MINI-DISSERTATION

WHICH PROBLEMS AND WHICH BENEFITS RESULT FROM THE YAMOUSSOUKRO DECISION OF THE AFRICAN ECONOMIC COMMUNITY IS IT WORTHWHILE TO IMPLEMENT THIS DECISION

By

CHRISTOPH SEIMELO

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Supervisor: Prof. Dr. Stephan Hobe

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Abstract

In 1999, African States concluded an intra-Africa air services treaty, namely the Yamoussoukro Decision (YD) the purpose of which was to improve intra-Africa air services. The YD was intended to be the legal basis on which intra-Africa air services may be conducted, thus to replace existing bilateral air services agreements between the African States, unless such bilateral air services agreements supplement the YD. In the market access provisions of the YD, African States agreed to derogate from the requirement of 'airline ownership and control' as a market access provision for intra-Africa air services because it was regarded as an obstacle to the growth of intra-Africa air services.

Airline ownership and control has been used by many States as a market access provision in bilateral air services agreements (in civil aviation commonly known as BASAS when refering to more than one agreement and BASA when it is one agreement.) since the 1940's. Its implementation did not only occur on the basis of the BASA but State practice as well. Thus it would not be an exaggeration to conclude that airline ownership and control attained the status of a rule of customary international law alternatively, by practice crystallising into a rule of customary international law.

Despite the conclusion of the YD in 1999 and its entry into force in 2000 some African States never implemented the YD or continue to violate material provisions of the YD by insisting on airline ownership and control as a market access provision for intra-Africa air services. It is in this context that the principle of *pacta sunt servanda* may become relevant as a customary international law principle, as stipulated in article 26 of the Vienna Convention on the Law of Treaties (VCLT), African States as parties to the YD have a legal duty to implement the YD in good faith.

The nature of obligations assumed by States under the YD are such that legal standing is limited to the parties to the dispute in case of breach of the YD. Expanding legal standing to all African States by inserting a special provision in the YD may resolve the problem of continuous breach of the YD by the African States.

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CHAPTER 1: BACKGROUND OF THE STUDY

1.1 Introduction and background information on the Yamoussoukro Decision

International air services are predominantly conducted on the basis of bilateral air services agreements concluded between States, and most of these agreements have airline ownership and control as the key market access provision. The practice of airline ownership and control has been around for several decades, and it is widely used by States in bilateral and multilateral air services agreements. Therefore it is safe to conclude that this practice is a rule of customary international law; alternatively, by practice, it is crystallising into a rule of customary international law.

In 1999, African States concluded a continental (multilateral) air services agreement in the form of the 'Yamoussoukro Decision' (YD) which excluded airline ownership and control as a market access provision. The YD was adopted by an African Heads of State and Governments meeting on 12 July 2000, in Lomé, Togo[1] and the object of the YD is to improve intra-Africa air services and thus trade and movement of people. In order to achieve this purpose provisions which are generally regarded as restricting trade in air service or protecting national airlines, were relaxed. As a result provisions such as airline ownership and control, approval of airline tariffs by States and approval of the schedule under which air services are to be provided by airlines, have been relaxed in the YD. Today, airlines determine their tariffs and schedule of air service with minimum intervention by States.

The requirement of airline ownership and control was replaced in Article 6.9 of the YD by the requirement of 'principle place of business of the airline'. It is worth noting that other continents have relaxed the provisions on airline tariffs approval and schedule of the air services to be provided, but not the airline ownership and control requirements. By derogating from the practice or rule of airline ownership and control in the YD, African States derogated from a rule of customary international law.

[1] Decision of the African Heads of State and Government ,'AHG/OAU/AEC/Dec. 1 (iv) Lomé, Togo 12 July 2000'

The YD was adopted by the African Heads of State and Government convened in 2000 under the Abuja Treaty and in terms of that Treaty became binding on all African States party to that Treaty.[2] Those not party to the Treaty but which declared that the YD will be binding on them, became equally bound. Nevertheless, the YD has not been implemented by most African States, for over a period of at least two decades.

Realising that the YD has not been implemented despite it being legally binding on most African States, African heads of State and Governments under the 'African Union Agenda 2063' have adopted a decision for the establishment of a 'Single African Air Transport Market[3]', which provides for the implementation of the YD unreservedly. With the recently established African Continental Free Trade Agreement, intra-Africa air transport must be at the forefront of spearheading trade and movement of people.

There are research and article papers on the YD[4] which also partly deal with airline ownership and control but the approach adopted in this dissertation is different in that it does not simply assume that the relaxation of airline ownership and control is in the best interest of Africa.

Derogation from airline ownership and control in Article 6.9 of the YD and the none-implementation of its material provisions are the focus of this dissertation.

[2] Article 12 of the YD provides: 'In accordance with Article 10 of the Abuja Treaty, this Decision shall automatically enter into force thirty (30) days after the date of its signature by the Chairman of the Assembly of Heads of State and Government at which this Decision was adopted'.

[3] Decision of the African Union Assembly/AU/Dec.665(XXX), 30th ordinary session of the Assembly 28th - 29th January 2018, Addis Ababa, Ethiopia

[4] The implementation of the YAMOUSSOUKRO DECISION By Charles E. Schlumberger, 2009; also see Schlumberger, C. (2010). Open Skies for Africa: Implementing the Yamoussoukro Decision (Directions in Development: Infrastructure). World Bank Publications, Washington, DC.

1.2 Statement of the problem

Is the market access provisions of the YD in the form of Article 6.9 inconsistent with a rule of customary international law in international air services agreements, in particular, of 'airline ownership and control'? And, is the termination of the YD the ultimate answer given its perpetual material breach by the greatest number of African States, or can it be saved?

These questions are answered in more detail in chapter two, three, four and five by breaking them down into sub-questions.

1.3 Purpose of Research

The purpose of this dissertation is to show that by derogating from the practice of airline ownership and control, African States derogated from a rule of customary international law and that the derogation is not necessarily in the best interest of African States.

Secondly, the fate of the YD must be queried, given its' continuous breach by the African States.

1.4 Research Methodology

The research is entirely a desktop exercise which seeks to prove that airline ownership and control is a requirement or practice which is generally accepted by States as a market access provision in international air services agreements and that the requirement has reached the level or is indeed a rule of customary international law, or by practice crystallising as a rule of customary international law.

There are brief discussions of the two constitutive elements of customary international law, which are, State practice and *opinio juris*, followed by the relationship between treaty law and customary international law. With respect to State practice and *opinio juris* it will be demonstrated that airline ownership and control meet both requirements.

Some Conventions[5] and International Agreements[6] concerning international air services are analysed to demonstrate the point that airline ownership and control is not necessarily a requirement or rule of treaty law. Further reference is made to reports of the International Law Commission[7] (ILC) regarding formation and identification of customary international law including the judgement of the International Court of Justice[8] (ICJ). In analysing international air services agreements, especially the provision on airline ownership and control, a comparative analysis is made between African States or continent and other continents with respect to derogation from this practice or requirement.

Thereafter attention is directed to the current attitude of some States and international organisations on the requirement of airline ownership and control, including actions which have been taken. Specific attention is directed towards actions taken by the African continent in the form of the Yamoussoukro Decision[9], particularly the market access provision in Article 6.9. Article 6.9 is analysed with respect to content and purpose in the light of airline ownership and control requirement. Further, the question of whether the YD has entered into force is briefly discussed, and that entails looking at the provisions of the Abuja Treaty and Vienna Convention on the Law of Treaties (VCLT).

A list of BASA between the African States is presented to demonstrate the point that African States still maintain the requirement of airline ownership and control contrary to Article 6.9 of the YD or at least, so it appears.

Given the fact that Africa has chosen to derogate from a rule of customary international law of airline ownership and control the question which is asked is whether States may

[5] Convention on International Civil Aviation of 1944

[6] International Air Transport Agreement of 1944

[7] 6th Report of the International Law Commission

[8] ICJ Reports 1969, p 3; North Sea Continental shelf cases (Sweden v Germany and Netherlands v Germany) para. 61 to 74 pp 38 – 42.

[9] Yamoussoukro Decision of 1999

derogate from a rule of customary international law and under which circumstances it may happen.

Provisions of Nigeria, South Africa, and Rwanda civil aviation legislations are cited to show that the requirement of airline ownership and control is not only a requirement limited to bilateral or multilateral air services agreements but that it has also found a place in domestic laws.

The nature of the obligations assumed under the YD by the African States will be briefly analysed to determine whether they are not partly the reason why the YD is continuously breached.

Based on the outcome of the research, recommendations are made to either cure the legal defect caused by derogating from the rule of customary international law or confirm that the derogation by African States is of no consequence and where possible propose solutions for the continuous breach of the YD.

1.5 Brief chapters' overview

In order to answer the main questions, the dissertation is divided into the following chapters,

Chapter one – Provides a brief introduction of the YD, the statement of the problem, purpose of the dissertation and research methodology.

Chapter two – This Chapter deals with formation and identification of customary international law in general and comes to the conclusion that airline ownership and control has met the two constitutive elements of customary international law, namely general State practice and *opinion juris* and thus airline ownership and control is a rule of customary international law or by practice crystallising into such a rule.

In order to prove that airline ownership and control is a rule of customary international law or by practice crystallising as such there has been an interrogation of the relationship between treaty law and customary international law, a brief history of air law, origin of airline ownership and control and comparing the position adopted by African States with respect to airline ownership and control with other continents.

Chapter three – In this Chapter, an analysis is made on whether States may derogate from a rule of customary international law and if so, under which circumstances.

Chapter four – This Chapter reviews whether the YD entered into force and if so, the possible causes of the violation of some provisions of the YD, to that end, special attention is paid to Article 6.9(a) and (g) of the YD. Further, the purpose of airline ownership and control is discussed in the light of the YD.

Chapter five – This Chapter shows that although the YD is a multilateral agreement and thus all the parties should have an interest in complying with its provisions, a closer analysis of the obligations assumed under the YD demonstrates that they are a package of bilateral obligations, and this may partly be the reason why there is continuous violation of some provisions of the YD because in the case of violation only the complainant State and defaulting State have legal standing.

Chapter six – Provides a summary and recommendations concerning the findings in relation to the statement of the problem.

CHAPTER 2: AIRLINE OWNERSHIP AND CONTROL AS A RULE OF CUSTOMARY INTERNATIONAL LAW OR BY PRACTICE CRYSTALLISING AS SUCH

2.1 Identification of customary international law

2.1.1 Introduction

In terms of Article 38 of the Statute of the ICJ, when the court decides disputes brought before it, the court must have regard to international law, and this specific article directs the court as to what is regarded as international law.[1] One of the sources of international law, according to Article 38(1)(b) is 'international customs, as evidence of a general practice accepted as law'. Article 38(1)(b) in its simplest terms refers to customary international law which is formed by general State practice and such practice accepted as law by States.[2] Customary international law is a two-step requirement or approach, first, general State practice and secondly, acceptance of the said practice as law by States.

In deciding disputes brought before it, the ICJ had to deal with the question whether a particular practice is a rule of customary international law or not,[3] and in that way clarified as to what qualifies as a rule of customary international law.

Further, the ILC as a subsidiary organ of the General Assembly to the United Nations, with the function of codifying and progressively developing international law has also pronounced itself on the formation and identification of customary international law, and its pronouncement carries weight in the international community.

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[1] Article 38 of the Statute of the ICJ refers to the list below as being part of international law:
(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[2] International Law Commission (ILC), Sixty-seventh session, A/CN.4/L.869, draft conclusions 1 to 11 on the formation and identification of customary international law

[3] See, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; (Federal Republic of Germany/Netherlands), ICJ Report 3, 20 February1969 para. 60 to 74 pp 38 - 43

2.1.1.1 Relationship between Treaty Law and Customary International Law

In terms of draft conclusion 11 of the ILC at its sixty-seventh session, a rule provided for in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) 'Codifies a rule of customary international law existing at the time when the treaty was concluded;

(b) Has led to the crystallisation of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) Has given rise to a general practice that is accepted as law (*opinio juris),* thus generating a new rule of customary international law'.

For purposes of this dissertation, it is argued that airline ownership and control is being codified in BASA, but it is essentially a rule of customary international law, in the alternative, that airline ownership and control in BASA by practice has led to the crystallisation of airline ownership and control as a rule of customary international law.

2.1.1.2 Bilateral Treaties and Customary International Law

The ILC on its work on the identification of customary international law recognised that several treaties may point to a rule of customary international law but that such treaties by their own do not contribute to such a rule. Further, according to M.E. Villiger, for a customary international law rule to emerge out of bilateral treaties, there must be a network of identical treaties on the rule or practice.[4]

Despite the possibility that a rule of customary international law may emerge out of bilateral treaties, he argues that States engage in bilateral treaties because they believe there is no customary international law or that it will never exist. Villiger's view with respect to the absence of a rule of customary international law may be correct

[4] M. E. Villiger, 'A Manual on the Theory and Practice of the Interrelation of Sources', Second Edition (1997) para. 296 page 189

because if the rule existed there would have been no need for the bilateral treaty, however, bilateral treaties are not entered into to deal with one rule only but other several issues thus such an assumption is not entirely correct.

Further notwithstanding the existence of the rule, for purposes of clarity and certainty, States prefer to codify rules of customary international law, for example, the principle of *pacta sunt servanda* as codified in the VCLT and in many bilateral treaties. The fact that States enter into bilateral treaties by itself cannot exclude the codification or emergence of a rule of customary international law in such treaties.

With respect to identical treaties on the rule or practice, perhaps the question should be: do States implement a practice in an identical manner or in a similar manner. Without trying to pronounce on this question one cannot help but imagine that some rules may not be implemented in an identical manner but rather that substantially the rule will be implemented in a similar manner because essentially the rule started as a matter of practice.

For example, with respect to airline ownership and control the rule under the first BASA between the USA and Great Britain (Bermuda I) was that ownership and control of the airline must vest in the majority of the nationals of the State designating the airline or the State itself' or both. However, later with the influence of the USA, the rule changed to 'substantial airline ownership and control must vest in nationals of the State designating the airline or the State itself' or both. In both instances the rule is that those who must benefit more must be nationals of the State designating the airline or the State itself', that seems to be the substance of the rule, what may be considered as substantial or majority is a matter of interpretation.

2.1.2 General State practice

"State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions."[5] Draft Conclusion 3, of the ILC at its sixty-seventh session provides clarity on how an assessment must be conducted on

[5] ILC, (note. 2, Chapter 2) draft conclusion 5, page 2

whether there is general State practice. The particular draft conclusion refers to the overall context and nature of the rule and particular circumstances in which the evidence is to be found.

Thus where possible there must be a historical analysis of the rule, for example, what was the rule intended to serve or what was intended to be achieved with the practice in question and the period within which the practice emerged. In this context, it is important not to look at the history with a modern eye but rather with the eyes of those who were present otherwise overall context may not be appreciated. With respect to the nature of the rule and its evidence in the case of airline ownership and control, though an aviation rule commonly found in bilateral, regional or multilateral air services agreements the principle behind this rule is commonly found in trade agreements, if consideration is to be given to the General Agreement on Tariffs and Trade (GATT) it could be equated to the 'rules of origin' rule.

The purpose of BASA was to enable two States to enter into an agreement to benefit their national air carries or air carriers of their nationals. Like in any trade agreement the question is always asked who must benefit from this agreement and the answer is naturally the parties to the agreement, hence the requirement of airline ownership and control in BASA.

Draft Conclusion 4 of ILC dictates that the practice referred to or sought should be the practice of States, because it is such practice that contributes to the formation of customary international law and understandably so, given that States by their very nature are subjects of the international law as opposed to individual persons.

In certain circumstances, the practice of international organisations may be relevant to the formation of customary international law. For example, in terms of Article 54(l) read with Article 90 of the Chicago Convention of 1944, the Council of ICAO have adopted standards and recommended practices as annexes to the Convention and refer such annexes to States for implementation. In general, the annexes are obligatory and must be implemented by States unless the majority of States object. Where an annexe is issued on a specific rule, for instance, rules applicable to flights over the high seas, all States must comply with such rules and over a period of time these rules even if they were initially treaty rules they may give rise to a general

practice that is accepted by States and therefore generating a new rule of customary international law.[6]

The requirement is that the practice must be general in nature. In short, a reasonable number of States must engage in a particular practice. What qualifies as general practice may be dependent on a particular practice, for example, the practice of sending satellites into outer space was initially only practiced by the USA and the former Soviet Union and thus the rules concerning acceptable human activities in outer space where developed by the USA and Soviet Union. However, when the General Assembly of the UN unanimously approved Resolution 1962 (XVIII), it accepted the practice started by two nations as the rules applicable to human activities in outer space.[7] Today, rules in outer space are accepted by all States although such rules where established or started by two states only.

There is no need that all the States must engage in the practice or the universal acceptance of the practice.[8] Where a practice is widespread, it is sufficient to constitute a rule of customary international law provided there is *opinio juris* and whether a practice is widespread or not depends on the particular practice. According to the ICAO secure portal[9] concerning world air services agreements database, there are 2972 agreements registered with ICAO. Without being accurate it is safe to conclude that over half of these BASA have airline ownership and control as a market access provision.

The fact that the practice is of general application, there is no particular period of time which is required,[10] for a practice to be accepted as a rule of customary international law.

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[6] ILC, (note 2, Chapter 2) draft conclusion 11

[7] J. Dugard, 'International law, A South Africa Perspective' at page 27, fourth Edition, 2011

[8] (note 3, Chapter 2)

[9] Aviation Law Library/ World Air Services Agreements Database, ICAO secure portal, last visited on 08/08/2019

[10] ILC, (note 2, Chapter 2) draft conclusion 8

2.1.3 *Opinio juris*

2.1.3.1 Introduction

As indicated above in paragraph 2.1.1 above, customary international law is a two-step approach, namely State practice and acceptance of the practice as law. In terms of Draft Conclusion 9 of the ILC at its sixty-seventh session, States must engage in the practice out of a sense of a 'right or obligation and not merely out of usage or habit'. Stated differently, it must not only be nice or convenient for the State to engage in a particular practice but the State must believe it has a legal duty or right to engage in the practice.

It is difficult to allege that when a new rule of customary international law arises the first States which engaged in the practice did so believing that there is a legal duty or the right to do so, because the legal duty or right is only established after there is general States practice and acceptance of the general practice as law by States. Therefore it may be that in the initial phase of a practice States engage in such practice out of convenience.[11] There can be no acceptance as law if there is no general practice.

For example, some States claim that as a matter of customary international law (the right to self-defense) they can enter into the territory of a third State without the consent of that State while in pursuit of none-State actors (terrorists), by invoking the right to self-defense.[12] To date, there is no general States practice and *opinio juris* which

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[11] (note 4, Chapter 2) para. 296 page 189

[12] State letters to the UN Security Council dated 2 July 1996 from the Minister for Foreign Affairs of Turkey addressed to the Secretary General and to the President of the Security Council, UN Doc S/1996/479(2July) 1996; letter dated 15 July 1993 from the Permanent Representative of Tajikistan to the United Nations addressed to the Security Council, UN Doc S/26092, annex (16 July 1993); letter dated 15July 1993 from the Permanent Representative of the Russian Federation to the Secretary General UN Doc S/26110 (Annex) Annex 19 July 1993; letter of the Permanent Representative of the United State of America to the United Nations addressed to the President of the Security Council, UN Doc S/2001/946 (7 October 2001); letter of the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, UN Doc S/2002/1012, Annex (12 September 2002); Letter of the Permanent Representative of Saudi Arabia to the United Nations addressed to the President of the Security Council, UN Doc S/2016/786 (16 September 2016); Letter of the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2014/695 (23 September 2014); Letter of the

supports the assertion that States may enter into the territory of a third State without its consent, to go after none-State actors (terrorist) is ambigous. Therefore no matter how much some States believe or proclaim that they have a right to self-defense against none-State actors and claim that they may enter into the territory of a third State without its consent, such action is not supported by customary international law (there is no general States practice and *opinio juris*) and thus such actions will be illegal under international law.

In paragraph 2.2.2 below it will be shown that States engage or insist on the requirement of airline ownership and control because they believe they have a legal right or duty to do so and not necessarily because it is provided for the BASA.

2.2 Airline ownership and control as a matter of general State practice and *opinio juris*

2.2.1 Introduction

It has been mentioned several times above that international air services are predominantly conducted on the basis of BASA. Usually, there are two States involved, the first State or designating State which is a State that informs the other State through diplomatic channels of an airline incorporated in its territory which is selected by the first State to conduct international air services between the two States. After an airline is selected the second State is informed about the airline it must indicate whether it will allow the selected airline to conduct the said air services and the second States is informed by the provisions of the BASA as to whether to agree or disagree. Where airline ownership and control is provided for in the BASA and airline ownership and control of the designated airline does not vest in nationals of the State designating the airline or the State itself the second State may refuse permission to the airline of the first State to operate international air services between the two States.

2.2.1.1 Paris Conference of 1910 and Paris Convention of 1919

Permanent Representative of France to the United Nations addressed to the Secretary General and to the President of the Security Council, UN Doc S/2015/745 (9 September 2015);

As a matter of context, it must be appreciated as to how the practice of airline ownership and control has developed. Attempts by the international community to unify the law concerning international civil aviation can be traced back to the Paris Conference of 18th May till 29th June 1910. This conference managed to come-up with certain terms and definitions which are relevant for air law today, many of which came from maritime law, whereas some proposals were rejected. Although no official text of the 1910 Conference was adopted the work of that Conference was recognised in the Paris Conference of 1919.[13]

It is the Paris Conference of 1919 (13 October 1919) which produced the Convention Relating to the Regulation of Aerial Navigation (more commonly known as the Paris Convention). This Convention expressly rejected the maritime law concept of the 'freedoms of the seas', instead recognised that each State had 'complete and exclusive sovereignty of the airspace above its territory'. Article 6 of that Convention introduced the concept of aircraft nationality into international law. The Paris Convention was only signed by 33 States and it never got general acceptance just like the Paris Conference of 1910, however some of the provisions of the Paris Convention found their way into the Chicago Convention of 1944.[14]

2.2.1.2 Chicago Convention of 1944

In 1944, the International Civil Aviation Conference convened in Chicago, USA and concluded the Chicago Convention, which to date is perhaps the most successful international legal instrument regulating international civil aviation. In Article, 1st the Chicago Convention reaffirmed that States have 'complete and exclusive sovereignty of the airspace above their territory' and provided for the nationality of aircraft in Article 17. With respect to the Chicago Convention, States did not reach agreement on a system for the reciprocal exchange of traffic rights for scheduled international air services between States on a multilateral basis.

[13] Annals of Air and Space Law Vol. XXXIII, 2008, pp 60 to 61

[14] A. Harrington, 'Foreign Ownership and the Future of the National Airline: Mixed Messages from Australia', HEINONLINE, 38 Annals Air & Space L. 123 (2013)

Instead, States reached a compromise in Article 6,[15] which essentially provides that scheduled international air services shall be operated in terms of special authorisation or permission. This compromise led to the entrenchment of bilateralism in international air services, however, BASA was not a new practice in 1944 they were used as air transport trade agreements as far back as in 1913[16] and in that particular year Germany and France concluded a BASA and therefore it is safe to argue that bilateralism in air services can be traced as far back as 1913.

2.2.1.3 Origin of airline ownership and control

In 1944, there were two other international multilateral agreement which were open for signature, the International Air Transit Agreement of 1944 (Transit Agreement) and the International Air Transport Agreement 1944 (Air Transport Agreement). The Air Transit Agreement provides for the first two freedoms of the air, commonly known as 'technical stops' whereas the Air Transport Agreement provided for the five freedoms of the air.

Section 5 of the Transit Agreement and section 6 of the Air Transport Agreement both have "substantial ownership and effective control" as a market access provision or requirement. Section 5 of the Transit Agreement and Section 6 of the Air Transport Agreement both provide as follows respectively:

'Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under this Agreement'.

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[15] Article 6 of the Chicago Convention provides: "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization".

[16] P.P.C. Haanappel, "Bilateral Air Transport Agreements - 1913 - 1980" (1978-1980) 5 Int'\. Trade L. J. 241 [Haanappel].

It is worth noting that in both Agreements there is no provision which requires that an airline must be owned and controlled by nationals of the State designating it or the State itself. That is to say, there is no positive requirement to that effect. It begs the question of why there is no provision crafted in the positive making substantial airline ownership and control compulsory. One cannot help but suspect that it is because it was a practice and therefore there was no need to provide for it in both Agreements but rather leave it to States to decide how to deal with it on a case by case basis.

The Air Transport Agreement never entered into force. Although the Transit Agreement provides State parties to it with the right to withhold or revoke a permit or authorisation for an airline operating air service in contravention with Section 5 thereof, in practice, that Agreement is never used by States to withhold or revoke permits or authorisation because the Agreement is primarily there to facilitate international air transit and not to grant market access. Therefore, from a multilateral treaty law perspective, there is no rule that an airline must be substantially owned or controlled by nationals of a designating State.

Nevertheless, the provisions of Section 5 and 6 of the Transit Agreement 1944 and Air Transport Agreement 1944 found their way into Bermuda I[17], the BASA entered into between the USA and United Kingdom of Great Britain after the failure of Air Transport Agreement of 1944 and the compromise reached in Article 6 of the Chicago Convention of 1944.

2.2.1.4 Bermuda I

Bermuda I served for many years as the precedent for hundreds of BASA. The substantial ownership and effective control provisions became a standard market access provision of those agreements.[18]

[17] Agreement between the United Kingdom and the United States, 11 February 1946, 3 U.N.T.S. 253 (hereinafter Bermuda I Agreement)

[18] (note 13, Chapter 2) paragraph XI, p 175, see also (note 14, Chapter 2) p. 129

Bilateralism and reciprocity are key components in BASA, hence the requirement of airline ownership and control. It goes without saying that when two governments enter into a trade agreement the purpose is to benefit themselves or their nationals and not a third government or its nationals. Therefore it makes perfect sense that under a bilateral arrangement a State which must approve operations of a foreign airline into its territory must be sure that the airline which is approved belongs to the State it has entered into with a BASA or to nationals of that State.

2.2.2 General State practice in respect of airline ownership and control in BASA

(a) State practice in connection with negotiating and conclusion BASA.

This requirement came about as a matter of adopting the practice of the USA and United Kingdom in Bermuda I and subsequently in Bermuda II[19].The practice of airline ownership and control is repeated in BASA almost automatically because it was found to be acceptable by States. In preparing for BASA negotiations there are usually preparatory meetings in which a State adopts a particular position with regard to various aspect of the BASA negotiations. For some States, there may well be a national policy adopted on certain aspects of the BASA and thus at the negotiation event it is simply a matter of conveying the national position. It is not an overstatement to say most States have entered into BASA and by now have adopted a position on certain aspects of BASA. Today States like China, USA, and EU Member States in their dealings with BASA have adopted airline ownership and control as a matter of policy.[20]

States generally insist on airline ownership and control including the clause on the revocation of the BASA in case there is violation of the airline ownership and control clause as a matter of practice. It is appreciated that airline ownership and control becomes a treaty rule after a BASA is concluded, but before that it is simply a matter of State practice. The question on whether States engage in airline ownership and

[19] Air Services Agreement between USA and UK, 1977 D.K.T.S. 76 (hereinafter Bermuda II Agreement)

[20] See, Article 3(2) of the BASA between Namibia and China; see Article 3(2) of the BASA between Namibia and the Netherlands; Article 3(2) of the BASA between Namibia and USA (BASA between Namibia and Netherlands and between China and Namibia, (all BASA referred to not published)

control because they believe there is a legal obligation to do so is addressed in paragraph 2.3 below.

2.2.2.1 Conclusion

Airline ownership and control is widely used by States as a market access provision in BASA. Further, there is no doubt that before this practice is provided for in BASA there is no treaty obligation on States to the BASA to comply with and airline ownership and control only becomes treaty rule after its insertion in BASA. Therefore it is safe to conclude that before airline ownership and control become a treaty rule it is simply a matter of State practice, hence a constitutive element of customary international law.

2.2.3 Acceptance of State practice in respect of airline ownership and control as law *(opinio juris)*, as evidenced in Bilateral Air Service Agreements

According the ILC[21] *opinio juris* or acceptance of general practice as law can be manifest in many ways and include, but not limited to: 'official publications; government legal position; diplomatic correspondence; decision of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference.'

There is a general understanding amongst international law scholars that State practice and *opinio juris* are two sides of the same coin. Suffice to say, practice of States by itself may show that a specific rule has been accepted as law and in this case it is the general use of the airline ownership and control rule as an automatic BASA provision by States. Airline ownership and control rule is widely used and accepted as a market access provision to the extent that it is hardly contested or discussed in BASA negotiations.

It is not an exaggeration to state that airline ownership and control is automatically provided in BASA as a matter of a rule and majority of States genuinely believe that the BASA must have such a provision. In the North Sea Continental Shelf cases (North Sea cases) the ICJ held that the 'acts concerned must also be such, or be carried out

[21] See, ILC (note 2 Chapter 2), draft conclusion 10 page 3

in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.

It is relatively easy to show that a certain practice is widely practiced by State, but certainly hard to prove that States engage in such practice in believing that they have a legal duty to do so. As recognised by M.E. Villiger, bilateral agreements may lead to or show a customary international law rule provided there is a considerable number of such agreements.

In terms of Article 83 of the Chicago Convention of 1944, State parties to ICAO are required to register BASA or any other air services agreements or arrangement with the Council of ICAO and the Council shall make such agreements public. Accordingly, to date, at least 2972 BASA have been filed in the ICAO secure portal on World Air Services Agreements. At least more than half of 2972 BASA have airline ownership and control as a market access provision thus this is evidence to show that airline ownership and control is a rule of customary international law or by practice crystallising as such.

Airline ownership and control have been accepted as law, clearly, the fact that States provide sanctions in case of non-compliance with the airline ownership and control market access rule in more than half of the 2972 BASA is an indication that States engage in this practice in the belief that there is an obligation to do so. As alluded to previously, compliance with the BASA is a matter of treaty obligation but insistence on the insertion of airline ownership and control and sanction in case of non-compliance is a matter of practice thus a rule of customary international law, alternatively by practice crystallising as rule customary international law.

2.2.3.1 Conclusion

Most, if not all States in one way or the other employ BASA as the legal means of conducting or allowing their subjects to conduct international air services. The majority of BASA have a clause on airline ownership and control as well as sanctions in case there is a violation of the said clause.

To predetermine and insist or provide for a provision on sanctions in case of a violation of airline ownership and control clause is a clear sign that when States negotiate BASA they already have an inclination that it is done in the belief that there is a legal obligation to provide for airline ownership and control. There are many provisions in BASA which, if violated, do not entitle a State party to that BASA to revoke it thus airline ownership and control is a norm creating provision or rule.

As already indicated above, BASA have been in use as early as 1913, however, it is since 1946 where airline ownership and control has been a key requirement for market access in international air services through Bermuda 1. Given the number of years this practice has been in place and the number of States which have adopted airline ownership and control in their BASA it is an indication that the second constitutive element of customary international law has been met, and therefore airline ownership and control is rule of customary international law, alternatively, by practice crystallising as a rule of customary international law.

2.2.4 Airline ownership and control and International Conferences on Air Transport

According to Draft Conclusion 4 of the ILC referred to in paragraph 2.1.2 above, the practice of international organisations in certain instances does contribute to the formation of a rule of customary international law. With respect to air transport, ICAO has to date organised at least six Worldwide Air Transport Conferences where States were given the opportunity to interrogate and provide their input on international air transport and one such conference is scheduled to take place in Guyana in 2018. An item that frequently appears on the agenda of these conferences is airline ownership and control clause.

At the 5th Worldwide Air Transport Conference held from 24th to 28th March 2003 in Montreal, Canada concerning challenges and opportunities of liberalisation of international air transport, ICAO presented a draft Manual on the Regulation of International Air Transport (Doc 9626, 1996). The ICAO secretariat proposed an alternative criterion for market access in international air transport to replace airline ownership and control, and it is 'the principal place of business and effective regulatory control of the airline.' States were separated on which market access regime to support.

States or group of States which indicated that they prefer 'the principal place of business and effective regulatory control of the airline' as a market access provision as opposed to the traditional airline ownership and control are, 53 African States[22], Barbados[23], Singapore[24] and Cuba[25].

States and interest groups which supported airline ownership and control as a market access provision are members of the Latin America Civil Aviation Commission[26], South Korea[27], Arab Civil Aviation Commission[28], and International Federation of Airline Pilots Association[29].

[22] ICAO Report of the 'Worldwide Air Transport Conference', Challenges and Opportunities of Liberalisation, agenda item 2.1, page 17, 24 – 28 March 2003: provided States spell out in their laws and regulations the condition of both "evidence of principal place of business" and "evidence of effective regulatory control."

[23] ICAO Report of the 'Worldwide Air Transport Conference (note 22 above), page 16: described the difficult financial situation facing airlines of developing countries and the need for foreign investment.

[24] ICAO Report of the 'Worldwide Air Transport Conference (note 22 above), page 16: believed that the secretariat's new proposal would assist the evolution of international air transport in a safe, orderly gradual and efficient manner.

[25] ICAO Report of the 'Worldwide Air Transport Conference (note 22 above): supported the liberalisation of air carrier ownership and control criteria and advised that there be consultative approach to States to understand and identify solutions to their unique concerns.

[26] ICAO Report of the 'Worldwide Air Transport Conference (note 22 above), page 17: noted that although liberalisation of ownership and control has been extensively debated, no solution acceptable to the majority of States has yet been found.

[27] ICAO Report of the 'Worldwide Air Transport Conference (n. 22 above), page 16: "believed that airline ownership and control criteria are more appropriate for the bilateral air transport framework, while the principal place of business criterion could be applied more appropriately in regional frameworks".

[28] ICAO Report of the 'Worldwide Air Transport Conference (n. 22 above), page 17: registered their preference of liberalisation of ownership and control for non-scheduled transport of passengers and cargo. "As for scheduled transport of passengers and cargo, they called for adopting the principal of liberalisation of airline ownership and control at the level of regional groupings while using the traditional regime with other parties".

[29] ICAO Report of the 'Worldwide Air Transport Conference (n. 22 above), page 17: "considered that the proposed change to the ownership and control criteria did not address the labour and social implications and that the general rule that a designated airline must be substantially owned and effectively controlled by the national of the designating country should be preserved as an essential safeguard against the use of "flags of convenience" which would undermine labour and social standards".

The report of this Conference indicates that although there is some indulgence by some States to move away from the traditional airline ownership and control, the majority of States still prefers airline ownership and control clause as opposed to the 'principal place of business and effective regulatory control of the airline as a new norm. At the 6th Worldwide Air Transport Conference which was organised in 2013, the majority of States still preferred airline ownership and control clause as opposed to the 'principal place of business and effective regulatory control of the airline', not only to apply airline ownership and control in their BASA, but also adopting it as part of new air service accords.[30]

2.2.5 State's Practice on limiting or restricting foreign ownership in domestic airlines: 2016 report of CEFiso

As a way of demonstration, bellow is a list of countries which restrict foreign ownership in their domestic airlines and this list is an extract from CEFiso DICE's, a database on Institutional Comparison in Europe.

State's Practice of limiting or restricting foreign ownership in domestic airlines

	The maximum percentage of foreign ownership permitted by national statue
(a) Australia	49%
Brazil	20%
Canada	25%
Chile	100%
China	35%
Columbia	40%
(b) European Union	49.9%
Israel	34%
Japan	33%
Kenya	49%
Korea	50%

[30] ICAO, working paper ATCon/6-WP-12, agenda item 2, dated 10/12/12, at paragraph 3.1, page 3

Peru	49%
Philippines	40%
Thailand	30%
United State	25%

(a) Australia places no legal limitation on foreign ownership and control of airlines that operate exclusively and entirely within its airspace jurisdiction. Foreign investors, however, continue to be restricted to a maximum of 49% ownership of any Australian-based carriers that fly internationally between Australia and other countries.

(b) Airline ownership and control have been multilateralised within the European Union such that any EU-licensed airline can be in the hands of any EU Member State, but there is a 49.9% cap on ownership of that carrier by non-EU citizens (as well as the control restriction).

(c)In the United States the corporation or association must be organized under the laws of the United States. The corporation´s president must be a US citizen. At least two-thirds of the board of directors and other managing officers must be US citizens. At least 75% of the voting interest in the corporation must be owned or controlled by persons who are citizens of the United States. The corporation must be “under the actual control of citizens of the United States”.

Source*:* World Economic Forum, a New Regulatory Model for Foreign Investment in Airlines, January 2016.

The table above includes States which have more airline activities both domestic and international thus have a significant role to influence the terms and conditions under which international air services are operated. In order to conduct international air services the States above enter into BASA or regional agreements. Thus, given their domestic laws on restricting foreign airline ownership with respect to their respective registered airlines it is likely that when they negotiate BASA with any other State their

domestic laws will influence the position which may be adopted regarding market access which is usually airline ownership and control clause.

For example, BASA entered into by EU Member State always have a compulsory clause on airline ownership and control[31], including a clause on the revocation of the BASA in case there is violation of airline ownership and control. Though the clause on airline ownership and control may be insisted upon by the EU, the fact that most State which have BASA with EU Member State have agreed to the said clause renders the clause no longer an EU policy position only but rather of the EU and any such State.

In Africa, some of the States which restrict foreign ownership in respect of their domestic airlines are Nigeria[32], Rwanda[33], and South Africa[34], to mention but a few and there may be many other African States which have same or similar legislations to Rwanda and South Africa on restricting foreign ownership in domestic airline.

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[31] EU, BASA clause on airline ownership and control: The airline is owned, directly or through majority ownership, and it is effectively controlled by EU Member States or member States of the European Free Trade Association and/or by nationals of such States

[32] Section 33 of the Civil Aviation Act, 2006 of Nigeria provides:

(1) Notwithstanding the provisions of section 17 of the Nigeria Investment Promotion Commission Act, the Authority shall refuse to grant a license permit, certificate or other authorisation in pursuance of an application if it is not satisfied that-

(a) the applicant is-
(i) a citizen of Nigeria, or
(ii) being a company or a body corporate, is registered in Nigeria and has its principa placeof business within Nigeria, and is controlled by Nigeria nationals;

[33] *Official Gazette nº 21bis of 25/05/2015* of Rwanda provides as follows: An undertaking whose principal place of business is within Rwanda shall not be designated in order to establish a scheduled air transport service between Rwanda and any other State or territory except if:

(a) he is a natural person, he is a citizen or resident of Rwanda; or
(b) not a natural person, is incorporated in Rwanda and 51% of the voting rights in respect of such person are held by citizens and/or residents of Rwanda; provided that if an applicable bilateral or multilateral agreement provides otherwise, the bilateral or multilateral agreement shall prevail.

[34] Section 16(4) (c) and (d) of Air Services Licence Act, 115 of 1990 of South Africa provides as follows: 'that, subject to the provisions of subsection(5)(c):
(i) If he is a natural person, he is resident in the Republic; or
(ii) If he is not a natural person, is incorporated into the Republic and at least 75 per cent of the voting rights in respect of such person is held by residents of the Republic;
(d) that the person referred to in paragraph(c) will be actively and effectively in control of the air services.

2.2.5.1 Conclusion

Domestic law, in particular, legislation may in certain circumstances codify State practice and *opinio juris*. Although the percentage of ownership which may be owned by foreign nationals may be different in the countries listed above, essentially the message drawn from the list is that nationals of these States will have more shares in an airline incorporated in one of these States than foreign nationals. When entering into BASA the States mentioned above are not likely to ignore their domestic position thus they are in all likelihood going to argue that the airlines designated to operate international air services under the BASA must be substantially owned and effectively controlled by their respective nationals or States.

2.2.6 Comparative analysis with other regions of the world on the use or disuse of airline ownership and control

Given the fact that the African States through the African Union have chosen to derogate from airline ownership and control in this section, a comparison is made between Africa and other regions. Like in Africa, it is appreciated that in America, Asia, Pacific, Europe, and North Atlantic and other regions, countries have entered into multilateral or regional agreements to liberalise international air services. A perusal of the market access clause of these agreements shows that even in multilateral or regional agreements or arrangements airline ownership and control is still dominant, despite the fact that at the 5th World Air Transport Conference some States expressed their support for the criteria of 'principal place of business and effective regulatory control of the airline' in multilateral or regional air transport agreements.

Below is a brief analysis of the market access clause of some of these agreements per region or group of countries.

2.2.6.1 America

The Caribbean community concluded a 'Multilateral Agreement Concerning the Operation of Air Services within the Caribbean Community', signed on 6 July 1996 and entered into force on 17 November 1998.

A Caribbean Community Carrier may operate the 1st up to the 5th air traffic right. However, in order to enjoy the rights provided in that agreement, first and foremost it must be established whether the airline is a Caribbean Community Carrier. Among other requirements airline ownership and control is required and has been provided for in Article 2(2) (c) as follows:

'Ownership of the majority of the shares of the air carrier by one or more Member States or their nationals and effective control by such States or nationals'.

In order to bring about clarity as to which carrier qualifies as Caribbean Community Carrier a definition has been provided in the definition clause and provides as follows:

"CARICOM air carrier" means an air carrier which is owned by a company or other legal entity constituted in a Member State in conformity with the law thereof and has its registered office in a Member State, the majority of the shares of which are owned by one or more Member States or their nationals, and which is effectively controlled by such State or States or nationals thereof**.'**

With this kind of an agreement, it is possible that nationals of Caribbean States may derive economic benefit from aviation activities instead of airlines putting up shop and the majority shareholders are non-nationals or other countries. Financially, the Caribbean Community is pretty much in the same position as Africa, and with this kind of foresight they are likely to derive more benefits than their African counterparts.

2.2.6.2 Asia and Pacific

ASEAN has entered into a Multilateral Agreement on the Full Liberalisation of Passenger Air Services, signed on 12 November 2010 and entered into force on 13 June 2011

In order to have market access among others Article 3(a) (i) of that Agreement requires that substantial ownership and effective control of the designated airline is vested in

the Contracting Party designating the airline, nationals of that Contracting Party, or both.

2.2.6.3 Europe and North Atlantic

(i) Agreement between the European Community and the West African Economic and Monetary Union on certain aspects of air services, signed on 30 November 2009, entry into force still pending.

In this Agreement airline ownership and control has been relaxed and provides as follows:

'(a) the air carrier is owned directly or through majority ownership and is effectively controlled by WAEMU Member States and/or nationals of WAEMU Member States, or by the other African States and/or nationals of such other African States; or

(b) the services operated by the certified air carrier in accordance with WAEMU legislation mainly depart from or arrive at one or more airports in a WAEMU Member State and its operational technical and management staff is comprised mainly of nationals of WAEMU Member States, if the EC Member State concerned confirms the application of the provisions contained in this point (b).'

An option to airline ownership and control is granted to the West African Economic and Monetary Union States and in the case of the EC, there is no requirement for airline ownership and control.

(ii) Euro–Mediterranean Aviation Agreement with the EU, signed on 21 June 1999 and entered into force in June 2002

This agreement is between all member States of the EU and Morocco, subsequently joined by Jordan and Israel. Airline ownership and control is required for both the EU and Jordan. In the case of Jordan the 'air carrier is owned, directly or by majority participation, and effectively controlled by Jordan and/or its nationals' and in the case of the EU 'the air carrier is owned, directly or by majority participation, by Member

States and/or by nationals of the Member States, or by other States listed in Annex IV, and/or of the nationals of these other States'. The same requirements which are applicable to Jordan on market access also apply to Israel and Morocco with respect to the EU.

2.2.6.4 Other regions

With respect to the 'Multilateral Agreement on the liberalisation of International Air Transport' (also known as MALIAT, 'Kona' agreement), signed on 1 May 2001 and entered into force on 21 December 2001.

Article 3(2) (a) and (b) of MALIAT require that effective control of the airline is vested in the designating State Party, its nationals or both and that the airline is incorporated in and has its principal place of business in the territory of the State Party designating the airline.

Effective control under MALIAT is defined to mean a possibility of directly or indirectly exercising a decisive influence on an airline. It would appear that under MALIAT the board of directors of an airline who ordinarily may directly or indirectly exercise a decisive influence on an airline can only be nationals of the State parties or at least the majority of them must be nationals, otherwise there is going to be a violation of Article 3(2)(a) and (b) of MALIAT. In MALIAT the criterion of airline ownership and control is not specifically provided for but by insisting that effective control of the airline must vest in the airline an element of airline ownership and control is retained.

2.2.6.5 Conclusion

In the above-mentioned multilateral or regional air services agreements the majority of them still retain airline ownership. Like BASA in multilateral air services agreements, airline ownership and control is still a dominant practice and it should not come as a surprise because this shows that what States do at bilateral level they turn to repeat it at multilateral level or vice versa.

The practice of airline ownership and control in multilateral agreements seems to suggest that States would not easily let go of a practice which is over 60 years and which is still relevant.

CHAPTER 3: DEROGATION FROM A RULE OF CUSTOMARY INTERNATIONAL LAW

3.1 Introduction

Chapter two established that airline ownership and control is a rule of customary international law, alternatively by practice crystallising as such. In this chapter, the question is whether African States may derogate from a rule of customary international law.

3.1.1 Desuetude, Modification and Derogation from a customary rule of customary international law.

Unless a rule of customary law is modified by another rule of customary law or becomes obsolete it remains a rule of customary law. For a new rule of customary law to emerge there must have been general States practice and supporting *opinio juris*. As alluded to in chapter two above there seem to be action by some States to move away from the traditional airline ownership and control requirement in BASA, however these actions or practices are not of general application and have certainly not been accepted by majority of States.

'As with a rule of any legal system, if a customary rule can come into existence, the rule may change, that is, fall into *desuetude*, or be modified by a new customary rule,'[1] but such must be done within acceptable legal norms. The ICJ in the Continental Shelf cases[2] recognised that customary international law can be derogated from in particular cases or between particular parties. Therefore there is no contestation that two or more sovereign nations can freely derogate from a rule of customary international law provided the rule in question is not a *jus cogens* rule or norm and/or the rule does not give rise to *erga omnes* obligations.

The point of departure on *jus cogens* is Article 53 and 64 of the VCLT, as the Convention was the first attempt to codify *jus cogens* norms. Article 53 of the VCLT

[1] M. E. Villiger, (note 4 Chapter 2 above) para. 79, page 55

[2] (note 3, Chapter 2) para. 72, page 42

define *jus cogens* as follows: 'For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

With regard to obligations *erga omnes*, this legal concept in international law was introduced by the International Court of Justice (ICJ) in the Barcelona Traction case of 1970. The ICJ pronounced that there are obligations in international law that are owed by States "towards the international community as a whole", and therefore all States can be held to have a legal interest in their protection.[3]

Airline ownership and control have not been accepted and recognised by the States or international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Equally, breach of airline ownership and control provision in a BASA, multilateral or regional air services agreement cannot give rise to obligation owed by a State or States towards the international community as a whole. Generally, customary international law is binding on all States and cannot by the words of the ICJ be dependent of 'any right of unilateral exclusion exercisable at will by anyone of (the members of the international community) in its own favour,'[4] however there is acceptance that States may derogate from a rule of customary international law.

Derogation from the rule of customary international law is not applicable to States which were not a party to the agreement where it was agreed to derogate from the rule concerned. Simply put, with respect to third States the rule of airline ownership and control must apply unless of course the third States also agree that it should not apply. Article 34 of the VCLT recognises the sovereign right of States by providing that a treaty does not create either obligations or rights for a third State without its consent.

[3] Case concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain) Merits judgement, ICJ Reports 1970 at para. 34 page. 33

[4] (note 3, Chapter 2) para. 63 page 39

The question asked in the introductory paragraph of this chapter as to whether the African States may derogate from a rule customary international law is answered in the affirmative. As independent States certainly African States have the right to decide on matters of their national and external relations. They have authority to decide on how air service must be conducted in their respective countries.

3.1.2 Conclusion

As independent States, African States may decide what is good for them exclusively, thus if they are of the view that the traditional customary law rule of airline ownership and control is not in their best interest they may derogate from it. Therefore, it is perfectly within their right to derogate from airline ownership and control amongst themselves within the context of the YD.

CHAPTER 4: ENTRY INTO FORCE OF THE YD, ITS VIOLATION AND PURPOSE OF AIRLINE OWNERSHIP AND CONTROL

4.1 Introduction

Now that it has been established in chapter three that States may derogate from a rule of customary international law *inter se parte*, in this chapter there is going to be an enquire as to whether the YD has entered into force, analysis of Article 6.9 of the YD and generally look at the purpose of airline ownership and control. Finally, an attempt is made to determine whether by derogation from airline ownership and control was in the interest of Africa.

4.1.1 Entry into force of the YD

As alluded to in the introduction of this dissertation African Heads of State and Government adopted the YD in Lomé, Togo on 12 July 2000. The YD was adopted in terms of Article 10 of the Abuja Treaty which provides as follows:

'Decisions

1. The Assembly shall act by decisions.
2. Without prejudice to the provisions of paragraph (5) Article 18, decisions shall be binding on the Member States and organs of the Community, as well as regional economic communities.
3. The decision shall be automatically enforceable thirty (30) days after the date of their signature by the Chairman of the Assembly, and shall be published in the official journal of the Community.
4. ..;'

The chairman of the Assembly of Heads of State and Government of the Organisation of African Unity signed the decision adopting the YD on 13th July 2000 and therefore in terms of Article 10(3) of the Abuja Treaty the YD became enforceable as from 14th August 2000. In terms of Article 12 of the YD, it is automatically binding on all African States which were party to the Abuja Treat and for African States which were not party to the Abuja Treat 30 days from the date of depositing a declaration indicating that they wish to be party to the YD.

The VCLT under Article 11 gives guidance on how international agreements may become binding on States.[1] The African States in terms of Article 10 of the Abuja Treaty clearly spelled out the regime that will be applicable to them, and that is that the Assembly shall act by decision. Therefore when a draft agreement is tabled in the Assembly and the heads of State and Government agree that such draft is adopted as an agreement there is compliance with Article 10 of the Abuja Treaty and thus also with Article 11 of the Vienna Convention.

Notwithstanding the fact that the YD has been in force as from 14 August 2000, this agreement was not implemented for over two decades and some African States are reluctant to implement it to date.

4.1.2 Conclusion

All the necessary actions have been executed by the African Heads of State and Government to put the YD into force. Further, Article 12 of the YD provides for the manner how it came into force, thus there can be no question on whether the YD has entered into force.

4.2 Modification and suspension of the provisions of a multilateral treaty

Save, for the article on the review of the YD, there is no provision for the suspension or modification of it and now that the YD does not provide for its modification or suspension the VCLT dictates how multilateral treaties may be modified or suspended.

Article 41(1)(b) of the VCLT prohibits *inter se* modification to a multilateral treaty that:
b) are Prohibited in the treaty itself; and

i) affect the enjoyment by other parties of their rights under the treaty or the performance of their obligations';

ii) relate to 'a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole'.

[1] Article 11 of the Vienna Convention on the Law of Treaties provides: 'The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed'.

Similarly, Article 58 of the VCLT provides for rules similar to those set out in Article 41, this time in respect of *inter se* suspension (as opposed to modification) of multilateral treaties.

It is trite law that two States or more may modify or suspend the provisions of a multilateral treaty provided such modification or suspension is not prohibited by the treaty itself and/or affect the enjoyment by other parties of their rights under the treaty or the performance of their obligations. Moreover, State parties cannot derogate from a provision of a treaty where such derogation is incompatible with the effective execution of the object and purpose of the treaty as a whole. This position was confirmed by the ICJ in the Reservation on Genocide case. Despite this internationally recognised legal position some African States derogated from a provision of the YD where the derogation is incompatible with the effective execution of the object and purpose of the YD as whole.

As indicated in paragraph 2.3 above State parties to ICAO are required to file BASA with ICAO and in compliance with that requirement, African States filed BASA with ICAO. The table below is indicative of the position of some African States in so far as airline ownership and control (traditional approach) and full liberalisation of air transport is concerned. The ICAO secure portal indicates that 1022 BASA have been amended and being mindful of the speed at which States function it is possible that some States have amended their BASA but have not filed them with the ICAO Council. Nevertheless, the sample below represent a fair picture of the BASA of African States available on the portal.

Article 6.9 of the YD provides for market access provisions but exclude airline ownership and control as a requirement. Further, Article 2 provides that the YD takes precedence over multilateral and bilateral agreements on air services between State Parties to the YD which are incompatible with the YD and those agreements which are compatible will remain valid and are supplementary to the YD.

From a sample of BASA's of African States below it would appear that despite Article 41 (1)(b)(i)and(ii) and 58(1)(b)(i) and (ii) of the VCLT read with Article 2 of the YD, in practice some African States still maintain that an airline must be substantially owned and controlled by the nationals of the State designating it or the State itself. If the

purpose and object of the YD is to relax the requirement of airline ownership and control and thereby the achievement of greater market access for airlines from the African States and thus liberalisation of air transport intra-Africa the application of the requirement of airline ownership and control by some African States is incompatible with the effective execution of the object and purpose of the YD as a whole.

Therefore, it is safe to conclude that most African States have either modified or suspended Article 2 of the YD, and thus derogated from a provision which renders the derogation incompatible with the effective execution of the object and purpose of the YD as a whole.

Despite the continuous breach of the YD, no evidence was found where any African State challenged the practice of airline ownership and control in court or through the structures established in the YD. In terms of Article 8 of the YD when there is a dispute about the interpretation or implementation of the provisions of the YD the dispute is limited to the parties to the dispute. Given the continuous breach of the YD perhaps the question should be asked whether limiting the dispute to the parties only is helpful. As if that is not enough, Article 8 provides that dispute settlement mechanism shall be developed but unfortunately there is no such mechanism twenty years after entry into force of the YD. The limitation of the dispute to the concerned parties will be interrogated in chapter 5 below.

The table below drawn from BASA found in the ICAO secure portal on World Air Services Agreements (WASA)[2]. The table shows a sample of BASA between African States which still subscribe to airline ownership and control (traditional approach) and those which have liberalised market access

Date of BASA entering into force	Country A	Country B	Liberalisation regime	ICAO number of the BASA
20/01/2017	South Africa	Chad	Traditional	05842
14/06/2011	Cameroon	South Africa	Full Liberalisation	05175
06/11/2013	Cameroon	South Africa	Traditional	06042
10/04/2017	Congo	Nigeria	Traditional	05917

[2] ICAO secure portal on World Air Services Agreements access to the portal is restricted

22/11/2011	Rwanda	Congo	Traditional	05918
10/03/1964	Congo	Mali	Traditional	02083
26/06/1963	Guinea	Ivory Coast	Traditional	01717
01/02/2008	Namibia	Ethiopia	Traditional	10443
25/05/2016	Rwanda	Ethiopia	Traditional	06048
07/08/1984	Comoros	Malawi	Traditional	03350
29/08/1960	Egypt	Ghana	Traditional	01556
20/06/2000	Gambia	Namibia	Traditional	10098
26/12/1965	Morocco	Egypt	Traditional	01855
29/10/2014	Mozambique	Kenya	Traditional	05760
10/05/2002	Mozambique	South Africa	Traditional	04610
20/06/1980	Benin	Burkina Faso	Traditional	03461
15/03/1968	Benin	Ghana	Traditional	02169
07/12/2016	Benin	Cape Verde	Full Liberalisation	010812
23/05/2018	Rwanda	Angola	Traditional	06040
19/12/2003	Botswana	Zimbabwe	Traditional	10027
12/12/2003	Botswana	Tanzania	Traditional	10028
16/08/2013	Burundi	Rwanda	Full Liberalisation	06046
01/05/2017	Burundi	Tanzania	Traditional	05890
13/05/1973	Central African Republic	Mauritius	Traditional	02508
04/11/2015	Rwanda	Central African Republic	Traditional	06049
09/04/2007	Morocco	Central African Republic	Traditional	05680
12/02/1974	Mali	Chad	Traditional	02474
12/12/2003	Rwanda	Chad	Traditional	06050

4.3 Interpretation of the provisions of Article 6.9 of the YD

For purposes of operating intra-Africa flights under Article 6.9 of the YD an airline must meet the requirement listed below:

‘6.9 Eligibility criteria
To be eligible, an airline should:

(a) be legally established in accordance with the regulations applicable in a State Party to this Decision;

(b) have its headquarters, central administration and principal place of business physically located in the State concerned;

(c) be duly licensed by a State Party 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 State Party.’

4.3.1 Article 6.9(a) of the YD

Before analysing article 6.9 of the YD it is worth to recall that Article 2 of the YD provides that the YD has precedence over multilateral and bilateral agreements on air

services between State Parties to the YD which are incompatible with the YD and those agreements which are compatible will remain valid and are supplementary to the YD.

Prima facie, Article 6.9(a) of the YD is not very helpful if the idea was to completely relax airline ownership and control. For example, in Nigeria, South Africa and Rwanda as a matter of domestic law, in order to have an airline granted an operating license by the appropriate authority it is imperative to show that the airline is either owned by citizens or persons resident in Nigeria, South Africa or Rwanda and in case it is a company at least 75% of the voting rights in the company are held by citizens or residents of these countries. It goes without saying, in that, if only airlines which meet the above requirements may be registered, then where local airlines must be designated to operate intra-Africa air services only those which meet the local requirement will be designated and it will be airlines substantially owned and effectively controlled by residents or nationals of these States which will be designated. In this context Article 6.9(a) is not helpful because the State would have complied with its domestic laws but have introduced airline ownership and control requirement a provision from which there was a deliberate decision to move away from in the YD.

Article 31(1) of the VCLT provides guidance in interpreting treaties and provides as follows: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

Where the text of Article 6.9(a) of the YD is accorded its ordinary meaning it is possible to arrive at an interpretation where the requirement of airline ownership and control is still valid and thus permissible under the YD. Thus, where the domestic law of a particular African State still calls for ownership and control of an airline to substantially remain with nationals or residents of that State then only such airlines may be designated by that State it cannot be said that there is non-compliance with Article 6.9(a) because the State would have complied with its domestic laws as required under the said Article. Some African States whose domestic laws still calls for airline ownership and control maintain that their actions are in compliance with Article 6.9(a).

In facts, some advocates of the Single African Air Transport Market argues that States are sovereign and thus it is within their rights to determine their domestic policy without interference from the outside and therefore where the domestic law calls for airline ownership and control it should be a problem. Without venturing into the State's ability to enter into agreements with other States and decide its domestic affairs exclusively, suffice to say domestic policy may influence how the State will behave international but also when a State freely chooses to enter into international agreements such may affect its domestic policy.

Returning to the interpretation of the provisions of the YD, where the provisions of Article 6.9(a) are to be accorded ordinary meaning within the context and in light of the object and purpose of the YD it is possible to arrive at an interpretation where the requirement of airline and ownership is invalid. As indicated in the introduction to this dissertation the purpose of the YD was to bring about liberalised intra-Africa air transport market. The idea was to create greater market access for airlines from African State regardless whether they were owned by Africans or not. If the requirement of ownership was or is used to deny market access for intra-Africa flights for African airlines, then such a requirement is contrary to the object and purpose of the YD.

Where the designating African State does not have laws which dictate that the airline must be owned and effectively controlled by nationals or residents of such State then it will be difficult for the receiving States to argue that the airline which is designated must be substantially owned and controlled by nationals of the designating State because there is no such requirement in the domestic law of the designating State. However, where such obligation exists in the domestic law of the designating State then the receiving State may well refer to such obligations,[3] but even so, domestic law must not be used to frustrate or render the State non-compliant with an international agreement, after all the State freely choose to enter into the international agreement knowing fully well what it stand for.

[3] With respect to South Africa see, International Air Services Act No. 60 of 1993, section 17 (5) (a), (b) and (c)

Suffice to say, Article 6.9(a) of the YD must be interpreted in the light of Article 31(1) of the VCLT, and if such interpretation is accorded to Article 6.9(a) there can be no doubt that airline ownership and control is excluded from the YD.

4.3.2 Article 6.9(g) of the YD

Article 6.9(g) requires that the State where the airline is legally established, which may also be the principal place of business of the airline, must be effectively in control of the airline, whereas in most BASA usually the requirement is that either the State designating the airline or nationals of that State or both must be effectively in control of the airline. 'Effective control' has a specific meaning in BASA and generally in air law. In the YD effective control has been defined as follows:

'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 substantial part of the assets of the air carrier.'

In EU Regulation 1008/2008/EEC under the definition clause define 'effective control' as follows:
'effective control' means a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by…; a) the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.' The EU definition is more extensive but both the EU and YD definitions essentially indicate that it is about decisive influence on the running of the business of the airline and similar definitions can be found in many other BASA.

From the reading of the definition 'effective control' in the YD it becomes clear that there is a contradiction between the definition clause and Article 6.9(g). It is not clear

why in Article 6.9(g) effective control has been limited to the State only. It is an accepted norm in interpretation of treaties that a treaty must be read as a whole and the preamble and definition clause are part and parcel of the treaty. Thus where the text is not clear or vague it is normal to turn to the preamble and in this case the definition clause of the YD to get clarity and this approach is supported by Article 31 (2) of the VCLT.

It is common knowledge that today not only States are in the business of running airlines but private persons and companies are also involved. Therefore, to limit effective control to States only in Article 6.9(g) was naïve, to say the least. It becomes apparent that the drafters of Article 6.9 tried by all means not to make reference to nationals of the designated airline even if it does not make sense if the definition of effective control is taken into consideration.

There is a difference between effective regulatory control of an airline which is mostly concerned with regulating safety and security aspects of civil aviation and whereas effective control of an airline is concerned with managing the business side of the airline. Articles 6.9(c) and (f) deals with safety and security issues because an airline cannot be duly licensed if it does not meet the safety and security requirements. Even if African States argue that airline ownership and control is no longer the requirement, the opposite seems to indicate that it still does apply in that at least Article 6.9(g) recognises that the State where the airline is incorporated must have effective control of the airline, that is, 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 substantial part of the assets of the airline.

The definition of effective control indicates the people or target groups which according to the YD are intended to benefit from the business of providing air services and that is in line with airline ownership and control criteria as applied throughout the world.

Given the above analyses, Article 6.9(g) must be amended so that it speaks to the definition of ‘effective control’ in the YD. Save, for the comments raised in respect of Article 6.9(a) and (g) other articles are found to be generally acceptable.

4.3.3 Conclusion

Even if African States proclaim that airline ownership and control is no longer a requirement for purposes of market access under the YD, a closer analysis of the provisions of the YD suggest otherwise or at least contradicting principles in the YD.

4.4 Purpose of airline ownership and control

In international air services, the liberalisation debate was initially about product liberalisation, that is, no or limited governmental intervention in deciding air traffic fares, the capacity of aircraft which may be used in the operations of such services and frequency of service. However, of late the debate is not about which granted air traffic rights may be exercised, limited governmental intervention in deciding air traffic fares, the capacity of aircraft or frequency of service but also about which airline may exercise the rights so granted, hence the push for liberalisation of airline ownership and control.

'The national ownership and control criterion, which has been used since the 1940s, provides a convenient link between the carrier or airline and the designating State by which parties to the agreement can: a) implement a "balance of benefits" policy for the airlines involved; b) prevent a non-party State through its carrier from gaining, indirectly, an unreciprocated ("free rider") benefit; and c) identify the country that is responsible for safety and security oversight. National defence considerations are also a factor in some cases. The nationality clause made obvious sense in the days when most airlines were State-owned.'[4] The elements of national ownership and control criterion as identified will be briefly discussed below.

4.4.1 Balance of benefits policy for the airlines Involved

Balance of benefits is at the heart of a trade agreements, that is, the parties to an agreement must both benefit from the agreement and this speaks to the principle of reciprocity. The strength of airlines may not be the same, thus States to BASA must

[4] See, (note 29, Chapter 2) paragraph 1.2 page 7

ensure that there is equitable sharing of benefits coming out of the BASA, and one way of doing that is to regulate airline ownership and control.

There can be no balance of benefits where the owners of the airline are national of a third State and the benefits of the BASA accrue to them simply because they have registered an airline in a country which is party to the BASA.

4.4.2 Prevention of a non-party State through its carrier from gaining, indirectly, an unreciprocated ("free rider") benefit

As alluded to already it cannot be the intention of two States to a BASA to benefit a third State or its nationals from an agreement of which they are not party. The exclusion of airline ownership and control in the YD creates an avenue for none African States or their nationals to put up airline shops in Africa and benefit from opportunities created by the YD. In the event it happens, then the question must be asked as to whether the YD has any substantive value for Africans, accept for transporting passengers and goods by air and maybe at reduced air fares.

4.4.3 Possible flight of foreign capital which could lead to less stable air operations.

It may well be argued that relaxing the airline ownership and control there will be foreign direct investment and therefore the needed jobs will be created but then the question is how many people could be employed and paid which salary. It is common practice in airline business that the airline brings with it its core staff which is usually technical, pilots and management staff and where that is allowed to happen then the benefits which comes with establishing an airline which is predominantly foreign owned are minimal.

The primary purpose of making an investment is to make profit. Where an investor is a foreign national or not a resident of the State in which he is investing the likelihood of repatriating capital and profits to his country of nationality or residence is great and in fact normal. African States have seen significant foreign direct investment in industries like mining and fisheries but the real benefits of these investments are not experienced by Africans but rather the investors. Some African States like Mozambique after many years of foreign investments in the fisheries sector today they are left with little fish in their territorial waters and exclusive economic zones and no

tangible benefits to be proud about. There is no reason to belief that the airline industry will do better than the two industries when there is direct foreign investment.

4.4.4 National defence

It matters for States on who owns and control a sector as critical as aviation. In September 2011, with the two aircraft which crashed into the twin towers in New York, USA the world was made aware that an aircraft could be used as an object to commit a crime. Given this reality and the consistent threat to the security of civil aviation it matters who owns and control and airline and if needs be, foreign ownership must be limited. Further, today it is common knowledge that air transport plays an important role in driving the economy of many countries in that there is mass movement of people and goods at a relatively short period of time, however, this advantage could easily be sabotaged if left unchecked.

4.5 Benefits of derogating form airline ownership and control according to ICAO

Below is an extract from Worldwide Air Transport Conference which was held from 18 to 22 March 2013.

'During the last decade, along with the trend of liberalization and globalization as well as regional economic unification, international air carriers have sought to adapt to increasing cost pressures, need for capital and heightened competition in a number of ways, including through cooperative arrangements such as alliances, code sharing, joint ventures and franchise operations, some of which have involved transnational investment (obtaining equity in air carriers from other States). Privatization of formerly state-owned air carriers has sometimes resulted in foreign investment in the privatized carriers. Transnational investments in air carriers have also occurred against a backdrop of widespread multinational ownership in other service industries.'[5]

[5] ICAO, working paper ATCon/6-WP-12, paragraph 3.1, p 7

4.5.1 Cooperative arrangements

Change is unavoidable and where necessary it must be encouraged. The arrangements on cooperative arrangements such as alliances, code sharing, joint ventures and franchise operations, as well as some transnational investment are welcomed developments.

In an analysis of the benefits of the Single African Air Transport Market (SAATM)[6] by IATA's Manager, Advocacy & Strategic Relations, in Africa it has been indicated that there is little cooperation between African airlines and if the African airlines are to have any meaningful competition with non-African airlines and to make profit then cooperation is one of the vehicles they must embark upon. The same concern was raised by the Ethiopian Airlines Group CEO, Tewolde Gebremariam[7] , who warned that airlines outside Africa will dominate the continent's airline industry, unless African airlines combine resources to archive critical mass. He indicated that African airlines faces stiff competition from the non-African airlines, particularly airlines from the Middle-east, Emirates, Qatar Airways and Etihad, including European airlines such as Turkish Airlines which flies to more than 40 destinations in Africa. According to him at least before 2016 African airlines had 40% share on the intra-Africa market but now it has been reduced to 20% and thus non-African airlines have 80% of the intra-Africa market share. This is rather a scary picture which needs serious political intervention. The only way how this picture may be reversed is to restrict 5th freedom of the air to African airlines and to introduce a requirement of airline ownership and control for intra-African flights.

Some African airlines have entered into cooperative arrangements with Emirates, Qatar Airways, Etihad, Turkish Airlines, and other non-African airlines but it has not been helpful, because according to IATA it is only in 2010 (the year of the soccer

[6] S. Chipunza, 'The Benefits of the Single African Air Transport Market (SAATM)', 5 July 2018, Windhoek, Namibia

[7] *https://www.ainonline.com/aviation-news/air.../african-countries-contemplate-new-mu...(*last visited on 17 July 2018)

world-cup in South Africa) where Africa airlines managed to make profits thereafter they have been making big losses.

Entering into cooperative arrangements is not as simply as suggested in the paper that was presented at Worldwide Air Transport Conference referred to above. Airlines are selective when they enter into cooperative arrangements and acceptably so, because their reputation is at stake. Therefore naturally economically weak airlines will find it difficult if not impossible to enter into a code share arrangement with economically strong airlines because of branding issues.

4.5.2 Transnational investments

One of the reasons why African States decided to exclude airline ownership and control in the YD was primarily to have access to foreign investments, that is, accesses to capital from non-African investors.

Even with the removal of what is regarded as an obstacle to foreign investment in airline business in Africa such investment have not been coming forth or where it did it is not encouraging.

4.5.3 IATA 12 Country Study on liberalisation of air transport in Africa

IATA commissioned a study on the liberalisation of air transport in 12 African countries namely Ghana, Nigeria, Senegal, Angola, Namibia, South Africa; Algeria, Egypt, Tunisia; Ethiopia, Kenya and Uganda. The study amongst others compared passenger numbers, capacity of aircraft used and frequency of operations between 2014 and 2016. Some of the countries like South African, Namibia, Angola, Nigeria, Ghana and Egypt still maintain airline ownership and control clause in their respective BASA.

The study did not consider relaxation of airline ownership and control but rather the increase in the number of frequencies by airlines and increase in capacity of aircraft for all the 12 countries. The study showed that between 2014 and 2016 there has been an increase in the total number of frequencies by 9% and total number of passengers increased by 8% and the net impact was that there was additional 4 intra-Africa routes between the 12 countries.

Thus increase in the number of passengers, frequencies and additional routes in the 12 countries is an indication that airline ownership and control is not an obstacle to the growth of aviation in Africa. In fact, in North America, and Asia where the growth of aviation supersedes any other regions of the world, airline ownership and control is still a key requirement for market access.

4.5.3 Conclusion

The purpose of airline ownership and control is to prevent potential emergence of flags of convenience particularly in the absence of effective regulatory measures to prevent this phenomenon. It would be of no help to get foreign direct investment in the airline industry if such can be negated by possible flight of foreign capital which could lead to less stable operations of African airlines.

Cooperative arrangements in airlines industry are welcome measures but they are of little help when the parties entering into them or even competing are not at the same level. The working paper on Worldwide on Air Transport Conference referred to above warned that there 'may also be potential implications on airline competition as a consequence of possible industry concentration (i.e. the air transport system being dominated by a few mega-carriers through mergers or acquisitions), a reality that exists in most other service sectors.' The three Middle-east airlines referred to above and operations of the Turkish Airline in Africa may be a case in point. In the interim the mega-airlines may bring about competition in the market, however, in the long run the benefits of competition may declining due to dominance of some airlines.

The study commissioned by IATA on 12 African countries shows that air transport liberalisation can be effective without liberalising airline ownership and control.

It is important that where the air transport is being liberalised specific attention must be paid to the geographical area of operations and possible consequences of liberalisation.

CHAPTER 5: NATURE OF OBLIGATIONS ASSUMED UNDER THE YD

5.1 Nature of obligations assumed by the African States under the YD

In Chapter four it has been demonstrated that the YD has been breached, at least by some African States. Given the continuous breach of the YD by some African States, the second issue for consideration under the propblem statement was whether the YD could be saved or is termination its ultimate fate.

'An important, though often neglected, the distinction between multilateral treaty obligations separates obligations of a bilateral nature from those of the collective or *erga omnes partes* type. Multilateral obligations of the bilateral type can be reduced to a compilation of bilateral state-to-state relations. They can be compared to contracts. Collective obligations, in contrast, cannot be divided into bilateral components. They are concluded in pursuit of a collective interest that transcends the individual interest of the contracting parties.'[1]

The Reservation to the Genocide Convention case (1951) presents one of the first signs of the difference between the distinction between bilateral and collective obligations. In the Genocide Convention case, the ICJ noted that 'the Convention was manifestly adopted for purely humanitarian and civilising purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree since its object, on the one hand, is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principle of morality.'[2] The ICJ opined that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose the Convention; otherwise, that State cannot be regard as being a party the Convention. Further, the ICJ in the Barcelona traction case, which

[1] J. Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature', EJIL(2003),Vol. 14 No. 5. 907-951

[2] ICJ Reports 1951, p. 15 para. 23.

was subsequent to the Genocide Convention case also dealt with the question of different obligations which may be assumed by States.

Although the YD is a multilateral treaty which is binding on most if not all African states as alluded to in Chapter 3 above, on closer analysis of the provisions of the YD, some obligations are of a bilateral type. For example, article 6 of the YD provides that each State party shall have the right to designate in writing at least one airline to operate the intra-Africa air transport services and such designation shall be notified to the other State party in writing through diplomatic channels. Article 6.10, empowers a State party to revoke, suspend or limit the operating authorisation of a designated airline of the other State party when the airline fails to meet the criteria of eligibility, last but not least article 8.1 provides that in case of any dispute between State parties relating to the interpretation or application of the YD, the State parties concerned shall in the first place endeavour to settle the dispute by negotiation and only thereafter through arbitration. Regrettably, the rules on arbitration under appendix 2 have not been promulgated.

It is important to highlight two things from the outset, and that is the fact that some obligations under the YD are bilateral in nature does not make them less binding, and the fact that the YD as a multilateral treaty does not determine whether the obligations assumed are multilateral or bilateral, an analyses of each obligation assumed will determine whether it is a multilateral or bilateral obligation.

The bilateral nature of the YD obligations is perhaps more apparent when examining the provisions on designating airlines, suspension, revocation or limiting operating authorisation and dispute resolution points to a system of bilateralism, in contrast to collective obligations. With respect to designating airlines, the one or more States designate the airline, and the other State accepts the designated airline and only the State which has accepted the airline may revoke or suspend its operations. Generally, in order to have legal standing a party to a dispute must show that it has vested right in the dispute. The party must show that is has suffered harm or is likely to suffer harm if it does not take steps to mitigate harm through litigation. This point is confirmed by GATT Article XXIII which provides that any WTO member may start proceedings if it

considers that any benefit accruing to it directly or indirectly under the GATT is being nullified or impaired.

In a multilateral treaty where obligations are of a bilateral nature it is only the States which have vested rights or States which have a dispute which shall have legal standing, whereas in a collective obligation or *erga omes* parte set-up all States have an interest in the resolution of the dispute and may on their own accord intervene in the dispute.

Contrary to GATT Article XXIII, GATS Article XXIII.I provides that if any Member should consider that any other WTO Member fails to carry out its obligations or specific commitments under that Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the dispute settlement procedures. In terms of the GATS regime a Member may institute 'violations claims' or 'non-violation claims'. 'Violation claims' involve allegations that a Member has violated the rules and a 'non-violation claim' is a dispute in which a Member believes that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member made under Part III of the GATS is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of the GATS. A 'non-violation claim' under the GATS does not involve any allegation that a Member has violated any obligations or specific commitments. Rather, the claim is that a benefit that a Member reasonably expected it would receive as a result of a specific commitment made by another Member has been nullified or impaired. The causes of action for 'violation' and 'non-violation' claims under the GATS are somewhat different and more specific than the causes of action under Article XXIII of the GATT 1994. However, once a claim is brought pursuant to paragraphs 1 or 3 of Article XXIII of the GATS, the rules and procedures of the DSU apply to that proceeding.

Under the YD disputes are limited to the parties to the dispute and perhaps that is the reason why African States continue to breach the YD. In Chapter 3 it was recognised that two States or more may modify or suspend the operation of a multilateral treaty provided it does not affect the rights and obligations of other parties to the treaty. In case of a dispute or non-compliance with a multilateral treaty States may renegotiate

and rearrange their activities between themselves and this is what is mostly happening with respect to the YD. For example, some States agree that the requirement of airline ownership and control must apply although that is contrary to the YD.

Although obligations assumed under the YD proves to be bilateral in nature it may be a good idea to enforce them collectively so as to ensure stricter compliance with those obligations. Therefore, it is worth to consider inserting a provision that will give legal standing to all African States in case of breach of the YD, something similar to GATS Article XXIII.I. Where the YD is amended to provide that all African States have legal standing in case of breach of the YD, States will be invoking the provision of the YD to claim standing and need not prove that they are especially affected by the non-compliance with the provisions of the YD by one or more of the other States. Where modification or suspension of the YD provision contrary to the object and purpose of the YD at least any African State may have legal standing to prosecute non-compliance with the provision of the YD.

It is appreciated that the collective enforcement of the YD obligations in no way will turn those bilateral obligations into collective obligations. Nevertheless, with collective enforcement, there is greater possibility that contraventions of the YD will be minimised.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

Coming to the conclusion and recommendation of the dissertation it worth revisiting the problem statement and the purpose of the dissertation.The purpose of the dissertation was to determine whether African States derogated from a rule of customary international law commonly used in air services agreements, namely 'airline ownership and control' and whether such derogation was in the best interest of African States. And whether the YD could be saved or not given its continuous breach by some African States.

It has been indicated that with the aim of being competitive in international air services, different regions of the world adopted different approaches, at regional or continental levels in respect to providing of air services. Africa has entered into a continental air services agreement in terms of which it decided to relax the requirement of airline ownership and control, because it is regarded as a limitation to Africa's growth in international air services, in particular, intra-Africa air services.

The practice or airline ownership and control date back to 1946 when the USA and United Kingdom entered into a BASA, named Bermuda I, which became a model BASA for most States.

Given that Bermuda I was adopted by many States as a model BASA, some of the provisions of Bermuda I are entrenched in international air services, in particular, the requirement of airline ownership and control. Even if airline ownership and control was initially a treaty rule in Bermuda I, it subsequently became a general State practice accepted as law, alternatively by practice crystallising as such, because some States have adopted airline ownership and control as a matter of State policy in so far as international air services are concerned.

There is no multilateral treaty obligation on States to maintain airline ownership and control in their air services agreements. States prefer this requirement as a matter of practice and believe that they have a legal right or duty to insist on such a requirement. It has been demonstrated in chapter two that airline ownership and control requirement in air services agreements met the two constitutive elements of customary international law, namely State practice and *opinio juris.*

In chapter three, it has been concluded that States have every right to derogate from a rule of customary international law and that such derogation will not apply to a third State. Therefore there is nothing wrong for the African States to derogate from the airline ownership and control requirement as a rule of customary international law.

The YD has entered into force as stipulated in the Abuja Treaty and repeated in Article 22 of the YD. Despite entry into force of the YD there is a continuous breach of the YD by some African States because some States still maintain the market access provision of airline ownership and control although it is not provided for in the YD. Perhaps the reason for continuous breach lies in the way how Article 6.9 (a) of the YD has been crafted in that it may be understood that airline ownership and control is not completely abolished. This Article must be amended to clearly state that airline ownership and control is completely abolished in so far as intra-Africa air services are concerned.

Alternatively, consensus must be reached that airline ownership and control still apply and then Article 6.9(a) of the YD must be amended accordingly. If consensus is reached that airline ownership and control still apply then Article 6.9(g) must also be amended to conform to the definition of 'effective control', that is, that effective control of the airline shall vest with a State Party or Group of State Parties or their nationals.

The benefits of airline ownership and control as a market access provision have been set out in chapter four. When comparing the benefits of maintaining airline ownership and control as a market access provision as oppose to derogating from it, there is doubt whether by derogating from the requirement of airline ownership and control Africans will substantially benefit from operating intra-Africa air services.

Finally, it is worth to consider inserting a provision in the YD, which gives legal standing to all State Parties to the YD or the African States in case of breach of the YD. On a bilateral level States turn to reach consensus or simply terminate an agreement when there is a breach, and this phenomenon has the disadvantage of not addressing the root causes of the breach of the agreement and traders are the most affected in case of breach of trade agreements. In case of breach of the YD, States which are not

directly affected by the breach may come to the rescue of the airlines, airports and air navigations service providers as traders, including the innocent State.

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