

## CHAPTER 4

# Regional Implementation of the Yamoussoukro Decision

It was recognized early on that implementation of the Yamoussoukro Decision depended mainly on regional initiatives that were to be carried out by regional economic groupings. The African states outlined this at the “Worldwide Air Transport Conference: Challenges and Opportunities of Liberalization,” which was held in Montreal in March 2004. They stated that with reference to competition regulation, implementation of the Yamoussoukro Decision should be made through regional economic groupings. They listed the following five possible groupings (ICAO 2003b, para. 2.2):

- the Arab Maghreb Union (AMU),
- ECOWAS,
- the Central African Economic and Monetary Community (Communauté Économique et Monétaire de l’Afrique Centrale or CEMAC),
- SADC,
- COMESA.

This report examines progress made in regional implementation of the Yamoussoukro Decision by using this proposed grouping of regional economic organizations. However, in some instances other regional organizations that play a certain role in the liberalization of air transport

in Africa, such as the League of Arab Nations, the West African Economic and Monetary Union (WAEMU), and the EAC, will also be examined.

## **North Africa**

In the past, two regional organizations have played a part in trying to regulate or liberalize air transport in North Africa: the AMU and the League of Arab States.

### ***The Arab Maghreb Union***

The AMU was created on 17 February 1989, by a treaty that was signed in Marrakesh, Morocco, by the leaders of Algeria, Libya, Mauritania, Morocco, and Tunisia (Treaty Creating the Arab Union of the Maghreb 1992). The treaty was, in essence, modeled, after the European Community, now the EU. Its main objectives include integrating the member states and their peoples with the goals of achieving progress and prosperity; preserving peace; developing a common policy in certain domains; and gradually achieving free movement of people and transfer of services, goods, and capital. At the international level, the treaty (Article 3) aims to “achieve concord among the Member States and to establish between them a close diplomatic cooperation based on dialogue.” The AMU’s economic objectives include the achievement of industrial, agricultural, commercial, and social development of member states, with an emphasis on setting up joint ventures and common programs.

AMU members have met fairly regularly since 1990 and the five member countries have signed more than 30 multilateral agreements in several economic, social, and cultural areas; however, only five agreements have been ratified by all AMU members. The agreements that were ultimately adopted concerned trade in and tariffs on industrial products, trade in agricultural products, investment guarantees, elimination of double taxation, and common phytosanitary standards (Institute for Security Studies 2007b). Despite these agreements, the AMU has largely been paralyzed because of the dispute about the status of the Western Sahara. Morocco annexed the territories of this former Spanish colony in 1975, but ever since, the liberation movement known as the Popular Front for the Liberation of Saguia el-Hamra and Río de Oro has proclaimed its independence with Algerian backing (Aghrout and Sutton 1990, p. 119).

AMU members recognized early on that the transport sector was important for achieving the stated objective of industrial, agricultural, commercial, and social development. In 1969, members created a shipping

company, the Maghreb Coast Line, which operated on a limited scale until it was dissolved 1976 because of financial problems. In 1970, the AMU's Air Transport Committee approved the concept of a jointly owned airline to be known as Air Maghreb. In the railway sector, members proposed a regional project that included the Trans-Maghreb Express, which would link Casablanca, Algiers, and Tunis (Aghrout and Sutton 1990, p. 117). Even though these three initiatives never resulted in sustainable ventures, a meeting of Maghreb transport ministers held in Tripoli in May 1989 resurrected the idea of joint air, land, and rail transport companies (Aghrout and Sutton 1990, p. 136). However, no significant progress was achieved and the idea of creating a joint airline appears to have been abandoned after the bankruptcy of Air Afrique in 2001.

The AMU did not consider the liberalization of air transport among member states even though all of them except Morocco were signatory states of the Yamoussoukro Decision. The initiative to liberalize air transport came from neighboring European countries that wanted to harmonize and gradually liberalize transport systems in the Mediterranean region. In a conference in Paris in 1995, the ministers of six western Mediterranean countries (Algeria, France, Italy, Morocco, Spain, and Tunisia) agreed to pursue a joint policy aimed at harmonizing and extending the European transport system with the Maghreb transport system. Concerning air transport, the conference set the objectives at harmonizing air traffic control systems between Europe and the Maghreb and fostering partnerships between the six countries "in the interest of gradual and controlled liberalization of the international air transport sector" (European Conference of Ministers of Transport 1995, pp. 3, 5).

The consultations between the Maghreb countries and their European counterparts were eventually elevated to the level of the EU, which began to negotiate air service agreements on behalf of its member states.<sup>1</sup> In May 2005, the European Commission began negotiations with Morocco on an open skies agreement. This initiative was widely seen as the test case for the new European aviation policy (European Commission 2005b). After five rounds of negotiations in Rabat, Morocco, an agreement was initialed in Marrakech on 14 December 2005. The open skies agreement has two phases. The first phase grants unrestricted third and fourth freedom rights between any point in Morocco and any point in a country in the EU for both Moroccan and EU carriers. The second phase, which will be instituted once Morocco has implemented the relevant European aviation legislation and regulation, will additionally grant consecutive fifth freedom rights to Moroccan carriers in Europe and to EU carriers "to countries

involved in the Neighbourhood Policy” (European Commission 2005b, p.2). The European Neighbourhood Policy in transport, as referred to in the agreement, consists of “setting-up an integrated multimodal Euro-Mediterranean transport network, which will contribute to the strengthening of exchanges between the EU and the Mediterranean Partners, and among the Mediterranean Partners themselves” (Euromed Transport Project 2005, p. 1). The background to this policy is the EU’s objective to develop the wider European common aviation area by 2010, which will include all 27 member states.

The open skies agreement between the EU and Morocco potentially has a significant impact on the liberalization of air transport in the Maghreb region. According to the agreement, any European carrier will eventually be allowed to serve any destination between two countries that are both part of the European Neighbourhood Policy.<sup>2</sup> Another country that is currently evaluating its bilateral relationship with the EU is Tunisia. A recent World Bank study (Kaminski 2007) concluded that Tunisia would greatly benefit from a similar bilateral air service agreement with the EU. However, while Morocco’s open skies agreement with the EU marks the climax of its 10-year initiative to liberalize international air travel, Tunisia has not yet embarked on talks with the EU on liberalizing its air services (Kaminski 2007, p. 2). The initial impact of the liberalization has been that several European discount operators, such as easyJet, Ryanair, and Aigle Azur, have initiated flights between European cities (Madrid, London, Barcelona, and Paris) to several points in Morocco (Casablanca, Marrakesh, Fez, Agadir, and Oujda). At the same time, Royal Air Maroc was strengthened after a successful restructuring and has expanded its network of European destinations (Kaminski 2007, p. 12). Thus given the promising initial results of the liberalization of air services between Morocco and the EU, other North African countries will certainly follow this path in the foreseeable future.

In addition to Morocco, the North African countries of the European Neighbourhood Policy include Algeria, the Arab Republic of Egypt, Libya, and Tunisia, all of which could agree to a similar air transport agreement. This may eventually lead to a situation where all Maghreb countries except Mauritania are bound to the same air service liberalization terms, which in phase two would allow fifth freedom flights of European carriers to these AMU states. Should Maghreb member states not liberalize air services among themselves, the odd situation may persist whereby European fifth freedom flights may openly compete with regional AMU traffic that is still bound to traditional bilateral air service agreements.

AMU ministers seem to have recognized the need for liberalizing air services in their region when they met in Skhirat, Morocco, in April 2007. During this meeting, they set up a committee to examine Morocco's proposal for an open skies agreement. At the conclusion of the meeting, Morocco's Transport Minister Karim Ghellab said: "For certain Maghreb countries, the liberalization of air transport will require a period of reflection, but I think the 2008 date is reasonable" (Sabooni 2007). This statement was supported by Driss Benhima, the director-general of Royal Air Maroc, who stressed the urgency of liberalizing the air transport sector, stating: "As Europe creates an open air space in which Morocco is a part, it seems more and more anachronistic that there is not a similar Maghreb open skies deal" (Middle East Online 2007). However, while the AMU has finally recognized the need to liberalize air services within the union, no considerations of the Yamoussoukro Decision and the liberalization of air traffic to Sub-Saharan Africa are currently apparent. Nevertheless, Royal Air Maroc has continuously expanded its operations in Sub-Saharan Africa, and in summer 2007 flew to 15 such destinations. In addition, Royal Air Maroc has acquired a 51 percent stake in Air Senegal International, a 51 percent stake in Air Gabon International, and a 51 percent stake in Air Mauritanie, which gives the carrier a unique advantage to expand into Sub-Saharan Africa even though Morocco did not join the Yamoussoukro Decision (Schmeling 2007).

We can conclude that the Maghreb region is confronted with the growing reality of needing to move decisively toward liberalizing air services by both the consequences of an opening of and participation in the European market and the important market potential in Sub-Saharan Africa. Because most AMU countries are bound to the Yamoussoukro Decision, which eventually will exert pressure for implementation on the region, the AMU is well advised to continue the path of liberalizing air services among its member states first. This would also provide additional leverage, for example, when negotiating with a supranational body such as the African Union about the terms of implementation of the Yamoussoukro Decision in the region.

### ***The League of Arab States***

The League of Arab States, or the Arab League, was founded in Cairo on 22 March 1945, by a treaty that was signed by the heads of state of seven Arab nations: Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, the Syrian Arab Republic, and the Republic of Yemen (League of Arab States 1992, p. 148). The purpose, as defined in Article 2 of the treaty, is to strengthen

relations between the member states, coordinate their policies, safeguard their independence and sovereignty, and deal with issues of general concern that are in the interests of the Arab countries. Subsequently, the Arab League extended its membership base continuously over the years to include a total of 22 members and two observing nations.<sup>3</sup>

In its early years the Arab League concentrated primarily on economic, cultural, and social programs. In 1959, it held the first petroleum congress, and in 1964 it established the Arab League Educational, Cultural, and Scientific Organization. However, over the years disputes about several political issues have weakened the league. Early problems arose in relation to recognition of the Palestine Liberation Organization despite Jordan's objections and Egypt's separate peace treaty with Israel on 26 March 1979, which led to the suspension of Egypt's membership and the transfer of the league's headquarters from Cairo to Tunis. However, Egypt was readmitted nine years later and the league's headquarters returned to Cairo in 1990. More recent tensions within the Arab League arose over the Kuwait crisis in 1990 and because of the invitation extended by Saudi Arabia to the United States that allowed a buildup of foreign military in the country. This issue created a fairly deep divide among the member countries that paralyzed the Arab League during the eruption of the Gulf crisis in 1990 (Geddes 1991). Subsequently, the future of the Arab League as a regional organization became highly uncertain, but this situation seems to have changed significantly during the war between Israel and Lebanon in the summer of 2006, when the Arab League displayed renewed unity and regained respect in the Arab world.

The Civil Aviation Council of the Arab States, created in 1967, dealt with the air transport sector. The original aim of this council was to study the "principles, techniques, and economics relating to air transport" (Peaslee and Xydis 1976, p. 265), and the council was to study international standards, practices, and agreements and to recommend adoption of such agreements that were in the interests of Arab states. The council also anticipated the preparation and adoption of a uniform advanced air law for Arab states; the preparation of an English-French-Arabic lexicon of civil aviation terminology; and the conclusion of various agreements on air transport, transit rights, and search and rescue (Peaslee and Xydis 1976, p. 265) Article 10 of the agreement even established a dispute settlement mechanism that was set up by the Civil Aviation Council (Peaslee and Xydis 1976, p. 265).

Despite the strong initial momentum of the Arab states' wanting to unify and harmonize their air transport sectors, and eventually creating a

common Arab aviation market, there is little evidence that the Civil Aviation Council achieved major progress toward that objective. About 30 years after the creation of the council, the Arab League states launched a new initiative in 1995 when they created a new entity called the Arab Organization for Civil Aviation. The main objective of the new organization was to provide the civil aviation authorities of the Arab League member states with a joint framework for the development of air transport services between the Arab countries and to ensure the safety of the sector. Its specific aim was to promote and develop cooperation and coordination between the Arab states (Radhi 1996, p. 285). The organization, which has its own General Assembly, Executive Board, and independent budget, enjoyed a certain independence in pursuing the promotion of cooperation and integration of the air transport activities of the member countries. For example, the Arab Organization for Civil Aviation may promote integration between Arab airline companies and consolidate arrangements between member countries wherever they contribute to implementing the regional plans issued by ICAO relating to aerial navigation supplies and services (Radhi 1996, p. 286). However, the organization remained bound to the rules approved by three councils, the Economic and Social Council, the Arab League Council, and the Arab Transportation Ministers Council, with respect to Pan-Arab action organizations. Its mandate also includes implementing resolutions and programs of these councils and it must coordinate with the General Secretariat of the Arab League (Radhi 1996, p. 292). These restrictions clearly indicate that the Arab League is deciding on policy issues of the air transport sector at the highest level. However, the objectives and mandate of the Arab Organization for Civil Aviation are similar to those of the Civil Aviation Council of the Arab States, which over the course of 30 years made little progress.

***Arab League Open Skies Agreement.*** The Arab Civil Aviation Commission, a specialized organization of the Arab League that is based in Rabat and emerged out of the Arab Organization for Civil Aviation, has continuously pushed for cooperation and for liberalization of the civil aviation sector in the Arab world. The commission's objectives are similar to those of the former council. Its creation was based on an agreement of the Council of Arab Transport Ministers, reached in 1999, to liberalize intra-Arab air services over a period of five years by gradually reducing restrictions for carriers of member states of the commission. This resulted in the signing of 17 open skies agreements among commission states that included Bahrain, Jordan, Lebanon, Morocco, Oman, Qatar, Syria, and the United Arab Emirates

(Kotaite 2006). In addition, on 19 December 2004, under the leadership of the commission, several Arab League members namely, Bahrain, Egypt, Iraq, Jordan, Lebanon, Oman, Palestine (West Bank and Gaza), Somalia, Sudan, Syria, Tunisia, and the Republic of Yemen, signed a multilateral agreement on the liberalization of air transport between the Arab states henceforth referred to as the Arab League Open Skies Agreement (Arab Civil Aviation Commission 2004a).

The agreement, which aims at liberalizing regional air services, is based on the Agreement on Facilitating and Developing Trade between the Arab Countries (known as the Agreement of Arab Free Trade), which the Economic and Social Council adopted on 27 February 1981 (Arab League 1981). Article 18 of this agreement provides for cooperation by the state parties of the Arab League to facilitate all means of transport and communication between them on a preferential basis. The preamble of the Arab League Open Skies Agreement specifically seeks to achieve greater liberalization of air transport services between the Arab countries by “coordinating Arab air transport policies in order to eliminate any obstacles to the development of Arab air transport.” The preamble encourages “the gradual liberalization of air transport within a regional and multilateral framework.” In Article 4, the agreement provides concrete traffic rights for any air transport company that was designated in accordance with the agreement the right to

- transit through any of the territories of the other state parties;
- land in any in any of the territories of the other state parties for non-commercial purposes;
- embark and disembark passengers, cargo, and mail, whether separately or combined, to and from any of the territories of the state parties.

The first two traffic rights represent the first two freedoms of the air as described in the International Air Services Transit Agreement of 1944, hereinafter referred to as the Transit Agreement, which was signed by 125 countries (ICAO 1944). Most of the Arab League states have already signed the Transit Agreement and are bound to grant these first two freedoms. However, for eight Arab League members (the Comoros, Djibouti, Libya, Palestine [West Bank and Gaza, not a contracting state of ICAO] Qatar, Saudi Arabia, Sudan, and the Republic of Yemen), this will become a new obligation provided they sign and ratify the agreement. The third right to be granted based on the agreement is much broader. While the

Yamoussoukro Decision clearly defines the granted rights in its Article 3 as first, second, third, fourth, and fifth freedoms, the Arab League Open Skies Agreement is less clear on what freedoms beyond the first two are granted. "To and from" a point of a state party does clearly include third and fourth freedoms, which are based on air traffic between two parties. However, the agreement seems to go beyond these freedoms, as it includes traffic "to and from any of the territories of the State parties." Clearly, fifth freedom rights are included, because any destination within state parties beyond the initial destination is included. The agreement even seems to grant seventh freedom rights, as it does not specify that traffic needs to route back over the departure point in the initial state party. The only freedom that is clearly excluded is cabotage, the eighth freedom.

The Arab League Open Skies Agreement has other provisions that are similar to the Yamoussoukro Decision. Article 5 entitles each state party to designate one or more air transport companies to benefit from the provisions of the agreement. To qualify, companies must have substantial ownership or effective control by one or more state parties or their citizens and their main place of business must be in one of the state parties. Similar to the Yamoussoukro Decision, Article 7 provides the freedom of capacity by stating that each designated air transport company is entitled to operate the capacity and number of flights it considers adequate, and that no state party may unilaterally restrict capacity, number of flights, types of aircraft, or air transport rights except on a nondiscriminatory basis for certain environmental or technical reasons when air safety or security are affected, which is similar to Article 5 of the Yamoussoukro Decision.

In terms of tariffs, the Arab League Open Skies Agreement provides a more complete framework than the Yamoussoukro Decision. According to Article 8 of the agreement, the tariffs for air transport of passengers, cargo, and mail must be determined in accordance with annex 1 of the agreement. This annex, "Criteria and Procedures for Fixing Tariffs," states that the designated air transport company should determine its tariffs for air transportation on the basis of commercial considerations. As criteria, it states that tariffs must be fixed at reasonable levels taking into account "all the relevant factors and, in particular, operating costs and types of services, a reasonable profit and the competition in the market." Civil aviation authorities do not need to approve the tariffs, but they must be filed 30 days prior to the date they come into force. However, the civil aviation authority of any state party may intervene to prevent discriminatory

practices and to protect consumers, particularly as regards the provisions pertaining to guarantees and competition. Discriminatory practices are further defined as the case where tariffs are to be considered prejudicial to the air transport company of a state party, in which case the civil aviation authority of that country might object. The consumer protection provisions aim at ensuring fair competition and are defined in annex 2.

The fair competition provisions focus on air carriers belonging to a given state party, which should not benefit from special agreements between the concerned state parties when they were concluded to adversely affect competition. The consumer protection provisions of annex 1 also provide certain guarantees that should eliminate unfair practices to promote a minimum of market participation. They are listed in annex 3 and include practices such as imposing excessively low tariffs, engaging in price dumping, or providing excess capacity on the market, all of which are intended to drive other participants out of the market.

Finally, annex 1 refers to the dispute resolution mechanism of Article 30 of the agreement, which shall be invoked if an objection to a tariff for scheduled air transport was raised and the matter could not be solved by consultations between the two state parties. The dispute settlement mechanism shall be applied in the case of any disagreement between two or more state parties concerning the interpretation or application of the provisions of the agreement and its annexes. If the parties involved cannot resolve the matter through negotiation, the issue shall be submitted to the director-general of the Arab Civil Aviation Commission. If the director-general's efforts to intermediate fail, an arbitration tribunal consisting of three arbitrators shall be established. The decisions of this tribunal are final and cannot be appealed. The states parties are bound by the decision, and measures may be invoked to ensure compliance by the carrier.

Overall, the Arab League Open Skies Agreement provides the same or, in the case of seventh freedom rights, even greater liberalization of air services than the Yamoussoukro Decision. It defines the competition rules and the conflict resolution procedure well. While the agreement goes much farther in many domains than the Yamoussoukro Decision omits, the provisions of the Arab League Open Skies Agreement generally do not conflict with the Yamoussoukro Decision. However, to date, the agreement has been ratified only by Syria (24 May 2005), Jordan (30 June 2005), Palestine (West Bank and Gaza) (23 October 2005), the Republic of Yemen (24 October 2005), the United Arab Emirates (28 November 2006), and Lebanon (14 June 2006) (El Alj 2007). Nevertheless, the

agreement has been in force since 18 February 2007, when according to Article 38, the necessary quorum of five countries was reached by deposition of their ratification instruments. In addition, Bahrain, Egypt, Oman, and Qatar have announced that their ratification processes are under way (El Alj 2007).

***Conclusion about the Arab States and the Yamoussoukro Decision.*** Of the six Arab states of the African continent—Algeria, Egypt, Libya, Mauritania, Morocco, and Tunisia—four are Yamoussoukro Decision party states and are bound to the decision. Only Morocco, which never signed the Yamoussoukro Decision, and Mauritania, which deposited its ratification instruments too late, are not parties to the Yamoussoukro Decision. However, Morocco has pursued an open skies policy by agreeing to an open skies agreement with the EU and has called for liberalization within the AMU. At the same time, all the African Arab states have state-owned carriers, and except for Morocco seem to have engaged in some form of protectionism in the past that resulted in a position generally opposed to liberalization. This may also explain why none of the African Arab states have so far ratified the Arab League Open Skies Agreement even though it would eventually provide them with access to a huge market in the Middle East.

Nevertheless, the new dynamic of the Arab League toward the liberalization of air services and the Arab League Open Skies Agreement are strong pillars on which the liberalization of air services among the African Arab states can grow. Being potentially bound by two liberalization agreements, the Arab League Open Skies Agreement and the Yamoussoukro Decision, the African Arab states should recognize the market potential rather than being concerned about the threat of competition to their own carriers. Three of the Maghreb states—Egypt, Morocco, and Tunisia—operate modern and competitive carriers and have a good safety rating (see appendix B), and these are the states that should jointly act as the driving force toward liberalization. This is particularly pertinent, as the Maghreb market may soon see European carriers operating between two or more North African European Neighbourhood Policy states. In addition, the Arab League will certainly continue to develop a stronger momentum for ratification of its Open Skies Agreement. This will result in many African Arab states facing a push toward gradual liberalization of their air services. For these states to take control of the steps toward liberalization by actively cooperating with the Arab League and the Arab Civil Aviation Commission would therefore be advantageous.

Finally, the Arab League could also consider approaching the African Union, as well as neighboring subregional groupings, such as WAEMU or COMESA, to negotiate and implement an agreement with the organizations that would further liberalize air services. (Note that the Arab League states have signed an agreement for collective negotiations with regional and subregional groups [Arab Civil Aviation Commission 2004b].) This step would amount to final implementation of the Yamoussoukro Decision in the African Arab region.

## **West Africa**

The West African states can be grouped into several economic and/or political organizations. The largest in terms of the number of member states is ECOWAS, which encompasses all 16 West African states. However, in relation to air transport policy and implementation of the Yamoussoukro Decision, the West African states split into two distinct groups early on. WAEMU comprises eight French-speaking West African states and the Banjul Accord Group (BAG) comprises seven predominantly English-speaking countries. Nevertheless, all three organizations play a role in the implementation of the Yamoussoukro Decision.

### ***Economic Community of West African States***

ECOWAS is a regional group founded in 1975 by the Treaty of Lagos that initially consisted of 15 countries: Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo. Cape Verde joined in 1976. The creation of this new economic community was initially seen as a major achievement (Adedeji 2004, p. 32). After three years of negotiations, the heads of state of the respective countries agreed to establish an organization that would not only put extremely small states on an equal footing with the large nation of Nigeria, but would also unite all West African states irrespective of the language spoken. The main languages are English and French. In addition, Portuguese is spoken in Guinea-Bissau and Arabic in Mauritania. Even though Mauritania is often referred to as a North African and not a West African country, it was a founding member of ECOWAS, but it left the organization in 2002.

From the beginning the mission of ECOWAS was to promote economic cooperation and integration by means of trade liberalization, and including the establishment of a customs union, and even a fund for economic compensation between the member states (Adedeji 2004, p. 34).

ECOWAS swiftly established its secretariat in Lagos and called for a first meeting of its Council of Ministers, which was held in Accra in July 1976. During this meeting the member states ran into some unexpected controversy when discussing the assessment of revenue losses by certain member states as a result of trade liberalization. The controversy was never fully resolved, and the initial expectations and enthusiasm about ECOWAS started to fade (Adedeji 2004, p. 33). ECOWAS then began to focus on peace-keeping operations, for which it gained some international recognition.<sup>4</sup> Nevertheless, in 1990 ECOWAS introduced its trade liberalization scheme, which consisted of the abolition of customs duties levied on imports and exports among member states; the adoption of a common external tariff and trade policy; and the removal of obstacles between member states to allow free movement of people, goods, services, and capital and to secure rights of residence and establishment (freedom of establishment is the right of both natural and legal persons, including companies and associations of any sort, to self-employment and to set up and manage undertakings) (Obuah 1997, p. 14).

After years of lack of political will, which resulted in member states' failure to ratify many ECOWAS protocols, ECOWAS eventually began to gain the necessary acceptance (Obuah 1997, p. 18). This resulted in the establishment of a committee in May 1990 that was charged with reviewing the Treaty of Lagos and proposing a revised version. In July 1993, at the Cotonou Summit of ECOWAS in Benin, the participants discussed and agreed on a revised version. All 16 member states, represented by their heads of state, signed the revised treaty (ECOWAS 1993). The revised treaty reaffirms the original objectives of promoting economic cooperation and integration (Article 3, para. 1). In addition, it also calls for the "harmonization and co-ordination of national policies and the promotion of integration programs, projects and activities particularly in food, . . . transport and communications" (Article 3, para. 2[a]). The most significant modification in the revised treaty is the principle that decisions made by the Authority of Heads of States of ECOWAS and regulations issued by the ECOWAS Council of Ministers are binding "on the Member States and on the institutions of the Community" (Article 9, para. 4; Article 12, para. 3). The revised treaty also specifically addresses air transport by referring to the harmonious integration of the physical infrastructure of member states and to the promotion and facilitation of the movement of people, goods, and services within the community (Article 32, para. 1). It specifically mandates member states to "encourage co-operation in flight-scheduling, leasing of aircraft and

granting and joint use of fifth freedom rights to airlines of the region, [and to] promote the development of regional air transport services and endeavour to promote their efficiency and profitability” (Article 32, para. 1, [f] and [g]).

According to member states, the stated objectives of airline cooperation and the promotion of regional development of air services, including the objective of granting fifth freedom rights to the region’s carriers, are the principles of the Yamoussoukro Declaration of 1988. Given the new powers of ECOWAS, and given its declared policy objectives in relation to air transportation, one might have expected this regional organization to play a major role in the preparation of the Yamoussoukro Decision, which was enacted six years after the signature of the revised treaty. However, ECOWAS was soon faced with the reality that its member states began to deal with air transport matters by way of two separate regional groupings. The French-speaking countries established WAEMU in 1994, while the English-speaking states organized themselves in BAG, which was created in 1997. Both subregional organizations began implementing a range of regulations and subsequently liberalized their air service markets either through a common policy or by means of a multilateral agreement among member states.

Nevertheless, because the Yamoussoukro Decision encouraged subregional and regional organizations to “pursue and to intensify their efforts in the implementation of the Decision,” the West and Central African states mandated ECOWAS and CEMAC to implement their air transport policy as defined in the Memorandum of Understanding signed in Yamoussoukro on 14 November 1999 (ECOWAS 2007, p. 1; UNECA 2004, Article 12.2). In March 2001, the ministers responsible for civil aviation in the 23 West and Central African countries met in Bamako, Mali, to discuss the steps toward implementation. At that meeting they developed the so-called Bamako Action Plan that aimed to (a) strengthen the capacity of civil aviation authorities to undertake the economic and technical regulation of civil aviation effectively, (b) harmonize the legal and institutional framework for air transport, and (c) explore options for mechanisms to ensure that oversight of the industry is carried out on a cost-effective and sustainable basis at both the state and regional levels (ECOWAS and CEMAC Project Secretariats 2004, p. 4). Based on the action plan, project secretariats were established at ECOWAS and CEMAC and several studies were initiated (World Bank 2000, 2002).

In February 2003, the Council of Ministers for the Implementation of the Yamoussoukro Decision met in Lomé, Togo, for their second meeting.

However, despite strong declarations in support of the Yamoussoukro Decision, including requesting the ministers of foreign affairs of member states to take urgent practical measures to fast-track the exchange of diplomatic notes within the framework of the designation of airlines, no significant progress was made in taking concrete steps toward implementation, for example, by adopting new regulations for the liberalization of air services (Council of Ministers for the Implementation of the Yamoussoukro Decision on Air Transport Liberalization in West and Central Africa 2003). Nevertheless, the Council of Ministers did establish the Air Transport Economic Regulation Harmonization Committee to steer the process of developing common air transport economic regulations for the two regions of West and Central Africa and to periodically monitor implementation of the Yamoussoukro Decision at the state level. In addition, to address the safety issues recognized at the Bamako meeting in 2001, the Council of Ministers also created three subregional state groups to implement the Cooperative Development of Operational Safety and Continued Airworthiness Program (COSCAP) (WAEMU 2002a, p. 9).<sup>5</sup> Finally, the Air Transport Project Secretariat of ECOWAS undertook regional assessments of the implementation of the Yamoussoukro Decision, which it saw as a requirement for periodic evaluation and monitoring of the implementation of the Yamoussoukro Decision (ECOWAS and CEMAC Project Secretariats 2004, p. 5). A new action plan, known as the Lomé Action Plan, was established that again focused on economic regulation and on safety and security improvements.

In November 2004, the Coordination Committee and the Council of Ministers Responsible for Civil Aviation of ECOWAS and CEMAC held their third meeting in Libreville, Gabon. At that meeting they adopted regulations on denied boarding, airport slots, and ground handling. In addition, they stressed the importance of the implementation of the Cooperative Development of Operational Safety and Continued Airworthiness Program and recommended the creation of autonomous civil aviation authorities. The Project Secretariat prepared several studies, for example, on competition rules, market access, air carrier licensing, and air carrier liability (ECOWAS 2007, p. 2; UNECA. 2004, Article 12.2).

Despite the several ministerial meetings, the various studies and reports prepared, and the financial support by international donors such as the World Bank and the African Development Bank, ECOWAS has not adopted any legally binding legislation or regulations that could be seen as steps toward implementation of the Yamoussoukro Decision. (A formal decision by the Authority of Heads of State of Government of ECOWAS

is necessary for any regulation or decision of ECOWAS to be binding on its member states [ECOWAS 1993, Article 9, para. 4, Article 12, para. 3]]. Member states of the other two subregional entities, WAEMU and BAG, appear to have been more successful in implementing some of the required regulatory framework.

### ***West African Economic and Monetary Union***

WAEMU, known in French as the Union Economique et Monétaire Ouest-Africaine, is a customs and monetary union of some ECOWAS members. It has its roots in the treaty signed on 12 May 1962, that established the West African Monetary Union (WAMU) (Peaslee, 1974, p. 1371). The treaty entered into force on 2 November 1962. It established the basis for issuing and managing the common currency, the Communauté Financière Africaine (CFA) franc (Peaslee 1974, p. 1368). France had introduced his currency in 1948 in all French colonies and it remained pegged to the French franc more or less unchanged for nearly 50 years.<sup>6</sup> The new Central Bank of West African States was created for the WAMU region that acted in the interests of the economies of the monetary union. WAMU initially consisted of seven West African states—Côte d'Ivoire, Dahomey (now Benin), Mauritania, Niger, Senegal, Togo, and Upper Volta (now Burkina Faso)—though Mauritania withdrew from the treaty in 1973 and Mali joined in 1984. Initially, WAMU was generally seen as a success, and for many years it was defined and driven by the strong economy of Côte d'Ivoire, which accounted for about 40 percent of the region's economic output (Rother 1999). However, in the mid-1980s, WAMU started to disintegrate as a result of serious economic pressure from a structural decline in commodity prices and nominal appreciation of the French franc against the U.S. dollar. Both resulted in a serious deterioration of the WAMU economies, and in 1994 the CFA franc was devaluated by a factor of 50 percent (Van den Boogaerde and Tsangarides 2005, p. 4).

In response to the financial crisis and the devaluation of the CFA franc, WAMU members dissolved the union and on 10 January 1994, founded WAEMU. The treaty establishing WAEMU was signed in Dakar, Senegal, by the heads of state and government of Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal, and Togo. It quickly came into force on 1 August 1994, after ratification by all seven member countries (WAEMU 1994). Finally, on 2 May 1997, Guinea-Bissau became WAEMU's eighth member state. The treaty was slightly modified in 2003 to include some minor administrative and procedural changes (WAEMU 2003b).

WAEMU's overall objectives are stated in Article 4 of the treaty. They are similar to the objectives of the EU and aim at establishing a common market (EU 2002, Articles 2 and 3). The main objectives include the following:

- achieving greater economic competitiveness through open and competitive markets along with rationalization and harmonization of the legal environment;
- converging member countries' macroeconomic policies by means of a multilateral surveillance procedure;
- creating a common market among the member states on the basis of free movement of goods, services, and capital and the right to be employed or to establish a business activity with common external tariffs and a common commercial policy;
- coordinating national sectoral policies in human resources, regional planning and development, transport, telecommunications, environment, agriculture, energy, industry, and mining;
- harmonizing fiscal policies to the extent necessary to ensure the efficiency of the common market.

Notably Article 5 of the WAEMU treaty states a principle of subsidiary that is similar to that of the EU while not specifically using the term subsidiary (EU 2002, Article 5). The principle of the WAEMU provides that the union shall prepare minimal directives and core regulations that must be finalized based on the specific requirements and constitutional rules of each member state. The significant advantage of WAEMU in terms of implementing any union internal decision or an external treaty is that the legal instruments are guided by two basic and strong principles, namely:

- The principle of immediate and direct applicability, which renders community legislation incorporated into domestic legislation valid as soon as it is published. This requires no additional domestic legislative action and any individual can directly invoke community law (Charrier and Coulibaly 2007, p. 4).
- The principle of primacy of community law over domestic law, which is stated in Article 6.

These two principles constitute a favorable legal framework that facilitates the timely implementation of decisions taken at different levels of

WAEMU. They also prevent abuse by countries that might agree to new laws or regulations at the union level only to stall them later at the national level. As noted in chapter 3, the African Union does not have such powers, and consequently, all its major decisions, directives, and agreements are subject to ratification by its member states.

### ***The Air Transport Common Program in the WAEMU States***

WAEMU's involvement in air transport matters stems from Article 4 of the treaty, which sets as an objective of the union the "coordination of national sectoral policies in . . . transport and telecommunications." To achieve this objective, on 27 June 2002, WAEMU's Council of Ministers adopted a common air transport program, which can be regarded as a sector strategy with an implementation action plan applicable to all its member states (WAEMU 2002b).

The first objective of the common air transport program is to open WAEMU territory to the outside world. To achieve this, WAEMU must establish a safe, orderly, and efficient air transport system that promotes efficient civil aviation management and the competitiveness of air transport enterprises (WAEMU 2002b). The internal objectives of the program are defined as providing cheap and accessible air transportation to the population of the WAEMU states, increasing commercial exchanges and tourist flows so as to stimulate economic growth, and supporting the integration of the member states. However, the program recognizes that member states are becoming marginalized in Africa's air transport market and many are "incapable of ensuring an orderly development of their civil aviation activities" (WAEMU 2002b). To address the objectives and challenges stated, the program focuses on four main items: (a) ensuring that infrastructure and equipment are in compliance with ICAO SARP, (b) harmonizing air transport regulations, (c) enhancing air transport systems, and (d) liberalizing air transport services (WAEMU 2002b, p. 12).

The first item refers to air navigation and aviation meteorology infrastructure and facilities. It includes implementation of the ICAO's Regional Air Navigation Plan, which requires full coverage of WAEMU airspace with communications, surveillance, and air traffic management systems. In relation to safety and security enhancement, the program aims at implementing the recommendations of ICAO and the FAA and COSCAP, which is seen as a transition toward a common agency for aviation safety oversight. In addition, several additional improvements in related areas such as search and rescue, bird hazard control, facilitation,

aviation medicine, and environmental protection are planned to be addressed (WAEMU 2002b, p. 14).

The second item, harmonization of air transport regulations, aims at the union's adopting a common legal framework that regulates access to air transport markets, aircraft operations, competition rules, consumer protection, and all safety and security issues. In addition, it specifically addresses compliance with ICAO SARP by "signing and ratification of international air law instruments by Member States on the Commission's recommendation" (WAEMU 2002b, p. 15).

The third item, enhancement of air transport systems, is to be achieved by several measures. These include common regulations for civil aviation authorities' statutes, which are aimed at providing legal and financial autonomy. Furthermore, aviation cooperation needed to be strengthened with several international or regional organizations, such as ICAO, IATA, ECOWAS, and CEMAC, as well as with donors, such as the EU and the governments of France and the United States. Other actions, such as creating an air transport databank, promoting investment in the union's air transport sector, establishing an air transport development fund, and undertaking measures to develop aviation human resources, are also planned (WAEMU 2002b, p. 16).

The most relevant measure in relation to implementation of the Yamoussoukro Decision is the fourth item, liberalization of air transport services. The two main elements of liberalization of air services in WAEMU are (a) the disengagement of member states in the "industrial and commercial air transport sector," which is defined as airlines, airports, ground handling, and catering; and (b) the full liberalization of access by allowing, in the long-term, cabotage, or eighth freedom flights for WAEMU carriers. Additional actions are planned to implement these two important steps, such as the development of common competition regulation, the enhancement of facilitation by eliminating restrictions to the free movement of people and goods, and the adoption of consumer protection regulations (WAEMU 2002b, p. 17).

For implementation of the common air transport program, the plan was to prepare and adopt a common air transport legal framework in three phases (WAEMU 2002b, p. 21). The first phase had to be adopted before March 2002 and included (a) regulations on market access; (b) regulations on air carriers' certification; (c) regulations on passengers, freight, and mail; and (d) regulations on accident and incident investigations. The second phase, to be implemented before December 2002, included (a) competition regulation, and (b) consumer protection regulation. The third and

final phase consisted of (a) the regulation of the creation of regional and national facilitation committees, and (b) the union's Aviation Code. In addition, the program also set clear deliverables for the Cooperative Development of Operational Safety and Continued Airworthiness Program in order to address the safety and security challenges that a common air transport market must regulate and supervise (WAEMU 2002b, p. 23). These included legislation or regulations covering (a) aviation safety, (b) air transport and the organization of civil aviation, (c) personnel licensing and training, (d) aircraft operations and airworthiness, (d) transport of dangerous goods by air, (e) bird hazard control, and (f) aviation safety oversight by means of a regional agency in the future.

In the five years since adoption of the common air transport program, WAEMU has made progress by adopting several regulations. Appendix D provides an overview of all aviation-related laws and regulations adopted and enacted. In summary, WAEMU has adopted most of the regulations necessary to implement its union-wide air transport liberalization program, which at the same time comply with or exceed the provisions and requirements of the Yamoussoukro Decision.

The most significant regulations are as follows:

- *Traffic rights (Yamoussoukro Decision, Article 3)*: Regulation No. 24/2002 on conditions for market access of air carriers within WAEMU grants all freedoms, including cabotage, after entitlement by the member states. This regulation clearly exceeds the requirements of the Yamoussoukro Decision, which includes third, fourth, and fifth freedom traffic rights.
- *Tariffs (Yamoussoukro Decision, Article 4)*: Regulation No. 07/2002 on tariffs on air service for passengers, freight, and mail within WAEMU allows carriers to freely fix tariffs, which need to be filed only 24 hours in advance. The Yamoussoukro Decision requires filing at least 30 days in advance.
- *Competition regulation (Yamoussoukro Decision, Article 7)*: Regulation No. 24/2002 on conditions for market access by air carriers makes the exercise of traffic rights subject to competition legislation. Enforcement action may be taken by the WAEMU Commission. Regulation No. 2/2002 outlines the union's competition regulation applicable to the air transport sector. Article 6 of the Yamoussoukro Decision notes that state parties shall ensure competition, which implementation of this WAEMU regulation accomplishes.<sup>7</sup>

- *Safety and security (Yamoussoukro Decision, Article 6.12)*: WAEMU has adopted a total of 10 safety and security regulations to address the region's safety and security challenges (appendix D). However, while the necessary regulations are in place, the overall safety and security situation remains unsatisfactory. According to the assessment in appendix C, the safety situation is rated as poor in six WAEMU member states and fair in two. The WAEMU Commission has signed and launched an implementation program with ICAO that should build the necessary human technical capacity and eventually lead to the establishment of a regional safety oversight agency (WAEMU 2003a).

In addition to dealing with the main provisions of the Yamoussoukro Decision, WAEMU has also addressed some consumer protection and carrier liability issues. Regulation No. 03/2003 provides for specific compensation for denial of embarkation, flight cancellation, or major flight delays (appendix D). The regulations, as well as the predefined amounts, are similar to the EU regulation on compensation for and assistance to passengers in the event of denied boarding and of cancellation or long flight delays.<sup>8</sup>

WAEMU took a similar approach when it issued Regulation No. 02/2003 on air carriers' liability in case of an accident. This regulation is tailored after the Montreal Convention of 1999 (ICAO 1999) and includes strict liability per the convention's Article 21 up to SDR 100,000 and its presumed liability above this limit if the carrier cannot demonstrate that the damage was not caused by its negligence or lack of oversight. The regulation is significant because only Benin has signed and ratified the Montreal Convention. The other seven countries of WAEMU have either not ratified (Burkina Faso, Côte d'Ivoire, Niger, Senegal, and Togo) or not signed the convention (Guinea-Bissau and Mali). The simple adoption of WAEMU Regulation No. 02/2003 by the Council of Ministers has effectively bound all WAEMU member states to the main principles of the Montreal Convention. Another provision that was also incorporated in Regulation No. 02/2003 is the requirement for advance payment by the carrier of SDR 15,000 in the case of the death of a traveler, which has its roots in a similar earlier EU regulation (Article 5 of European Commission Regulation No. 2027/97 of 9 October 1997, on Air Carrier Liability in the Event of Accidents).

Thus, WAEMU has established most of the necessary regulatory framework that implements the main provisions of the Yamoussoukro Decision within its territory, and even goes beyond the Yamoussoukro Decision in relation to market access. However, integration of WAEMU's air service

market into the continental African region, which is covered by the Yamoussoukro Decision, is not effectively dealt with. Even though each regulation related to air transport includes a reference to the Yamoussoukro Decision in its preamble, it also limits the scope of the air transport policy on WAEMU territory.<sup>9</sup> Reference to air traffic of non-member states is only dealt with by Article 5 of Regulation No. 24/2002, which empowers WAEMU member states to grant access to outside carriers to intracommunity links. This provision includes fifth freedom rights by nonmember states to destinations within the WAEMU. As it is based on “international agreements in force,” it can be applied to any member state of the Yamoussoukro Decision. However, while Article 3 of the Yamoussoukro Decision states that “State parties grant to each other the free exercise of the rights of the first, second, third, fourth, and fifth freedoms of the air,” WAEMU Regulation No. 24/2002 only states that non-WEMUA carriers “may be authorized by a member State to operate traffic rights . . . on intercommunity links.” This indicates that WAEMU maintains reservations about full, continent-wide implementation of the Yamoussoukro Decision.

Nevertheless, WAEMU’s full liberalization of air services within its territory must be considered a successful step toward ultimate implementation of the Yamoussoukro Decision. A future regulation by the Council of Ministers, which clarifies access by carriers of non-WAEMU, but Yamoussoukro Decision, states would finalize this step.

### ***The Banjul Accord Group***

BAG was created on 29 January 2004, when seven West African states—Cape Verde, The Gambia, Ghana, Guinea, Liberia, Nigeria, and Sierra Leone—signed the BAG Agreement (BAG 2004a, p. 19). This new agreement builds on the initial Banjul Accord signed on 3 April 1997 (BAG 1997, appendix A). The initial Banjul Accord aimed primarily at ensuring and accelerating implementation of the Yamoussoukro Declaration of 1988. Accordingly, the Banjul Accord states as its prime objective the safeguarding of international air transport in the region and the promotion of cooperation among national carriers. Similar to the Yamoussoukro Declaration, the integration of airlines into larger entities, even joint multinational carriers, became the declared objective of the Banjul Accord (UNECA 1988, p. 2). The preamble to the Banjul Accord foresaw cooperation among airlines at three levels: (a) the provision and management of air traffic services, (b) the establishment and exercise of safety oversight procedures, and (c) the establishment of a coordinated multinational

approach for the negotiation of agreements with respect to the granting of air traffic rights. However, the initial Banjul Accord, like the Yamoussoukro Declaration, did not liberalize traffic rights, but primarily maintained the view that African air carriers would cooperate, eventually leading to the elimination of the need to grant traffic rights (UNECA 1988, p. 2). The Banjul Accord became an integral part of a memorandum of understanding that was signed on 26 November 1997, between the civil aviation authorities of four West African states and nine airlines (Cape Verde, The Gambia, Ghana, Nigeria, Air Dabia, Cape Verde Airlines, Ghana Airways, MUK Air, Far Airways, Bellview Airlines, Gambia International Airlines, Mahfooz Aviation Ltd., and Nigeria Airways). Even though this memorandum of understanding did not include all member states of the Banjul Accord, it was one of the few attempts to establish cooperation among air carriers, the declared objective of the Yamoussoukro Declaration. However, there is no evidence that the memorandum of understanding or the Banjul Accord ever resulted in any operational cooperation between carriers of the Western African region.

Article 3.1 of the BAG Agreement of 2004 explicitly states implementation of the Yamoussoukro Declaration and the Yamoussoukro Decision as an objective. In addition, member states agree to enter into joint ventures and or cooperative arrangements to foster the development of international civil aviation among both member states and nonmember states and organizations (Articles 3.2 and 3.3). However, while the intent of the Yamoussoukro Decision is to liberalize access to air transport markets in Africa, the BAG Agreement seems to emphasize airline cooperation rather than to focus primarily on liberalization and free competition as stipulated in the Yamoussoukro Decision. By agreeing on implementation of both the Yamoussoukro Declaration and the Yamoussoukro Decision, the BAG Agreement creates a certain contradiction, or at least confusion, about its real focus with respect to the development of air services. The crux of the issue is that the policy focus clearly shifted from cooperation to liberalized competition in the 11 years between the signing of the Yamoussoukro Declaration and the enactment of the Yamoussoukro Decision. Nevertheless, the BAG Plenary produced two documents in addition to the BAG Agreement. The first is the Multilateral Air Services Agreement (MASA) (BAG 2004c) and the second is the memorandum of understanding for the implementation of a technical cooperation project (COSCAP) for BAG (BAG (Article 3.1).

The MASA was signed on 29 January 2004, by all seven West African states that signed the BAG Agreement. The MASA is, in essence, an

identical application of the Yamoussoukro Decision for the BAG member states. For example, the MASA includes the following:

- *Traffic rights (Yamoussoukro Decision, Article 3)*: First and second freedom rights are granted without conditions or restrictions. Third, fourth, and fifth freedom rights are granted for any scheduled and nonscheduled passenger, cargo, and mail flights that are conducted in the territory of the contracting states (MASA, Article II, para. 1). The MASA also stimulates that each contracting state will enjoy fifth freedom traffic rights with respect to other African states in accordance with the Yamoussoukro Decision (MASA, Article II, para. 2). As all BAG member states are full Yamoussoukro Decision member states, this can be interpreted as an acknowledgement and reaffirmation of the Yamoussoukro Decision by BAG.
- *Designation of carrier (Yamoussoukro Decision, Article 6)*: Each contracting state may designate one or more airlines to operate on the specified routes in accordance with the MASA. The carriers can be of another contracting state, and the designation may be refused only if the chosen airline does not conform to the eligibility criteria as defined in Article 6.9 of the Yamoussoukro Decision (MASA, Article 3).
- *Tariffs (Yamoussoukro Decision, Article 4)*: Tariffs are to be freely established based on commercial considerations and are not subject to approval (MASA, Article XII, para. 1). Nevertheless, if tariffs are discriminatory (unreasonably high, restrictive, or artificially low), the contracting parties may intervene. Upon request by the other contracting states, their aeronautical authorities may have to be notified about the tariffs no more than 30 days before the proposed date of effectiveness. If a contracting state considers an announced tariff inconsistent with the above-mentioned principles, consultations between the contracting states should settle the matter. If no mutual agreement can be reached between the parties, the existing tariff shall continue in effect (MASA, Article XII, para. 4). However, the MASA does not provide for a situation in which no prior tariff existed.
- *Capacity and frequency (Yamoussoukro Decision, Article 5)*: Except for considerations concerning safety, security, and environmental requirements, no restrictions shall be imposed on the frequency, capacity, and/or types of aircraft used on air services under the agreement (MASA, Article II, para. 4).

In addition to granting traffic rights in conformity with the Yamoussoukro Decision, the MASA also emphasizes safety and security beyond the principles of the Yamoussoukro Decision. For example, while the state parties of the Yamoussoukro Decision only reaffirm their obligation to comply with the civil aviation safety standards and practices recommended by ICAO (UNECA 2004, Article 6.12, para. c), MASA contracting states may request consultations on the safety standards of any other contracting states relating to aeronautical facilities and services, air crews, aircraft, and operations of designated airlines (MASA, Article VII, para. 1). In addition, each contracting party may withhold, revoke, or limit the operating authorization or technical permission of an airline designated by the other contracting party in the event that the other contracting party does not take appropriate corrective action (MASA, Article VII, para. 2). This unusually strong rule gives any BAG state the right to revoke the operating permit of a foreign BAG airline and effectively ground its operations. The BAG member states recognized that the level of regulatory safety oversight did not meet required international standards, and to address the shortcomings, BAG signed a memorandum of understanding to implement a technical cooperation project that was subsequently launched under the management of ICAO's Technical Cooperation Bureau (BAG 2004b). The program focuses primarily on preparing the required technical regulation and on building capacity for regulatory supervision. Its cost is borne by international donors such as the African Development Bank, the French government, and the EU.

The MASA also goes far beyond the provisions of the Yamoussoukro Decision in relation to security. While the Yamoussoukro Decision stipulates in Article 6.12 that state parties must reaffirm their obligations to protect the security of civil aviation in accordance with annex 17 of the Chicago Convention, the MASA specifically reminds contracting parties that they must act in conformity with the provisions of the Convention on Offences and Certain other Acts Committed on Board Aircraft, signed in Tokyo on 14 September 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft, signed in The Hague on 16 November 1970; and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 23 September 1971, which all BAG members have signed and ratified. In addition, the MASA obligates the contracting parties to provide assistance to prevent or to take action in the case of unlawful acts prejudicing the safety of aircraft, passengers, crew, airports, and air navigation facilities (MASA, Article VIII). The signing of the Yamoussoukro Decision before the events of 11 September 2001, which triggered a renewed and strong focus on aviation security, and the signing

of the MASA two years later explains the latter's relatively strong focus on security in comparison with the Yamoussoukro Decision.

Finally, the settlement of disputes that may arise between two or more contracting parties relating to the interpretation or application of the MASA is to be settled primarily by negotiation (MASA, Article XVI). If the parties fail to reach a settlement by negotiation, they may refer to an arbitration mechanism as set forth in Article XVII of the MASA or to any arbitration mechanism available within the African Union (MASA, Article XVI, para. 2). The MASA outlines the arbitration procedure well, including the appointment of arbitrators and the establishment of its procedural rules. The clear definition of an arbitration procedure, as well as the option of referring to the African Union, is a consequence of the fact that BAG is not an international body, which means that it does not have the necessary infrastructure, human resources, and regulations, like, for example, WAEMU does. Nevertheless, dispute settlement by negotiation or by arbitration may in many cases be a more effective way to deal with issues of air transportation, an ever-changing industry.<sup>10</sup>

In conclusion, by means of the MASA, BAG has established a liberalized regime that is fully compatible with the provisions and obligations of the Yamoussoukro Decision. Its clear obligations and focus on safety and security, as well as the simplified dispute settlement mechanism, should be an inspiration to implement the Yamoussoukro Decision within the BAG region. It can also serve as a good example that liberalized air transport markets may not require costly and complicated institutional supervisory mechanisms such as the executing agency and monitoring body of the Yamoussoukro Decision.

## **Central Africa**

Central Africa has one regional economic community, CEMAC, which is made up of the six central African states.

### ***Economic and Monetary Community of Central Africa***

CEMAC was established to promote economic integration among countries that share a common currency, the CFA franc. (Although Central African CFA francs and West African CFA francs have the same monetary value against other currencies, West African CFA coins and banknotes are not accepted in countries using Central African CFA francs, and vice versa [Van den Boogaerde and Tsangarides 2005, p. 4].) The legal basis of CEMAC is a treaty that was signed in 1994 between Cameroon, the

Central African Republic, Chad, the Republic of Congo, Equatorial Guinea, and Gabon (CEMAC 1994). The annex to this treaty includes the Convention Governing the Economic Union of Central Africa, which was created by Article 2 of this treaty. CEMAC became the successor of the former Customs and Economic Union of Central Africa, which it completely replaced in June 1999.

The main objectives of CEMAC are similar to those of WAEMU. The overall goal is the harmonized development of member states within the institutional framework of CEMAC's two main institutions, the Economic Union (Union Economique de l'Afrique Centrale) and the Monetary Union (Union Monétaire de l'Afrique Centrale). The more specific objectives are stated in Article 2 of the convention governing the Economic Union, namely:

- strengthening economic and financial competitiveness by harmonizing members' regulatory frameworks;
- converging overall macroeconomic policy by coordinating the economic and monetary policies of member states to assure an improved economic outcome;
- creating a common market on the basis of free movement of goods, services, and capital;
- coordinating national sectoral policies of member states in agriculture, livestock, fisheries, industry, trade, tourism, transport, telecommunications, energy, environment, research, and education.

As an institution, CEMAC benefits from a distinct legal personality that is based on public law. It has its own equity, budget, organs, and agents. This is specifically confirmed by the statement that CEMAC is to be recognized as a full and legally independent entity by all member states regardless of any contradictory rules or regulations (CEMAC 1994, annex, Article 35). Article 36 of the treaty also empowers CEMAC to sign agreements of cooperation with international, regional, or subregional organizations. Member states are called upon to contribute to achievement of the general objectives of the community and to "assure all internal measures to secure the implementation of their community obligations" (Articles 8 and 10 of the convention regulating the Economic Union and the Monetary Union). Finally, the institutional treaty and any annexes are considered to be the constitutional basis of the community, which also entails certain limitations to member states' autonomy, namely, in line with the same principles governing the European Community, CEMAC

member states must apply community law without any further national rulemaking procedure (Kamto 2002). Overall, CEMAC's legal and regulatory basis is sufficiently well structured for the community to act as an entity. CEMAC's defined legal entity, and the fact that decisions taken by the Conference of Heads of States and regulations or directives set forth by the Council of Ministers are legally binding for member states, are the necessary powers for the community to decide on and implement a community-wide regulatory framework. CEMAC is also entitled to engage in international agreements with third parties. Both the necessary powers and the entitlement to engage in agreement are required tools for regional implementation of the Yamoussoukro Decision.

### ***The Air Transport Program of the CEMAC States***

Since early on, the CEMAC states have aimed at developing the region's air transport sector. They have done so in view of the specific objective, stated in Article 2 of the convention governing the Economic Union of "coordinating national sectoral policies of Member States in . . . trade, tourism, transport." The three measures that were taken before the Yamoussoukro Decision was signed or took full effect in the CEMAC region included the Agreement on Air Transport, the Civil Aviation Code, and the Joint Competition Regulation.

The Agreement on Air Transport, which the Council of Ministers adopted on 18 August 1999, is a program that aims to develop CEMAC's intracommunity air transport sector to establish greater access within the region and to promote economic and commercial relations between member states (CEMAC 1999b, Article 2). It also includes a provision for the creation of an entity for supervising flight safety and fosters technical and commercial cooperation among CEMAC air carriers. Several provisions of the program, such as the designation of participating carriers or the freedoms of the air provided in the program, are similar, or even identical to, the Yamoussoukro Decision, for example:

- *Designation of carrier (Yamoussoukro Decision Article 6)*: Each member state designates two carriers to participate in the intracommunity air service market. The carriers can be of another CEMAC member state and the designation has to be communicated to CEMAC's Executive Secretariat, which will publish the selection in the community's official bulletin (CEMAC 1999b, Article 4). The member states must grant the same treatment and access to infrastructure and equipment to all carriers and may not give their own carriers preferential fees (CEMAC 1999b, Article 5)

- *Traffic rights (Yamoussoukro Decision, Article 3)*: First and second freedom rights are granted without conditions (CEMAC 1999b, Article 11). Third and fourth freedom rights are granted for any scheduled passenger, cargo, and mail flights that are conducted within the CEMAC region (CEMAC 1999b, Article 12). Fifth freedom rights were initially restricted to 40 percent of the previous annual capacity (reserving 60 percent for third and fourth freedom operators on the same leg), but became fully liberalized for community operators after a two-year transition period that ended in August 2001 (CEMAC 1999b, Article 13). Sixth and seventh freedoms are not mentioned, but eighth freedom rights (cabotage) are possible if a member state specifically grants this right to a designated carrier of another member state (CEMAC 1999b, Article 16).
- *Tariffs (Yamoussoukro Decision, Article 4)*: Tariffs are freely determined based on commercial considerations. They must be communicated to the civil aviation authorities of respective states at least 60 days in advance. Carriers must, however, comply with the community's Competition Regulation (CEMAC 1999b, Article 18).
- *Capacity and frequency (Yamoussoukro Decision, Article 5)*: The member states must grant a maximum of frequencies, but the designated carriers must coordinate their schedules (CEMAC 1999b, Article 14). No restriction of capacity and types of aircraft shall be imposed. Nevertheless, in the case of significant disparity between capacity and type of aircraft, the carriers must enter into commercial arrangements between themselves (CEMAC 1999b, Article 15).

In addition to the foregoing basic rules of the CEMAC Agreement on Air Transport, it includes additional provisions in relation to the implementation of intracommunity liberalization of the sector. These include the establishment of an executing agency that shall be designated and supervised by the Council of Ministers in charge of civil aviation. The agency will be responsible for implementing and supervising the liberalized air transport policy (CEMAC 1999b, Article 21), although sanctions against carriers, such as the revocation or suspension of granted traffic rights, are decided by the Council of Ministers after considering the recommendations of the executing agency (CEMAC 1999b, Article 23). Finally, the agreement permits nonmember states to join this framework and to participate in its air transport market (CEMAC 1999b, Article 24), but existing bilaterals with member

states or participating nonmember states remain valid and may have to be modified to comply with the provisions of the agreement (CEMAC 1999b, Article 25). Member states also have the right to terminate their rights and obligations under the agreement by opting out (CEMAC 1999b, Article 25).

Given the objective of establishing a coordinated and harmonized legal framework for the air transport sector, in July 2000, the Council of Ministers adopted the CEMAC Civil Aviation Code (CEMAC 2000b). The code became legislation in all member states of the community, replacing obsolete or contradictory aviation legislation (CEMAC 2000a, Article 335). However, it also provides for member states to regulate certain domains at the national level that the code does not cover (CEMAC 2000a, Article 333). Nevertheless, the new Civil Aviation Code incorporated most of the provisions that had been decided just one year earlier in the CEMAC Agreement on Air Transport. The code is structured into the following 10 main sections:

- general provisions defining the scope and applicability of the code;
- supervision of the civil aviation sector and the requirement for autonomous civil aviation authorities;
- regulation on aircraft, including requirements for registration, nationality and ownership, airworthiness, operations, and liability insurance;
- regulation of air navigation;
- regulation of airports, airport operations, and facilitation of air services;
- public air transport and on-demand operators, including requirements for certification, ownership requirements, and access to markets;
- personnel licensing;
- aviation security;
- environmental protection;
- criminal and civil enforcement.

In terms of the Yamoussoukro Decision, all major provisions that have been developed for the CEMAC member states in the Agreement on Air Transport have been included in the code. In particular, these include regulations governing the following:

- *Market access (Yamoussoukro Decision, Article 3)*: Liberalization of scheduled air services within the community of first to fifth freedom rights (CEMAC 2000a, Article 214) and full liberalization of cargo and on-demand traffic (Article 219).

- *Tariffs (Yamoussoukro Decision, Article 4)*: Free, but “reasonable” tariff fixing by carriers to be filed 60 days in advance (CEMAC 2000a, Article 219) and interdiction of anticompetitive practices, such as dumping, with the possibility of temporary intervention on tariffs by the civil aviation authorities (Article 215).
- *Frequency and capacity (Yamoussoukro Decision, Article 5)*: No restrictions on frequency and capacity (CEMAC 2000a, Article 219), but commercial activities must be coordinated among operators and their programs must be approved by the civil aviation authorities (Article 209).
- *Designation and establishment (Yamoussoukro Decision, Article 6)*: Single or multidesignation of operator by each member state (CEMAC 2000a, Article 205), with requirements for community nationality in relation to ownership and minimum standards for technical, financial, and managerial qualification (Article 204).
- *Competition regulation (Yamoussoukro Decision, Article 7)*: Code of conduct for carriers that aims at developing a sound competitive environment by prohibiting all forms of price and capacity dumping (CEMAC 2000a, Article 215), as well as discrimination against a given designated carrier by another member state (Article 216).

The third element of liberalization of air services among the CEMAC member states is the Joint Competition Regulation, which the Council of Ministers adopted on 25 June 1999 (CEMAC 1999a). The competition regulations are general in nature and cover all domains or industries of the CEMAC common market. Their primary objective is to prevent any form of interference with free and efficient competition (CEMAC 1999a, Preamble, Article 2). The provisions that are applicable to the air transport sector include anticompetitive agreements between suppliers, market domination through mergers, and abuse of a dominant position.

The provision on anticompetitive agreements between suppliers prohibits any price fixing, limitation of production, market segmentation with competitors, or any other way of preventing efficient competition (CEMAC 1999a, Article 3). However, in cases where such an agreement could lead to more efficient market development, this interdiction might exempt certain agreements or coordinating measures between market participants.<sup>11</sup> The prohibition of market domination through mergers concerns any merger or acquisition of independent enterprises that leads to the elimination of a competitive environment (CEMAC 1999a, Article 5). The prohibition is applicable in cases of market concentration

within the community, which are defined as involving two entities each having an annual turnover of CFAF 1 billion or both entities controlling more than 30 percent of a given market (CEMAC 1999a, Article 6). The abuse of a dominant market refers to maintaining abusive pricing practices or severely limiting production in order to stimulate demand (CEMAC 1999a, Article 16). A dominant market position is again defined as controlling more than 30 percent of a given market (CEMAC 1999a, Article 15).

A specialized CEMAC monitoring body is established by the Joint Competition Regulation and is responsible for controlling and supervising the market and its participants with respect to the Completion Regulation (CEMAC 1999a, Article 17). The monitoring body is composed of an executive secretariat that investigates anticompetitive practices and reports to the Regional Council that considers cases and renders judgments (CEMAC 1999a, Article 19). To appeal a decision rendered by the Regional Council, an arbitration court is to be set up that includes three arbitrators each appointed by a different party or entity (CEMAC 1999a, Article 24). The sanctions against an entity found guilty of infringement of the Joint Competition Regulation include fines of up to 5 percent of turnover achieved in the common market during the past year or of 75 percent of the profits gained from the prohibited practice (CEMAC 1999a, Article 37). In addition, the Regional Council can decide that a merger of an anticompetitive nature must be dissolved (CEMAC 1999a, Article 39).

Thus, like WAEMU, CEMAC has implemented most of the necessary framework that constitutes the main provisions of the Yamoussoukro Decision.

## **Southern and East Africa**

Southern and East Africa have three RECs that address the air transport sector. The largest in terms of member states and territory covered is COMESA, which currently includes 20 countries from Egypt in the north to Zimbabwe in the south. The next largest REC is SADC, which comprises 15 member states in southern Africa. The smallest REC is the EAC, which comprises the five East African states. Some of the member states of these communities are also members of neighboring and overlapping organizations. For example, in East Africa, Burundi, Kenya, Rwanda, and Uganda are members of COMESA and the EAC, and in southern Africa, Angola, the Democratic Republic of Congo, Madagascar, Malawi, Mauritius, the Seychelles, Swaziland, Tanzania, Zambia, and Zimbabwe

are members of COMESA and the SADC. Nevertheless, each of the three RECs has taken on the issue of liberalization of air services.

### ***The Common Market for Eastern and Southern Africa***

COMESA has its origins in the Preferential Trade Area (PTA) for Eastern and Southern Africa, which was established in 1981. Its principle objectives included increasing economic and commercial cooperation between member states, harmonizing tariffs, and reducing trade barriers with the eventual outcome of creating a common market (the PTA was created based on the framework of the Lagos Plan of Action of the Organization of African Unity [OAU 1980]). The PTA's headquarters were in Lusaka, Zambia. UNECA had supported an arrangement whereby the PTA would have comprised all 18 southern and East African states, including the African Indian Ocean islands. However, because of several local disputes, for example, the border dispute between Kenya and Tanzania following the termination of the EAC in 1977, six countries never signed the treaty (Matthews 1984, p. 174). On 8 December 1994, the COMESA treaty formally succeeded the PTA upon ratification of the treaty by 11 signatory states. The establishment of COMESA was a direct fulfillment of the requirements of Article 29 of the treaty establishing the PTA, which provided for the transformation of the PTA into a common market 10 years after the entry into force of the PTA Treaty (COMESA Secretariat 2007, p. 1).

COMESA is Africa's largest REC. It currently includes 20 member states, of which 15 were signatory states of the former PTA. The member states are (effective 21 December 1981, unless another date is shown) Angola, Burundi, the Comoros, Democratic Republic of Congo, Djibouti, Egypt (6 January 1999), Eritrea (1994), Ethiopia, Kenya, Libya (3 June 2005), Madagascar, Malawi, Mauritius, Rwanda, the Seychelles (2001), Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. The main aims and objectives of COMESA are stated in Article 3 of the COMESA Treaty (COMESA Secretariat 1994), and include (a) promoting sustainable growth and development of the member states; (b) jointly adopting supporting macroeconomic policies and programs; (c) creating an enabling environment for foreign, cross-border, and domestic investment; (d) promoting peace, security, and stability among member states; (e) strengthening relationships between the common market and the rest of the world; and (f) contributing toward the establishment and realization of the objectives of the EAC.

To achieve these objectives, Article 4 of the COMESA Treaty laid out a set of specific undertakings. These undertakings are (a) establishing a customs

union; (b) adopting a bond guarantee scheme; (c) trading documents and procedures; (d) establishing regulations governing the re-exportation of goods from third countries within the common market; (e) establishing rules of origin for products originating in member states; and (f) granting a temporary exemption for Lesotho, Namibia, and Swaziland from the full application of specific provisions of the treaty. Article 4 goes on to list specific undertakings in several specialized fields such as transport, communications, industry, and energy. In the field of transport, the undertaking focuses on regulations for facilitating transit trade within the common market (COMESA Secretariat 1994, Article 4, para. 2 [b]).

COMESA has launched and implemented several programs since its creation. In 2000 it established the COMESA Free Trade Area, a declared prerequisite for the pending customs union (COMESA Secretariat 2007, p. 3). To support trade liberalization, various technical harmonization projects were implemented, such as harmonized road transit charges, a common carrier's license, joint customs bond guarantee schemes, and telecommunications interconnectivity. Liberalization of air transport services is also addressed under the main objective of trade facilitation among member states (COMESA Secretariat 2007, p. 8).

### ***The COMESA Air Transport Liberalization Program***

COMESA's policy on air transport was already well established in the COMESA Treaty. Article 84 of the treaty notes that member states should undertake to develop coordinated and complementary transport and communications policies. To facilitate the movement of interstate traffic and promote greater movement of people, goods, and services within the Common Market, member states "shall take all necessary steps" to maintain, upgrade, and rehabilitate the roads, railways, and harbors in their territories (COMESA Secretariat 1994, Article 84, para. a).

The essence of the air transport policy is outlined in Article 87, which seems to be drafted in line with the Yamoussoukro Declaration of 1988. The main focus of Article 87 is cooperation between Common Market operators, namely: "The establishment of joint ventures for co-operation in the use of equipment, in the pooling of aircraft maintenance and training facilities, in the acquisition and use of fuel and spare parts, in insurance schemes, in the coordination of flight schedules and the improvement of managerial techniques and skills" (COMESA Secretariat 1994, Article 87, para. 1). However, it goes on to say that member states "shall in particular" liberalize the granting of air traffic rights for passenger and cargo operations, to harmonize civil aviation rules and regulations

by implementing the provisions of the Chicago Convention, to establish common measures for the facilitation of passenger and cargo air services, to develop and maintain a common navigation and communications infrastructure for air space management, and to harmonize rates for and rules and regulations on scheduled air transport services (COMESA Secretariat 1994, Article 87, para. 3).

In 1999, practically in parallel with the AEC-initiated agreement of the Yamoussoukro Decision, COMESA's Council of Ministers issued the Regulation for the Implementation of the Liberalised Air Transport Industry (COMESA Secretariat 1999). The regulation was issued as a directive entitled Legal Notice No.2, which became binding on the member states and on all subordinate organs of the Common Market (COMESA Secretariat 1994, Article 9, paras. 2[c], 3). Legal Notice No. 2 aims at liberalizing air transport services as a step toward creating a free trade area guaranteeing the free movement of goods and services produced within COMESA and removing all tariff and nontariff barriers (COMESA Secretariat 1999, Preamble). However, even though Legal Notice No. 2 goes beyond the scope of liberalization of the Yamoussoukro Decision, it does not mention the Yamoussoukro Decision as a basis of or inspiration for COMESA's air transport policy.

According to Legal Notice No. 2, air transportation within COMESA was to be liberalized in two phases. Phase I, which was initiated in October 1999, (a) introduced free movement of air cargo and nonscheduled passenger services within COMESA, (b) introduced free movement of intra-COMESA scheduled passenger services with a frequency limit of up to two daily flights between any city pair within COMESA, and (c) adopted multiple designations and the elimination of capacity restrictions (COMESA Secretariat 1999, Preamble). Fifth freedom rights, which many liberalization policies such as the Yamoussoukro Decision viewed as essential, were already granted in phase I of COMESA's liberalization, whereby fifth freedom rights were limited to 30 percent of a carrier's capacity on routes where third and fourth freedom traffic were provided, but no restrictions were put on fifth freedom traffic on routes where no third and fourth traffic by another operator existed (COMESA Secretariat 1999, Article 5 [a]).

The main liberalization of air transportation within COMESA was reached one year after the commencement of phase I, when in October 2000 phase II became the new policy. This, in essence, introduced free movement of air transport services within COMESA (COMESA Secretariat 1999, Article 5 [b]). Phase II of Legal Notice No. 2 liberalized

air services far beyond the scope of the Yamoussoukro Decision by implementing the following:

- *Market access (Yamoussoukro Decision, Article 6)*: Any air carrier is eligible provided it is substantially owned and effectively controlled by a COMESA member state or its nationals. It must demonstrate financial, managerial, and technical ability to perform the services, which is also a condition for receiving an air operator's certificate (COMESA Secretariat 1999, Article 3). However, in contrast with the Yamoussoukro Decision where traffic rights are notified on a bilateral basis between two or, in cases of fifth freedom flights three, countries, COMESA carriers are able to operate between any destination within COMESA. Carriers can also use aircraft registered in and owned by any COMESA state or its nationals (Article 4).
- *Traffic rights (Yamoussoukro Decision, Article 3)*: Legal Notice No. 2 set forth the principle of free movement of air transport services within COMESA (COMESA Secretariat 1999, Article 2 [b]). This explicitly includes cabotage rights, which were only excluded during phase I.
- *Tariffs (Yamoussoukro Decision, Article 4)*: No specific regulations are set forth with regard to air services, but the preamble to Legal Notice No. 2 states that all COMESA member states have agreed on the removal of all tariff and nontariff barriers to facilitate the establishment of a free trade area, implying that air services would also be free from any tariff regulation.
- *Capacity and frequency (Yamoussoukro Decision, Article 5)*: Legal Notice No. 2 notes that no restriction of capacity shall be imposed during phase II. This is explicitly mentioned in the case of fifth freedom rights even though traffic in COMESA is free, including cabotage. (COMESA Secretariat 1999, Article 5, para. 2 [c]) As concerns equipment, another explicit rule states that no restrictions on types and capacity of aircraft shall be made (Article 7). Nevertheless, similar to Article 11.4 of the Yamoussoukro Decision, COMESA carriers are encouraged to establish intra-COMESA airline alliances and commercial arrangements as long as these arrangements do not undermine COMESA's competition rules and regulations (Article 6).

Despite the clear and concise liberalization program contained in Legal Notice No. 2, its adoption was stalled in 2001 when COMESA's Council

of Ministers decided to “defer the implementation of Phase 2 awaiting the preparation of competition regulations” (COMESA Secretariat 2005, p. 3). Subsequently, the implementation of liberalized air services within COMESA, as specified in phase II, remained pending for several years. By 2004, only 12 member states had implemented phase I and only Djibouti had opened its airspace to COMESA carriers in line with Legal Notice No. 2 (COMESA Secretariat 2004, p. 22). Indeed, Legal Notice No. 2 did not mention issues of fair competition and the procedure for dealing with disputes resulting from liberalization of international air traffic in the region. In addition to the missing competition regulations, several other elements were subsequently identified that were required to “successfully complete this regional air transport liberalization agenda” (COMESA Secretariat 2003b, p. 7). These elements included the following:

- the adoption of a COMESA air transport policy,
- the implementation of provisions for air transport competition rules,
- the creation of a joint institutional and monitoring mechanism for the liberalization and competition rules,
- the drafting of a memorandum for the Court of Justice and Tribunal on the jurisdiction and enforcement of decisions under the competition rules,
- the drafting of a standardized mechanism for entry into the market and for enjoying the rights enshrined in Legal Notice No. 2 and in the Yamoussoukro Decision,
- the sensitization of airlines and other key stakeholders on the implementation of Legal Notice No. 2 and the Yamoussoukro Decision,
- the drafting of a comprehensive regulation on consumer protection in the air transport sector,
- the harmonization of the regulatory framework, and
- the incorporation of all Council of Ministers’ regulations into individual state’s legal and administrative procedures.

The key issue is whether implementation of this agenda for the liberalization of regional air transport can be seen as a condition precedent for the application of liberalization as set out in Legal Notice No. 2. Given that the Yamoussoukro Decision does not deal with detailed competition regulation or the various aforementioned regulations, the application of a liberalized air transport policy may be beneficial in general, or may benefit the air transport sector or industry, but does not need to exist *a priori*. As outlined in chapter 3, air transport and its liberalization in Africa is still mainly regulated on a bilateral basis between member states of the

Yamoussoukro Decision. There is no reason why the principles of Legal Notice No. 2 could not be applied by agreeing to new bilaterals that conform to both Legal Notice No. 2 and the Yamoussoukro Decision. Legal Notice No. 2 does not refer to bilateral relationships between states. In Article 2 (b) it primarily aims at establishing free movement of air transport services within COMESA. At the same time, Article 2 of the Yamoussoukro Decision, Scope of Application, provides 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, provisions that are included in such agreements and that are not incompatible with the decision remain valid and are supplementary to the decision. Article 10.5 states that state parties shall not be precluded from maintaining or developing on a bilateral basis or among themselves arrangements that are more flexible than those contained herein. A bilateral solution among COMESA member states could therefore at least provide a temporary solution, which would allow the application of the principles of liberalization as agreed upon in both Legal Notice No. 2 and the Yamoussoukro Decision.

Nevertheless, COMESA began to prepare specialized competition regulations for the air transport sector even though its secretariat had already drafted general competition regulations that it could have adapted or extended to include the sector (COMESA Secretariat 2003a). COMESA issued a first draft of its air transport competition regulations, but soon after recognized the need to develop common regulations for the entire southern and East Africa region, where member states belonged to a number of RECs. Subsequently, COMESA's draft competition regulations and those prepared by SADC were considered together and a common draft was adopted by a joint ministerial meeting of COMESA, EAC, and SADC ministers responsible for civil aviation in September 2002 (COMESA 2005, p. 3).

The draft regulations for competition in air transport services within COMESA, the EAC, and the SADC include three main provisions (Council of Ministers of COMESA and EAC Responsible for Civil Aviation and the Committee of Ministers of Transport and Communications of SADC 2004). Article 4 prohibits any anticompetitive agreements and practices, such as fixing prices, limiting or controlling markets, providing excessive capacity or frequency of services, dividing markets or sources of supply, or entering into agreements that place trading partners into a competitive disadvantage by applying dissimilar conditions to similar transactions. Article 5 aims at preventing the abuse of a dominant position, which may occur

when a carrier introduces unfair trading conditions to the prejudice of competitors, such as excessively low or high prices; limits capacity or markets to the prejudice of consumers, including excessive pricing or oversupply and undersupply on certain routes to drive out another competitor; or applies dissimilar conditions to similar transactions with other trading parties, effectively placing them in a disadvantaged competitive situation. Article 6 reminds member states not to discriminate in national legislation or administrative measures against carriers or associations of carriers of other member states. Article 9, para. 1, entrusts the application and enforcement of the joint competition regulation to the RECs, which are responsible for investigating violations of the rules and for granting, refusing, or revoking exemptions. However, Article 9, para. 2, states that the Council of Ministers responsible for civil aviation of COMESA, EAC, and SADC will establish a joint body responsible for monitoring implementation of the Yamoussoukro Decision and the joint competition regulations.

According to an interview with Amos Marawa, COMESA's director of infrastructure development (28 March 2007, in Lusaka, Zambia), the adoption of both the COMESA and SADC draft competition regulations by the joint ministerial meeting of COMESA, EAC, and SADC in September 2002 and the adoption of the resulting common draft regulations by SADC and the COMESA Council of Ministers in 2004 was primarily seen as a policy decision. All those involved understood that the application or implementation of the principles of Legal Notice No. 2 of 1999 depended on the finalization of the pending competition regulations and their "implementation." In November 2006, COMESA, SADC, and EAC ministers responsible for civil aviation jointly adopted the Guidelines, Provisions, and Procedures for the Implementation of the Regulations for Competition in Air Transport Services within COMESA, EAC, and SADC (SADC 2007, p. 1). According to these guidelines, implementation of the competition regulation includes the establishment of a joint competition authority that would be responsible for monitoring implementation of the Yamoussoukro Decision and competition regulations in air transport services within the RECs (SADC 2007, p. 1). Even though the Twelfth Summit of the COMESA Authority of Heads of States formally agreed to the speedy establishment of a joint competition authority in May 2007, implementation of the joint competition regulations remains pending in all three RECs, COMESA, SADC, and the EAC.

Thus, more than eight years after COMESA liberalized air services within its territory by instituting phase II of Legal Notice No. 2 of 1999,

application of this liberalization remains pending. Currently, the understanding of all COMESA member states is that the establishment of a joint competition authority remains the missing link before liberalization of air services can be applied.

### ***The Southern African Development Community***

SADC's roots were created in the 1960s and 1970s, when the leaders of countries with black majorities and national liberation movements coordinated their efforts on a political and military level to bring an end to colonial and white minority rule in southern Africa. The initial grouping was the so-called Front Line States, an informal organization founded in the mid-1970s with the goal of achieving black majority rule in South Africa. Its members consisted of Angola, Botswana, Lesotho, Mozambique, Tanzania, Zambia, and Zimbabwe (Rowlands 1998, p. 926). On 1 April 1980, these seven states plus Malawi and Swaziland, all black majority-ruled southern African countries, issued the so-called Lusaka Declaration, which paved the way for the establishment of the Southern African Development Coordination Conference on 17 August 1981, in Maseru, Botswana (Tsie 1996, p. 84). This organization was not a formal authority based on a treaty, but primarily the outcome of a conference of independent southern African states whose primary objective was to reduce their dependency on South Africa by coordinating interstate projects in a decentralized manner. Soon the Southern African Development Coordination Conference experienced its own limitations, because the decentralized set-up did not include clear lines of reporting or accountability, both of which are necessary when implementing regional projects (Mandaza and Tostensen 1994, p. 109).

On 17 August 1992, SADC was formally founded by treaty (SADC 1992, p. 17). The SADC Treaty, which basically transformed the Southern African Development Coordination Conference into SADC, was later called the Windhoek Declaration and was adopted by the founding members of the Southern Africa Development Community and newly independent Namibia. The main objectives of SADC include development and economic growth, poverty reduction, and enhancement of the standard of living and quality of life of the peoples of southern Africa while supporting the socially disadvantaged through regional integration (SADC 1992, Article 5, para. 1). The objectives also include developing common political values, systems, and institutions and promoting and defending peace and security. To achieve the objectives, SADC is to harmonize the political and socioeconomic policies and plans of member

states. This could be achieved by encouraging the peoples of the region and their institutions to take initiatives to develop economic, social, and cultural ties across the region, and to participate fully in implementing SADC's programs and projects (SADC 1992, Article 5, para. 2).

While these objectives were generally less specific in terms of concrete measures than those of other African RECs, they at least included the development of policies aimed at progressive elimination of obstacles to free movement of capital and labor, goods and services, and people of the region among member states (SADC 1992, Article 5, para. 2). On 14 August 2001, the SADC Treaty was slightly amended by overhauling some of the community's structures, policies, and procedures. One of the major changes was the institutionalization of political and security cooperation in the Organ on Politics, Defense, and Security. Currently, SADC comprises 15 member states (date of joining is 17 August 1992, unless shown otherwise): Angola, Botswana, the Democratic Republic of Congo (8 September 1997), Lesotho, Madagascar (18 August 2005), Malawi, Mauritius (28 August 1995), Mozambique, Namibia (31 March 1990), the Seychelles (15 August 2007), South Africa (30 August 1994), Swaziland, Tanzania, Zambia, and Zimbabwe. The SADC maintains its headquarters in Gaborone, Botswana.

In relation to decision making and its applicability to member states, Article 4 of the SADC Treaty declares that member states are expected to demonstrate their commitment to act in accordance with a set of principles. These include sovereignty and equality of member states, solidarity, peace and security of human rights, democracy, rule of law, and peaceful settlement of disputes. However, only decisions made by the Summit are legally binding on member states unless otherwise noted in the treaty. To enforce decisions made by the Council or to make member states fulfill other obligations under the treaty, including implementing policies or settling arrears of contributions to SADC, the SADC Treaty provides for sanctions that may be imposed against member states (SADC 1992, Article 33). However, these sanctions have to be determined by the Council.

To foster the development and implementation of the main objectives of the SADC Treaty, it defines certain main areas of cooperation in which member states are expected to coordinate, rationalize, and harmonize their overall macroeconomic and sectoral policies and strategies (SADC 1992, Article 21, paras. 1, 2). These areas include infrastructure and services, industry, trade, investments and finance, international relations, and peace and security (SADC 1992, Article 21, para. 3). To better define the policies

for these areas of cooperation, member states are encouraged to conclude specific protocols to spell out the objectives and scope of cooperation and integration of a given sector (SADC 1992, Article 22, paras. 1, 2). These protocols shall be approved by the Summit on the recommendation of the Council and become an integral part of the SADC Treaty. However, other than the decisions of the Summit that are generally applicable to member states without any further ratification, each protocol must be signed and ratified by each member state that becomes party thereto (SADC 1992, Article 22, paras. 1, 2). Since 1992, in addition to the initial treaty, the SADC member states have signed more than 37 protocols in a variety of sectors, for example, protocols on energy (1996); trade (1996); the Regional Tourism Organization of Southern Africa (1997); health (1999); wildlife conservation and law enforcement (1999); politics, defense, and security cooperation (2001); corruption (2001); and fundamental social rights (2003) (SADC 2005, p. 35). Of the 37 protocols, 26 have attained the necessary quorum and entered into force.

The objectives and development priorities of the transport sector of SADC were defined in a relatively early protocol, known as the Protocol on Transport, Communications, and Meteorology, which was signed on 24 August 1996, and came into force on 6 July 1998 (SADC 2005, p. 34). This protocol deals with a variety of transport sectors, including integrated transport (logistics), road transport, railways, maritime and inland waterway transport, and civil aviation. In addition, it defines similar objectives and implementation programs for the telecommunications sector, for postal services, and for meteorology (SADC 2005, p. 3). Civil aviation is defined in chapter 9 of the protocol, which starts by setting the objectives for the sector. These include providing safe, reliable, and efficient air transportation within member states (SADC 2005, Article 9.1). The protocol further recognizes that member states must enhance co-operation within the regional air transport market “in order to overcome the constraints of small national markets, market restrictions and the small size of some SADC airlines” (SADC 2005, Article 9.1). Liberalization of air services is only mentioned once, in Article 9.2, which is titled Civil Aviation Policy and notes that member states will develop a harmonized regional aviation policy that includes the “gradual liberalization of intra-regional air transport markets for the SADC airlines” (SADC 2005, Article 9.2). Civil aviation policy also focuses on developing regionally owned airlines by restructuring existent SADC airlines, airports, and air navigation service providers and on promoting fair competition between these service providers. In addition, it aims at expanding and strengthening

governments' capacity to provide adequate policy frameworks and to establish an appropriate regional institutional mechanism (SADC 2005, Article 9.2, paras. b, c, d).

The SADC Protocol on Transport, Communications, and Meteorology, which was agreed upon three years before the signing of the Yamoussoukro Decision, clearly reflects the objectives of the former Yamoussoukro Declaration, whose primary aim was to integrate African air carriers (UNECA 1988, p. 2). While most of the other RECs have agreed upon or issued legislation aimed at implementing the Yamoussoukro Decision, SADC did not further define liberalization in relation to implementation of the Yamoussoukro Decision. Nevertheless, even though SADC never formally agreed on intraregional liberalization of its air services, it worked continuously to implement the Yamoussoukro Decision, to which all SADC member states except Madagascar, South Africa, and Swaziland are bound (see appendix B). The only regional aspect of implementation of the Yamoussoukro Decision is the joint COMESA, SADC, and EAC approach toward preparing regulations for competition in air transport services. However, even though the three RECs laid out a concrete road map for implementation on several occasions, the adoption of the joint competition regulations and the establishment of a joint competition authority remain pending (SADC 2006, p. 9).

Thus, SADC has not taken any steps toward implementing the Yamoussoukro Decision that can be considered binding for its member states. However, it has at least acknowledged the Yamoussoukro Decision and its objective of liberalizing air transportation across the continent. The SADC Summit has the necessary power to decide by consensus to adopt the Yamoussoukro Decision in the region, which would be a binding decision on all member states, but the matter has never been presented for decision by the Council. The SADC member states therefore cannot be considered to have liberalized air transport in the spirit of the Yamoussoukro Decision.

### ***The East African Community***

The history of the EAC goes back as far as 1917, when Kenya and Uganda formed one of the first cooperative entities in Africa by establishing a customs union. Tanganyika, now Tanzania, joined the union in 1927 after being freed from German colonial rule (Kayizzi-Mugerwa 1999, p. 178). The main role of the customs union was to provide for a common customs administration. In 1948, it was replaced by the more formal East African High Commission, which was enacted under British colonial

oversight. However, the populations of the countries involved saw the East African High Commission as a regime imposed on the three British territories of East Africa, Kenya, Tanganyika, and Uganda. (The British Settlement Acts of 1887 and 1945 and the British Foreign Jurisdiction Act of 1890 in essence allowed the British Crown to make laws for British possessions without recourse to the British Parliament [Akintan 1977, p. 124].) Nevertheless, in 1961, when Tanganyika entered into formal negotiations for independence with the British government, it was recognized that the “common services at present provided by the East African High Commission should continue to be provided on an East African basis” (Akintan 1977, p. 125). Subsequently, on 12 December 1961, 11 days after Tanganyika’s independence, representatives from Kenya, Tanganyika, Uganda, the East African High Commission, and the British government established a new institution known as the East African Common Services Organisation.

In 1967, Kenya, Tanzania, and Uganda formed the EAC as an economic cooperative. One of the objectives of the treaty establishing the EAC was to maintain the cooperative regional trade framework that had initially been mandated by the British Crown. An earlier attempt to create a cooperative, the East African Federation, had failed in 1964 because of strong nationalistic attitudes and the divergence of the three countries’ economic and political priorities.

The declared long-term objective of the EAC was to set up an East African common market to promote, strengthen, and regulate common industrial and commercial development (Mead 1969, p. 277). However, soon after its creation, it became apparent that the EAC Treaty had failed to address several important issues, which resulted in many instances of stalled application of the principles of the common market, for instance, the external tariffs of the three countries, a crucial element of a common market, could not be harmonized because of flaws in the community’s institutional arrangements (Mead 1969, p. 277).

The main challenge facing the new organization was the increasing divergence in the three member governments’ ideological and political views. The ideological split was caused by the dictatorship under Idi Amin in Uganda, socialism in Tanzania, and capitalism in Kenya. In addition, Kenya demanded more seats than Tanzania and Uganda in decision-making organs (Petersen 2005). Indeed, Mugomba (1978, p. 262) summarizes the situation as “a three-dimensional verbal ‘guerrilla’ war . . . waged by Kenya, Tanzania, and Uganda against one another; . . . sometimes it has come very close to physical combat.” The result was the collapse of the

EAC in 1977, only 10 years after its creation. The triggering event was the bankruptcy and liquidation of the joint airline, East African Airways, with Kenya immediately creating its own national carrier in response (Mugomba 1978, p. 264). The EAC collapsed quite swiftly despite its initial recognition by the international community as a promising example of regional cooperation.

Soon after the EAC's dissolution in 1977, the member states negotiated a mediation agreement for the division of assets and liabilities, which they signed in 1984. One of the provisions of the agreement was that the three states would explore areas of future cooperation and prepare concrete arrangements for such cooperation. This eventually led to the signing on 30 November 1993, of the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation by the heads of state of Kenya, Tanzania, and Uganda. Formal cooperation started in March 1996 with the launch of the Secretariat of the Permanent Tripartite Commission, headquartered in Arusha, Tanzania.

The leaders of the three governments quickly recognized that the regional cooperation between the three states needed to be consolidated. At their second summit in Arusha on 29 April 1997, the East African heads of state directed the Permanent Tripartite Commission to initiate the process of transforming the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation into a treaty reestablishing the EAC (Kayizzi-Mugerwa 1999, p. 179). Three years later, on 30 November 1999, the three so-called partner states signed the treaty in Arusha. Following ratification and deposit of the instruments of ratification with the secretary general by all three member states, the treaty entered into force on 7 July 2000. Initially comprising three partner states, the EAC was enlarged in 2007 when Burundi and Rwanda joined (Ford 2007).

The objectives of the EAC are outlined in Article 5 of the EAC Treaty of 1999 (EAC 1999). The EAC's prime objective is to "develop policies and programs aimed at widening and deepening cooperation among the Partner States in political, economic, security and legal and judicial affairs, for their mutual benefit" (EAC 1999, Article 5, para. 1). To achieve these objectives, the EAC shall establish a customs union, a common market, and subsequently a monetary union ultimately leading to a political federation (EAC 1999, Article 5, para. 2). The EAC Treaty lays out a set of fundamental and operational principles that must govern the achievement of the set objectives (EAC 1999, Articles 6, 7). The most significant

fundamental principles include “mutual trust, political will and sovereign equality,” as well as peaceful coexistence and peaceful settlement of disputes (EAC 1999, Article 6). The community’s key operational principles are “the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labor, services, capital, information and technology” and the principle of subsidiary of the EAC, which secures multilevel participation and the involvement of a wide range of stakeholders during the integration process (EAC 1999, Article 7).

Overall, the institutional framework of the newly established EAC is well defined and consists of all the necessary elements for effective implementation of its goals, economic cooperation, and integration among its partner states. The decision making is, in general, consensus based, which does not seem to pose a major problem given the small number of partner states and their long history of economic cooperation.

### ***The East African Community's Air Transport Program***

Chapter 15 of the EAC Treaty (EAC 1999) outlines the modalities of cooperation in infrastructure and services by partner states. The sectors for which policies and concrete programs are outlined are

- transport and communications (Article 89),
- roads and road transport (Article 90),
- railways and rail transport (Article 91),
- civil aviation and civil air transport (Article 92),
- maritime transport and ports (Article 93),
- inland waterways transport (Article 94),
- multimodal transport (Article 95),
- freight booking centers (Article 96),
- freight forwarders, customs clearing, and shipping agents (Article 97);
- postal services (Article 98),
- telecommunications (Article 99),
- meteorological services (Article 100), and
- energy (Article 101).

The objectives of the civil aviation program are to harmonize civil aviation policies among partner states and to facilitate the establishment of joint air services (EAC 1999, Article 92, paras. 1, 2). In particular, the treaty provides a list of concrete steps to reach these goals (EAC 1999, Article 92, para. 3). The main steps are

- adopting common policies to develop civil air transport in collaboration with other relevant organizations (for example, airline associations or ICAO);
- liberalizing the granting of air traffic rights for passenger and cargo operations;
- harmonizing civil aviation rules and regulations;
- establishing an upper area control system, that is, a system of air traffic control for the upper flight levels;
- coordinating the flight schedules of designated carriers;
- applying ICAO guidelines to determine user charges for scheduled air services; and
- adopting common aircraft standards and technical standards.

Some of these steps match elements of the Yamoussoukro Decision, which was signed the same year as the Treaty of the EAC, but the latter is basically limited to liberalizing the granting of air traffic rights for passengers and cargo operations and does not further specify the extent of liberalization. The other steps are, at most, secondary measures of the Yamoussoukro Decision. Furthermore, the concrete objectives of establishing joint air services and facilitating the efficient use of aircraft are elements of the Yamoussoukro Declaration of 1988 (UNECA 1988, p. 2). At the same time, Article 11.3 of the Yamoussoukro Decision does provide for a mild form of cooperative arrangements among designated carriers.

Even though the EAC Treaty did not incorporate all the principles of the Yamoussoukro Decision, the EAC's Sectoral Council on Transport, Communications, and Meteorology worked continuously on several key measures of the Yamoussoukro Decision. The most important was the application of a liberalized air transport policy for scheduled air services. While other RECs developed specific regulations that liberalized air services within their REC, for example, WAEMU, the EAC choose to focus on amending the bilaterals between the partner states. The 11th Meeting of the Council of Ministers of the EAC formally approved several projects pertinent to air transport and issued the necessary directives, namely (EAC Secretariat 2006, p. 61):

- The amendments to the bilaterals between the EAC states toward full implementation of the Yamoussoukro Decision on air transport liberalization are approved and must be incorporated into the respective bilaterals (EAC Secretariat 2006, Decision 44, p. 61).

- The amendments include full liberalization of air services between any points within the territory of the EAC. Following the principles of the Yamoussoukro Decision, no restriction shall be posted on frequency, capacity, or types of aircraft operated by designated EAC carriers.
- The EAC Secretariat is to inform the Economic Commission for Africa, with copies to COMESA and SADC, that the EAC is fully compliant with the Yamoussoukro Decision. The latter two organizations are urged to “expedite the move towards continental implementation of the Yamoussoukro Decision” (EAC Secretariat 2006, Directive 13, p. 62).
- The EAC Air Transport Subcommittee for implementation of the Yamoussoukro Decision will be staffed with an official responsible for administering the bilaterals and with officials from the civil aviation authorities, airport authorities, and the attorneys general chambers of each partner state (EAC Secretariat 2006, Decision 45, p. 62).
- The heads of civil aviation and airport authorities of each partner state are authorized and instructed to renegotiate the funding for civil aviation safety and airport projects with their respective ministers of finance and to seek other resources for such projects (EAC Secretariat 2006, Decision 46, p. 62).
- The revised civil aviation regulations for the EAC are to be promulgated to facilitate establishment of the East African Civil Aviation Safety and Security Agency (EAC Secretariat 2006, Decision 47, p. 62). The implementation of priority airport projects is approved (EAC Secretariat 2006, Decision 48, p. 62).
- The EAC Secretariat must develop a comprehensive funding arrangement for the priority airport projects for consideration by the Sectoral Council on Transport, Communications, and Meteorology.

The EAC took the first step toward implementing these decisions and directives on 18 April 2007, when the Extra Ordinary Council of Ministers Meeting in Arusha approved the establishment of the EAC’s Civil Aviation Safety and Security Oversight Agency (EAC Secretariat 2007). The main objective of this agency is to promote safe, secure, and efficient use and development of civil aviation by having the partner states meet their obligations and responsibilities under the Chicago Convention (EAC Secretariat 2007, Article 4). In this respect, the revisions and harmonization of the civil aviation regulations in the EAC cover the domains of personnel licensing, flight operations, and airworthiness in accordance with annexes 1 and 6 of the Chicago Convention. The main

functions of the agency are to strengthen the institutional framework within the partner states in aviation security, to coordinate civil aviation security oversight activities among partner states, and to evaluate and monitor compliance of partner states with ICAO SARP (EAC Secretariat 2007, Article 5).

Even before the establishment of the Civil Aviation Safety and Security Oversight Agency in 2007, the EAC's civil Aviation Authorities were working on the development and adoption of harmonized civil aviation safety and security regulations for the region. These regulations contain specific rules for most operational aspects of air transportation. Uganda has established regulations that were formally adopted in 2006 on

- personnel licensing (Government of Uganda 2006, p. 571);
- approved training organizations (Government of Uganda 2006, p. 853);
- aircraft registration and marking (Government of Uganda 2006, p. 929);
- airworthiness (Government of Uganda 2006, p. 955);
- approved maintenance organizations (Government of Uganda 2006, p. 1019);
- instruments and equipment (Government of Uganda 2006, p. 1099);
- operation of aircraft (Government of Uganda 2006, p. 1207);
- air operator certification and administration (Government of Uganda 2006, p. 1471);
- commercial air transport operations by foreign air operators in and out of Uganda (Government of Uganda 2006, p. 1615);
- aerial work, that is, operations of aircraft used for specialized services, for example, agriculture, surveying, or search and rescue (Government of Uganda 2006, p. 1639);
- rules of the air and air traffic control (Government of Uganda 2006, p. 1707); and
- parachute operations (Government of Uganda 2006, p. 1815).

However, as of April 2008, only Tanzania and Uganda had formally adopted the harmonized civil aviation regulations into national law. Kenya reported that its civil aviation regulations had been submitted to the Attorney General's Chambers for promulgation, while the two new members of the EAC, Burundi and Rwanda, requested assistance to harmonize their civil aviation regulations with those of the EAC (EAC Secretariat, 2008, p. 3).

Thus, the EAC has displayed great interest in and motivation toward liberalizing and developing air services within its territory. As a relatively

small REC, the EAC relies mainly on mutual consent with respect to major decisions and program implementation. The notion of cooperation among partner states has a long history in the region and must be regarded as the best way forward. Therefore the approach of agreeing to bilaterals that conform to the principles of the Yamoussoukro Decision is the most appropriate manner of implementation. However, this key element of the EAC's approach toward implementing the Yamoussoukro Decision, that is, amending the bilaterals between EAC states, is still pending. Currently, the existing bilaterals regime among the EAC partner states is more restrictive than that established by the Yamoussoukro Decision framework. For example, Tanzania's current bilaterals with Kenya and Uganda generally have no limitations on capacity or types of aircraft, but they limit frequencies, and in the case of Kenya, the destinations to be served in both countries, and there are also no provisions for fifth freedom traffic (Munyagi 2006). Finally, the creation of the regional Civil Aviation Safety and Security Oversight Agency is an important step, not only for implementation of the Yamoussoukro Decision, but for the development of international air services by any EAC state. However, it is only an important support tool and revision of the bilaterals remains the more important step.

## **Conclusion**

The Yamoussoukro Decision explicitly encourages subregional and regional organizations to pursue and intensify their efforts to implement the Yamoussoukro Decision (UNECA 2004, Article 12.2). It does so because Africa is a fragmented continent with heterogeneous economic and political organizations. Expecting full and harmonious application of the mechanism of the Yamoussoukro Decision and liberalization of air services in all Yamoussoukro Decision party states two years after the decision came into force was probably excessively optimistic. A better strategy is to encourage the various subregional and regional organizations that are involved in air transportation to begin implementing the steps of the Yamoussoukro Decision, while at the same time pan-African efforts are driven by the African Union. The underlying idea clearly seems to be to reach a situation where many RECs have applied the Yamoussoukro Decision and then start to agree on liberalizing air traffic between them. This last step would eventually complete full continent-wide implementation.

When one reviews the different regions, a fairly heterogeneous picture appears. The Arab states of North Africa have not begun liberalizing air services among themselves, even though certain instruments, such as the Arab League Open-Skies Agreement, exist. Morocco, the only North African country that is not a Yamoussoukro Decision party state, is the most active nation with respect to liberalizing and expanding its air services, as it has signed an open skies agreement with the EU and has acquired controlling stakes in two African air carriers.

In West Africa, the overarching organization, ECOWAS, has been unable to take any significant steps toward liberalizing air services. However, the smaller REC, WAEMU, went even beyond the principles of the Yamoussoukro Decision when it agreed to an EU model that includes cabotage rights. Finally, BAG has agreed to a multilateral air service agreement that establishes a liberalized regime that is fully compatible with the Yamoussoukro Decision.

In Central Africa, CEMAC has implemented all the necessary legislative and regulatory elements to comply with the provisions of the Yamoussoukro Decision.

In southern and East Africa, COMESA has achieved the most progress by issuing a legal instrument that would effectively have liberalized air services in 2001. However, after delays, application of the legal notice was suspended until other elements, such as competition regulations, were prepared. The EAC, which has the longest history of cooperation of any of the RECs, especially in the field of aviation, has chosen an effective strategy of revising bilaterals to conform to the Yamoussoukro Decision. However, while implementation remains pending, progress in other relevant matters, such as the establishment of a joint air safety and security agency, are significant steps forward. Finally, SADC has achieved the least progress. Apparently, the dominant position of South Africa and the fear that its national carrier, South African Airways, would quickly wipe out competition in a liberalized southern African market, remain the main obstacles toward more progress in implementing the Yamoussoukro Decision.

Of the 10 African states that cannot be considered Yamoussoukro Decision party states, two, Equatorial Guinea and Gabon, have implemented the Yamoussoukro Decision by means of their REC (CEMAC). This means that eight African states—Djibouti, Eritrea, Madagascar, Mauritania, Morocco, Somalia, South Africa, and Swaziland (see appendix B)—remain uncommitted to any obligations to liberalize

air transportation according to the Yamoussoukro Decision on either a continental or a regional level.

## Notes

1. In November 2002, the EU's Court of Justice ruled that several member states (Austria, Belgium, Denmark, Finland, Germany, Luxembourg, and Sweden) had failed to fulfill their obligations under the European Community Treaty when they had agreed to individual open skies agreements with the United States in 1994, 1995, and 1996 (European Court of Justice 2002, pp. 2–8). This marked the beginning of new EU external aviation policy that aims to (a) bring existing bilateral agreements in line with community law, and (b) gradually adopt ambitious agreements between the community and third countries (European Commission 2005a).
2. These economies are Algeria, Armenia, Azerbaijan, Belarus, the Arab Republic of Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the West Bank and Gaza, the Syrian Arab Republic, Tunisia, and Ukraine (European Commission 2007a).
3. Current members are Egypt (1945), Iraq (1945), Jordan (1945), Lebanon (1945), Saudi Arabia (1945), Syria (1945), Yemen (1945), Libya (1953), Sudan (1956), Morocco (1958), Tunisia (1958), Kuwait (1961), Algeria (1962), Bahrain (1971), Oman (1971), Qatar (1971), United Arab Emirates (1971), Mauritania (1973), Somalia (1974), Palestine (West Bank and Gaza) (1976), Djibouti (1977), and the Comoros (1993). The observer states are Eritrea (2003) and India (2007) (League of Arab States 2007).
4. ECOWAS was the first regional organization to intervene militarily to resolve a conflict in the post-Cold War period. It set up the Economic Community Monitoring Group in 1990 to resolve the Liberian civil war. It began its peace-keeping operations in December 1989 when Libyan-backed rebels invaded Liberia from Côte d'Ivoire. The war ended in 1996, but President Charles Taylor's autocratic and dysfunctional government led to a new rebellion in 1999. Estimates suggest that more than 200,000 people were killed in the civil wars since 1998. In 2006, former President Charles Taylor was arrested and extradited to the International Criminal Court at The Hague to face 17 counts of alleged war crimes (Blackwell Synergy 2007).
5. The Cooperative Development of Operational Safety and Continued Airworthiness Program is a regional initiative of ICAO aimed at improving aviation oversight using a regional approach. Several such programs have been initiated in Africa, Asia, and Latin America. Most are financed by ICAO contracting states or by development partners such as the African Development Bank or the EU (ICAO 2006).

6. Between 1945 and 1958, CFA stood for Colonies françaises d'Afrique (French colonies of Africa). Thereafter, it stood for Communauté française d'Afrique (French Community of Africa), which existed from 1958 (establishment of the French Fifth Republic) to the colonies' independence at the beginning of the 1960s. The use of the term CFA in connection with the franc continues to this day. Two regional currencies are denominated CFA: the Central African franc and the West African franc.
7. In May 2002, WAEMU's Council of Ministers adopted in the Community Competition Law, which consists of five parts: (a) control of anticompetitive behavior within WAEMU; (b) rules and procedures related to the control of cartels and abuse of a dominant position within WAEMU; (c) control of state support within WAEMU that could distort competition, for example, subsidies or no landing taxes for a particular corporation or airline; (d) transparency of the financial relationship between member states and public enterprises and between public enterprises and international or foreign organizations; and (e) cooperation between the WAEMU Commission and national authorities in law enforcement. According to a ruling by the WAEMU Court of Justice (opinion 003/2000/CJ/WAEMU), the WAEMU Commission has exclusive authority to implement these provisions as they relate to competition. National competition authorities still do enforce national competition laws where they exist, but WAEMU competition law takes precedence when in case of a conflict with national law (WAEMU 2002c).
8. For example, the EU sets the compensation for passenger delays at €250 for flights of less than 1,500 kilometers (km), €400 for flights of between 1,500 and 3,500 km, and €600 for flights of more than 3,500 km. WAEMU fixes the compensation at CFA100,000 (€150) in economy or CFA200,000 (€300) in business class for flights of less than 2,500 km and CFA400,000 (€600) in economy or CFA800,000 (€1,200) in business class for flights of 2,500 km or further (European Parliament and the European Council 2004).
9. Regulation No. 07/2002/CM/UEMOA, "Passengers, Freight and Cargo, and Mail Tariffs Applicable to Air Services within, from and to WAEMO Member States," states in its preamble: "Considering the Decision dated 14 November 1999 relating to the implementation of the Yamoussoukro Decision on the liberalization of air transport markets access in Africa signed on 12 July 2000 by the current Chairperson of OAU." But it limits the scope in the same preamble to the territory of WAEMU: "Anxious to promote the development of a safe, orderly and efficient air transport within the Union."
10. Girma Wake, chief executive officer of Ethiopian Airlines, confirmed some issues were pending concerning the denial of fifth freedom traffic rights by Kenya. However, rather than trying to settle the matter via the auspices of the African Union, he considered direct negotiations with the Kenyan authorities

to be a much more effective way to reach a solution (interview held with Girma Wake, 25 April 2007, Addis Ababa).

11. Both Article 5 of the Yamoussoukro Decision and Article 14 of CEMAC's Civil Aviation Code state that designated carriers must coordinate their schedules. In the spirit of CEMAC's Competition Regulation, the requirement for coordination is justified as long as it leads to more efficient market development.