

**National Interest Analysis [2012] ATNIA 25**

**with attachment on consultation**

**Agreement between  
the Government of Australia and the Government of the Republic of Kenya  
relating to Air Services  
done at Nairobi on 24 May 2012**

**[2012] ATNIF 23**

## NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

### SUMMARY PAGE

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#### **Nature and timing of proposed treaty action**

1. The proposed treaty action is to bring into force the *Agreement between the Government of Australia and the Government of the Republic of Kenya relating to Air Services* done at Nairobi on 24 May 2012 (the proposed Agreement).
2. Pursuant to its Article 20, the proposed Agreement will enter into force when the Parties have notified each other in writing that their respective requirements for its entry into force have been satisfied. The Australian Government will provide its notification to the Government of the Republic of Kenya (Kenya) as soon as practicable after the conclusion of the tabling process and receipt of recommendations from the Joint Standing Committee on Treaties (JSCOT).
3. The proposed Agreement will establish for the first time a treaty level air services relationship between Australia and Kenya. It will allow the airlines of Australia and Kenya to develop international air services between the two countries.
4. The text of the proposed Agreement was settled in July 2011, having been largely negotiated in 2008. The proposed Agreement was preceded by aviation arrangements of less than treaty status, in the form of a Memorandum of Understanding (MOU) signed in 2008. In accordance with established Australian and international practice, the MOU applies the provisions of the proposed Agreement on a provisional, non-legally binding basis until the proposed Agreement enters into force.

#### **Overview and national interest summary**

5. The key objective of the proposed Agreement is to provide a binding legal framework to support the operation of air services between Australia and Kenya. The proposed Agreement will facilitate trade and tourism between the two countries and will provide greater opportunities for airlines to develop expanded air travel options for consumers.

## **Reasons for Australia to take the treaty action**

6. The proposed Agreement grants access for Australian airlines to the Kenyan aviation market and allows for the establishment of air services between the two countries. The proposed Agreement will enable airlines of Australia and Kenya to provide services between any point in Australia and any point in Kenya, based on capacity levels decided from time to time between the aeronautical authorities of the Parties.

7. Australian travellers and Australian businesses, particularly in the tourism and export industries, will benefit from the proposed Agreement through the opening up of increased commercial opportunities.

## **Obligations**

8. Australia and Kenya are both Parties to the *Convention on International Civil Aviation* ([1957] ATS 5) done at Chicago on 7 December 1944 (the Chicago Convention). The proposed Agreement was made in accordance with and pursuant to the Chicago Convention, which entered into force for Australia and generally on 4 April 1947.

9. The proposed Agreement is based on Australia's model air services agreement and obliges Australia and Kenya to allow the designated airlines of each country to operate scheduled air services carrying passengers and cargo between the two countries on specified routes in accordance with the provisions of the proposed Agreement. To facilitate these services, the proposed Agreement also includes reciprocal provisions on a range of aviation-related matters such as safety, security, customs regulation and the commercial aspects of airline operations, including the ability to establish offices in the territory of each Party and to sell fares to the public.

10. Under Article 2 of the proposed Agreement, each Party may designate any number of airlines to operate the agreed services. On receipt of such a designation, and an application from a designated airline for operating authorisations, the other Party must grant the necessary authorisations provided that the airline being designated complies with the conditions for ownership and control set out in the proposed Agreement, holds necessary operating permits, and meets the conditions the Party normally applies to the operation of international air transport. It is also a condition of granting authorisation to a designated airline that the Party designating the airline complies with the safety and security provisions of the proposed Agreement. In the event of any non-compliance with the terms of Article 2, the other Party may withhold, suspend or limit that airline's authorisations.

11. Under Article 3 of the proposed Agreement, each Party grants the airlines of the other Party the right to fly across its territory without landing and to make stops in its territory for non-traffic purposes (such as refuelling). Article 3 also provides the right for designated airlines to operate on the routes specified in Annex 1 for the purpose of taking on board and discharging passengers, cargo and mail. The Article also precludes designated airlines from carrying purely domestic traffic (cabotage) within the territory of the other Party.

12. Article 4 of the proposed Agreement confirms that each Party's domestic laws and regulations relating to the operation and navigation of aircraft apply to the designated airlines when they are entering, within or leaving the territory of that Party. Each Party's laws and regulations relating to entry and exit (for example, immigration, aviation security, customs

and quarantine) must be complied with. This Article prevents either Party giving preference to any airline – including its own designated airlines – in applying any such laws. It also provides that passengers, baggage and cargo in direct transit shall be exempt from customs duties and other similar taxes.

13. Under Article 5, each Party is required to recognise certificates of airworthiness, competency and licences issued by the other Party, provided the standards under which such documents were issued conform to the standards established by the International Civil Aviation Organization (ICAO). Each Party can, however, refuse to recognise certificates and licences held by its own nationals or airlines that have been issued by the other Party. Under this Article, each Party may also request consultations with the other Party at any time concerning the safety standards maintained by the other Party. If required, the other Party shall be informed of the corrective action required to be undertaken to conform with the minimum standards pursuant to the Chicago Convention. Article 5 also provides that each Party may, in its territory, arrange inspections of aircraft of the other Party to verify the validity of the relevant aircraft documents and those of its crew and ensure that the aircraft equipment and the condition of the aircraft conform to ICAO standards. Each Party can take immediate action essential to ensure the safety of an airline, including varying or suspending operating authorisation, if it considers such action to be necessary.

14. Under Article 6, both Parties are required to protect the security of civil aviation against acts of unlawful interference and, in particular, to act in conformity with multilateral conventions relating to aviation security. Each Party must advise the other Party of any differences between its national regulations and the standards established by ICAO, and either Party may request consultations at any time to discuss any differences. A Party may require the designated airlines of the other Party to observe the first Party's aviation security provisions for entry into, departure from or while within the territory of that Party. Parties shall ensure adequate measures are applied to protecting aircraft; inspecting passengers, crew, carry-on items, baggage, cargo and aircraft stores, prior to and during boarding or loading. The Parties shall assist each other in the event of an incident or threat of an incident. Each aeronautical authority may request to conduct a security assessment in the other Party's territory. Such assessments are to be conducted in accordance with arrangements agreed between the aeronautical authorities without delay. Each Party shall also give consideration to a request from the other Party to discuss arrangements for the deployment of In-Flight Security Officers.

15. Article 7 requires each Party to encourage those responsible for airport, airport environmental, air navigation and aviation security facilities and services to not levy charges that are unreasonable, inequitable or discriminatory.

16. Article 8 provides that the aeronautical authorities of one Party may require a designated airline of the other Party to provide statistics related to the traffic carried on services performed under the proposed Agreement.

17. Article 9 lists equipment and stores used in the operation of the agreed services that the Parties are required, in accordance with international practice, to exempt from customs duties, excise taxes, inspection fees and other related charges. This Article also provides that the customs laws of each Party are to be observed in relation to the supervision, re-exportation and/or disposal of equipment and supplies.

18. Article 10 allows the designated airlines of each Party to set their own fares. The Parties are obliged to settle any concerns with proposed tariffs through consultation, and not to take unilateral action against an airline of the other Party.

19. Under Article 11, the passenger and cargo capacity which may be provided by the designated airlines of each Party will be determined by the aeronautical authorities from time to time. This capacity was initially settled in an MOU signed in May 2008. These capacity arrangements will continue once the Agreement enters into force.

20. Article 12 provides a framework for airlines of one Party to conduct business in the territory of the other Party. The framework includes provisions allowing designated airlines to establish offices, bring in and employ staff, sell air transport services to the public, perform ground handling and use the services and personnel of any organisation, company or airline operating in the territory of the other Party, to conduct its business. Each Party shall permit airlines of the other Party to freely convert and move currency. The Article allows airlines to utilise leased aircraft to conduct their services, provided they meet the applicable operating and safety standards and requirements of the Parties. Designated airlines may also enter into code share arrangements with any other appropriately authorised airline. Each Party is also required to provide the airlines of the other Party with access to airports and the allocation of slots (aircraft movements at an airport) on a non-discriminatory basis and in accordance with local laws and regulations.

21. Article 13 permits the designated airlines of each Party to use, in connection with international air transport, any surface transport (for example, road or rail transport) within the territories of each Party or third countries, making it possible for airlines to provide 'multimodal' connections.

22. Under Article 14, each Party shall allow fair and equal opportunity for designated airlines of both parties to compete in providing international air services. Article 14 also provides for each Party to take appropriate action within its jurisdiction to eliminate all forms of discrimination and unfair competitive practices adversely affecting the competition position of airlines of the other Party. Neither Party may unilaterally limit services of airlines of the other Party, except as required for customs, technical or operational reasons. Each Party may also require the filing of schedules or plans by airlines of the other Party, provided such a requirement is applied on a non-discriminatory basis. The competition laws of each Party shall apply to the operation of the airlines within the jurisdiction of the respective Party. This Article does not preclude unilateral action by the airline or the competition authorities of either Party.

23. Under Article 15, either Party may request consultations with the other Party at any time on the implementation, interpretation, application or amendment of the proposed Agreement.

24. Article 17 provides a process for dispute resolution on matters, other than those relating to air fares or the application of domestic competition laws, which cannot be settled by consultation, negotiation or mediation. A three-person arbitral tribunal shall hear the dispute and provide a written award, which is final and binding upon both Parties. Failure to comply with the award is grounds for one Party to suspend or revoke the rights granted under the proposed Agreement to the other Party.

25. Annex 1 contains a route schedule which specifies the routes that may be operated by designated airlines, as well as operational provisions.

26. Annex 2 contains a non-binding option for mediation, as an alternative to undertaking dispute resolution procedures. The mediation process is without prejudice to the continuing use of the mechanisms for consultations, arbitration and termination.

### **Implementation**

27. The proposed Agreement will be implemented through existing legislation, including the *Air Navigation Act 1920* and the *Civil Aviation Act 1988*. The *International Air Services Commission Act 1992* provides for the allocation of capacity to Australian airlines. No amendments to these Acts or any other legislation are required for the implementation of the proposed Agreement.

### **Costs**

28. No direct financial costs to the Australian Government are anticipated in the implementation of the Agreement. There are no financial implications for State or Territory Governments.

### **Regulation Impact Statement**

29. The Office of Best Practice Regulation has been consulted and confirmed that a Regulation Impact Statement is not required.

### **Future treaty action**

30. Article 16 provides that the proposed Agreement may be amended or revised by agreement in writing between the Parties. Any amendment to the proposed Agreement shall enter into force when the two Parties have notified each other in writing that they have completed their domestic procedures for entry into force of the amendments. Article 16 also provides that the proposed Agreement will be deemed to be amended so far as is necessary to comply with any multilateral agreement concerning air services that may enter into force for both Parties.

31. Any amendment to the proposed Agreement will be subject to Australia's domestic treaty-making process, including tabling in Parliament and consideration by JSCOT.

### **Withdrawal or denunciation**

32. Article 18 provides for termination of the proposed Agreement. Either Party may give notice in writing at any time to the other Party of its decision to terminate the proposed Agreement and must simultaneously lodge a notice of termination with ICAO. The proposed Agreement shall terminate one year after the date of receipt of the notice of termination by the other Party, unless the notice is withdrawn by mutual agreement before the end of the termination period.

33. Any termination of the proposed Agreement by Australia will be subject to Australia's domestic treaty-making process, including tabling in Parliament and consideration by JSCOT.

**Contact details**

Aviation Industry Policy Branch  
Aviation and Airports Business Division  
Department of Infrastructure and Transport

## **ATTACHMENT ON CONSULTATION**

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### **CONSULTATION**

34. It is the practice ahead of negotiation of an air services agreement for the Department of Infrastructure and Transport to consult government and non-government bodies that may have an interest in the outcome of the negotiations and to take into account their views in developing a negotiating position for the Minister's approval.

35. Prior to the negotiation of the proposed Agreement, consultations were held with industry and Commonwealth and State and Territory government agencies. The following stakeholders were advised by letter and/or email of the proposal to negotiate an agreement between Australia and Kenya and invited to comment on issues of importance to them:

#### **Commonwealth Government Agencies**

- Attorney-General's Department
- Australian Quarantine and Inspection Service
- Australian Competition and Consumer Commission
- Austrade
- Civil Aviation Safety Authority
- Australian Customs Service
- Department of Foreign Affairs and Trade
- Department of Finance and Administration
- Department of Immigration and Citizenship
- Department of Industry, Tourism and Resources
- Department of Prime Minister and Cabinet
- International Air Services Commission
- Treasury
- Tourism Australia (formerly the Australian Tourism Commission)

#### **State Government Agencies**

- ACT Government Chief Minister's Department
- Queensland Government Department of Transport and Department of State
- NSW Government Ministry of Transport, Department of State and Regional Development, and Department of Planning and Infrastructure
- South Australian Government Department for Transport, Energy and Infrastructure
- Tasmanian Department of Infrastructure, Energy & Resources
- Victorian Government Department of Innovation, Industry and Regional Development and Department of Infrastructure
- Government of Western Australia

- Northern Territory Government Department of Planning and Infrastructure and the Northern Territory Aviation Committee
- South Australian Tourism Commission
- Tourism New South Wales
- Tourism NT
- Tourism Queensland
- Tourism Tasmania
- Tourism Victoria
- Tourism Western Australia

## **Industry**

- Adelaide Airport Limited
- Air Freight Council of NSW Inc
- Australian Airports Association
- Australian Federation of International Forwarders
- Australian Federation of Travel Agents
- Australian and International Pilots Association
- Australian Local Government Association
- Australian Tourism Export Council
- Australian Transport and Logistics Association
- Australia's North West Tourism
- Aviation Australia
- Aviatour
- Board of Airline Representatives of Australia
- Brisbane Airport Corporation Ltd
- Broome International Airport Holdings
- Burnie Airport Corporation Pty Ltd/Wynyard Aerodrome
- Cairns Airport
- Canberra International Airport
- Chamber of Commerce Northern Territory
- City of Melbourne
- DHL
- Essendon Airport Pty Ltd
- Global Aviation Services
- Gold Coast Airport Ltd
- Hobart International Airport
- Horticulture Australia
- Linfox
- Melbourne Airport
- Mildura Rural City Council
- Moorabbin Airport
- National Food Industry Strategy Ltd
- National Jet Systems Pty Ltd
- National Tourism Alliance
- Newcastle Airport Ltd
- Northern Territory Airports Pty Ltd
- Overnight Freight Operators Association
- Perth Airport
- Qantas Airways Ltd

- Queensland Airports Ltd
- Queensland Tourism Industry Corporation
- Regional Aviation Association of Australia
- South Australian Freight Council
- Sydney Airport Corporation Ltd
- Tasmanian Chamber of Commerce and Industry
- Tourism and Transport Forum (TTF) Australia
- Townsville Airport
- Townsville Enterprise Ltd
- Tourism Top End
- Tropical Tourism North Queensland
- Virgin Blue (now known as Virgin Australia)
- Westralia Airports Corporation Pty Ltd

36. Comments were received from: the Department for Transport, Energy and Infrastructure (South Australia Government), the Northern Territory Aviation Committee (Northern Territory Government), Qantas, Perth Airport and a number of Commonwealth agencies.

37. Stakeholders who provided comments supported the negotiation of an air services agreement with Kenya to open market access for airlines in both countries.

38. Comments regarding technical details of the proposed Agreement were received from a number of Commonwealth agencies. These agencies cleared the text of the proposed Agreement prior to its approval by the Federal Executive Council.

39. The proposed Agreement has been included in the Schedule of Treaties provided to the Commonwealth-State/Territory Standing Committee on Treaties since September 2008 and in subsequent years.

40. The proposed Agreement was approved for signature by the Federal Executive Council on 9 February 2012.