

CHAPTER 2

Elements and Entry into Force of the Yamoussoukro Decision

The Yamoussoukro Declaration

On 17 October 1988, the ministers in charge of civil aviation of 40 African states met in Yamoussoukro, Côte d'Ivoire, and announced a new African air transport policy that was subsequently named the Yamoussoukro Declaration (UNECA 1988, p. 7).¹ Even though the Yamoussoukro Declaration is seen as the origin of the later Yamoussoukro Decision, it focused primarily on airline cooperation and integration. It stated a commitment by the governments represented to make all necessary efforts to integrate their airlines within eight years (UNECA 1988, p. 2). The eight-year period was subdivided into three phases. In the first phase (two years) the focus was to be on maximizing capacity usage between carriers. This was to be achieved by exchanging technical and capacity data, preparing for the designation of gateway airports, and promoting cooperation among national carriers in order to eventually merge them into larger and more competitive airlines. The second phase (three years) would have committed the airlines to joint operations on international routes. In addition, certain airline operations would have been conducted jointly to achieve better economies of scale and deeper integration, for example, instituting a common insurance mechanism and computer reservation system, purchasing spare parts and aircraft, undertaking promotion and marketing, providing

training, and maintaining equipment (UNECA 1988, p. 3). The last phase (three years) was to be used to strive toward achieving the complete integration of airlines by establishing joint airline operations or entities (UNECA 1988, p. 4).

The stated strategy of cooperation and integration of African carriers seemed to be driven more by the need for pan-African cooperation than by the objective of creating a more competitive market environment. Nevertheless, the Yamoussoukro Declaration also foresaw the gradual elimination of traffic restrictions. Specifically, the granting of fifth freedom rights to African airlines during the implementation period was a declared necessary measure to achieve flexibility. However, the stated objectives and schemes aimed at full integration of the African air transport market, comprising at least 40 of the 53 African states, within eight years were overly ambitious. In addition, as its denotation indicated, the Yamoussoukro Declaration was widely understood to be a general, nonbinding expression of strategy (interviews with Jorge Lima Delgado Lopes, minister of infrastructure and transport of Cape Verde, on 13 May 2002; Sama Juma Ignatius, director general of the Cameroon Civil Aviation Authority on 27 August 2003; and António Pinto, director general of the Instituto De Aviação Civil de Moçambique on 30 March 2004).

Despite its too ambitious objectives and its weak likelihood of implementation, the Yamoussoukro Declaration set in motion further initiatives aimed at liberalizing the African air transport market. In 1994, having evaluated the steps required to implement the Yamoussoukro Declaration, the African ministers in charge of civil aviation met in Mauritius and agreed on a set of measures to facilitate the granting of third, fourth, and fifth freedom rights to African carriers. Most remarkable was the understanding that fifth freedom rights should be granted on routes where third and fourth freedom flights did not exist (UNECA 2004, p. 32).² Significant also was the fact that the Yamoussoukro Declaration enforced the notion that the air transport sector in Africa primarily needed to be liberalized.

This led UNECA to include the liberalization of air services in its work program. Furthermore, it was UNECA that, in November 1999, initiated the conference in Yamoussoukro that resulted in the Yamoussoukro Decision, the historic agreement to liberalize pan-African air services.

The Yamoussoukro Decision

On 13–14 November 1999, African ministers in charge of civil aviation met in Yamoussoukro, Côte d'Ivoire, to discuss the liberalization of air services. Their mandate was based mainly on the objectives of the

Yamoussoukro Declaration and on their previous decision adopted in Mauritius in September 1994 aimed at accelerating implementation of the Yamoussoukro Declaration. In addition, the recommendation of the 11th Conference of African Ministers Responsible for Transport and Communications held in Cairo in November 1997 called for a regional meeting of African ministers to find ways to implement the Yamoussoukro Declaration (UNECA 1999). The conference in Yamoussoukro ended with the adoption of the Decision Relating to the Implementation of the Yamoussoukro Declaration concerning the Liberalization of Access to Air Transport Markets in Africa, which became known as the Yamoussoukro Decision. The Yamoussoukro Decision was then formally adopted during the Assembly of Heads of State held in Lomé, Togo, on 10–12 July 2000.

The objective of the Yamoussoukro Decision is defined under Article 2, Scope of Application, as the gradual liberalization of scheduled and nonscheduled intra-African air transport services. The main elements are the granting to all state parties to the decision the free exercise of first, second, third, fourth, and fifth freedom rights on both scheduled and nonscheduled passenger and freight (cargo and mail) air services performed by an eligible airline. The granting of fifth freedom rights was initially limited in Article 3 by the possibility for a state to grant these rights only in specific circumstances.³ However, this limitation was set for a transitional period of two years and expired on 12 August 2002. The Yamoussoukro Decision came into force on 12 August 2000, 30 days after its signature by the chair of the Assembly of the African Economic Community (AEC).

Article 4 of the Yamoussoukro Decision liberalizes tariffs to the extent that the aeronautical authorities of state parties do not require approval for any increases. An increase in tariffs has to be filed with the appropriate authorities only 30 working days before it enters into effect, while a lowering of tariffs takes effect immediately. As the Yamoussoukro Decision liberalizes only international air services, the tariff liberalization regime thereby established only applies to international air traffic.

In relation to capacity and frequency, Article 5 stipulates that frequencies and capacity offered on air services linking any city pair combination shall not be limited by either of the state parties concerned. It specifies this by providing that no state party shall unilaterally limit the volume of traffic, the type of aircraft to be operated, or the number of flights per week. However, the same article stipulates that for environmental, safety, technical, or other special considerations, states may limit traffic. While limitation or refusal of air services for environmental, safety or technical reasons are standard practices in traditional air service agreements (see, for example, the 1997 Air Transport Agreement between the United States

of America and Singapore⁴), “other special considerations” needed further clarification.

The monitoring body, which was established in accordance with Article 9 of the Yamoussoukro Decision, issued a directive clarifying that other special considerations are primarily of a technical nature, such as fuel shortages, runway repairs in progress, or security issues (UNECA 2004, p. 89). These considerations should not be driven by commercial considerations in favor of any particular airline. Article 9 further sets out conditions applicable to any limitation of capacity and frequencies. The limitation must

- be nondiscriminatory to any carrier,
- be of limited duration,
- not affect the objectives of the Yamoussoukro Decision excessively,
- not distort competitive forces among carriers,
- not be too restrictive to tackle the problem and not be more restrictive than that applied to a party state and to the Yamoussoukro Decision.

In addition, a state party may refuse to authorize an increase in capacity if such additional capacity is not in compliance with the provisions of the rules of fair competition as set forth in Article 7.

Article 6 outlines the procedure for designating and authorizing an airline. Each state party can designate in writing at least one airline to operate intra-African air transport services. The notification to the other state party, or in fifth freedom cases, to two other state parties, must be done in writing through diplomatic channels. According to the directive of the monitoring body, a copy of the notification should be transmitted to the regional economic organizations concerned. The state party that grants the operational permit must in turn notify the monitoring body and the regional economic organization (UNECA 2004, p. 90). A state can designate any eligible airline from another state party to operate air services on its behalf, including an eligible African multinational airline in which it is a stakeholder. There is no limitation to the number of carriers a state party can designate, as long as they meet the eligibility criteria. The notification obligates the other state party to initiate the process of authorization and licensing of the designated airline to operate the services in accordance with its national laws. The authorization must be granted within 30 days, and the airline must submit its proposed schedule of flights to the appropriate authorities for approval.

The eligibility criteria, set forth in Article 6.9, aim at ensuring that the designated airline meets minimum standards with regard to its legal and physical establishment, its licensing and operating capacity, its insurance coverage, and its capacity to maintain international standards. The carrier must, therefore, be legally established in accordance with the regulations applicable in the relevant state party and have its headquarters, central administration, and principal place of business physically located in that same country. It must also be effectively controlled by the nationals of one, or in the case of multinational airlines, several, state parties. The airline (a) must be duly licensed by a state party as per the requirements of annex 6 of the 1944 Convention on International Civil Aviation;⁵ (b) must fully own or have a long-term lease exceeding six months on an aircraft for which it has technical supervision; (c) must be adequately insured with regard to passengers, cargo, mail, baggage, and third parties; and (d) must be capable of demonstrating its ability to maintain standards equal at least to those set by the International Civil Aviation Organization (ICAO). If an airline fails to meet the eligibility criteria, a state party may revoke, suspend, or limit its operating authorization by informing the carrier at least 30 days before the measure enters into force (UNECA 2004, Article 6.10).

One of the strong elements of the Yamoussoukro Decision is its focus on safety and security. Not only must an airline meet the standards defined by ICAO, but the state parties explicitly reaffirm in Article 6.12 their obligation to comply with established civil aviation safety and security standards and practices. A state party must also recognize air operating certificates, certificates of airworthiness, certificates of competency, and the personnel licenses issued or validated by other state parties and still in force provided that the requirements for issuing such certificates or licenses are at least equal to the minimum standards set by ICAO. Although justified, the strong focus on safety and security has become the main obstacle to timely implementation, as many African states do not, or only marginally, comply with ICAO's safety and security standards and recommended practices (SARP).⁶

Another perceived obstacle to the implementation of the Yamoussoukro Decision is the issue of unfair competitive behavior when the decision is applied. Smaller African carriers in particular fear unfair competitive practices such as price dumping, when competing with larger established airlines (Macdonald 2006). Article 7 of the decision obligates state parties to "ensure fair opportunity on non-discriminatory basis for the designated African airline to effectively compete in providing air transport services

within their respective territory.” While this implies that certain common competition rules should be established, the Yamoussoukro Decision falls short of further defining this requirement. It does, nevertheless, refer in Article 8 to arbitration procedures, which are set forth in annex 2 of the decision. The latter primarily defines the duties and responsibilities of the monitoring body, which is established in Article 9. It does not make particular reference to competition rules or arbitration procedures except the duty of the monitoring body to prepare the relevant annexes to the Yamoussoukro Decision for adoption by the Subcommittee on Air Transport. The assumption is therefore that arbitration procedures, still missing from annex 2, are one of the tasks that must be performed by the monitoring body in order to implement the Yamoussoukro Decision. Another indication in annex 2 (g) is the monitoring body’s obligation to state, at the request of state parties, its views on predatory and unfair competition practices.

The monitoring body is established in Article 9.1. Its principal responsibility is the overall supervision, follow-up, and implementation of the decision. It is composed of representatives of UNECA, the OAU, the African Civil Aviation Commission (AFCAC) (founded on 17 January 1969 as a specialized agency what was then the OAU, now the African Union, in the field of civil aviation, with headquarters in Dakar, Senegal), and AFRAA, who shall be assisted by representatives of subregional organizations. As defined in Article 9.2, the monitoring body’s main purpose is to assist the Subcommittee on Air Transport, composed of African ministers responsible for civil aviation, to follow up on implementation of the decision. Article 9.3 refers to annex 3 of the decision for an outline of the monitoring body’s overall duties and responsibilities, but as annex 3 does not exist, it presumably refers to annex 2, “Duties and Responsibilities of the Monitoring Body.” As annex 3 became annex 2, the arbitration procedures referred to in Article 8 that were supposed to be spelled out in annex 2 were never prepared.

In addition to the monitoring body, an African air transport executing agency shall be established. Article 9.4 defines the principal responsibilities of this agency to be the supervision and management of Africa’s liberalized air transport industry to ensure successful implementation of the Yamoussoukro Decision. Article 9.5 stipulates that it shall have “sufficient powers to formulate and enforce appropriate rules and regulations that give fair and equal opportunities to all players and promote healthy competition.” In addition, in Article 9.6 the executing agency is also mandated to protect consumers’ rights. In other words, it is the executing agency

that is in charge of assuring fair competition and consumer protection once the appropriate rules have been drafted and adopted.

As a transitional measure, Article 10 (1) of the Yamoussoukro Decision provides the option for state parties not to grant and receive the rights and obligations envisaged in Articles 3 and 4, that is, up to unrestricted fifth freedom rights and a liberal tariff regime. This option is limited to a maximum transitional period of two years, which expired when the Yamoussoukro Decision became fully binding on 12 August 2002. Given that implementation of the Yamoussoukro Decision was considered pending for the past five years, the transitional measures remain theoretical and were never applied. According to the African Union (2005b, p. 11) reasons for the slow implementation of the Yamoussoukro Decision include the lack of tools and funds for monitoring implementation of the decision, the lack of clear and independent responsibilities assigned to the regional economic communities (RECs), the establishment of the monitoring mechanism without any clearly defined powers to prescribe rules, and the negative implications of the position and policy of the European Union (EU) on an open aviation area.

Finally, Article 11 of the Yamoussoukro Decision addresses some commercial and operational issues. In Article 11.1, certain commercial aspects are provided for on a reciprocal basis, such as (a) the right of the designated airline to establish offices in the territory of the other state party, (b) the right to convert and remit revenues in local currency without restrictions, (c) the option to pay for local expenses such as handling and fuel costs in local currency, and (d) the possibility of employing and bringing into the territory employees to perform various tasks. Article 11.2 allows the designated carrier certain operational flexibility, such as the use of one-way or return service on the concerned segments, the use of code sharing arrangements, and the right to serve additional points as well as to omit certain stops. The cooperative arrangements, first mentioned under operational flexibility by “the use of the same flight number,” are further defined in Article 11.3 as marketing arrangements such as blocked space, code sharing, franchising, or leasing arrangements among state party airlines.

In addition to these operational issues, Article 11.4 provides the possibility for a state party to request consultations with respect to the interpretation or application of the Yamoussoukro Decision. This is enhanced by the mandate given in Article 11.5 to the Air Transport Subcommittee to review the decision every two years or earlier if requested by two-thirds of the state parties. The main purpose of the

review is for the monitoring body to propose measures to further eliminate existing restrictions.

The Abuja Treaty and Its Entry into Force

Origins of the Treaty of Abuja

On 3 June 1991, an international treaty was signed in Abuja, Nigeria, that established the AEC. The Treaty Establishing the African Economic Community, commonly known as the Abuja Treaty, was the culmination of more than 30 years of initiatives all aimed at achieving greater economic, social, and cultural integration among African countries. The origin of these initiatives was the establishment of the OAU on 25 May 1963, in Addis Ababa, Ethiopia, by signature of the OAU Charter by the representatives of 32 governments (Charter of the Organization of African Unity [OAU Charter], Article XXXIII).⁷ Subsequently, a further 21 African states joined the OAU, with South Africa becoming its 53rd member on 23 May 1994.

The main purpose of the OAU was to promote unity and solidarity among African states, coordinate efforts to improve living standards, defend the sovereignty and independence of African states, eradicate all forms of colonialism, and, promote international cooperation with due regard to the Charter of the United Nations and the Universal Declaration of Human Rights (OAU Charter, Article II). The OAU's initial purpose and mission were greatly influenced by a period of intense political struggle during 1960–63, with the “main preoccupation on an accelerated liberation process” (El-Ayouty and Zartman 1984, p. 4). Subsequently, during its initial decade, the OAU was primarily seen as a political organization that focused on the liberation struggle through both peaceful means, such as working through the United Nations, and nonpeaceful means, such as training freedom fighters and engaging in trade boycotts (OAU 1973, p. 28); the settlement of disputes, for instance, border disputes; and the continued decolonization efforts of territories under British, French, Portuguese, and Spanish domination and of Namibia and South Africa.

However, at its 10th Summit Anniversary in 1973 the OAU recognized that the First Assembly of Heads of State and Government of the OAU, held in Cairo on 21 July 1964, had specified that the OAU had a basic role in planning and direction in relation to economic and social matters in Africa (OAU 1973, p. 36). This included intensifying regional cooperation, accelerating industrial development with an emphasis on multinational projects, increasing inter-African trade, harmonizing customs procedures, promoting cooperation between African air transport

companies to increase trade and promote tourism, and harmonizing social and labor legislation.

After a series of international meetings at different levels and on various issues, the heads of states met again in Lagos on 28–29 April 1980, under the auspices of the OAU. (From 1963 until 1980, the OAU held more than 66 documented meetings in various locations in Africa; see El-Avourty and Zartman 1984.) The objective was to take stock of the declining economic situation of many member states and to prepare an action plan to address the then prevailing deficiencies. The result was the adoption of a plan of action aimed at overcoming problems in various fields. The so-called Lagos Plan of Action retained a broad, state-led model of actions that were considered necessary given the past 20 years of disappointing economic performance (OAU 1980). The OAU's adoption of the Lagos Plan of Action and of an agenda for creating an African economic community by 2000 was the culmination of the initiative for change in the international economic order launched by the United Nations in 1974–75. The states committed themselves to promoting economic and social development and to integrating their economies (OAU 1980, Preamble). The actions and objectives focusing on industrial development were grouped into short-term (until 1985), medium-term (1990), and long-term actions (2000) that were supposed to significantly improve Africa's economic and social situation. However, while the need for integration was clearly stipulated, the Lagos Plan of Action did not include liberalization of trade or services as a declared objective.

The transport and communications sector was recognized as most important for all sectors and for socioeconomic development (OAU 1980, p. 58). However, the actions proposed were based on UN resolution 32/160 (19 December 1977) declaring 1978–88 as the Transport and Communications Decade for Africa, which was focused mainly on infrastructure improvements.⁸ In the field of air transport, the plan mentioned the development of air transport infrastructure, the extension and modernization of airports, and technical assistance for better air transport integration (OAU 1980, p. 61).⁹

Overall, the 1980 Lagos Plan of Action was an attempt to gradually strengthen economic and cultural relationships between states and its ultimate goal was the establishment of an African common market by 2000. Achievement of these goals was impeded by the failure of the numerous conferences of independent African states held between 1958 and 1968, which aimed at establishing a universal African organization, coupled with the failure of regional initiatives, such as the collapse of the East African

Community (EAC) in 1977. However, there was also an opposing viewpoint that continental unity could only be achieved through political integration (M'buyinga 1982).

Establishment of the African Economic Community

The establishment of the AEC was a clear sign of a new philosophy of regional economic cooperation that would eventually lead to full economic integration. The preamble of the Abuja Treaty lists the various conferences at which declarations and resolutions paved the way for consensus by the governments of the various African states. Among them were the OAU Summit in Algiers in 1968, the Monrovia Summit of 1979 (resulting in the Monrovia Declaration), and the Lagos Economic Summit of 1980, where the Lagos Plan of Action was formulated and the Final Act of Lagos adopted.

Article 2 of the treaty provides for the establishment of the community, while Article 4 (1) lists its objectives in four paragraphs that cover (a) the promotion of economic, social, and cultural development and the integration of African economies; (b) the establishment of a framework for the development, mobilization, and utilization of human and material resources; (c) the promotion of cooperation in all fields of human endeavor; and (d) the coordination and harmonization of policies among existing and future economic communities to foster the gradual establishment of the AEC.

Article 4 (2) then itemizes 15 actions that the community is expected to implement to achieve the stated objectives. Some have seen this itemization of actions as a somewhat worrisome approach (Akanle 1993, p. 10). Akanle (1993, p. 10) suggested that an omnibus provision that granted the power to take whatever action necessary to the attainment of its objectives would have been more suitable. However, the focus on economic integration in Africa is further emphasized in Article 88 (3), which states that the treaty shall coordinate, harmonize, and evaluate the activities of existing and future regional economic bodies.

Article 6 (1) defines the modalities for the establishment of the community, which shall be gradual over a transitional period not exceeding 34 years. This period is subdivided into six stages of different durations. The initial stages focus primarily on regional activities and initial steps toward sectoral integration, while the final phase is aimed at reaching a full union, including a monetary union and a pan-African parliament. Article 98 (1) then provides that the community shall be an integral part of the OAU, which implies that the community has priority over regional

economic bodies and is expected to streamline its activities with the general objectives of the OAU as stipulated in the OAU's Charter of 1963.

Article 3 (5) provides the principle that the parties to the treaty shall observe the legal system of the community. This implies that the legal system of the treaty, which is separate and distinct from those of the member states of the community, will apply throughout the community in each of the member states (Akanle 1993, p. 12). There will be a duality of legal systems: the national legal system and the community's legal system. Article 5 (2) obligates member states to ensure the enactment and dissemination of such legislation as necessary to implement the provisions of the treaty.

The institutions of the community are provided for in Article 7 (10). The supreme organ of the community is the Assembly of the Heads of State. Article 8 (2) states that the assembly's main responsibility is to implement the objectives of the AEC. In Article 8 (3), the assembly is further directly responsible for 12 specific tasks ranging from determining general policy to coordinating and harmonizing various policies of member states to undertaking certain organizational matters and, finally, to taking "any action, under this Treaty, to attain the objectives of the community." Article 9 (1) mandates the assembly to meet once every year for a regular session and also empowers the chair to convene extraordinary sessions at the request of a member state provided that such a request is supported by two-thirds of assembly members. However, for a legislative organ of an economic community to meet only once a year is rather inappropriate. A better option would have been to limit the assembly's role to solving political problems (Akanle 1993, p. 31).

Finally, the most significant rule for the implementation of the Yamoussoukro Decision is Article 10. In this article, the assembly is empowered to act by decision (on any subject according to Article 8), which if reached by consensus or two-thirds majority, becomes binding for all member states, other organs of the community, and the RECs. Decisions shall become automatically enforceable 30 days after the date of their signature by the chair of the assembly.

Ratification and Entry into Force of the Abuja Treaty

For the provisions of the Abuja Treaty to be binding, Article 100 requires that the high contracting parties (the representatives of states that have signed or ratified a treaty) must sign and ratify the treaty and the protocols thereto in accordance with their respective constitutional procedures. The article further stipulates that the instruments of ratification shall be deposited with the secretary-general of the OAU. Article 101 stipulates

that the treaty shall enter into force 30 days after the deposit of the instruments of ratification by two-thirds of the member states of the OAU.

The Abuja Treaty entered into force on 12 May 1994, after two-thirds of the member states of the OAU had deposited their instruments of ratification (African Union 2006b, p. 2). The ratification process continued and, as of 22 June 2004, 48 of the 54 African states had signed and ratified the treaty. However, four of those ratifications and/or deposits of the ratification instruments were done when the Abuja Treaty had been replaced by the African Union framework (the ratification period for the treaty establishing the AEC ended on 26 May 2001, when the treaty establishing the African Union came into force). Four states (Djibouti, Gabon, Madagascar, and Somalia) have signed, but not ratified, the treaty, and Eritrea and Morocco were never signatories to the treaty.

Entry into Force of the Yamoussoukro Decision

The Abuja Treaty as the Legal Basis of the Yamoussoukro Decision

African ministers in charge of civil aviation from 40 African states convened in Yamoussoukro, Côte d'Ivoire, on 13–14 November 1999 to discuss and adopt a new framework for liberalized air transport on the African continent. The basis of the discussions was the Yamoussoukro Declaration (UNECA 1988), which aimed at integrating African carriers, gradually eliminating traffic rights, and reducing tariffs. The meeting resulted in the adoption of the Yamoussoukro Decision, which focused primarily on full liberalization of traffic rights up to the fifth freedom.

The Yamoussoukro Decision has its legal basis in Article 10 of the Abuja Treaty, which states that the decisions of the Assembly of the AEC shall be binding on member states and organs of the community as well as on RECs. The assembly, however, is defined in Article 8 as the Assembly of Heads of State, while the meeting in Yamoussoukro was attended by the African ministers in charge of civil aviation. The formal adoption of the Yamoussoukro Decision on the basis of the Abuja Treaty took place during the Assembly of the Heads of State on 10–12 July 2000, in Lomé, Togo (UNECA 2004, p. 63).

It is generally assumed that the legal basis of the Yamoussoukro Decision is the formal decision of the Assembly of the AEC, which was taken on 12 July 2000. If this assumption is correct, the Yamoussoukro Decision then becomes an obligation of the Abuja Treaty, and is thus a legally binding instrument. However, this is only the case for those countries that signed and ratified the treaty and its protocols and deposited the instruments of

ratification with the secretary-general of the OAU (Article 100). For states that did not sign the treaty, formal acceptance through accession, acceptance, and approval remains a valid path for the treaty to become binding (Brownlie 2003, p. 583).

Several states signed, ratified, and/or deposited their instruments of ratification after the treaty came into force. As none of the ratifying state parties have expressed any reservations or consent to be bound by part of the treaty only (See Vienna Convention on the Law of Treaties, 1969, Articles 17, 19 [Vienna Convention]), all state parties that later succeeded to member states are therefore bound to all the prior decisions taken by the AEC, that is, decisions taken on the basis of Article 10 of the treaty. The only such significant decision taken by the AEC was the Yamoussoukro Decision.

Establishment of the African Union

At the Fourth Extraordinary Session of the AEC in Sirte, Libya, on 9 September 1999, the assembly decided to establish a new organization called the African Union, which would be in conformity with “the ultimate objectives of the Charter of our Continental Organization and the Treaty establishing the African Economic Community” (African Union 2000, Preamble). The decision was based on the need to “accelerate the process of implementing the Treaty establishing the AEC in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalization” (African Union 2000, Preamble). The formal constitutive Act establishing the African Union was adopted in Togo on 11 July 2000. Initially, 27 states signed the act (African Union 2006b, p. 2), which formally entered into force on 26 May 2001. By July 2003, all African countries except Morocco had adopted and ratified the act (Institute for Security Studies 2007a). (Morocco withdrew from the OAU in 1985 after it admitted the Saharawi Arab Democratic Republic [West Sahara], which Morocco did not recognize as a legitimate signatory member of the act. Later, Morocco refused to sign the act creating the African Union for the same reason.)

Similar to the AEC, the constitutive act of the African Union established several organs. Article 5 stipulates that these organs are (a) the Assembly of the African Union; (b) the Executive Council; (c) the Pan-African Parliament; (d) the Court of Justice; (e) the Commission; (f) the Permanent Representative Committee; (g) the specialized technical committees; (h) the Economic, Social, and Cultural Council; and (i) the financial institutions. Despite some slight changes in their titles, the organs of

the African Union are similar to the organs of the AEC. The only exceptions are the financial institutions to be created (African Union 2000, Article 19, provides for the establishment of the African Central Bank, the African Monetary Union, and the African Investment Bank).

The main, and the most relevant for the Yamoussoukro Decision, difference between the AEC and the African Union is that the constitutive act of the African Union does not provide for the assembly's decisions to be automatically binding and enforceable on member states and organs of the community. Instead, Article 9 of the act limits the assembly's powers and functions to policy decisions, to membership and financial issues, to directions to the Executive Council on issues concerning war or emergencies, and to the appointment of judges and commissioners. The functions and powers of the various other organs are also limited to policy recommendations (Article 13 for the Executive Council) or to project preparation and supervision (Article 15 for the technical committees) or are left to be determined in future acts, such as the creation of a Pan-African parliament (Article 17). (The Pan-African Parliament was established by the adoption of the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament on 30 July 2003.)

Article 33 (1) of the constitutive act of the African Union stipulates that the act shall replace the Charter of the OAU after a transitional period of one year or such further period as determined by the assembly. It further provides in Article 33 (2) that the act shall take precedence over and supersede any inconsistent or contrary provision of the treaty establishing the AEC. In essence, the constitutive act of the African Union replaced the Abuja Treaty,¹⁰ and especially canceled those provisions that had not been carried over into the African Union framework.

For purposes of the Yamoussoukro Decision, the most relevant provision that was not carried over into the new treaty establishing the African Union was Article 10 of the Abuja Treaty. This meant that from the day the constitutive act of the African Union entered into force, decisions taken by the assembly would no longer become automatically binding for all member states. Under Article 7 of the constitutive act, decision making of the Assembly of the African Union requires consensus or a two-thirds majority of the member states. However, the words "automatically binding" were omitted. It can thus be assumed that the member states of the constitutive act of the African Union wanted to preserve their rights to ratify major decisions taken in the future by the Assembly of the African Union.

Ratification Period of the Yamoussoukro Decision Based on the Abuja Treaty

The entry into force of the African Union on 26 May 2001 terminated the ratification period of the Abuja Treaty, which included accession to the Yamoussoukro Decision as a binding element of the Abuja Treaty. Thus, even though the constitutive act of the African Union provides for a transitional period of one year or such further period as may be necessary (African Union 2000, Article 33), it does so solely for the purpose of enabling the OAU to undertake measures for the devolution of its assets and liabilities to the union.

The question of whether the constitutive act of the African Union can be seen as a successor of the Abuja Treaty with regard to the Yamoussoukro Decision can be answered by referring to Article 12 of the Yamoussoukro Decision. This article declares Article 10 of the Abuja Treaty as the basis for entry into force of the Yamoussoukro Decision by stating that “in accordance with Article 10 of the Abuja Treaty, this Decision shall automatically enter into force thirty days after the date of its signature by the Chairman of the Assembly of Heads of State and Government at which this Decision was adopted.” This is the provision that provides for the prime difference between the Abuja Treaty, where decisions of the assembly become automatically binding on member states, and the act of the African Union, which does not include this mechanism. In other words, if the Yamoussoukro Decision would have been agreed upon when the African Union was established (and the Abuja Treaty replaced), its entry into force would have depended on the ratification of the decision by each state, because the African Union treaty does not include the provision that decisions are automatically binding on member states.

The day that the African Union framework came into force by replacing the Abuja Treaty therefore marks the end of the mechanism (automatic binding for member states) of Article 10 of the Abuja Treaty. Consequently, the ratification period of the Abuja Treaty (which also constituted membership of the Yamoussoukro Decision), which includes accession, acceptance, and approval of the treaty, started when the treaty was signed on 3 June 1991, and ended on 26 May 2001.

Status of the Non-Abuja Treaty States

Of the 54 African states, 10 must be considered to be non-Abuja Treaty states. These 10 states can be grouped into three categories: (a) states that never signed the Abuja Treaty (Eritrea and Morocco); (b) states that

signed, but never ratified, the treaty (Djibouti, Gabon, Madagascar, and Somalia); and (c) states that ratified and/or deposited the instruments of ratification after the African Union entered into force (Equatorial Guinea, Mauritania, South Africa, and Swaziland).

Those states that never signed or ratified the Abuja Treaty can clearly be described as nontreaty states. They are not part of the Yamoussoukro Decision framework. The status of states that ratified and/or deposited the instruments of ratification after the African Union entered into force can be examined from different perspectives. A first lead can be found in paragraph 1 of Article 33 of the constitutive act of the African Union, which stipulates that this act shall replace the Charter of the OAU, and a second in paragraph 2, which states that the act takes precedence over and supersedes any inconsistent or contrary provision of the AEC Treaty.

The main provision concerning the Yamoussoukro Decision that was superseded in the constitutive act of the African Union was Article 10 of the Abuja Treaty, which provides that the decisions of the Assembly of the AEC shall be binding on member states and organs of the Community, as well as on RECs. The argument that the provisions of Article 10 were terminated when the constitutive act of the African Union came into force can also be made with Article 59 of the Vienna Convention. This article stipulates that a treaty shall be considered to be terminated if all the parties to it conclude a later treaty relating to the same subject matter and the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. As all four parties concerned (Equatorial Guinea, Mauritania, South Africa, and Swaziland) have signed, and two (Equatorial Guinea and South Africa) even ratified, the constitutive act of the African Union before its entry into force, one can conclude that these parties knew and agreed to the new framework of the African Union. It is nevertheless remarkable that all four of these states also ratified the Abuja Treaty and deposited their instruments of ratification after 26 May 2001, the date on which the African Union came into force and replaced the Abuja Treaty framework. This is even more astonishing when considering that three of the states (Equatorial Guinea, South Africa, and Swaziland) actually deposited their instruments of ratification of the Abuja Treaty much later than they did the same instruments for the constitutive act of the African Union, which replaced the Abuja Treaty.

The key question to analyze before we can conclude that states that did not sign the Abuja Treaty during its legal existence are not parties to the Yamoussoukro Decision is whether decisions of the African Union are

automatically binding for all its member states without any further ratification. Article 10 of the Abuja Treaty is clear on this issue. It provides that the decisions of the Assembly of the AEC shall be binding on member states and organs of the community, as well as on RECs. The constitutive act of the African Union is less clear on this question. Article 6 stipulates that the assembly shall be the supreme organ of the union, and Article 7 states that the assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of the member states of the union. However, the constitutive act of the African Union does not explicitly state that the decisions of the assembly are binding on all member states, but at the same time it provides in Article 23 (2) for the imposition of sanctions against a member state that fails to comply with the decisions and policies of the union, such as the denial of transport and communication links with other member states, and other measures of a political and economic nature to be determined by the assembly.

One strong indication about the nature and scope of applicability of decisions of the African Union on a member state can be found in Article 33 of the *Rules of Procedure of the Assembly of the Union* (African Union 2002). Article 33 states that decisions of the assembly shall be issued as (a) regulations; (b) directives; and (c) recommendations, declarations, resolutions, and opinions. Regulations are applicable in all member states, which “shall take all necessary measures to implement them.” The question here is whether “all measures to implement them” means formal adoption or ratification in each member state. Article 34 (1) states that regulations and directives shall be automatically enforceable 30 days after the date of publication in the *Official Journal of the African Union* or as specified in the decision. Furthermore, Article 34 (2) provides that regulations and decisions shall be binding on member states, organs of the union, and RECs. Before we conclude that Article 34 does indeed render any decision of the assembly automatically enforceable after publication, we need to examine two issues, namely: (a) can the adoption of rules of procedure of the assembly by the assembly overcome the fact that the constitutive act of the African Union did not provide for the powers of automatic enforceability after publication, and (b) what is the demonstrated practice of the assembly in this matter?

The first question is relatively easy to answer. The constitutive act of the African Union needed ratification by all member states. One of the major provisions, the power of automatic enforceability on member states, was not included in the act. However, in 2002, the assembly adopted its own rules of procedure and gave itself the power of automatic enforceability on member states. As member states never ratified this

significant rule, and as the assembly did not have these powers in the constitutive act, the new provision cannot be deemed to be an expressed or implied amendment of the constitutive act. The rules of procedure that gave the Assembly of the African Union the power of enforceability of decisions on member states must be considered an amendment of the original treaty. According to Article 40 of the Vienna Convention, any proposal to amend a multilateral treaty must be notified to all the contracting states. Each state has the right to take part in (a) the decision to be taken in regard to such a proposal, and (b) the negotiation and conclusion of any agreement to amend the treaty. Article 32 of the constitutive act of the African Union provides that amendments shall be adopted by the assembly by consensus or, failing which, by a two-thirds majority and submitted for ratification by all member states in accordance with their respective constitutional procedures. The second question, the practice of the assembly, is less clear. The African Union has taken several decisions during its assemblies, but little evidence of automatic enforcement in member states is apparent. A concrete lead came during the Sixth Assembly of the African Union, at which the assembly took notice of Libya's intervention concerning nonsubmission of decisions of the African Union to the ratification mechanism of African Union member states. Libya called upon all member states "to sign and ratify the Treaties, Charters, Conventions and Protocols adopted by the Assembly and requests national parliaments to hold, if necessary, extraordinary sessions for their ratification" (African Union 2006a, p. 5).

Finally, the evidence is strong that the African Union does not enjoy the same automatic enforcement mechanism as provided in the Abuja Treaty for the AEC, another factor underlining the argument that certain states that ratified the Abuja Treaty after 26 May 2001 are not bound by the Yamoussoukro Decision. If we assume that the Assembly of the African Union was empowered to grant itself the power of automatic enforceability in Article 33 of its rules of procedure, we need to review the date of effectiveness of this decision. The assembly's rules of procedure were adopted during the First Ordinary Session of the African Union on 10 July 2002. According to Article 34 of the rules of procedure, decisions become enforceable 30 days after the date of their publication in the *Official Journal of the African Union*. However, three of the four states that ratified the Abuja Treaty after it was replaced by the constitutive act of the African Union on 26 May 2001 did so before the new rule would have taken effect in August 2002 (South Africa ratified on 31 May 2001, Swaziland on 6 June 2001, and Mauritania on 20 November 2001). Only

Equatorial Guinea could claim that its ratification of the Abuja Treaty on 20 December 2002 would have benefited from the same automatic enforcement mechanism as Article 10 of the Abuja Treaty should the assembly's rules of procedure be recognized as binding.

As outlined earlier, the Assembly of the African Union does not enjoy the same power as provided for in Article 10 of the Abuja Treaty. Therefore, all four states (Equatorial Guinea, Mauritania, South Africa, and Swaziland) that ratified and/or deposited their instruments of ratification after the African Union entered into force cannot be considered Yamoussoukro Decision party states. Concluding that the late ratification of the Abuja Treaty by certain states indicates that those states primarily intended to join the Yamoussoukro Decision framework would also be inappropriate. The Yamoussoukro Decision provides for a much simpler procedure for nontreaty states that wish to be parties to the decision (UNECA 2002, Annex 1 [a]). The late and obsolete ratification was much more likely to have been caused by administrative delays.

Conclusion

The Abuja Treaty, which formally entered into force on 12 May 1994, can be recognized as the legal basis for the Yamoussoukro Decision. All states that signed and formally ratified the Abuja Treaty during its legal existence from the date of initial signing on 3 June 1991 to the date of its replacement on 26 May 2001 have also adhered to the Yamoussoukro Decision, which became fully binding on 12 August 2002.

Of the 54 African states, 44 have signed and formally ratified the Abuja Treaty. Those states became parties to the Yamoussoukro Decision. The other 10 states (Djibouti, Equatorial Guinea, Eritrea, Gabon, Madagascar, Mauritania, Morocco, Somalia, South Africa, and Swaziland) cannot be considered parties to the Yamoussoukro Decision.

Notes

1. The states represented at the conference were Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape-Verde, Central African Republic, Chad, Congo, Côte d'Ivoire, the Arab Republic of Egypt, Equatorial Guinea, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Liberia, Libya, Madagascar, Mali, Morocco, Mauritius, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zaire (today, the Democratic Republic of Congo), and Zimbabwe.

2. The ministers decided that states would grant the fifth freedom no later than 1 November 1997 as follows:
 - Where no other airlines are operating under the third and fourth freedoms, fifth freedom rights should be unconditional.
 - Where airlines are operating the third and fourth freedoms, up to 20 percent of the traffic (based on the total volume of traffic in the preceding year) or of the number of seats available on the route shall be reserved for operation under the fifth freedom, provided that 80 percent of the total traffic or number of seats available on the route are reserved for airlines operating the third and fourth freedoms.
 - Where airlines are operating the third, fourth, and fifth freedoms, fifth freedom rights should be granted to non-African operators on a reciprocal basis after due consultation with concerned operators in the subregion for the benefit of the Economic Community of West African States subregion.
3. Article 3.2 limits the obligation to grant and receive unrestricted fifth freedom rights to (a) sectors where, for economic reasons, no third and fourth freedom operators exist; and (b) up to a minimum of 20 percent of the capacity offered on the route concerned during any given period of time with respect to any sector where third and fourth freedom operators exist.
4. As an example see Air Transport Agreement between the United States of America and Singapore (31 March 1978).
5. Convention on International Civil Aviation, signed at Chicago on 7 December 1944, 61 Stat. 1180 (1944), [Chicago Convention].
6. African ministers responsible for air transport discussed the safety-related challenges of African carriers at a conference in Gabon in May 2006. They recognized that capacity building in safety oversight must be addressed on a regional level and aircraft that do not meet basic airworthiness criteria must be banned (African Union 2006c, pp. 6–8).
7. The governments represented were Algeria, Burundi, Cameroon, Central African Republic, Chad, the Republic of Congo, Côte d'Ivoire, Dahomey (today, Benin), Ethiopia, Gabon, Ghana, Guinea, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Tanganyika (today, Tanzania), Togo, Tunisia, Uganda, United Arab Republic (today, the Arab Republic of Egypt), Upper Volta (today, Burkina Faso), and Zaire (today, the Democratic Republic of Congo).
8. See Resolution by the Economic Commission for Africa Conference of Ministers held in March 1977, which was endorsed by the Economic and Social Council and, subsequently, by the General Assembly of the UN.
9. Lagos Plan, *supra* note 3, at 61.
10. The adoption by a two-thirds majority of the constitutive act of the African Union is a major amendment of the Abuja Treaty in accordance with the principle in Article 103.