

CASE CONCERNING THE AIR SERVICE AGREEMENT OF 27
MARCH 1946 BETWEEN THE UNITED STATES OF AMERICA
AND FRANCE

DECISION OF 9 DECEMBER 1978

Characterization of questions of facts and issues of law—Application of the rule of exhaustion of local remedies in cases of diplomatic protection distinguished from application of the rule in cases of direct injury to States *inter se*—The relevance of draft Article 22 of the International Law Commission on State responsibility in the determination of the nature of the local remedies rule—Affirmation of the principle that a treaty must be read as a whole and that its meaning is not to be determined mainly upon particular phrases which, if detached from the text, may be interpreted in more than one sense—Interpretation of the concept of “continuous service” for the purposes of determining permitted and prohibited change of gauge (size of aircraft) in a designated air service route—Consideration of the fifth-freedom rights in relation to the question of change of gauge—The relevance of the Convention on International Civil Aviation convened at Chicago 7 December 1944 in the application of the concept of “freedom of the air” as opposed to the concept of national sovereignty of a State over the air space above its territory in the determination of the right of change of gauge in third-party States—The relevance of the formula on the change of gauge contained in the 1946 Bermuda Agreement between the United States and the United Kingdom—The weight to be given to the evidence of the practice of the parties to a treaty in interpretation of the treaty—Consideration of the concept of “counter-measures” and the related rule of “proportionality”—The proper content of the requirement to negotiate, the duty not to aggravate a dispute, and the related question of interim measures of protection.

ARBITRAL AWARD

Mr. Willem RIPHAGEN, *President*;

Mr. Thomas EHRLICH, M. Paul REUTER, *Arbitrators*;

Mr. Lucius CAFLISCH, *Registrar*.

In the case concerning the Air Services Agreement of 27 March 1946
between The United States of America, represented by:

Mr. Lee R. Marks, Deputy Legal Adviser, Department of State, as Agent; and Ms. Judith Hippler Bello, Department of State, Ms. Lori Fisler Damrosch, Department of State, as Deputy-Agents; assisted by: Mr. James R. Atwood, Deputy Assistant Secretary for Transportation Affairs, Department of State, Mr. William A. Kutzke, Assistant General Counsel, International Law, Department of Transportation, Mr. Peter B. Schwarzkopf, Assistant General Counsel, International Affairs, Civil Aeronautics Board, as Advisers; Mr. Norman P. Seagrave, Pan American World Airways, Inc., as Expert-Adviser; Mrs. Cozetta B. Johnson, Department of State, as Secretary;

And The French Republic, represented by:

M. Guy Ladreit de Lacharrière, Minister Plenipotentiary, Director of

Legal Affairs in the Ministry of Foreign Affairs, as Agent; M. Noël Mu-seux, Magistrate, Deputy-Director of Legal Affairs in the Ministry of Foreign Affairs, M. Henry Cuny, Secretary in the Ministry of Foreign Affairs, Office of the Director of Legal Affairs in the Ministry of Foreign Affairs, as Deputy-Agents; assisted by: M. Gilbert Guillaume, *Maître des requêtes*, *Conseil d'Etat*, M. Michel Virally, Professor of the Faculties of Law, University of Paris, M. Emmanuel du Pontavice, Professor of the Faculties of Law, University of Paris, as Counsel; M. Robert Espérou, Director of Air Transport (Civil Aviation), M. Jean-Baptiste Vallé, Head of Department, Air France, as Experts; Mlle Solange Challe, as Secretary;

THE TRIBUNAL, composed as above, *delivers the following Arbitral Award:*

By a *Compromis* of Arbitration signed on 11 July 1978, the text of which is given below, at paragraph 9, the Governments of the United States of America and of the French Republic submitted to the Arbitral Tribunal, composed as above, the following questions:

(A) Does a United States-designated carrier have the right to operate West Coast-Paris service under the Air Services Agreement between the United States and France with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey)?

(B) Under the circumstances in question, did the United States have the right to undertake such action as it undertook under Part 213 of the Civil Aeronautics Board's Economic Regulations?

The *Compromis* provided that on Question (A), "the tribunal's decision . . . shall be binding", and with respect to Question (B), "the tribunal shall issue an advisory report . . . in accordance with Article X of the Agreement,"⁵⁴ which shall not be binding". It also provided that the Parties were to exchange memorials not later than 18 September 1978, and replies not later than 6 November 1978. It finally specified that oral hearings were to be held at Geneva (Switzerland) on 20 and 21 November 1978.

On 4 September 1978, the French Government appointed M. Guy Ladreit de Lacharrière as its Agent for the case. Mr. Lee R. Marks was appointed as Agent for the United States of America on 18 September 1978.

The Arbitral Tribunal met at Geneva on 17 and 18 November 1978 and, after having consulted the Parties, appointed Mr. Lucius Caflisch as its Registrar. Its inaugural hearing took place on 17 November 1978 in the "Alabama" room of the Geneva City Hall.

The Memorials and Replies having been filed within the prescribed time-limits, the case was ready for hearing on 6 November 1978.

The Arbitral Tribunal held hearings on 20 and 21 November 1978, during which it heard, in the order agreed between the Parties and approved by the Tribunal, the following persons submit oral argument: Mr. Marks on behalf of the Government of the United States of America, M. Ladreit de

⁵⁴ Air Services Agreement concluded between the United States of America and France on 27 March 1946. Article X of the Agreement was amended by the Exchange of Notes dated 19 March 1951

Lacharrière, Agent, and MM. Guillaume and Virally, Counsel, on behalf of the Government of the French Republic.

In the course of the oral proceedings, the following final Submissions were made by the Parties:

On behalf of the Government of the United States of America:

On the basis of the Memorial and Reply of the United States, including the Exhibits thereto, and the oral hearings held in Geneva on November 20-21, 1978, including the eight Hearing Exhibits submitted by the United States, the United States respectfully requests the Tribunal to rule as follows:

—On Question A, to answer in the affirmative;

—On Question B, to decline to answer the question, or, in the alternative, to answer in the affirmative.

On behalf of the Government of the French Republic:

May it please the Arbitral Tribunal:

(1) Regarding Question (A),

To adjudge and declare that the Government of the United States was required, before acting on the international level by resorting to arbitration, to wait until the United States company that considers itself injured by the allegedly unlawful act of the French Government had exhausted the remedies open to it under French law; and that, since those remedies have not been exhausted, the Arbitral Tribunal is unable to decide on the question submitted to it;

Subsidiarily,

To adjudge and declare that, for the above-mentioned reasons, the Arbitral Tribunal must postpone its decision on Question (A) until such time as the Pan American World Airways company has either obtained recognition of the rights it claims from the French courts or exhausted the remedies available to it under French law without obtaining satisfaction;

If neither of the above is possible,

To adjudge and declare that a carrier designated by the United States does not have the right, under the Air Services Agreement between France and the United States of America, to operate a West Coast-Paris service with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey),

(2) Regarding Question (B),

To adjudge and declare that, under the circumstances in question, the United States Government did not have the right to undertake such action as it undertook under Part 213 of the Economic Regulations of the Civil Aeronautics Board ⁵⁵

The Facts

1. An Exchange of Notes of 5 April 1960 relating to the Air Services Agreement concluded between the United States of America and France on 27 March 1946 authorises air carriers designated by the United States to operate to Paris via London (without traffic rights between London and Paris) services to and from United States West Coast points.⁵⁶ A carrier so desig-

⁵⁵ Translation by the Registry.

⁵⁶ Part of this Exchange of Notes is reproduced below, p 436, foot-note 67.

nated, Pan American World Airways (hereinafter referred to as Pan Am) intermittently operated services over this route until 2 March 1975.

2. On 20 February 1978, pursuant to French legislation requiring flight schedules to be filed thirty days in advance, Pan Am informed the competent French authority, the Direction générale de l'Aviation civile (hereinafter referred to as D.G.A.C.), of its plan to resume its West Coast-London-Paris service (without traffic rights between London and Paris) on 1 May 1978 with six weekly flights in each direction. The operation of this service was to involve a change of gauge, in London, from a Boeing 747 aircraft to a smaller Boeing 727 on the outward journey and from a Boeing 727 to a larger Boeing 747 on the return journey.

3. On 14 March 1978, the D.G.A.C. refused to approve Pan Am's plan on the ground that it called for a change of gauge in the territory of a third State and thus was contrary to Section VI of the Annex to the 1946 Air Services Agreement, which deals with changes of gauge in the territory of the Contracting Parties only.⁵⁷ The United States Embassy in Paris having, on 22 March 1978, requested the French Foreign Ministry to re-consider the decision of the D.G.A.C., the matter then became the subject of discussions and of diplomatic exchanges between the two Parties, the United States arguing that Pan Am's proposed change of gauge in London was consistent with the 1946 Air Services Agreement and France contending that it was not and reserving its right to take appropriate measures.

4. On 1 and 2 May 1978, when Pan Am operated for the first time its renewed West Coast-London-Paris service with a change of gauge in London, the French police confined themselves to drawing up reports of what they considered to be unlawful flights. Another flight having taken place on 3 May, Pan Am's Boeing 727 aircraft was surrounded by French police upon arrival at Paris Orly Airport, and its captain was instructed to return to London without having disembarked the passengers or freight. Thereupon Pan Am's flights were suspended.

5. On 4 May, the United States proposed that the issue be submitted to binding arbitration, on the understanding that Pan Am would be permitted to continue its flights pending the arbitral award. On 9 May, the United States Civil Aeronautics Board (hereinafter referred to as C.A.B.) issued a first Order putting into operation phase 1 of Part 213 of its Economic Regulations by requiring the French companies Air France and Union de transports aériens (U.T.A.) to file, within prescribed time-limits, all their existing flight schedules to and from the United States as well as any new schedules. After having unsuccessfully attempted to have this Order stayed and revised by the C.A.B. or the United States courts, the two companies complied with it on 30 May 1978 by filing their schedules.

6. In a Note dated 13 May 1978, the French Embassy in Washington had in the meantime acknowledged Pan Am's suspension of its flights to Paris and had informed the United States Department of State of France's agreement "to the principle of recourse to arbitration". At the same time,

⁵⁷ For the full text of this provision, see below, paragraph 45

the Embassy had objected to the unilateral measure decreed by the Order of the C.A.B. prior to the exhaustion of the means of direct negotiations; it had proposed that such negotiations be held and had noted that French local remedies had not been exhausted; finally, it had warned the Department of State that the pursuit of a course of unilateral measures "would have damaging consequences for the French airline companies and create an additional dispute regarding legality and compensation".

7. On 18 May 1978, Pan Am requested the Administrative Tribunal of Paris to annul as being *ultra vires* the decision taken by the D.G.A.C. on 14 March 1978 to disapprove Pan Am's flight schedule. This request is still pending. In a motion filed on 31 May, Pan Am asked that the decision of 14 March 1978 be stayed. This motion was denied on 11 July on the ground that implementation of that decision would not cause irreparable harm.

8. In the meantime, on 31 May 1978, the C.A.B. issued a second Order under Part 213 of its Economic Regulations. This Order, which was subject to stay or disapproval by the President of the United States within ten days and which was to be implemented on 12 July, was to prevent Air France from operating its thrice-weekly flights to and from Los Angeles and Paris via Montreal for the period during which Pan Am would be barred from operating its West Coast-London-Paris service with change of gauge in London.

9. The second Part 213 Order was not implemented, however. Legal experts of both Parties having met on 1 and 2 June in Washington, on 28 and 29 June in Paris and on 10 and 11 July in Washington, a *Compromis* of Arbitration was signed between the United States and France on 11 July 1978. This *Compromis* reads as follows:

Compromis OF ARBITRATION

BETWEEN

THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND THE GOVERNMENT OF THE FRENCH REPUBLIC

The Government of the United States of America and the Government of the French Republic (the "Parties"):

Considering that there is a dispute concerning change of gauge under the Air Services Agreement between the United States of America and France, signed at Paris on March 27, 1946, as amended, and its Annex, as amended (collectively referred to as the "Agreement"),

Recognizing that the Parties have been unable to settle this dispute through consultations;

Considering also that the Government of France has raised a question with respect to the validity of the action undertaken by the Government of the United States under Part 213 of the Civil Aeronautics Board's Economic Regulations in response to the action of the Government of France;

Noting that the Parties have decided to submit the dispute concerning change of gauge to an arbitral tribunal for binding arbitration;

Noting that the Government of France wishes to submit its question regarding the validity of the action undertaken by the United States to the arbitral tribunal for an advisory report pursuant to Article X of the Agreement;

Noting that in agreeing to resort to arbitration with respect to change of gauge, the French Government reserves its right to argue before the tribunal that all means of internal recourse must be exhausted before a State may invoke arbitration under the Agreement;

Noting also that in agreeing to resort to arbitration with respect to Part 213, the United States Government reserves its right to argue before the tribunal that under the circumstances the issue is not appropriate for consideration by an arbitral tribunal,

Agree as follows:

(1) The arbitral tribunal ("tribunal") shall be composed of three arbitrators. One arbitrator shall be Mr. Thomas Ehrlich. If for any reason Mr. Ehrlich becomes unable to act as arbitrator, the Government of the United States shall promptly designate a replacement. Another arbitrator shall be Prof. Paul Reuter. If for any reason Prof. Reuter becomes unable to act as arbitrator, the Government of France shall promptly designate a replacement. The third arbitrator shall be Prof. W. Riphagen, who shall serve as President of the tribunal.

(2) The tribunal is requested to decide the following two questions in accordance with applicable international law and in particular with the provisions of the Agreement:

(A) Does a United States-designated carrier have the right to operate West Coast-Paris service under the Air Services Agreement between the United States and France with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey)?

The tribunal's decision of this question shall be binding.

(B) Under the circumstances in question, did the United States have the right to undertake such action as it undertook under Part 213 of the Civil Aeronautics Board's Economic Regulations?

The tribunal shall issue an advisory report with respect to this question in accordance with Article X of the Agreement, which shall not be binding.

(3) The parties have agreed on interim arrangements that will maintain strict equality of balance between the position of the Government of the United States that Pan American World Airways should be permitted to change gauge during arbitration, and the position of the Government of France that it should not change gauge during this period. To this end, and without prejudice to the position of either Party in this arbitration, from the date of this *compromis* to December 10, 1978, Pan American World Airways shall be permitted to operate West Coast-Paris service with a change of gauge in London to the extent of 95 London-Paris flights in each direction. Such flights may be scheduled at the airline's discretion; provided, however, that no such service may operate prior to July 17, and that no more than six flights per week may be operated in each direction.

The tribunal shall be competent, in any event, at the request of either Party, to prescribe all other provisional measures necessary to safeguard the rights of the Parties. A Party may make such request in its written pleadings, at oral hearings, or subsequent to the oral hearings, as appropriate.

Upon signature of this *compromis*, the United States Civil Aeronautics Board shall immediately vacate all pertinent orders issued pursuant to Part 213 of its Economic Regulations (Orders 78-5-45, 78-5-106, 78-6-82, and 78-6-202).

(4) Each Party shall be represented before the tribunal by an agent. Each agent may nominate a deputy or deputies to act for him and may be assisted by such advisors, counsel, and staff as he deems necessary. Each Party shall communicate the names and addresses of its respective agent and deputy or deputies to the other Party and to the members of the tribunal.

(5) The tribunal shall, after consultation with the two agents, appoint a registrar.

(6) (A) The proceedings shall consist of written pleadings and oral hearings.

(B) The written pleadings shall be limited to the following documents:

(i) A memorial, which shall be submitted by each Party to the other Party by September 18, 1978,

(ii) A reply, which shall be submitted by each Party to the other Party by November 6, 1978.

Four certified copies of each document shall be submitted promptly to the registrar.

(C) The tribunal may extend the above time limits at the request of either Party for good

cause shown, provided that the time limits shall not be extended under any circumstances by a total of more than two weeks. The tribunal may if it wishes request supplemental pleadings.

(D) Oral hearings shall be held at Geneva, Switzerland, or at such other place as the Parties may agree, on November 20 and 21, 1978, at a specific time and place to be fixed by the President of the tribunal.

(7) (A) The Parties shall present their written pleadings and oral arguments to the tribunal in English or in French

(B) The tribunal shall arrange for simultaneous interpretation of the oral hearings and shall keep a verbatim record of all oral hearings in English and in French.

(8) (A) Subject to the provisions of this *compromis*, the tribunal shall determine its own procedure and all questions affecting the conduct of the arbitration.

(B) All decisions of the tribunal shall be determined by a majority vote

(C) The tribunal may engage such technical, secretarial, and clerical staff and obtain such services and equipment as may be necessary.

(9) The tribunal shall use its best efforts to render a decision on the change of gauge question and an advisory report on the Part 213 issue as soon as possible, but not later than December 10, 1978. To this end the tribunal shall sit from the date of the opening of the oral hearings until the date its decision and advisory report are rendered. If necessary, the tribunal may render a decision and advisory report limited to the conclusion, on or before December 10, with sufficiently clear guidance to enable the Parties to implement the decision; and issue a full decision and advisory report as soon as possible thereafter. A copy of the decision and of the advisory report, signed by all three arbitrators, shall be immediately communicated to each of the agents

(10) Any dispute between the Parties as to the interpretation of the decision or of the advisory report shall be referred to the tribunal for clarification at the request of either Party within 60 days of receipt of the written decision and report.

(11) (A) One copy each of all written pleadings of the Parties, the decision and the advisory report of the tribunal, and any written clarification thereof shall be submitted by the tribunal to the International Civil Aviation Organization.

(B) One copy of the verbatim record of all oral hearings, in English and in French, shall be submitted by the tribunal to the International Civil Aviation Organization.

(C) Notwithstanding subparagraphs 11 (A) and (B), documents regarded and designated as confidential by a Party and relevant portions of any pleading or record based thereon shall be treated confidentially by both Parties and the tribunal, and shall not be submitted by the tribunal to the International Civil Aviation Organization.

(12) (A) The remuneration of the three arbitrators, their travel and lodging expenses, and all general expenses of the arbitration shall be borne equally by the Parties. Each arbitrator shall keep a record and render a final account of all general expenses. The Parties shall agree upon the amount of remuneration and shall confer with each other and the President of the tribunal in all matters concerning remuneration and expenses.

(B) Each Party shall bear its own expenses incurred in the preparation and presentation of its case.

(13) The provisions of Articles 59, 65 to 78 inclusive, 81 and 84 paragraph 1 of the Convention of October 18, 1907 for the Pacific Settlement of International Disputes shall be applicable with respect to any points which are not covered by the present *compromis*.

(14) The *compromis* shall come into force on the date of signature.

10. During the hearing of 21 November 1978, in reply to a question addressed to them, the Agents of the two Parties agreed that the Arbitral Tribunal, if it so chose, could go beyond the 10 December 1978 fixed in point (9) of the *Compromis* of Arbitration as the final date for the delivery of the operative part of its award, in order to issue a complete award, on the understanding that this would be done as soon as possible.

*Summary of the Arguments of the Parties*1. *Question (A)*(a) *The preliminary issue*

11. In the sixth preambular paragraph of the *Compromis*, France reserved its right to plead that local remedies have not been exhausted. France contends that the requirement of the exhaustion of local remedies, which is firmly rooted in international practice, must apply to the situation envisaged in Question (A), because the latter relates to a dispute over treaty rules which are specifically designed to protect the rights of private entities—the designated air carriers—rather than those of the United States as such. This contention is based on the terms of the 1946 Air Services Agreement between the United States and France as well as on the wording of the *Compromis* of Arbitration.⁵⁸ Article X of the 1946 Agreement, which calls for submission to an arbitral tribunal of disputes “relative to the interpretation or application of this Agreement or its Annex which cannot be settled through consultation . . .”,⁵⁹ cannot be construed as a derogation from the local remedies rule. As Pan Am has requested the Administrative Tribunal of Paris to annul the decision of 14 March 1978, and as this request is still pending, the Arbitral Tribunal is precluded, at least for the time being, from replying to Question (A).

12. The United States argues that the local remedies rule does not apply to disputes where, as is the case here, a State complains that its own rights have been infringed. Nor does it apply to disputes in which a State claims that both its own rights and those of its nationals have been infringed; in such disputes, the State’s own rights take precedence. This is precisely the situation in the present case: the disputed rights flow from an international agreement between the United States and France in the implementation of which the United States has designated a carrier—Pan Am—whose rights are also affected by the decision of 14 March 1978. In any event, the United States contends, the local remedies rule is waived by Article X of the 1946 Air Services Agreement. Finally, the United States argues, the rule would in any case be inapplicable because no effective remedy is available under French law: the interpretation of a treaty obligation of France given by the French Minister of Foreign Affairs cannot be reversed by the French administrative tribunals.

(b) *The substantive issue*

13. The United States contends that Section VI of the Annex to the 1946 Agreement⁶⁰ limits the right of either Party to changes of gauge in the territory of the other Party but not in the territory of third countries. According to the United States, change of gauge in London is consistent with the fundamental objective of the 1946 Agreement, stated in Section IV of its Annex,⁶¹ to provide air travel “at the cheapest rates consistent with sound

⁵⁸ The full text of the *Compromis* is reproduced in paragraph 9.

⁵⁹ For the full text of Article X, see below, p. 429, foot-note 63.

⁶⁰ For the text of Section VI, see below, paragraph 45.

⁶¹ The full text of Section IV is reproduced below, at p. 436, foot-note 69.

economic principles''; this objective would be frustrated by denying the carriers designated by the United States the most efficient means to operate over agreed routes. The change of gauge in London contemplated by Pan Am (from a larger to a smaller aircraft on the outward journey and from a smaller to a larger aircraft on the return journey) is also consonant with the capacity principles enunciated by Section IV; operational changes which are consonant with traffic principles, which do not affect traffic rights, and which are executed in third countries on agreed routes should be of no concern to the other Party. This interpretation is confirmed by the negotiating history of the 1946 Agreement, which is modelled on the Air Services Agreement concluded on 11 February 1946 between the United States and the United Kingdom (Bermuda I). The latter Agreement, like the former, only regulated changes of gauge occurring in the territory of the Contracting Parties; in so doing, it struck a compromise between United Kingdom preference for regulating changes of gauge anywhere and United States preference for total freedom in this matter. In their similar, Bermuda I-type Agreement, the United States and France likewise agreed to regulate changes of gauge in their territory but not in the territory of third countries. Finally, the interpretation of the 1946 Agreement advocated by the United States is confirmed by long-standing international practice under that Agreement as well as by the manner in which other States have applied bilateral air services agreements of the Bermuda I type.

14. France argues that the 1919 Paris Convention and the 1944 Chicago Convention on International Civil Aviation recognise the sovereignty of States over the air space above their territory and that the bilateral air services agreements granting air traffic rights must hence be interpreted strictly, in the sense that, wherever an agreement does not expressly permit changes of gauge—as is the case under Section VI of the Annex to the 1946 Agreement as regards changes in third countries—such changes must be deemed to be prohibited. This interpretation, which corresponds to the clear text and natural meaning of Section VI and which results in an application of the maxim "*expressio unius est exclusio alterius*", is supported by the application of general principles of treaty interpretation, not only by the above-mentioned rule according to which treaty rules implying limitations on sovereignty must be interpreted restrictively, but also by the principle according to which the objective and the fundamental provisions of the agreement must be taken into consideration. First, it is the objective of the 1946 Agreement to confer upon the Parties specific and limited rights on a basis of reciprocity, and this objective calls for a strict interpretation; the grant of additional economic advantages, such as the right to change gauge in third countries, would require new negotiations. Second, certain fundamental rules contained in Section IV of the Annex to the Agreement and expressly referred to in Section VI (change of gauge) support the strict interpretation already arrived at. This is true, in particular, of the statement that the Parties wish "to foster and encourage the widest possible distribution of the benefits of air travel", of the principle under which the designated carriers of one Party operating on authorized routes shall take into account the interests of the carriers of the other Party operating on all or part of the same route, of the rule

that the air services offered “should bear a close relationship to the requirements of the public”—and changes of gauge may indeed inconvenience the public—and of the capacity principles contained in letter (d), which provides, *inter alia*, that the services provided by a designated air carrier

shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic.

A change of gauge, in London, on the West Coast-Paris route, from a Boeing 747 to a Boeing 727 aircraft means that the capacity offered is geared to the traffic demand on the San Francisco-London segment rather than to the traffic demand existing for the entire San Francisco-Paris service. According to France, a strict interpretation of Section VI of the Annex to the 1946 Agreement is also warranted by the opinions of writers and by the subsequent conduct of the Parties to that Agreement.

2. Question (B)

(a) The preliminary issue

15. In the seventh preambular paragraph of the *Compromis*, the United States reserved the right to argue that “under the circumstances the issue is not appropriate for consideration by an arbitral tribunal”. The United States submits that the Arbitral Tribunal should decline to answer Question (B). A first argument made in support of this Submission is that neither France nor French carriers suffered any injury as a result of the action taken by the United States under Part 213 of the Economic Regulations of the C.A.B. The Order of 9 May 1978 required Air France and U.T.A. to file their existing and new schedules within specified time-limits, just as United States carriers must routinely file schedules with the French authorities. The Order of 31 May 1978, which was to bar Air France from operating its thrice-weekly Paris-Los Angeles flights, was vacated before its implementation. It follows that, no French air services having been restricted by the two Orders, France has suffered no injury. A second argument put forward by the United States is based on the rule that international tribunals vested with a judicial function should not act when, as in the present case, there is no actual and genuine controversy the resolution of which can affect existing relations between the Parties. A third argument is that the issue addressed by Question (B) did not form the object of the consultation required by Article X of the 1946 Agreement. Finally, in response to a French argument outlined below (paragraph 16), to the effect that the two C.A.B. Orders were deliberately maintained during negotiations with a view to inducing France to accept binding adjudication of Question (A) and to agree to an expedited procedure and to the interim arrangements now contained in the *Compromis*, the United States observes that these solutions were arrived at, not as a result of undue pressure, but because France, too, was convinced that binding arbitration was the most appropriate method for dealing with Question (A), because the interests in issue called for a prompt solution, and because the interim régime established appeared a fair one.

16. In reply to the first argument put forward by the United States,

France contends that it is seeking reparation for the moral damage ("dommage moral") caused to it through the violation of international law and, in particular, of the 1946 Agreement resulting from United States action. In addition, France argues, the C.A.B. Orders did cause material injury to the French carriers. Finally, it states that these two Orders were deliberately maintained by the United States during the negotiations for the purpose of inducing France, which wished to confine its commitments to the obligations established by Article X of the 1946 Agreement (advisory jurisdiction), to accept binding adjudication of Question (A) and to agree to the expedited procedure and the interim arrangements now provided for in the *Compromis*. As regards the second United States argument—the absence of any actual controversy due to the lack of injury—France insists that it claims reparation for the moral damage inflicted on it, that the reparation claimed consists in a declaration, and that in cases such as the present one, international tribunals are empowered to render declaratory judgments even in the absence of a material injury—which is not the case here. Finally, the reality of France's interest is evidenced by the fact that both the 1946 Agreement and Part 213 of the C.A.B.'s Economic Regulations continue to be in force; thus, Part 213 may at any future time serve as a basis for new measures against France, either within the framework of the present case or in other situations. France also rejects the third United States argument—the alleged non-compliance with the requirement of consultation contained in Article X of the Agreement—by pointing out that if consultations were not as extended as one might have wished, this is due to the rigidity of the negotiating position of the United States. Moreover, the United States should have voiced its objection prior to the conclusion of the *Compromis*; the provision included in the seventh preambular paragraph of the *Compromis* is far too general to be understood as a reference to the obligation of prior consultation. Having thus accepted to submit Question (B) to arbitration, the United States is now estopped from arguing that the issue is not appropriate for consideration by the Arbitral Tribunal.

(b) The substantive issue

17. According to France, the C.A.B. Orders of 9 and 31 May 1978 are unjustified regardless of whether they are characterised as reprisals or considered from the perspective of the law of treaties, within the framework of the *exceptio non adimpleti contractus*. As regards the theory of reprisals, France first notes that its decision of 14 March 1978 did not run counter to the 1946 Agreement and, hence, could not justify reprisals. In any event, France argues, reprisals may be resorted to only in case of necessity, *i.e.* in the absence of other legal channels to settle the dispute; plainly this condition was not met, for such channels were available under Article X of the 1946 Agreement. Furthermore, the retaliation procedure should have been preceded by an unsuccessful formal request, as required by international law. Finally, the measures taken by the United States were disproportionate. On the one hand, they affected uncontested rights of French carriers under the 1946 Agreement, while the right of the United States-designated carrier to effect a change of gauge in London is a contested one; on the other hand, the implementation of the C.A.B.'s Order of 31 May 1978, depriving Air

France of its thrice-weekly Paris-Los Angeles flights, would have entailed an economic prejudice far exceeding that suffered by Pan Am as a result of the decision of 14 March 1978. If the question is viewed from the perspective of the law of treaties, it must be pointed out that the suspension of treaty provisions by one Party is not permitted unless the other Party has previously violated the treaty, which France denies having done. In addition, the violation in question must be material, *i.e.* consist in an unauthorised repudiation of the treaty or pertain to a provision essential to the accomplishment of the treaty's object or purpose; in the present case, neither condition was fulfilled. Moreover, even if the above-mentioned conditions had been met, suspension could have taken place only if the injured State had had no other means to ensure respect of the treaty; Article X of the 1946 Agreement shows that this was not the case here.

18. According to the United States, the action taken by the C.A.B. was justified under the theory of reprisals and the law of treaties, for both require a prior breach of an international obligation. Such a breach resulted from France's action at Orly Airport on 3 May 1978 and from its continued refusal to allow Pan Am to operate a change-of-gauge service, regardless of whether the existence of the right claimed by the United States has been confirmed by an arbitral tribunal or not. The measures taken by the United States should not be viewed as a termination of the 1946 Agreement or as a suspension of its application, but rather as steps towards a limited withdrawal of rights of French carriers corresponding to the rights denied the United States carrier. At any rate, France's conduct amounts to a "serious" or "material" breach of the 1946 Agreement, as is shown by the losses suffered by Pan Am due to the disruption of its operating plans. The United States rejects the French argument that under both the theory of reprisals and the law of treaties no counter-measures may be taken where alternative means of satisfaction exist. The theory of reprisals as represented by France, if correct, applies to armed reprisals only; in the present context, that theory could not be accepted until the institutions of international adjudication have evolved to the point where there are international tribunals in place with the authority to take immediate interim measures of protection, for otherwise the respondent State would lack any incentive to co-operate in the expeditious conclusion of arbitration proceedings. An examination of the rules of the law of treaties leads to a similar conclusion. As far as the French argument on the lack of proportionality is concerned, the United States points out that Air France's Paris-Los Angeles service is roughly equivalent in fact to the West Coast-Paris service Pan Am proposed to resume; the French carriers moreover neglected the opportunity to complain to the C.A.B. regarding the scope of the proposed counter-measures. The two services are also equivalent in law, for, contrary to the French argument, there *can* be proportionality between a disputed service and an undisputed service.

Preliminary Issues

19. In the sixth and seventh preambular paragraphs of the *Compromis* of Arbitration, it is noted

that in agreeing to resort to arbitration with respect to change of gauge, the French Government reserves the right to argue before the tribunal that all means of internal recourse must be exhausted before a State may invoke arbitration under the Agreement, and

that in agreeing to resort to arbitration with respect to Part 213, the United States Government reserves the right to argue before the tribunal that under the circumstances the issue is not appropriate for consideration by an arbitral tribunal.

20. The relevant final Submissions of the Parties, as presented during the oral hearing of 21 November 1978, read as follows:

For France:

May it please the Arbitral Tribunal:

(1) Regarding Question (A),

To adjudge and declare that the Government of the United States was required, before acting on the international level by resorting to arbitration, to wait until the United States company that considers itself injured by the allegedly unlawful act of the French Government had exhausted the remedies open to it under French law; and that, since those remedies have not been exhausted, the Arbitral Tribunal is unable to decide on the question submitted to it;

Subsidiarily,

To adjudge and declare that, for the above-mentioned reasons, the Arbitral Tribunal must postpone its decision on Question (A) until such time as the Pan American World Airways company has either obtained recognition of the rights it claims from the French courts or exhausted the remedies available to it under French law without obtaining satisfaction;

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For the United States:

the United States respectfully requests the Tribunal to rule as follows: on Question B, to decline to answer the question

21. At first glance, the preambular paragraphs, together with the Submissions quoted above, seem to be self-contradictory, in particular when viewed within the context of the *Compromis* as a whole.

22. In paragraph (2) of the *Compromis*, the Parties in common agreement request the Tribunal "to decide the following two questions", and in the first sentence of paragraph (9) a precise and very short time-limit is set for the Tribunal "to render a decision on the change of gauge question and an advisory report on the Part 213 issue": the decision and advisory report must be given not later than 10 December 1978; the same time-limit appears in paragraph (3) dealing with interim arrangements. Apparently, the Parties to the *Compromis* wanted a decision on both questions, and that within a period of time that would not permit the delays inherent in the fulfilment of the conditions elaborated in the written and oral pleadings relating to these preliminary matters.

23. Indeed, this is *not* a case in which one Party *unilaterally* presents a *claim* before a tribunal under Article X of the Air Transport Services Agreement.⁶³ On the contrary, both Parties, by *agreement*, request the Tri-

⁶² Translation by the Registry.

⁶³ Article X of the Agreement, as amended by an Exchange of Notes of 19 March 1951, reads as follows:

"Except as otherwise provided in this Agreement or its Annex, any dispute between the Contracting Parties relative to the interpretation or application of this Agreement or its

bunal to "decide . . . two *questions*" which they themselves have formulated and which, under the terms of paragraph (2) of the *Compromis*, must be answered "in accordance with applicable international law and in particular with the provisions of the Agreement" (emphasis added).

24. It is in this context that the Tribunal has to respond to the requests formulated by the two Parties in their final Submissions quoted above.

25. The French Submissions on Question (A) request the Tribunal to declare that it " . . . is unable to decide on the question . . . " because Pan Am has *not* exhausted "the remedies open to it under French law", or at least *until* Pan Am has exhausted these remedies.

26. In this connexion, it should be noted that, as will appear from the part of the present Award relating to Question (A), there is no need for the Tribunal to decide on any question relating to any fact the existence of which might be in dispute between the Parties. Question (A), as formulated by agreement between the Parties, is purely a question of *law*, to be answered by interpretation of rules of international law and in particular of rules embodied in a treaty "establishing rules expressly recognised by the contesting States" (Article 38 of the Statute of the International Court of Justice).

27. The Tribunal is *not* requested, in respect of Question (A), to state whether or not the existence of any fact or situation constitutes a breach of an international obligation, let alone to decide on "the nature or extent of the reparation to be made for the breach of an international obligation" (Article 36 of the Statute of the International Court of Justice).

28. As stated by the Arbitral Tribunal for the Agreement on German External Debts in its Award in the case of *Swiss Confederation v. Federal Republic of Germany* (No. 1), of 3 July 1958,

In legal text-books and decisions by the Permanent Court of International Justice and the International Court of Justice, as well as in treaty practice, the application of the rule of exhaustion of local remedies has always been taken into consideration only in connection with a discussion of the question of the international responsibility of a State for an unlawful act (. . .) committed on its territory against a national of another State and for a refusal to grant reparation of this unlawful act, *viz.* , a denial of justice (. . .) (*International Law Reports*, vol. 25, 1958-I, p. 33, at p. 42.)

Annex which can not be settled through consultation shall be submitted for an advisory report to a tribunal of three arbitrators, one to be named by each Contracting Party, and the third to be agreed upon by the two arbitrators so chosen, provided that such third arbitrator shall not be a national of either Contracting Party. Each of the Contracting Parties shall designate an arbitrator within two months of the date of delivery by either Party to the other Party of a diplomatic note requesting arbitration of a dispute; and the third arbitrator shall be agreed upon within one month after such period of two months.

"If either of the Contracting Parties fails to designate its own arbitrator within two months, or if the third arbitrator is not agreed upon within the time limit indicated, the President of the International Court of Justice shall be requested to make the necessary appointments by choosing the arbitrator or arbitrators, after consulting the President of the Council of the International Civil Aviation Organization.

"The Contracting Parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report. A moiety of the expenses of the arbitral tribunal shall be borne by each Party."

29. It has however been argued that, even if the question put to the Tribunal is formulated as a pure question of law independent from any *existing* factual situation, in reality a specific set of actual facts involving acts of Pan Am and of the French authorities (communication by Pan Am to French aeronautical authorities and reply thereto; landing of Pan Am aircraft at Orly on 3 May 1978 and acts of the French gendarmerie on that date) is at the root of the request for a decision on Question (A). In this connexion, reference has also been made to the fact that paragraph (3) of the *Compromis*, dealing with interim arrangements, mentions a specific air carrier—Pan Am—and specific conduct of that company in the period from the date of signature of the *Compromis* up to 10 December 1978.

30. The Tribunal does not consider these elements to be of such a character as to justify the application of the rule of exhaustion of local remedies in the present situation, with the effect of excluding—even if only for the time being—a decision of the Tribunal on Question (A). Quite naturally, governments of States are not likely to create a legal dispute between them if there exist no factual situations which somehow raise questions of international law. Similarly, if these governments agree on any interim arrangements pending the settlement of the dispute, such arrangements are likely to be expressed in terms of actual conduct, be it conduct of private individuals or entities or conduct of State organs in relation to those individuals or entities. Indeed, rules of international law, though primarily conceived in terms of conduct of and relationships between States, are ultimately concerned, like all rules of law, with the reality of physical persons, objects and activities in their interrelationship within human society. Accordingly, the rule of international law relating to the requirement of exhaustion of local remedies, when making a distinction between the State-to-State claims in which the requirement applies, and claims which are not subject to such a requirement, must necessarily base this distinction on the *juridical* character of the *legal relationship* between States which is invoked in support of the claim. Consequently, with respect to the applicability of the local remedies rule, a distinction is generally made between “cases of diplomatic protection” and “cases of direct injury”.

31. If it is argued that, by virtue of the French reservation contained in the sixth preambular paragraph of the *Compromis*, a *parallel* distinction should be made in the present case, where the question before the Tribunal is not one of reparation for, or even only determination of, injuries allegedly caused to a State by actual conduct of another State, such a distinction could only be based on the juridical character of the *rules* of international law which the Tribunal is requested and required to apply in deciding on Question (A). In this connexion, it is significant that Article 22 of the draft articles on State responsibility, as provisionally adopted in first reading by the International Law Commission in 1977,⁶⁴ establishes the requirement of ex-

⁶⁴ This Article reads:

“When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equiva-

haustion of local remedies only in relation to an obligation of "result", which obligation "allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State", and which is an obligation "concerning the treatment of aliens". Leaving aside the choice made in this draft article between the qualification of the rule of exhaustion of local remedies as one of "procedure" or one of "substance"—a matter which the Tribunal considers irrelevant for the present case—it is clear that the juridical character of the *rules* of international law to be applied in the present case is fundamentally different from that of the rules referred to in the draft article just cited. Indeed, under Article I of the Air Services Agreement, "[t]he Contracting Parties grant to *each other* the rights specified in the Annex hereto" (emphasis added), and Sections I and II of the Annex both mention "the right to conduct air transport services by one or more air carriers of French [United States] nationality designated by the latter country" as a right granted by one *government* to the other *government*. Furthermore, it is obvious that the object and purpose of an air services agreement such as the present one is *the conduct of air transport services*, the corresponding obligations of the Parties being the admission of such conduct rather than an obligation requiring a "result" to be achieved, let alone one allowing an "equivalent result" to be achieved by conduct subsequent to the refusal of such admission. For the purposes of the issue under discussion, there is a substantial difference between, on the one hand, an obligation of a State to grant to aliens admitted to its territory a treatment corresponding to certain standards, and, on the other hand, an obligation of a State to admit the conduct of air transport services to, from and over its territory. In the latter case, owing to the very nature of international air transport services, there is no substitute for actually permitting the operation of such service, which could normally be regarded as providing an "equivalent result".

32. On the basis of the foregoing considerations, the Tribunal is of the opinion that it is "able to decide on the question submitted to it" and that it should *not*

postpone its decision on Question (A) until such time as the Pan American World Airways company has either obtained recognition of the rights it claims from the French courts or exhausted the remedies available to it under French law without obtaining satisfaction.

33. Turning now to the last preambular paragraph of the *Compromis* and the final Submission of the United States requesting the Tribunal " . . . to decline to answer" Question (B), the Tribunal first of all recalls the general observations made earlier relating to the self-contradictory character of this paragraph and Submission and the context within which the Tribunal has to deal with the objections of the United States to the effect that the Part 213 issue "under the circumstances . . . is not appropriate for consideration by an arbitral tribunal."

34. Indeed, here again, the objections of the United States that (a)

lent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment "

United States action under Part 213 did not injure France or French air carriers; (b) the Parties did not consult with respect to the Part 213 issue; and (c) there is no actual controversy to adjudicate, are to be appreciated within the framework of the *Compromis* as a whole, including in particular its paragraphs (2) (B) and (3).

35. In paragraph (2) of the *Compromis*, then, the Tribunal is requested “to decide the following *two* questions . . .” (emphasis added), including Question (B), which is framed as follows: “Under the circumstances in question, *did* the United States have the right to undertake . . . ?” (emphasis added). The opinion of the Tribunal, expressed in an advisory report, will have the effect provided for in Article X of the Agreement.

36. On the other hand, paragraph (3) of the *Compromis*, dealing with arrangements the Parties have agreed upon pending the arbitration, provides *inter alia* that:

Upon signature of this compromis, the United States Civil Aeronautics Board shall immediately vacate all pertinent orders issued pursuant to Part 213 . . .

37. Under these circumstances, the Tribunal is of the opinion that the objections raised against its issuing an advisory report with respect to Question (B) have to be assessed in a context substantially different from the one which exists in a case where an arbitral tribunal or international court would have to decide on a unilateral claim of one Party to a dispute, to establish the actual breach of an international obligation and to determine the consequences of such a breach.

38. In particular, the fact that, *by virtue of paragraph (3) of the Compromis*, the pertinent C.A.B. Orders—notably Order 78-6-82 as amended by Order 78-6-202—have been vacated before they became effective is, in the opinion of the Tribunal, irrelevant for an answer to Question (B), which can only relate to the action undertaken by the United States *before* the date of signature of the *Compromis*.

39. The Tribunal does not consider it necessary to express an opinion on the question whether the earlier C.A.B. Orders 78-5-45 (Order to file schedules) and 78-5-106 (Order denying motion for stay)—which *did* have effects before they were vacated—did injure France or French air carriers, since it is clear that the *other* Orders, considered within the framework of Question (B)—*i.e.* without taking into account their being vacated by virtue of, and after the signature of, the *Compromis*—*would* inflict such injury.

40. The question of the requirement of prior consultations under Article X of the Air Services Agreement should be contemplated within the same framework. Even if the discussions between the Parties with respect to the action of the United States under Part 213 were not very extensive and perhaps more limited in time than those relating to the change-of-gauge issue, dealt with in the same discussions, they did in fact take place. In this connexion, it should be taken into account that, by their nature, the two issues were in fact closely interrelated: the Part 213 issue, by the very wording of both the relevant legislative text and the Orders themselves, is based on an alleged violation by France of its obligations in the matter of change of gauge.

41. Finally—and again within the framework outlined above—the Tribunal considers that the arguments advanced and the precedents invoked by the United States in support of its thesis that under international law tribunals are enjoined to decide only “actual controversies” between the Parties are not directly applicable in the present situation. Throughout the discussions leading up to the signature of the *Compromis*, the request for arbitration on Question (B) has been linked up with the request for arbitration on Question (A). The link between the two issues also appears clearly from paragraph (3) of the *Compromis*. Both issues, in fact, involve the object and purpose of the Air Services Agreement between the Parties, viz., the rights of France and of the United States, respectively, to conduct air transport services on the routes specified in Schedules I and II (as amplified by the Exchange of Notes of 5 April 1960).

42. Under these circumstances, the Tribunal would be failing in its duties were it to refuse to give its opinion on Question (B).

Question (A)

43. The first question to be decided by the Tribunal is as follows:

Does a United States-designated carrier have the right to operate West Coast-Paris service under the Air Services Agreement between the United States and France with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey)?

On this question, the decision of the Tribunal shall be binding.

44. To answer Question (A), the Tribunal first examined the terms of the Agreement itself as they refer specifically to change of gauge. In the absence of a clear answer based solely on those terms, the Tribunal next referred to other provisions of the Agreement as a whole. This analysis led to a tentative judgment on a response to Question (A). The Tribunal then tested that judgment in the light of both the overall context of international civil aviation in which the Agreement was negotiated and the practice of the Parties as they operated under the Agreement. The analysis indicates that neither the overall context nor the practice of the Parties is inconsistent with the tentative judgment based on the text of the Agreement as a whole. Finally, the Tribunal undertook a limited examination of practice under air services agreements similar to the France-United States one, for the sole purpose of ensuring that this practice did not suggest a wholly dissimilar approach from the Tribunal’s tentative judgment. Having taken these steps, the Tribunal concluded that the judgment referred to is valid and should properly serve as the basis for its response to Question (A). Each of the steps is discussed in some detail below.

1. The Text of the Agreement Relating to Change of Gauge

45. The only specific provision concerning change of gauge in the Agreement is in Section VI of the Annex.⁶⁵ Section VI provides:

⁶⁵ Throughout this Award, the Tribunal uses the terms “change of gauge” and “rupture de charge” to mean a change in the size of the aircraft

(a) For the purpose of the present Section, the term 'Transshipment' shall mean the transportation by the same carrier of traffic beyond a certain point on a given route by different aircraft from those employed on the earlier stages of the same route

(b) Transshipment when justified by economy of operation will be permitted at all points mentioned in the attached Schedules in territory of the two Contracting Parties.

(c) However, no transshipments will be made in the territory of either Contracting Party which would alter the long-range characteristics of the operation or which would be inconsistent with the standards set forth in this Agreement and its Annex and particularly Section IV of this Annex

46. By its terms, therefore, Section VI covers only a change of gauge (or other forms of transshipment) within the territory of one of the Parties. It does not apply to situations, such as the one referred to in Question (A), when a carrier seeks to change gauge in the territory of a third country along one of the routes covered by the Agreement. What implications may be drawn from the absence of any reference in the Agreement to change of gauge in third countries?

47. The French Government has argued that this silence should be interpreted to preclude any change of gauge in third countries by a carrier of one Party unless specifically approved by the Government of the other Party. The French Government contends that no grant of authority to change gauge in third countries may be implied, particularly since only one type of situation involving change of gauge is expressly covered by Section VI. The United States Government takes the opposite position. A change of gauge in third countries is always permitted, it argues, and no prohibition may be implied from the Agreement. Rather, the United States Government urges, the implication of Section VI is that the only restrictions on change of gauge are those that relate to the territories of the Parties. Outside those territories, it claims, the Parties are permitted to change gauge without limitation.

48. In the view of the Tribunal, neither of these extreme positions may be properly derived on the basis of Section VI, viewed in isolation from the other terms of the Agreement. It is necessary, instead, to turn to the text of the Agreement as a whole. As stated by the Permanent Court of International Justice in its Advisory Opinion of 12 August 1922 regarding the *Competence of the International Labour Organisation*,

it is obvious that the Treaty must be read as a whole and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense (Publications of the P C I J , Series B, No. 2, p. 23).

see also the *United States-France Air Arbitration*, 1963 (United Nations, Reports of International Arbitral Awards, vol. XVI, pp. 46-47).

2. *The Text of the Agreement as a Whole*

49. The Agreement states in Article I that the

Contracting Parties grant to each other the rights specified in the Annex hereto for the establishment of the international air services set forth in that Annex

It is the terms of the Annex, therefore, that must be examined for a consideration of the rights of the Parties and any limitation on those rights.

50. In Sections I and II of the Annex, the two Parties grant each other "the right to conduct air transport services" on the routes designated in the

attached Schedules.⁶⁶ In the present case, the relevant texts are Schedule II and the Exchange of Notes dated 5 April 1960.⁶⁷

51. In Section III, each Party provides limited rights on its own territory to the other Party—"rights of transit, of stops for non-traffic purposes and of commercial entry and departure for international traffic . . .".⁶⁸

52. Section IV establishes basic guidelines for regulating capacity on the authorised routes. It states that both Parties wish to encourage air travel "for the general good of mankind at the cheapest rates consistent with sound economic principles"; that each Party shall take into account the interests of the carrier of the other Party in regard to services on the same routes; that services should "bear a close relation to the requirements of the public for such services" and, perhaps most important, that services "shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic". Finally, the rights of carriers of either Party to embark or disembark passengers in the territory of the other Party are subject to an additional set of guiding principles.⁶⁹

⁶⁶ Sections I and II of the Annex read:

"Section I

"The Government of the United States of America grants to the Government of the French Republic the right to conduct air transport services by one or more air carriers of French nationality designated by the latter country on the routes, specified in Schedule I attached, which transit or serve commercially the territory of the United States of America."

"Section II

"The Government of the French Republic grants to the Government of the United States of America the right to conduct air transport services by one or more air carriers of United States nationality designated by the latter country on the routes, specified in Schedule II attached, which transit or serve commercially French territory."

⁶⁷ Part of the Note of 5 April 1960 addressed by the United States Embassy in Paris to the French Ministry of Foreign Affairs reads.

"After recent discussions on this subject, it is the Embassy's understanding that agreement has been reached on an exchange of air transit rights to accord the following advantages to air carriers of both countries.

"(1) French carriers may serve Los Angeles via Montreal (without traffic rights between Montreal and Los Angeles)

"(2) United States carriers may operate to Paris via London (without traffic rights between London and Paris) for services to and from United States west coast points."

⁶⁸ The full text of Section III is as follows:

"One or more air carriers designated by each of the contracting Parties under the conditions provided in this Agreement will enjoy, in the territory of the other Contracting Party, rights of transit, of stops for non-traffic purposes and of commercial entry and departure for international traffic in passengers, cargo and mail at the points enumerated and on each of the routes specified in the schedules attached at all airports open to international traffic."

⁶⁹ Section IV reads.

"It is agreed by the Contracting Parties:

"(a) That the two governments desire to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind at the cheapest rates consistent with sound economic principles; and to stimulate international air travel as a means of promoting friendly understanding and good will among peoples and insuring as well the many indirect benefits of this new form of transportation to the common welfare of both countries

"(b) That in the operation by the air carriers of either Contracting Party of trunk serv-

53. Section V deals with rates to be charged by carriers of the Parties. Section VI, of course, has already been discussed. Section VII permits route changes by one Party in the territory of third countries—but not in the territory of the other Party—with a requirement only of prompt notice and an opportunity to consult if requested.⁷⁰ Lastly, Section VIII calls for the prompt exchange of information by the Parties.⁷¹

54. The text of the entire Agreement is as significant for what it omits as for what it specifies. It is silent concerning most of the major operational issues facing an air carrier—types of plane, number of crew members, and the like. When jet planes were first developed, for example, one unfamiliar with the Agreement might have assumed that a new accord would be necessary. In fact, however, the 1946 Agreement was not modified at the time this remarkable technological innovation was introduced. Similarly, recent objections to supersonic planes were not based on the terms of the Agreement but solely on environmental concerns. The point is that the Agreement

ices described in the present Annex, the interests of the air carriers of the other country shall, however, be taken into consideration so as not to affect unduly the services which the latter provide on all or part of the same route.

“(c) That the air transport services offered by the carriers of both countries should bear a close relationship to the requirements of the public for such services.

“(d) That the services provided by a designated air carrier under this Agreement and its Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic; and

“—that the right of the air carriers of either country to embark and to disembark at points in the territory of the other country international traffic destined for or coming from third countries at a point or points specified in the Schedules attached, shall be applied in accordance with the general principles of orderly development to which both governments subscribe and shall be subject to the general principle that capacity shall be related

“(1) to traffic requirements between the country of origin and the countries of destination,

“(2) to the requirements of through airline operation, and

“(3) to the traffic requirements of the area through which the airline passes after taking account of local and regional services ”

⁷⁰ Section VII provides:

“Changes made by either Contracting Party in the routes described in the Schedules attached except those which change the points served by these airlines in the territory of the other Contracting Party shall not be considered as modifications of the Annex. The aeronautical authorities of either Contracting Party may therefore proceed unilaterally to make such changes, provided, however, that notice of any change is given without delay to the aeronautical authorities of the other Contracting Party

“If such other aeronautical authorities find that, having regard to the principles set forth in Section IV of the present Annex, interests of their air carrier or carriers are prejudiced by the carriage by the air carrier or carriers of the first Contracting Party of traffic between the territory of the second Contracting Party and the new point in the territory of a third country, the authorities of the two Contracting Parties shall consult with a view to arriving at a satisfactory agreement.”

⁷¹ The full text of Section VIII is:

“After the present Agreement comes into force, the aeronautical authorities of both Contracting Parties will exchange information as promptly as possible concerning the authorizations extended to their respective designated air carriers to render service to, through and from the territory of the other Contracting Party. This will include copies of current certificates and authorizations for service on the routes which are the subject of this Agreement and, for the future, such new authorizations as may be issued together with amendments, exemption orders and authorized service patterns ”

leaves to the Parties—and, if a Party chooses, to its designated air carriers—the right to decide a wide range of key issues concerning almost every aspect of service on designated routes apart from those regarding rates and capacity.

55. Exceptions to this basic approach are made in the Agreement, but *in the main they concern regulation by a Party of activities in that Party's territory*. Section VII of the Annex provides, for example, that one Party may make changes in the routes described—with notice and the option of consultation—in the territory of third countries, but not in the territory of the other Party.

56. Section VI of the Annex refers, as has been discussed, solely to change of gauge in the territory of one of the Parties. This in itself is understandable when the Agreement is viewed as a whole. It is entirely reasonable to draw a distinction between activities within the territory of a Party and activities within the territories of third countries. Each Party is naturally more concerned about what happens on its own territory than what happens elsewhere. Within a network of bilateral air services agreements throughout the world, this approach assures that activities in each territory are primarily regulated by the countries most directly concerned.

57. What insights on Question (A) emerge from this examination of the text of the Agreement as a whole? First, it seems evident to the Tribunal that neither extreme position on the change-of-gauge issue may be accepted. On the one hand, some gauge changes in third countries must be permitted. When a plane has a mechanical failure, for example, a transshipment is plainly required, and no plane of the same size may be available. Similarly, carriers on routes that involve extremely long distances—including, most obviously, routes around the world—must change planes at some point or points, and there seems to be no reason why the same size aircraft must be used on every segment of such routes.

58. On the other hand, the Agreement includes a variety of conditions concerning services by carriers of the Parties. The route descriptions in the Schedules are one set of conditions. The capacity provisions in Section IV of the Annex are another. It would undercut the terms of the Agreement to permit a change of gauge for the *sole* purpose of enabling a carrier to act inconsistently with one or more of these conditions.

59. The issue that must be resolved, therefore, is how to distinguish between permitted and prohibited gauge changes in third countries. On this issue, the terms of the Agreement referred to above are of considerable assistance. Most important, they refer to designated routes and to services on those routes. Passengers may embark and disembark at various points, but the Agreement consistently reflects a concept of continuous service scheduled from a point of origin on a route to a point of termination on that route. This concept is not stated expressly in the Agreement, but it emerges from the text when read as a whole—particularly Section I of the Annex and the Schedules.

60. On this basis, the Tribunal tentatively concluded that a change of gauge is authorised in the territory of a third country when the service in-

volved is continuous—when the change of gauge is not simply a basis for providing a series of separate services.

61. Under this approach, change of gauge cannot be used as an excuse for acting inconsistently with provisions of the Agreement, most obviously those relating to capacity. At the same time, a change of gauge may be the most appropriate means to ensure compliance with certain provisions. Traffic demands may diminish, for example, over the course of an extended route. This is plainly the case when, as in the particular situation at issue, so-called fifth-freedom traffic is precluded. United States carriers are prohibited from embarking passengers in London on the route to Paris via London from United States West Coast points. It is virtually certain, therefore, that the traffic demands on the route will be less on the London to Paris segment than on the preceding segment.

62. Although Section VI is not by its terms applicable to the situation raised in Question (A), its text may properly be taken into account, and seems appropriately to reflect the Tribunal's tentative judgment. That text refers specifically to three criteria: first, a change of gauge within the territory of a Party must be justified by "economy of operation"; second, it must not "alter the long-range characteristics of the operation"; and third, it must not be inconsistent with other provisions of the Agreement, particularly Section IV of the Annex regarding capacity.

63. The focus of the Tribunal on a concept of continuous service appears related to these criteria, when interpreted broadly. Economy of operation would naturally be a guiding principle for gauge changes that are consistent with the concept of continuous service; the "long-range characteristics of the operation" (*i.e.* characteristics of a service as opposed to a particular aircraft) reflect a sense of that concept; and, as already stated, a change of gauge may not be used simply as a basis for action inconsistent with provisions in the Agreement—most obviously the capacity provisions in Section IV of the Annex.

64. Drawing on Section VI for appropriate guidance thus further confirms the judgment that a concept of continuous service is the key to a resolution of Question (A). A change of gauge that is consistent with that concept is authorised; a change of gauge that is designed to establish essentially separate services is precluded.

65. At a point on a route where fifth-freedom rights are allowed, therefore, a scheduled change of gauge from a smaller to a larger plane is not permitted if experience has shown that the purpose of the change is solely to accommodate more fifth-freedom traffic than is allowed under the capacity principles in Section IV. Even if—as in the situation involved in Question (A)—no fifth-freedom rights are permitted at a point, change of gauge must not be used as an excuse for a significant delay in service—in effect to change a continuous service into a series of separate services.

3. *The Context in Which the Agreement Was Negotiated*

66. Although no negotiating history of the Agreement concerning the specific question at issue was uncovered by the Parties, the broader context

in which the Agreement was negotiated is relevant. There is no need to dwell at length on the Convention on International Civil Aviation concluded at Chicago on 7 December 1944, the basic instrument that set the stage for the rapid expansion of international civil aviation. It is considered in some detail in the *Italy-United States Air Arbitration*, 1964 (United Nations, Reports of International Arbitral Awards, vol. XVI, pp. 96-98). Most important, the Convention established the structure for an international régime for civil air services that was remarkably open and unregulated except in terms of routes, rates, and capacity, and certain activities that may be regulated by the government of a country within its own territory. Taken as a whole, the Chicago Convention reflects neither the concept of "freedom of the air" nor a concept of national sovereignty of a State over the airspace above its territory as would permit that State to impose on the use of that airspace by foreign air carriers any condition whatsoever relating to conduct of that air carrier prior to or after such use. This context supports, therefore, the distinction that has been drawn above between activities relating to the territories of the Parties, which generally require specific authorisation, and activities on the territories of third countries, which are generally permitted absent a specific prohibition.

67. The 1946 Bermuda Agreement between the United Kingdom and the United States, which preceded the France-United States Agreement by only a few months, is also a part of the relevant context, although France is clearly not bound by the Bermuda Agreement, let alone its negotiating history, for it was not a Party to the Agreement.

68. The negotiating history of the Bermuda Agreement does indicate, however, a compromise between an initial United Kingdom position that was opposed to any change of gauge by a carrier of one Party without specific authorisation by the other Party, and an initial United States position favouring completely unrestricted change of gauge. The change-of-gauge provision that was finally adopted⁷² and the negotiating history make clear

⁷² Section V of the Annex to the Bermuda Agreement, which deals with change of gauge, provides the following

"(a) Where the onward carriage of traffic by an aircraft of different size from that employed on the earlier stage of the same route (hereinafter referred to as 'change of gauge') is justified by reason of economy of operation, such change of gauge at a point in the territory of the United Kingdom or the territory of the United States shall not be made in violation of the principles set forth in the Final Act of the Conference on Civil Aviation held at Bermuda from January 15 to February 11, 1946 and, in particular, shall be subject to there being an adequate volume of through traffic

"(b) Where a change of gauge is made at a point in the territory of the United Kingdom or in the territory of the United States, the smaller aircraft will operate only in connection with the larger aircraft arriving at the point of change, so as to provide a connecting service which will thus normally wait on the arrival of the larger aircraft, for the primary purpose of carrying onward those passengers who have travelled to United Kingdom or United States territory in the larger aircraft to their ultimate destination in the smaller aircraft. Where there are vacancies in the smaller aircraft such vacancies may be filled with passengers from United Kingdom or United States territory respectively. It is understood however that the capacity of the smaller aircraft shall be determined with primary reference to the traffic travelling in the larger aircraft normally requiring to be carried onward

" . . . " (United Nations Treaty Series, vol. 3, p. 253)

that the Bermuda Agreement embodies a position on change of gauge consistent with the judgment expressed in this Award.

4. *The Practice of the Parties*

69. The activities of the Parties under an international agreement over a period of time may, of course, be relevant—occasionally even decisive—in interpreting the text. In this case, a number of changes of gauge in third countries by United States carriers on routes specified in the Schedules occurred during the years that the Agreement has been in force. Not surprisingly, the Parties differ on the weight to be given to this practice. In the circumstances of this case, the Tribunal believes that all that can be fairly concluded from the entire course of practice by the Parties is that it does not lead to a different conclusion from the one tentatively adopted on the basis of the text of the Agreement and supported by the overall context in which the Agreement was negotiated.

70. The United States has also referred to thousands of gauge changes under other international air services agreements to which it was or is a Party. Some of those agreements contain provisions similar to those in the France-United States Agreement; others are substantially different.

71. The Tribunal would be extremely hesitant to draw firm conclusions from this practice, at least without detailed examination of each agreement and the relevant practice of the Parties—an examination that has not been possible in the limited time available to the Tribunal. On this basis, it is possible to say no more than that this practice also does not appear inconsistent with the approach adopted by the Tribunal.

Question (B)

72. As a preliminary consideration, the Tribunal has to make two series of observations, the first covering the question itself, the second covering the “circumstances in question”.

73. First of all with regard to the question itself, it is quite certain that the Arbitral Tribunal does not have to consider the compatibility in principle of the régime as a whole established by the system of Part 213 of the C.A.B. Economic Regulations with United States international obligations; nor even less does it have to assess the advantages and drawbacks of a system which constitutes, in air transport, the application of an approach which the United States has often used in its economic relations with other countries.

74. All the Tribunal has to consider is whether, *in the circumstances in question*, the United States Government violated its international obligations by the *action* taken in the period immediately prior to the conclusion of the *Compromis* of Arbitration. It is also quite obvious that the lawfulness of such action must be considered regardless of the answer to the question of substance concerning the alleged violation of the 1946 Agreement by the French Government. It must now be established whether the United States

Government violated its international obligations by its action, even if it were assumed that it was established after such action, so as to bind the French Government, that the French Government had violated the 1946 Agreement before the United States action was taken.

75. The second series of observations pertains to the specific “circumstances in question” in the present case. They cover a number of general aspects which must be briefly recalled. The most sensitive issue is perhaps the great uncertainty surrounding relations between the Parties *inter se* and between them and the company in question regarding the subject of the dispute, the objectives pursued, and even the exact reach of their positions. Such a situation easily gives rise to suspicion, concern and misjudged reactions which are liable to worsen the dispute. The fact that the interested company ignored the objections of the French authorities—brought to its notice by letter of 14 March 1978—by landing in French territory, the action taken by the French gendarmerie on 2 May and the subsequent measures taken by the C.A.B. clearly show an “escalation” of the conflict.

76. Relations between the air companies and their national governments are complex; legally the companies are distinct from the governments and occasionally oppose their action; but the companies also fall in many ways under the legal dependence of governments and often act in close conjunction with them.

77. Pan Am’s primary intention, as it appears from its letter of 5 October 1977, was to make changes in its services that could give rise to questions of principle. The French authorities’ refusal to approve those changes was not, however—it would seem—followed by any kind of consultation which would have been for both authorities concerned the normal consequence of such a representation under Article VIII of the 1946 Agreement. Pan Am then presented a more limited request which is at the origin of the dispute and based on transitional technical reasons which might possibly have been responded to by an approval for a limited period of time. The French refusal of 1978 acutely raised a question of principle not dealt with in so many words by the text of the Agreement (change of gauge in third countries); according to the documents submitted to the Tribunal, it does not appear that in more than 30 years of application of the Agreement the Parties had even discussed that question of principle. What then is the matter about? The solution of a provisional technical problem? The definition of a rule both the existence and the scope of which the Parties until then had avoided addressing? Would it really be a limited dispute or the preliminaries of a restructuring of international transport networks in that region of the world?

78. The scope of the United States action could be assessed in very different ways according to the object pursued; does it bear on a simple principle of reciprocity measured in economic terms? Was it pressure aiming at achieving a quicker procedure of settlement? Did such action have, beyond the French case, an exemplary character directed at other countries and, if so, did it have to some degree the character of a sanction? It is not certain that those responsible for the measures taken made very refined studies of that point; it is understandable that France may have construed the proce-

dures adopted by the United States in a way other than may have been intended by the United States.

79. Those circumstances as a whole characterise a situation during which the Parties negotiated and which resulted in a *Compromis* of Arbitration, including interim measures, which is not submitted to the judgment of the Tribunal.

80. Having thus recalled some of the essential circumstances of the case, the Tribunal will consider, in turn, the principle of the legitimacy of "counter-measures" and the limits on those measures in the light either of the existence of a machinery of negotiations or of a mechanism of arbitration or judicial settlement.

81. Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States. If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "counter-measures".

82. At this point, one could introduce various doctrinal distinctions and adopt a diversified terminology dependent on various criteria, in particular whether it is the obligation allegedly breached which is the subject of the counter-measures or whether the latter involve another obligation, and whether or not all the obligations under consideration pertain to the same convention. The Tribunal, however, does not think it necessary to go into these distinctions for the purposes of the present case. Indeed, in the present case, both the alleged violation and the counter-measure directly affect the operation of air services provided for in the Agreement and the Exchange of Notes of 5 April 1960.

83. It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach; this is a well-known rule. In the course of the present proceedings, both Parties have recognised that the rule applies to this case, and they both have invoked it. It has been observed, generally, that judging the "proportionality" of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with

countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation.

84. Can it be said that the resort to such counter-measures, which are contrary to international law but justified by a violation of international law allegedly committed by the State against which they are directed, is restricted if it is found that the Parties previously accepted a duty to negotiate or an obligation to have their dispute settled through a procedure of arbitration or of judicial settlement?

85. It is tempting to assert that when Parties enter into negotiations, they are under a general duty not to aggravate the dispute, this general duty being a kind of emanation of the principle of good faith.

86. Though it is far from rejecting such an assertion, the Tribunal is of the view that, when attempting to define more precisely such a principle, several essential considerations must be examined.

87. First, the duty to negotiate may, in present times, take several forms and thus have a greater or lesser significance. There is the very general obligation to negotiate which is set forth by Article 33 of the Charter of the United Nations and the content of which can be stated in some quite basic terms. But there are other, more precise obligations.

88. The Tribunal recalls the terms of Article VIII of the 1946 Agreement, which reads as follows:

In a spirit of close collaboration, the aeronautical authorities of the two Contracting Parties will consult regularly with a view to assuring the observance of the principles and the implementation of the provisions outlined in the present Agreement and its Annex.

This Article provides for an obligation of continuing consultation between the Parties. In the context of this general duty, the Agreement establishes a clear mandate to the Parties to make good faith efforts to negotiate on issues of potential controversy. Several other provisions of the Agreement and the Annex state requirements to consult in specific circumstances, when the possibility of a dispute might be particularly acute. Finally, Article X imposes on the Parties a special consultation requirement when, in spite of previous efforts, a dispute has arisen.

89. But the present problem is whether, on the basis of the above-mentioned texts, counter-measures are prohibited. The Tribunal does not consider that either general international law or the provisions of the Agreement allow it to go that far.

90. Indeed, it is necessary carefully to assess the meaning of counter-measures in the framework of proportionality. Their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution. In the present case, the United States of America holds that a change of gauge is permissible in third countries; that conviction defined its position before the French refusal came into

play; the United States counter-measures restore in a negative way the symmetry of the initial positions.

91. It goes without saying that recourse to counter-measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute. But the Arbitral Tribunal does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures during negotiations, especially where such counter-measures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.

92. That last consideration is particularly relevant in disputes concerning air service operations: the network of air services is in fact an extremely sensitive system, disturbances of which can have wide and unforeseeable consequences.

93. With regard to the machinery of negotiations, the actions by the United States Government do not appear, therefore, to run counter to the international obligations of that Government.

94. However, the lawfulness of such counter-measures has to be considered still from another viewpoint. It may indeed be asked whether they are valid in general, in the case of a dispute concerning a point of law, where there is arbitral or judicial machinery which can settle the dispute. Many jurists have felt that while arbitral or judicial proceedings were in progress, recourse to counter-measures, even if limited by the proportionality rule, was prohibited. Such an assertion deserves sympathy but requires further elaboration. If the proceedings form part of an institutional framework ensuring some degree of enforcement of obligations, the justification of counter-measures will undoubtedly disappear, but owing to the existence of that framework rather than solely on account of the existence of arbitral or judicial proceedings as such.

95. Besides, the situation during the period in which a case is not yet before a tribunal is not the same as the situation during the period in which that case is *sub judice*. So long as a dispute has not been brought before the tribunal, in particular because an agreement between the Parties is needed to set the procedure in motion, the period of negotiation is not over and the rules mentioned above remain applicable. This may be a regrettable solution, as the Parties in principle did agree to resort to arbitration or judicial settlement, but it must be conceded that under present-day international law States have not renounced their right to take counter-measures in such situations. In fact, however, this solution may be preferable as it facilitates States' acceptance of arbitration or judicial settlement procedures.

96. The situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears. In other words, the power of a tri-

bunal to decide on interim measures of protection, regardless of whether this power is expressly mentioned or implied in its statute (at least as the power to formulate recommendations to this effect), leads to the disappearance of the power to initiate counter-measures and may lead to an elimination of existing counter-measures to the extent that the tribunal so provides as an interim measure of protection. As the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the Parties to initiate or maintain counter-measures, too, may not disappear completely.

97. In a case under the terms of a provision like Article X of the Air Services Agreement of 1946, as amended by the Exchange of Notes of 19 March 1951, the arbitration may be set in motion unilaterally. Although the arbitration need not be binding, the Parties are obliged to "use their best efforts under the powers available to them to put into effect the opinion expressed" by the Tribunal. In the present case, the Parties concluded a *Compromis* that provides for a binding decision on Question (A) and expressly authorises the Tribunal to decide on interim measures.

98. As far as the action undertaken by the United States Government in the present case is concerned, the situation is quite simple. Even if arbitration under Article X of the Agreement is set in motion unilaterally, implementation may take time, and during this period counter-measures are not excluded; a State resorting to such measures, however, must do everything in its power to expedite the arbitration. This is exactly what the Government of the United States has done.

99. The Tribunal's Reply to Question (B) consists of the above observations as a whole. These observations lead to the conclusion that, under the circumstances in question, the Government of the United States had the right to undertake the action that it undertook under Part 213 of the Economic Regulations of the C.A.B.

For these reasons,

THE ARBITRAL TRIBUNAL replies as follows to the questions submitted to it:

Question (A)

Considering that under the sixth preambular paragraph of the *Compromis* of Arbitration, the French Government,

In agreeing to resort to arbitration with respect to change of gauge reserves its right to argue before the tribunal that all means of internal recourse must be exhausted before a State may invoke arbitration under the Agreement,

Considering that the question asked is the following:

Does a United States-designated carrier have the right to operate West Coast-Paris service under the Air Services Agreement between the United States and France with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey)?

Considering that the Arbitral Tribunal is therefore called upon to pronounce on two points,

THE ARBITRAL TRIBUNAL,

With regard to the first point,

DECIDES, unanimously, that it is able to decide on Question (A);

With regard to the second point,

DECIDES, by two votes to one, that the answer to be given on this point is that a United States designated carrier *has* the right to operate West Coast-Paris service under the Air Services Agreement between the United States and France with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey), provided that the service is continuous and does not constitute separate services.

Question (B)

Considering that, under the seventh preambular paragraph of the *Compromis* of Arbitration, the United States Government,

in agreeing to resort to arbitration with respect to Part 213, reserves its right to argue before the tribunal that under the circumstances the issue is not appropriate for consideration by an arbitral tribunal,

Considering that the question asked is the following:

Under the circumstances in question, did the United States have the right to undertake such action as it undertook under Part 213 of the Civil Aeronautics Board's Economic Regulations?

Considering that the Arbitral Tribunal is therefore called upon to pronounce on two points,

THE ARBITRAL TRIBUNAL,

With respect to the first point,

DECIDES, unanimously, to pronounce on Question (B);

With respect to the second point,

DECIDES, unanimously, that the answer to be given on this point is that, under the circumstances in question, the Government of the United States had the right to undertake the action that it undertook under Part 213 of the Economic Regulations of the C.A.B.

DONE in English and French at the Graduate Institute of International Studies, Geneva, this 9th day of December 1978, both texts being equally authoritative, in three original copies, one of which will be placed in the archives of the Arbitral Tribunal, and the two others transmitted to the Government of the United States of America and to the Government of the French Republic, respectively.

(Signed)

Willem RIPHAGEN, President

Thomas EHRLICH, Arbitrator

Paul REUTER, Arbitrator

Lucius CAFLISCH, Registrar

M. Paul Reuter appends to the Arbitral Award a statement of his dissenting opinion.

DISSENTING OPINION OF M. REUTER

I accepted the position of the Tribunal on the preliminary objection to Question (A) and on the preliminary objection and the answer on the merits to Question (B); in that connexion I feel bound, however, to make a number of observations and to express certain doubts.

The Parties in the present Arbitration sovereignly determined the questions put to the Tribunal and therefore restricted the Tribunal's jurisdiction to those questions. An arbitral tribunal like the present one has to comply with that common will. But it is clear, from the documents of the case, that the dispute between the Parties is more extensive than the questions submitted to the Tribunal. The actual choice of questions is, in my view, very artificial. That situation resulted in problems which created difficulties for the Parties themselves since they raised preliminary objections; difficulties may arise for the Tribunal as well. It could thus have been asked whether the difference in legal value attributed to the Tribunal's replies to Questions (A) and (B) is consonant with the judicial function of a tribunal; it could further have been asked whether, in the circumstances of the case, France could still claim a sufficient legal interest to ask Question (B) after the conclusion of the *Compromis*. With the Tribunal, I have answered in the negative the preliminary issue raised by Question (B), because a refusal of the Tribunal to answer that Question would only have emphasized further an inequality between the Parties visible elsewhere.

As regards the merits of Question (B), my answer has been that of the Tribunal, but with one observation. I accept the Tribunal's legal analysis, in particular the idea that, in order to assess the proportionality of the counter-measures, it is necessary to take into account, not only the actual facts, but also the questions of principle raised by them. Those questions should, however, be considered in the light of their probable effects. Hence, proportionality should be assessed on the basis of what actually constituted the dispute rather than exclusively on the basis of the facts before the Tribunal. One may well continue to entertain serious doubts on the proportionality of the counter-measures taken by the United States, which the Tribunal has been unable to assess definitely.

As far as the Tribunal's reply to Question (A) is concerned, I regret being unable to concur in either the general position adopted by the Tribunal or its reply, and I shall briefly state the reasons for my dissent.

I shall first make two preliminary comments pertaining to the scope of "transshipment" and to the terminology used.

Within the extensive meaning attributed to the term "transshipment" by the 1946 Agreement,⁷³ the economic scope of this expression varies con-

⁷³ In the present Opinion, the term will be used in that sense

siderably, from non-existent to considerable, depending on the conditions under which "transshipment" takes place. If an aircraft is replaced by another aircraft whose characteristics are similar, "transshipment" is but a consequence of technical considerations pertaining to air navigation. If, for a specific service, an aircraft is replaced by another aircraft with a different capacity, however, the economic consequences can be significant. If the change of aircraft is accompanied by a combination of services (one aircraft being used to carry the freight or passengers of several others) or a fanning out of services (passenger or freight of one aircraft being distributed among several aircraft with different destinations), the identity and continuity of air services become more questionable, and the reasonably linear character of long-distance air routes is affected.⁷⁴

In this field terminology is very unclear; the same expressions are not always used to describe the same realities, and "transshipment" is not always clearly distinguished from the different operations which can be carried out as a result of "transshipment". But the interests affected by those operations may be considerable; they vary from one country to another and lead to different agreed solutions reflecting the different types of compromise struck between the interests of the Parties.

There is, in particular, one essential point on which I am unable to concur in the Arbitral Award: it concerns the interpretation to be given to the intention of the Parties as regards the obvious gap in this Agreement which specifically regulates "transshipment" in the territory of the Parties and is pointedly silent on "transshipment" in third countries.

When a treaty between two or several Parties is intended to establish general rules on a specific subject, it is tempting to infer general principles from that treaty and thereby to collect elements which will make it possible to "fill a gap", *i.e.* to settle matters which were not specifically resolved. However, the use of such a constructive approach is only permissible if it truly corresponds to the intention of the Parties as is ascertainable from specific and consistent evidence. That is not the case where the treaty is silent, not because the Parties did not want to lay down detailed rules, nor because the negotiators had neglected to do so, nor because of a development which had not been foreseen at the time the Agreement was concluded, but because of the conscious acceptance of an unresolved disagreement which resulted in a gap being left in the Agreement. Whether the Parties were unable to overcome their disagreement because of lack of time or because of the seriousness of their differences is irrelevant: the only way left open by them for settling the unresolved issue is the conclusion of an agreement at a later date. It is not permissible to take the place of the Parties and to attempt, under the cloak of general principles, what practically amounts to legislation when the Parties themselves failed to undertake such legislation although they were

⁷⁴ The background of the present dispute illustrates the differences in scope of "transshipment". The first Pan Am request clearly contemplated complex operations (combinations of services) which were to be carried out under the cover of a "transshipment" in London (letter of 5 October 1977); the request of 20 February 1978 referred to a "transshipment" on the sole ground of a "lack of equipment owing to the delay in Boeing deliveries".

the most properly qualified to do so. The fact that an arbitral tribunal cannot legislate in such a case, even under the pretence of interpretation, does not mean that pending the conclusion of a supplementary agreement between the Parties the question remains unanswered. It means that the situation is governed by the other relevant rules of international law.

In the present case, the 1946 Agreement devotes a rather substantial provision to "transshipment" (Section VI of the Annex). The wording of this provision leads the reader to expect a thorough regulation both of "transshipment" in the territory of the Parties and of "transshipment" in the territory of third countries; but the text then fails to fulfil that expectation and remains totally silent on "transshipment" in third countries. It is therefore apparent from the very structure of that text that the matter was not overlooked by the negotiators, that they realised its importance, and that it was intentional that the issue was left unresolved when the Agreement was concluded. Having endorsed, in Article VIII, the principle of close collaboration and regular consultations, the Parties probably did not regard that silence as a final situation, but they must have accepted the fact that pending a new agreement, general rules which had hitherto been applicable between them should remain in force, *i.e.* the rules of the Convention on International Civil Aviation concluded at Chicago on 7 December 1944 and, in particular, the rule which provides that every State shall have complete and exclusive sovereignty over the airspace above its territory (Article 1). Under these rules, the French Government had to give its agreement to air services relating to French territory in all their aspects (Article 6).

There is no need to seek confirmation of this interpretation of the 1946 Agreement by reviewing the respective positions and interests of the Parties at the time of conclusion of that Agreement. At the time, there existed a strong divergence of views between the United States which, in accordance with its interests, sought maximum "flexibility" in air services, and certain European countries which were not then (and have never been since) in a position to put such flexibility to use. As far as the long-distance character of services and the capacity principles are concerned, France had requirements that were even more stringent than those of the United Kingdom. These requirements are reflected in the Exchange of Notes of 28/29 December 1945 establishing a provisional régime between the United States and France; this Exchange of Notes, which preceded the 1946 Agreement, is quoted in full by the Arbitral Award of 22 December 1963 in the *United States-France Air Arbitration*.⁷⁵ They are also reflected in the actual text of the 1946 Agreement, which differs considerably from the text of the Bermuda I Agreement.⁷⁶ The absence of any agreement on "transshipment" in

⁷⁵ For the official French text, cf. *Revue générale de droit international public*, t. 69, 1965, p. 189.

⁷⁶ In particular by the wording of Section IV (d) of the Annex to the Agreement and by the inclusion, among the conditions applicable to "transshipment" in the territory of the Contracting Parties, of the requirement that "the long-range characteristics of the operation" may not be altered; this constitutes an addition to the requirement that, "the standards set forth in this Agreement and its Annex and particularly Section VI of this Annex" must be respected.

third countries acquires its full meaning in the light of those diverging interests. An interpretation overlooking such a failure to agree would not only be unjustified but would introduce into the interpretation of the Agreement an element of imbalance; international law, inspired in this respect by the common law, shows, in connexion with another problem, that it does not favour such imbalances in the law of treaties (Article 44, paragraph 3(c), of the Vienna Convention on the Law of Treaties, of 23 May 1969). Indeed, practice taken as a whole, in particular the practice regarding air routes, has interpreted the 1946 Agreement restrictively,⁷⁷ while other provisions of the Agreement would be given an extensive interpretation which would be unfavourable to the Party which is not in fact in a position to take advantage of that interpretation.

The fact that by remaining silent the 1946 Agreement records a disagreement between the Parties on the "transshipment" régime in third countries, thereby submitting "transshipment" to the authorisation of the other Contracting Party, does not, however, imply that that Party is totally free to refuse such authorisation.

It is indeed necessary, in the first place, to take into account the duties of the Parties regarding air safety and the compliance with the technical constraints of air navigation. The rights of the Parties in this respect are so obvious that the 1946 Agreement did not even mention them in Section VI of its Annex; they derive from the general or specific provisions of the Chicago Convention mentioned earlier (from its Article 25, for instance).

In the second place, the Parties are committed to close collaboration and regular consultations on all matters concerning the application of the Agreement (Article VIII); this is particularly true for a matter on which they failed to agree when the Agreement was concluded. They therefore have to comply with a far more serious and definite obligation to negotiate than under an ordinary obligation to negotiate. Such negotiations, as the International Court of Justice has often stated, must be meaningful, *i.e.* they must by compromise seek mutually acceptable solutions, and these solutions must respect the balance which was established by the Agreement and on which the Parties have laid great stress in connexion with the United States counter-measures; in the course of such negotiations, the Parties must moreover respect the various objectives of the Chicago Convention, in particular the objective set forth in Article 44 (f) under which each Contracting State is assured of "a fair opportunity to operate international airlines".

Those are not merely nominal obligations. In fact, because of their scope, the refusal to grant an *authorisation* for "transshipment" in a third country is justifiable only where such "transshipment" affects the balance of concessions mutually granted by the Parties in the Agreement—in which case a reasonable compensatory concession will restore the balance—or where the legitimate interests of one Party are in serious jeopardy—in which

⁷⁷ Such is the case, in particular, of the Arbitral Award of 22 December 1963 and of the Decision Interpreting the Award, of 28 June 1964 (*Revue générale de droit international public*, t. 69, 1965, p. 259).

case appropriate safeguards may also be contemplated. But it can easily be conceded that a great number of "transshipments" carried out in third countries do not belong to these categories and that, consequently, the authorisation to effect them is a right and gives rise to neither compensation nor safeguards.

This interpretation cannot be objected to on the ground that it results in the establishment of two separate régimes of "transshipment", one for the territory of the Parties and another for third countries. Such an objection would be ill-founded in law.⁷⁸ The two régimes do not have the same legal basis; it is for the two Parties alone to give the rules applicable in either case the same legal basis and, possibly, the same content.

One of the ways open to the Parties to the 1946 Agreement was to adopt, at a favourable juncture, by an exchange of letters or by even less formal means, a number of rules governing change of gauge in third countries. It would appear that some understanding was reached on another issue which is also connected with the continuity and identity of air services, *i.e.* stop-over; but there was no such understanding over change of gauge in third countries.⁷⁹ There is, by contrast, a practice made up of isolated cases where the French authorities defined their position with regard to flight schedules involving change of gauge in third countries. This practice appears to be in consonance with the interpretation set forth here; it should be noted, in particular, that the French authorities authorised services involving change of gauge in third countries through the substitution of a single aircraft of smaller capacity for another aircraft, as long as the long-range characteristics of the service were maintained with respect to the type of aircraft used and to the length of the service as well as to the continuity of the flight; such were in particular the conditions governing change of gauge in Rome and in Barcelona. On the contrary, wherever there was a case of fanning out a service onto several aircraft, under the pretence of "transshipment", objections were raised and requests were refused (Shannon), or particular agreements were concluded (Exchange of Notes of 28 May 1969).

During the written and oral proceedings, the Parties considered "transshipment" above all within the context of the 1946 Agreement. With regard to the question put to the Tribunal, it is in fact the Exchange of Notes of 5 April 1960 which is specifically at issue. The actual details of the provisions of that Exchange of Notes were only summarily discussed before the Tribunal. It is sufficient for me to state that, in my view, no provision in the Exchange of Notes justifies a conclusion different from the one reached above; quite the contrary.

⁷⁸ In fact, there is no need here to define the scope of the provisions of Section VI of the Annex to the Agreement, for Question (A) refers to changes of gauge in third countries only; I wish to emphasize, however, that I do not accept the interpretation of the principles of the Agreement as given in the Award; nor do I accept the meaning attributed by the Award to the respect of the "long-range characteristics of the operation".

⁷⁹ From the documentation submitted to the Tribunal, it would appear that in their negotiations, the Parties dealt with change of gauge on only one occasion, in connexion with change of gauge in the territory of the Contracting Parties (Minutes of the negotiations of 20 July-5 August 1959), the Minutes clearly reflect France's opposition to changes of gauge in cases where one aircraft would be replaced by several.

In conclusion, "transshipment" in London of

avions des Etats-Unis . . . autorisés à desservir Paris via Londres (sans droits de trafic entre Londres et Paris) sur les lignes qu'ils exploitent à partir de ou à destination de la côte occidentale des Etats-Unis (French text of the Exchange of Notes of 5 April 1960).

was therefore subject to the prior consent of the French Government; negotiations were to be opened for that purpose; it was necessary to establish the precise nature of the operations contemplated under the guise of "transshipment", as well as the precise nature of the rights which United States aircraft intended to exercise on a segment on which they had no traffic rights; France was entitled to equitable compensation and, possibly, to safeguards. But, as such, the consideration that the aircraft which replaced another aircraft in London had a smaller capacity is only one element in the negotiations and not necessarily the most important one.

It is in that sense, in my view, that Question (A) should have been answered.

(Signed)

Paul REUTER

AFFAIRE CONCERNANT L'ACCORD RELATIF AUX SERVICES
AÉRIENS DU 27 MARS 1946 ENTRE LES ETATS-UNIS
D'AMÉRIQUE ET LA FRANCE

SENTENCE ARBITRALE DU 9 DÉCEMBRE 1978

Caractérisation des questions de faits et des questions de droit—Distinction à établir entre l'application de la règle de l'épuisement des recours internes dans les cas de protection diplomatique et l'application de cette règle dans les cas de dommage direct d'Etat à Etat — Importance du projet d'article 22 de la Commission du droit international sur la responsabilité des Etats pour ce qui est de déterminer la nature de la règle de l'épuisement des recours internes—Affirmation du principe qu'un traité doit être lu dans son ensemble et que l'on ne saurait déterminer sa signification sur la base de quelques phrases qui, détachées de leur contexte, peuvent être interprétées de plusieurs manières—Interprétation du concept de "service continu" aux fins de déterminer les ruptures de charge (changements de dimension d'appareils) autorisées ou interdites sur un parcours aérien déterminé—Examen des droits de cinquième liberté au regard de la question des ruptures de charge—Importance de la Convention relative à l'Aviation civile internationale signée à Chicago le 7 décembre 1944 dans l'application du principe de la "liberté de l'air" par opposition au principe de la souveraineté nationale d'un Etat sur l'espace aérien au-dessus de son territoire, pour ce qui est de déterminer le droit de procéder à des ruptures de charge sur le territoire d'un Etat tiers—Importance de la disposition sur la rupture de charge figurant dans l'Accord des Bermudes de 1946 entre les Etats-Unis et le Royaume-Uni—Valeur à donner à la preuve de la pratique des parties à un traité dans l'interprétation du traité—Examen du concept de "contre-mesures" et de la règle connexe de la "proportionnalité"—Teneur appropriée de l'obligation de négocier et du devoir de ne pas aggraver un différend, et question connexe des mesures conservatoires

SENTENCE ARBITRALE⁸⁰

M. Willem RIPHAGEN, *Président*;

MM. Thomas EHRLICH, Paul REUTER, *Arbitres*.

M. Lucius CAFLISCH, *Greffier*.

En l'affaire relative à l'Accord aérien du 27 mars 1946 entre la République française, représentée par:

M. Guy Ladreit de Lacharrière, Ministre plénipotentiaire, Directeur des Affaires juridiques au Ministère des Affaires étrangères, comme Agent; M. Noël Museux, Magistrat, Directeur adjoint des Affaires juridiques du Ministère des Affaires étrangères, M. Henry Cuny, Secrétaire des Affaires étrangères, Direction des Affaires juridiques du Ministère des Affaires étrangères, comme Agents adjoints; assistés par: M. Gilbert Guillaume, Maître des requêtes au Conseil d'Etat, M. Michel Virally, Professeur des facultés de droit, Université de Paris, M. Emmanuel du Pontavice, Professeur des facultés de droit, Université de Paris, comme Conseils; M. Robert

⁸⁰ Texte soumis (fourni) par le Département d'Etat des Etats-Unis d'Amérique