

CHAPTER 3

Status Quo of the Implementation of the Yamoussoukro Decision

Since its enactment by heads of state in 1999, the central theme of the Yamoussoukro Decision has been its implementation across the continent. According to the African Union (2005a, p.1), the Yamoussoukro Decision is a “landmark initiative to develop the industry through the removal of barriers by promoting the liberalisation of the industry.” However, as the complete title of the decision is the “Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalization of Access to Air Transport Markets in Africa” (UNECA 1999), the question arises as to what implementation actually means in the context of the Yamoussoukro Decision. This is relevant, because one could easily conclude that the Yamoussoukro Decision of 1999 is actually the legally binding framework for implementing the former Yamoussoukro Declaration. If this were the case, no further legal action would be necessary and the Yamoussoukro Decision would become applicable after the transition period provided for in Article 10.

Yet many African politicians, representatives of economic organizations, and members of the aviation industry refer to the pending implementation of the Yamoussoukro Decision. Numerous conferences, studies, papers, and initiatives present a set of actions that has been developed to implement the Yamoussoukro Decision, which is commonly seen as the most

important measure for developing the African aviation sector (African Union 2006c). However, one could conclude that using the term *implementation* in relation to the Yamoussoukro Decision is a pleonasm (the use of more words than necessary, that is, a form of redundancy), because the Yamoussoukro Decision itself is the decision to implement the Yamoussoukro Declaration of 1988. Alternatively, one could also state that implementation stands for applying the Yamoussoukro Decision framework, because its legal implementation was achieved at the time of its adoption by heads of state in 1999.

The question arises regarding what is actually meant in a legal and political sense by the term implementation of a treaty, which in this case is implementation of a declaration or intent to liberalize air services. A definition of the word implementation can be found in the popular online encyclopedia Wikipedia: "In political science, implementation refers to the carrying out of public policy. Legislatures pass laws that are then carried out by public servants working in bureaucratic agencies. This process consists of rule-making, rule-administration and rule-adjudication. Factors impacting implementation include the legislative intent, the administrative capacity of the implementing bureaucracy, interest group activity and opposition, and presidential or executive support."¹

In analyzing the implementation of the Yamoussoukro Decision as the carrying out of public policy based on a law or treaty, we need to review which elements have been formally created by the decision itself and which elements of the decision are to be established. The entity that is explicitly created in Article 9 of the Yamoussoukro Decision is the monitoring body. Its duties are defined in annex 3, which at publication became annex 2. While this body was created by the Yamoussoukro Decision, Article 9.4 mentions the African Air Transport executing agency, which needs to be created for the "successful implementation of the Decision." This indicates that implementation of the Yamoussoukro Decision is indeed understood as an administrative procedure that will be carried out by a specialized agency.

Finally, implementation of the Yamoussoukro Decision could also be understood as the application of its operational principles. These operational principles are defined in Article 3.1 as granting free exercise of the rights of the first, second, third, fourth, and fifth freedoms of the air on scheduled and nonscheduled passenger, cargo, and/or mail flights performed by an eligible airline to and/or from their respective territories. The application mechanism is defined in Article 6.1. Each state party has the right to designate in writing at least one airline to operate in accordance with the principles of the Yamoussoukro Decision, and the designation

should be notified to the other state party in writing through diplomatic channels. Article 6.4 obliges the other state party to initiate the process of authorization and licensing of the designated airline to operate the services. The authorization should be granted in 30 days.

A supplementary application can be found in Article 2, which states that the Yamoussoukro Decision has precedence over any multilateral or bilateral agreements on air services between state parties that are incompatible with the decision. However, it also states that provisions of such agreements that are not incompatible with the Yamoussoukro Decision remain valid and supplementary to the Yamoussoukro Decision. Even though the formal application mechanism of the Yamoussoukro Decision as defined in Article 6.1 is clear, one could conclude that agreeing on a bilateral that complies fully with the provisions of the Yamoussoukro Decision is a valid application mechanism. This is especially important as long as many elements of implementation in the sense of carrying out of public policy remain pending.

One can conclude that implementation of the Yamoussoukro Decision is widely understood as the carrying out of public policy based on a law or treaty. This entails several additional steps, such as setting up specialized agencies and defining competition regulation. However, the key question is whether the absence of implementation in the sense of public policy suspends the application of the operational principles of the Yamoussoukro Decision. With reference to the various interpretations of the word implementation discussed earlier, the status quo must be analyzed both as policy implementation and as operational implementation. In addition, probably, the most challenging hurdle for the development of liberalized air services in Africa regardless of the stage or the degree of liberalization is meeting safety and security requirements.

Policy Implementation

As seen earlier, the Yamoussoukro Decision implements the Yamoussoukro Declaration. It provides the following main elements of implementation:

- The competition rules (Article 7) state that “state parties shall ensure fair opportunity on non-discriminatory basis for the designated African airline, to effectively compete in providing air transport services within their respective territories.” There are no further provisions for competition rules other than in Article 9.5, which states that the executing agency shall have sufficient powers to formulate and

enforce appropriate rules and regulations that give fair and equal opportunities to all players and promote healthy competition.

- The arbitration procedure (Article 8) encourages state parties to settle disputes by negotiation. Failing that, either party may submit the dispute to arbitration in accordance with the procedures set forth in appendix 2. However, appendix 2, which is actually annex 2, does not include any arbitration procedure but describes the duties and responsibilities of the monitoring body.
- The monitoring body (Articles 9.1–9.3) is the only element that is formally created (“hereby established”) by the Yamoussoukro Decision. It takes the form of the Subcommittee on Air Transport of the Committee on Transport, Communications, and Tourism of the former African Economic Community (now the African Union), which is responsible for the overall supervision, follow-up, and implementation of the Yamoussoukro Decision.
- The executing agency (Articles 9.4–9.6) shall be created to ensure successful implementation of the Yamoussoukro Decision, which includes the supervision and management of Africa’s liberalized air transport industry. To this end the executing agency shall formulate and enforce appropriate competition rules and regulations and ensure that consumer rights are protected.

Based on the foregoing elements of implementation of the Yamoussoukro Decision, the following four main components must be completed: (a) developing competition rules and consumer protection rights; (b) implementing formal arbitration procedures; (c) assuring that the monitoring body, which has already been created, starts functioning by meeting regularly to supervise and follow up on implementation of the Yamoussoukro Decision; and (d) establishing an executing agency.

Developing Competition Rules

Article 7 of the Yamoussoukro Decision provides that state parties must “ensure fair opportunity on non-discriminatory basis for the designated African airline, to effectively compete in providing air transport services within their respective territory.” This provision of fair opportunity and antidiscrimination is kept extremely marginal, and Article 7 does not provide any further principles or rules that would better define fair and unfair competition between operators. The absence of any competition rules can therefore be seen as a missing element in the implementation of the Yamoussoukro Decision.

The First Ordinary Session of the Ministers Responsible for Air Transport, held by the African Union in Sun City, South Africa, in May 2005 concluded that harmonization of the rules for liberalizing air transport was necessary, as different rules in different subregions were hindering full implementation of the decision (African Union 2005a, para. 5.2.8). This conclusion was primarily based on the fact that joint draft regulations for competition in air transport services within the Common Market for Eastern and Southern Africa (COMESA), the EAC, and the Southern African Development Community (SADC) had already been prepared and discussed (Council of Ministers of COMESA and EAC Responsible for Civil Aviation and the Committee of Ministers of Transport and Communications of SADC 2004). However, the Council of Ministers of COMESA, the EAC, and SADC had not yet adopted these competition rules. Mauritius had even informally indicated that it was withdrawing from the Yamoussoukro Decision because of the failure of SADC countries to adopt the competition rules relating to the full liberalization of air transport.²

During the Second Session of African Union Ministers Responsible for Air Transport, held in Libreville, Gabon, in May 2006, the experts' meeting positively recognized the aforementioned joint elaboration of competition regulations by COMESA, the EAC, and SADC. It also became evident that no progress had been made in having all the RECs adopt these regulations (African Union 2005b, para. 63).

Finally, in 2007 the African Union drafted its own common competition rules, including special provisions on air transportation (African Union 2007b). These competition rules, which are similar to the draft regulations for competition in air transport services within COMESA, the EAC, and SADC, prohibit engaging in anticompetitive agreements and practices, abusing a dominant position, and having any member state grant any subsidy that distorts or threatens to distort competition. At the Third Session of African Union Ministers Responsible for Air Transport, held in Addis Ababa, Ethiopia, in May 2007, the ministers noted the preparation of draft texts concerning the harmonization of common competition rules. These were prepared based on a conclusion and recommendation of a meeting of African Union air transport experts that called for harmonizing competition rules on the basis of regulations developed by the RECs (African Union 2007c, paras. 31–36). Accordingly, the ministers asked the African Union Commission to proceed with the process of validation and finalization (African Union 2007c, para. 45). The objective was to have the heads of state formally adopt these rules at the Ninth Ordinary Session of the Assembly of the African Union,

which was held in Accra, Ghana, on 1–3 July 2007. However, the matter remains pending.

Implementing Arbitration Procedures

In addition to ensuring fair competition, Article 8 of the Yamoussoukro Decision addresses dispute settlement. While it encourages state parties to settle any dispute by negotiation, it also refers to arbitration procedures, which are provided for in annex 2 of the Yamoussoukro Decision. However, annex 2 of the decision makes no reference to arbitration procedures, but defines the duties and responsibilities of the monitoring body established by Article 9 of the decision.

The First Ordinary Session of African Union Ministers Responsible for Air Transport, held in Sun City, South Africa, did not elaborate on the issue of missing arbitration procedures in the Yamoussoukro Decision. It did, however, consider a first apparent dispute, which arose between the Arab Republic of Egypt and Nigeria in relation to operational difficulties. The ministers did not deal with the case directly, but recommended that the president of the monitoring body contact the Economic Community of West African States (ECOWAS) and COMESA to clarify the nature of the dispute between the two countries' civil aviation authorities to find an amicable solution (African Union 2005a).

As with the issue of competition regulation, the experts recognized the work done by COMESA, the EAC, and SADC to elaborate a dispute settlement mechanism during the Second Session of the Ministers Responsible for Air Transport held in Libreville, Gabon. They linked the implementation of a dispute settlement mechanism to the outcome of a study on the creation of the pending executing agency (African Union 2005b, para. 63). The executing agency was finally created in 2007 during the Third Session of African Union Ministers Responsible for Air Transport, held in Addis Ababa, by assigning its responsibilities and duties to AFCAC, a specialized institution of the African Union (African Union 2007a, p. 2). The arbitration procedures of the dispute settlement mechanism remain pending for the time being. However, one can expect that AFCAC, as the executing agency, will play a leading role in establishing this mechanism.

Assuring Functioning of the Monitoring Body

Article 9.1 of the Yamoussoukro Decision established the monitoring body. Its main task is the overall supervision, follow-up, and implementation of the Yamoussoukro Decision. The initial plan was to empanel the

monitoring body with representatives of UNECA, the OAU, AFCAC, and AFRAA assisted by representatives of subregional organizations. Annex 2 (not annex 3 as referred to in Article 9.3), which is adequately titled “Duties and Responsibilities of the Monitoring Body,” details the monitoring body’s overall duties and responsibilities.

The first meeting of the monitoring body was held in Addis Ababa, Ethiopia, in November 2000. Representatives of several agencies, including the OAU, AFCAC, AFRAA, the Intergovernmental Agency on Development, COMESA, and UNECA attended the meeting.³ The meeting took note of several reports by individual organizations on their experience and ideas on rules, procedures, and a proposed timetable for implementation of the Yamoussoukro Decision. In addition, it examined and approved the versions of annex 1 (a), (b), and (c) and annex 2 (formerly annex 3) of the Yamoussoukro Decision. It also set the deadline of 31 March 2001 for states to submit their declaration to limit, for a period not exceeding two years, their obligations and rights provided for in Articles 3 and 4 of the Yamoussoukro Decision (UNECA 2000).

The monitoring body held a few additional meetings in subsequent years. At its fourth meeting, held in Sun City, South Africa, in March 2005, participants included representatives from the African Union, COMESA, AFRAA, the African Development Bank, and the New Partnership for African Development (NEPAD). The meeting reviewed an evaluation of the progress made on implementation of the Yamoussoukro Decision and discussed an action plan for the way forward. The participants noted in particular that RECs such as COMESA had made good progress with respect to coming up with a common, liberalized air transport policy; harmonizing civil aviation regulations, and coordinating safety oversight and security programs. However, one of the main concerns was that the monitoring body lacked sufficient resources to secure financing for the many proposed activities (African Union 2005a, pp. 5–6).

Nevertheless, and even though the monitoring body has met only a few times since its legal creation, we can conclude that it was established and is indeed functioning. Its responsibilities, as set forth in Article 9 of the Yamoussoukro Decision, namely, overall supervision, follow-up, and implementation of the decision to assist the Subcommittee on Air Transport, composed of African ministers responsible for civil aviation, are quite well served. However, the infrequent meetings of the monitoring body are one indication of the overall slow pace of implementation of the Yamoussoukro Decision.

Establishing an Executing Agency

To ensure successful implementation of the Yamoussoukro Decision, Article 9.4 provides that an African air transport executing agency should be established as soon as possible. The same article defines the principal responsibility of the executing agency as supervising and managing Africa's liberalized air transport industry. Article 9.5 stipulates that the executing agency should have "sufficient powers for [sic] formulate and enforce appropriate rules and regulations that give fair and equal opportunities to all players and promote healthy competition." In addition, Article 9.6 mandates the executing agency to ensure consumer protection.

The creation of the executing agency was discussed and delayed at several meetings of the ministers responsible for air transport (African Union 2005b, para. 61; 2006c, para. 63). Finally, having prepared a detailed study on the creation of the agency, the Third African Union Conference of Ministers Responsible for Air Transport decided in Addis Ababa in May 2007 that AFCAC would be entrusted with the functions of the executing agency as set forth in Article 9.4 (African Union 2007a, p. 2). However, the experts noted two issues concerning this decision. First, even though AFCAC is a specialized institution of the African Union, eight member states of the African Union are not also members of AFCAC. Second, the integration of the executing agency into a specialized institution of the African Union does not comply entirely with the wording of Articles 9.4 to 9.6, which call for a powerful and mostly independent agency. The failure to create an independent agency stems from the experts' rejection of a proposal to fund the agency at least partially by collecting community aviation charges (African Union 2005b). This was reflected by the ministers, who concluded that AFCAC needed to be strengthened by entrusting it with the responsibilities of the executing agency. To address the funding issues, they called for financial support from the African Union and from African Union member states, as well as for the secondment of national experts and for the organization of meetings (African Union 2007a, p. 2).

The formal creation of the executing agency by assignment of its responsibilities to AFCAC must be evaluated by examining its achievements. AFCAC has had a history extending over 40 years, with a mandate of encouraging cooperation in all civil aviation activities throughout Africa. It further aims to promote the coordination and improved utilization and development of African air transport systems and the standardization of aircraft, flight equipment, and training programs for pilots and mechanics. Finally, it has organized some working groups and seminars and compiled statistics (OAU 2000, para. 6.7.3).

Africa's civil aviation sector has performed somewhat poorly over the last 40 years. In particular, attempts to improve cooperation and consolidation have failed and the standardization of aircraft, flight equipment, and training programs has never been addressed, with the most prominent example of a failed attempt at airline cooperation being the bankruptcy of Air Afrique (UNECA 2004, p. 95). However, if the assignment of the executing agency is considered under AFCAC's current objectives, which include promoting the development of the civil aviation industry in Africa to fulfill the objectives of the African Union Charter of 1963 and the Abuja Treaty of 1991, the compatibility is far greater (AFCAC 1969). The wide recognition that the development of air transport in Africa depends on liberalizing intra-African markets supports AFCAC's new role of supervising and managing Africa's liberalized air transport sector under the Yamoussoukro framework.

However, the newly designated executing agency will need to be given sufficient powers to enforce competition rules and regulations and to successfully arbitrate and settle disputes arising from unfair competition. Currently, neither the rules and regulations nor the arbitration procedures and the dispute settlement mechanism have been elaborated. Finally, not all Yamoussoukro Decision party states would be equally bound by AFCAC's rulings, as only 46 of the 54 Yamoussoukro Decision party states are currently members of AFCAC.⁴ The following eight states, six of which are full party states of the Yamoussoukro Decision, should join AFCAC: Cape Verde, Comoros, Djibouti, Equatorial Guinea, Liberia, the Saharawi Arab Democratic Republic (better known as the Western Sahara), the Seychelles, and Zimbabwe.

In summary, the policy implementation of the Yamoussoukro Decision has made little progress over the past eight years. However, the outcome of the most recent meeting of ministers responsible for air transport indicates some enhanced political will to move ahead with the required policy implementation of the Yamoussoukro Decision (African Union 2007c).

Operational Implementation

At the operational level, the current situation in Africa concerning the liberalization of intra-African air services reflects a heterogeneous picture. On the one side are those states that typically maintain a small, often struggling, state-owned carrier and that generally remain very protective in their bilaterals. By not applying the principles of the Yamoussoukro

Decision, they aim at regulating access, capacity, and frequency to limit competition, which maintains tariffs at high levels.

On the other side are two groups of countries that actively support the liberalization of air services. The first group of states consists of those that have strong, and often market-dominant, air carriers. These states are typically able to compete on an operational, as well as on a financial, level. Their main challenge, however, is access to adequate markets, as intra-African air service markets remain generally thin, fragmented, and underdeveloped. To support the development of new markets, states with strong carriers therefore aim at opening up to achieve free access on a bilateral basis. The second group consists of states that have lost or never had a significant national carrier. These states are typically keen to attract more flights to serve their country and do not mind foreign domination of the airline industry. Both types of states with a liberal air service policy have begun to agree to bilaterals, which are mostly in line with the principles of the Yamoussoukro Decision.

The Cases of Ethiopia, Uganda, and Zambia

An interesting case of a special form of protectionist policy is Zambia, which liquidated its national airline, Zambia Airways, in 1994. Even though Zambia does not currently have a recognized national carrier,⁵ and even though it is unlikely that a national carrier could be operated successfully on the proposed network, which includes transcontinental flights to Europe, the government of Zambia continues to plan for the re-establishment of such a carrier (SH&E Ltd. and Ernst and Young 2005, p. 8). This has resulted in a continued policy of protectionism when negotiating international air service agreements. The government of Zambia has signed a total of 72 bilaterals, but of these only the following eight are currently in use: Angola, the Democratic Republic of Congo, Ethiopia, Kenya, Malawi, South Africa, the United Kingdom, and Zimbabwe. The most important bilateral air service relationship is with South Africa, for which traffic between five city pairs was agreed: Johannesburg to Lusaka (3,000 seats per week each party), to Ndola (2,700 seats), to Livingstone (2,200 seats), and to Mfuwe (400 seats) and from Pilanesberg to Livingstone (400 seats).

The capacity of these traffic rights was initially only partially used, because Zambia did not designate a qualified operator. Eventually, the Zambian traffic rights on the Lusaka–Johannesburg segment were assigned to a South African low-cost carrier that operated under a Zambian operator's certificate. However, further liberalization has been constrained because of continued resistance by both the South African and the

Zambian governments. Both countries have repeatedly refused to grant fifth freedom rights, which were requested on the basis of the Yamoussoukro Decision: Egypt (Cairo–Lusaka–Johannesburg) was refused by South Africa in 2001, Libya (Tripoli–Lusaka–Johannesburg) was refused by Zambia in 2001, Ethiopia (Addis Ababa–Lusaka–Johannesburg) was refused by Zambia in 2005, Nigeria (Lagos–Lusaka–Johannesburg) was refused by Zambia in 2006 during bilateral negotiations, and a request by Kenya (Nairobi–Lusaka–Harare) was refused by Zambia in 2005 (Schlumberger 2007, p. 192). Clearly Zambia's protectionism policy is geared at protecting a future national carrier. This is especially obvious on the most lucrative routes, where even existing Zambian operators have been refused traffic rights.

The stark contrast to Zambia is Ethiopia, which for more than 60 years has operated Ethiopian Airlines, its strong national carrier. For many years Ethiopia pursued an aggressive open skies policy that aimed at granting liberal air service rights on a reciprocal basis to states both within and outside Africa.⁶ As an airline, Ethiopian Airlines recognizes access to new markets, especially in Africa, as a strategic opportunity that clearly outweighs possible fare reductions resulting from a more competitive environment (interview with Girma Wake, chief executive officer of Ethiopian Airlines, 25 April 2007, Addis Ababa). As of October 2006, Ethiopia had concluded a total of 84 bilaterals. Of these, 46 bilaterals had been undertaken with African states,⁷ 13 with European states, and 25 with other states (Strategic Planning Consulting 2006). Of the 46 bilaterals with African states, 19 can be considered to be in accordance with the Yamoussoukro Decision, of which 6 were concluded before the Yamoussoukro Decision came into force and 13 were signed after the Yamoussoukro Decision was adopted.

An analysis of Ethiopian Airlines' current network provides an interesting picture:

- Of the 19 bilaterals that conform to the Yamoussoukro Decision, 13 are regularly served by Ethiopian Airlines with third, fourth, and fifth freedom traffic. Six have no traffic.
- Of the 27 bilaterals that do not conform to the Yamoussoukro Decision, 10 are regularly served by Ethiopian Airlines with third, fourth, and fifth freedom traffic. Seventeen have no traffic.

The analysis of the bilaterals of Ethiopia with the current network flown by its designated carrier indicates that two-thirds of these bilaterals result in regular third, fourth, and fifth freedom traffic, while only two

exclude fifth freedom operations. At the same time, of the 27 bilaterals that do not conform to the Yamoussoukro Decision, only about one-third results in regular third, fourth, and fifth freedom traffic, while two exclude fifth freedom operations and most result in no traffic at all (see appendix I).

The example of Ethiopia demonstrates that implementation, when understood as application of the principles of the Yamoussoukro Decision, can be done successfully on a purely operational basis. This is important, because it supports the statement that implementation of the Yamoussoukro Decision does not depend primarily on carrying out public policy based on a law or treaty. In other words, even if certain elements of the Yamoussoukro Decision such as the executing agency are absent, implementation can be achieved between two or more states on a bilateral basis. This also implies that certain elements of the Yamoussoukro Decision that are considered crucial for implementation, for example, competition regulation, could be substituted by a bilateral understanding. Therefore, should a conflict arise in the application of a bilateral that conforms with the Yamoussoukro Decision, a solution would most likely be sought in negotiations rather than by calling upon a third party institution such as the executing agency or the monitoring body.⁸

A country that has developed an open skies policy without having a strong carrier to benefit from liberalization is Uganda. Uganda's national carrier, Air Uganda, was liquidated in 2001 after it had declared bankruptcy. In the absence of a significant national carrier, Uganda began opening up its air service market by agreeing to bilaterals that have no restrictions in terms of access, capacity, or frequency. These bilaterals conform fully to the Yamoussoukro Decision. The government's objective was to allow the foreign private sector to develop the air transport market, recognizing that Uganda had insufficient private capital to support the start-up of an operator that could compete successfully (interview with Zephaniah M. Baliddawa, chair of the board of directors of the Civil Aviation Authority of Uganda, 24 April 2007, Addis Ababa). This open policy has resulted in the continued growth of air services expressed in passengers and cargo carried. According to Ugandan Civil Aviation Authority statistics, the flow of international passengers grew by an average of 11 percent per year from 2002 to 2006 while cargo grew at a rate of 7.9 percent. In 2001, when the Ugandan national carrier was liquidated, international passenger flows stagnated, but air cargo experienced a significant increase of 42.7 percent.

The African Air Transport Industry and Liberalization

AFRAA has also recognized the opportunities that liberalization of air transportation in Africa provides. AFRAA expressed its concerns about the lack of progress in the liberalization of market access within Africa at its 38th Annual General Assembly held in 2006. It stated that procrastination in implementation was inhibiting the growth and competitiveness of African carriers. However, it also recognized that full implementation by all states at the same time was not feasible because of the great disparity in air transport development and level of preparedness of many African countries. To support implementation by certain member states and the African Union, AFRAA decided to establish a core group of states that were like-minded, ready, and willing to spearhead implementation of the Yamoussoukro Decision on a multilateral basis without waiting for implementation by all other countries (AFRAA 2006, p. 2). This group, referred to by AFRAA and subsequently by the press and others, as the club of the ready and willing, does not carry any legal weight, because it was initiated by AFRAA, a private association of African carriers, without any official endorsement by the states that are party to the Yamoussoukro Decision. However, it signifies an important political factor, namely, while many states are still procrastinating, implementation of the Yamoussoukro Decision is indeed supported by the industry.

Finally, when assessing the current situation in Africa in terms of operational implementation, one needs to review the air transport sector by breaking it down on a country-by-country basis according to the type of national carrier operated. This results in an extremely fragmented picture (see appendix B for a complete analysis):

- Five countries have dominating state-owned carriers: Egypt, Ethiopia, Kenya, Morocco, and South Africa.
- Twenty countries have weak or small state-owned carriers: Algeria, Angola, Botswana, Cameroon, Cape Verde, Comoros, Djibouti, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Seychelles, Sudan, Tanzania, Tunisia, and Zimbabwe. (Weakness is defined as either maintaining a heavily subsidized air carrier with public funds or providing other government-directed advantages, for instance, airport privileges, to the flag carrier.)
- Twenty-five countries have only private operators: Botswana, Burkina Faso, Burundi, Chad, the Democratic Republic of Congo, the Republic of Congo, Côte d'Ivoire, Equatorial Guinea, Eritrea, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Nigeria, Rwanda,

São Tomé and Príncipe, Senegal, Sierra Leone, Somalia, Swaziland, Togo, Uganda, and Zambia.

- Four countries have no known operators: the Central African Republic, Niger, Lesotho, and the Western Sahara.

When evaluating the status quo of the ready and willing countries, which are applying or will apply the Yamoussoukro Decision, one can assume that all 5 countries with dominating state-owned carriers, most of the 25 countries with private operators, and all 4 countries with no operators would be included. These 34 countries represent a clear majority compared with the 20 countries that maintain weak or small state-owned carriers and that are procrastinating in opening up their air service markets.

Safety and Security Requirements

Several articles of the Yamoussoukro Decision address safety and security directly and indirectly. Article 5.1 notes that a state party may unilaterally limit the volume of traffic, the types of aircraft to be operated, or the number of flights per week for environmental, safety, technical, or other special considerations. Article 6.9 declares that the eligibility criteria for a designated airline to operate under the Yamoussoukro Decision framework are that the airline must be capable of demonstrating its ability to maintain standards at least equal to those set by ICAO and to respond to any query from any state to which it provides air services. Article 6.10 cites that a state party may revoke, suspend, or limit the operating authorization of a designated airline of the other state party if the airline fails to meet the eligibility criteria. Article 6.11 notes that state parties must recognize air operators certificates, certificates of airworthiness, certificates of competency, and personnel licenses issued or validated by the other state parties that are still in force provided that the requirements for issuing such certificates or licenses are at least equal to the minimum standards set by ICAO. Finally, Article 6.12 addresses security by setting out that state parties explicitly reaffirm their obligation to comply with civil aviation safety and security standards and practices.

ICAO regularly assesses the degree of states' compliance with its safety and security oversight requirements. In 1994, the ICAO General Assembly established ICAO's Safety Oversight Programme, a voluntary assessment of states' compliance with SARP, which included assistance to states whose compliance was deficient. In 1999, ICAO commuted this program to the mandatory Universal Safety Oversight Audit

Programme, which consisted of a well-structured and in-depth evaluation of each ICAO contracting state's compliance with annexes 1, 6, and 8 (ICAO 2000). In 2002, ICAO launched its Universal Security Audit Programme, which assesses compliance with annex 17, "Security: Safeguarding International Civil Aviation against Acts of Unlawful Interference," to promote global aviation security. While the safety audits are shared between contracting states and became public as of March 2008, the security audits remain strictly confidential. Finally, in 2005, ICAO extended the scope of its Universal Safety Oversight Audit Programme to a much more detailed audit that includes all annexes except annex 17.⁹

Several other sources of information for assessing Africa's current aviation safety and security situation are also available in addition to ICAO's safety and security audit programs. In 1991, the U.S. Federal Aviation Administration (FAA) launched the International Aviation Safety Assessment Program. This mandatory audit program of foreign states by FAA inspectors assesses the compliance of countries that currently operate flights to the United States on aircraft registered in that state or will do so in the near future. This came about after a series of accidents and incidents in the United States involving foreign carriers, often from developing countries (Dempsey 2004). However, as the International Aviation Safety Assessment Program only assesses countries that have currently or will have future flights by foreign-registered operators into the United States, the program has only evaluated 10 African countries, half of which are considered to be compliant with ICAO's SARP (FAA 2007).

Another useful tool for assessing states' safety standards is the Operational Safety Audit Program of the International Air Transport Association (IATA). The program's aim is to be "an internationally recognized and accepted evaluation system designed to assess the operational management and control systems of an airline." It claims to provide a "degree of quality, integrity and security such that mutually interested airlines and regulators can all comfortably accept IOSA [the program's] audit reports" (IATA 2007b). Each member airline of IATA had to become certified by the program by the end of 2007 or risk losing its IATA membership. Currently, only nine certified carriers are registered in seven African countries (Egypt, Ethiopia, Kenya, Mauritius, Morocco, South Africa, and Tanzania [IATA 2007b]).

The most recent source of information on air carrier safety is the EU's blacklist of certain airlines. After a series of accidents in 2004 and 2005,

the European Commission decided, in consultation with member states' aviation safety authorities, to ban airlines found to be unsafe from operating in European airspace.¹⁰ The EU published its first list on 22 March 2006, and it included 50 carriers, mostly from Africa (Dempsey 2006, p. 61). The two-part list is updated regularly and published in the *Official Journal of the European Union* as annexes A and B to the Commission Regulation. The first list includes all airlines banned from operating in Europe. The second list includes airlines whose operations in Europe are restricted under specific conditions.¹¹ The 4 July 2007 list contains 156 airlines from 17 countries. Of these, 74 airlines (47 percent) and 9 countries (53 percent) are in Africa.

Another approach to assessing the overall safety situation in Africa could be to compare Africa's accident statistics with those of other regions. According to IATA, Africa has the worst accident statistics. In 2004, African airlines accounted for 23 of the total of 103 accidents worldwide, or 22 percent of all accidents. However, Africa accounts for only 4.5 percent of all flights flown globally for all fleets (Eastern- and Western-built aircraft) (IATA 2006, p. 23). Expressed in hull losses per million sectors flown, African carriers lost an average of 6.3 aircraft per million departures in 2004 compared with 0.78 aircraft per million departures worldwide (IATA 2006, p. ix). This rate improved slightly in 2006, when African carriers lost 4.31 aircraft per million departures compared with 0.65 aircraft per million departures worldwide (IATA 2006, p. 7). This still represents an accident rate 6.6 times higher than the worldwide average. When compared with Europe (0.32 losses), the accident rate in Africa is 13.5 times higher, and when compared with North America (0.49 losses), it is 8.8 times higher.

When analyzing the cause of the high accident rates in Africa one needs to look at three distinct groups of carriers. The first group is the major intercontinental carriers that operate between the African continent and Europe, Asia, and the Americas. Most of these carriers are registered in Europe, North America, or Asia and have an excellent safety record.¹² Indeed, none of these carriers had any major accidents on intercontinental operations to and from Africa during 1998–2007 except for one crash of a Spanish-registered regional flight between Spain and Morocco. (On 25 September 1998, a BAe-146 of the Spanish operator Paukn Air crashed near Boumahfouda, Morocco, claiming 38 lives [Flight Safety Foundation 2007]). The second group involves operators that are registered in an African country and that operate Western-built air transport category aircraft that are currently still in use in most developed countries.¹³ Table 3.1 summarizes all major accidents of this group from

Table 3.1 Major Accidents of African Carriers Operating Western-Built Aircraft, October 1998–June 2008

<i>Date</i>	<i>Type of aircraft</i>	<i>Operator</i>	<i>Number of deaths</i>	<i>Crash location</i>
10 October 1998	Boeing 727	Congo Airlines	41	Kindu, Democratic Republic of Congo
7 August 1999	Dornier Do-228	Transportes Aéreos de Cabo Verde	18	Santo Antão, Cape Verde
31 October 1999	Boeing 767	EgyptAir	217	Nantucket, United States
30 January 2000	Airbus A310	Kenya Airways	169	Abidjan, Côte d'Ivoire
17 March 2001	Beech 1900	SAL Express	16	Quilemba, Angola
7 May 2002	Boeing 737-500	EgyptAir	14	Tunis, Tunisia
4 July 2002	Boeing 707	New Gomair	28	Bangui, Central African Republic
6 March 2003	Boeing 737-200	Air Algérie	102	Tamanrasset, Algeria
8 July 2003	Boeing 737-200	Sudan Airways	116	Port Sudan, Sudan
19 July 2003	Metroliner	Ryan Blake Charter	14	Mount Kenya, Tanzania
25 December 2003	Boeing 727	Union des Sports Africains	151	Cotonou, Benin
3 January 2004	Boeing 737-300	Flash Airlines	148	Sharm el Sheikh, Arab Republic of Egypt
22 October 2005	Boeing 737-200	Bellview Airlines	117	Lisa, Nigeria
10 December 2005	DC9-30	Sosiso Airlines	108	Port Harcourt, Nigeria
29 October 2006	Boeing 737-200	ADC Airlines	97	Abuja, Nigeria
5 May 2007	Boeing 737-800	Kenya Airways	114	Douala, Cameroon
15 April 2008	DC9-51	Hewa Bora	48	Goma, Democratic Republic of Congo
2 May 2008	Beechcraft 1900C	Flex Air	23	Rumbek, Sudan
10 June 2008	Airbus A310-324	Sudan Airways	30	Khartoum, Sudan

Source: Flight Safety Foundation 2007.

October 1998 through June 2008. Note that this report defines a major accident as a full hull loss with 10 or more fatalities (Flight Safety Foundation 2007).

The most accurate source for researching the causes of aircraft accidents are the official accident reports that each state of occurrence must initiate provided that it is an ICAO contracting state. Annex 13 of the Chicago Convention specifies the requirements for the notification and reporting of certain incidents and accidents (ICAO 2001). The following accident reports are available and provide a clear overall picture of the causes:

- On 31 October 1999, EgyptAir Flight 990 dove into the Atlantic Ocean about 60 miles south of Nantucket, Massachusetts, in international waters, killing all 217 people on board. At the request of the Egyptian government, the U.S. National Transportation Safety Board took the lead in this investigation, with the Egyptian Civil Aviation Authority participating. The board determined that the probable cause of the accident was the airplane's departure from normal cruise flight and subsequent impact with the Atlantic Ocean as a result of the relief first officer's flight control inputs. The reason for his actions was not determined (National Transportation Safety Board 2002, p. 67).
- Kenya Airways Flight 481 crashed into the sea on 30 January 2000, shortly after it took off from Abidjan en route for Lagos. Of the 179 people on board the Airbus A310 aircraft, only 10 passengers survived the crash. The investigation determined that the cause of the accident was the pilot's action to put the aircraft into a descent after a faulty stall warning sounded immediately after takeoff (Bureau d'Enquêtes et d'Analyses pour la Sécurité de l'Aviation Civile 2002, p. 73).
- On 19 July 2003, a Fairchild Metroliner II (SW4) of the South African operator Ryan Blake Air Charter collided with terrain a few hundred feet below the peak of Mount Kenya. All 12 passengers and 2 crew members perished on impact. The probable cause of the accident was the pilot's failure to maintain situational awareness of the aircraft's proximity to the surrounding terrain, resulting in controlled flight into terrain. Contributing factors were inadequate flight planning, poor pilot briefing by air traffic control personnel in Nairobi, poor communication between air traffic control units, and failure of the radar controller to advise the pilot of termination of radar service (Ministry of Transport Department of Air Accident Investigation 2003, p. 69).

- Air Algérie Flight 6289 crashed shortly after liftoff on 6 March 2003, killing 96 of the 97 passengers and all 6 crew members. The investigation determined that the probable cause of the accident was a combination of loss of an engine during the critical phase of the flight, followed by the nonretraction of the landing gear after the engine failure, and the captain as the nonflying pilot taking over control of the airplane before having clearly identified the problem (National Commission of Inquiry 2004, p. 40).
- On 25 December 2003, Flight 141 of the charter company Union des Transports Africains crashed on takeoff at Cotonou Cadjèhoun Airport in Benin killing 151 of the 163 people on board. The accident was a result of the aircraft being severely overloaded (the exact number of passengers could never be completely determined, but the overload was estimated at around 8 tonnes or 10 percent of the total weight) and the aircraft's centre of gravity was affected (Bureau d'Enquêtes et d'Analyses pour la Sécurité de l'Aviation Civile 2004, p. 63).
- On 3 January 2004, Flash Airlines Flight 604 crashed into the Red Sea shortly after takeoff from Sharm el-Sheikh International Airport killing all 135 passengers and 13 crew. The National Transportation Safety Board and the French Bureau d'Enquêtes et d'Analyses pour la Sécurité de l'Aviation Civile conducted a joint investigation in support of the Egyptian authorities. Their conclusion was that the pilot had suffered spatial disorientation and that the copilot was unwilling to challenge his more experienced superior, plus both pilots were insufficiently trained (Ministry of Civil Aviation 2005).
- On 10 December 2005, Sosoliso Airlines Flight 1145 crashed near the runway at Port Harcourt, Nigeria, claiming 108 lives. The accident investigation determined as probable cause the crew's decision to continue the approach beyond the decision altitude without having the runway in sight (Ministry of Aviation 2006, p. 23).
- Kenya Airways Flight KQ 507, a Boeing 737-800, crashed on 5 May 2007 shortly after take-off on a flight from Douala, Cameroon, to Nairobi, Kenya. All 114 occupants on board were killed and the airplane was completely destroyed. The accident report (Cameroon Civil Aviation Authority 2010), which was prepared with assistance of the US National Transportation Safety Board, determined as probable cause the loss of control by the crew as a result of spatial disorientation after a long slow roll, during which no instrument scanning was

done, and in the absence of external visual references in a dark night. In addition, inadequate operational control and lack of crew coordination, coupled with nonadherence to flight monitoring procedures and confusion in the use of the autopilot, also contributed to the accident. The report urged rigorous implementation of the accident prevention system for air carriers. It also identified as an ongoing challenge the maintenance of continuous oversight over aviation operators, who are often better equipped thanks to international commercial partnerships, by the civil aviation administration.

All of the above findings on major accidents involving African carriers reveal pilot error as the prime cause. In addition, in two cases (Kenya Airways in 2000 and Air Algérie in 2003) mechanical failure contributed to the crash, but if the crew had applied the recommended procedures the accident could have been avoided. In the Sosoliso 2005 case, poorly designed airport infrastructure contributed to accident. In the Kenya Airways 2000 case, the absence of adequate search and rescue equipment was a major factor.

The third group of carriers consists of various African carriers that operate older Western- or Eastern-built aircraft. During February 1998 through October 2007, at least 29 accidents involving such aircraft were recorded (table 3.2). The aircraft operated by this group of carriers are mostly uneconomical to operate in the West because of strict safety and environmental regulations. Many accidents among this group are never reported and the authorities of the state of occurrence investigate only a few of the accidents. The reasons for the accidents are therefore mostly unknown. However, the various small carriers that acquire one or several old aircraft on the nontransparent aircraft supply market often operate without any supervision by their national civil aviation authority. Their pilots must work long hours and regularly operate in a dangerous environment, which results in crashes with many causes. One of the most notorious countries with respect to poor safety oversight is the Democratic Republic of Congo. This large country the size of Western Europe has only 300 miles of paved roads and depends primarily on air transportation, but the presence of many small, unregulated operators and the virtual absence of regulatory oversight have resulted in various accidents (Langewiesche 2007).

Another concern in relation to air transport safety is the large number of accidents involving flights conducted by the air force, which in many African countries transports passengers and cargo for profit. The ministry

Table 3.2 Accidents of African Carriers Operating Western- or Eastern-Built Older Aircraft, February 1998–October 2007

<i>Date</i>	<i>Type of aircraft</i>	<i>Operator (includes air force flights)</i>	<i>Number of deaths</i>	<i>Crash location</i>
12 February 1998	Antonov 26	Sudan Air Force	26	Nasir, Sudan
12 May 1998	Yunshuji Y-7	Mauritanian Air Force	39	Nema, Mauritania
14 December 1998	Antonov 12	Khors Air	10	Kuito, Angola
26 December 1998	Lockheed L-100	Transafrik	14	Vila Nova, Angola
2 February 1999	Antonov 12	Savanair	30	Luanda, Angola
3 June 1999	Antonov 32	Sudan Air Force	50	Khartoum, Sudan
19 April 2000	Antonov 8	Rwanda Air Force	24	Pepa, Democratic Republic of Congo
12 August 2000	Antonov 26	Staer Airlines	27	Tshikapa, Democratic Republic of Congo
31 October 2000	Antonov 26	ACA Ancargo Air	49	Monaquimbundo, Angola
15 November 2000	Antonov 24	ASA Pesada	57	Luanda, Angola
4 April 2001	Antonov 26	Sudan Air Force	14	Adar Yel, Sudan
4 May 2002	BAC One-Eleven	EAS Airlines	149	Kano, Nigeria
30 June 2003	Lockheed C-130	Algerian Air Force	15	Blida, Algeria
17 November 2003	Antonov 12	Sarit Airlines	13	Wau, Sudan
29 November 2003	Antonov 26	Congolese Air Force	33	Boende, Democratic Republic of Congo
8 June 2004	H5-748	Gabon Express	19	Libreville, Gabon
5 May 2005	Antonov 26	Aeroworld	10	Kisangani, Democratic Republic of Congo
18 May 2005	Yunshuji Y-12	Zambian Air Force	13	Mongu, Zambia

(continued)

Table 3.2 Accidents of African Carriers Operating Western- or Eastern-Built Older Aircraft, February 1998–October 2007 (continued)

<i>Date</i>	<i>Type of aircraft</i>	<i>Operator (includes air force flights)</i>	<i>Number of deaths</i>	<i>Crash location</i>
25 May 2005	Antonov 12	Victoria Air	27	Biega, Democratic Republic of Congo
16 July 2005	Antonov 24	Equatorial Express	60	Baney, Equatorial Guinea
5 September 2005	Antonov 26	Aerocom	11	Isiro-Matari, Democratic Republic of Congo
9 September 2005	Antonov 26	Air Kasai	13	Brazzaville, Republic of Congo
11 February 2006	Antonov 26	Sudan Air Force	20	Aweil, Sudan
10 April 2006	Yunshuji Y-12	Kenyan Air Force	14	Marasbit, Kenya
3 August 2006	Antonov 28	Tracep	17	Bukavu, Democratic Republic of Congo
17 September 2006	Dornier DO-228	Nigerian Air Force	13	Vande Ikya, Nigeria
23 March 2007	Ilyushin 76	Transaviaexport	11	Mogadishu, Somalia
26 August 2007	Antonov 26	GLBC	14	Kongolo, Democratic Republic of Congo
4 October 2007	Antonov 26	Malilia Airlift	49	Kinshasa, Democratic Republic of Congo

Source: Flight Safety Foundation 2007.

of defense generally regulates and supervises these flights, which therefore do not need to comply with the same regulations as civilian flights.

Finally, there is a general misconception that Eastern-built aircraft tend to be of poor technological quality and that accounts for the high accident rate in Africa (Usim 2007). Africa indeed has an alarmingly high rate of accidents with Eastern-built aircraft. The hull loss rate per million departures of Eastern-built aircraft reached 54.35 in 2006 in Africa, 10 times the world average (5.61) and more than 40 times the rate in the Commonwealth of Independent States (1.32), which includes most states of the former Soviet Union (IATA 2006, p. 20).

The Interstate Aviation Committee, created in 1991 by the intergovernmental Agreement on Civil Aviation and Air Space Use among various states of the former Soviet Union, compared the safety record of aircraft designed and manufactured in the former Soviet Union with the safety level of comparable aircraft over a 30-year period. The study concludes that the level of flight safety of most Soviet-made types of aircraft is not worse, and in some cases is even better, than that of their Western analogues (Interstate Aviation Committee 2006). This clearly demonstrates that high accident rates are primarily a result of poor safety standards and not a consequence of operating Eastern-built and/or older aircraft.

The obligation of ICAO contracting states to adopt and apply the regulatory framework of the SARP must translate into a strong regime of surveillance and oversight of the aviation sector of any country. ICAO's safety audits have found an interesting correlation between poor implementation of SARP and lack of oversight, resulting in high accident rates. According to audit findings of 179 contracting states (audit findings are items of noncompliance with SARP, for example, no appropriate security regulations; the higher the findings, the worse the situation in the country audited), all regions of the world experience the same correlation (ICAO 2003a, p. A5). In Africa, the two most critical problems are the lack of continued surveillance and the poor resolution of safety audits (ICAO 2003a, p. A5). In other words, when addressing high accident rates in Africa, the most important factors for improvement are compliance with SARP and establishment of an adequate regulatory oversight regime.

For an overall assessment of the current safety and security situation in Africa, the following have been evaluated on a country by country basis (see appendix C):

- ICAO audit reports: audit findings, recent improvements, and ICAO recommendations in comparison with the world average result in

4 states rated “good,” 21 states rated “marginal,” and 26 states rated “poor.”

- FAA International Aviation Safety Assessment Program: 5 states are certified as category 1 (compliant with ICAO SARP) and 5 states are certified as category 2 (noncompliant).
- EU list of banned carriers: 9 states have one or more banned carriers.
- IATA Operational Safety Audit: 7 states have carriers certified by the IATA.
- Fatal accidents: known accidents of air transport category aircraft and reported fatalities in air transport category aircraft registered in a given state since 1943.

The application of these five elements on the current aviation safety situation of African countries permits an overall rating of these states as good (1), marginal (2), or poor (3) in terms of safety. The conclusion of this research leads to 6 states being rated “good,” 16 states being considered “marginal,” and 31 states being rated “poor.” In other words, well over half of all African countries currently have poor aviation safety standards.

To assess progress on a regional basis (within RECs), one can review the implementation of operational regulation and the development of regional oversight capacity. However, the analysis reveals that most RECs have taken only minor steps toward regional oversight and states rated as poor can be found in most regions except North Africa (table 3.3).

Thus, the current situation with respect to safety oversight in Africa must be considered the single most important obstacle to implementation of the Yamoussoukro Decision. This is significant, especially because international air services in general, and the Yamoussoukro Decision in particular, foresee the restriction or suspension of air services in the case of poor safety standards. In addition, the costs of financing and insuring aircraft become expensive if the aircraft concerned are registered in a state with poor aviation safety standards (Chérif 2006).

Implementation: Condition Precedent or Subsequent?

Numerous meetings, conferences, and workshops have been held since the Yamoussoukro Decision was initially signed in November 1999. All these meetings included discussions about various elements of the decision that needed to be implemented. For example, the most recent high-level meeting of the African Union, namely, the Third Conference of Ministers Responsible for Air Transport, concluded with the following

Table 3.3 Quality and Progress of Safety Oversight by RECs as of 2009

REC	Safety oversight by individual REC countries (number and percentage of REC countries)			Operational regulation	Regional (REC) safety oversight
	Good	Marginal	Poor		
Arab Maghreb Union	2 (40%)	2 (40%)	1 (20%)	None	None
Banjul Accord Group	1 (14%)	3 (43%)	3 (43%)	Pending; being prepared by the Cooperative Development of Operational Safety and Continued Airworthiness Program	Ongoing; Cooperative Development of Operational Safety and Continued Airworthiness Program should lead to a new safety agency
Economic and Monetary Community of Central Africa (CEMAC)	0 (0%)	1 (17%)	5 (83%)	Joint aviation code enacted; regulations pending.	Pending; Cooperative Development of Operational Safety and Continued Airworthiness Program should lead to a new safety agency
COMESA	2 (10%)	6 (30%)	12 (60%)	None	None
EAC	0 (0%)	2 (40%)	3 (60%)	Prepared by the EAC Civil Aviation Safety and Security Oversight Agency and needs to be adopted by each member state	Regional safety agency, EAC Civil Aviation Safety and Security Oversight Agency, established in 2007
ECOWAS	2 (12%)	5 (31%)	9 (57%)	None	None
SADC	1 (7%)	8 (53%)	6 (40%)	None	None
West Africa Economic and Monetary Union	0 (0%)	6 (25%)	6 (75%)	10 safety and security regulations enacted	Ongoing; Cooperative Development of Operational Safety and Continued Airworthiness Program should lead to a new safety agency

Source: Author compilation and research.

statement: “The Ministers reaffirmed the necessity to set up the Executing Agency responsible for the economic oversight of the liberalized air transport industry in Africa with a view to speeding up the implementation of the Yamoussoukro Decision” (African Union 2007c, p. 5).

This statement gives the impression that certain steps need to be taken before the Yamoussoukro Decision can be considered implemented. However, the key question is whether the Yamoussoukro Decision can be applied before these elements are implemented or whether the aforementioned elements (for example, competition rules) or certain conditions (such as safety compliance) have to be in place before the Yamoussoukro Decision can be applied. Applying common law principles of contract law, this section seeks to examine whether, on the one hand, the Yamoussoukro Decision states that several conditions precedent (that is, a fact, act, or event that must exist or occur before a contract or obligation becomes binding), or, on the other hand, whether the decision entails certain conditions subsequent (that is, facts that would extinguish an obligation that initially became binding after the breach had occurred, for example, the conclusion that a certain measure, such as an adequate safety oversight regime at a certain date, was not implemented as planned, while a liberalized air service agreement based on the Yamoussoukro Decision was already in place and flights were operating).

The first element of implementation to consider is the establishment of competition rules. The provision on competition rules in Article 7 of the Yamoussoukro Decision obliges state parties to “ensure fair opportunity on non-discriminatory basis for the designated African airline, to effectively compete in providing air transport services within their respective territories.” Strictly analyzed, and assuming that “within their respective territories” would be interpreted as a state party’s own national territory, the provision would only be applicable on flights within that territory. In other words, the provision on competition rules would only concern domestic air services among carriers of a given state. However, this would contradict “designated African airline,” which is a definition for carriers operating under the Yamoussoukro Decision.¹⁴ It would also not be an adequate provision to be included in the Yamoussoukro Decision, which, by definition, regulates the liberalization of intra-African (international) air services.

If one assumes that Article 7 concerns air services between the territories of two or, in the case of fifth freedom flights, three state parties, the Yamoussoukro Decision calls upon the concerned state parties to assure fair competition among, and nondiscrimination against, the designated

airlines operating between those states. This conclusion would steer away from the condition precedent of establishing general competition rules that are applicable to air transport services and put the burden of regulating competition on the bilateral relationship between state parties. If this interpretation were correct, application of the Yamoussoukro Decision would be possible as long as the concerned state parties of a given segment under the decision assure fair competition. If one applies modern principles of competition regulation, this would mainly imply that anticompetitive agreements between the different designated carriers would be sanctioned.

However, the question remains: does the absence of any guidelines or regulations on competition hinder application of the Yamoussoukro Decision? The answer lies in the fact that air transport in Africa has been, and mainly still is, regulated on a bilateral basis. While certain RECs have recently adopted competition regulations that apply to air transport, most new bilaterals that were negotiated on the basis of the principles of the Yamoussoukro Decision did not benefit from any competition regulation. The case of Ethiopian Airlines illustrates that the Yamoussoukro Decision can be applied on a bilateral basis even in the absence of competition regulation or an executing agency that could intervene and arbitrate in case of a dispute. The establishment of competition rules can therefore be considered a condition subsequent that does not hinder application of the Yamoussoukro Decision.

The dispute settlement mechanism, defined in Article 8 as the submission to arbitration after a failed settlement by negotiation, is another important element of the liberalization of air services. While the arbitration procedures remain pending, the executing agency was established by designating AFCAC to perform its duties and responsibilities. It is now the duty of the executing agency to develop the arbitration procedures in order to be in a position to arbitrate and settle disputes between Yamoussoukro Decision party states. However, as stated earlier, the absence of an arbitration procedure has not hindered several African states from agreeing to liberalized bilateral air service agreements that are fully in line with the principles of the Yamoussoukro Decision. To date, any disputes between states have been settled by negotiation. With the assignment of the responsibilities and duties of the executing agency to AFCAC, the agency can be considered established. No further conditions, other than the aforementioned establishment of competition rules, are therefore pending.

The monitoring body, which is responsible for the overall supervision, follow-up, and implementation of the Yamoussoukro Decision,

was established in Article 9 of the decision. While it has met only a few times since its creation, the monitoring body can be considered to be functional.¹⁵ The question remains whether the performance of the monitoring body can be considered to be satisfactory enough to comply with the dictates of Article 9.3, which refers to those duties and responsibilities set forth in annex 3 (actually annex 2). Given the several complex tasks of the monitoring body on the one hand, and the slow overall implementation of the Yamoussoukro Decision on the other hand, the monitoring body's performance is clearly substandard (box 3.1).

Box 3.1

Duties and Responsibilities of the Monitoring Body

The following duties and responsibilities of the monitoring body are defined in annex 2 of the Yamoussoukro Decision (quoted from UNECA 2004):

1. Prepare, for adoption by the subcommittee on Air Transport, the relevant annexes to the Decision;
2. Formulate proposals on studies, seminars, workshops and other measures aimed at enhancing and updating air transport services in Africa;
3. Use, if necessary, experts to undertake studies related to the implementation of the Decision;
4. Provide, on request, to interested organization and Member States, technical advises for the implementation of the Decision;
5. Receive declarations made in accordance with the Decision, notification of withdrawals of any declaration of complaints and requests and shall inform the Depository accordingly;
6. State its views on any disputes resulting from the application and/or interpretation of the Decision and recommend solution to the dispute;
7. State, on request of States party, its views on predatory and unfair competition practices;
8. Request the competent national and international bodies for the support required to carry out studies, seminars, work programs and other measures aimed at enhancing and updating air transport services in Africa;
9. Assist the OAU to organize the meeting of the subcommittee on Air Transport of the Committee on Transport, Communications and Tourism;
10. Analyze and plan for the periodic review of the Decision; and
11. Develop and formulate a coordinated implementation programme of the Yamoussoukro Decision between and within sub-regions.

Nevertheless, it would be too farfetched to consider this as a condition precedent for the application of the Yamoussoukro Decision, as this would include better performance of the monitoring body.

Finally, probably the most significant element of concern is the prevalent poor safety and security record in most African countries. High accident rates and poor safety and security ratings by many authorities or agencies paint an overall discouraging picture that might seriously hinder full application of the Yamoussoukro Decision. However, the decision does not directly establish the condition that all party states must fully comply with all ICAO SARP and that accident rates, for example, must remain at acceptable levels. The decision addresses safety and security by setting down several conditions that, if not met, mostly entail sanctions of a bilateral nature. For instance, in Article 5.1, a state party may unilaterally limit the volume of traffic for safety considerations; in Article 6.9, the eligibility criteria for a designated airline to operate under the decision include compliance with ICAO SARP; and, finally, in Article 6.10, a state party may revoke, suspend, or limit the operating authorization of a designated airline of the other state party if the airline fails to meet the criteria of eligibility, which include the maintenance of standards set by ICAO. Therefore, attaining and maintaining high safety standards under the Yamoussoukro Decision can clearly be seen as a condition subsequent. Traffic rights granted pursuant to the decision could be suspended or revoked if it was subsequently concluded that safety standards were not met.

Nevertheless, it remains of great concern that more than half of all African states continue to have poor safety standards. This is especially true because when strictly applying the principles of the Chicago Convention as outlined earlier, the consequence would be that more than half of African countries could not even engage in traditional international scheduled air traffic operated by aircraft registered in those states. Finally, on a more positive note, the African Union confirmed and reaffirmed its commitment to aviation security at the Third Conference of Ministers Responsible for Air Transport and plans to enhance cooperation among all member states with respect to this matter (African Union 2007c).

Notes

1. "Implementation." Wikipedia. <http://en.wikipedia.org/wiki/Implementation>. Accessed 11 April 2007.
2. The main reason for Mauritius' withdrawal (which was never done formally in accordance with Article 12.3 of the Yamoussoukro Decision) was apparently

- that Air Mauritius feared that sixth freedom traffic from Europe over the hubs of Johannesburg or Nairobi would be operated as third and fourth freedom traffic under the Yamoussoukro Decision.
3. Heads of state and government founded the Intergovernmental Agency on Development on 21 March 1996, at the Second Extraordinary Summit in Nairobi. The objectives of this intergovernmental agency are conflict prevention, management, and resolution; humanitarian affairs; infrastructure development (transport and communications); food security; and environmental protection.
 4. The 46 members states of AFCAC are Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, the Central African Republic, Chad, the Democratic Republic of Congo, the Republic of Congo, Côte d'Ivoire, the Arab Republic of Egypt, Eritrea, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Liberia, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, and Zambia.
 5. A small operator, Zambian Airways, has successfully established a regional network and is operating three Boeing 737 aircraft. However, the government of Zambia does not consider this operator to be a replacement for a national airline and continues to insist that a new national carrier must be established (interview held with Peter Tembo, permanent secretary of the Ministry of Communications and Transport, 26 March 2007, Lusaka).
 6. An open skies policy is the liberal granting of at least third, fourth, and fifth freedom rights without any restrictions of frequency, capacity, or type of equipment used. An open skies policy is always translated into a bilateral air service agreement with the aforementioned liberal traffic rights. However, the Yamoussoukro Decision notification process eliminates the need for a formal Yamoussoukro Decision compliant bilateral air service agreement, but to date no case of formal Yamoussoukro Decision procedure for notification and granting of traffic rights has occurred.
 7. One of these states is Somaliland, a self-declared independent republic located in the Horn of Africa within the internationally recognized borders of Somalia that is not recognized by any other country or by any international organization.
 8. Kenya temporarily refused Ethiopian Airlines the right to conduct fifth freedom operations between Nairobi and Kigali, Rwanda, in breach of the Yamoussoukro Decision compliant bilateral between Ethiopia and Kenya. However, the issue was dealt with by seeking a diplomatic solution, that is, direct negotiations between the parties, rather than, for example, calling on the African Union for support. Ethiopian management considers an amicable solution paramount for any legal procedure that the Yamoussoukro Decision

framework would provide in the future (interview with Girma Wake, chief executive officer of Ethiopian Airlines, 25 April 2007, Addis Ababa).

9. The 35th Session of the ICAO General Assembly considered the council's proposal for the continuation and expansion of the Universal Safety Oversight Audit Programme as of 2005 and resolved that the program be expanded to cover all safety-related annexes (1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, and 18) and also to transit to a comprehensive systems approach for the conduct of safety oversight audits. All states are now being progressively audited under the expanded program.
10. The list bans both individual air carriers that are considered unsafe as well as some states that do not demonstrate that they exert the necessary regulatory oversight. The latter are blacklisted by banning all carriers registered in such a state. However, this creates a false picture for travelers, because they do not know if all carriers of a given state have been checked or only the one that is banned. Industry experts therefore criticize the list and suggest a mechanism that does not mix the evaluation and banning of individual carriers with the banning of a state (interview with Günther Matschnigg, IATA senior vice president for safety, operations, and infrastructure, Montreal, 25 September 2007).
11. List of airlines banned within the EU. European Commission, Mobility and Transport. http://ec.europa.eu/transport/air-ban/list_en.htm.
12. These carriers include Air France, British Airways, Alitalia, KLM, IBERIA, TAP Portugal, Swiss International Airlines, SN Brussels, Austrian, Virgin Atlantic, Delta, North American, Etihad, and China Southern Airlines (*Official Airline Guide* 2007).
13. These aircraft include all the Boeing 700 series, as well as Airbus, McDonnell Douglas, British Aerospace, Dornier, Fairchild Swearingen Metroliner, Beech, and the DHC-6 Twin Otter aircraft.
14. Article 6.1 provides that each state party has the right to designate at least one airline to operate the intra-African air transport service in accordance with the Yamoussoukro Decision. According to Article 6.2, the designated carrier could also be from another state party.
15. The monitoring body held a total of four documented meetings until 2005 (African Union 2005a). The meetings of experts at the second and third sessions of the Conference of African Ministers Responsible for Air Transport in 2006 and 2007 represent the monitoring body even if their reports are not titled accordingly (African Union 2006c, 2007c). However, according to annex 2 of the Yamoussoukro Decision, the monitoring body shall meet, on a rotational basis, twice a year for the first year and thereafter as required.

