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THE FUTURE OF AFRICAN CIVIL AVIATION

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ABSTRACT

The African Civil Aviation Commission (AFCAC) held its Fifteenth Plenary Session in Abuja, Nigeria from 20-24 April 1998. The meeting was held at a critical period in the global history of civil aviation when the winds of change and liberalization in air transport were sweeping the air transport industry, calling for fierce competition among carriers to set up viable airlines, whether singularly or collectively. Africa is all too conscious of the rapidly evolving face of commercial aviation which has recently brought on titanic profiles of merged carriers and crafty but legal commercial tools such as outsourcing and franchising in the airline industry. The AFCAC meeting focused on the need to implement its own regional plans expeditiously and to infuse new life to its aviation entities by making them autonomous and competitive. There was also heavy emphasis on the need to focus on safety and training of personnel.

So far, African civil aviation has been courageous amidst competition and energetic in its collectivity. However, it now needs a boost in the arm and a much needed blood transfusion to stand up to its competition in other parts of the world and run with the portentous winds of change that are rapidly blowing towards the next millennium. This paper discusses ways and means available to African civil aviation to achieve this goal.

INTRODUCTION

Regulatory responsibility for civil aviation in Africa falls generally under the broad umbrella of the International Civil Aviation Organization (ICAO)[1] which is charged with global regulatory responsibility in the field of civil aviation. At the regional level, and through cooperation with ICAO, the African Civil Aviation Commission (AFCAC)—the regional specialized agency of the Organization of African Unity (OAU)[2] which is charged with the responsibility for development of civil aviation in Africa—takes responsibility in assisting member African States in their endeavour towards developing civil aviation in their territories. At its Fifteenth Plenary Session held in Abuja in April 1998, AFCAC sought to face reality squarely in the eye, by addressing the key issues

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which may affect the African States in the next millennium in attaining success as a competitive force in the world of civil aviation.

At the meeting, AFCAC addressed in limine the cornerstone of African civil aviation—the Yamoussoukro Declaration—which is the fundamental postulate containing the strategies considered by the Africans as inherent in their aviation philosophy. As its commitment towards the development of African civil aviation, AFCAC resolved to play a more prominent role in the implementation of the Declaration together with such other organizations as the African Airlines Association (AFRAA).

This article will analyse the microcosm of the issues which AFCAC, AFRAA and other concerned African civil aviation bodies would need to address in order to attain their objectives and goals.

The History of Civil Aviation in Africa

One of the watershed events of African civil aviation history occurred in 1961 when 10 African nations[3] signed the Treaty on Air Transport in Africa.[4] Popularly known as the Yaoundé Treaty, it has its roots in Articles 77 and 79 of the Chicago Convention of 1944[5] which provides for the setting up by two or more States of joint or international operating organizations and for the participation of the States in these organizations. Based on these principles, the Yaoundé Treaty established perhaps the oldest surviving jointly owned airline—Air Afrique—to operate on behalf of its contracting States international services between their territories and from their territories to non-contracting States' territories[6] and also domestic air services within the territories of the contracting States.[7] These services are now operated by the airline consequent to the negotiations between contracting States carried out through a body named Comite Multinational de Negociation des Etats Signataires du Traité de Yaounde (CMN). At the present time, contracting States to the Yaoundé Treaty include States of Western and Central African sub-regions.

The second major event in African civil aviation history occurred in 1988 when African civil aviation ministers gathered in Yamoussoukro in the Republic of Côte d'Ivoire on 6 and 7 October and signed the Yamoussoukro Declaration on a New African Air Transport Policy.[8] This declaration was the result of a collective consensus in Africa that African nations must, *inter alia*, prepare for the effects of deregulation in the United States on other countries and the potential adverse effects on African airlines of the air transport liberalization policies of Western Europe, especially the application by EEC of the Treaty of Rome to air transport services and the creation of a single internal European market by 1993. The Declaration also responds to the fact that many aircraft owned by African airlines are obsolete and thus in need of replacement at great cost, particularly with regard to the need for African airlines to comply with Chapters 2 and 3 of the Annex 16 to the Chicago Convention concerning aircraft noise. Another compelling issue addressed at Yamoussoukro and incorporated into the Declaration concerned the liberal exchange of air traffic rights by African States and the need for African airlines to market their product competitively through an unbiased computer reservation system.

The Yamoussoukro Declaration committed African States, both individually and collectively, to achieve the total integration of their airlines under the above policies within a period of eight years. The eight years was divided into three phases of two years, three years, and three years, respectively. A review of the Declaration, conducted by African experts at a meeting held in Mauritius in September 1994, resulted in a series of recommended solutions for achieving the implementation of the Yamoussoukro Declaration.[9] The overall recommendation of the experts was to incorporate the Declaration as an integral part of national air transport policy in each African State.[10] The incorporation was to be provisionally effective immediately after the Mauritius meeting.

Later in April 1997, the Banjul Accord for an Accelerated Implementation of the Yamoussoukro Declaration, adopted by Ghana, Sierra Leone and the Gambia, Cape Verde, Guinea Bissau and Nigeria, recognized the region representing these States as a single geographical commercial air transport operations zone for the purpose of implementing the Yamoussoukro Declaration. The Accord, through a joint Secretariat established for the purposes of aeronautical co-operation within these States, offered specialized services in air traffic services; safety oversight; market access; engineering and maintenance; communications; aeronautical information services and meteorology.

Since the Yamoussoukro Declaration in 1988 some progress has been made in the aeropolitical scene in Africa. For example, there is increasing cooperation among airlines of the Southern African Development Community (SADC) countries. These airlines and the countries concerned have already discussed possibilities of operating air transport services by SADC—country airlines under a common logo. At the time of writing, a protocol was being considered for the establishing of a Southern Africa Regional Air Transport Authority (SARATA) which is a new entity that would formulate and co-ordinate air transport policies within the SADC region and cope with emergent changes in the air transport industry in the region.

Another recent initiative has been the Air CEDEAO project which would set up a joint airline to serve the western sub-region of Africa. The Northern African States have made their own contemporary contribution to the evolving air transport scene in Africa in the form of Air Maghreb—a consortium for consolidating and operating air transport services in Northern Africa more efficiently. Separately, in the western sub-region, three States have initiated the establishment of Air Mano—a multinational airline.

States in the African continent have made significant strides in the field of computer reservation systems (CRSs) by joining together to develop GETS—the Gabriel Extended Travel Service—a CRS launched by the Société Internationale de Telecommunications Aéronautique (SITA).

Another great stride by African civil aviation has been made towards facilitating the implementation of the Yamoussoukro Declaration has been the opening up of South Africa to intra-African aviation. Now, the developed aviation infrastructure of South Africa is made available to African States, particularly in areas such a leasing of aircraft, engineering and maintenance services and the training of personnel.

In the area of air navigation services and the provision of air navigation facilities to aircraft, ASECNA (Agence pour la Sécurité de la Navigation Aérienne en Afrique et Madagascar), the agency for the safety of air navigation in Africa and Madagascar,[11] has created ASECNA services, a subsidiary agency which explores and facilitates numerous concomitant activities related to air transport and air navigation in Africa. Some of the significant areas in which ASECNA services are involved are fleet financing and management under leasing and sale agreements.[12] This activity could well give rise to the formation of an African aircraft leasing company, in conformity with the objectives stipulated in the Yamoussoukro Declaration.

The Air Tariff Coordination Forum of Africa (ATCOF)—a new forum— has been charged with assisting the air transport industry of Africa in coping with and adapting to the vicissitudes and vacillations of international air tariff policy on fares and rates. This is yet another area where the African air transport and civil aviation scene is showing signs of conforming to the objectives of the Yamoussoukro Declaration.

In spite of the many strides made by the African nations, there are still challenges ahead with regard to the proper implementation of the Yamoussoukro Declaration in full. These challenges are mostly in the economic field, which are seemingly being addressed. The involvement of non-African investors in civil aviation in Africa both from the public and private sectors, is an example of the positive approach so far adopted in this regard.

In the legal field, considerable work has been accomplished towards bringing about the implementation of the Yamoussoukro Declaration, particularly after the Mauritius meeting of 1994. This article will address some of the more critical legal issues that should be addressed by African States in seeking the full implementation of the provisions of the Yamoussoukro Declaration, as they approach the next millennium.

Legal and Economic Issues

Simply stated, the Yamoussoukro Declaration is anchored upon the fundamental postulate of cooperation in air transport brought about by the integration of African airlines. Toward this end, the first phase of implementation of the Declaration—which is given a life of two years—carries the objective *inter alia* of carrying out studies and research on air transport issues in order to integrate African airlines harmoniously with the rest of the world air transport industry to ensure fair competition at market access. The second phase, which is given three years, is dedicated to commercial aspects of air transport such as the integration of CRS, joint purchase of spare parts, maintenance and overhauling of equipment, training of personnel, etc. The third phase, which is also allotted a span of three years, concerns the actual implementation of the overall integration of African airlines into a consortium of competitive commercial entities that would bring about sustained progress in air transport in Africa that would be capable of withstanding rapidly evolving world trends in aviation.

The Yamoussoukro Declaration brings to bear the inexorable fact that economic and legal issues in African civil aviation are inextricably linked together and cannot be addressed in isolation. The primary consideration and concern facing civil aviation in Africa is uncontrovertibly the economic factor. However, the legal infrastructure which is needed to place economic issues in their right order follows inevitably, making it essential that the two areas of interest are addressed together.

Although some of the objectives of the Yamoussoukro Declaration have already been achieved at least partially—such as by the participation by most African airlines in the GETS CRS system—the most critical areas involving overall airline management and the use of modern commercial tools—such as the merger of airlines and effective fleet financing—have yet to be addressed in a comprehensive way. Although not specifically mentioned in the Declaration, safety oversight is a factor of critical interest to African civil aviation, and has to be addressed realistically, along with other issues raised by the Yamoussoukro Declaration.

The Need for New Aircraft Fleets in Africa. There are two types of megatrends affecting the airline industry today. They are country mergers and airline mergers. Both these trends affect the airline industry profoundly. Of these, the unification of Europe is the largest single influence on international airlines. From 1 January 1993, 12 European countries commenced sharing their air traffic rights and strengthening their airlines' marketing potential. There is also a possibility that Australia and New Zealand will form a more crystallised and intensified joint aviation market. At the intra-regional level, the most ominous merger in recent years was the one proposed by British Airways–KLM. If this merger materializes, the two mega carriers, who would ordinarily benefit from the economic unification of their two countries in the European Community, will further consolidate their positions in the aviation world by joining forces. This can only mean more aggressive competition by them using the usual cost cutting synergy of joint purchasing of equipment, elimination of management duplication and the sharing of resources. Each will also mutually eliminate a strong competitor in the other and share access to new markets more effectively. The proposed British Airways–KLM merger is, however, not the only significant regional one. SAS, Sabena, Austrian Airlines and Swissair were also involved in grouping together in Europe to form a strategic alliance called the "European Quality Alliance". The threats posed, even at inter-regional level with current commercial arrangements between British Airways and American Airlines, and KLM and Northwest, are real issues that affect the commercial viability of African airlines adversely.

Within the two megatrends are smaller trends that individual airlines have to follow just to remain competitive. They are privatization, the use of information technology, removing infrastructure constraints and governmental restraints and, most importantly, changing travel patterns. These trends have given rise to the new phenomenon in the global aviation scene that survival (if not success) of airlines is now dependent not on pricing but on service. This new phenomenon calls for the airline product to be similar to the one from the entertainment industry, bearing in mind that a passenger spends 70 percent of his total travel time in the aircraft on long-distance flights. To counter strong alliances between countries and airlines, the smaller carriers (as well as the big ones) are now going in more for glamour and in-flight luxury to score on the 70 percent in-flight time. Personal video screens for every seat, satellite assisted telephone facilities and teleconference services are some of the luxuries offered. Indeed, as David Shoenfeld, International Marketing Vice President of Federal Express said, "if you view your services as flying between terminals, you miss the point."

The view that marketing is determined from the view of the customer is becoming more valuable now more than ever before. To survive, airlines have to build brand recognition. There are 12 important factors influencing passenger choice. They are: flight punctuality; excellence of in-flight service; superiority of aircraft; comfortable seats; clean cabins, seats, and washrooms; good food and beverages; superior first class; superior business class; efficient reservations systems; pricing; good check-in service; and attractive frequent flyer programmes. At least seven of these factors are entirely dependent on the quality of the aircraft. The foremost important factor—punctuality—cannot indeed be achieved with aged aircraft. The matter becomes more crucial to a relatively small airline, running a small fleet of aircraft, where, if one aircraft is grounded for reasons of repair or maintenance, the entire flight schedule of the airline would be in disarray, leading to delays down the line. Connecting services would be disrupted and passengers stranded. It is needless to envisage the effect this catastrophe would have on the airline's good name. No amount of superior in-flight service would atone for a six-hour delay where a connecting passenger has to sit inside an unknown airport terminal. It is therefore necessary for any airline to seriously consider removing one of its most burdensome infrastructural constraints—its ageing aircraft.

Another compelling reason for airlines to modernize their fleets is that ageing aircraft do not conform to noise restrictions imposed by many countries and thus face being barred from certain airports. The noise issue has become a crucial environment issue in the world aviation community. At the 27th Session of the Assembly of the International Civil Aviation Organization (ICAO) held in Montreal in 1989, when the matter of possible noise restrictions on subsonic jet aircraft was taken up, the main concern of the Assembly was to achieve a balance between the desire to protect the environment around airports against unnecessary noise and the desire to avoid excessive costs associated with accelerated replacement of noisier aircraft, particularly where these aircraft were registered in countries which did not themselves intend to introduce noise-related operating instructions. In one of their past Sessional discussions, Airport Council International (ACI) noted that aircraft noise represents a major constraint upon the future viability and capacity of the aviation system. Unless concerted international action was taken, there would be a proliferation of various local legislation banning noisy aircraft from their airports—a measure that would have a devastating effect on air commerce. The International Air Transport Association (IATA) representing the airlines at the Session noted that the airline industry recognized the need in many States to address political and other concerns relating to the environment and the fact that the noise climate in areas adjacent to airports is linked to the ability of airports to provide expanded travel facilities to meet the growing demand of air travel. The ICAO Assembly ultimately decided that further time was necessary for consultation and analysis with a view to reaching consensus, and deferred the issue to the 28th Session (Extraordinary) of the Assembly which was held in Montreal in October 1990.

At its 28th Session (Extraordinary), the ICAO Assembly, by its Resolution A28-3 resolved to urge States not to commence phasing out noisy aircraft until 1 April 1995, and to spread out the phasing in period over seven years from 1 April 1995, so that airlines would have time to renew their aircraft fleets or hush-kit (silence the engines of aircraft) them to conform to prescribed noise levels. ICAO further urged States not to restrict before the end of the phase-in period the operations of any aircraft less than 25 years of age from the date the aircraft was issued its first certificate of airworthiness and to assist aircraft operators in their efforts to accelerate fleet modernization.

The standards of the international community on ageing aircraft are now clear. States have been given the right by the international civil aviation community to start phasing out aircraft from 1 April 1995 until the year 2002. This means that airlines that have ageing aircraft in their fleets would have to commence modernizing their fleets soon. If they fail to modernize their fleet their ageing aircraft would not be admitted to countries which have phased them out by legislation. The need for modernizing ageing aircraft fleets has become more compelling than ever, and is amply reflected by the recommendations made by the Fourth Meeting of ICAO's Committee on Aviation Environmental Protection (CAEP) which was held from 6 to 8 April 1998. CAEP has recommended the reduction by an average of about 16 per cent levels of nitrogen oxides that aircraft engines are currently allowed to emit under Annex 16 to the Chicago Convention.[13] CAEP has also recommended that States implement ICAO's new Communications, Navigation, Surveillance and Air Traffic Management systems (CNS/ATM), thereby implicitly requiring aircraft to be equipped with the modern facilities onboard to comply with the satellite navigation systems introduced by the CNS/ATM systems.

Another commitment made by CAEP at its Fourth Meeting is to carry out more work in the future to establish new noise standards for jet aeroplanes that would be more stringent than the present Chapter 3 standards in Annex 16.[14]

This seriously impacts African airlines, requiring them to consider the modernization of their fleets.

Despite a Gulf war in 1990, and the recession in the early nineties, industry growth has remained strong throughout the decade. European traffic growth is estimated at five percent and growth forecasts for the Asia-Pacific are 8.6 percent per annum. Macdonnell Douglas in its *Outlook for Commercial Aircraft 1988-2002*, forecasts a sustained growth rate of worldwide commercial passenger traffic at 5.7 percent per annum. Worldwide cargo capacity demand has been forecast at a six percent annual rate through the year 2002. During the next 15 years, worldwide generic demand for new passenger aircraft is forecast at 5,888 units with an estimated value of U.S.$302 billion, and a total generic demand at 413 full cargo freighters through the year 2002.

Apart from the compelling marketing reasons and environmental factors discussed above, a modernized fleet in an African airline would succeed in sweeping the airline to success if the acquisition of aircraft is managed prudently. For example, the new aircraft would have to be placed in the fleet just before the airline reaches peak utilization of its aircraft. New air traffic rights of the airlines would have to be negotiated beforehand and existing ones reviewed for maximum utilization. The fixed costs of the new aircraft would have to be analysed well beforehand to maximise profits. The resale value of the aircraft, when they are ultimately phased out in order that newer aircraft are brought in, should also be given serious consideration. Engineering and maintenance facilities and costs thereof of new aircraft also have to be carefully thought out.

To capitalize on changes in their competitive environment, competent airline managers now need to know that in the foreseeable future there will be a few mega-carriers operating in America, Europe, Asia and the Pacific Rim and that these carriers probably will be composites of strong strategic alliances between powerful airlines and powerful regional States. They would be well equipped to offer the quality of service and punctuality that modern glamour requires of air travel. To compete with these carriers for a fair share of the market, a smaller African airline would have to offer a comparable product. In order to offer this type of product airline managers in Africa have to consider the global issues now facing the world of civil aviation and, above all, the ways and means to adapt to the sweeping trends of the rest of the world in aviation.

Although the standards of management in African airlines are currently of a high standard, these airlines need to constantly update their management profile to adapt to the rapidly changing global aviation scene as envisaged by the Yamoussoukro Declaration. For this purpose, airline managers have to be constantly trained in such issues as market access and benefits that could be derived through Africa's strategic position in the world, market resources available, the efficient use of commercial torts such as outsourcing[15] and franchising[16] and the ensuring of aviation safety within Africa. With the trend of liberalization sweeping the world, African airline managers have to be particularly mindful of the various arrangements between mega-countries which now admit to open skies.

Market Access. At the time of writing, the United States and the United Kingdom were discussing deregulating air transport between the countries. The talks were aimed at replacing the U.K.–U.S. bilateral air services agreement with an open skies agreement, which would allow the market to determine prices, routes and scheduling. The United States already has signed open skies agreements with the Netherlands and Germany, although an agreement for open skies with the United Kingdom could be at a much larger scale considering the frequency of air services between the two countries. One of the problem areas that were being ironed out at the discussions was the reported apprehension of the United Kingdom authorities that an open skies policy between the United Kingdom and the United States, if fully implemented, would give American carriers access to countries beyond the United Kingdom with full commercial traffic rights (i.e. the right to carry passengers between the United Kingdom and third countries) whereas British carriers had no rights to fly between destinations in the United States.[17]

According to a study carried out in the United States, a liberalized open skies agreement with the United Kingdom will provide a five year, $108 billion boost to the United States economy and create 152,000 new jobs. The study projects a five-year period of steady growth and an estimated 9.4 million new passengers a year who would take advantage of the 86 percent increase in air services between the two countries if an open skies policy is implemented[18] and help introduce U.S.–U.K. air services from 12 new U.S. cities.[19] American Airlines chairman Robert Crandall sums up the view of the US carriers on an open skies policy between the two countries:

> This study confirms what we have been saying for some time — open skies with the UK will be good for passengers, shippers and communities across the country by providing new service, more competition and lower fares in the transatlantic market.[20]

Earlier, in June 1996, Japan rejected a proposal by the United States for an open skies agreement on somewhat similar grounds as the British, that U.S. carriers have unlimited rights to fly beyond Japan under the current bilateral air services agreement which was signed in 1952 by the two countries. In return, Japan Airlines, the only Japanese airline at that time, has no comparable benefit.[21] Japan has openly claimed that it does not support the U.S. version of open skies for two reasons: (1) Japan would not have access to the large U.S. domestic market and; (2) open skies does not take into account inconsistencies created by capacity constraints in airports such as Narita and Kansai.[22] The United States, on the other hand, maintains that Japanese authorities seem more intent on protecting intra-Asian air service markets for Japanese carriers by blocking out U.S. carrier competitors than they are in opening the U.S.–Japan aviation market.[23]

The United States carriers have, to their favour, consistently advocated an open skies policy throughout the world. In May 1996, Delta Airlines' Chief

Executive Ronald Allen called upon the European Union to enter into an open skies agreement with the United States. Allen contended that open skies are useful because they remove government restrictions on every aspect of aviation except for safety and predatory market behaviour and concluded that an open skies policy would result in a more vibrant market place where consumers are allowed to select among the best, most efficient and most competitive operators.[24]

The United States has also sought open skies agreements with some Asian countries. In September 1995, U.S. authorities signed a Memorandum of Understanding with the authorities of Hong Kong which liberalized to a large extent existing arrangements for the carriage of cargo by air between the two countries.[25] Singapore Airlines has been a staunch supporter of the open skies policy and has openly called for its implementation between Asia and the United States. According to Singapore Airlines' Chairman Cheong Choong Kong:

> The U.S. and Singapore agree that liberalizing aviation is in the best interests not only of the consumers but of the economy generally through the stimulation of trade… I hope therefore that the U.S. will extend its open skies to cover the Asia-Pacific region, which, based on traffic forecasts is going to be the largest aviation market within 15 years.[26]

Later, in December 1996, Cheong was critical of the stance taken by the United States in response to the offer of open skies by Singapore and Malaysia. He said:

> it was no secret that open skies bilaterals with Singapore and Malaysia were attainable right away… but unfortunately it was all or nothing with them [U.S.]; they insisted on a critical mass of willing countries before they would proceed. Apparently, Malaysia and Singapore did not constitute such a critical mass.[27]

He has also extended his comments on liberalization to Australia and New Zealand, claiming that those countries should open their markets so that tourists can fly in and out of, and, more importantly within their territories more conveniently[28] thus suggesting that such markets should not be protected and preserved only for the national carriers of Australia and New Zealand.

On the subject of critical mass in Asia, the suggestion made by the Prime Minister of Malaysia in October 1995, that Asia-Pacific nations must adopt a common stand in talks with the United States, is significant. The key contention of Asian countries against most developed countries in the west is that the laters' enthusiasm for open skies is tainted by their refusal to lay open their domestic markets within the open skies package. This refusal, it is claimed, only reflects a cosmetic balance between countries which do not have extensive domestic markets and those—such as the United States—which do. Prime Minister Mohamad articulated:

> Asia-Pacific nations must be prepared to act in concert and adopt a coordinated stance in negotiating with the E.U. and the U.S.… the consequence of not doing so

> will likely be the domination of the aviation industry by the mega carriers from the U.S. and Europe.[29]

In January 1997, officials from the United States and Singapore reached an open skies aviation deal, making Singapore the first Asian country to sign an open skies deal with the United States.[30] The U.S.–Singapore deal followed a preliminary meeting in October 1996 which included South Korea, Taiwan, Malaysia and Brunei. On 10 January 1997 the United States also re-opened its negotiations with Japan and is expected to seek progress towards an open skies agreement in 1997.

In the above context, it cannot be claimed incontrovertibly that an open skies policy, as advocated by the various proponents is not totally lacking in overprotectiveness. Most nations still give an unusually high priority to the marketing policies of their airlines, which are naturally geared to world protectionism and exploitation. An ideal open skies policy should be such as the one practised by Dubai, where, irrespective of reciprocity, unlimited access to air traffic rights is given to any who wish to operate air services. Maurice Flanagan, Group Managing Director of Emirates (the airline of Dubai) writes:

> Open skies describes the situation in which a country allows unlimited traffic rights to the airlines of other countries, almost always on a reciprocal basis and is not all common. Open skies usually results from bilateral negotiation. Singapore, however, places open skies on the table immediately, and, if the other side reciprocates, there the negotiations end. Holland is much the same. But Dubai grants open skies unconditionally, i.e. without requesting reciprocity, which is unique for a place which has its own airline.[31]

Whichever way the open skies policy is interpreted, and whatever is the nature of the practice, it is inevitable that liberalization would impact market forces and affect airlines differently. With free market competition expanding around the globe in the recent past and the emergence of free trade agreements such as NAFTA (North American Free Trade Agreement), EFTA (European Free Trade Agreement), and free market forces within the European Union, the collapse of the communist economy in most countries including the former U.S.S.R. and increasingly new consumer demands in Japan, it is a necessary corollary that protectionism in commercial aviation should give way to some degree of liberalization in the least.

African airlines are therefore faced with the imminent prospect of the future realm of commercial aviation being controlled by a group of air carriers which may serve whole global regions and operated by a network of commercial and trade agreements. Regional carriers will be predominant, easing out niche carriers and small national carriers whose economics would be inadequate to compare their costs with the lower unit costs and joint ventures of a larger carrier. It is arguable that a perceived justification for open skies or unlimited liberalization exists even today in the bilateral air services agreement between two countries, where, *fair and equal opportunity to operate* air services is a *sine* *qua non* for both national carriers concerned. This has been re-interpreted to mean *fair and equal opportunity to compete* and later still, *fair and equal opportunity to effectively participate* in the international air transportation as agreed.[32] Of course, there has been no universal acceptance of this evolution in interpretation.

ICAO has suggested the following preferential measures for the consideration and possible use of its member States who are at a competitive disadvantage when faced with the mega trends of commercial aviation and market access:

a) the asymmetric liberalization of market access in a bilateral air transport relationship to give an air carrier of a developing country: more cities to serve; fifth freedom traffic rights[33] on sectors which are otherwise not normally granted; flexibility to operate unilateral services on a given route for a certain period of time; and the right to serve greater capacity for an agreed period of time;

b) more flexibility for air carriers of developing countries (than their counterparts in developed countries) in changing capacity between routes in a bilateral agreement situation; code-sharing to markets of interest to them; and changing gauge (aircraft types) without restrictions;

c) the allowance of trial periods for carriers of developing countries to operate on liberal air service arrangements for an agreed time;

d) gradual introduction by developing countries (in order to ensure participation by their carriers) to more liberal market access agreements for longer periods of time than developed countries' air carriers;

e) use of liberalized arrangements at a quick pace by developing countries' carriers;

f) waiver of nationality requirement for ownership of carriers of developing countries on a subjective basis;

g) allowance for carriers of developing countries to use more modern aircraft through the use of liberal leasing agreements;

h) preferential treatment in regard to slot allocations at airports; and

i) more liberal forms for carriers of developing countries in arrangements for ground handling at airports, conversion of currency at their foreign offices and employment of foreign personnel with specialized skills.[34]

These proposed preferential measures are calculated to give air carriers of developing countries a head start which would effectively ensure their continued participation in competition with other carriers for the operation of international air services. Furthermore, improved market access and operational flexibility are two benefits which are considered as direct corollaries to the measures proposed.

While the open skies policy sounds economically expedient, its implementation would undoubtedly phase out smaller carriers who are now offering competition in air transport and a larger spectrum of air transport to the consumer. Lower fares, different types of services and varied in-flight service profiles are some of the features of the present system. It is desirable that a higher level of competitiveness prevails in the air transport industry, and to achieve this objective, preferential measures for carriers of developing countries would play a major role.

In addition, to addressing the preferential measures proposed by ICAO, which would be of immense assistance to carriers of developing countries if implemented, it would be prudent for the international aviation and trading community to consider the larger issue of funding, whereby long-term low-interest loans could be made available to carriers of developing countries through such institutions as the World Bank and the International Monetary Fund. Some consideration could also be given to a balanced distribution of aircraft throughout the world, whereby developing countries could have access to aircraft which have been discarded by their more affluent counterparts. An equitable system of leasing these aircraft is a possibility that could be considered.

The exemption of aircraft operated by carriers of developing countries from technological standards (to the extent possible) which may apply to modern aircraft is another useful tool which could be addressed under the umbrella of preferential measures. Aircraft engine emission standards and noise regulations are some examples which could be examined.[35]

Preferential measures may also be considered on a collective basis whereby air traffic rights could be used by a carrier of one country on behalf of another carrier representing another country. This would help, particularly in the event of a developing country not being able to launch its own airline or is unable to allocate its national carrier on a particular route due to economic reasons. This principle could also be extended to cover instances where airlines from developing countries could combine their operations by using their collective air traffic rights. For example, airlines of countries A and B who have been granted air traffic rights to operate air services from their countries to countries C and D, respectively, would be able to operate one joint service to countries C and D in one flight, using their collective traffic rights under this scheme.

It could be argued on behalf of the African airlines that as far as possible, developing countries should be released from the obligation to own and control their air carriers or to have their carriers substantially owned and controlled by their nationals. It is only then that countries which cannot fully finance their carriers could maintain them and provide well-rounded competition in the air transport industry.

Aviation Safety. Safety is the primary concern of the world aviation community at the present time. It is not only because the fundamental postulates of the Chicago Convention[36] call for the safe and orderly development of international civil aviation[37] and mandate ICAO to insure the safe and orderly growth of international civil aviation throughout the world[38] but also because the aviation world faces a critical era where, in the words of Dr. Assad Kotaite, President of the ICAO Council:

> the international aviation community cannot afford to relax its vigilance…ICAO would continue to take timely action to ensure safety and security standards are in effect, and that deficiencies are properly and efficiently addressed.[39]

The compelling need for higher standards in aviation safety was formally recognized when the ICAO Council adopted ICAO's Strategic Action Plan on 7 February 1997. The basic strategic objective of the Plan is to further the safety, security and efficiency of international civil aviation. ICAO plans to accomplish this task by assisting States in identifying deficiencies in the implementation of Annexes to the Chicago Convention.

One of the core elements of ICAO activity on safety, according to its Strategic Action Plan, is to carry out assessments by teams of experts of the capacity of participating States to control effectively the level of safety for which they have responsibility. ICAO's Safety Oversight Programme, which would implement this activity, extends to personnel licensing, operation of aircraft and aircraft airworthiness. ICAO may, in the foreseeable future, extend ICAO's Safety Oversight Programme to cover areas such as air traffic control and the operation of airports.

Taking a cue from ICAO, several regional aviation organizations have formally incorporated safety provisions in their documentation. The African Civil Aviation Commission (AFCAC), at its Thirteenth Plenary Session (Abuja, 11-18 May 1995) discussed the matter of safety oversight in Africa, which led to the Commission adopting Decision S13-3[40] on Safety Oversight. This decision recognizes that States must take appropriate means to ensure compliance with international safety standards contained in the relevant Annexes to the Chicago Convention and that most African States may not have the necessary infrastructure to fully implement such standards. The Commission refers to the ICAO Safety Oversight Programme in Decision S13-3 and instructs the AFCAC Bureau to improve safety oversight in AFCAC activities and promote co-operation among African States in the field of safety oversight. Through the Decision, AFCAC has also requested ICAO's assistance for African States in order that they could effectively introduce the Safety Oversight Programme in Africa.

The European Civil Aviation Conference (ECAC) at its 100th Meeting of Directors General of Civil Aviation (Paris, 14-15 May 1997) discussed an ECAC Recommendation on Safety of Foreign Aircraft[41] which calls for increased ramp checks on aircraft and rigid adherence, on a bilateral basis, by States of the provisions of the Chicago Convention on licensing of personnel and certification of aircraft.[42]

The ECAC bilateral safety clause calls *in limine* for consultations to be called for at any stage where such consultations would relate to safety standards of aircrew, aircraft or the operation of aircraft. The provision allows for the revocation of the clause if one party to the agreement finds that the other does not maintain minimum ICAO Standards. The clause also admits of the need to conduct random ramp checks in order for one party to determine whether aircraft conform to Article 33 of the Chicago Convention—which relates to certification of airworthiness. At the same meeting, ECAC also discussed a recommendation[43] on leasing of aircraft and safety, which calls for Standards as prescribed in Annex 6 (Operation of Aircraft) to the Chicago Convention and minimum conditions on the use of leased aircraft, to ensure that they are maintained in accordance with ICAO Standards of Safety. It must be noted that safety regulations of the European Community are generally stringent, on product liability[44] which stipulate that any person who imports into the community a product for leasing is considered a manufacturer of that product for purposes of product liability.

Another regional civil aviation organization which has recognized the compelling need for the implementation of safety oversight in its region is the Latin American Civil Aviation Commission (LACAC). At LACAC's Eleventh Assembly (Manaus, 7-10 November 1994) some LACAC member States adopted the "Manaus Declaration" which expressed its support of the role of the ICAO Council to establish a safety oversight programme and requested ICAO to implement the programme as quickly as possible.[45]

Both ICAO and the regional aviation organization have focussed their attention on the air navigational aspects of safety oversight. This is understandably so, since safety of civil aviation primarily depends on safe air navigation. However, safety of civil aviation does not stop at air navigation. There are other extraneous factors which may impact aviation safety, such as human conduct in the aircraft and air traffic controller liability. The management of these areas of activity are as crucial to African civil aviation as the overall ensuring of aviation safety through satellite communication systems.

Taking the above analogies into consideration, the African States should, in the final analysis, consider that one of the most important management issues for Africa concerns the safety of civil aviation. Regulation in Africa on this subject should be introduced on the fundamental basis that air transport is now a high technology intensive industry and any regulation promulgated must be focussed on a proactive and not reactive approach. Aviation management must target through regulation such aspects as cross culture communications in the cockpit and cabin, enhanced automation in the cockpit, and a common policy on crew conduct based on available statistics on disruptive passenger conduct. For the last measure to attain fruition, a unified system of collecting information on disruptive behaviour must be implemented. The most important step, at this juncture, is for the African aviation community to support studies which may be initiated by ICAO in the necessary and relevant areas related to the overall issue of aviation safety.[46]

CONCLUSION

The principal instrumentality of airline cooperation in Africa is the African Airlines' Association (AFRAA), which is the only such organ in the region that enables African airlines to collaborate in their air services and the services provided by any air transport enterprise within Africa, in the pursuit of the airline integration envisaged by the Yamoussoukro Declaration.[47] On the regulatory side, the African Civil Aviation Commission (AFCAC) coordinates policy, technical and coordination issues with ICAO and IATA without actually involving itself with airline issues directly. This two-pronged modality has somehow to converge at the focal point of the Yamoussoukro Declaration's airline integration policy, if a meaningful adaptation by the African airlines to the global trends in aviation is to attain fruition.

The fact that such an integration is possible is amply evidenced by the 1961 Yaoundé Treaty and the later African Joint Air Services (AJAS) accord signed by and between Tanzania, Uganda and Zambia. The latter provided for the establishment of an independent air transport operating agency within Article 77 of the Chicago Convention to operate air services in intercontinental routes on behalf of Air Tanzania, Uganda Airlines and Zambia Airways, together with Air Maghreb (which is actually a combination of the airlines of Algeria, Libyan Arab Jamahiriya, Mauritania, Morocco and Tunisia) and Air Mano, consisting of the carriers Air Guinea, Air Liberia and Sierra Leone Airways.

In addition to this airline integration, it is encouraging to note that the restructuring and commercialization which started in Africa in 1992 has yielded positive results. More African airlines are veering from the flag carrier notion and going to for self reliance, privatization and delinking themselves from governmental control. The privatization of Kenya Airways and the turnaround of Air Tanzania and Uganda Airlines are good examples of a progressive African air transport industry.

However, considered wholly, African civil aviation, with the exception of the few airlines already mentioned, has failed to show that it could contribute positively to national economic integration and development. Moreover, African airlines in general have shown over the past few years the need for a management approach that could cope with global trends in civil aviation.

Nonetheless, the prognosis for the future of African air transport is far from gloomy. Although African airlines do not yet contribute to the regional economy, it is encouraging that over the 1985-1995 period, the scheduled airlines of the African region showed an annual increase in operating revenues in U.S. dollars at the rate of 5.4 percent[48] compared with a world annual average of 9.1 percent and positive overall operating results have been achieved by these airlines since 1992.[49]

During 1996 ten airlines in the world showed progress towards privatization, five of which were from Africa.[50]

Obviously, the potential for achieving full maturity within the global challenges faced by Africa remains within the African States and their airlines themselves. Autonomy in civil aviation authorities, the aggressive development of infrastructure, and personnel training is the key that could open the door to strategic African airline management within the Yamoussoukro Declaration.

ENDNOTES

1. The International Civil Aviation Organization is the United Nations' specialized agency responsible for the regulation of international civil aviation. ICAO has a membership of 185 States.

2. The Organization of African Unity was set up as the regional organ for Africa primarily for the purpose of promoting peace and security in the African region. OAU is set up under Article 52 (1) of the United Nations Charter which states : "Nothing in the present Charter precludes the existence of regional arrangements of agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations."

3. Central African Republic, Republic of the Congo, Republic of the Ivory Coast, Republic of Gabon, Republic of Dahomey, Republic of Upper Volta, Islamic Republic of Mauritania, Republic of Niger, Republic of Senegal and the Republic of Chad.

4. See, ICAO Circular 98-AT/19, 1970, for text of the Treaty.

5. See, Convention on International Civil Aviation, signed at Chicago on 7 December 1944. See ICAO Doc 7300/7, Seventh Edition 1997 for text of the Convention.

6. Yaoundé Treaty, *supra note* 2, Article 2.

7. *Id.* Article 3.

8. See, Report of the African Civil Aviation Commission, Eleventh Plenary Session (AFCAC/11), Blantyre, 22-31 May 1989, Dakar: 1990, Appendix, for the text of the Yamoussoukro Declaration.

9. See, United Nations Economic Commission for Africa, TRANS/EXP/94-07 Annex 1.

10. *Id.* para 2.1.

11. ASECNA was created by the convention of St. Louis de Senegal which was signed on 12 December 1959. ASECNA's objective is to provide services that are designed to guarantee the regularity and safety of flights in the designated territories. The Agency manages the en-route and air navigation installations and services pooled by the signatory Sates. The Convention establishing ASECNA was signed by Chad, Cameroon, Central African Republic, the Congo, Dahomey, Gabon, Ivory Coast, Malagasy Republic, Mauritania, Niger, Sénégal and Upper Volta. Mali and Togo were later signatories.

12. ASECNA services collaborate in fleet financing with the Banque Ouest Africaine de Developement (BOAD) and the Caisse Francaise de Developpement (LFD).

13. See, ICAO Environmental Experts Recommend Stricter Noise and Emissions Standards, ICAO News Release, PIO 02/98 at p. 1.

14. *Id* at p. 2.

15. For a detailed discussion on this subject, see R.I.R. Abeyratne, Outsourcing and the Virtual Airline—Legal Implications, *Air and Space Law*, Vol. XXII Number 4/5 October 1997, pp. 182-193.

16. See, R.I.R. Abeyratne, Franchising in the Airline Industry, Some Implications at Common Law, *Air and Space Law*, volume XXII, Number 6, December 1997, pp. 284-290.

17. See, U.S., U.K. to Restart Open Skies Talks in London, *The Air Letter*, Monday 2 December 1996, page 2, No. 13, 633.

18. The current bilateral air services agreement between the two countries, known as the Bermuda 2 Agreement, permits only two US carriers, American and United, to serve London's Heathrow Airport from a limited number of cities.

19. See, U.S.-U.K. Open Skies to add $108 bn to Economy, *The Air Letter*, Thursday 14 November 1996 at p. 3, No. 13, 621.

20. Ibid.

21. U.S.–Japan, Fairplay Comes First, *Airlines International*, Jan/Feb 1996 at 7.

22. U.S.–Japan, Fairplay Comes First, *Airlines International*, Jan/Feb 1996 at 7.

23. No surprise in Japan's Rejection of Open Skies, *Aviation Daily*, June 28, 1996 at p. 529.

24. Delta Calls for Open Skies with Europe, *The Airletter*, Friday, 24 May 1996, page 1, No. 13, 499.

25. U.S.–Hong Kong in MOU; DOT Presses to Liberalize Asian Markets, *Aviation Daily*, October 2, 1995 at p. 3.

26. SIA Chief Seeks Open Skies between U.S., Asia, *The Air Letter* Monday 24 June 1996 at p. 3, No. 13, 519.

27. Singapore Airlines CEO says Singapore, Malaysia Ready for Open Skies, *Aviation Daily*, Friday, Dec. 6, 1996 vol 326 No. 45 at p. 377.

28. *Ibid.*

29. Asian Airlines Urged to Adopt United Stand, *The Air Letter*, Wednesday, 1 November 1995 P. 1, No. 13, 363.

30. U.S., Singapore agree to end air restrictions, *Airletter*, Monday 27 January 1997, p. 3, No 13,667.

31. Maurice Flanagan, Open Skies and the Survival of the Fittest, *Aerospace*, August 1996 at 16.

32. Henri Wassenbergh, De-Regulation of Competition in International Air Transport, *Air and Space Law*, Vol XII, November 2, 1996 at p. 80.

33. The right to uplift or discharge passengers, mail and cargo in a country other than the grantor State.

34. See, Study on Preferential Measures for Developing Countries, ICAO Doc AT-WP/1789, 22/8/96 at A-7 - A-9.

35. For a detailed discussion of regulations on aircraft noise and engine emissions, see R.I.R. Abeyratne, Legal and Regulatory Issues in International Aviation (Transnational Publishers: New York, 1996) at chapter 3, pp. 271-313.

36. Chicago Convention, *supra note* 3.

37. *Id.* Preamble at p. 1.

38. *Id.* Article 44 (a).

39. ITA Press , *284, 01-05 April 1997 at p. 10.*

40. Decision S13-3: Safety Oversight. See African Civil Aviation Commission, Thirteenth Plenary Session, Abuja 11-18 May 1995, AFCAC/13 Report at p. 25.

41. DGCA/100-DP/7, 21/4/97, Appendix.

42. Article 31 provides that every aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered. Article 32 provides for the issuance of certificate of competency to technical crew of aircraft and prescribes minimum standards. Article 33 stipulates that certificates of airworthiness issued to aircraft by one State should be acceptable by another, provided certain minimum standards are followed.

43. DGCA/100-DP/8, 28/4/97, Appendix.

44. EU Council Directive 85/374/EEC of 25 July 1985.

45. ICAO Doc 9637, Annual Report of the Council 1994, ICAO: Montreal, Chapter III at pp. 45-46.

46. See, R.I.R. Abeyratne, International Obligations as regards Safety in International Civil Aviation, *The Aeronautical Journal*, December 1997, volume 101, Number 1010 at p. 457 at 461-466.

47. African Airlines' Association, Articles of Association, at Article 4B.

48. See The World of Civil Aviation, 1996-1999, ICAO Circular 271-AT/112 at p. 88.

49. *Id.* at 89.

50. *Id.* at 13.