AIR SERVICES AGREEMENT CASE[27]

France v. United States (1978)

Arbitral Tribunal: Riphagen, President; Ehrlich, Reuter. 18 R.I.A.A. 416

By a 1946 bilateral Agreement, France and the US provided for civil air flights between their two countries. A 1960 Exchange of Notes between them relating to the 1946 Agreement authorised designated American carriers to fly to Paris from the US west coast via London. In 1978, Pan American Airlines, a designated carrier, announced its resumption of a west coast-London-Paris service, but with a change of gauge in London, passengers transferring from a larger to a smaller plane. France objected that this change of gauge was contrary to the 1946 Agreement, which prohibited changes of gauge within the territory of the two parties, but contained no provision on changes of gauge in the territory of a third state. When, on May 3, 1978, despite further French objection and diplomatic exchanges between the two states, Pan American sought to operate the service, passengers were not allowed to disembark in Paris. Thereafter Pan American suspended its flights. On May 4, the U.S. proposed that the dispute be referred to arbitration. On May 13, France agreed in principle and in July a *compromis* was signed. In the meantime, the US, acting contrary to the 1946 Agreement, had on May 9 taken the first steps in a procedure which led on May 31 to the issue of an order under its C.A.B. Economic Regulations prohibiting flights by French designated carriers to the US west coast from Paris via Montreal so long as the French ban on Pan American flights continued. However, following the signing of the *compromis*, the US ban was not implemented.

The Tribunal decided that US carriers were entitled under the 1946 Agreement to operate with a change of gauge in London. The following extract concerns a second question put to the Tribunal, *viz*. whether in international law the US was entitled to take the action that it took immediately prior to the signing of the *compromis*. Neither state was a party to the 1969 Vienna Convention on the Law of Treaties.

Award of the Tribunal

81. … 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

[27] *See* Damrosch, 74 A.J.I.L. 785 (1980).

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. ... 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. ...

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. …

The Tribunal then referred to the general duty to negotiate in Article 33, UN Charter, Appendix III, below, and to the particular obligations to consult and negotiate in the 1946 Agreement.

89. … 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 proportionally. Their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution. …

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. …

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 tribunal 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 countermeasures and may lead to an elimination of existing counter-measures to the extent that the tribunal so provides as an interim measures 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 countermeasures, too, may not disappear completely. …

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 *[i.e.* before a *compromis* is concluded], 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. …

For these reasons,

THE ARBITRAL TRIBUNAL …

DECIDES, unanimously, that the answer to be given … 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.

Notes

1. The *Air Services Agreement Case* illustrates one way by which international law may be enforced, *viz.* by self-help. The term "countermeasure"[28] which the Tribunal uses has in recent years come to replace the term "reprisal," probably because the association of the latter term with armed reprisals, which are now illegal. A countermeasure (or reprisal not involving the use of armed force) is essentially an illegal act that is rendered lawful as a response to a prior illegal act. According to the *Naulilaa Case*,[29] the *locus classicus* on the law of reprisals, the object of a reprisal must be "to effect reparation from the offending state for the offence or a return to legality by the avoidance of further offences" and is only lawful when preceded by' an "unsatisfactory demand" for reparation, although this latter requirement is not uniformly supported by state practice or writers and may not be appropriate or possible in some circumstances.[30] The requirement stated in the *Air Services Agreement Case* that a countermeasure be in proportion to the prior illegal act in terms of the damage it does is now generally accepted. The retaliatory act, which need not be of the same kind as the prior illegal act, must be directed against the delinquent state, not a third state, although injurious effects for third states may be unavoidable. In the *Cysne* Case,[31] in retaliation for a breach by Great Britain of a treaty obligation not to carry certain items as contraband, Germany added further items to the list without authority and sank a Portuguese ship that carried them. Finding against Germany, the Tribunal stated:

> Reprisals are admissible only against the provoking state. Admittedly, legitimate reprisals taken against the offending state may affect the nationals of an innocent state. But that is an indirect and unintentional consequence that the victim state will in practice seek to avoid as far as possible.

Countermeasures involving the use of armed force are prohibited by virtue of Article 2(4), United Nations Charter.[32] The use of economic or political force against the

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[28] On countermeasures, see Elagab, The Legality of Non-Forcible Countermeasures in International Law (1988) and Zoller, Peacetime Remedies: An Analysis of Countermeasures (1984).

[29] *Portugal v. Germany, 2* R.I.A.A. 1012 at p. 1026 (1928). Translation.

[30] See Malanczuk, in Spinedi and Simma, eds., *United Nations Codification of State Responsibility* (1987), p. 197 at p. 214. The I.L.C. described the object *of* countermeasures as "to 31 inflict punishment or to secure performance": Y.B.I.L.C. 1979,11-2, p. 116.

[31] *Portugal v. Germany,* 2 R.I.A.A. 1052 at p. 1057 (1928). Translation. Footnote omitted. See also Reed, 29 Virg. J.I.L. 175 (1988).

delinquent state is still permitted, as are countermeasures against its nationals *(e.g.* by their arbitrary expulsion). An example of the use of economic force as a countermeasure that would probably still be lawful nearly arose in connection with the *Corfu Channel* Case.[33] It would seem that the British Government were prepared to confiscate Albanian assets in the United Kingdom when Albania failed to pay the damages awarded against it by the International Court of justice in that case but were unable to find any.[34]

The facts of the *Air Services Agreement Case* raise the question of the relationship between the general customary international law on counter-measures and the customary international law of treaties[35] which permits the termination or suspension of a treaty in a case of material breach. Although both parties argued their case partly by reference to the customary international law rules on material breach,[36] the Tribunal neither referred to the law of treaties on this point nor considered whether the breach was a material one. It would appear that the general law on countermeasures supplements the law of treaties so that the former permits retaliation in the case of a minor or non-material breach as well as in the case of a material breach, whereas the latter does not. The position in respect of material breaches is less clear. The normal approach would be to regard the *lex specialis* in the customary international law of treaties as replacing the general law on countermeasures, although the intention of the International Law Commission in drafting what became the Vienna Convention on the Law of Treaties may have been that the two, different regimes should coexist.[37] The discussion on counter-measures in the ILC during preparation of the 2001 Draft Articles on State Responsibilities demonstrated fundamental divisions on the issue, with many members form developing countries expressing concern that acceptance of a right to take counter-measures would simply result in powerful states applying economic and political pressure on less powerful states, without any prospect of real reciprocity. No agreement was reached on this issue.

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[32] See below, paras. 210, 249. Note, however, the I.C.J.'s treatment of "countermeasures" in the *Nicaragua Case*, see below, p. 824.
[33] See below, p. 370
[34] *Hansard*, H.C. Vol. 488, col. 981. June 6, 1951.
[35] As to which, see the note to Art. 60, Vienna Convention on the Law of Treaties, below, p. 794.
[36] Neither state was a party to the Vienna Convention and hence were not bound by Art. 60 as a treaty rule.
[37] In its Commentary to Art. 60, the I.L.C. stated, in respect of bilateral treaties, that the right to terminate or suspend a treaty that it gave "arises independently of any right of reprisal": Y.B.I.L.C. 1966, 11, p. 255.