



A FRAMEWORK FOR THE OPERATIONALISATION OF THE COMESA-EAC-SADC JOINT COMPETITION AUTHORITY (JCA)

DRAFT FINAL REPORT – PART 6 YD COMPLIANT AIR SERVICES AGREEMENT

**CONTRACTING AUTHORITIES
COMESA**

**BENEFICIARY
COMESA, EAC, SADC**

Service Agreement Number TMSA-SC-12-31



**Prepared by
Bilson Henaku Solicitors**



Project: A Framework for the Operationalisation of the
COMESA EAC-SADC Joint Competition Authority (JCA)

Service Agreement No: TMSA-SC-12-31

	CONTRACTING AUTHORITY	CONTRACTOR
Name	COMESA	BH SOLICITORS
Address	COMESA Centre Ben Bella Road Lusaka Zambia	5 th Floor Dorland House, 14 – 16 Regent Street London SW1Y 4PH United Kingdom
Telephone	+260 211 22726 - 32	+44 208 463 9970
Fax	+260 211 227 318	+44 208 463 9989
Contact Person	Sindiso Ngwenya <i>Secretary General</i>	Barbara Bilson <i>Senior Partner</i>
Email	sngwenya@comesa.int	bbilson@bhsolicitors.com

Date of report: 31/5/2013

Authors of Report:

- ❖ Mr. Rexter Ndhlovu – Air Transport Policy Consultant
- ❖ Dr. Kofi Henaku - Team Leader - BH Solicitors

Contents

Executive Summary	6
Development of a YD Compliant ASA Template for the Tripartite Region	8
1.1 Introduction	8
1.1 Background and Context	8
1.2 African Union (AU) Level	9
1.3 Bilateral Level	9
1.4 Implementation Activities at Individual RECs Level	10
1.5 COMESA, EAC and SADC Harmonised Legal and Institutional Framework for YD Implementation	11
1.6 Template and JCA Operationalisation	11
2. Role and Application of the Template	13
2.1 The Status of the Template	15
3. Template and Bilateral Air Services Agreements	16
4. State of Full Implementation of YD – An Overview	18
5. CONCLUSIONS	20
Appendix 1 YD COMPLIANT ASA TEMPLATE FOR COMESA-EAC-SADC TRIPARTITE REGION	21
ARTICLE 1	22
DEFINITIONS	22
ARTICLE 2	24
GRANT OF TRAFFIC RIGHTS	24
ARTICLE 3	25
CAPACITY AND FREQUENCY	25
ARTICLE 4	25
TARIFFS	25
ARTICLE 5	25
DESIGNATION AND AUTHORISATION OF AIRLINES	25
ARTICLE 6	27
WITHHOLDING, REVOCATION OF AUTHORISATION	27
ARTICLE 7	27
COMPETITION REGULATIONS	27
ARTICLE 8	28
COMMERCIAL OPPORTUNITIES	28
ARTICLE 9	29
APPLICATION OF LAWS AND REGULATIONS	29
ARTICLE 10	29
USER CHARGES	29
ARTICLE 11	30
EXEMPTION FROM CUSTOMS DUTIES, INSPECTION FEES AND OTHER SIMILAR CHARGES	30
ARTICLE 12	30
SAFETY	30
ARTICLE 14	32
SETTLEMENT OF DISPUTES	32
ARTICLE 15	32
CONSULTATION	32

ARTICLE 16.....	32
AMENDMENTS	32
ARTICLE 17.....	32
EXISTING AGREEMENTS	32
ARTICLE 18.....	32
WITHDRAWAL.....	32
DEPOSITORY	33
ARTICLE 20.....	33
REGISTRATION OF AGREEMENT.....	33
ARTICLE 21.....	33
ENTRY INTO FORCE.....	33
SIGNATURE OF AGREEMENT	33
Signature	33
Appendix 2: YD COMPLIANT BASA TEMPLATE FOR COMESA-EAC-SADC TRIPARTITE REGION	34
PREAMBLE	34
ARTICLE 1.....	35
DEFINITIONS.....	35
ARTICLE 2.....	37
GRANT OF TRAFFIC RIGHTS.....	37
ARTICLE 3.....	38
CAPACITY AND FREQUENCY	38
ARTICLE 4.....	38
TARIFFS.....	38
ARTICLE 5.....	39
DESIGNATION AND AUTHORISATION OF AIRLINES	39
ARTICLE 6.....	40
WITHHOLDING, REVOCATION OF AUTHORISATION	40
ARTICLE 7.....	40
COMPETITION REGULATIONS	40
ARTICLE 8.....	41
COMMERCIAL OPPORTUNITIES	41
ARTICLE 9.....	42
APPLICATION OF LAWS AND REGULATIONS	42
ARTICLE 10.....	42
USER CHARGES.....	42
ARTICLE 11.....	43
EXEMPTION FROM CUSTOMS DUTIES, INSPECTION FEES AND OTHER SIMILAR CHARGES	43
ARTICLE 12.....	43
SAFETY	43
ARTICLE 13.....	44
AVIATION SECURITY	44
ARTICLE 14.....	45
SETTLEMENT OF DISPUTES	45
ARTICLE 15.....	45
CONSULTATION.....	45
ARTICLE 16.....	45
EXISTING AGREEMENTS	45
ARTICLE 18.....	46

DEPOSITORY	46
Appendix 3: Response to Selected Stake Holder Comments	47
5.1 Comments from Workshop	47
5.1.1 AFCAP definition of the Air Transport Services	47
5.1.2 Registration and Depository	48
5.1.3 Implications of the Beijing Convention/Protocol on Aviation Security	50
5.1.4 Lessons from the Banjul Accord MASA (2001)	52
5.1.5 Issues of non-Physical Barriers	53
5.2 Written Comments submitted	56
5.2.1 Designation and Authorisation of airlines	56

Executive Summary

The Consultants have developed and propose a draft YD compliant MASA template for the COMESA EAC-SADC Tripartite region to be used for the exchange of route and traffic rights. It is drafted as a multilateral agreement and incorporates YD liberalisation principles and provisions particularly as they affect the exchange of traffic rights between member countries. In this way it will be a supervisory tool for facilitating liberalisation and YD implementation in the tripartite region. In a most basic way, its application should enhance harmonisation of air transport policy regulation and coordination of the liberalisation process in the three RECs and provide a yardstick against which YD implementation can be monitored and measured. Specifically the template could have the following purposes:

Specifically the template could have the following purposes:

- a. To provide a YD compliant model Multilateral Air Service Agreement to be used as a basis for exchanging traffic rights between member States.
- b. To enhance regulatory harmonisation of liberalisation policies and provisions within the region,
- c. To serve as a 'yardstick' to measure progress and changes in liberalisation and YD implementation at the regional level.
- d. To provide a framework of harmonised regulation and harmonised national and regional air transport policies in respect to the exchange of market access rights between States in the three Communities.
- e. To provide Member States in the tripartite region, a basic practical supervisory tool to use in facilitating liberalisation and full YD implementation.

The template has been drafted as a Multilateral Air Services Agreement (MASA) and includes wording and provisions normally found in such agreements. It uses the language developed by ICAO over the years on various air services agreements, provisions and language from the YD and instruments used by RECs in their agreements. It consists of a Preamble and twenty one Articles. The YD compliant Articles include the following:

- a) Article 1 –Definitions
- b) Article 2 – Grant of Traffic Rights
- c) Article 3 – Capacity and Frequency
- d) Article 4 – Tariffs
- e) Article 5 – Designation and Authorisation
- f) Article 6 – Withholding and Revocation of Authorisation
- g) Competition Regulations

Provisos contained in the above Articles are to a large extent identical to the relevant Articles in the YD. Most of these provisions are a departure from the traditional BASAs. In particular, Article 5 on Designation and Authorisation as reproduced from Article 6.9 of YD leaves out the traditional "*Substantial Ownership and Effective Control*" criteria for airline designation found in most BASAs. Instead, it opts for other criteria such as effective control, incorporation in and principal place of business and other operational and technical fitness criteria.

This deviation is a source of concern for some States as it opens opportunities for interests outside the continent to exercise control over African airlines through equity participation, thus gaining undue advantage from the liberalisation package which is intended to benefit African carriers and not those from outside the continent. It is to be noted however, the YD criterion in a way creates conducive conditions for private sector participation in the airline industry in Africa.

Other provisions in the template are those normally found in any ASA such as provisions on civil aviation safety and security, competition rules, application of laws/regulations, consultation, settlement of disputes, withholding authorisation, withdrawal, Depository and entry into force. However, Article 13 on Aviation Security has been formulated to take into consideration the Beijing Conventions and Protocols signed in September 2010 while in Article 19, the AU has been named a Depository of the MASA as it is a Supplementary Agreement to YD.

The role of the Template in YD implementation belongs to a cluster of issues that need clarity as the role it is allowed to play may have a huge bearing on YD implementation. In this regard there is a clear indication as to its role in the terms stating to the effect that the MASA template is for the exchange of route and traffic rights that complies with the YD. The conclusion here is that it is to be used as a basis for exchanging market access rights based on YD provisions contained in the agreement.

In order for it to effectively play this role, the JCA should be allocated a specific function of ensuring compliance by States with the template particularly with YD provisions therein. This suggestion arises from The JCA's general function, as derived from the Communiqué of Tripartite Summit of 2008, to oversee the full implementation of the YD in the 3 RECs. The role of the template and its application could be one of the specific functions of the JCA. A key specific function could therefore be to ensure compliance by member States with YD provisions in the template.

Thus, in addition to monitoring implementation of Competition Regulations, the JCA will also facilitate application of the template by States as a means of overseeing full implementation of YD in the tripartite region.

The other and broader aspect of the MASA could be seen in its role as a strategy in implementing Free Movement of people Programmes of RECs. A liberalised air transport industry brought about by YD implementation will create an environment of that will facilitate the free movement of people, services and goods within and beyond the 3 RECs.

Development of a YD Compliant ASA Template for the Tripartite Region

1.1 Introduction

This report presents the proposed YD compliant Air Service Agreement template for the COMESA-EAC-SADC Tripartite region to be used for the exchange of route and traffic rights. It is drafted as a multilateral agreement covering all aspects normally found in such an agreement. The template also incorporates YD liberalisation principles particularly as they affect the exchange of traffic rights between member countries. In this way it will be a supervisory tool for facilitating liberalisation and YD implementation in the tripartite region. It will also provide a harmonised policy framework or yardstick against which YD implementation will be monitored and measured. In a most basic way, its application should enhance harmonisation of air transport policy regulation and coordination of the liberalisation process in the three RECs.

The report addresses and examines the following issues:

- a. Background and Review of Current Situation
- b. Concept of the template
- c. Content
- d. Role of template in YD implementation
- e. Status of template
- f. Role of BASAs
- g. Overview of full YD implementation
- h. Conclusions

Appendices 1 and 2 contain the draft MASA Template and the BASA Template.

Appendix 3 captures a selection of issues addressed in response to stakeholder comments.

1.1 Background and Context

In October 1999, African Ministers of Transport adopted the Yamoussoukro Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa. The Decision entered into force in August 2000, 30 days after the signature of the Chairman of the Assembly of Heads of State and Government of the African Union.

The Decision provides for the liberalisation of scheduled and non-scheduled air transport services within Africa. It sets the principles with which to govern the exchange of traffic rights, fixation of tariffs, capacity and frequency, designation of airlines and criteria for their eligibility. It establishes organs for the supervision, follow-up and implementation of the

Decision as well as a permanent regulatory body, the Air Transport Executing Agency, to supervise the liberalised sector and to formulate and enforce rules of fair competition and consumer protection.

Various initiatives have been taken and effort exerted at continental, regional and bilateral levels to implement this liberalisation programme. While notable progress has been made, full implementation has not been realised for various reasons. The reasons include lack of a regulatory mechanism to handle competition issues and a weak enforcement and follow up mechanism to facilitate and ensure implementation. Another contributing factor has been the absence of a harmonised regulatory mechanism to monitor implementation and liberalisation. A brief overview of YD implementation activities is given below.

1.2 African Union (AU) Level

At continental level, the Conference of Ministers Responsible for Air Transport in 2007 in Addis Ababa adopted a Resolution entrusting the African Civil Aviation Commission (AFCAC) with the responsibility of the Executing Agency. That Resolution was endorsed by the Assembly of Heads of State and Government in Accra, Ghana on 29 June 2007. Subsequently, on 16th December 2009, the AFCAC revised Constitution was submitted to Plenipotentiaries for signature and ratification.

The Executing Agency as constituted by the AU has not yet been operationalised. States have therefore been involved in implementing YD either bilaterally or within institutional arrangements in their respective RECs.

1.3 Bilateral Level

At bilateral level, air transport relations between countries in the tripartite region, as elsewhere, are still primarily governed by Bilateral Air Service Agreements (BASAs). Accordingly, a number of these States have been implementing YD within the framework of these agreements. However, while some States have revised their respective BASAs to incorporate YD principles to open up market access, some countries still restrict competition as they maintain BASAs that still contain provisions that are not in accordance with the liberalised environment created by YD. For example, the agreements still retain provisions that restrict granting of fifth freedom traffic rights frequency and capacity and a single designation regime that does not allow multiple designations. In addition, the estimated over two hundred agreements between countries in the three RECs have been revised to varying degrees of conformity to YD.

It is clear therefore, that, in their current state, these agreements do not provide an environment conducive to opening up market access as provided for within the YD regime and framework. They may therefore not be relied upon to ensure full implementation of the YD liberalisation programme in the three sub-regions. A harmonised multilateral arrangement in the form of a YD compliant ASA template is a suitable tool in this respect.

1.4 Implementation Activities at Individual RECs Level

At the regional level, COMESA, EAC and SADC as implementing agents of the **Decision** have each developed legal, regulatory and institutional arrangements under their own treaties to try to address the challenges of liberalisation and facilitate YD implementation in their respective sub-regions. COMESA decided to implement the YD through Legal Notice No. 2 of 1999 and pursued its implementation with the Air Transport Regulatory Board. A Study undertaken in 2008 to evaluate its implementation found that despite some progress, Member States still faced difficulties in a number of areas. In particular, the majority of countries did not grant fifth freedom as provided in the Legal Notice. This was largely attributed to the continued use of BASAs whose provisions were mostly inconsistent with those of YD and Legal Notice. Consequently, COMESA Ministers responsible for Transport at their meeting in Djibouti in October 2009 decided that a MASA, based on Legal Notice and YD, should replace BASAs as basis for exchanging traffic rights between member States. The Ministers also called for the operationalisation of the JCA to address concerns about anti-competitive behaviour.

As for SADC, the YD Implementation Steering Committee and the Regional Competition Authority (RCA), under the supervision of the Civil Aviation Committee (CAC), shared responsibility for YD implementation. Towards this end, the Committee agreed on an implementation road map by which full implementation would be achieved by 1st January 2009. An evaluation Study carried out at the end of the road map, established that considerable progress had been made with regard to full implementation of the YD, as envisaged in the roadmap. This was particularly the case in the areas of third and fourth freedoms and of tariffs as well as in the field of multiple designations of carriers, where the YD had been virtually fully implemented. However, there remained progress to be made, particularly in two areas: the exchange of fifth freedom traffic rights, and the abolition of restrictions on capacity and frequency of services.

In light of the above findings, the Study suggested, as an option, migration to a multilateral regime based on updated Legal Notice to achieve full YD implementation. However, SADC Member States considered this to be premature at the time as such a move should follow more closely the roadmap for the implementation of SADC programmes in general: the free trade area, the customs union, the common market and, finally, the monetary union. The Study also called for the operationalisation of an adequately resourced JCA to further facilitate implementation.

In the East African Community, the Air Transport Sub Committee is responsible for YD implementation and competition. The Sub-Committee has developed a comprehensive mechanism and carried out extensive work in developing a framework for liberalisation of air transport services and YD implementation in the region. To this effect, it has drafted Regulations for the liberalisation of air services in EAC. The Committee has also reviewed and realigned the Regulations for competition in air transport services within the EAC regulatory framework. It is to be noted in this respect that, like the YD, the EAC draft

Regulations provide for the liberalisation of traffic rights and market access. In a sense, the EAC Regulations are more or less a YD template by another name.

It would appear that, YD implementation activities in the three regions point to the same conclusion that a multilateral arrangement based on YD would be a useful tool in facilitating full implementation of the Decision. Experience elsewhere seems to suggest the same. In Africa, Member States of the Banjul Accord Group used the Decision as a template for their draft Agreement. Outside Africa, five South American countries of the Andean Pact signed a multilateral agreement to implement the agreed liberalisation programme based on the provisions of an open skies policy.

1.5 COMESA, EAC and SADC Harmonised Legal and Institutional Framework for YD Implementation

At the level of the three regions, Ministers of Transport of COMESA, EAC and SADC at their meeting, in Maputo in 2001, noted that multiple memberships in RECs was an impediment to effective implementation of the YD and agreed on common framework for joint implementation of YD. This was to be facilitated by, among others, the development of a Code of Fair Competition Practices and harmonization of sub-regional initiatives so that common rules could be developed for uniform application throughout the tripartite region. Regulations for competition in air transport services within COMESA, EAC and SADC were adopted by the Ministers in 2004. The Competition Regulations provide for the establishment of the Joint Competition Authority to monitor the implementation of the Yamoussoukro Decision and the Regulations. In 2007, the RECS, adopted the Guidelines, Provisions and Procedures for Implementing the Competition Regulations.

The first COMESA-EAC-SADC Tripartite Summit held on 20 October 2008 in Kampala, Uganda launched the JCA to oversee the full implementation of the Yamoussoukro Decision in the three RECs. The JCA comprises seven members, two members each from EAC, COMESA and SADC plus a chairperson on a rotational basis. The Tripartite Summit also decided that the JCA Secretariat would be hosted at the SADC Secretariat and that COMESA would be chair of the JCA.

1.6 Template and JCA Operationalisation

The JCA was launched to oversee the full implementation of the Yamoussoukro Decision in the three RECs. Thus, the operationalisation framework of the JCA was to be based on this function of overall **manager**, **supervisor** and **administrator** of the implementation of the YD within the territories of the Tripartite States. It therefore needed to be adequately equipped with appropriate tools and resources in order to effectively carry out this mandate. Against this background it was decided to operationalise the JCA within an empowering framework and capacity that included; the development of the legal and institutional framework to give effect and mandate to the JCA, development of the organisational structure for the JCA Secretariat, development of sustainable mechanisms for funding the JCA and the development of an Air Services Agreement (ASA) template for the implementation of the YD in the Tripartite region.

A YD compliant template as proposed for the tripartite region was clearly identified as an essential component of the framework to operationalise the JCA. The Template incorporating all principles of the **Decision** would be a basic supervisory tool to be used by the JCA, as regulator and overall manager, of YD implementation within the territories of the Tripartite States. In addition, the template will be an essential harmonised tool for States as principal actors in YD implementation. Its application will also confirm their collective intentions to break from bilateralism to a multilateral system based on community of interests as intended and provided by the Yamoussoukro Decision. It is also to be used by COMESA, EAC and SADC to operationalise their collective agreement to implement the YD in the three regions.

2. Role and Application of the Template

The role of the Template in YD implementation belongs to a cluster of issues that need clarity as the role it is allowed to play may have a huge bearing on YD implementation. Thus, after establishing the general purpose of the template the next question to consider is its specific role in full implementation of YD. In this regard, the only clear indication as to its role is found in the 'Scope of Work' item in the terms of reference which states, among others, that the scope of work includes "the development an Air Services Agreement (ASA) template for the exchange of route and traffic rights that complies with the YD." It follows from this that the intention is to use it as a basis for exchanging market access rights based on YD provisions as contained in the template. The next step is to consider modalities of ensuring that the template is allowed to effectively play this role.

Our submission in this respect is, that the JCA should be allocated a specific function of ensuring compliance by States with the template particularly with YD provisions therein. This suggestion arises from The JCA's general function, as derived from the Communiqué of Tripartite Summit of 2008, to oversee the full implementation of the YD for and on behalf of the three separate regional economic communities. As observed in earlier comments, this general function may be broader or even deeper than specific cases and possibly involve intervention of the JCA in the activities of one or more States in order to ensure the full implementation of the YD. In which case, the JCA will need to be assigned specific functions and legal mandate to facilitate such interventions. The role of the template and its application could therefore be reflected in some of these specific functions adding up to performing this JCA's general function. A key specific function of the JCA could therefore be to ensure compliance by member States with YD provisions in the template.

There will also be need to develop to some detail other relevant specific functions necessary to ensure full implementation of the YD and the specific role that the template could to play to fulfil this objective. This could be done by first defining and outlining guidelines for full YD implementation against which implementation is to be measured. In this regard, essential principles of YD which are the framework for the liberalisation process would form the basis of the guidelines.

It will be recalled that YD sets the principles with which to govern the exchange of traffic rights, fixation of tariffs, capacity and frequency, designation of airlines and criteria for their eligibility. It establishes organs for the supervision, follow-up and implementation of the Decision as well as a permanent regulatory body, the Air Transport Executing Agency, to supervise the liberalised sector and to formulate and enforce rules of fair competition and consumer protection.

These principles are also reflected in the guidelines issued by African Ministers responsible for transport at their meeting in 2005 in South Africa for evaluating YD compliance. They have also been incorporated as provisions in the proposed template for the tripartite region. Technically, the status of implementation by each State in the tripartite region could

therefore be assessed from the perspective of compliance with these key YD based provisions in the template, which to a certain degree are the “pillars” of liberalisation.

Other functions could include reviewing implementation of the provisions of YD particularly with regard to impact on the operations of airlines in member States and recommending appropriate action resulting from such reviews. In summary the role of template will be to assist the JCA in monitoring YD implementation and proposing remedial action to address any adverse impact resulting from implementation of any specific provision of the template. In this regard, specific functions of the JCA relating to YD implementation could include the following:

1. Ensuring compliance of YD provisions in the template.
2. Defining and setting measurement criteria for full implementation of YD
3. Developing and refining rules clarifying YD interpretation
4. Implementing measures to achieve enhanced convergence of interpretation and application of the Decision
5. Regularly reviewing implementation of template in general and specific YD provisions in particular.
6. Ensure compatibility of national regulations
7. Assessing net impacts (including costs and benefits) of liberalisation on consumers and producers
8. Developing guidelines and policies relating to third countries
9. Develop policy guidelines on Consumer protection
10. Build and maintain a data bank on the airline industry it is regulating to allow analysis on:
 - Capacity
 - Traffic
 - Tariffs
 - Financial performance and productivity
 - Route Structure
 - Airports
 - employment

Thus, in addition to monitoring implementation of Competition Regulations, the JCA will also facilitate application of the template by States as a means of overseeing full implementation of YD in the tripartite region.

2.1 The Status of the Template

Another issue closely related to role of the template and demands clarity before anything else is the important question of the status of the template. This question is important as most issues concerning the role the template is to play in the YD implementation process revolves around this one single issue. In this regard, two questions stand out prominently:

- a) First, will it be a legally binding document, in other words will it be enforceable with the necessary legal mandate, or
- b) Will the template be for guidance purposes only, for States to use at their discretion?

Answers to these questions will have a huge bearing on the role the template is to play in the YD implementation process. It will be recalled that a specific task assigned to the JCA after breaking down the overseeing function was to ensure compliance by States with the template. The effectiveness of carrying out this function will largely depend on whether the template will be an enforceable document or not.

As regards to the first question, our view is that an empowered and enforceable template in the form of a MASA could be the glue that will hold and tie the States to the commitment to fully implement YD. In addition, a multilateral agreement will further enhance harmonisation of air transport policies and regulations facilitating deeper integration of the air transport sector in the three regions. A MASA will also signal a break from bilateralism to a multilateral system based on community of interests as intended and provided by the Yamoussoukro Decision. It is unlikely that the liberalisation process will proceed as intended in the three regions if States will be allowed to pick and choose which provisions of the template to apply. The importance of this issue requires that the JCA Regulation should provide for this transformation of the template. It could also provide for a transitional arrangement where States will be required to declare, individually, their commitment to be bound by the template pending determination of its final status.

On the other hand the template may not be a very useful implementation tool for the JCA if it were only for guidance material to be used by States at their discretion. The concern is that it will stand the risk of being ignored and being treated as any other document that is only referred to at the convenience of State Parties concerned. This is the fate of YD and other liberalisation programmes such COMESA Legal Notice No. 2 of 1999. This a fate that should be avoided at any rate. A loose arrangement that leaves the template in limbo and non enforceable is a recipe for such a fate.

In light of the above it is recommended as follows:

- i) The legal mandate and status of the template be specified in the Regulation
- ii) Template to be transformed into a MASA open for signature by any member State
- iii) Regulation to provide provisional arrangement for States to declare commitment to template awaiting final determination of its status.

3. Template and Bilateral Air Services Agreements

The place or role of existing BASAs in the YD created regime of the JCA and the template also requires to be settled. The issue of BASAs is complex and will undoubtedly solicit divergent views of varying degrees of intensity. The way States choose to relate to the BASAs and react to the template could therefore have far reaching consequences for YD implementation in the tripartite region.

The facts on the ground are that air transport in the three regions continues to be governed by bilateral agreements. In fact, a number of countries have been implementing YD in a limited manner within the framework of these agreements. On the other hand the proposed template, according to the terms of reference of the project, is to be used as a basis for exchanging traffic and route rights between member States within the tripartite region. Thus, the template being a YD compliant model MASA, could in theory replace such BASAs as a basis for exchanging market access rights. However, the bilateral agreement may still be required. First, it is likely that some States in the tripartite region may decide to continue to use BASAs in their relationship with each other, rather than the template for any number of reasons including the desire to protect their national airlines or to regulate certain details not covered by YD. Secondly, such States will continue to enter into bilateral agreements with African States outside the three RECs.

However, most of these agreements contain provisions which are not in accordance with YD and therefore cannot facilitate the liberalisation process. Their continued use may therefore undermine joint YD implementation and negate the very basic concept of a multilateral approach to exchanging of traffic rights which the template is intended to facilitate and promote. It is appreciated however, that BASAs may not disappear soon and States in exercise of their sovereignty may choose to continue using bilaterals in the new environment. However, such bilateral agreements will need to be consistent with the provisions of the **Decision**.

In light of the above, it is proposed that a model bilateral air services agreement which is consistent with the provisions of the Decision be developed to be used instead as a basis for negotiations between countries that may decide to continue using BASAs. The same model bilateral agreement is to be used by individual member States in their negotiations with African countries outside the tripartite region. The recommendation here is to develop a model bilateral agreement, consistent with YD provisions, to co-exist with the template. The model bilateral agreement is also attached to this paper.

The two templates solution should be seen as an interim measure. The lasting solution lies in constructing the tripartite region into a single air transport market and phasing out the BASAs and replacing them with a MASA as a legal basis for the exchange of traffic rights. This is consistent with the proposal to develop a YD compliant ASA for the three RECs and the ultimate objective of YD to effectively replace BASAs as legal basis for exchange of traffic rights.

It is proposed in this regard the JCA Regulation should reinforce Article 2 of YD for it to have “true and real” “precedence” over BASAs that are incompatible with the Decision. This is the only way that the proposed the model bilateral agreement can effectively be enforced.

4. State of Full Implementation of YD – An Overview

The JCA was assigned the function of overseeing full implementation of the YD in the three RECs. We have considered the role and examined guidelines and specific functions that could assist the JCA in carrying out this mandate. It is perhaps opportune at this point to consider what “Full Implementation of YD” means. We need to have an idea of what we seek to achieve so that we may know when we get there. This may be addressed by taking stock of the objectives of the Yamoussoukro Decision.

The primary objective of the **Decision** is to enhance operations of air services by African airlines by implementing liberalisation measures through:

- Multi-designation of carriers
- Deregulation of
 - Frequencies
 - Capacity ; and
 - Tariffs
- Removal of restrictions on traffic rights (Freedoms of the air) including 5th Freedom; and
- Compliance with YD eligibility criteria dealing with designation and authorisation of airlines;
- Establishing a multilateral air services regulatory framework;
- Effectively replacing the system of BASAs as a legal basis for the exchange of traffic rights.

In addition, YD provides for the creation of a multilateral executing agency to supervise and enforce the liberalisation process and to act as a regulator. The YD, through the mandate of the Abuja Treaty, also assigned RECs the responsibility for YD implementation.

In light of the above, YD implementation should be defined in terms and in the context of meeting the above policy objectives. Simply put, full YD implementation would mean successful installation by the JCA of a YD based air transport regulatory regime throughout the territories of the three RECs. Under such a regime YD broad principles will become national air transport policy of all countries in the tripartite region translating into a YD based liberalised air transport market spanning the three regions. The proposed template on its part will have provided the basic harmonised regulatory framework facilitating the transition to liberalisation.

It may also be useful to consider full implementation in terms of what stakeholders consider impact of such liberalisation. In this respect, conditions for full implementation will include an operationalised JCA that manages the competition and regulatory regime in such a manner that States and their airlines will have the same level of confidence in the institutional regulatory mechanism as they currently have in BASAs. When difficulties and problems faced by States in implementing the liberalisation programme such as the granting of the 5th freedom rights will have virtually disappeared, full YD implementation will then be in sight. While challenges will continue to be faced as expected of any ongoing process, it is expected that they will not be about whether to liberalise but how-to facilitate the process further. At that time, States that wish to liberalise and have the capacity to do so should not have to face difficulties in accessing any air transport market within the three RECS.

In a nutshell, the moment the JCA will have created an environment where airlines will have the freedom to operate to the fullest extent of their ability then full implementation will have taken place. What is being described here is the creation of a level playing field, a marketplace devoid of barriers to entry and market exit not based on anti-competitive practices but on operational and other abilities to compete in a liberalised market. The emergence of fundamental airline alliances and other arrangements and initiatives as envisaged by YD, will also be an indication that full implementation is underway. Strong, viable and commercially managed airlines independent of government direct financial support, with the ability to take on any competition in the world will certainly herald a fully liberalised marketplace. This competitive marketplace should benefit consumers through lower fares and rates and increased services. This is the impact that should be noticeable when liberalisation has taken root in the three regions.

In summary, full implementation will mean JCA facilitating implementation and attainment of YD policy objective and coordinating the liberalisation of air transportation among the 27 member states including traffic rights, tariff liberalisation, capacity and designation, determination of eligibility. It will also mean no difficulties for States in accessing traffic and other rights provided by YD. This is to be done in liaison with continental and regional organisations charged with the monitoring of implementation of the YD. Full compliance will also mean aligning, with YD principles, all market access provisions in air services agreements between member States. The Template will be the basic and suitable tool that the JCA will use in carrying out this responsibility.

5. CONCLUSIONS

From the above discussions, the following conclusions may be drawn:

- a) The proposed template attached to this paper provides the JCA and Member States a basic practical supervisory tool to use in facilitating liberalisation and full YD implementation in line with the decision of the First Tripartite Summit.
- b) The template will provide a practical packaged YD for States to use in implementing the liberalisation programme. As a model MASA, it will enhance harmonisation of air transport regulations and policies in the tripartite region. The template will require to be developed to eventually evolve and be transformed into a multilateral agreement.
- c) The degree and extent of the effectiveness of the template in YD implementation will largely depend on its status in the operationalised JCA.
- d) States should be encouraged to use the template as a basis in their bilateral relationships with African States outside the tripartite region
- e) The JCA should regularly review implementation of provisions in the template to determine their impact on the provision of air services in the three RECs and beyond.
- f) The template should be accorded legal and formal recognition and empowerment in the JCA Regulation.

Appendix 1 YD COMPLIANT ASA TEMPLATE FOR COMESA-EAC-SADC TRIPARTITE REGION

PREAMBLE

The undersigned Governments, being members of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), Southern African Development Community (SADC), (hereinafter referred to as the Tripartite), the African Union (AU) and the African Civil Aviation Commission (AFCAC)

NOTING that the highest organs of the three RECs have endorsed the need to harmonise the policies of the three institutions in the context of the overall objective of all the States to attain continental integration as envisaged under the Constitutive Act of the African Union and the Treaty Establishing the African Economic Community;

Having regard to the Treaty establishing the Common Market for Eastern and Southern Africa (hereinafter referred to as “COMESA Treaty”), the Treaty establishing the East African Community (hereinafter referred to as “EAC Treaty”) and to the Treaty establishing the Southern Africa Development Community (hereinafter referred to as “SADC Treaty”)

NOTING that the Tripartite Summit of the Heads of State and Government of COMESA, EAC and SADC held in Kampala, Uganda on 20th October 2008 agreed on a programme of harmonisation of trading arrangements amongst the three RECs, free movement of people, joint implementation of inter-regional infrastructure programmes as well as institutional arrangements on the basis of which the three RECs would foster co-operation, given the challenges of multiple membership;

CONSIDERING the Abuja Treaty Establishing the African Economic Community, in particular Article 61 relating to the integration of air transport and Article 10 relating to the authority of the Assembly of Heads of State and Government to adopt decisions;

RECOGNISING that efficient and competitive international air services are important to develop trade, benefit consumers, and promote economic growth;

DESIROUS of establishing and developing air transport services between their respective territories and within the Tripartite region and strengthen their cooperation in this respect;

BEING Parties to the Decision relating to the implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa adopted in October 1999 by African Ministers of Transport and entered into force in July 2002;

RECOGNISING that the main objectives of the Yamoussoukro Decision is the facilitation of intra-African connections, liberalization, the development of an improved aviation network on the African continent and increased private sector participation;

TAKING NOTE of AFCAP that calls on Member States to develop a liberalised and competitive air transport industry that responds promptly to the dictates of the market,

technological developments and global trends; and also establish a common African air transport market through the full implementation of the Yamoussoukro Decision.

RECALLING the adoption by the three RECs in 2004 of the joint Regulations for Competition in Air Transport Services within COMESA, EAC and SADC to facilitate joint YD implementation in the three regions;

NOTING that in 2007 the three RECs established the JCA to exercise oversight over implementation of the Competition Regulations in COMESA, EAC and SADC.

RECALLING further that the Summit launched the Joint Competition Authority to oversee the full implementation of the Yamoussoukro Decision within the common territory of the RECs;

DESIRING to ensure that highest degree of safety and security in international air transport and reaffirm their grave concern about acts or threats against the security of aircraft, which jeopardise the safety of persons or property, adversely affect the operation of air transportation, and undermine public confidence in the safety of civil aviation;

ALSO DESIRING to facilitate and enhance air services and their related activities, to complement the other transport facilitation and liberalisation efforts of the Tripartite Region;

BEING Parties to the Convention on International Civil Aviation opened for signature at Chicago on 7 December 1944;

Have agreed as follows:

ARTICLE 1 DEFINITIONS

For the purpose of this Agreement and its annex unless the context otherwise requires-

“Aeronautical Authority” means, the minister in the Tripartite Member State responsible for Civil aviation or any other person or body authorised to perform any particular function to which this agreement relates;

“Agreement” means this agreement, the annex attached thereto, and any amendment of the agreement or the Agreement or the Annex adopted in accordance with Article 16 of this Agreement;

“Air Services” and “Airlines” have the meaning respectively assigned to them in Article 96 of the Chicago Convention on International Civil Aviation dated 7th December 1944.

“Air operator's certificate” means a document issued by the competent aeronautical authority of a Member State which affirms that the operator named therein is competent to secure the safe operation of aircraft for the aviation activities specified in the certificate;

“Air service license” - means license to carry out air services

“Annex” means the annex to this agreement or as amended in accordance with the provisions of Article 18 thereof, and for the purposes of this agreement, the annex forms an integral part hereof and all references to the Agreement shall include reference to the annex unless the context otherwise require;

"Cabotage" means the taking on in the territory of one Member State, by an air carrier of another Member State of passengers, cargo or mail carried for reward originating in and destined for another point in the territory of the first Member State;

“Capacity” –as defined by ICAO;

"Convention" means the Convention on International Civil Aviation, opened for signature at Chicago on 7 December 1944, including any amendment thereto which has entered into force under Article 94(a) thereof and has been ratified by Member States, as well as any Annex or amendment thereto adopted under Article 90 of that Convention, insofar as such amendment or Annex is at any given time effective for such Member States;

“Decision” means the Decision relating to the implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa;

“Designated Airline” means an airline, which has been designated and authorised in accordance with Article 5 paragraph 4 of this Agreement;

“Eligible Airline” any Member State air transport company fulfilling the requirements set forth in Article 5 paragraph 4 below.

“Effective Control” a relationship constituted by rights, contracts or any other means which, either separately or jointly confer the possibility of a Member State or group of Member States 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 carrier;

"Fifth freedom traffic right" means the right of an air carrier to undertake the air transport of passengers, cargo or mail between two States other than the State in which it is registered;

"Fourth freedom traffic right" means the right of an air carrier licensed in one State to take on, in the territory of another State, passengers, cargo or mail for off-loading in the State in which it is registered;

“ICAO” means the International Civil Aviation Organisation, a specialized agency of the United Nations which **was** created in 1944 to promote the safe and orderly development of international civil aviation throughout the world. It sets standards and regulations necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental protection. The Organization serves as the forum for cooperation in all fields of civil aviation among its 191 Member States.

"Member State" means any State or territory which is a Member of the Tripartite Region of COMESA, EAC and SADC;

"National" means, a person who is a citizen of a Member State;

"Operating licence" means a licence to carry out air services or means an authorisation granted to an air carrier by the competent aeronautical authority of a State enabling it to carry

out the carriage by air of passengers, mail or cargo, as specified in the licence, for remuneration;

"Scheduled air service" means a series of flights possessing all of the following characteristics:

it is performed by aircraft for the transport of passengers, cargo or mail, in such a manner that on each flight, seats are available for individual purchase by members of the public either directly from the carrier or from its authorised agent;

it is operated either:

according to a publicised timetable; or

with flights so regular or frequent that they constitute a recognisably systematic series;

"Tariff" means the prices to be charged for carriage of passengers, baggage and cargo and the conditions under which those prices apply, including prices and conditions for agency and other auxiliary services, but excluding remuneration and conditions for the carriage of mail;

"Territory" in relation to a State that has the meaning assigned to it in Article 2 of the Convention;

"Third freedom traffic right" means the right of an air carrier licensed in one State to put down, in the territory of another State, passengers, cargo or mail taken up in the State in which it is registered

Traffic right - means the right of a carrier to carry passengers, cargo and or mail on an air service between two airports in the Tripartite Region

ARTICLE 2 GRANT OF TRAFFIC RIGHTS

1. Each Member State grants to each other Member State in the tripartite region, the free exercise of the following rights for scheduled and non-scheduled passenger, cargo and/or mail air transport services performed by eligible airlines of such other Member State:

- a) the right to fly across its territory without landing;
- b) the right to make stops in its territory for non-traffic purposes;
- c) the right to put down, in the territory of any other Member State, passengers, freight and mail taken up in the Member State in which it is licensed;
- d) the right to take on, in the territory of any other Member State, passengers, freight and mail for off-loading in the Member State in which it is licensed;
- e) the right to carry passengers, freight and mail between two Member States other than the Member State in which it is licensed;

2. In operating scheduled and unscheduled services each designated airline may, on any or all flights and at its option:

- a) Operate flights in either or both directions;

- b) Be permitted by the Member States concerned to combine air services and use the same flight number
- c) Serve, intermediate, and beyond points and points in the territories of the Member States in the Tripartite region on the routes in any combination and in any order, and
- d) Omit stops at any point or points, provided that the service commences at a point in the territory of the State designating the airline.

3. Nothing in this Agreement shall be deemed to confer on the airline(s) of one Member State the right to take on board, in the territory of another State, passengers, baggage, freight, or mail carried for compensation and destined for another point in the territory of that other State.

ARTICLE 3 CAPACITY AND FREQUENCY

1. A Member State shall not limit the number of frequencies and capacity offered on air services linking any city pair combination between Member States concerned;
2. Each Member State shall allow each designated airline of another Member State to mount and operate such capacity and frequency based upon commercial considerations in the marketplace;
3. Accordingly, no Member State shall unilaterally limit the volume of traffic, the type of aircraft to be operated or the number of flights to be operated per week, by the designated airline of any other Member State, except for environmental, safety, technical or other special consideration.
4. Without prejudice to the provisions in paragraphs 1, 2 and 3 above, a Member State may refuse to authorise an increase in capacity if such additional capacity is not in compliance with the provisions of Article 7 of this Agreement relating to fair competition regulations,

ARTICLE 4

TARIFFS

. In the case of tariff increase, no approval shall be required by the aeronautical authorities of Member States concerned for tariff to be charged by the designated airlines of Member States for the carriage of passengers, cargo and mail. However, the airlines shall be required to file such tariffs before competent authorities 30 working days before they enter into force.

2. No notice shall be required in the case of lowering the tariff and any such lower tariff shall take immediate effect.

3. However, any increases or decreases of tariffs not in compliance with any provision of Article 7 of the Agreement shall be deemed ineffective.

ARTICLE 5 DESIGNATION AND AUTHORISATION OF AIRLINES

1. Each Member State shall have the right to designate at least one eligible airline to operate intra-regional air transport services in accordance with this Agreement. Such designation shall be notified to the other State in writing through diplomatic channels;

2. A Member State may also designate an Eligible airline from another Member State in the tripartite region to operate air services on its behalf;

3. A Member State shall have the right to designate an eligible African multinational airline in which it is a stakeholder and this airline shall be accepted by each other Member State;

4. On receipt of the notification of such designation, the other Member State shall, in accordance with its national laws, speed up the process of authorization and licensing of the airline designated by the other Member State to operate the services. While such authorization should be granted within 30 days, the proposed schedule of flights should be submitted to the appropriate authorities for approval.

To be eligible, an airline should:

- (a) be legally established in accordance with the regulations applicable in a Member State to this Agreement;
- (b) have its headquarters, central administration and principal place of business physically located in the State concerned;
- (c) duly certified by a Member State as defined in Annex 6 of the Chicago Convention;
- (d) fully own or have a long-term lease exceeding six months on an aircraft and have its technical supervision;
- (e) be adequately insured with regard to passengers, cargo, mail, baggage and third parties in an amount at least equal to the provisions of the International Conventions in force;
- (f) be capable of demonstrating its ability to maintain standards at least equal to those set by ICAO and to respond to any query from any State to which it provides air services;
- (g) Be effectively controlled by one State Party or a group of State Parties or their nationals.

5. Should a Member State be convinced that a designated airline does not meet the criteria in subparagraph 4 above, it may refuse the authorisation. The State that has designated the airline may request consultations in accordance with Article (XX) paragraph (x) of this Agreement.

6. Each State Party has the right to withdraw the designation of an Eligible Airline and to designate another eligible airline or airlines in writing through diplomatic channels within 30 days except when prevented from doing so for security reasons or similar emergencies.

7. Authorizations for the performance of non-scheduled air transport services by Eligible Airlines of the Member States shall be granted by the respective competent authorities, provided that an application has been submitted for approval to the appropriate

authority, accompanied by the operating certificates of the airline's country of nationality and the corresponding insurance policies.

8. In order to ensure continued scheduled air services on a particular route sector where scheduled airlines have an obligation to operate during low and high traffic seasons, the scheduled airlines will be given preference over the non-scheduled airlines on the same sector.

ARTICLE 6 WITHHOLDING, REVOCATION OF AUTHORISATION

A Member State may revoke, suspend or limit the operating authorisation of a designated airline of the other Member State where

- a) the airline has failed to prove that it meets the eligibility criteria under Article 4 paragraphs 4 (a) to (g) above, or
- b) the airline has failed to comply with the laws, regulations and rules referred to in Article 9 (Application of Laws) of this Agreement;
- c) the other Party is not maintaining and administering the standards as set forth in Article 12 (Safety)

2. Unless immediate action is essential to prevent further non-compliance with subparagraphs 1(b) or 1(c) of this Article, the rights established by this Article shall be exercised only after consultation with the Party designating the airline.

3. A State Party that exercises its right to withhold, revoke, suspend, limit or impose conditions on the operating authorisation of an airline in accordance with paragraph 1 of this Article shall inform the airline at least thirty (30) days before the measure enters into force.

4. This Article does not limit the rights of any Party to withhold, revoke, suspend, limit or impose conditions on the operating authorisation or technical permission of an airline of another).

ARTICLE 7 COMPETITION REGULATIONS

1. Each Member State shall ensure within its territory fair opportunity on non-discriminatory basis for the designated airline of another State Party, to effectively compete in providing air transport services under this Agreement.

2. In particular, each Member State undertakes to implement within its territory the Regulations for competition in air transport services within COMESA, EAC, and SADC of 2004 to promote and guarantee free and fair competition within the three RECs. The regulations provide for:

- a) The regulation of anti-competitive behaviour
- b) Regulation of abuse of dominant position
- c) Regulating subsidies, discriminatory behaviour, and complaints mechanism
- d) An institutional mechanism to manage the effective implementation of the Competition regime and the full implementation of the YD

3. Each Member State within its territory shall in particular:

- a) ensure prohibition of any practice or anti-competitive behaviour, specified in Article 4 of the Competition Regulations, which could adversely affect the competitive position of a designated airline of any other Member State;
- b) Prohibit abuse of dominant position as specified in Article 5 of the Regulations, that could adversely affect the competitive position of any designated air carrier of any other State Party;
- c) Ensure non-discrimination defined in Article 6 of the competition regulations which have the effect of discriminating against designated airlines of any other State Party;
- d) Prohibit any subsidy that could distort competition as defined in Article 7 of the Competition regulations

4. Each Member State shall facilitate, to the greatest possible extent, the conduct by designated airlines under this Agreement, in particular by minimising administrative requirements;

5. Each Member State shall promptly attend to and examine concerns notified by the JCA that unfair competitive behaviour by its own airline(s) is adversely affecting the airline(s) of the other Member State. The first Member State shall, when appropriate, take steps following notice from the JCA to ensure that fair and equal opportunity to compete exists.

6. Each Member State undertakes to extend full cooperation within its territory, to the Joint Competition Authority and other Member States in administering and implementation of the Regulations for competition in air transport services within COMESA, EAC and SADC.

ARTICLE 8 COMMERCIAL OPPORTUNITIES

1. The designated airline of each Member State shall have the right:

- a) to establish in the territory of the other Member State offices for the promotion and sale of air transport services;
- b) to engage, in the territory of any other Member State, directly and, at that airline's discretion through its agents, in the sale of air transport services;
- c) To convert and remit to the country of its choice, all local revenues from the sale of air transport services and associated activities¹ directly linked to air transport in excess of sums locally disbursed, with conversion and remittance permitted promptly without restriction, discrimination taxation¹ in respect thereof in accordance with the applicable foreign exchange regulations.
- d) To pay for its local expenses such as handling and purchase of fuel in local currency, as provided for in the exchange control regulations;
- e) to bring in and maintain in the territory of any other Member State – in accordance with the laws and regulations of that other Member State relating to entry, residence and employment, - employees who perform managerial, commercial, technical, operational and other specialist duties required for the provision of air transport services.

¹ The term "without taxation" refers to taxation on the conversion and remittance, not to national income tax which is better dealt with on the basis of a double taxation treaty, or some other arrangement in which the income from the sale of air transportation by foreign airlines is exempted from national income tax on a reciprocal basis; however in the absence of a double taxation treaty or other arrangement. States could use this clause to exempt reciprocally air carriers from foreign income taxes, but should make their intention clear in this regard.

- f) To enter into cooperative marketing arrangements such as blocked-space, code sharing, franchising or leasing arrangement, with an airline or airlines of other State Parties.

2. The aforementioned measures shall be taken by State Parties on the basis of reciprocity.

- a) The term “without taxation” refers to taxation on the conversion and remittance, not to national income tax which is better dealt with on the basis of a double taxation treaty, or some other arrangement in which the income from the sale of air transportation by foreign airlines is exempted from national income tax on a reciprocal basis. However, the absence of a double taxation treaty or other arrangement. States could use this clause to exempt reciprocally air carriers from foreign income taxes, but should make their intention clear in this regard.

ARTICLE 9 APPLICATION OF LAWS AND REGULATIONS

1. While entering, within, or leaving the territory of any Member State, each designated airline shall comply with the laws, regulations and rules of that Member State relating to the operation and navigation of aircraft.
2. While entering, within, or leaving the territory of any Member State, each designated airline shall comply with the laws, regulations and rules relating to the admission to or departure from its territory of passengers, crew or cargo on aircraft
3. No Party shall give preference to its own or any other airline over a designated airline of the other Parties engaged in similar international air transport in the application of its customs, immigration and quarantine regulations.
4. Passengers, baggage and cargo in direct transit through the territory of a Member State and not leaving the area of the airport reserved for such purpose shall not undergo any examination except for reasons of aviation security, narcotics control, prevention of illegal entry or in special circumstances.

ARTICLE 10 USER CHARGES

1. User charges that may be imposed by the competent charging authorities or bodies of each Member State on air carriers of other Member States shall be just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users. In any event, any such user charges shall be levied on the airlines of one State by another on terms not less favourable than the most favourable terms available to any other airline at the time the charges are assessed.
2. User charges imposed by competent charging authorities or bodies of one Member State on airlines of the other Member States may reflect, but shall not exceed, the full cost to the competent charging authorities or bodies of providing the appropriate airport, airport environmental, air navigation, and aviation security facilities and services at the airport or within the airport system. Such cost may include a reasonable return on assets, after depreciation. Facilities and services for which charges are made shall be provided on an efficient and economic basis.
3. Each Member State shall encourage consultations between the competent charging authorities or bodies in its territory and the airlines using the services and facilities, and shall encourage the competent charging authorities or bodies and the airlines to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles of paragraphs (1) and (2) of this Article. Each Member State shall encourage the competent charging

authorities to provide users with reasonable notice of any proposal for changes in user charges to enable users to express their views before changes are made.

ARTICLE 11 EXEMPTION FROM CUSTOMS DUTIES, INSPECTION FEES AND OTHER SIMILAR CHARGES

1. On arriving in the territory of any Member State, aircraft engaged in international scheduled or non-scheduled services, as well as their regular and spare equipment, supplies of fuel, lubricants and other consumable technical supplies and aircraft stores, including food, beverages, tobacco and any items intended for sale to or for the entertainment of passengers during flight, shall be exempt from all customs duties, inspection fees and other similar national or local duties or charges, except for charges for provision of services.
2. Upon arrival of the aircraft, the customs authorities shall seal the compartments where stores are retained, and these seals can only be broken after the aircraft departure for a place outside the territory of that Member State.
3. The exemption in paragraph 1 of this Article shall also apply to aircraft stores taken on board in the territory of the other Member State, within the usually allowable limits of quantity and variety, and shall also apply to spare and replacement parts and equipment necessary to flight safety, maintenance, repair and handling, which are obtained in the territory of that other Member State, as well as to fuel, lubricants and other consumable technical supplies, destined to supply such aircraft, including those used during over flight of the territory of the Member State where they were obtained, on condition that their entry on board may be controlled by the customs authorities concerned.
4. The exemption provided for in paragraph 1 of this Article shall also apply to baggage and cargo in direct transit, to equipment referred to in Annex 9 to the Convention, and to documentation and advertising material of the designated airlines and other commercial air transport operators, in accordance with the relevant laws and regulations of the Member State concerned.
5. The exemptions provided for in the previous paragraphs of this Article may also be applicable to such items obtained by the designated airlines and other commercial operators from aircraft maintenance organizations or aircraft handling agents, on condition that all such operations are controlled by the local customs authorities.
6. The regular airborne equipment, as well as the materials and supplies normally retained on board the aircraft of one Member State, may be unloaded in the territory of any other Member State only with the approval of the customs authorities of that territory. In such case, they may be placed under the supervision of the said authorities up to such time as they are re-exported or otherwise disposed of in accordance with customs regulations.
7. In order to determine the correct utilisation and/or existence, the customs authorities of each Member State shall be entitled at any reasonable time to effect a direct inspection of any item exempted by them from customs duty which is stored or stationed, whether temporarily or permanently, in their territory.
8. In all situations not provided for in the previous paragraphs of this Article, imported items shall be subject to customs duties according to the laws and regulations in force in the Member State concerned.

ARTICLE 12 SAFETY

1. Each Party shall recognise as valid, for the purpose of operating the air transport services provided for in this Agreement, Air Operating Certificate, Certificate of Airworthiness, Certificate of Competency and the licenses issued or, validated by the

other Member State and still in force, provided that the requirements for such certificates or licenses at least equal the minimum standards set by ICAO.

2. Each Member State undertakes to conform to the provisions of the various conventions on air safety in accordance with ICAO provisions of the Chicago Convention on International Civil Aviation;
3. Each Member State reaffirms its obligations to comply with the civil aviation safety standards and practices recommended by ICAO.

1. Each Member State re-affirms its obligations to each other State to protect the security of civil aviation against acts of unlawful interference;
2. Without limiting the generality of their rights and obligations under international law, Member States shall, in particular, act in conformity with the provisions of:
 - a) the Convention on Offences and Certain Other Acts Committed on Board Aircraft, opened for signature at Tokyo on 14 September 1963;
 - b) the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at the Hague on 16 December 1970 as amended by the Beijing Protocol September 2010;
 - c) the Convention for the Suppression of Unlawful Acts Relating to Civil Aviation, opened for signature at Beijing on 10 September 2010; and
 - d) Any other multilateral agreement governing civil aviation security binding upon Member States.
3. Member States shall provide upon request from all necessary assistance to each other to prevent acts of unlawful seizure of civil aircraft and other unlawful acts against the safety of such aircraft, their passengers and crew, airports and air navigation facilities, and any other threat to the security of civil aviation.
4. Member States shall, in their mutual relations, act in conformity with the aviation security provisions established by the International Civil Aviation Organisation and designated as Annexes to the Convention on International Civil Aviation to the extent that such security provisions are applicable to Member States.
5. In addition, Member States shall require that operators of aircraft of their registry, or operators of aircraft who have their principal place of business or permanent residence in their territory, and the operators of airports in their territory, act in conformity with such aviation security provisions as are applicable to Member States. Accordingly, each Member State shall advise the other Member States of any differences between its national regulations and practices and the aviation security standards of the Annexes referred to in paragraph 4 above. A Member State reporting such differences, or any other Member State, may request immediate consultations with any Member State at any time to discuss such differences.
6. Each Member State agrees that its operators of aircraft shall be required to observe the aviation security provisions referred to in paragraph 4 above applied by another Member State upon entering, or departure from, or sojourn in, the territory of that other Member State. Each Member State shall ensure that adequate measures are effectively applied within its territory to protect aircraft and to apply security controls to passengers, crew, carry-on items, and baggage, cargo and aircraft stores, prior to and during boarding or loading. Each Member State shall give sympathetic consideration to any request from another Member State for reasonable special security measures in its territory to meet a particular threat to civil aviation.
7. When an incident, or threat of an incident of unlawful seizure of civil aircraft or other unlawful act against the safety of such aircraft, their passengers and crew, airports and air navigation facilities occurs, Member States shall assist each other by facilitating communications and other appropriate measures intended to terminate such incident or threat as rapidly as possible commensurate with minimum risk to life.

8. A Member State which has reasonable grounds to believe that another Member State has departed from the provisions of this Article, may request immediate consultations with that other Member State on the matter

ARTICLE 14 SETTLEMENT OF DISPUTES

1. Any dispute arising between Member States relating to this Agreement, the Member States concerned shall in the first place endeavour to settle the dispute by negotiation;
2. If the Parties involved fail to reach a settlement of the negotiation within 21 days, either Party may submit the dispute for arbitration in accordance with the provisions of the COMESA Treaty, the EAC Treaty or the SADC Treaty.

ARTICLE 15 CONSULTATION

Each Member State may, at any time, request consultation with other Member States relating to the implementation or application of this Agreement. Such consultation shall begin at the earliest possible date but not later than 30 days from the date the other Party receives the request.

ARTICLE 16 AMENDMENTS

1. Any Party may at any time propose an amendment to this Agreement
2. Any proposal for amendment to this Agreement shall be submitted to the Joint Competition Authority in writing which shall within thirty (30) days of its receipt communicate it to the Member States.
3. Any amendment to this Agreement shall come into force after approval by the COMESA Council of Ministers, the EAC Council of Ministers and the SADC Council of Ministers.

ARTICLE 17 EXISTING AGREEMENTS

Upon entry into force of this Agreement, any bilateral air services agreement existing between any Member States in the tripartite region at the time of such entry into force shall be suspended and shall remain suspended for so long as this Agreement shall remain in force.

ARTICLE 18 WITHDRAWAL

A Party may withdraw from this agreement by giving written notice of withdrawal in accordance with the provisions of the COMESA Treaty, EAC Treaty or the SADC Treaty.

**ARTICLE 19
DEPOSITORY**

1. The original of this Agreement shall be deposited with the African Union (AU) Secretariat which is hereby designated as the Depository of the Agreement.
2. The Depository shall transmit certified copies of this Agreement and any amendments or protocols to all State Parties to YD including member States in the three RECs.

**ARTICLE 20
REGISTRATION OF AGREEMENT**

This Agreement, any amendments to the Agreement, any exchange of notes to the Agreement shall be registered with the COMESA-EAC-SADC Joint Competition Authority (JCA), the COMESA Secretariat, the EAC Secretariat, the SADC Secretariat, the AFCAC Executing Agency and ICAO.

**ARTICLE 21
ENTRY INTO FORCE**

1. This Agreement shall be open for signature by all Tripartite Members States.
2. This Agreement shall enter into force on the [agreed day] from the date of deposit of the [agreed number] instrument of ratification, and thereafter for each Party [number of days] after the deposit of its instrument of ratification or accession.
3. The Depository shall inform each Party of the date of entry into force of this Agreement

SIGNATURE OF AGREEMENT

Signature

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

Signed at This day of.....

Agreements should be written in English, French and Portuguese languages, each text being authentic. In case of divergence between the three language texts, the English language text shall prevail.

Appendix 2: YD COMPLIANT BASA TEMPLATE FOR COMESA-EAC-SADC TRIPARTITE REGION

PREAMBLE

WE, the Heads of State and Government of the Tripartite States of the Common Market of Eastern and Southern Africa (hereinafter, COMESA), the East African Community (hereinafter, EAC), the Southern African Development Community (hereinafter, SADC) globally identified as the Tripartite Summit comprising the following:

The Republic of Angola

The Republic of Botswana

The Republic of Burundi

The Union of the Comoros

The Democratic Republic of Congo

The Republic of Djibouti

The Arab Republic of Egypt

The State of Eritrea

The Federal Democratic Republic of Ethiopia

The Republic of Kenya

Libya

The Kingdom of Lesotho

The Republic of Madagascar

The Republic of Malawi

The Republic of Mauritius

The Republic of Mozambique

The Republic of Namibia

The Republic of Rwanda

The Republic of Seychelles

The Republic of South Africa

The Republic of South Sudan

The Republic of Sudan

The Kingdom of Swaziland

The United Republic of Tanzania

The Republic of Uganda

The Republic of Zambia

The Republic of Zimbabwe

BEING Parties to the Convention on International Civil Aviation opened for signature at Chicago on 7 December 1944;

DESIRING to conclude an agreement to establish, operate and develop air transport services between and beyond their respective territories and strengthen their cooperation in this respect;

BEING members of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), Southern African Development Community (SADC), (hereinafter referred to as the Tripartite), the African Union (AU) and the African Civil Aviation Commission (AFCAC)

RECALLING that the Tripartite in 2004 adopted the Regulations for Competition in Air Transport Services within COMESA, EAC and SADC and established the Joint Competition Authority to oversee implementation of the Yamoussoukro Decision and the Regulations.

RECOGNISING that efficient and competitive international air services are important to develop trade, benefit consumers, and promote economic growth;

BEING Parties to the Decision relating to the implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa adopted in October 1999 by African Ministers of Transport and entered into force in July 2000;

RECOGNISING that the main objectives of the Yamoussoukro Decision is the facilitation of intra-African connections, liberalization, the development of an improved aviation network on the African continent and increased private sector participation;

DESIRING to facilitate and enhance air services and their related activities, to complement the other transport facilitation and liberalisation efforts of their respective territories and elsewhere in Africa;

DESIRING to ensure highest degree of safety and security in international air transport and reaffirm their grave concern about acts or threats against the security of aircraft, which jeopardise the safety of persons or property, adversely affect the operation of air transportation, and undermine public confidence in the safety of civil aviation;

Have agreed as follows:

ARTICLE 1

DEFINITIONS

For the purpose of this Agreement and its Annex unless the context otherwise requires-

“Aeronautical Authority” means, any governmental authority, body corporate or organ or person duly authorised to perform any particular function to which this agreement relates;

“Agreement” means this agreement, the Annex attached thereto, and any amendment of the agreement or the Agreement or the Annex adopted in accordance with Article (xx) of this Agreement;

“Air Services” and “Airlines” have the meaning respectively assigned to them in Article 96 of the Chicago Convention on International Civil Aviation dated 7th December 1944.

“Air operator's certificate” means a document issued by the competent aeronautical authority of a Member State which affirms that the operator named therein is competent to secure the safe operation of aircraft for the aviation activities specified in the certificate;

“Air service license” - means license to carry out air services

“Annex” means the Annex to this agreement or as amended in accordance with the provisions of Article 16 thereof, and for the purposes of this agreement, the Annex forms an integral part hereof and all references to the Agreement shall include reference to the annex unless the context otherwise require;

“Cabotage” means the taking on in the territory of one Party, by an air carrier of another Party of passengers, cargo or mail carried for reward originating in and destined for another point in the territory of the first State;

“Capacity” is the amount(s) of services provided under the agreement, usually measured in the number of flights (frequencies) or seats or tons of cargo offered in a market (city pair, or country-to-country) or on a route during a specific period, such as daily, weekly, seasonally or annually;

“Convention” means the Convention on International Civil Aviation, opened for signature at Chicago on 7 December 1944, including any amendment thereto which has entered into force under Article 94(a) thereof and has been ratified by Member States, as well as any Annex or amendment thereto adopted under Article 90 of that Convention, insofar as such amendment or Annex is at any given time effective for such Member States;

“Decision” means the Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa;

“Designated Airline” means an airline, which has been designated and authorised in accordance with Article 5 of this Agreement;

“Eligible Airline” any African air transport company fulfilling the requirements set forth in Article 5, paragraph 4 below.

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

“Fifth freedom traffic right” means the right of an Eligible Airline of one Party to carry passengers, freight or mail between two States other than the State in which it is licensed;

"Fourth freedom traffic right" means the right of an Eligible Airline of one Party to take on, in the territory of another Party, passengers, freight or mail for off-loading in the State in which it is licensed;

"National" means, a person who is a citizen of a Party to this agreement;

"Party" is a State which has agreed to be bound by this agreement;

"Operating licence" means an authorisation granted to an air carrier by the competent aeronautical authority of a State enabling it to carry out the carriage by air of passengers, mail or cargo, as specified in the licence, for reward;

"Scheduled air service" means a series of flights possessing all of the following characteristics:

it is performed by aircraft for the transport of passengers, cargo or mail, in such a manner that on each flight, seats are available for individual purchase by members of the public either directly from the carrier or from its authorised agent; it is operated either:

according to a publicised timetable; or

with flights so regular or frequent that they constitute a recognisably systematic series;

"Tariffs": means the prices to be paid for the carriage of passengers, baggage or cargo (excluding mail) on scheduled air services and the conditions, under which these prices apply, including remuneration and conditions offered to travel agencies and other auxiliary services.

"Territory" in relation to a State that has the meaning assigned to it in Article 2 of the Convention;

"Third freedom traffic right" means the right of an Eligible Airline of one Party to put down, in the territory of another Party, passengers, freight or mail taken up in the State in which it is licensed;

Traffic right - means the right of a carrier to carry passengers, cargo and or mail on an air service between two airports.

ARTICLE 2 GRANT OF TRAFFIC RIGHTS

1. Each Party grants to the other Party, the free exercise of the following rights in respect of scheduled and non-scheduled passenger, freight and/or mail air transport services performed by eligible airlines of the other Party:

- f) the right to fly across its territory without landing;
- g) the right to make stops in its territory for non-traffic purposes;
- h) the right to put down, in the territory of the other Party, passengers, freight and mail taken up in the State in which it is licensed;
- i) the right to take on, in the territory of the other Party, passengers, freight and mail for off-loading in the State in which it is licensed;
- j) the right to carry passengers, freight and mail between two States other than the State in which it is licensed;

2. In operating scheduled and unscheduled services each designated airline may, on any or all flights and at its option:

- e) Operate flights in either or both directions;
- f) Be permitted by the Party concerned to combine air services and use the same flight number
- g) Serve, intermediate, and beyond points and points in the territory of the other Party on the routes in any combination and in any order, and
- h) Omit stops at any point or points, provided that the service commences at a point in the territory of the State designating the airline.

3. Nothing in this Agreement shall be deemed to confer on the airline(s) of one Party the right to take on board, in the territory of the other Party, passengers, baggage, freight, or mail carried for compensation and destined for another point in the territory of that other State.

ARTICLE 3 CAPACITY AND FREQUENCY

1. A Party shall not limit the number of frequencies and capacity offered on air services linking any city pair combination between States of the Parties concerned;

2. Each Member State shall allow the designated airline of another Member State to mount and operate such capacity and frequency as such airline deems appropriate.

3. Consistent with the right in paragraph 2 above, no Member State shall unilaterally limit the volume of traffic, the type of aircraft to be operated or the number of flights to be operated per week, by the designated airline of any other Member State, except for environmental, safety, technical or other special consideration.

4. Without prejudice to the provisions in paragraphs 1, 2 and 3 above, a Party may refuse to authorise an increase in capacity if such additional capacity is not in compliance with the provisions of Article 7 of this Agreement relating to fair competition.

ARTICLE 4 TARIFFS

1. No approval shall be required by the aeronautical authorities of the Parties concerned in case of an increase in tariffs to be charged by the designated airlines of the Parties for the carriage of passengers, cargo and mail. However, the airlines shall be required to file such tariffs before competent authorities 30 working days before they enter into force.

2. No notice shall be required in the case of lowering the tariff and any such reduced tariff shall take immediate effect.

3. However, any increases or decreases of tariffs not in compliance with any provision of Article 7 of the Agreement relating to fair competition shall be deemed ineffective.

ARTICLE 5 DESIGNATION AND AUTHORISATION OF AIRLINES

1. Each Party shall have the right to designate at least one eligible airline to operate intra-regional air transport services in accordance with this Agreement. Such designation shall be notified to the other Party in writing through diplomatic channels;

2. A Party may also designate an Eligible airline from another African State to operate air services on its behalf;

3. A Party shall have the right to designate an eligible African multinational airline in which it is or its national are stakeholders and this airline shall be accepted by the other Party;

4. On receipt of the notification of such designation, the other Party shall, in accordance with its national laws, speed up the process of authorization and licensing of the airline designated by the other Party to operate the services. While such authorization should be granted within 30 days, the proposed schedule of flights should be submitted to the appropriate authorities for approval.

To be eligible, an airline should:

- (h) be legally established in accordance with the laws and regulations applicable in the State of the Party to this Agreement;
- (i) have its headquarters, central administration and principal place of business physically located in the State concerned;
- (j) duly licensed by the Party as defined in Annex 6 of the Chicago Convention;
- (k) fully own or have a long-term lease exceeding six months on an aircraft and have its technical supervision;
- (l) be adequately insured with regard to passengers, cargo, mail, baggage and third parties in an amount at least equal to the provisions of the International Conventions in force;
- (m) be capable of demonstrating its ability to maintain standards at least equal to those set by ICAO and to respond to any query from any State to which it provides air services;
- (n) Be effectively controlled by the Party concerned

5. Should a Party be convinced that a designated airline does not meet the criteria in subparagraph 4 above, it may refuse the authorisation. The Party that has designated the airline may request consultations in accordance with Article 15 of this Agreement.

6 Each Party has the right to withdraw the designation of an Eligible Airline and to designate another eligible airline or airlines in writing through diplomatic channels within 30 days except when prevented from doing so for security reasons or similar emergencies.

7 Authorizations for the performance of non-scheduled air transport services by Eligible Airlines of the Parties shall be granted by the respective competent authorities, provided that an application has been submitted for approval to the appropriate authority, accompanied by the operating certificates of the airline's country of nationality and the corresponding insurance policies.

8. In order to ensure continued scheduled air services on a particular route sector where scheduled airlines have an obligation to operate during low and high traffic seasons, the scheduled airlines will be given preference over the non-scheduled airlines on the same sector.

ARTICLE 6 WITHHOLDING, REVOCATION OF AUTHORISATION

1. A Party may revoke, suspend or limit the operating authorisation of a designated airline of the other Party where

- d) the airline has failed to prove that it meets the eligibility criteria under Article 5 paragraphs 4 (a) to (g) above, or
- e) the airline has failed to comply with the laws, regulations and rules referred to in Article 9 (Application of Laws) of this Agreement;
- f) the other Party is not maintaining and administering the standards as set forth in Article 12 (Safety)

2. Unless immediate action is essential to prevent further non-compliance with subparagraphs 1(b) or 1(c) of this Article, the rights established by this Article shall be exercised only after consultation with the Party designating the airline.

3. A Party that exercises its right to withhold, revoke, suspend, limit or impose conditions on the operating authorisation of an airline in accordance with paragraph 1 of this Article shall inform the airline at least thirty (30) days before the measure enters into force.

4. This Article does not limit the rights of any Party to withhold, revoke, suspend, limit or impose conditions on the operating authorisation or technical permission of an airline of the other Party in accordance with the provisions of Article 13 (Aviation Security).

ARTICLE 7 COMPETITION REGULATIONS

1. Each Party shall ensure within its territory fair opportunity on non-discriminatory basis for the designated airline of another State Party, to effectively compete in providing air transport services under this Agreement.

2. In particular, each Party undertakes to be governed within its territory by the Regulations for competition in air transport services within COMESA, EAC, and SADC of 2004 to promote and guarantee free and fair competition. The regulations provide for:

- a) The regulation of anti-competitive behaviour
- b) Regulation of abuse of dominant position
- c) Regulating subsidies, discriminatory behaviour, and complaints mechanism
- d) An institutional mechanism to manage the effective implementation of the Competition regime and the full implementation of the YD

3. Each Party within its territory shall in particular:

- e) ensure prohibition of any practice or anti-competitive behaviour, specified in Article 4 of the Competition Regulations, which could adversely affect the competitive position of a designated airline of the other Party;
- f) Prohibit abuse of dominant position as specified in Article 5 of the Regulations, that could adversely affect the competitive position of any designated air carrier of the other Party;
- g) Ensure non-discrimination defined in Article 6 of the competition regulations which have the effect of discriminating against designated airlines of the other Party;
- h) Prohibit any subsidy that could distort competition as defined in Article 7 of the Competition regulations

4. Each Party shall facilitate, to the greatest possible extent, the conduct by designated airlines under this Agreement, in particular by minimising administrative requirements;

5. Each Party shall promptly attend to and examine concerns notified by the JCA that unfair competitive behaviour by its own airline(s) is adversely affecting the airline(s) of the other Party. The first Party shall, when appropriate, take steps following notice from the JCA to ensure that fair and equal opportunity to compete exists.

6. Each Party undertakes to extend full cooperation within its territory, to the Joint Competition Authority and other States in administering and implementation of these Regulations for competition in air transport services.

ARTICLE 8 COMMERCIAL OPPORTUNITIES

1. The designated airline of each Party shall have the right:

- g) to establish in the territory of the other Party offices for the promotion and sale of air transport services;
 - h) to engage, in the territory of the other Party, directly and, at that airline's discretion through its agents, in the sale of air transport services;
 - i) To convert and remit to the country of its choice, all local revenues from the sale of air transport services and associated activities² directly linked to air transport in excess of sums locally disbursed, with conversion and remittance permitted promptly without restriction, discrimination taxation in respect thereof in accordance with the applicable foreign exchange regulations.
 - j) To pay for its local expenses such as handling and purchase of fuel in local currency, as provided for in the exchange control regulations;
-

- k) to bring in and maintain in the territory of the other Party – in accordance with the laws and regulations of that other Party relating to entry, residence and employment, - employees who perform managerial, commercial, technical, operational and other specialist duties required for the provision of air transport services.
- l) To enter into cooperative marketing arrangements such as blocked-space, code sharing, franchising or leasing arrangement, with an airline or airlines of other States.

2. The aforementioned measures shall be taken by Parties on the basis of reciprocity.

ARTICLE 9 APPLICATION OF LAWS AND REGULATIONS

- 5. While entering, within, or leaving the territory of the State of the other Party, each designated airline shall comply with the laws, regulations and rules of that State relating to the operation and navigation of aircraft.
- 6. While entering, within, or leaving the territory of the of the State of the other Party, each designated airline shall comply with the laws, regulations and rules relating to the admission to or departure from its territory of passengers, crew or cargo on aircraft
- 7. No Party shall give preference to its own or any other airline over a designated airline of the other Party engaged in similar international air transport in the application of its customs, immigration and quarantine regulations.
- 8. Passengers, baggage and cargo in direct transit through the territory of a Party concerned and not leaving the area of the airport reserved for such purpose shall not undergo any examination except for reasons of aviation security, narcotics control, and prevention of illegal entry or in special circumstances.

ARTICLE 10 USER CHARGES

- 4. User charges that may be imposed by the competent charging authorities or bodies of each Party on air carriers of the other Party shall be just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users. In any event, any such user charges shall be levied on the airlines of one Party by another on terms not less favourable than the most favourable terms available to any other airline at the time the charges are assessed.
- 5. User charges imposed by competent charging authorities or bodies of a Party on airlines of the other Party may reflect, but shall not exceed, the full cost to the competent charging authorities or bodies of providing the appropriate airport, airport environmental, air navigation, and aviation security facilities and services at the airport or within the airport system. Such cost may include a reasonable return on assets, after depreciation. Facilities and services for which charges are made shall be provided on an efficient and economic basis.
- 6. Each Party shall encourage consultations between the competent charging authorities or bodies in its territory and the airlines using the services and facilities, and shall encourage the competent charging authorities or bodies and the airlines to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles of paragraphs (1) and (2) of this Article.

7. Each Party shall encourage the competent charging authorities to provide users with reasonable notice of any proposal for changes in user charges to enable users to express their views before changes are made.

ARTICLE 11
EXEMPTION FROM CUSTOMS DUTIES, INSPECTION FEES AND OTHER SIMILAR CHARGES

9. On arriving in the territory of the other Party, aircraft engaged in international scheduled or non-scheduled services, as well as their regular and spare equipment, supplies of fuel, lubricants and other consumable technical supplies and aircraft stores, including food, beverages, tobacco and any items intended for sale to or for the entertainment of passengers during flight, shall be exempt from all customs duties, inspection fees and other similar national or local duties or charges, except for charges for provision of services.
10. Upon arrival of the aircraft, the customs authorities shall seal the compartments where stores are retained, and these seals can only be broken after the aircraft departure for a place outside the territory of that Party.
11. The exemption in paragraph 1 of this Article shall also apply to aircraft stores taken on board in the territory of the other Party, within the usually allowable limits of quantity and variety, and shall also apply to spare and replacement parts and equipment necessary to flight safety, maintenance, repair and handling, which are obtained in the territory of that other Party, as well as to fuel, lubricants and other consumable technical supplies, destined to supply such aircraft, including those used during over flight of the territory of the Party where they were obtained, on condition that their entry on board may be controlled by the customs authorities concerned.
12. The exemption provided for in paragraph 1 of this Article shall also apply to baggage and cargo in direct transit, to equipment referred to in Annex 17 to the Convention, and to documentation and advertising material of the designated airlines and other commercial air transport operators, in accordance with the relevant laws and regulations of the Party concerned.
13. The exemptions provided for in the previous paragraphs of this Article may also be applicable to such items obtained by the designated airlines and other commercial operators from aircraft maintenance organizations or aircraft handling agents, on condition that all such operations are controlled by the local customs authorities.
14. The regular airborne equipment, as well as the materials and supplies normally retained on board the aircraft of one Party, may be unloaded in the territory of the other Party only with the approval of the customs authorities of that territory. In such case, they may be placed under the supervision of the said authorities up to such time as they are re-exported or otherwise disposed of in accordance with customs regulations.
15. In order to determine the correct utilisation and/or existence, the customs authorities of each Party shall be entitled at any reasonable time to effect a direct inspection of any item exempted by them from customs duty which is stored or stationed, whether temporarily or permanently, in their territory.
16. In all situations not provided for in the previous paragraphs of this Article, imported items shall be subject to customs duties according to the laws and regulations in force in the State of the Party concerned.

ARTICLE 12
SAFETY

4. Each Party shall recognise as valid, for the purpose of operating the air transport services provided for in this Agreement, Air Operating Certificate, Certificate of Airworthiness, Certificate of Competency and the licenses issued or, validated by aeronautical authorities of the other Party and still in force, provided that the requirements for such certificates or licenses at least equal the minimum standards set by ICAO.
5. Each Party undertakes to conform to the provisions of the various conventions on air safety in accordance with ICAO provisions and especially with Annex 17 of the Chicago Convention on International Civil Aviation;
6. Each Party reaffirms its obligations to comply with the civil aviation safety standards and practices recommended by ICAO.

ARTICLE 13 AVIATION SECURITY

9. Each Party re-affirms its obligations to the other Party to protect the security of civil aviation against acts of unlawful interference;
10. Without limiting the generality of their rights and obligations under international law, both Parties shall, in particular, act in conformity with the provisions of:
 - a) the Convention on Offences and Certain Other Acts Committed on Board Aircraft, opened for signature at Tokyo on 14 September 1963;
 - b) the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at the Hague on 16 December 1970;
 - c) the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971; and
 - d) Any other multilateral agreement governing civil aviation security binding upon States of the Parties concerned.
11. Parties shall provide upon request all necessary assistance to each other to prevent acts of unlawful seizure of civil aircraft and other unlawful acts against the safety of such aircraft, their passengers and crew, airports and air navigation facilities, and any other threat to the security of civil aviation.
12. Parties shall, in their mutual relations, act in conformity with the aviation security provisions established by the International Civil Aviation Organisation and designated as Annexes to the Convention on International Civil Aviation to the extent that such security provisions are applicable to concerned States.
13. In addition, Parties shall require that operators of aircraft of their registry, or operators of aircraft who have their principal place of business or permanent residence in their territory, and the operators of airports in their territory, act in conformity with such aviation security provisions as are applicable to the Parties. Accordingly, each Party shall advise the other Party concerned of any differences between its national regulations and practices and the aviation security standards of the Annexes referred to in paragraph 4 above. A Party reporting such differences, or any other State, may request immediate consultations with any State at any time to discuss such differences.
14. Each Party agrees that its operators of aircraft shall be required to observe the aviation security provisions referred to in paragraph 4 above applied by the other Party upon entering, or departure from, or sojourn in, the territory of that other Party. Each Party shall ensure that adequate measures are effectively applied within its territory to protect aircraft and to apply security controls to passengers, crew, carry-on items, and baggage, cargo and aircraft stores, prior to and during boarding or loading. Each Party shall give sympathetic consideration to any request from the other Party for reasonable special security measures in its territory to meet a particular threat to civil aviation.

15. When an incident, or threat of an incident of unlawful seizure of civil aircraft or other unlawful act against the safety of such aircraft, their passengers and crew, airports and air navigation facilities occurs, Parties shall assist each other by facilitating communications and other appropriate measures intended to terminate such incident or threat as rapidly as possible commensurate with minimum risk to life.
16. A Party which has reasonable grounds to believe that the other Party has departed from the provisions of this Article, may request immediate consultations with the other Party on the matter

ARTICLE 14 SETTLEMENT OF DISPUTES

3. Any dispute arising between the Parties relating to this Agreement, the Parties shall in the first place endeavour to settle the dispute by negotiation;
4. If the Parties fail to reach a settlement by negotiation within 21 days, either Party may submit the dispute for arbitration in accordance with the arbitration procedures set forth in Appendix 2 of the YD unless the Member States decide to settle the dispute in accordance with the provisions of the COMESA Treaty, the EAC Treaty or the SADC Treaty.

ARTICLE 15 CONSULTATION

1. In a spirit of close co-operation, the aeronautical authorities of the Parties may consult each other from time to time with a view to ensuring the implementation of and satisfactory compliance with, the provisions of this Agreement and the Annex thereto.
2. Each Party may, at any time, request consultation with the other Party relating to the implementation or application of this Agreement. Such consultation shall begin at the earliest possible date but not later than 30 days from the date the other Party receives the request.

ARTICLE 16 AMENDMENTS

1. Any Party may at any time propose an amendment to this Agreement
2. Any proposal for amendment to this Agreement shall be submitted to the Depository in writing which shall within thirty (30) days of its receipt communicate it to the other Party.
3. Any amendment of this Agreement agreed by the Parties shall come into effect when confirmed by an exchange of diplomatic notes.
4. This Agreement shall, mutatis mutandis, be deemed to have been amended by those provisions of any international convention or multilateral Agreement which become binding on both Parties.

ARTICLE 17 EXISTING AGREEMENTS

This Agreement supersedes any agreement in force between the Parties in relation to air services between and beyond their respective territories.

**ARTICLE 18
DEPOSITORY**

1. The original of this Agreement shall be deposited with the JCA Secretariat which is hereby designated as the Depository of the Agreement.
2. The Depository shall transmit certified copies of this Agreement and any amendments or protocols to all Member States in the three RECs

**ARTICLE 19
ENTRY INTO FORCE**

4. This Agreement shall enter into force on the [agreed day] from the date of deposit of the [agreed number] instrument of ratification, and thereafter for each Party [number of days] after the deposit of its instrument of ratification or accession.
5. The Depository shall inform each Party of the date of entry into force of this Agreement

**ARTICLE 20
WITHDRAWAL**

A Party may withdraw from this agreement by giving written notice of withdrawal in accordance with the provisions of the COMESA Treaty, EAC Treaty or the SADC Treaty.

SIGNATURE OF AGREEMENT

I witness wherefore the undersigned, being duly authorized thereto by their respective Governments, have signed this Agreement.

Done at.....on this.....day
Of.....Two thousand.....in duplicate in the

[Languages] Both or all texts being equally authentic.

Appendix 3: Response to Selected Stake Holder Comments

This section of the report addresses comments from the Stake Holders Workshop on the Draft Final Report on the operationalisation of the JCA. The Workshop was held in Harare, Zimbabwe from 11 to 12 April 2013. In particular, it addresses comments on the Draft YD compliant Multilateral Air Services Agreement (MASA).

The vast majority of comments have been incorporated in the text. A selection of issues are addressed below.

5.1 Comments from Workshop

5.1.1 AFCAP definition of the Air Transport Services

The African Civil Aviation Policy (AFCAP) was adopted by the Conference of African Ministers for Transport held in Luanda, Angola in November 2011. It was endorsed by the AU Heads of State Assembly, held in January 2012. It is an overarching policy framework document, which forms the basis of which African Regional Programmes, Action Plans and common Rules, Regulations and Guidelines should be formulated. The Policy addresses among others, common objectives, policy statements and strategies for the management of the various aspects of civil aviation: - safety, security, airspace management and air transport.

The Directive to adopt AFCAP definition of the Air Transport Services is to be interpreted to mean that the proposed MASA should be consistent with these policy guidelines. It should also be framed and used as a tool to facilitate realisation of goals and objectives of this policy document. We propose to do this by adding a paragraph to the Preamble of the MASA that recognises and acknowledges its consistence with AFCAP.

The proposed paragraph number 10 reads as follows:

TAKING NOTE of AFCAP that calls on Member States to develop a liberalised and competitive air transport industry that responds promptly to the dictates of the market, technological developments and global trends; and also establish a common African air transport market through the full implementation of the Yamoussoukro Decision.

It is also our interpretation that the provisions and principles included in the MASA must be in line with the policy guidelines in the document. The policy objectives in AFCAP, particularly as they refer to the Air Transport Industry indicates that this is so.

According to AFCAP, the objective of the industry is to develop a liberalised and competitive air transport industry that responds promptly to the dictates of the market, technological developments and global trends; and also establish a common African air transport market through the full implementation of the Yamoussoukro Decision. In this regard, States are to ensure full implementation of the Yamoussoukro Decision. They are also to ensure that all

Air Transport Policies are consistent with the YD. In addition, AFCAC as the Executing Agency is expected to work with States and RECs to ensure the full implementation of the YD.

The role of the MASA in fulfilling this policy mandate dates back to the first COMESA-EAC-SADC Tripartite Summit held on 20 October 2008 in Kampala, Uganda which launched the JCA to oversee the full implementation of the Yamoussoukro Decision in the three RECs. A YD compliant MASA template, incorporating all YD principles, was identified as a basic supervisory tool to be used by the JCA to ensure full implementation of the YD within the territories of the Tripartite States. It has the objective of facilitating the liberalisation process by giving the JCA and States, a practical tool to use to meet the challenges and opportunities of liberalisation and YD implementation. In this respect, the proposed MASA could be considered to be consistent with AFCAP and advances its overall objective of air transport liberalisation through full YD implementation in Member States.

With regard to coverage, the proposed MASA is YD compliant as it reflects YD liberalisation principles in its provisions on operational and commercial rights of the designated airlines on such matters as grant of rights, designation and authorisation, capacity, tariffs, fair competition and a number of related 'doing business' activities. Wherever possible; the actual or modified wording of the relevant YD Article is used. This is consistent and in line with the overall AFCAP policy position that Member States shall ensure that all Air Transport Policies are consistent with the Yamoussoukro Decision. To this effect and as an example, the Article on Designation and Authorisation of Airlines is in full compliance with the AFCAP Policy that Member States shall only designate airlines that meet the eligibility criteria set in YD. The relevant MASA Article, (Article 5), captures in full the YD eligibility criteria as restated in the AFCAP policy document.

The Article on Competition Rules (Article 7) also encourages fair competition and protection of consumers as advanced by AFCAP. Article 13 on Aviation Security, among other things, in a way encourages Member States in the 3 regions to ratify all relevant ICAO and other Conventions and Protocols on Aviation Security as outlined in the policy document.

5.1.2 Registration and Depository

This section draws on comments received from Stakeholders following a discussion on Article 19, on the Depository, of the proposed MASA for the tripartite region. The Article as presented to the Workshop read as follows:

3. The original of this Agreement shall be deposited with the JCA Secretariat which is hereby designated as the Depository of the Agreement.
4. The Depository shall transmit certified copies of this Agreement and any amendments or protocols to all Member States in the three RECs

The Issue

Article 19 named the JCA as depository of the Agreement. The discussion therefore was specifically on the rationale and basis for proposing the JCA as Depository of the Agreement.

Various views were expressed without reaching consensus; hence the directive to provide further recommendations based on detailed analysis.

Situation Analysis

What is a Depository and what does it do? The ICAO Manual on the Regulation of International Air Transport defines the **Depository of a treaty** as: “A State or international Organization as stipulated in the treaty, which assumes the responsibility to maintain the official record of which States are parties and to inform other participating States when new expressions consent to be bound by the treaty are deposited or other actions calling for such notification occur. If the diplomatic conference at which the treaty was drafted was held under the auspices of a State or an international organisation, that State or organisation is likely to be named the depository”.

Thus, the Government of the United States of America was named Depository of the Convention on International Civil Aviation as the Conference which drafted and adopted it was held under the auspices of that government. The US government maintains record of the Convention and updates Contracting States accordingly. In the same vein the African Union was designated the Depository of the YD as it was adopted by AU Ministers of Transport. Consequently, as a custodian of the YD, the AU is expected to keep record of any or all activities pertaining to the YD and to inform State Parties accordingly. To this end, the Banjul Accord Group named the African Union as the depository of their YD based Multilateral Air Services Agreement of 2004. Accordingly, the AU, through its Agencies, notified, among other things, all State Parties of this supplementary Agreement to the YD.

Registration of Agreement

A matter related to that of depositing of an Agreement is that of registration. Thus, in addition to depositing an Agreement with the Depository, it may also have to be registered with other relevant organisations. For instance, Article 83 of the Convention requires the registration of any aviation-related treaty involving any ICAO Contracting State with the Council of ICAO. Article 11 paragraph 6 of YD provides that the Decision shall be registered by the Depository and/or Monitoring Body with ICAO.

While there can only be one Depository, an Agreement may be registered with a number of relevant organisations and institutions. In this vein, the Multilateral Air Services Agreement for the Banjul Accord Group provides for it to be registered with the Banjul Accord Secretariat, ECOWAS, AU and ICAO. The proposed MASA could follow this model. In this case, it could be registered with the JCA to serve the purpose for which it was originally named Depository. This was to facilitate speedy and effective monitoring of developments concerned with the application and or implementation of the template in the 3 RECs.

Conclusions

The following conclusions can be drawn from the above analysis:

a) A State or Organisation that sponsored a particular Agreement is normally designated a Depository of such an Agreement. Supplementary Agreements can also be deposited with such an Organisation or State.

b) The AU is the Depository of the YD. Supplementary Agreements such as the proposed MASA could also rightly be deposited with the AU.

c) Although the AU has delegated YD implementation to RECs, it retains ultimate responsibility for its implementation and therefore appropriately placed to take any action including notifying State Parties of any developments anywhere relating to YD and in particular initiatives concerning its implementation.

d) An Agreement can be registered with any number of relevant Organisations or Institutions.

e) Any aviation-related Agreement has to be registered with the Council of ICAO

Recommendations

In light of the above it is recommended that:

1 The African Union should be named Depository of the proposed MASA for the tripartite region, thus following the example of the Banjul Accord Group.

2. The MASA should be registered with the JCA, COMESA Secretariat, EAC Secretariat, the SADC Secretariat, AFCAC Executing Agency and ICAO.

3. An additional Article on Registration of Agreement should be included in the draft MASA as Article 20'

Article 19 will now read as follows:

3. The original of this Agreement shall be deposited with the African Union (AU) Secretariat which is hereby designated as the Depository of the Agreement.
4. The Depository shall transmit certified copies of this Agreement and any amendments or protocols to all State Parties to YD including member States in the three RECs.

An additional Article 20 on Registration will read as follows:

Registration of the Agreement

This Agreement, any amendments to the Agreement, any exchange of notes to the Agreement shall be registered with the COMESA-EAC-SADC Joint Competition Authority (JCA), the COMESA Secretariat, the EAC Secretariat, the SADC Secretariat, the AFCAC Executing Agency and ICAO.

5.1.3 Implications of the Beijing Convention/Protocol on Aviation Security

Article 13 – Aviation Security

The review of Article 13 of the MASA on Aviation Security was against the background and recognition that States are responsible for ensuring the implementation of adequate security

measures in accordance with the provisions of ICAO Annex 17 to the Chicago Convention. To this end, States are required to take necessary actions and take into consideration all international Conventions and Protocols on Aviation to enhance aviation security. It is in this context that comments were made and a directive issued for the MASA to take into consideration implications of the Beijing Convention and Protocol on Aviation Security.

2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation

This new Convention, signed at Beijing on 10 September 2010:

- Criminalises the act of using civil aircraft as a weapon to cause death, injury or damage;
- Criminalises the act of using civil aircraft to discharge biological, chemical and nuclear (BCN) weapons or similar substances to cause death, injury or damage, or the act of using such substances to attack civil aircraft;
- Criminalises the act of unlawful transport of BCN weapons or certain related material;
- A cyber attack on air navigation facilities constitutes an offence;
- A threat to commit an offence may be an offence by itself, if the threat is credible.
- Conspiracy to commit an offence, or its equivalence, is punishable.

As to its effect on existing Conventions Article 24 of the Beijing Convention provides that, "As between the States Parties, this Convention shall prevail over the following instruments:

- (a) The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Signed at Montreal on 23 September 1973; and
- (b) The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Convention for the Suppression of Unlawful Acts Against the Safety of Civil aviation, Done at Montreal on 23 September 1971, Signed at Montreal on 24 February 1988."

2010 Protocol Supplementary To the Convention for the Suppression of Unlawful Seizure of Aircraft

The Protocol was also adopted on 10 September 2010 by the International Conference on Air Law held under the auspices of ICAO at Beijing from 30 August to 10 September 2010. The Protocol:

- Supplements the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970 by expanding its scope to cover different forms of aircraft hijacking, including through modern technological means.
- Being supplementary to the Hague Convention, the Protocol is to be read and interpreted together as one single instrument and to be known as The Hague Convention as amended by the Beijing Protocol, 2010.
- Also incorporates the provisions of Beijing Convention relating to a threat or conspiracy to commit an offence.

We propose to incorporate into the MASA the provisions and principles of the two legal instruments by making appropriate amendments to Paragraph 2 of Article 13 on Aviation Security. To this end, paragraph 2b of Article 13 has been amended to reflect that the 2010 Beijing Protocol is supplementary to the Hague Convention and the reference to the Montreal Convention in paragraph 2c is replaced by “Beijing Convention”.

The paragraph now reads:

2. Without limiting the generality of their rights and obligations under international law, member States shall, in particular, act in conformity with the provision of:

- b) The Convention for the Suppression of Unlawful Seizure of aircraft, opened for signature at The Hague on 16 December 1970 as amended by the Beijing Protocol, 2010.
- c) The Convention on the Suppression of Unlawful Acts Relating to Civil Aviation opened for signature at Beijing on 10 September 2010;

These amendments have made bearing in mind the AFCAP policy statement on Aviation Security which obliges member States to ratify and domesticate all international Conventions and Protocols on Aviation Security. Other provisions in Article 13 of the MASA remain unchanged.

5.1.4 Lessons from the Banjul Accord MASA (2001)

The Banjul Accord was signed on 4th April 1997 by six West African States (Cape Verde, Gambia, Ghana, Guinea Bissau, Nigeria and Sierra Leone). It was meant to foster accelerated implementation of the Yamoussoukro Declaration of 1988. In order to do this it constituted a single geographical Commercial Air Transport operations zone comprising entire territory of member States. The Accord also contained liberalising provisions that provided a legal basis for competition in the market. A joint permanent Secretariat to co-ordinate activities including Air Transport Services Agreements was established.

In 2000, the original structure was revised with the signing of the Banjul Agreement to Establish the Banjul Accord Group and Implement the Banjul Accord (“**the Banjul Agreement**”). The revised structure, which included the standardisation and harmonization of the air services agreements and regulations drafted and proposed an Air Service Agreement (MASA 2001) for the Banjul Accord Group (the “**Draft Banjul Agreement**”) open for signature by the Member States of the Banjul Accord Group.

The majority of the provisions in the draft, including those on the granting of traffic rights, fixation of tariffs, frequency and designation and authorization of airlines are identical to those of YD. For instance, the Article which governs designation and authorisation is almost identical to the equivalent provisions of Article 6 of YD and even makes express reference to the criteria in Article 6.9 of the **Decision**. Article 9 on competition rules in the MASA is identical to Article 7 of the YD. Articles on Safety and Security reflects the equivalent in the

Decision. Overall, the draft multilateral agreement constituted by the Draft Banjul Agreement closely reflects the provisions of the Decision.

In a sense the Banjul Accord air services agreement was the first MASA agreed by a regional grouping to develop a liberalised air transport industry through the implementation of YD. It also provided a framework for harmonisation of air transport policies and regulations in respect to the exchange of market access rights within the single air transport zone.

The lessons for the JCA and the tripartite region from the Banjul MASA may not necessarily be from its implementation but its establishment and having been accepted and recognised by a small group of States that the way to full implementation of YD is via a multilateral agreement. It is also a means of enhancing harmonisation and coordination of policies, rules and air transport regulations. It is a living document open to review and amendments in line with the dynamic nature of the industry operating environment. The proposed MASA for the JCA should be such a document.

In light of the above, it is recommended that, the Banjul multilateral agreement serve as a useful reference document in the finalising processes of the MASA or template for the tripartite region.

5.1.5 Issues of non-Physical Barriers

The issues of non-physical barriers as they relate to free movement of people are rooted within the Treaty establishing the African Economic Community (AEC). They are also to be considered in the context of integration programmes of RECs as provided and prescribed in their respective Treaties.

The Treaty establishing the AEC lists the following, among others, as objectives of the Community:

- a) To promote economic, social, and cultural development and integration of African economies in order to increase economic self reliance and promote and endogenous self sustained development; and
- b) To coordinate and harmonise policies among existing and future economic Communities in order to foster the gradual establishment of the Community

In order to attain these objectives the Community would institute programmes that would include the following:

- a) The liberalisation of trade through the abolition, among member States, of Customs Duties levied on imports and exports and the abolition, among member States of Non-Tariff Barriers in order to establish a Free Trade Area at the level of each Regional Economic Community;
- b) The harmonisation of national policies in order to promote Community activities, particularly in the fields of agriculture, industry, transport and communications, energy, natural resources, trade, money and finance, human resources, education, culture, science and technology; and

- c) ***The gradual removal, among Member States, of obstacles to the free movement of persons, goods, services and capital and the right of residence and establishment.***

Similarly at regional level, various RECs have included and highlighted issues dealing with barriers as they affect the free movement of people. As for COMESA, EAC and SADC each has in place programmes on free movement of people as provided in the respective Treaties. At the tripartite level, the First Tripartite Summit of 2008 agreed to move towards market integration and trade liberalisation and called for close harmonisation of programmes including the free movement of people as a way of deepening integration that would ultimately lead to a Single Market. The issues relating to non-physical barriers in the Tripartite region is to be considered in this context.

Issues

Free movement of persons which refers to the removal of barriers such as visa requirements which operate to restrict the movement of human beings across national borders is considered essential for attaining the objectives of integration programme. In particular, the success of any liberalisation programme largely depends on the free movement of people within a given economic community. It is not surprising therefore that the removal of such barriers has been at the top of the Integration agenda in each of the 3 RECs and now in the tripartite region.

As already indicated, the removal of barriers particularly non-physical barriers has been a priority item in the integration agenda of the 3 RECs and now collectively of the tripartite region. Towards this end liberalisation programmes have been put in place to gradually remove these artificial barriers which normally take the form of government or national policies, laws and or regulations or administrative actions that have an effect of preventing or restricting the movement of people. In the case of the air transport sector which is relevant to this discourse, these non-physical barriers are provisions in air services agreements and other arrangements that restrict the operation of air services and consequently negatively impact on the free movement of not only of people but of goods and services as well. For example, restrictions in the in the granting of the 5th freedom traffic rights and other market access rights adversely affect competition and connectivity within the regions and beyond. Limited connectivity has a huge constraining effect on the free movement of people, services and goods. For this reason the three RECs and others elsewhere in Africa have agreed on programmes aimed at removing these barriers.

YD and Liberalisation of Air Transport Services

With regard to the air transport sector the RECs in particular have agreed on implementing the Yamoussoukro Decision (YD) on intra-African air services liberalisation as a way of achieving this objective. YD is a formidable instrument not only for the development of air services but also for the removal of physical and non-physical barriers imposed on airlines. Full implementation of YD provides for the elimination of all non-physical barriers and restrictions to the granting of 5th freedom and other market access rights. The removal of these artificial restrictions will generate more competition between the airlines. The

increased competition will not only strengthen the airlines but will also improve connectivity with the introduction of new services. Increased airline connectivity is expected positively impact on the free movement of people within the regions.

It is against this background that the operationalisation of the JCA includes the development of an Air Services Agreement (ASA) template to be used by COMESA, EAC and SADC to operationalise their collective agreement to implement the YD in the three regions. The proposed template could therefore be considered as an ultimate tool to be used to remove non-physical barriers to facilitate free movement of people within the tripartite region.

Legal Instruments

Another set of non-physical barriers that impact on the free movement of people concerns the broad and complex issue of immigration laws and specifically visa requirements. Although some progress particularly at bilateral level have been made, onerous visa and other travel requirements still exist that hamper and discourage free movement of people within and across the RECs in Africa.

Travel or visa restrictions have far reaching implications for the successful implementation of harmonisation and other regional integration programmes. In fact full implementation of programmes on free movement is essential to the successful attainment of any well integrated Common Market. For instance, YD and other liberalisation programmes can only be implemented fully and equitably in an environment without visa and other travel restrictions. In other words, a level playing field is necessary for efficient of implementation of such programmes. This calls for the removal of all physical and no-physical barriers such as visas and other restrictions that limit the movements of persons in a liberalised market

Legal instruments governing the free movement of people already exist within the three RECs which include Protocols on the on Free Movement of Persons, Labour, Services, the Right of Establishment and Residence. There are also bilateral initiatives. At the tripartite level, the First Tripartite Summit of 2008 agreed on, among other things, a harmonised programme on the free movement of people across the three RECs as a way of deepening integration that would ultimately lead to the establishment of a Single Market. However, all these instruments require harmonising and ratifying before entering into force.

Conclusion

The conclusion that can be drawn from the above observations is that free movement of people is a requirement for achieving successful market integration. Non-Physical barriers on the other hand take the form of imposed laws or regulations that hamper or prevent free movement of people. With respect to air transport, these barriers are found in the restrictive provisions of BASAs. At a broader and more complex level they could be in the form of stringent visa requirements or other travel restrictions.

In light of this, RECs have agreed on programmes aimed at removing these barriers to facilitate free movement of people. To this effect a programme of liberalisation by way of YD implementation has been put in place to remove non-physical barriers present in the air transport sector. The proposed YD compliant ASA template is to be viewed as tool for facilitating the free movement of people. The RECs have also put in place instruments and

relevant Protocols to address the issues of visa and other related obstacles to the free movement of people within and across the regions.

5.2 Written Comments submitted

5.2.1 Designation and Authorisation of airlines

This submission is a response to concerns and comments from a number of States and an Airline that the MASA has deviated from YD in its provisions on the issue of airline eligibility criteria. It is proposed in this respect that this submission, to the extent possible, replaces the text in the Draft Final Report presented to the Workshop in Harare.

Article 5 of the MASA reflects, without deviation, the exact provisions and intentions of Article 6 of YD on Designation and Authorisation. It specifies conditions for designation including number of airlines to be designated and the criteria for designation as explained below.

- a) **Number of Airlines to be designated** - With regard to the number of airline to be designated, Member States have the right to multiple designations as the Article does not limit the number of airlines to be designated. Each Member State can therefore designate any number of airlines to operate intra-regional services provided that such airlines meet the eligibility criteria. Designation has to be notified to the other State in writing through diplomatic channels. In the event that the airline designated does not meet the eligibility criteria, the State concerned may refuse authorisation to that airline.
- b) **Eligibility Criteria and Ownership** - The eligibility criteria set in paragraph 4 of Article 5 of the proposed MASA, as adopted from Article 6.9 of YD, reads as follows:

To be eligible, an airline should:

- a) be legally established in accordance with the regulations applicable in a Member State to this Agreement;
- b) have its headquarters, central administration and principal place of business physically located in the State concerned;
- c) duly licensed by a Member State as defined in Annex 6 of the Chicago Convention;
- d) fully own or have a long-term lease exceeding six months on an aircraft and have its technical supervision;
- e) be adequately insured with regard to passengers, cargo, mail, baggage and third parties in an amount at least equal to the provisions of the International Conventions in force;
- f) be capable of demonstrating its ability to maintain standards at least equal to those set by ICAO and to respond to any query from any State to which it provides air services;
- g) Be effectively controlled by a Member State.

The above YD compliant designation criteria is a departure from the long established traditional rule found in most BASAs, including those between member States in the

tripartite region, that an airline must be substantially owned and effectively controlled by the designating State or its nationals as criterion for designation. Instead, it opts for other criteria such as effective control, incorporation in and principal place of business and other operational and technical fitness criteria.

The departure from this long established tradition has to be viewed in the context of changed business environment in which the industry operates. The national ownership and control provision operated successfully for decades largely in the environment of state-owned and fully funded national airlines. However, a change in national policies, trends towards liberalisation and regional integration programmes has resulted, among other things, in the dwindling and in some cases outright withdrawal of State funding to national airlines. In this regard, a number of governments including some in the tripartite region have disbanded national airlines, inviting instead the private sector to invest in and establish airlines in their respective countries to enable them participate more effectively in international air transport. This was to be by way of creating an enabling and conducive environment that would attract private sector capital investment in the industry. However, there exist considerable challenges in raising sufficient capital to invest in airlines from within national borders and across Africa. The advantage of the YD criteria therefore lies in the opportunities it creates for increased access to international and foreign equity participation. It possibly also facilitates the restructuring and strengthening of airlines through cross border capital injection.

The deviation from the established tradition is understandably a source of concern for some States as it opens opportunities for interests outside the continent to exercise control over African airlines through equity participation, thus gaining undue advantage from the liberalisation package which is intended to benefit African carriers and not those from outside the continent. This raises the question as to whether such African carriers with part foreign ownership and or control should be considered eligible for designation to operate intra-regional services. A related question is whether subsidiaries of non African airlines established in a member State should be allowed to operate intra-regional services. The YD criteria seems to suggest that such airlines could be allowed to so.

The absence of the substantial ownership provision does not however, alter the underlying national legislation governing foreign ownership levels in the airlines. Each Member State will continue to set the permissible level of foreign ownership based on its national policies on inward foreign investments. In this respect some States place no limit on the level of foreign investments but have to continue to participate in regional or international air transport. For example Uganda does not place any limit on foreign investment. Air Uganda which has majority foreign shareholding has been licensed to operate domestic services and designated to operate intra-East African services into Kenya and Tanzania.

In addition, the YD criterion does not abandon the need for genuine link with the designating State. The conditions of eligibility are cumulative and the absence or lack of one of the elements can constitute the legal basis for denying authorisation to operate the services. For example, if the receiving State concludes that the designating State does not exercise effective control over the airline as defined in Article 1 of YD and of the proposed MASA, it can deny authorisation even if all other conditions of eligibility are met.

It is clear that there is no readily available answer to the complex and vexing question of airlines with substantial non African shareholding. The complexity mainly lies in the fact that on one hand, States in the exercise of their sovereignty have the right to determine the level of foreign investments in airlines established within their jurisdiction. On the other hand, where such airlines are overwhelmingly controlled by foreign interests they are and could be viewed non African and therefore cannot be considered eligible to operate services under YD which was and is intended for the benefit of African carriers.

Our view and suggestion is to seek a possible compromise in the context of the concept of "Effective Control". To be eligible an airline must be effectively controlled by a State Party, or by nationals of the country where it is based. An agreed objective and creative interpretation and application of this concept could help to clarify and put in proper perspective the eligibility of airlines with substantial foreign shareholding and or control. The key criteria in the concept of "effective control" is who actually exercises a decisive influence on the airline, in particular (a) the right to use all or part of the assets of the airline (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). An interpretation of this concept based on these elements could assist in determining whether the airline in question is effectively controlled by the State Party concerned.

To conclude, the eligibility criteria specified in Article 5 of the proposed MASA does not in any way deviate from or relax that set by Article 6 of YD. However, it leaves out the traditional "*Substantial Ownership and Effective Control*" requirement found in most BASAs. In addition, each State retains the sovereign right to determine the permissible level of foreign ownership. The two factors have given rise to concerns about the eligibility, under YD, of airlines with substantial non-African shareholding. It is suggested in this regard that an objective interpretation of the concept of "effective control" could assist in determining the eligibility of such airlines. Lastly, the criteria in paragraph 4 of Article 5 of the MASA, retains genuine link with designating State while the conditions are cumulative.