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

DISSENTING OPINION OF M. REUTER
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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 countermeasures, 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, the economic scope of this expression varies considerably, 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

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

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”
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 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, \textit{i.e.} they must by compromise seek mutually acceptable solutions, and these solutions must respect the balance which

\(^{75}\) \textit{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.

\(^{77}\) 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 (\textit{Revue générale de droit international public, t 69, 1965, p. 259})
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 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.  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. 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 April 5 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;

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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.

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quite the contrary.

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.