Article 3.2.

b) clarifying the provisions of Articles 4 and 10.1 relating to the limitations of commitment in respect to the tariffs by clearly stating that, a party does not have the right to limit its commitment except in cases of predatory pricing on the basis of Article 7 of the Decision. The MOC may introduce the concept of "price leadership" and "suspension of tariffs" regulatory device to prevent anti-competitive pricing behaviour. For example the MOC may provide that only 3rd and 4th freedom operators on the sector are authorised to introduce "new products" or to offer tariff which are lower than that applicable in the marketplace for the same product. This would in addition require the removal of the reference to Article 4 from Article 10.

[19] See Article 1 of the Decision which defines "State Party" as " each African State signatory to the Abuja Treaty and such other African country which, though not a party to the said Treaty, has declared in writing its intention to be bound by this Decision".

c) clarifying the provisions of Articles 3.1, 10 and 12.1 in respect to who has the right of deferral of commitments by clearly providing that such right deferral is exclusively reserved to non-parties to the Abuja Treaty and providing a cut-off date beyond which a party will be preclude from exercising its right of deferral. Such a party may use the mechanism of temporary relief referred to above

59. A final question in respect to transitional measures is the absence of a cut-off date beyond which a party will be preclude from exercising its right of deferral. The two-year transitional period starts to run from the date the declaration of commitment is made. A declaration of commitment could be made at any time after the adoption of the Decision in terms of Article 10.

2.2.4 Limitation of Capacity and Frequency - Government Intervention

60. The conditions under which government oversight and interventions in capacity are permissible have become a source of concern as a result of ambiguities of the provisions of Article 5 and the loophole created by Article 7 of the Decision.

61. Article 5 sets forth two broad categories of conditions under which government oversight and intervention in capacity would be permissible, namely (a) "environmental, safety, technical or other special considerations and (b) incompatibility with the "rules of fair competition." The first category of conditions are essentially of a technical nature, not intended as a protective measure of the commercial or economic interest of an airline, although the term "other special considerations" may have a hybrid character. The second category is designed to ensure the protection of the commercial interest of an airline from distortion of the market by the introduction of excessive capacity. It is curious to note that this category does not specifically cover tariffs.

A. Environmental, Safety, Technical or Other Special Considerations

62. In terms of Article 5.1, a party is prohibited from taking unilateral measures the purposes of which is to limit the volume of traffic, the type of aircraft to be operated or the number of flights per week, unless such limitation is justified on the grounds of "environmental, safety, technical or other special consideration." [20]

63. Except for the use of the phrase *"other special considerations,"* limitations of capacity on the grounds of "environmental, safety and technical" reasons are recognised concepts in many bilateral agreements; they should, accordingly, not pose any practical difficulties in their application. These conditions are essentially of a technical nature, not intended as a protective measure of the commercial or economic interests of an airline.

64. However, the problem arises from the use of the phrase *"other special considerations"* as a basis for limitation of capacity, the exact meaning, intent and scope of application of which is unclear.

[20] Article 5.1 in part provides"... no State Party shall unilaterally limit 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."

65. The concept of "other special considerations" is a new concept that was added at a later stage during discussions at the ministerial conference. To the best of our knowledge, it is not found in bilateral agreements and recognised by the practices of other states. Secondly it lacks clear articulation, being a vague and elastic concept, the boundaries of which are not properly delimited by the Decision.

66. The difficulties of defining the term can be easily appreciated as it could not capture all possible eventualities. Perhaps the Decision opted to rely instead on a case by case analysis of each situation rather than formulating a general definition. For example does it include the protection of the economic and commercial interests of an airline? Or is it limited to non-commercial issues which may not be covered in "environmental, safety, technical considerations" referred to in the same paragraph? Does it have a hybrid character or is it purely the result of over drafting which does not otherwise add much to the provision? An additional difficulty is that its intent is unclear and its scope of application arbitrary and discretionary. It is feared that it may be used as a back door for re-introducing capacity regulation.

67. One may also hold the view that it has a hybrid character overlapping the purely technical considerations to capture commercial considerations. It may have the objectives of protecting the economic and commercial interests of an airline. It might be used, for example, as a temporary measure in situations where there is a deterioration of the market share of an airline or may be used as a retaliatory measure (i.e. in the event of non-respect of the principle of reciprocity, discriminatory treatment etc.).

68. A better view, it is submitted, would be that the term has essentially a non-commercial connotation in the sense that it has the same or similar characteristics as "environmental, safety, technical considerations" referred to in the same paragraph. The "special considerations" contemplated under that Article would mean all those other circumstances, which are not strictly of an "environmental, safety, technical" nature but have a similar or related purpose (such as, for example, fuel shortage or rationing, repair of runways, strike, security reasons, emergency situation etc.). In any event, they should not be used as a protective measure of the economic interests of an airline, the protection of which will be amply dealt with under the general rules governing competition, when enacted.

B. Incompatibility with the Rules of Fair Competition.

69. A second condition under which government oversight and intervention are permissible results from all those circumstances where the capacity actions of an airline are incompatibility with the rules of fair competition. Article 5.2 of the Decision allows a party to refuse authorisation of an increase in capacity where such increase is incompatible with the rules of fair competition.[21] Implied in this provision is that the actions of the airline are anti-competitive. As a regulatory measure designed to prevent distortion in the marketplace, the condition is intended to protect the commercial interest of an airline from the introduction of excessive capacity.

70. However, the major difficulty is that Article 7 does not deal with issues of fair competition and is of marginal value as an effective means for dealing specifically with the conduct that may be the

[21] Without prejudice to the provisions of paragraph 5.1 above, a State Party concerned may refuse to authorise an increase in capacity if such additional capacity is not in compliance with the provisions of Article 7 relating to the rules of fair competition

object of the complaint and obtaining relief in situation of perceived unfairness or discrimination In any case the issue is related to competition matters and will be considered in Section 3.

C. Recommendations

71. In the interest of achieving concordance of views on the precise conditions that would justify government oversight in capacity, it is important to develop appropriate parameters that guide the practical application of government intervention. The following, inspired by the experience of other countries are offered, as a model, for discussion:

a) First, it would be useful to define, in greater detail, what is and is not intended behind the term "special consideration". One possibility is to make clear that the term does not imply the protection of the commercial interests of an airline which will be amply dealt with under the general rules governing competition, when enacted. For example the MOC could provide that the "special considerations" referred to in Article 5 mean all those other circumstances, which are not strictly of an "environmental, safety, technical" nature but have a similar or related purpose such as, for example, fuel shortage or rationing, repair of runways, strike, security reasons, emergency situation etc.

b) Secondly, there must be a detailed procedure to be followed by a party intending to invoke Article 5, including the giving of notice, justification of the need for such intervention, appropriate adjudication procedures etc. When a party considers that intervention is necessary it should be required, to inform, sufficiently before the entry into force of the action, all other parties and the regional body so as to allow for any consultation prior to the date of effectiveness of such intervention. The proposed action will only be implemented if not contested within a specified period. If the action is contested, the adjudication procedures will come into play.

c) Thirdly, the intervention must satisfy a certain number of pre-agreed minimum conditions before its implementation, for example, non-discriminatory and applied under uniform conditions; limited duration, proportionality to the problem to be remedied etc.

2.2.5 Other Issues

72. Many other issues have also been raised, but the most important are those relating to the general question of the mechanism for enforcement of the Decision, exclusive allocation of route authority, the numbers of airlines to be designated, the criteria and the procedure for the selection of airlines, and the issue of ownership, subsidiaries and franchisees. [22]

A. Mechanism for Enforcement of the Decision

[22] A case in point is the clarification sought by Cape Verde to a request of Senegal for the designation of a second airline. Cape Verde considers that the bilateral air services agreement with Senegal remains in force and allows only for the designation of one airline.

86. Additionally the Decision has not abandoned the need for a genuine link with the designating state. The conditions of eligibility are cumulative and the absence or lack of one of the elements will constitute the legal basis for denying authorisation to operate the services.

87. The approach adopted by the Decision takes into account recent developments in ownership and control requirements such as the work of ICAO in replacing "substantial ownership and effective control" by the concept of "principal place of business and permanent residence" as well as recent multilateral agreements. The importance of this provision lies in the opportunities it creates for increased access to international foreign equity participation in African airlines and possibly also encouraging the restructuring of the airlines through cross border capital injection.

E. Subsidiaries and Franchisee

88. A related question often raised is the extent to which the Decision allows airlines of third countries to establish wholly owned subsidiaries in the territory of a party to operate intra-African air services under the Decision. It is clear that, in terms of the Decision, the controlling factors are that the airline be established, licensed and effectively controlled by the party to the Decision or its nationals and otherwise meet the other operational eligibility criteria, irrespective of the level of foreign ownership.

89. To the extent that a subsidiary of third country airlines is established, incorporated and licensed in accordance with the laws of a party to the Decision and otherwise meets the other eligibility criteria including the criteria of effective control set forth in Article 6 of the Decision, it would seem that such subsidiary would enjoy the same privileges and rights arising from the Decision as the other national airlines of the parties.

90. A further question, which is not as clear as the preceding one, is the extent to which the Decision allows an airline of third countries to enter into a franchising agreement with a local airline to operate intra-African air services under the Decision.[25] The question of a franchisee of an airline of a non-party to the Decision is an entirely different issue and may raise certain difficulties in operating intra-African air services under the brand name of the franchiser.

91. In Africa, major foreign carriers are beginning to explore relationships based on franchising, where an African carrier operates under the brand of such carrier; there may or may not be investment by the lead airline. Franchising is generally regarded as directly related to the exercise of traffic rights because the essential purpose of franchising is to channel regional traffic towards international and intercontinental flights that otherwise would not have been available.

92. This is a major policy question that needs to be examined on a case by case basis to determine whether the relationship thus created, actually or potentially, confers the right to exercise a decisive influence on the allocation of financial benefits or the management of the subsidiary, affiliate or franchisee of a third country.

[25] In essence, franchising, in air transport, is the granting by an air carrier (the franchiser) of a franchise or right to use its name, aircraft livery, uniforms, brand image, flight designator code and marketing symbols to a franchisee as part of an overall package in which the franchiser undertakes the marketing and sale of the franchisee. In return the franchisee pays royalty fees and acts as a feeder to the franchiser. In marketing and delivering its air service product, the franchisee is subject to standards and controls intended to maintain the quality desired by the franchiser.

93. In all cases, the concept of "effective control," if properly interpreted and applied, would clarify the extent to which subsidiaries, affiliates or franchisees that is owned or controlled by a non-party would enjoy the privileges and rights under the Decision.[26] The key criteria in the concept of "effective control" is who actual exercise a decisive influence on the airline, in particular (a) the right to use all or part of the assets of the airline (the financial test) and (b) on the composition, voting or decision making powers in the governing bodies of the airline, the management and the running of the airline (the management test).

F. Danger of Excess Capacity

94. Another issue, often heard and probably designed as a masked argument against the grant of 5th freedom, is the concern expressed by some states that the liberalisation of 5th freedom would create the potential for excess capacity.

95. It is true that liberalisation, at least during the initial stage, may lead to excess capacity as some airlines, usually the bigger airlines, try to position themselves in the market place by taking maximum advantage of the new opportunities created by liberalisation. This is to be expected and has happened in other regions. It will particularly be so for a region, like Africa, that has long lived under a highly protectionist regime.

96. However, in recognition of this eventuality, the Decision calls upon airlines to seek inter-airline co-operative arrangements (such as blocked-space, code-sharing, franchising or leasing arrangements) to offset the possible adverse impact of liberalisation. Another important factor to be taken into account is that liberalisation, in the long run, tends to encourage traffic development. This has also happened in certain parts of Africa where market access has been fully liberalised. A further benefit is the overall reduction in fares and greater efficiency which would result in stimulating additional traffic.

97. In all cases, an underlying principle on which the Decision is based is the recognition that liberalisation is not *laissez faire* and the need to avoid the risk of larger airlines becoming so dominant in a manner as to prevent smaller airlines from benefiting from the liberalisation process A central issue will be how to weigh the efficiency enhancing effects of the liberalisation process against the need for appropriate safeguard to avoid the danger for the industry becoming highly concentrated in the hands of these bigger airlines

✈✈✈✈✈

[26] **effective control**" is defined to mean the "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."

3. Synopsis of Competition Policy for Intra-African Air Transport

3.1 Background

98. One major area that requires the elaboration of new rules is the issue of competition matters, the other issues being institutional arrangement and dispute settlement. Other than a general loose obligation to "ensure fair opportunity on a non-discriminatory basis to compete," Article 7 of the Decision does not define the concept of "fair opportunity on a non-discriminatory basis," nor identify or specify what constitutes anti-competitive behaviour. [27] One would have expected to find a better treatment of competition issues commensurate with the title of Article 7.

99. The fair opportunity and anti-discrimination provisions of the Decision are of marginal value as an effective means for dealing specifically with the conduct that may be the object of the complaint (tariff, capacity) and obtaining relief in situation of perceived unfairness or discrimination. Where attempts have been made to apply this general principle in the bilateral context, it has often revealed fundamental disagreement between the parties. Such disagreements have been so difficult to resolve and states have been reluctant to embark on a long and costly arbitration. The difficulty may be viewed from the differing perspective: what is conceived as a legitimate, economically desirable measure in one country may be considered unfair in another country. The maintenance of rigid national positions creates possibilities for friction and conflicts.

100. The development of a more extensive and more effective means of coping with the new liberalised regulatory environment necessitates, as a second step, the development of regulatory devices that will ensure fair competition between the operators. The purpose of this section is, therefore, to explore, in very general terms, the elements or components of competition rules that may be of relevance to Africa - issues that need to be addressed and developed on a priority basis to lay the basic foundation for defining future policy options.

a) The synopsis starts with the objectives that the proposed competition policies for air transport are supposed to achieve in Africa;

b) It then examines some elements of the proposed architecture of competition policy, the nature of the problem within the African context, the scope and extent of competition rules that may be required and provides a menu that identifies possible areas of focus where regulation and intervention may be necessary and

c) It also looks at the mechanism for the enforcement of competition standards, the nature of remedies required, and the method of resolving disputes.

[27] Article 7 entitled "Competition Rules" provides that the Parties will allow "fair opportunity on a non-discriminatory basis for the designated airlines to effectively compete in providing air transport services within their respective territories."

3.2 Regulatory Objectives

101. Although the activities that competition policies prohibit are similar in many countries, there are differences among these countries in respect to what competition rules are supposed to achieve.[28] What can African countries learn from the experience of these countries in defining the regulatory objectives of air transport competition policy? Would the following concepts meet such regulatory objectives?

3.2.1 Maintenance of the Integrity of the Liberalisation Process

102. The integrity of the liberalisation of intra-African aviation market could be jeopardised by several potential risk areas so long as effective rules are not developed and applied. These risk areas may include the opportunity for the creation of oligopolistic situation where a few larger African airlines control a bigger share of the market or creation of a situation where the full benefits of liberalisation may not be captured by users of air transport

103. Government intervention in Africa could be justified by the need to protect market access, pricing and capacity which are the three pillars of liberalisation from artificial distortions of the market through an appropriate competition policy.

3.2.2 Participation - Protection of Smaller African Carriers

104. Another objective could be to provide the regulatory device for the effective and sustained participation of all African carriers, small and big and protection against the market power of the relatively bigger African airlines with more resources.

105. A further objective could focus on the protection of the interests of consumers. An appropriate competition policy would make it possible, for example, to protect more effectively and rapidly smaller airlines by ensuring a minimum level of participation and by granting interim relief, in suitable cases.[29] There may be a need to assure the survival of smaller carriers when faced with capacity increases and pricing practices that can bring an earlier financial end to small carriers.

106. However, while the protection of smaller carriers may be a legitimate objective of African competition policy, it must also be understand that there is a price to be paid if the protection is greater than what is needed to enable them to survive. In a world where air transport is opening up even more, African airlines must learn to be competitive at home if they hope to survive. Carriers that are not competitive in their home markets will never be able to compete elsewhere. It may also mean that such carriers should seek co-operative arrangements (alliances, codesharing and other marketing arrangements) to increase their participation in the intra-African market and enhance their chances of survival.

---

[28] For example the US emphasises the welfare of the consumer, while the EU places greater importance on completion of the single European market. One country with efficient airline may use competition rules to encourage competition. Another country may lean toward the protection of its small indigenous airline against the market power of a larger airline with more resources. Such differences in aims of competition policy can produce quite different results from the application of apparently equivalent rules

[29] For example, the US Deregulation Act calls for the "continued strengthening of small carriers so as to ensure a more effective competitive airline industry". The Act also calls on the DOT to prevent unfair or anti-competitive acts or practices that enable airlines to unreasonably increase price, reduce service or exclude competition. In short the DOT was directed to protect small airlines from destructive competition.

3.2.3 Protection of Consumer Interests

107. A further objective could be the protection of the interests of consumers. Consumer protection is usually lost in the dialogue on aviation policy in Africa and had very little or no impact in the past on the development of such policies. The interests of the consumers are paramount and appropriate policies must be designed to recognise and protect their rights and eliminate, as much as possible, conduct that obstruct the full benefits of the liberalisation process from being captured by users of air transport.

108. Equipping African states with a means for intervention is essential if the beneficial effects of the liberalisation process that is underway are not to be offset by restrictive or abusive conduct by the airlines.

3.3 Structure of the Policy

3.3.1 Specificity of the African Market

109. In the more sophisticated and developed economies, competition rules generally capture a wide range of practices or conduct on market and seek to protect the freedom of the marketplace from artificial distortion. In the air transport sector, competition laws are applicable to a wide area such as: pricing, capacity, dominant position or the abuse thereof, co-operative joint ventures and other form of co-operative agreements; commercial agreements (i.e. sharing capacity, consultation or agreement on schedules; consultation or agreement on fares; pooling of revenue; joint operation of certain routes) and other cartel behaviour.

110. In the African context, many of these concepts, at least at the initial stage, may not be relevant as a basis for evolving the structure of intra-African competition policy for air transport. From a broader regulatory perspective, a number of issues specific to Africa need to be closely considered by African States in their approach to competition issues for a many reasons among which:

a) the maturity and the size of the African market as well as the number of players that, with very few exceptions, are more or less of the same or equivalent competitive strength;

b) the need to balance the experience of other countries with the widely different needs, experience and different legal system of African countries and to adapt the applicability of these concepts to the stage of development of African air transport;

c) The lack of sufficient experience in many African countries to regulate competition in a deregulated environment coupled with the absence of adequate legal and institutional framework. The vast majority of African countries do not regulate competition or have the institutions specialised in competition matters. While some countries may have monopolies acts, they may not have properly equipped institutions to deal with competition issues in air transport; and

d) the need to have an appropriate institutional arrangement and to develop flexible and cost effective rules - too much regulation could be counter productive

111. The specificity of the African context thus requires a deeper examination of the structure of an appropriate air transport competition policy, including its scope of coverage and how comprehensive it should be etc. The starting point could perhaps be to omit or adapt certain aspects of competition rules to reflect the peculiar situation and circumstances of the continent and to gradually build to a more sophisticated and advanced level at a later stage.

3.3.2 The Conceptual Framework

112. In the exploration of the conceptual framework of competition policy for intra-African air transport, an important reference point to be used as a model would be the work of ICAO. The concepts of safety net and safeguard mechanisms were extensively discussed at the ICAO World-wide Conference on International Air Transport Regulation held in 1994 and subsequently by the ICAO Air Transport Panel.[30]

113. In the context of the Decision, the liberalised framework of full market access requires an integrated and interrelated packages that would provide the needed regulatory devices in terms of a broader safety net mechanism, and safeguard measures.

114. The safety net mechanism will address the need for a regulatory devise that will ensure the participation of an airline in a market, if certain strictly defined conditions occur that either (a) reduce the participation of an airline below a pre-agreed percentage or (b) in the event of serious financial damage to an airline resulting in sustained losses requiring the restructuring of the airline.

115. The safety net mechanism will conceptually be a market stabilisation measure, designed to allow government intervention in strictly defined circumstances to give relief to an airline in difficulties, independent of any allegation of unfair conduct or behaviour of other airlines serving the market.

116. The safeguards measures, on the other hand, will in essence target anti-competitive conduct of an airline by preventing restrictive and market exclusionary practices defined in terms of fares established at levels below cost and capacity increase in excess of anticipated demand. These measures are most needed in situations where regulatory control are relaxed and there are one or two dominant airlines in a relatively small market, as is the case in Africa. [31]

---

[30] See for example the recommendations of ICAO.
The Air Transport Panel considers the charging of fares and rates on routes at levels that are, in aggregate, insufficient to cover the costs of providing the services to which they relate as being anti-competitive. These situations include an excessively low price which is likely to have significant adverse impacts on a competing airline (price dumping);an excessively low price which is likely to be perceived as specifically designed, targeted and intended to keep out a new entrant airline or to drive out a weaker incumbent (price predation);a price increase which is unreasonably high because of a lack of price competition, or abuse of a dominant position, or collusion (inordinately high pricing); a price which is unduly or unjustly discriminatory (price discrimination).
According to ICAO, unfair capacity competition arises as a result of addition of excessive capacity or frequency of services on a given sector far in excess of anticipated demand, when (a) such capacity increase is likely to have significant adverse impacts upon a competing designated airline or airlines and (b) is perceived as specifically designed, targeted and intended to drive out a weaker incumbent The other factors considered are the intentional under supply by a designated airline or airlines of adequate capacity in a market, which is contrary to agreed objectives of a healthy and sustained competition (capacity insufficiency); or the allocation of capacity by a designated airline or airlines between components or segments of a market in a manner which is unduly discriminatory (capacity discrimination

[31] In comparing the provisions of Article 5 with those of Article 4, it is interesting to note that the Decision does not treat tariff issues with the same degree of gravity as it does capacity issues from a competitive point of view. Article 4 does not explicitly bar excessively low prices in the same fashion as what Article 5 does in respect to excessive capacity. In terms of Article 4, a party does not have the right to suspend the effectiveness of any tariff filed

117. Both the safety net and safeguard measures will be backed by a well focused enforcement procedures for fact finding and adjudication, including the remedies available and the manner in which disagreements are to be resolved.

118. It is recognised that defining the components of the structure may be fraught with difficulties in many respects. While the benchmarks developed by ICAO may useful in identifying the general characteristics and circumstances of safety net and safeguard mechanisms, it will be difficult, for example

a) to differentiate between a sudden deterioration in participation from a decline occurring over a period of time.

b) to distinguish between a reduction in price or an increase in capacity with predatory intent (made in order to drive out a competitor) and one which represents fair competition (rendered possible by savings in cost or by revenue enhancing yield management).

c) to conclusively establish or prove excessively low fares or excessive capacity, in particular the difficulties of establishing the "costs" of providing the services and definition of traffic demand justifying the capacity increase or the intention of the airline that such tariff or capacity is "specifically designed, targeted and intended to keep out a new entrant airline or to drive out a weaker incumbent"; or is "likely to have significant adverse impacts on a competing airline".

119. The role of African policy makers in airline competition policy is one of identifying the point at which, on one hand, safety net could be triggered without re-introducing capacity or tariff regulation and on the other determining the point at which carriers cross the threshold between acceptable and desirable competitive action and destructive anti-competitive behaviour. The crux of the matter will be to find the dividing line between a genuinely fair competition and other practices aimed at undermining a competitor. This is never going to be easy and a more pragmatic approach will be required.

120. A mechanism that condemns overboard reduction in fares or increases in capacity could have a chilling effect on competition. A policy that makes it difficult to prove predatory behaviour could make it more likely that predation could be attempted. Conversely a rule under which it is relatively easy to claim predation could encourage frivolous accusations from airlines seeking to frustrate the normal process of competition.

3.3.3 Policy Options

121. What should African policy makers do about developing acceptable and measurable criteria for safety net and safeguard measures. There are some possible alternative policy options that are normally suggested and at times have been used. These options are presented below as a menu from which to select the most appropriate device suitable for the region..

with it in the event that such tariffs violate the provisions of the Decision relating to unfair competitive behaviour. However, implicit in Article 7 is the proscription of predatory pricing.

122. Safety Net Mechanism. In regard to the safety net mechanism, the policy options to be explored could, for example, include any of the following or a combination thereof:

a) enriching and defining its scope of coverage to make its application in the Africa more meaningful - a detailed definition of the circumstances and the threshold levels that would trigger the safety net mechanism; defining what constitutes direct or indirect participation; quantifying the meaning of participation - a minimum level of and decline together with a loss in participation occurring over a period;

b) using the criteria of serious economic effect or significant economic damage; defining the concept; whether sustained or temporary, whether covering the specific problems of an individuals airline or a generalised widespread difficulties or both.

c) exploring additional possible participatory measures to cover a greater number of different situations, for example, co-operative arrangements, interlining, not to obstruct smaller airlines by scheduling or not to exercise capacity increases above a threshold level without approval etc.;

d) increasing the timeliness and sufficiency of the safety net in terms of not coming too late to save an airline whose continued existence is required for participation etc.

e) defining with precision the procedures to be followed and the conditions under which the safety net mechanism would be implemented, in particular the requirement of giving notice with justification of the action contemplated to be taken to all the parties;

123. Safeguard Measures. In respect to the safeguard mechanism, the policy option would focus on developing, to the extent possible, detailed definition of all prohibited practices with a degree of precision that captures as many scenarios as possible. For example

a) In regard to pricing, the policy could consider to use any of the following criteria , in combination or otherwise, in the definition of predatory pricing:

- ✈ use of a cost based test which will regard as predatory if the fare is set below either the marginal cost or the average variable cost or a standard industry average cost line or fully allocated operating cost; and/or
- ✈ test based on revenue to identify likely predation if the fare yield less than a specified percentage of cost; and/or
- ✈ establishment of a reference fare and discount within zones comprising pre-agreed fixed percentages variation in fare levels within each zones; and/or
- ✈ Requirement that only 3rd and 4th freedom operates be price leaders; and/or a requirement that only carriers of the Union are authorised to introduce "new products" or tariff which are lower than the applicable fares in the market for the same product
- ✈ not regarding as predatory, reductions in fares sold by airlines without market power (dominant position). This would mean a new entrant or a smaller airline could introduce low

fares without being accused of predatory pricing, but if an established airline with a certain degree of market power were to do so, that would be classed as predation; defining market power; and/or

- ✈ allowing the matching of fares , but placing restrictions on subsequent raising of fares for a specified period or in the event the competitor exist the market; and/or

- ✈ suspending the inauguration or continuation of any tariff filed that are artificially low due to direct or indirect governmental subsidy or support.

b) In regard to capacity, the policy could consider to use any of the following criteria in the definition of predatory behaviour:

- ✈ establishing a zone of capacity flexibility on a city pair basis comprising of a lower and upper limits, the lower limit being the actual total traffic carried during the previous corresponding season and the lower limit (as determined below) being the forecast for that season or if there is no forecast increased by the historical growth rate of the season concerned and allowing a pre-agreed incremental capacity increases either in terms of a specific number of flights or seats;

- ✈ The upper limits could be determined on the basis of mandatory filings required to be made by airlines operating air services between city pairs of their capacity proposal for the following season within a specified period before the commencement of the services and adding up the total capacity thus proposed by the airlines. The lower limit would be the capacity achieved during the current period; and/or

- ✈ allowing the matching of capacity, but placing restrictions on subsequent capacity increase for a specified period or in the event the competitor exist the market; or giving priority to the airline offering the lesser capacity to match the capacity offered by the other airline before this other airline will be allowed to mount additional capacity; and/or

- ✈ using load factor and traffic spill for automatic increases in capacity by allowing agreed percentage increases if load factors are above an agreed threshold level; and/or

- ✈ not regarding as predatory capacity by airlines without market power. This would mean a new entrant or a smaller airline could introduce capacity without being accused of predatory capacity increases, but if an established airline with a certain degree of market power were to do so, that would be classed as predation; defining market power;

c) defining with precision the procedures to be followed and the conditions under which the safeguard mechanism would be implemented.

124. All these ideas are offered as a menu from which to choose and many of them are not new and have been tested elsewhere although difficulties are recognised in their formulation and application, for example, the specification and allocation of cost, the provision by the airlines of financial data and confidentiality of data. Nevertheless, the concepts need to be further explored to determine whether they offer any practical value with respect to fair competition in Africa. In addition, detailed

procedures will be required to be developed to ensure that the measures do not lead to unjustified attempt at regulating prices or capacity.

3. 4 Enforcement and Oversight

125. Beyond the difficulties of defining with precision the safety net and safeguard mechanisms, the other major difficulty will be developing an appropriate enforcement mechanism and agreeing on suitable remedies. An appropriate enforcement mechanism will give greater credibility to the system as an effective means of protection of the airlines from tariffs that are artificially low and capacity that is excessively high.

3.4.1 Oversight.

126. The first issue will be on agreeing on how the safety net and safeguard mechanism will be effectively applied, monitored and enforced; who exercises oversight and investigates infringements; how and to whom are complaints to be made; who initiates the procedures etc.

127. An ideal option would be a sub-regional, rather than a national, approach under which the parties will establish and delegate authority to a central independent body to oversee the enforcement of competition standards. The preference for such an approach emanates essentially from the following:

a) The nature of the alleged behaviour or actions taken by a party may have potential effect on all the parties which makes the regulation of the conduct dependent on a single jurisdiction inappropriate. The initiation of the procedures, investigation of any infringement or any action taken by a party would point to the need for such an independent body; As the regulatory system is regional the authority should likewise be regional;

b) The lack of adequate legal and institutional framework at the national level in many African countries to deal effectively with anti-competitive behaviour in a deregulated market tends to reinforce the need for a regional approach;

c) Resources at the national level are often insufficient to establish the organisational structure and to ensure continued updating of the regulatory regime. A sub-regional approach will be more cost effective and efficient.

3.4.2 Remedies

128. The second difficulty is developing suitable remedies. The following general concepts are offered as a menu for further exploration:

a) nature of remedies There may be a need for the remedies envisaged to be both preventative and curative in the sense that they must anticipate and cure the problem. They would place more emphasis on *ex ante* deterrence than on *ex post facto* prosecution.

b) types of remedies. These may include the grant of interim relief which may take the form of short term adjustment such as imposition of a temporary freeze of capacity or pricing or temporary reversion to the *status quo ante*; blocking of prices decreases or capacity increases in the event of sustained downward movement of fares or upward movement of capacity; the duration that these measure would be maintained;

c) sanctions, fine and penalties. the desirability and the manner of defining the sanctions and penalties that would be applicable in the event of proven anti-competitive conduct or, when an intervention by a party is found to be unjustified;

d) the specific conditions under which these measures will be allowed and exercised ; their duration and modus operandi; the procedure to be followed and the authority mandated to grant the relief etc.

129. As stated earlier these concepts are not new and have been tested elsewhere which could be used as one model but their precise modus operandi need to be carefully thought out.

3.5 Resolving Disputes

130. A further important point is the need for the policy to be accompanied by an appropriate disputes resolution mechanism, taking into account the time sensitive nature of the safety net and safeguard mechanism including the role of the sub-regional body, the details of the procedure to be followed for fact finding and adjudication. etc. This aspect of the topic will be presented in more detail in the next Section 4.

3.6 Other Competition Issues

131. Competition rules usually prohibit or proscribe other conduct such as concerted action or behaviour of the airlines, merger and acquisitions, market sharing, co-operative arrangements, dominant position (i.e. an airline occupying a dominant position in a market that may affect the provision of air services) or abuse thereof.

132. These concepts may not be totally relevant at this early stage of the evolution of competition policies in Africa. At this stage and probably also for a long time to come, it may be necessary that the policy should not capture these other forms of anti-competitive conduct.

133. On the contrary, the policy framework should encourage rather than deter co-operative arrangements, cross-border alliances, the regrouping of African airlines, including mergers, consolidation as well as other airline co-operative arrangements (such as tariff co-ordination and related issues; joint negotiations of goods and services; joint technical agreements and co-operation; joint products i.e. pooling, joint operations; joint planning and co-ordination of schedules).

134. A final issue to be mentioned is the form in which the policies should be formulated - a Code of Fair Competitive Practices or other appropriate instrument as well as the procedure for its adoption, whether a regional or a sub-regional approach. The purpose of the Code will be to define the safety net

and safeguard measures in a manner that would cover all situations and also to make a clear distinction between aggressive and unfair competition. In the interest of ensuring synergy and harmonisation between sub-regional initiatives, there is merit in following the continental route that would enable to develop a template for adoption and implementation by the different sub-regions which will guarantee uniformity of application throughout Africa.

3.7 Recommendations

135. The organisation of a work shop to test the various concepts presented in this paper as well as other issues will be absolutely necessary. The workshop will provide the opportunity not only to test the principles enunciated in this paper but also to interact with the practitioners on the ground, namely the airlines and if possible users of air transport, to develop practical concepts. The workshop needs to be organised by resource personnel on the basis of a well prepared agenda with clear objectives of what the workshop should achieve, and a thought provocative documentation circulated in advance.

136. It is anticipated that the workshop will concentrate on discussing the possible components of the safety net mechanism and safeguard measures. It will focus on defining (a) the types of circumstances that would trigger the safety net mechanism, (b) the types of behaviour that would be regarded as unacceptable and (c) the procedures for enforcement, the remedies available and appropriate disputes resolution mechanism.

137. Once a general consensus has emerged from such workshops, then the work of the actual preparation of the competition policy will be much easier and its subsequent acceptance and implementation equally made easier.

✈✈✈✈✈

4. Dispute Settlement and Institutional Arrangement

4.1 Background

138. The two other crucial areas that have not been dealt with sufficiently by the Decision relate to the mechanism for dispute resolution and the institutional arrangement. The absence of a clear dispute resolution mechanism and an appropriate institutional arrangement are major loopholes in the Decision.

139. Given that the Decision is a multilateral regional regime, a special institutional arrangement and a modern dispute resolution mechanism are considered necessary as part of the regime so established. One focal point of the paper is to interject some general ideas on possible approaches to these two issues as a starter to lay the ground work for future study and consideration.

4.2 Dispute Settlement Mechanism

140. While the bare structure of a dispute resolution mechanism is indicated, defined in very general terms, consisting of a negotiation/consultation, followed by arbitration[32], the Decision has overlooked to include the details of the procedures which are left to be set at some future date in an appendix to the Decision; the appendix is not as yet available.

141. Until such time as this mechanism is put in place, the dispute resolution mechanism existing under bilateral agreements will continue to apply in accordance with Article 2 of the Decision which provides that *"in respect to matters not specifically covered herein, this Decision shall be supplemented by such provisions in such bilateral air service agreements"*. Alternatively, the parties to the dispute may agree to the ICAO model arbitration procedures.

4.2.1 Inadequacies of the Current Mechanism

142. The dispute resolution mechanism under bilateral agreements and ICAO model arbitration procedures may be unsuitable for resolving disputes arising within the context of the Decision for the following reasons among others:

a) the mechanism does not differentiate between time sensitive issues (in particular alleged anti-competitive behaviour which by their essence require a more expeditious and less cumbersome procedure) from the general purpose dispute;
b) Any dispute or disagreement regarding the interpretation or application of a multilateral agreement concerns not only the parties directly involved in such dispute but also the other parties; the bilateral mechanism does not address this situation.

[32] Article 8.1 provides "If any dispute arises between States Parties relating to the interpretation or application of this Decision, the States Parties concerned shall in the first place endeavour to settle the dispute by negotiation. 8.2 If the State Parties concerned fail to reach a settlement of the dispute by negotiation within 21 days, either party may submit the dispute for arbitration in accordance with the arbitration procedures set forth in Appendix 2 hereof.
Article 11.4 also provides for consultation that should begin within 30 days from the date of the request

c) The negotiation/conciliation phase may be inadequately defined and in consequence largely ineffective. When the parties remain deadlocked in the consultation process, their options are very limited apart from either invoking the arbitration procedures or taking unilateral measures or terminating the agreement. All of these options may be inappropriate in the context of a multilateral agreement. Clearly, within the framework of the Decision, there can be no place for unilateral action by a party against another party on matters covered by the Decision. As an initial and important phase of dispute resolution, the consultation procedures will need to be refined to bring them to the standard of a modern consultation process.

d) The procedures are costly, lengthy and time consuming that their use in air transport has been extremely rare; arbitration is difficult and in diplomacy impolitic

e) Compliance procedures are absent. The mechanism does not foresee the manner in which decisions given under the arbitration process are to be effectively enforced and does not provide for the grant of interim relief, in suitable cases.

4.2.2 Recommendations

143. While it is not within the scope of this briefing paper to go into the details, some general thoughts are offered as a possible basis for further consideration and study in the design of an appropriate dispute resolution mechanism applicable in the context of the Decision. There are several models that can be examined, for example the Multilateral Agreement referred to above as well as other models[33] An extract of the arbitration clauses of this agreement is shown in **Attachment 3.** The main objective is to establish a mechanism that introduces a higher level of transparency, is more focused, expeditious and cost effective. Such a system would include, *inter alia,*

(a) the requirement that all parties to the Decision be notified of the dispute and to intervene in the consultation and arbitration proceedings, if they so desire;

(b) the development of a more focused mechanism that clearly differentiates the time sensitive issues (such as dispute relating to anti-competitive behaviour, tariffs and capacity) from the general purpose disputes;

a) the need to back the mechanism by a formal process, preferably within the sub-regional entity, with mandatory compliance with decisions and findings:

- ✈ A first phase in which the parties would be required within a defined period of time limit to negotiate, with the assistance of a neutral conciliator preferably experts in air transport selected from a pre-established roster maintained by the sub-regional entity; the detail procedure will include the number of experts to be appointed for fact finding and adjudication;

- ✈ A second phase of adjudication and arbitration that might include an appellate level with time limits imposed which are short but realistic and properly policed;

[33] The Multilateral Paris Agreement of April 30, 1956, on non-scheduled commercial air services used a similar approach.

- ✈ appropriate compliance procedures including the grant of interim relief, in suitable cases, final and binding rulings to be complied with by the parties within a reasonably short period of time, possible sanctions for failure to comply;

- ✈ With respect to a formal and enforceable dispute settlement mechanism, the parties will be required to use such a mechanism as a mandatory measure, and should not be limited to filling a gap between the consultation process and the arbitration process, both of which are found in most bilateral agreements. There is also a need for clear and objective criteria to be applied to specific cases if such a mechanism is to have credibility. It is recognised that developing such rules may be difficult.

144. The roles of the regional and sub-regional bodies in the oversight of disputes may need to be considered and defined. The establishment of a regional body responsible for the day-to-day running of the system, ensuring effective convergence in the application and interpretation of the agreed rules, would mean that the procedures for dispute resolution are likely to be used only in exceptional cases and can therefore be kept simple and straightforward.

145. The proposed conceptual mechanism provides a starting point for an institutional safeguard. However, the practicability and applicability of the specific points have to be further examined.

146. Pending the development of an appropriate dispute resolution mechanism, the parties could rely on the ICAO model or the Abuja Treaty mechanism foreseen under Article 87 of the Treaty - disputes are to be settled by direct agreement of the parties, failing which by the Court of Justice or a model similar to Attachment 3.. There may also be a need to closely analyse the treaties establishing the sub-regional economic groupings to determine if other alternatives are available thereunder.

4.3. Institutional Arrangement

147. Article 9 of the Decision outlines the general structure of the proposed institutional framework, at the continental level, consisting of a Sub-Committee on Air Transport, with responsibility, *inter alia*, for the overall supervision, follow-up and implementation of this Decision assisted by a Monitoring Body. It also provides for an African Air Transport Executing Agency that will be responsible for the regulation of the liberalised air space.[34]

4.3.1 Shortcomings of Proposed Structure

148. The effectiveness and adequacy of this three tier structure leaves much to be desired mainly because:

[34] Article 9 provides that "9.1 Pursuant to paragraph 4 of Article 25 of the Abuja Treaty, a Sub-Committee on Air Transport of the Committee on Transport, Communications and Tourism is hereby established which shall be responsible, *inter alia*, for the overall supervision, follow-up and implementation of this Decision. 9.2 A Monitoring Body composed of representatives of the ECA, OAU, AFCAC and AFRAA which shall be assisted, as the case may be, by representatives of sub-regional organisations, is hereby established to assist the Sub-Committee on Air Transport composed of African Ministers Responsible for Civil Aviation in the follow-up of the implementation of this Decision. 9.3 The duties and responsibilities of the Monitoring Body are set forth in Annex 3 hereof. Secretariat services required by the Monitoring Body shall be provided by the ECA.
9.4 To ensure successful implementation of the Decision, an African Air Transport Executing Agency will be established as soon as possible. The principal responsibility will include *inter alia* the supervision and management of Africa's liberalised air transport industry. 9.5 The Executing Agency shall have sufficient powers to formulate and enforce appropriate rules and regulations that give fair and equal opportunities to all players and promote healthy competition. 9.6 The Executing Agency will also ensure that consumer rights are protected.

(a) The cumbersome nature of the proposed structure with no clear delineation between the regulatory, the administrative and rule making functions.[35]

(b) the lack of clarity in the role and absence of clear separation of functions between the Monitoring Body[36] on the one hand and the Executing Agency on the other hand. In addition, there are risks of duplication and overlap of responsibilities between the various organs and possible conflict of jurisdiction.

(c) As the building blocks of the liberalisation process, sub-regional organisations are not effectively recognised in the institutional set-up. Article 12.2, on the role of sub-regional organisations, is nothing more than an encouragement provision and does not clearly provide for their effective participation in the Monitoring Body. It simply provides that "*Sub-regional and regional organisations are encouraged to pursue and to intensify their efforts in the implementation of this Decision.*" Furthermore, Article 9.2 appears to give to these organisations a secondary role when it provides that the Monitoring Body will be "assisted, as the case may be, by representatives of sub-regional organisations."

4.3.2 Recommendations

149. A key characteristic of the Decision, distinguishing it from the traditional bilateral relationships, is that it establishes a common regulatory framework. The establishment of common framework involves activities at the working level that are substantially different and much more complex than under the bilateral regime. The main elements of these activities include

a) the enhancement of effective commonality in the application of the Decision, adaptation of the application and interpretation of the provisions in light of experience and to suggest new rules for adoption by the parties.

b) the refinement of the common rules by developing an authoritative explanatory statement, responses to complaints etc., and detailed proposals for new and modification of existing rules.

150. These activities would indicate the need for special institutional arrangement. The Western and Central African sub-regions are currently exploring avenues for the establishment of and delegation of authority to a sub-regional body to act on behalf of the sub-region. Other regions may also wish to consider a similar approach by examining options for institutional arrangement with clear objectives, authority, mandate, basic organisational structure, finances etc.

[35] Compare this three-tier structure with the EU that has a Council of Ministers as the decision making and legislative authority and the Commission that is the main executive body.

[36] The Monitoring Body, in November 2000, recommended to the Air Transport Sub-Committee its proposed duties and responsibilities, which include, inter alia: (i) the preparation of the relevant annexes to the Decision; (ii) receive declarations made in accordance with the Decision, notification of withdrawals of any declaration of complaints and requests and shall inform the Depository accordingly; (iii) state its views on any disputes resulting from the application and/or interpretation of the Decision and recommend solution to the dispute; (iv) state, on request of States party, its views on predatory and unfair competition practices; (v) analyse and plan for the periodic review of the Decision

5. Recommendations and Conclusion

151. The Decision has started the first phase of a process that could be far reaching for the liberalisation of intra-African air transport to an extent that a wide spectrum of opinion regard the Decision as the last chance for reform of the air transport sector in Africa. However, the dynamic nature of the industry will require many areas to be critically examined in the second and subsequent phases. The purpose of this briefing paper has been to suggest the areas of improvements that could be considered during the second phase and to point those areas where convergence of views in interpretation is necessary. Other areas where new rules are required have also been indicated.

152. The paper lays no claim to be complete or to have identified in each case all the issues and their solutions. On the other hand, the recommendations and the ideas put forward are only conceptual in approach and much further work will be needed to give them more substance. A summary of the recommendations are set forth in **Attachment 2.**

153. Most of the concerns expressed could be removed by a sustained guidance efforts. Most of the sub-regions are confronted with many questions and most airlines are faced with many practical difficulties. Unfortunately they do not seem to get much direction from the Monitoring Body. There are a number of implementing rules to be developed and a lot of guidance and thinking to be done reasons.

154. On the other hand, some of the concerns may be motivated by reasons other than the lack of clarity of the Decision. In many respects, they may be motivated by the desire to soft pedal the liberalisation process. Otherwise, it is difficult to understand the basis of these concerns that are outside normal practices and precedents either under existing bilateral air services agreements or international practices. The Decision, like any other treaty, must be interpreted and applied in accordance with the principle of good faith, without which no amount of clarification would resolve the root cause which generated the concern in the first place.. The rules of treaty interpretation require, in case of doubt or discrepancy, to give preference to the text that involves a lesser limitation.

155. The brief canvas has identified a number of legal and regulatory issues where further consideration and study will be required, but more importantly in respect to (a) the clarification of the Decision through a Memorandum of Clarification or Statement of Interpretation, (b) internalisation of the decision, (c) competition issues, (d) a modern dispute resolution mechanism and (e) institutional arrangement

156. Memorandum of Clarification or Statement of Interpretation. One possible approach to clarify the Decision would be through a memorandum of clarification or statement of interpretation to be developed at a continental level and executed at the sub-regional level which will be a sort of a collective diplomatic note so often used in the bilateral framework. A memorandum of clarification or statement of interpretation would crystallise the areas where a broad convergence of views could be achieved. The other alternative would be through an amendment of the Decision which will be a lengthy process.

157. Internalisation and Empowerment of the Decision. The internalisation of the Decision through formal recognition under national laws stands out prominently as an important step to be taken as soon as possible as an expression of the political commitment of the parties to the liberalisation process and to build a broad consensus among all stakeholders. If it is the desire of the parties to see the Decision

fully applied, then they must take clear and unambiguous actions to internalise the Decision within their respective countries.

158. In view of the critical importance of the issue of empowerment of the Decision, the Ministers responsible for civil aviation and Directors of Civil Aviation Authorities who have the ownership of the Decision, should be urged to take all requisite actions (administrative, legal or otherwise) to (a) to initiate all requisite actions (administrative, legal or otherwise) to officially recognise the Decision within their respective jurisdictions, (b) to take cabinet approval and publication of the Decision (c) to notify the Monitoring Body as well as the secretariat of the sub-regional organisations and the other parties within a specified period of time of the actions taken and (d) ECA, OAU, RECs and other partners and the sub-regional groupings should exert as much pressure as possible on the parties to ensure the internalisation of the Decision at the national level

159. Competition Issues. The development and enactment of appropriate 'safety net' and safeguard measures, suitable for the African context. As the Decision is a multilateral regional agreement, there should be an effort to develop as part of such system a code of fair competitive practices. Competition rules to be developed and applied for intra-African air transport should be as similar as possible and harmonised so as to avoid conflicts. Similar conduct should be accorded like treatment under competition rules because air transport cannot operate effectively when different sets of rules are applied to carriers by different authorities. There should be consistency in the enforcement of competition rules so that operators can know how certain conduct will be treated.

160. Institutional Arrangement. The establishment and strengthening of an effective institutional arrangement with clear mandate and financial resources at the sub-regional and continental level will provide a common framework for the oversight of the liberalisation process and co-ordination of the activities related to the implementation of the Decision.

161. Dispute Resolution Mechanism.. The main objective is to establish a mechanism applicable in the context of the Decision that introduces a higher level of transparency, is more focused, expeditious and cost effective. Such a system would include the requirement that all parties be notified of the dispute and intervene in the consultation and arbitration proceedings; the development of a more focused mechanism that clearly differentiates the time sensitive issues of a dispute, from the general purpose disputes; and the need to back the mechanism by a formal process, preferably within the sub-regional entity, with mandatory compliance with decisions and findings.

162. Harmonisation of Sub-Regional Initiatives. A major priority of those responsible for the liberalisation process in Africa should be to achieve synergy between sub-regional initiatives so that common rules will be developed for uniform application throughout Africa. The current tendency of each economic grouping taking independent and uncoordinated initiatives will complicate the efforts of greater uniformity in the application of the Decision. It is hoped that this briefing will serve as a basis for further work and allowing the co-ordination of the sub-regional initiatives in a manner that would avoid duplication of efforts and further balkanisation of the already fragmented rules governing air transport in Africa.

✈✈✈✈✈

Attachments 1

Term of Reference

Clarification of Legal Issues of the Yamoussoukro Decision and Synopsis of Key Elements of Competition Rules in support of Air Transport Liberalisation in The SADC Region

Objective

The objectives of the project are to:

- ✈ review the legal issues of the Yamoussoukro Decision of concern to SADC and preparation of a comprehensive legal brief in clarification of these issues;
- ✈ identify and develop a synopsis of the key elements of competition rules and related institutional and regulatory arrangements relevant to the region as the basic foundation for defining future policy options; and
- ✈ participate and present the results of these studies to the SATCC Ministerial Conference as a resource person.

Work Plan

Output 1

Elaboration of a comprehensive legal brief clarifying the legal concerns expressed by SATCC in respect to the Yamoussoukro Decision.

Activity 1.1

Review the legal concern expressed by SADC on the basis of documents made available to the consultant, analysis of these concerns vi-a-vis the text of the Yamoussoukro Decision, determination and identification of the areas of inconsistency and ambiguity that need to be clarified, modified, replaced or added to allow for clearer understanding of the Yamoussoukro Decision, taking into account the preparatory work, discussions at the Conference of African Ministers and other source materials.

Activity 1.2

Based on this analysis and background material, develop a comprehensive legal brief focusing on the main legal issues of concern, specifying clearly the areas of clarification and/or indication of alternative courses of action to reach a common understanding on these issues.

Output 2

Synopsis of the key elements of competition rules and related institutional and regulatory arrangements in air transport of relevance to the region.

Activity 2.1

Gather relevant information and undertake research on the basis of work done by ICAO, UNIDROIT and the experiences of other countries (EU, US, etc.) on competition matters in air transport and related institutional and regulatory matters.

Activity 2.2

On the basis of research undertaken, evaluate and determine the key elements of competition rules that are initially of relevance to the region that need to be addressed and developed on a priority basis.

While the overview will be based on the same principles as those generally applied to air transport in other parts of the world, the study will focus on those issues of relevance to the sub-region. The principal purpose will be to explore a set of concepts that will prevent the distortion of competition by restrictive and market exclusionary practices including initially the following aspects:

- the concept of anti competitive behaviour
- the notion of 'predatory behaviour;
- the notion of dominant position;
- clearances and exemptions;
- enforcement of competition standards and behaviour and
- remedies, dispute resolution mechanism and institutional arrangement

Activity 2.3

Prepare a report encompassing the aforementioned key elements as well as other items of competition rules and related regulatory matters that could serve as the basic foundation for defining future policy options.

Output 3

Activity 3.1

Participate and present the findings of the report, as a facilitator, to the SATCC Ministerial Conference.

--END--

Attachment 2

Summary of Recommendations

Based on the presentation of the preceding section, the following is a summary of the various recommendations formulated in the Briefing Paper and allocating responsibilities for their implementation and completion dates.

Recommendations	Nature of Recommendation	Responsible Institutions	To be Completed by
Recommendation One **Empowerment of the Decision**	To urge the Ministers responsible for civil aviation and Civil Aviation Authorities: a) to initiate all requisite actions (administrative, legal or otherwise) to officially recognise the Decision within their respective jurisdictions, b) to take cabinet approval and publication of the Decision c) to notify the Monitoring Body as well as the secretariat of the sub-regional organisations and the other parties within a specified period of time of the actions taken and d) ECA, OAU, RECs and other partners and the sub-regional groupings should exert as much pressure as possible on the parties to ensure the internalisation of the Decision at the national level	OAU ECA RECs CAA	Date to be determined
Recommendation Two **Bilateral Air Services Agreements**	Develop a memorandum of clarifications (MOC) to be executed by the Parties on the basis of Article 2 of the Decision clearly providing that all provisions in existing bilateral air services agreements that deal with market access, pricing, capacity, designation, etc. are deemed automatically replaced and superseded by the Decision and that other provisions in existing bilateral air services agreements that are not covered by the Decision will continue to apply between the parties until such time as explicit provisions are adopted under the Decision in substitution thereof .	ECA RECS CAA	Date to be determined
Recommendation Three **Transitional Measures**	Develop a memorandum of clarifications (MOC) to be executed by the Parties clarifying the provisions of Articles 3, 4 10 and 12 by clearly providing that: a) in respect to the extent of the right of deferral of traffic rights, a party has no right to defer the freedoms of the air except 5th freedom b) in respect to tariffs matters, a party does not have the right to limit its commitment except in cases of predatory pricing on the basis of Article 7 of the Decision. The MOC may introduce the concept of "price leadership" and "suspension of tariffs" regulatory devise to prevent anti-competitive pricing behaviour. clarifying that the right of deferral is exclusively reserved to non-parties to the Abuja Treaty since and providing a cut-off date beyond which a party will be preclude from exercising its right of deferral. Such a party may use the mechanism of temporary relief referred to above.	ECA RECS CAA	Date to be determined

Recommendation Four **Limitation of Capacity and Frequency**	Develop appropriate parameters for the practical application of government intervention in capacity a) define the term "special consideration". One possibility is to make clear that the term does not imply the protection of the commercial interests of an airline. b) establish detailed procedure to be followed by a party intending to invoke Article 5, including the giving of notice, justification of the need for such intervention, appropriate adjudication procedures etc. c) the intervention must satisfy a specified number of pre-agreed minimum conditions before its implementation, for example, non-discriminatory and applied under uniform conditions; limited duration, proportionality to the problem to be remedied etc.	ECA RECS	Date to be determined
Recommendation Five **Competition issues: Code of Fair Competitive Practices**	Develop a Code of Fair Competitive Practices on the basis of a) organise work shops to test the various concepts presented in this paper as well as other issues and also to allow for the interaction with the practitioners on the ground, namely the airlines, civil aviation authorities and if possible users of air transport, to develop useable and practical concepts. b) workshop to be organised by resource personnel on the basis of a well prepared agenda and documentation circulated in advance with clear objectives of what the workshop should achieve, in particular examine possible components of the safety net and safeguard mechanism, defining (a) the types of circumstances that would trigger the safety net mechanism, (b) the types of behaviour that would be regarded as unacceptable and (c) the procedures for enforcement, the remedies available and appropriate disputes resolution mechanism. c) Once a general consensus has emerged from such workshops, proceed with the actual preparation of a code of fair competitive practices	ECA RECS	Date to be determined
Recommendation Six **Dispute Resolution Mechanism**	Design of an appropriate dispute resolution mechanism applicable in the context of the Decision that introduces a higher level of transparency, is more focused, expeditious and cost effective.. The main components would be: a) requirement of notification of the dispute to all parties and recognition of their right to intervene in the proceedings, if they so desire; b) development of a more focused mechanism that clearly differentiates the time sensitive issues from the general purpose disputes; c) the need to back the mechanism by a formal process, preferably within the sub-regional entity, with mandatory compliance with decisions and findings; appropriate compliance procedures including the grant of interim relief, in suitable cases, final and binding rulings to be complied with by the parties within a reasonably short period of time, possible sanctions for failure to comply	ECA RECS CAA	Date to be determined
Recommendation	Establishment and empowerment of a sub-regional body	ECA	

Seven **Institutional Arrangement**	mandated to act on behalf of the parties of the sub-region with clear objectives, mandate, and delegation of authority basic organisational structure, finances etc. The establishment of common framework will enhance effective commonality in the application and interpretation of of the Decision and to suggest new rules for adoption by the parties and the refinement of the common rules by developing an authoritative explanatory statement, responses to complaints etc., and detailed proposals for new and modification of existing rules	RECS CAA	Date to be determined
Recommendation Eight **Harmonisation of Sub-Regional Initiatives.**	Achieve synergy, co-ordination and harmonisation of sub-regional initiatives so that common rules will be developed for uniform application throughout Africa by deploying greater effort to give direction to the tendency of each economic grouping taking independent and uncoordinated initiatives in a manner that would avoid duplication of efforts and further balkanisation of the already fragmented rules governing air transport in Africa.	ECA RECs	Date to be determined

--END--

Attachment 3

Arbitration Procedure

(Extract taken from the Multilateral Agreement on the Liberalisation
of International Air Transport
between the US, New Zealand, Chile, Brunei & Singapore)

1 Any dispute arising under this Agreement, except those relating to Pricing or Capacity and that is not resolved by a first round of formal consultations may be referred for decision to some person or body. It the Parties do not so agree, the dispute shall, at the request of Each Party, be submitted to arbitration in accordance with the procedures set forth below.

2. Arbitration shall be by a tribunal of three arbitrators to be constituted as follows:

a. Within 30 days after the receipt of a request for arbitration, each Party shall name one arbitrator. Within 60 days after these two arbitrators have been named, they shall by agreement appoint a third arbitrator, who shall act as President of the arbitral tribunal;

b. If Each Party fails to name an arbitrator; or if the third arbitrator is not appointed in accordance with subparagraph a of this paragraph, Each Party may request the President of the Council of the International Civil Aviation Organisation to appoint the necessary arbitrator or arbitrators within 30 days. If the President of the Council is of the same nationality as one of the Parties the most senior Vice President who is not disqualified on that ground shall make the appointment.

3. Except as otherwise agreed by the Parties to the dispute, the arbitral tribunal shall determine the limits of its jurisdiction in accordance with this Agreement and shall establish its own procedural rules. The tribunal, once formed, may recommend interim relief measures pending its final determination. At the direction of the tribunal or at the request of either of the Parties, a conference to determine the precise issues to be arbitrated and the specific procedures to be followed shall be held not later than 15 days after the tribunal is fully constituted. If the Parties to the dispute are unable to agree on the issues , the arbitral tribunal shall determine the precise issues to be arbitrated and the specific procedures to be followed.

4. Except as otherwise agreed or as directed by the tribunal, each Party shall submit a memorandum within 45 days of the time the tribunal is fully constituted. Replies shall be due 60 days later. The tribunal shall hold a hearing at the request of Each Party or on its own initiative within 15 days after replies are due.

5. The tribunal shall attempt to render a written decision within 30 days after completion of the hearing, if no hearing is held, after the date both replies are submitted. The decision of the majority of the tribunal shall prevail.

6. The Parties to the dispute may submit requests for clarification of the decision within 15 days after it is rendered and any clarification given shall be issued within 15 days of such request.

7. Each Party to the dispute, including intervening Parties, shall, to the degree consistent with its national law, give full effect to any decision or award of the arbitral tribunal. The decisions of the tribunal shall not be open to appeal and shall be complied with within the time periods established therein.

8. . In the case of a dispute involving more than two parties, multiple Parties may participate on either or both sides of the proceedings described in this Article the procedures set out in this Article shall be applied with the following exceptions:

(a) In respect to paragraph 2 (a), the Parties on each side of the dispute shall name one arbitrator;

(b) In respect to paragraph 2 (b), if the Parties on either side of the dispute fail to name an arbitrator, the other Party or Parties may use the procedure set forth in paragraph 2 (b) to secure the appointment of the arbitrator and

(c) with respect to paragraph 3, 4 and 6, each party on either side of the dispute may take the action provided for a Party.

10. Any other Party affected by the dispute has the right to intervene in the proceedings on the following conditions:

(a) a Party desiring to intervene shall file a declaration to that effect with the arbitral tribunal no later than 10 days after the third arbitrator has been named:

(b) the arbitral tribunal shall notify the Parties to the dispute of any such declaration, and the Parties to the dispute shall each have 30 days from the date such notification is sent to submit any objections to an intervention. The arbitral tribunal shall decide whether to allow any intervention within 15 days after the date such objections are due;

(c) if the arbitral tribunal decides to allow an intervention, the intervening Part shall notify all other Parties to the Agreement of the intervention and the tribunal shall take all necessary actions to make the documents available to the intervening Party, who may file pleadings within the time frame set by the tribunal and may participate in any proceedings; and

(d) the decision of the arbitral tribunal shall be equally binding upon the intervening Party.

11. The arbitral tribunal shall transmit copies of its decision to the Parties to the dispute. The tribunal shall provide copies to the Executing Agency.

12. The expenses of the arbitral tribunal, including the fees and expenses of the arbitrators, shall be shared equally by the Parties. Any expenses incurred by the President of the Council of the International Civil Aviation Organisation in connection with the procedure of paragraph 2.b. of this Article shall be considered to be part of the expenses of the arbitral tribunal

--END--