The US/Nigeria 'Open Skies' Air Transport Agreement: An Appraisal

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Introduction

The United States of America (the "**US**") and Nigeria (the "**Parties**") on May 13, 2024, announced that they have begun in earnest the implementation of the US/Nigeria 'Open Skies' Air Transport Agreement (the "**Agreement**"). Elements of the Agreement had been provisionally and sporadically applied since it was signed over two decades ago in August 2000.

The Agreement which seeks to establish a modern civil aviation relationship between the US and Nigeria sets the stage for expanded air travel between the two nations. It aims to promote increased connectivity, tourism, safety and trade. The goals of the renewed effort are to strengthen bilateral aviation relations between the USA and Nigeria while liberalizing the African aviation sector. Both the content and the renewed effort to implement it are broadly welcome.

Key Provisions

The Agreement contains ambitious provisions which are summarized below.

Grant of Rights to Fly: Under the Agreement, each Party agrees to grant the other Party the right to fly across its territory without landing, to make stops for non-traffic purposes[1] and conduct international air transportation[2] as otherwise specified in the Agreement. But the Agreement does not confer on the airlines of one Party any right to take on board in the territory of the other Party, passengers, baggage, cargo, or mail carried for compensation and destined for another point in that territory.[3]

Designation of Airlines: The Parties agree to grant each other the right to designate airlines (to be specified) with the power to conduct air transportation in accordance with the Agreement (the "**Designated Airlines**").[4] The Designated Airlines may apply for operating authorizations and technical permissions. The other Party upon receipt of notice of such designation shall grant the authorizations and permissions with minimum procedural delay, provided that each of three conditions is satisfied.

Three Conditions. The three conditions are that: (i) the Party designating the airline or its nationals or both has substantial ownership and effective control of the airline, (ii) the Designated Airline is qualified to meet the conditions prescribed under the laws and regulation normally applied to the operation of international air transportation by the Party to whom the application is submitted, and (iii) the Party designating the airline maintains and administers the safety and security standards set forth in the Agreement. Where any of the above conditions is not fulfilled, such authorizations or permissions may be revoked or suspended.[5]

Safety and Security: In line with their obligations under international law, the Parties by the Agreement reaffirm their obligation to each other to protect and guarantee the security of civil aviation against threats of unlawful interference. Further, the Parties agree to always act in conformity with the provisions of various international conventions relating to the safety of civil aviation and to assist each other to prevent acts of unlawful seizure of civil aircraft and other unlawful acts against the safety of aircraft, their passengers and crew, and of airports and air navigation facilities.[6]

Chicago Convention. Further, the certificates of airworthiness, certificates of competency as well as licences must comply with the minimum standards established pursuant to the Convention on International Civil Aviation, signed at Chicago on December 7, 1944. Otherwise, they will not be mutually recognized as valid for the purpose of operating air transportation as provided for in the Agreement.[7]

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[1] This is defined to mean a landing for any purpose other than taking on or discharge passengers, baggage, cargo and/or mail in air transportation. (This could be landing for emergency purposes such as refueling, repair and maintenance of aircraft).

[2] This is defined to mean air transportation that passes through the airspace over the territory of more than one state.

[3] See Article 2(2) of the Agreement.

[4] See Article 3 of the Agreement.

[5] See Article 4 of the Agreement.

[6] See Article 7 of the Agreement.

[7] See Article 6(1) of the Agreement.

Commercial Terms: The airlines of each Party are to have the right to (i) establish offices in each other's territory; (ii) bring in and maintain specialist staff in each other's territory; (iii) perform in each other's territory self-handling operations; (iv) sell or engage in the sale of air transportation in each other's territory; (v) convert and remit to its country, on demand, local revenues in excess of sums locally disbursed; and (vi) pay for local expenses, including purchases of fuel, in each other's territory in local currency or freely convertible currencies.[8]

Co-operative Marketing Arrangements. The Parties' Designated Airlines may, while operating on the agreed routes of the other Party, enter into cooperative marketing arrangements such as leasing, code-sharing and blocked-space arrangements with (i) airlines of either Party and (ii) airlines of a third country provided that such third country allows comparable arrangements between the airlines of the other Party and other airlines on services to and from the third country.[9]

Customs Duties: Exemptions from customs duties and charges apply, on a reciprocal basis, where the aircraft of the Designated Airlines of one Party operated as an international air transportation service arrives in the territory of the other Party. This exemption includes exemption from all import restrictions, property taxes and capital levies, customs and excise duties that are imposed by the national authority of the receiving Party. (The exemption does not include the cost of services provided.) The exemption also extends to aircraft equipment, fuel, lubricants, consumable technical supplies, spare parts (including engines), and aircraft stores (including but not limited to food, beverages and liquor and tobacco).[10]

User Charges, and Pricing. The Agreement aims to promote fair and equitable user charges by the Parties. It stipulates that the user charges imposed by either Party shall be just, reasonable and non-discriminatory.[11] The pricing provisions allow airlines to establish prices based on commercial considerations, with intervention by the Parties limited only to prevent unreasonable discrimination or abuse of a dominant position.[12]

Fair Competition: The Parties agree to compete fairly against each other and to allow equal opportunity for the Designated Airlines of both Parties to compete in providing the international air transportation services that are governed by the Agreement. For example, they are to allow each of their Designated Airlines to determine the frequency and capacity of the international air transportation it offers[13] based solely on commercial considerations, without unilateral restrictions from either Party.[14]

Dispute Resolution and Termination: Disputes arising out of the Agreement (other than dispute on pricing) shall be finally resolved by arbitration. The Parties agree to give effect to the award of the tribunal to the full extent permissible by their local laws.[15] The Agreement may be terminated by either Party giving written notice to that effect to the other Party as well as to the International Civil Aviation Organization.[16]

Treaty Status: The Agreement is a treaty between the two countries. In Nigeria, a treaty must be domesticated by a legislative instrument before it can become enforceable within the municipal legal order.[17]

Although the US has announced that the Agreement entered into force on May 13, 2024, there is no indication that the Agreement has been domesticated by any legislative instrument in Nigeria pursuant

[8] See Article 8 of the Agreement.
[9] See Article 8(7) of the Agreement.
[10] See Article 9 of the Agreement.
[11] See Article 10 of the Agreement.
[12] See Article 12 of the Agreement.
[13] Subject to Annex IV, section 1(A) of the Agreement.
[14] See Article 11 of the Agreement.
[15] See Article 14 of the Agreement.
[16] See Article 16 of the Agreement.
[17] This principle is enshrined in section 12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the "**Constitution**").

to section 12 of the Constitution. This means that strictly speaking, it does not yet have the force of law in Nigeria.

Annexes: There are four annexes to the Agreement. Each of them makes specific provisions relating to scheduled air transportation, charter air transportation, computer reservations systems (CRSs), and transition provisions respectively.

Annex I covers scheduled air transportation, including the routes that the Designated Airlines of each Party are entitled to operate, as well as provisions for operational flexibility and change of gauge. *Annex II* deals with charter air transportation, granting the Designated Airlines the right to carry international charter traffic and specifying applicable rules and regulations.

Annex III sets out principles of non-discrimination within and competition among CRSs, aimed at ensuring fair and impartial information dissemination to the public of the airlines services while *Annex IV* includes provisions on transition which expired on March 31, 2006. The transition provisions placed temporary limitations on the frequency of scheduled air transportation and fifth-freedom traffic rights for airlines designated by the US, but not by Nigeria.

Conclusion

The Agreement has been criticized by some as benefitting the US far more than it benefits Nigeria. Nevertheless, the Agreement has great potential for the Nigerian aviation sector and players and is reasonably favourable to them. Comparable agreements have similarly favourable terms and in the fulness of time have been beneficial to the emerging economy countries who have signed them. For example, the Brazil-U.S. Open Skies Agreement signed in 2011, the India-U.S. Open Skies Agreement signed in 2005, and the South Africa-U.S. Open Skies Agreement signed in 1996, have all liberalized air transport services in these countries and are widely regarded as beneficial[18].

Not much difference exists between these other agreements and the Agreement. The Brazilian and Indian agreements, for example, have more detailed and robust grant of rights provisions which allow them more flexibility in their conduct of international commercial air transport services, but these are not fundamental differences.

On the other hand, Like Nigeria, there are various issues affecting the full optimization of these other Open Skies agreements. For example, in Brazil, several bureaucratic barriers and government intervention have been said to slow down the implementation of the Open Skies Agreement.[19] Most of the air service agreements to which India is a signatory remain restrictive in nature, with many having limits on capacity, designated airports and, in some cases, approved airline and pricing.[20]

As matters stand today, however, there are no Nigerian-controlled airlines conducting flight operations to the US. Nigerian-controlled industry players should start thinking about building capacity to fly open skies so as to harness the benefits of the Agreement. With the Agreement, more American airlines are set to start coming into Nigeria. If there is no take-up from Nigerian airlines, this may result in more pressure on Nigeria's foreign currency reserves and further dampen the economy. Hence, there is a need for Nigerian airlines to wake up and build capacity in order to explore the benefits of the Agreement.

For enquiries on the Agreement and other transport sector matters, please contact our taiye.adegoke@gelias.com, somtochukwu.anekwe@gelias.com or oluomachi.agbazuere@gelias.com

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