AN OVERVIEW OF INTERNATIONAL AVIATION LAW: ISSUES IN DOMESTIC IMPLEMENTATION IN NIGERIA

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1.1 Introduction

Transportation is an essential part of human activity and in many ways forms the basis of all socio-economic interactions. Indeed, no two locations will interact effectively without a viable means of movement. A good transport system is, thus, essential to support economic growth and development.[1] Nigeria's commercial transportation system includes road, rail, water and air transport. All the transportation systems are covered by a series of varied policies and laws designed to tackle the challenges facing the transport sector

Of all the conventional commercial transport systems in Nigeria, air transport has the comparative advantage of speed, time saving and comfort. Air transport as a mode of transportation has made tremendous impact on human history, advancement and development. It has bridged continents, broken geographical, cultural and other primordial barriers, transformed the airspace into a network of air routes and a global highway for inter and intra continental commerce.[2] According to Tyler[3] "Today, aviation is the life blood of global economy"[4] and that the industry supports over 58 million jobs and $ 2.4 trillion in annual economic activity. It has turned our wonderfully big planet into a wonderful small world of enormous and wonderful opportunities, thereby creating a "very big future for us all."[5] Sadly, air transport has not only been used for altruistic purposes but also for destructive purposes such as warfare and acts of conscious interference with air navigation such as hijacking aircraft and using same as weapons of destruction as happened on September 11, 2001 when the twin towers of the World Trade Centre as well as other targets in the United States of America

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1 National Bureau of Statistics (NBS), Transport Statistics, http://www.nigerianstat.gov.ng/sectorstat/sectors/transport accessed on 19/08/2014
2 Inasuen, S. Overview of Developments in Aviation, Paper Presented at Airports Management Course, Organized by the Nigerian Institute of Transport Technology (NITT) Zaria, October 2002
3 Tyler, T, (2014) State of the Air Industry Today, Address on 2/6/2014 by IATA's Chief Executive at the 70th Annual General Meeting of IATA at Dohar, Qatar at http://www.iata.org/pressroom/speeches/pages accessed on 22/7/2014
4 Ibid
5 Ibid

were bombed using hijacked aircrafts. This led to a death toll of about 3,000 people.[6] The downing on 17th July, 2014 of Malaysian aircraft Mh17 in Ukraine by Pro-Russian separatists led to the death of all 298 lives on board the aircraft[7]

Civil aviation is a critical element in Nigeria's transportation system and indeed its economy. The domestic or passenger traffic for the period January 2012 to December 2013 according to figures released by the National Bureau of Statistics in April, 2014 shows that air transport contributed ₦36.6 billion in 2011; ₦ 42.7 billion in 2012 and ₦ 48.8 billion in 2013 representing an average of 4.8% of transport sector and an average of 0.05% of total nominal GDP during the period. In 2012, 14,084,651 domestic passengers travelled within Nigeria while in 2013 there was an increase of 1.3% with 14,277,410 passengers plying our 20 airports.[8] Nigeria's population of over 168m is the seventh largest in the world, the largest in Africa and estimated to reach 230 million within the next 20 years.[9] This presents a huge market and potential for the development of an enviable aviation industry. Considering the population, land mass, our transport infrastructure and air traffic, Nigeria ought to become a global force to reckon with as far as aviation business is concerned. This should translate to good earnings from the sector, better infrastructure, job creation and high standard of safety record. This cannot, regrettably be said of Nigeria's aviation industry today. Foreign airlines repatriate a huge chunk of revenue that would otherwise accrue to Nigeria to their countries. It is estimated that Nigeria loses over ₦ 120 billion to ₦ 350 billion annually to foreign countries which operate international flights into Nigeria under Bilateral Air Services Agreements (BASAs).[10]

Aviation is both a national and global enterprise. Its contribution to human history, advancement and development is undoubted but paradoxically so also is its capacity for destruction through breaches of safety and security. The industry is an one that is highly regulated at the global and national level by a complex of international and national legal instruments.

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[6] New Nigerian Newspapers, September 12, 2006 p. 15

[7] Odiogor, H (2014), Malaysian Flight M17: Making the Skies the Choice Spot for Terror Strikes, Vanguard Newspapers, 20/7/2014, at file:///c:/users/user/downloads/malaysianflightm17 accessed on 22/7/2014

[8] Nigeria Bureau of Statistics (NBS), Domestic Air Passenger Traffic January, 2012 – December 2013 at www.nigerianstat.gov.ng, April, 2014 accessed on 26/6/2014

[9] Sanusi, L. S, "Central Bank of Nigeria Intervention in the Power Sector: The Journey so Far," Presentation by CBN Governor to the 2nd World Stage National Power Conference, 2012 available at www.worldstagegroup.com/worldstagenews/media accessed on 26/4/2014

[10] Ekwere, U "Nigerian Airlines Lose more Ground to Foreign Counterparts", Punch Newspaper, 20th January, 2014

The objectives of this paper therefore, are to consider the applicability of international aviation law as sources of aviation law in Nigeria as well as to examine salient issues arising from the implementation of international aviation law instruments in Nigeria. The ultimate aim through this exposition is to enthrone a robust regime of implementation of aviation law in Nigeria that will promote efficiency, safety and good returns for Nigeria. This will enable the country occupy her pride of place in the comity of nations as a major/global hub in the aviation business. This will in turn have a major and positive impact on our domestic economy as well as our citizens.

1.2 Conceptual Clarification of Key Terms

Three key terms such as overview, implementation and international aviation law are examined here. The word overview is defined as "a broad, comprehensive view; a survey"[11] as well as "a summary of review"[12] and as "an inspection, a general survey."[13] Overview with regards to academic writing therefore, means a summary, survey or review of a particular issue, a miniature or a bird's eye view of a particular position, postulation or even institution.

On the other hand the word "implementation" is defined as "to give effect to; to fulfill or perform"[14] and, "apply in a manner consistent with its purpose or design, ensure observance of laws and rules; pursue to a conclusion or bring to successful issue."[15] Implementing an international treaty means "putting the treaty into effect… covers all those measures which must be taken to ensure that the rules of international… law are fully respected."[16] Implementation therefore, is the observance, fulfillment, performance or translation of, (in this case, legal instruments) to give practical effect to in order to attain the objectives of the legal instruments.

Lastly, aviation law is the law that governs the legalities and business aspect of flight and air transport. This includes air traffic rights, aviation safety and security, economic regulations of airlines as well as the operation of airports amongst others.[17] Aviation (also referred to as air) law, therefore,

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[11] The free Dictionary at http://www.thefreedictionary.com/overview, accessed on 8/9/2014

[12] Ibid

[13] Chambers English Dictionary (1990) 7th Ed, W & R Chambers Ltd, Edinburgh

[14] Chambers English Dictionary, 7th Ed, W & R Chambers Ltd, Edinburgh, (1990) p. 715

[15] Audio English ne at http:///www.audioenglish.net/dictionary/implement.htm accessed on 23/01/2012

[16] Ladan, M. T. (2008), Materials and Cases on Public International Law, Ahmadu Bello University Press Ltd, Zaria p. 195

[17] Aviation Safety Bureau "Keeping the Industry Fair and Safe" at www aviation-safety-bureau com/aviation-law htm accessed on 9/8/2014

comprises the body of legal principles and rules from time to time effective, which governs and regulates flight, flight space, the extent and character of the rights of individuals and States to use or control such space for flight or other purposes; the instrumentalities with which flight is effected, including their nationality, ownership, use or control; the surface facilities used in connection with flight, such as airports and airways; the relationships of every kind affecting or between individuals, communities or States arising from the existence or use of the area of flight (flight space).[18]

Due to the nature of air travel, aviation law is both national and international in scope. In 1910, the first conference on an international air law code took place in Paris. Airplanes flying through international skies are subject to international aviation law. International air laws are international legal norms regulating the rights and obligations of States when using airspace for international air travel. National air laws are the legal norms within the state pertaining to the use of a given States airspace and the regulation of air travel in the nation's air territory.[19]

1.3 Sources of Aviation Law in Nigeria

There are two major sources of aviation law in Nigeria viz: international and municipal law. Almost every question of air or aviation law has international aspects as international air law presents in microcosm all the fundamental problems of international law as a whole such as sovereignty, jurisdiction, territory, the relationship of States, conflict of laws, and so on.[20]. In the same manner, municipal law on air law as well as municipal decisions interpreting the terms of international treaties is an important source of air law for States.[21]

Article 38(1) of the Statute of International Court of Justice (ICJ) directed the ICJ to apply the following as international law:

a. International Conventions;

b. International custom, as evidence of a general practice accepted as law;

c. The general principles of law recognized by civilized nations;

[18] Cooper J. C. "Roman Law and the Maxim *CujusEstSolum* in International Air Law", Institute of International Air Law, McGill university, at www.lawjournal.mcgill.ca/userfiles/other/39679-1.cooper.pdf accessed on 9/8/2014
[19] "Air Law", The Great Soviet Encyclopedia, 3rd Edition C. 2010
[20] Shawcross and Beaumont, (1977) Air Law, fourth Ed. Vol. 1 General Text, Butterworths, London p. 11
[21] Ibid, p. 15

d. 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.[22]

Besides the above apparent sources, two other sources are: decisions of arbitral tribunals bearing on legal matters; and the decisions or determinations of the organs of international institutions.[23]While the above sources of international law largely apply to international aviation law, the most common sources of international air law are, however, Conventions. The conventions or treaties could be multi or bilateral.[24]

The Convention for the Regulation of Aerial Navigation[25] was the first major multilateral convention in the field of air law. The Convention recognized the full sovereignty of states over the airspace above their land and territorial sea.[26] Other important multilateral conventions followed.

Where there are no treaties covering questions of international air law, custom will become the source of the rules to be applied.[27] Judicial and even quasi-judicial decisions are also important sources of air law. Municipal decisions interpreting the terms of the Warsaw Convention are important sources of air law.[28] The Supreme Court of Nigeria in the case of *Ibidapo v. Lufthansa Airline*[29]held that the Warsaw Convention is applicable to the country. In the same manner, various international tribunals have jurisdiction to settle aviation disputes involving states (which consent to the jurisdiction of the tribunals). The tribunals include the International Court of Justice which may entertain disputes covering international airspace, give advisory opinions to the International Civil Aviation Organization (ICAO), determine questions regarding the interpretation or application of individual conventions concerning air law and hear appeals from the decisions of the ICAO Council concerning disagreements or complaints;[30] the Council of ICAO, though not composed of jurists or lawyers has been delegated extensive powers in the settlement of international aviation disputes;[31] and special arbitral tribunals provided for by treaty or agreed to by the parties to a dispute.

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[22]See Article 38(1) of the Statute of the ICJ

[23] Shearer I. A. (1994) "Starkes International Law", 11th Ed., Butterworths, London p. 29

[24] Shaw Cross Op. Cit p. 15

[25]signed at Paris on 13th October, 1919

[26] Ibid p. 29 and p. 370

[27] Ibid p. 15

[28] Ibid

[29] (1997) 4 NWLR part 498

[30] Shaw cross Op. cit. p. 39

[31] Ibid

1.3.1 The Chicago Convention of 1944

The Chicago Convention of 1944 gave birth to the International Civil Aviation Organization (ICAO). Article 43-55 of the Convention provides for the formation, Organization, Council and Assembly of ICAO which came into force on 4th April, 1947. Under Article 7 of the United Nations Charter, ICAO is a special agency of the U.N with headquarters at Montreal, Canada. It is made up of an Assembly, a Council, subsidiary bodies as well as the Air Navigation Commission.[32]

ICAOs objective include the development of the principles and techniques of international air navigation so as to insure safety and regularity of air transport throughout the world; to promote the development of all aspects of international civil aeronautics; and inter alia, encourage the development of airways, airports and air navigation facilities for international civil aviation. ICAO, by virtue of Article 1(i) and (ii) of the United Nations Convention on the Privileges and Immunities of the Specialized Agencies[33] and similarly by virtue of Article 47 of the ICAO possesses juridical personality. Membership is open to the signatory states which ratified the Convention, members of the United Nations[34] or members admitted by the Assembly. The Chicago Convention vests on the Council of ICAO the mandatory function of adopting international standards and recommended practices as annexes to the Convention and to notify all contracting States of the action taken.[35]

The function of adoption of International Standards and Recommended Practices (SARPS) in matters concerning the safety, regularity and efficiency of air navigation as may from time to time appear appropriate[36] is regarded as one of the most important functions discharged by ICAO.[37] The SARPS are designed to achieve the "highest practical degree of uniformity in regulations, standards, procedures and organization in relation to aircraft, personnel, airways, and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation."[38]

Pursuant thereto to this mandatory function, the ICAO through its Council, adopted 19 international standards and recommended practices (designated

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[32] See Articles 43, 56 and 57 of the Chicago Convention

[33] New York, 21st November, 1947, Nigeria ratified the Convention on 26th June, 1961

[34] Nigeria ratified CICA, Chicago on 14th November, 1960, see "Status of Nigeria with Regard to International Air Law Instruments" at www.icao.int/.../legal/status%20of%20individual%20states/nigeria_en-pdf accessed on 23rd July, 2014; Nigeria is a member State of the United Nations.

[35] See Article 54(5) (l) of the Chicago Convention.

[36] Article 37, Chicago Convention, 1944

[37] Cheng, B. (1962), The Law of International Air Transport, Stevens & Sons Ltd, London, Published under the auspices of the London Institute of World Affairs pp. 70,71

[38] Ibid

as annexes to the Convention) which are presently in force.[39] The SARPS do not have the same legal binding force as the Convention itself, because Annexes are not international treaties. Moreover States agreed to "undertake to collaborate in securing... uniformity,"[40] not to "comply" with. Also, Article 38 permits any State which finds it impracticable to comply in all respects with any SARP or which deems it necessary to adopt regulations or practices differing from those established to give notification to the ICAO of the differences between SARPS and its own regulations and practices. ICAO verifies compliance with SARPS through audits of state oversight systems. Currently there are two audit programmes viz: the Universal Safety Oversight Audit Programme (USOAP), and the Universal Security Audit Programme (USAP).[41] The provisions permitting departure from the annexes by states appear to have considerably whittled down the weight and potency in the enforcement of the SARPS. The interpretation of what each contracting state considers "impracticable" as to warrant departure is left to be subjectively construed by each State without the guarantee that the standards will not be lowered by States to the detriment of safety and regularity of air navigation.

Air Services Agreements may be in the form of Bilateral Air Services Agreements (BASAs) or Multilateral Air Services Agreements (MASAs). During the Second World War (WWII), it became clear that aviation needed to be organized on a worldwide basis, rather than regional basis. President Roosevelt of the United States of America (USA), upon the realization of a necessity for the provision of a sound basis for the organization of civil aviation after the war, invited a large number of governments to attend a conference in Chicago. 52 governments attended the conference in 1944.[42]

The conference formulated the Convention on International Civil Aviation (CICA), better known as the Chicago Convention 1944 which came into force on 4th April, 1947. The Conference also set up the ICAO[43]

Besides the interim agreement and the main Convention, the conference drew up two other agreements viz: the International Air Services Transit Agreement (IASTA) or the "Two Freedoms" agreement and the International Air Transport Agreement (IATA) or the "Five Freedoms"

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39 The SARPs are 19 in number

40 Article 37 of the Chicago Convention, 1944

41 ICAO Working Paper SP AFI/08-WP/32 15/9/08 at www.icao.int/WACAF/AFIRANODoc/sp-afi_wp32_en.pdf accessed on 25th July, 2014

42 Johnson, D.H.N, (1965) "Rights in Airspace" Manchester University Press, Oceana Publications Inc., U.S.A

43 Shearer, I.A. Op. Cit. p. 213

Agreement.[44] The general principles of the Chicago Convention of 1944 includes the recognition and provision of States' sovereignty over the airspace above their lands and territorial sea. Article 1 of the Chicago Convention 1944 reiterated the provisions of Article 1 of the Paris Convention 1919 for the Regulation of Aerial Navigation. There thus, is no right of passage over the airspace above the territory of the State save with the agreement of the State concerned. By the above article, the principle of sovereignty and State security dovetailed and blended with those of protection of national economic interest.

Secondly, the Convention by Article 7 of CICA granted to the subjacent States the right of cabotage (that is the subjacent State is given the exclusive right of commercial air transportation within its territory). With regards to commercial air transportation whether cabotage or non cabotage transportation, foreign air services are subjected to the authorization and permission of the subjacent State as:

> *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.*[45]

The contracting State may thus restrict, refuse or in allowing such flights designate the route to be followed and the airport which may be used.[46]

Thirdly, the Convention gave some limited right to aircraft not engaged in scheduled international air service, (that is private aircraft or aircrafts involved in charter flights for remuneration that do not have a defined timetable or schedule of operation) to make flights into or in transit non-stop across a foreign contracting States' airspace without the necessity of obtaining prior permission.[47] This is however, subject to the right of the State flown over to require landing, or for reasons of safety of flight to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes or to

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[44] Ibid

[45] Article 6 of the Chicago Convention, 1944

[46] Ibid, Article 68

[47] Article 5, Chicago Convention, 1944

obtain special permission for such flights.[48] The rights given by Article 5 have in practice, however, been restrictively and harshly interpreted due to the "hostility of governments as a whole and the ICAO Council to the provision and the rights." [49] States have consequently required that permission be obtained prior to the acceptance of charter flights over or into their territory, notwithstanding the provisions of Article 5.

The Chicago Conference according to Johnson "agreed to disagree" on the issue of scheduled international air service[50] (that is service performed by aircraft for the public transport of passengers, mail or cargo[51] for remuneration in such a manner that each flight is open to use by members of the public according to a published timetable or with flights so regular or frequent that they constitute a recognizably systematic services and passes through the airspace over the territory of more than one State.)[52]

1.3.2 Freedom of the Air

At the Chicago Conference a cardinal contention was basically on the issue of whether there should be freedom of the air or "order in the air" that is total freedom or controlled freedom by contracting States in scheduled inter-nation or commercial air service.[53] Due to the intense disagreement on the above issue, the Chicago Conference of 1944 resolved not to deal with the issue of scheduled international air service in the main convention, rather, the conference was constrained to draw up the two agreements aforementioned containing Five "Freedoms of the Air".

The Five Freedoms of the air, (which are rights of the airlines of each contracting State in respect of scheduled international air service) were as follows:

1. The right to fly across foreign territory without landing;
2. The privilege to land for non-traffic purpose (stop over);
3. The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;
4. The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses; and

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48 Ib.
49 Jo. ison, D.H.N. Op. Cit. p. 63
50 Ib l, pp. 64, 65
51 A cle 96 of the Convention
52 I O Working Paper (2009) "Review of the Classification and Definitions Used for Civil Aviation Activities" STA/)-WP/7 16/10/09 at http://www.icao.int/meetings/atconfb/documents/doc%25209587_enpdf accessed on 01/08/ 014
53 Joh son Op. Cit pp. 64,65

5. The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory, in other words, the privilege to carry traffic between two foreign countries.[54]

1.3.3 Bermuda Agreements and Bilateral Air Service Agreements(BASAs)

Of the two agreements drawn viz: the IASTA and the IATA, the first agreement received the support of majority of the States present at the conference (32 states signed the agreement); the second agreement did not receive as much support as only 20 States signed the agreement.[55] It was felt that too much of commercial value had been granted away. Consequently, it was not ratified by many countries, and ironically, even the United States, its chief proponent withdrew from it in 1946. The countries generally felt that the sovereignty which they possess over their land territory and their air space must, in aviation matters be exploited as an economic asset.[56] Thus, the exchange of air routes simply becomes a matter of bargaining by two or more countries as the subject of allocation of traffic between competing scheduled international airlines was not settled by multilateral agreement. As a result of this failure, the regulation of scheduled services in actual practice is been achieved by an extensive network of bilateral agreements between States concerned such as the agreement between the United Kingdom and the United States on 11th February, 1946 at Bermuda which provided a framework and became a model and precedence for subsequent bilateral agreements by and between other countries. The Bermuda Agreement of 1946 was replaced by the Bermuda Agreement of July, 1977 commonly referred to as "Bermuda 2" entered into between the United Kingdom and the U.S.A.

The two Bermuda models of agreements were premised on reciprocity. In the actual Bermuda agreements, the two countries granted to each other rights to the extent described in the annex to the agreement for the

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[54] In 1944 only the first Five Freedoms were formulated. Since that time, however, four additional freedoms have been formulated and these are the sixth to the ninth freedoms. The Sixth freedom is the right to carry traffic from one country through the home country to a third country; the Seventh is the right to carry traffic from one country to another State without going through the home State; the Eight is the right to carry traffic between two points within a foreign country (i.e. domestic traffic) as an extension off a service starting or ending in the airlines own country (also known as tag on or fill up cabotage) ; and the Ninth freedom is the right to carry traffic between two points within a foreign country with no requirement to start or end the service in the airline's own country (known as pure cabotage).

[55] Shawcross& Beaumont Op. Cit. 521

[56] Shaw, M. N Op. Cit. p. 371

purpose of the establishment of the air services described therein.

The failure to reach a multilateral agreement by the contracting States at the Chicago Convention meant that air services agreements between States generally is primarily a matter of hard bargaining between parties on a bilateral basis unless there is a multilateral agreement involving a large number of States. Each bilateral or Air Services Agreement (ASA) determines the terms and conditions of market access that includes, inter alia, the number of airlines permitted to operate, the frequency of operations, the tariff structure, the level of foreign ownership permitted and city pairs available to the operating airlines[57]

Bilateral ASAs remain the primary vehicles for liberalizing international air transport services for most states. During the past decade, about one thousand ASAs were reportedly concluded. Over 70 percent of these agreements contained some form of liberalized arrangements, such as expanded traffic rights.[58] This has encouraged a proliferation of different kinds of BASAs and has not served to encourage uniformity of air services agreements internationally which was one of the primary objects of the Chicago Conference. Besides the lack of uniformity of laws and agreements is the hardship and economic loss that may be incurred by countries before signing BASAs. An example is the BASA signed by Nigeria with Sao Tome and Principe. From the exploratory talks between the two states on the desirability for the agreement in 1978, it took 28 years to sign in 2006. The absurdity is that even though the two countries are two hours apart by air, yet because there was no direct link because of the absence of a BASA, it usually took a passenger from Nigeria 22 hours to reach Sao Tome and Principe.[59]

1.3.4 Open Skies Agreements

Aside from the Bermuda I and II type of bilateral that became precedence for other countries to follow and which are generally seen as restrictive,[60] another type of bilateral which is fairly more liberal is referred to as an open skies type agreement first signed between the U.S and the Netherlands in 1992. The key feature of the agreement include full 5th freedom rights; no restrictions on capacity, fares or routings; free access to all

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[57]Decurtins, C. G. (2007) "The Air Transport Review at the WTO: Bilateralism Versus Multilateralism" PhD Thesis NO. 735 Graduate Institute of International Studies, Geneva, Switzerland p. 45

[58] ICAO Secretariat (2013), Regulatory and Industry Overview, 20th September, 2013, at http://www.icao.int/sustainability/documents/overviewtrendspdf accessed on 02/08/2014

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[60] Ibid p. 47

points in each country as well as amongst others, unrestricted designation of airlines.[61] Since then several countries, including Nigeria, signed bilateral Open-Skies Agreements with the U.S.[62] As of March, 2013, 440 Open Skies Agreements (OSAs) have been signed[63] between the U. S. and other countries including Nigeria.

1.3.5 The Yamoussoukro Declaration (YD)

The adoption of group approaches to liberalization is used as an alternative means to regulatory change and adjustment for many States.[64] The International Air Services Transit Agreement (IASTA) which entered into force in 1945, provides for the multilateral exchange of rights of overflight and non-traffic stops for scheduled air services among its contracting States. The Agreement is a cornerstone of multilateralism in air transport.[65] At the regional level, the following agreements or arrangements for liberalization of intra-regional air transport services involving Nigeria are currently in operation in Africa:

a. The Yamoussoukro Declaration on a New African Air Transport Policy (1988)
b. The Banjul Accord for an Accelerated Implementation of the Yamoussoukro Declaration (1997);
c. The Multilateral Air Services Agreement for the Banjul Accord Group (2004);
d. The Yamoussoukro Decision (1999); and
e. The Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberation of access to air transport markets in Africa of the African Union (AU) (2000).[66]

The Yamoussoukro Decision (Y.D) deals with liberalization of air transport market access. Its main objectives are to facilitate inter-African connectivity and to develop an inter-African network, removing obstacles such as restrictions on traffic and limitation on capacity and frequency between city pairs, as well as designation of competent airlines. In practice, whilst most States do apply YD, rights are granted on selective bases,

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[61] Williams, G (7.1) "Achieving Open Skies" Cranfield University, at http://revistas.ulusofona.pt/index.php.r.cacronautics/article/download/2332/1839 accessed on 02/08/2014
[62] Nigeria's Bilateral Open-Skies Agreement with the US was signed in 2000, source:- Aviation and International Affairs of the U.S Department of Transportation at http://ostpxweb.dot.gov/aviation/ accessed on 02/08/2014
[63] ICAO Secretariat (2013) Regulatory and Industry Overview Op. Cit.
[64] Ibid
[65] Ibid
[66] Ibid

influenced by the need for reciprocity and in some cases, the request for royalties to be paid.[67]

1.3.6 Aviation Industry Developments

Two industry developments with regards to airlines are worth mentioning. The airline industry has continued to undergo major structural transformation and to adjust to a dynamic market place. The global trends include airline alliances and inter alia/mergers and acquisitions.

One of the strong global trends is the formation of airline alliances: voluntary unions of airlines held together by various commercial cooperative arrangements. The phenomenon has been evolving since 1997, when Star Alliance was created by five major airlines. The expansion of alliances is a consequence of airlines response to, inter alia, perceived regulatory constraints (such as bilateral restrictions on market access, ownership and control), a need to reduce their costs, and economic incentives to restructure into larger networks as markets become more competitive. The three major global alliances are: Star Alliance, Oneworld Alliance and Skyteam. As at 2013, the membership of Star Alliance was 31 with membership from several continents. Only three airlines are members from Africa viz: South African Airways, Egypt Air and Ethiopian Airlines. Oneworld Alliance has a membership of 12 airlines. No African airlines is a member of the alliance. With regards to Skyteam, out of its 19 member airlines, Kenya Airways, is its only African airline member. Of the three global alliances having a total number of 62 airlines. Africa has only four airlines. No Nigerian airline is on any of the alliances.[68]

Another global trend is that of mergers and acquisition. Airlines in many parts of the world have resorted to mergers, acquisitions or operational integration under a single holding company. The common motive of this trend is the need to remain competitive, to gain access to new markets and achieve cost savings. Up to the early 2000's most mergers or acquisitions were within the same State, nevertheless, the opportunity for cross-border mergers and acquisitions has been increasing as the economy becomes globalized and many States adopted new policies or rules on foreign investment and control in national airlines, and relaxed the ownership and control conditions in their ASAS. Elsewhere, examples of mergers or acquisitions abound. In 2004, KLM Royal Dutch Airlines merged with Air

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[67] Ibid
[68] Ibid

France under a new parent company Air France/KLM; in 2013, US Airways and American Airlines merged and amongst others in 2010, Caribbean Airlines acquired Air Jamaica.[69]So far, there is no record of any Nigerian airline(s) involved in cross-border or domestic mergers or acquisitions.[70]

1.4 Domestication of International Air Law Instruments

Aviation, including airports, safety of aircraft and carriage of passengers and goods by air,[71] external affairs,[72]implementation of treaties,[73] meteorology,[74] and international trade[75] are all items contained on the Exclusive Legislative List made pursuant to section 4 of the 1999 Constitution vesting exclusive legislative powers to the National Assembly on those items. S. 12 of the 1999 Constitution provides for the domestication of treaties by the National Assembly before implementation. Consequently, all treaties and laws that have been domesticated by the National Assembly pursuant to S. 12 of the Constitution shall have the force of law in Nigeria.

In that regard, the repealed Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953 and the carriage by Air (Non-International Carriage) (Colonies, Protectorate and Trust Territories) Order of 1953 both made the Warsaw Convention, 1929 applicable to the country. Indeed, the Supreme Court in the case of *Ibidapo v. Lufthansa Airlines*[76] held that the 1953 Order is still an existing law in Nigeria and by virtue thereof in force and applicable. The court further held that the Warsaw Convention is still applicable to the country by virtue of the two 1953 Orders.[77]

Domestication of certain Conventions relevant to the aviation industry is one of the main thrust and objectives of the Civil Aviation Act, 2006 (CAA). Multilateral conventions signed, ratified or acceded to by Nigeria before the CAA, 2006 not domesticated in accordance with S. 12 of the Constitution were now domesticated under the CAA, 2006. For example, s. 57(1) and Schedule I of the CAA, 2006 domesticated conventions dealing with safety. The CAA, 2006 also domesticated the Convention on

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[69] Past and Future Airlines Mergers: A Brief History and Predictions, 21/2/2013 at http://thepointsguy.com/2013/02//past-and-future-airline-mergers-a-brief-history-andpredict accessed on 16/9/2014
[70] Ibid
[71] Item 3
[72] Item 26
[73] Item 31
[74] Item 17
[75] Item 62
[76] (1994) 4 NWLR Part 498
[77] Note that the 2 Orders have been repealed by the Civil Aviation Act, 2006

International Interests in Mobile Equipment, 2001 and the Protocol to the Convention on International Interest on Mobile Equipment on Matters Specific to Aircraft Equipment, 2001 (the Cape Town Convention and Protocol). The goal of the Cape Town Convention and the Protocol specific to aircraft equipment is to facilitate asset based financing and leasing of aircraft, aircraft engines, aircraft objects and helicopters to ensure that interests in such equipment are recognized and protected universally.[78] This would give Nigeria the opportunity to acquire new, modern, safe and efficient aircraft and equipment at reduce transaction costs by about 30%.[79]

The Convention for the Unification of Certain Rules Relating to International Carriage by Air, Montreal, 1999 as well as the modifications to the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Montreal, 1999 both dealing with international carriage by air were domesticated by the CAA, 2006[80]

1.4.1 Status of Nigeria with Regards to International Air Law Instruments

Nigeria has signed, ratified or acceded to not less than fourty eight international air law instruments.[81] They include the Chicago Convention 1944;[82] the Convention on the International Recognition of Rights in Aircraft, Geneva, 1948;[83] the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 1929;[84] the Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 1999;[85] the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 1963;[86] the Convention for the Suppression of Unlawful Seizure of Aircraft, the Hague, 1970, and amongst others the Convention on International Interests in Mobile Equipment, Cape Town, 2001[87]

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[78] Section 73(2) and Schedules v (b)and (c)

[79]Gaiya S. M (2006) Features and Benefits of the Domesticated Conventions in the New Civil Aviation Bill", Paper Presented at the Stakeholders Workshop on the New Civil Aviation Act, held at Hamdala Hotel, Kaduna, October 12, 1996

[80] Section 49(1)(2)

[81] ICAO, "Status of Nigeria with Regard to International Air Law Instruments" at www.icao.int/.../legal/status%20of%20individual%20states/nigeria_en.pdf accessed on 23/7/2014

[82] Nigeria acceded to the Convention on 14th November, 1960

[83] Nigeria acceded to the Convention on 10th May, 2002

[84] Nigeria signed the Convention on 28th May 1999 and ratified same on 10th May, 2002

[85] Nigeria signed the Convention on 29th June, 1965 and ratified same on 7th April, 1070

[86] National Bureau of Statistics (NBS), Transport Statistics, http://www.nigerianstat.gov.ng/sectorstat/sectors/transport accessed on 19/08/2014

[87]Ibid, Nigeria signed the Convention on 16th November, 2001 and ratified same on 16th December, 2003

In otherwords, Nigeria has at multilateral level signed, ratified or acceded to most international air law instruments that guide the conduct of air navigation, international law of carriage, safety and security as well as procurement of mobile equipments. The country also signed relevant instruments at the continental/regional level.[88]

Aside the MASAs signed, ratified or acceded to by Nigeria, the country currently has BASAs with over 78 countries.[89] What the above portends is that Nigeria has evinced its intention to be bound both at the international as well as at the domestic level to the growth and orderly development of the aviation industry in accordance with international and national best practices. We shall, however, examine domestic implementation of international air law instruments in Nigeria through the prism of safety, security as well as implementation of air services agreements to determine the levels of implementation.

1.4.1.1 Safety and Security

Aviation is a global activity hence the necessity to have a set of rules and procedures which are common internationally to ensure safety, security and expeditious operation of aircraft. ICAO in consultation with member States has produced to date 19 Annexes to the Chicago Convention known as Standards and Recommended Practices (SARPs).[90] Annex 14 provides for the benchmark on aerodromes and heliports while Annex 17 deals with security. Basically, the benchmarks provide for the installations and facilities necessary for the safe operation of aircrafts such as airfield security, perimeter fencing, provision of lightings, firefighting equipments, communication facilities etc.

It is necessary, therefore, to assess the level of Nigeria's compliance with the ICAO benchmarks for security and safety especially as no country is immuned from security or safety breaches. Indeed, the first hijack incident in Nigeria occurred on 23^{rd} April, 1967 when a Nigerian Airways Fokker

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[88] See University of Pretoria, "An Overview of Regulation and Deregulation in the Global Aviation Industry" at http://www.wto.org/englsh/tratop_e/serv_/transport_e/quasar_parta_e.pdf accessed on 7/8/2014

[89] See NCAA "Industry Oversight", NCAA website at http://ncaa.gov.ng/about-ncaa/industry-overview accessed on 7/8/2014

[90] The SARPs are as follows: Annex 1 – Personnel Licensing; Annex 2- Rules of the Air; Annex 3- Metrological Services; Annex 4- Aeronautical Charts; Annex 5 – Units of Measurement; Annex 6- Operation of Aircraft; Annex 7 – Aircraft Nationality and Registration Markings; Annex 8 – Airworthiness of Aircraft; Annex 9 – Facilitation; Annex 10- Aeronautical Telecommunications; Annex 11 – Air traffic Services; Annex 12- Search and Rescue; Annex 13 – Aircraft Accident and Incident Investigations; Annex 14 – Aerodromes and Heliports; Annex 15 – Aeronautical Information Services; Annex 16 – Environmental Protection; Annex 17 – security; Annex 18 – Safe Transportation of Dangerous Goods by Air; Annex 19 – Safety Management Systems

Friendship F-27 heading to Lagos from Benin was hijacked and diverted to Enugu by one Sam Inyang. This was closely followed by another hijack on 15th June, 1967 of a DC3 plane by Biafran Forces in Port Harcourt. The last incident occurred on 25th October, 1993 when four Nigerian youths under the of aegis the Movement for the Advancement of Democracy (MAD) hijacked with toy guns Nigerian Airways Airbus A310-200 Jetliner carrying about 135-150 passengers from Lagos to Abuja and forced the plane to land in Niger Republic.[91] In the area of aircrashes, the first aircrash in Nigeria appears to be in 1944 in Kano (albeit without fatalities). The next one occurred in 1946 near Oni involving a Douglas DC 3 with 22 fatalities.[92] From 1944 to 2013 alone there were not less than 121 recorded air crashes in Nigeria.[93] The worst of the crashes happened in 2005 and 2006 prompting the setting up of the Presidential Task Force (PTF) on the Aviation Industry in 2006 by the Federal Government which made very extensive findings on the state of the aviation industry in Nigeria.[94]

The PTF found that almost all the airports in the country were deficient in the required safety and security standards expected and specified by Annex 14 dealing with aerodromes and heliports such that the view was expressed by the PTF that Nigeria's aviation security lacked the requisite capacity to effectively handle terrorism. The screening of cargo and passengers was not rigorous enough at the airport. The airports were not in a position to handle any type of emergency, let alone air crash. Part of the findings of the PTF on Owerri airport is worth reproducing:

> a. Airfield security: The Airport has neither perimeter fence nor road; in fact farming activities were observed within the airport vicinity. The runway has faded markings. There are also no airfield and apron lighting. Furthermore, no CCTV, patrol vehicles…
>
> b. Fire Cover and Rescue Services: The two fire fighting vehicles are not the right type for airports… one of them was in fact borrowed from the State fire service… the nearest source of water for the fire vehicle is 30km away.

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91 GboroGboro, A. B. (2013) "The Four Plane Hijackers of Nigeria" at www.abiyamo.com accessed on 8/8/2014

92 Leadership Newspaper, November 9, 2006 p. 20

93 Source: Aviation Safety Network http;//aviation-safety.net/database/dblist.php?country=5N&Lang=&page=1 accessed on 8/8/2014

94 "Causes of Dereliction in the Nigerian Aviation Industry" Punch Newspaper 11/12/2006 – 29/02/2007

c. Facilitation of Air Transport: The security arrangement in the terminal building is poor. There was no x-ray machine and handheld metal detectors...[95]

The PTF recommended that "due to the serious shortcomings observed, flight operations to the Owerri Airport should be suspended forthwith pending the rectification of the observed deficiencies,"[96] the findings of the PTF on Owerri airport was symptomatic of the general malaise and decay of aviation facilities and infrastructure then in Nigeria.

Up to 2010, the situation was still deplorable. Safety and critical security equipment and installations were obsolete, unserviceable or unavailable. Airport terminals were dilapidated and derelict. Facilities were either unserviceable, unreliable, unavailable or not user friendly. Most security screening equipment at the airports were obsolete and mostly unreliable.[97]

The Aviation Masterplan and Roadmap approved by the President in January 2012 included a roadmap for institutional changes, infrastructure development, human capacity development, the strengthening of domestic carriers, the establishment of a national carrier, the development of regional hubs and perishable cargo handling facilities, free trade zones and aerotropolis. The emphasis of the master plan and roadmap is to reposition Nigeria's aviation industry as a pivot to the economic growth of Nigeria.[98]

After the roadmap, structural work began at the nation's airports for example, the Murtala Mohammed International Airport (MMIA) had its international terminal E and D wings expanded and equipped with sophisticated screening equipment. Almost all terminals across the country are being remodeled and upgraded including stand by power systems.[99]

While re-modeling of airports is desirable, it must not be done in isolation of certain other issues such as perimeter fencing of the airports. For example, a decade before the re-modeling, on 6th July, 2005 an Airforce plane with 196 people on board had a collision with cows that strayed into Portharcourt International Airport killing seven cows.[100] There are other embarrassing incidents in most of our airports. A decade later, on 24th

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[95] Ibid

[96] Ibid

[97] Ibid

[98] Tureta, "Another Peep into Jonathan's Aviation Sector" Thisday Newspaper 8th February, 2014

[99] Ibid

[100] BBC News of Thursday, 7th July, 2005 at http://news.bbc.co.uk/2/hi/africa/4659281.ston accessed on 11/8/2014

August, 2013 a gross breach of security occurred. A teenage stowaway, Daniel Ihekina successfully entered the tyre hole of an Arik plane from Benin to Lagos.[101] These incidences occurred because though the airports, including the international airports, have airport fencing, they do not have security fencing to satisfy Annextures 14 dealing with aerodromes and heliports and 17 dealing with security of ICAOs SARPs[102]

No airport in Nigeria has absolute security fencing. Some of the strategic ones have perimeter fencing but do not have security fencing. "Perimeter fence is not security fencing. What will make security fence is for you to raise it above the level where it is. And it must be six meters away from any obstruction... where you cannot do that you must have a secondary fence."[103] Partially as a result of this and other deficiencies, Nigerian airports have failed to meet the expected safety and security requirements in accordance with the Annexes of ICAO as a consequence of which the Nigerian Civil Aviation Authority (the regulatory body in Nigeria and by extension the ICAOs country representative) has refused to certify any of Nigeria's airports because none had met the minimum standard for the certification of the ICAO. NCAA, as representative of Nigeria (as member State of ICAO), certifies the airports for the world body if any airport meets the required standards[104]

The above bleak picture does not mean that there is no silver lining in the horizon, indeed minimal success has been recorded. For example, in ICAO's annual safety report for the year 2013, ICAO listed Nigeria as one of the 14 African countries that has achieved effective air safety implementation, scoring above the global average of 61% effectively declaring Nigeria's airspace safe.[105] On 18th September, 2010 Nigeria attained the Federal Aviation Administration International Air Safety Assessment category one certification after the audit conducted by the United States Federal Aviation Agency.[106] Nigeria has operated for more than three years as a Cat I Country, and one of the only three in Africa and the only one in the West African Sub-region. The benefits of the Cat I certification includes the fact that due to the enhance safety rating, insurance premium

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[101] The Punch Newspaper of August 26th, 2013 "Stowaway Boy Thought Arik Plane was US Bound" at www.punchng.com>news accessed on 11/8/2014

[102] Ehigiator K, "Aviation Development: A Rehash of old Tunes", Vanguard Newspaper of 5th October, 2013

[103] Eze, C "Waiting for ICAO's Certification of Nigerian Airports", ThisdayNewpaper, Monday 11th August, 2014

[104] Ibid

[105] The Nation Newspaper of 22nd August, 2013, "ICAO Okays Nigeria's Airspace" at http://thenationonlineng.net/new/icao-nigerias-airspace accessed on 22/8/2014

[106] Ekwere, U, "Aviation Experts Jittery over Cat-I Status Retention", Punch Newspapers, March 28, 2014

(which is one of the most significant operating costs of airlines) will be more reasonable; Nigerian registered aircraft began to operate directly into the United States.[107]

1.4.1.2 Implementation of Nigeria's Air Services Agreements

Currently, Nigeria has BASAs with over 78 countries[108] but utilizes only 21 of these agreements and reciprocating only about five of them. [109] The agreements entered into by Nigeria are largely skewed and lopsided in favour of the foreign airlines whose airlines enjoy many frequencies and multiple entry access into the Nigerian Airspace without corresponding local airlines reciprocating by operating into the foreign countries.[110] The foreign airlines operate many flights into Nigeria and transfer their proceeds to their countries without commensurate revenue being recorded on the part of Nigeria. Thus, Nigeria loses over ₦ 120 to ₦ 350billion annually to these foreign countries who operate international flights into Nigeria under BASAs.[111]

According to Meggison, "Nigeria has sold out its BASA without knowing it. It is like selling ones inheritance. It is a birthright,"[112] He also added that "BASA is supposed to be a treaty that is mutually benefitting between two countries. What we are doing is that we are signing equal rights with an unequal partner"[113] Indeed captain Meggisons' assertions can be buttressed by the fact that firstly, for a proper BASA agreement, the contracting partners must reciprocate, if not the non-reciprocating partner in the agreement (in this case Nigeria) will suffer.[114] The main denominator in the negotiation of BASA's is reciprocity.

Secondly, States hardly grant multiple entry points or designation to foreign airlines but grant single entry point from where the domestic airline feeds the foreign airlines or carries the goods or passengers of the foreign airline within domestic airports. Multiple designation allows foreign airlines to fly more than one destination in a country. Most countries BASAs restrict foreign airlines point of entry in order to develop their local airline giving the

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[107] Ibid

[108] NCAA, Op. Cit

[109] Ekwere, U "Nigerian Airlines Lose more Ground to Foreign Counterparts", Punch Newspaper, 20th January, 2014

[110] Eze, C "Nigeria Has Signed its Fortune Away Through BASA", ThisdayNewpaper, 11th July, 2014

[111] Bakrin, F. O "Revisiting BASAs, Promoting Airline Partnership", Aviation & Allied Business Magazine, May-June, 2014 p. 111 also see Jetlife Magazine of 27th February, 2014 "How Nigeria Loses Billions Through Non-Reciprocity of Routes"

[112] Eze, C "Nigeria Has signed its fortune Away Through BASA" Op. cit

[113] Bakrin, F.O Op. cit

[114] Ibid

domestic carriers the privilege to distribute for the foreign carriers through interline agreements. This in turn increases the capacity of the local airline. But currently, most of the BASAS signed by Nigeria have given foreign airlines multiple entries into Nigeria and into different cities for example, that signed by the U.S. and Nigeria[115]. So the money that would have been made by local carriers by taking passengers from point of entry to other airports in Nigeria has been given away to foreign airlines[116].

This has reduced the scope and effectiveness of domestic airline operation.[117] While the United Kingdom and Nigeria have 21 frequencies on both sides, these 21 frequencies are being operated by British Airways and Virgin Atlantic on the UK side, Arik Air the only Nigerian carrier currently flying to the UK, is only able to reciprocate 14 out of the 21 agreed frequencies[118] Similarly, on the US route, Delta Airlines and United Airlines are adequately making use of the US Open Skies Agreement with Nigeria. Delta Airlines flies directly from Atlanta to Lagos, while United Airlines flies directly from Houston, Texas to Lagos. On the Nigerian side, Arik Air alone flies to New York, not meeting with as much frequencies as both American carriers combined [119]. Another example is Ethiopian Airlines, one of Africa largest carriers. It flies into Nigeria with entry points at Lagos, Abuja and lately its entrance into Enugu Airport was celebrated with a lot of hoopla in September, 2013 by government. An aviation analyst indicted the government:

> *... any government serious about the development of its aviation sector would not celebrate multiple entries for foreign airlines into its territories as doing that sets the tone for the death of local airlines ... the wild celebration that greeted ET flight into Enugu demonstrated the lack of capacity on the part of those drawing up policies for the aviation industry... this makes the aviation industry the worst bleeding spot for the country in terms of*

[115] ibid
[116] Eze, C "Nigeria Has signed its fortune Away Through BASA" Op. cit
[117] Ibid
[118] Ekwere, u Op cit
[119] Koleosho, E "Managing the Growth of Foreign Airlines in Nigeria" Aviation and Allied Bussiness Magazine, May-June, 2014 P 12

capital flight.[120]

If all foreign airlines operating in the country each has only one entry point. They would be forced to partner with the local operators to help them redistribute the passengers they bring in. In the same vein, air travellers wishing to travel to international destinations would opt to travel by any local carrier or other means of transport to get to the airport of their final departure, thereby encouraging local operators.[121]

Thirdly, Nigeria does not have a national carrier nor does it have a dominant or strong flag carrier. Nigeria's only national carrier, Nigeria Airways, was liquidated in 2004. Since then, several domestic carriers have operated to fill the void but have largely been characterized by short life spans. Even though NCAA posits that Nigeria has "23 active domestic airlines"[122] nonetheless it has been pointed out that Nigeria has only six viable airlines on scheduled service.[123] For airlines to survive and prosper, they need "a critical mass of aircraft, an air traffic and an optimal route network"[124] . Unfortunately Nigerian airlines lack the requisite "critical mass of aircraft" to survive and prosper compared to other foreign airlines. Ethiopian Airlines currently operates 50 aircrafts to 81 destinations across five continents with over 200 daily flights. [125] United Airlines has 705 active aircrafts[126] while Delta Airlines has 760 aircrafts on its fleet [127]. The largest airline fleet in Nigeria is Arik Airlines fleet with only 20 aircrafts[128]. The size and scale of an airline operations are important.. It is very hard to compete against bigger international airlines with just a handful of aircrafts as airlines need a reasonably sized fleet to be able to compete effectively. [129] The alternative is to enter into cooperative marketing arrangements or even to merge. Combining forces could help: "If two or three or more Nigerian airlines joined forces they would have a large fleet size and combined resources and would become more bankable and formidable[130]. Since 2010

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[120]Ehigiator, K "Aviation Development: A Rehash of Old Tunes" Vanguard Newspaper, 5th October, 2013
[121]Koleosho, E Op. Cit. p. 12
[122] NCAA Industry Overview Op. cit p. 12
[123]Eze C, "Nigeria, A Growing Market For Foreign Airlines" Thisday Newspaper, 11th May, 2014
[124]Shadare, W, Op. Cit. p. 9
[125] Ibid
[126] Air fleets. Net , " United Airlines Fleet" at http://www. Airfleets.net/united Airlines accused on 16/08/2014
[127]Planes Potters net "Delta Airlines Fleet Details and History" at Planespotters. Net just Aviation accessed on 16/08/2014
[128]Shadare, Op. cit p. 9
[129] Ibid
[130] Ibid

when the US Federal Aviation Administration designated Nigeria Category One safety status, there has been an influx of more foreign airlines into Nigeria[131]. These foreign airlines unfortunately account for 92 percent of the international passenger traffic into and out of the country while Nigerian airlines account for the remaining eight percent.[132] Previous reports had shown that over 20 foreign airlines repatriated above N400bn made from ticket sales to their various countries every year.[133] Of the 2,518,516 international seats from Nigeria 26 foreign airlines offer 2,316, 288 aircraft seats to the Nigerian international travel market every year while their Nigeria counterparts offer only a paltry 202,228 seats. [134] Nigerian airlines are left with just three percent of the air traffic market to and from Nigeria[135].

The BASA between Nigeria and the UK was signed in 1998. Basically, the agreement allows each country to designate up to three airlines; routes were specified; the capacity provision requires UK designated airlines to operate up to 21 services per week between the UK and named points in Nigeria and vice-versa. The UK- Nigeria market from 2001 to 2010 had a total scheduled traffic of 5,082,924 passengers which was higher than any other single route. In 2010, the route passenger volume accounted for 20.8 percent of annual international passenger traffic in the country. The route should have a maximum of 42 flights per week provided by three carriers from each side. The designated UK carriers ie, British Airways and Virgin Atlantic provided 14 and seven flights per week, respectively, while the Nigeria designated carrier, Arik Air is only able to offer 11 flights per week. UK airlines have 83 percent of the market share while the Nigerian carrier has just about 17 percent of the market share[136]

The Open Skies Agreements that was signed between Nigeria and the USA in 2002 is a fully liberal bilateral air service agreement which allowed free designation of airlines by each State, permitted the airlines to operate unrestricted on any route between the respective countries with unlimited fifth freedom rights available; allowed airlines to set fares freely without seeking approval from the aeronautical authorities of both countries. The agreement was aimed at promoting an international air transport system

[131]Eze, C "Nigeria, A Growing Market for foreign Airlines" Thisday Newspaper 11th May, 2014

[132] This was contained in a report by the U.S. based Sabre Travel Netwoek. See Ekwere, U "Nigerian Airline Lose More Ground To Foreign Counterparts" Punch Newspaper, 20th January, 2014

[133] Ibid

[134] Ibid

[135]Shadare, W "Nigeria Has Just 3% of Her Air Traffic Market, says Fadugba," New Telegraph Newspaper, 7th July, 2014.

[136] Ibid

based on competition among the airlines in the market place with minimum government interference and regulation. As at 2010 the route was a duopolistic market with Delta Airlines (US Airline) dominating with 89 percent of the passengers, while Arik Air handled only 11 percent of the routes passengers. Since then, United Airlines, another US Airline has joined Delta Airline to provide service on the route[137].

The Yamoussoukro Declaration and Decision (YD) which were entered into by African countries required countries to grant each other free exercise of the first to the fifth freedoms of the air amongst other. The YD is a multilateral agreement signed by Nigeria with other African countries but the YD is not automatically applied to all African counties. South Africa and Nigeria still have a restricted BASA agreement. Even after the YD, countries have to review their former agreements and allow YD to be effective. From 1999-2005 only eight African countries ratified the YD agreement with Nigeria and for those countries, the YD supersedes the former bilateral agreements with them. Three of the countries viz: Egypt, Ethiopia and Kenya have made the best use of the YD agreement so far. Kenya Airlines had seven flights a week; Ethiopia's Airline 14 per week while Egypt airline provides 12 flights per week. Sadly, there were no Nigerian carriers on these three routes due to inadequate fleets from the Nigerian carriers that were expected to reciprocate and compete with their counterparts and as such, the foreign airlines enjoyed some form of market monopoly.[138]

1.5 Conclusion

This paper showed that the aviation industry is not only important to the economy of Nigeria but that Nigeria has the potentials by virtue of our population of becoming a foremost aviation nation in Africa and the World. The paper posited that international law and legal instruments are undoubtedly sources of law in Nigeria. Nigeria is not only a signatory to several multilateral conventions dealing with issues of air navigation, commercial aviation, carriage, safety and security as well as several bilateral agreements but has in fact ratified as well as domesticated almost all the very vital international air law instruments.

Unfortunately, the paper has found that while Nigeria is a party to multilateral as well as bilateral legal instruments, it has failed to be adroit or circumspect with regards to the commercial benefits accruable to the country

[137] Ibid
[138] Ibid

from the instruments the country is party to. Neither has the country taken advantage of aviation industry developments to grow its domestic industry.

Also, it is discovered that the country has been tardy and sloven with regards to implementation of key safety and security issues which are necessary to guarantee global confidence in Nigeria's aviation industry. In this regard, while the major denominator of BASAs is reciprocity by each countries airlines, Nigeria signed several BASAs giving away too much of commercial value to countries that are much stronger whereas Nigeria is not in a position to compete with the airlines of those countries. The country does not have its own carrier or a strong flag carrier that will be able to reciprocate by providing enough frequencies on the routes it has given away or be able to provide service to multiple cities of such countries. What is worse is that no airline in Nigeria is a member of any global alliance nor has any of the airlines been involved in any merger or acquisition as to take advantage of strength in combination. Finally, while there have been some efforts at re-modeling airports across the country, the efforts are still below ICAO's benchmark for safety and security as a result of which up to the present moment no airport in the country has been certified by both NCAA and ICAO. Failure to be certified by the global regulator is an indication that giant steps need to be taken if Nigeria's aspiration to be a global player in the aviation industry is to be attained.

In conclusion, it is recommended that Nigeria's BASA agreements should urgently be reviewed. Multiple entry points granted to foreign airlines such as those granted to U.S airlines, Ethiopian airlines and U.K. airlines should be withdrawn in favour of single entry point for each airline until such a time that the domestic airlines are able to reciprocate the services being offered by the foreign airlines. Steps should be taken to encourage the establishment of a national carrier or alternatively the consolidation of existing airlines into two or three formidable flag carriers that will be able to compete globally. Nigeria should be at the forefront of implementation of the YD for the benefits of its airlines. It must also take all necessary steps to ensure that it complies with ICAO benchmarks on security and safety in all its airports and heliports such as security fencing, airfields lightings, and provision of modern communication gadgets amongst others.