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UNITED NATIONS
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Conference of African ministers responsible
for civil aviation

Conference of African ministers responsible
for civil aviation

Meeting of Experts
9 - 12 November 1999

Ministerial Conference
13 - 14 November 1999

**GENERAL EXPLANATORY NOTES
OF
THE DRAFT DECISION ON THE LIBERALIZATION OF
ACCESS TO AIR TRANSPORT MARKET IN AFRICA**

1. Background

1. The ECA Working Group for the Preparation of the Conference of African Ministers responsible for Civil Aviation, at its meeting held in Nairobi on 20-23 October 1998, agreed that the new instrument to be developed should be in a form of Treaty or Protocol to the Abuja Treaty establishing the African Economic Community.

2. The Working Group also agreed that such instrument should have in-built flexibility to allow States to make their own choices as to the degree and pace of implementation of the instrument. States that are ready to implement the instrument will be able to do so immediately among themselves while other states not fully ready will have the opportunity to implement the instrument at their own pace within a specified time frame.

2. Legal form of Proposed Instrument

3. The working group examined different alternatives in respect to the legal form of proposed instrument. These included:

a) Stand-alone Treaty (e.g., not linked to any existing instrument)

According to international law, a treaty is subject to signature and ratification by states followed by exchange or deposit of instruments of ratification for entering into force. By completing these formalities or procedures, the treaty becomes part of international law, acquiring obligatory force among the parties. This approach was not retained as it will require ratification for its entry into force and will be lengthy and cumbersome.

b) Protocol

A protocol to the Treaty establishing the African Economic Community is foreseen under Article 66 of the Abuja Treaty (Protocol on Transport, Communication and Tourism)¹. The working group eliminated this approach for two reasons:

- (i) It was the view of the Working Group that probably only one Protocol embracing Transport, Communications and Tourism appears to be anticipated by the drafters of the Treaty as is borne out by the work currently in progress within the OAU for the preparation of a Protocol on Transport, Communications and Tourism.

¹ Article 66 : Protocol on Transport, Commission and Tourism -

"For the purpose of this Chapter, Member States undertake to cooperate in accordance with the provisions of the Protocol on Transport, Communications and Tourism".

- (ii) A protocol would still require signature and ratification, within the terms of the provision of Article 100 of the Abuja Treaty².

c) Existing mechanism within the Abuja Treaty

The working Group examined whether a mechanism was available within the Abuja Treaty. Article 10³ of the Abuja Treaty, authorises the Assembly of Heads of States and Governments to adopt decisions that are binding on Member States. Decisions adopted under Article 10 are automatically enforceable thirty (30) days after the date of their signature by the Chairman of the Assembly. Decisions are generally adopted by consensus, failing that, by a two-third majority of Member States. This option accordingly offered a better alternative and was retained. No further ratification process will be required because the Decision derives its authority from a Treaty that itself is in force since May 1994.

3. Preamble

- 4. An appropriate preamble has been developed to provide the context within which the instrument has been prepared.

4. Definitions

- 5. Certain definitions of key words and expressions used in the Decision have been with the objective of setting the framework within which the draft instrument was prepared. Attention is drawn to the following definitions.

- (a) Eligible Airline. The definition of Eligible Airline has elected to retain the concept of "**majority ownership**" rather than "**substantial ownership**". The draft does not define what constitutes **majority ownership** which is left to local laws. In order to make clear the situation of subsidiaries, affiliates or franchisees of an air airline that is owned or controlled by a non-party to the Decision, it was found necessary to clarify the concept of [**Effective control** means : a relationship constituted by rights, contracts or any other means which, either separately or jointly resulting in creating the possibility that a substantial part of the profits from the operations of the eligible designated airline are retained by s State or its nations.
- (b) State Party. "State Party" is defined to include not only an African country that is a party to the Abuja Treaty but also such other African countries that are not parties to the said Treaty but are willing to participate in the liberalization process and accept be

² "This Treaty and the Protocol shall be signed and ratified by the High Contracting Parties."

³ 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".

bound by the Decision. This way it is hoped that the Decision will have a wider geographical coverage and application in matters relating to the economic regulation of air transport.

6. Other definitions that may be completed once the instrument is given a final shape.

5. Scope of Application

7. The draft Article 2 establishes the arrangement among the State Parties for the progressive liberalization of scheduled and non-scheduled air transport within Africa.

8. In addition and in order to make the Decision acceptable to a broad spectrum of African States, the draft includes provisions that allow States to choose the pace at which they are prepared to apply the measures adopted by the Decision.

9. Accordingly such States are allowed by a formal declaration made to that effect to limit their commitments for a specified period from the application of the core provisions of the Decision relating to:

- 5th Freedom Traffic Rights; and
- Pricing and Tariffs.

10. However such States are required to assume a minimum commitment in respect to 1st, 2nd, 3rd and 4th freedom.

11. The Draft also provides that the principle of reciprocity would apply to the relationship with States that have made a declaration and others that have made full commitment.

12. As a binding legal instrument deriving its stature from the Treaty, the Decision supersedes and replaces those provisions in existing bilateral sub-regional and or sub-regional agreements that are inconsistent with the terms of the Decision. Those other provisions normally included in such agreements which are not in conflict with the Decision will continue to be valid and supplement the Decision.

6. Grant of Traffic rights

13. Based on the consensus reached at the level of the ECA preparatory Committee the new instrument affirms the principle of full liberalization of all freedoms of the air initially among like - minded states for the operation of scheduled and non-scheduled air transport services by an Eligible Airline to/from their respective territories.

14. At the same time, the instrument also allows States to opt out from full liberalization in respect to fifth freedom for a maximum transitional period of 5 years. During this transitional period, States will commit:

- (a) to grant and receive unrestricted fifth freedom on sectors where there are no third and fourth freedom operators; and
- (b) to grant and receive a minimum of 20 percent of the capacity offered on the route concerned where third and fourth freedom operators exist. This takes into account the minimum market access agreed in the Mauritius Decision.

7. Pricing and Tariffs

15. The main thrust of Article 5 of the draft on pricing and tariffs is to establish the principle of complete tariff liberalization while at the same time allowing States to attain this objective within a transitional period of five years. During this transitional period, State Parties will be allowed to approve tariffs in accordance with the country of origin rules i.e., for travel commencing within their territories.

8. Capacity and Frequency

16. Article 6 provides for no regulation of frequencies and capacity offered on air services linking any city pair combination between State Parties concerned. Each airline will be allowed to mount and operate such capacity and frequency as such airline deems appropriate

17. However, a State Party may refuse to authorise the offer of additional capacity by a designated airline if it proves that such additional capacity will result in unfair competitive behaviour.

9. Designation and Authorization

18. Article 6 of the draft allows each State Party to designate more than one airline on a city pair basis, provided the designated airline meets certain defined operational requirements

10. Competition

19. State Parties are required to ensure fair and equal opportunity for the designated airlines to compete in providing air transport services to and from their respective territories, in particular charging fares and rates on routes at levels which are, in aggregate, insufficient to cover the costs of providing the services to which they relate; and the addition of excessive capacity or frequency of services on a given sector constitute unfair competitive practices.

11. Settlement of Dispute

20. The draft includes a dispute settlement mechanism patterned on the ICAO model which is not incompatible with the dispute settlement provisions of the Abuja Treaty.

12. Monitoring Body

21. Article 9 proposes the establishment of an Air Transport Sub - Committee which will be responsible for the overall supervision, follow-up and evaluation of the implementation of the Decision within the terms of Article 26 of the Abuja Treaty.

22. The Sub-Committee on Air Transport proposed hereunder is intended to be established by the Assembly under Article 25.4 of the Treaty.

23. To assist the Sub-Committee in the follow-up of the implementation of this Decision a Monitoring Body is also proposed to be established.

13. Other Provisions

24. This section is intended to cover administrative and general provisions relating to, inter alia, the following:

- Commercial Opportunities
- Fair Competition
- Operating Flexibility
- Consultation
- Review
- Registration

14. Final Provisions

26. It is envisaged that, in line with normal practices, draft final provisions will need to be prepared. The proposals for draft final provisions set out in the draft Articles are simply to indicate some suggestions.

15. Appendices

Other appendices may be needed to give further detail or amplification of the Decision. However, the Draft initially includes the following:

Appendix 1 - Forms of Declaration of commitment

Appendix 1(a) - to be used by States that are not parties to the Abuja Treaty or have not deposited their instruments of ratification and wish to be parties to the Decision.

Appendix 1(b) - to be used by States that are not parties to the Abuja Treaty or have not deposited their instruments of ratification and wish to limit the extent of their commitment.

Appendix 1(c) - to be used by States that are parties to the Abuja Treaty who wish to limit the extent of their commitment

Appendix 2 - Settlement of Dispute

Appendix 3 - Powers and Duties of the Sub-Committee on Air Transport

Appendix 4 - Criteria and Procedures for the Establishment of
Scheduled air fares

Appendix 5 - Safety Net and Safeguard Measures
