GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

VOLUME 32 2004 NUMBER 2

FLIGHTS OF FANCY AND FIGHTS OF FURY: ARBITRATION AND ADJUDICATION OF COMMERCIAL AND POLITICAL DISPUTES IN INTERNATIONAL AVIATION

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 Portions of this Article are based on earlier work published by the author in Paul Stephen Dempsey, Law & Foreign Policy in International Aviation (Transnational 1987). The author would like to thank Steve Rynerson, then a J.D. candidate at the University of Denver, for his assistance on the portion of this article addressing the dispute over aircraft noise regulations in *United States v. Fifteen European States* (2003). The author would also like to thank Dr. Assad Kotaite, President of the ICAO Council, Dr. Ludwig Weber, General Counsel of ICAO, and Ed Stimpson, U.S. Ambassador to the ICAO, for reviewing an earlier draft of this manuscript and providing invaluable insights as to the events described herein.

I. INTRODUCTION

By its very nature, aviation is inherently international in character, shrinking the planet and drawing together disparate peoples, cultures, and economies. As aircraft cross borders into foreign airspace and land at foreign airports, conflicts inevitably arise at both commercial and political levels. It is the resolution of these disputes that is the focus of this Article.

International dispute settlement mechanisms exist along a spectrum. Coercive means exist at one end, while legal means exist at the other.[1] This Article focuses on the latter, and in particular, the ad hoc arbitrations that have resolved commercial aviation disputes, as well as the adjudication of aviation disputes before the International Civil Aviation Organization (ICAO),[2] and the International Court of Justice (ICJ).[3]

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[1] Dimitri Maniatis, *Conflict In the Skies: The Settlement of International Aviation Disputes*, 20 ANNALS AIR & SPACE L. 167, 170, 172, 185-206 (1995). More formally, negotiation, which offers the parties "the greatest degree of flexibility and control over their dispute," stands at one end of the spectrum. Adjudication stands at the other, inasmuch as it requires the parties to relinquish the highest degree of control over their dispute to a third party. Between negotiation and adjudication are a variety of options, including inquiry, good offices, mediation, conciliation, and arbitration. Though these categories are quite distinct, many dispute settlement mechanisms do not fall precisely within a single category. A. Neil Craik, *Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law*, 10 GEO. INT'L ENVT'L L. REV. 551, 553 (1998).

[2] The International Civil Aviation Organization was created under the terms of the Chicago Convention on International Civil Aviation, 61 Stat. 1180 (1944) [hereinafter Chicago Convention]. This agreement was ratified by the United States in August 1946 and has been ratified or adhered to by 188 nations—virtually the entire world community. It is permanently headquartered in Montreal.

[3] To date, the World Trade Organization (WTO) has yet to exert jurisdiction over commercial aviation. *See* Ruwantissa I.R. Abeyratne, *Would Competition in Commercial Aviation Ever Fit Into the World Trade Organization?*, 61 J. AIR L. & COM. 793 (1996). At this writing, only three sectors of aviation activity have been brought under the General Agreement on Trade in Services (GATS) Annex on Air Transport Services: (1) aircraft repair and maintenance; (2) the sale and marketing of air transport services; and (3) computer reservations systems. For an argument that more should be swept under the GATS umbrella, see Randall Lehner, *Protectionism, Prestige and National Security: The Alliance Against Multilateral Trade in International Air Transport*, 45 DUKE L.J. 436 (1995), though others argue that an agency with aviation expertise would be better suited to resolve such disputes. *See* PAUL DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 302 (1987).

Although the WTO has not addressed commercial airlines, it has rendered several decisions regarding aircraft finance subsidies by manufacturers. *See, e.g.*, Brazil—Export Financing Programme For Aircraft: Second Recourse By Canada To Article 21.5 of the DSU, Wt/Ds46/Rw/2; (01-3570), 2001 WTO Ds Lexis 37 (26 July 2001); Brazil—Export Financing

Bilateral air transport agreements (bilaterals) define legal rights between nations in the realm of commercial aviation. Rights and responsibilities defined therein concerning airline traffic rights, rates, capacity, safety, security, and competition often lead to conflict between signatory states. Most bilaterals require consultation by governments over disputes before any retaliatory action is taken. Early bilaterals called for an advisory report or adjudication by the ICAO. The Chicago Convention also provides for dispute resolution before the ICAO Council. Modern bilaterals have replaced the ICAO as a dispute resolution forum with ad hoc arbitration, usually with three arbitrators.[4] Bilaterals typically call for termination only on twelve months' prior notice.

In the history of international aviation, relatively few disputes have resulted in ad hoc arbitration or ICAO or ICJ adjudication.[5] At this writing, only six aviation disputes have been submitted to arbitration, only five have been submitted to the ICAO for adjudication, and only twelve have been filed with the ICJ. Most aviation disputes are resolved through negotiation, and, depending on the relative strength of the aviation trading partners, unilateral coercion.[6]

This Article will review the six ad hoc arbitrations that have been sought to resolve issues of commercial aviation:

- *United States v. France* (1963)—involving fifth freedom[7] rights beyond Paris;
- *United States v. Italy* (1965)—involving all-cargo service to Rome;

Programme for Aircraft, Recourse By Canada To Article 21.5 Of The DSU, Wt/Ds46/Rw; (00-1749), 2000 WTO Ds Lexis 14 (9 May 2000); Canada—Measures Affecting the Export of Civilian Aircraft, Wt/Ds70/R; (99-1398), 1999 WTO Ds Lexis 6 (14 April 1999). In this bitter and protracted dispute over subsidies to Embraer and Bombardier by Brazil and Canada, respectively, the WTO first found that Canada could impose $1.4 billion in retaliatory sanctions against Brazil, then subsequently found that Brazil could impose $250 million in retaliatory sanctions against Canada. Tom Cohen, *WTO Approves Brazil Sanctions On Canada Over Airline Subsidies*, MEMPHIS COMM. APPEAL, Dec. 24, 2002, at B11.

[4] Typically, each nation designates one arbitrator, after which the first two arbitrators jointly select the third.

[5] For a review of each of these disputes, *see* DEMPSEY, *supra* note 3, at 259-67, 293-302.

[6] *See* DEMPSEY, *supra* note 3, at 167-229, 306-07.

[7] Under "fifth freedom" rights, an airline has the right to carry traffic between two countries outside its own country of registry so long as the flight originates or terminates in its own country of registry.

- *United States v. France* (1978)—involving "change of gauge"[8] operations between London and Paris;
- *Belgium v. Ireland* (1981)—involving airline capacity between Dublin and Brussels;
- *United States v. United Kingdom* (1992)—involving airline user charges at London Heathrow Airport; and
- *Australia v. United States* (1993)—involving fifth freedom operations between Osaka and Sydney.

This Article will also review the five aviation disputes that have been brought before the ICAO Council for quasi-judicial resolution:

- *India v. Pakistan* (1952)—involving Pakistan's refusal to allow Indian commercial aircraft to fly over Pakistan;
- *United Kingdom v. Spain* (1969)—involving Spain's restriction of air space at Gibraltar;
- *Pakistan v. India* (1971)—involving India's refusal to allow Pakistani commercial aircraft to fly over India, later appealed to the ICJ;
- *Cuba v. United States* (1998)—involving the U.S. refusal to allow Cuba's commercial aircraft to fly over the United States; and
- *United States v. Fifteen European States* (2003)—involving European Union (EU) noise emission regulations.

Finally, this Article will review the dozen aviation disputes that have been brought before the ICJ:

- *United States v. U.S.S.R*, and *United States v. Hungary* (1954)—involving the treatment in Hungary of U.S. Air Force aircraft and crew;
- *Israel v. Bulgaria*, *United States v. Bulgaria*, and *United Kingdom v. Bulgaria* (1955)—involving the destruction of an El Al civilian aircraft by Bulgarian military jets;
- *United States v. Czechoslovakia* (1956)—involving the destruction of a U.S. military jet over Czechoslovakia;

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[8] "Change of gauge" operations involve the transfer of passengers between aircraft at a foreign point for a through journey.

- *United States v. U.S.S.R.* (1956)—involving the destruction of a U.S. military jet by the Soviet Air Force;
- *United States v. U.S.S.R.* (1958)—involving the destruction of a U.S. military jet by the Soviet Air Force;
- *United States v. U.S.S.R.* (1959)—involving the destruction of a U.S. military jet by the Soviet Air Force;
- *Libya v. United States* (1992)—involving the U.S. and United Kingdom decision to prosecute Libyan nationals for the destruction of Pan Am flight 103;
- *Iran v. United States* (1996)—involving the U.S.S. Vincennes' destruction of Iran Air flight 655; and
- *Pakistan v. India* (2000)—involving the destruction by India of a Pakistani military aircraft.

II. ARBITRATION OF INTERNATIONAL AVIATION DISPUTES

A. Bilateral Air Transport Agreements

Bilateral air transport agreements are international trade agreements in which the governmental aviation authorities of two nations establish a regulatory mechanism for the performance of commercial air services between their respective territories[9] and, often, beyond.[10] Bilaterals may be concluded as treaties, inter-governmental agreements, executive agreements, conventions, protocols, or exchanges of diplomatic notes. Essentially, they are contracts between governments.[11] The importance of these agreements becomes

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[9] Most U.S. bilaterals define territory as "the land areas under the sovereignty, suzerainty, protection, jurisdiction or trusteeship of that State, and territorial waters adjacent thereto." *See, e.g.*, Agreement Between the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Art. 1(n) (July 23, 1977), CCH Avi. ¶ 26,540c, and Agreement Between the Government of the United States of America and the Government of the Republic of Singapore Art. 1(j) (Apr. 8, 1977), CCH Avi. ¶ 26,495a. The language tracts somewhat the language of Article 2 of the Chicago Convention of 1944.

[10] The term "and beyond" refers to those bilaterals which provide for an exchange of so-called "fifth freedom" rights.

[11] Such agreements need not, however, be of a formal character, for international law imposes no requirement that they be in writing. BIN CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 465 (1962) [hereinafter B. CHENG]. An excellent resource tool for the study of U.S. bilaterals is AIR TRANSPORT ASSOCIATION, PROVISIONS IN U.S. INTERNATIONAL TRANSPORT AGREEMENTS (1985), a three volume compilation [hereinafter ATA U.S. PROVISIONS], and 3 CCH Aviation Law Reporter. *See also*, Joseph Gertler, *Bermuda Air Transport Agreements:*

manifest when one realizes the tremendous impact of international commercial aviation upon world commerce and global communications.

From its inception, commercial air transportation has been regulated to some degree by bilateral agreements between sovereign nations, the first being an aerial navigation agreement between France and Germany entered into in 1913.[12] World War I revealed the commercial and military potential of air transport; in the years following the war, however, only government subsidies and mail contracts sustained the economic viability of the fledgling industry.[13]

In order to establish and define the basic legal framework for international aviation, the Peace Conference of 1919 produced the Convention Relating to the Regulation of Aerial Navigation, more commonly known as the Paris Convention.[14] Article 1 thereof declared that each state enjoys "complete and exclusive sovereignty over the airspace above its territory."[15] Henceforth, transit and landing rights for foreign carriers on international routes would be conditioned upon the explicit or tacit approval of the national governments in or above whose territory they would operate. This principle of territorial sovereignty, coupled with the vital economic support already provided by governmental authorities, insured that national governments would play a dominant role in the emerging political and economic development of international civil aviation.

The Chicago Convention, the formal agreement executed at the conclusion of the Chicago Conference in 1944, reaffirmed the international legal principles embraced by the Paris Convention twenty-five years earlier, stating that "every state has complete and exclusive sovereignty over the airspace above its territory,"[16] and therefore "[n]o scheduled international air service

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Non Bermuda Reflections, 42 J. AIR L. & COM. 779, 781 (1976). In the absence of a formal written agreement, comity and reciprocity may form the foundation of aviation relations between two countries.

[12] PETER HAANAPPEL, PRICING AND CAPACITY DETERMINATION IN INTERNATIONAL AIR TRANSPORT 25 (1984) [hereinafter PRICING AND CAPACITY].

[13] ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 24 (1984); PAUL DEMPSEY & LAURENCE GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 21, 98 (1997).

[14] Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173 [hereinafter Paris Convention].

[15] *Id.* art. 1.

[16] *Id.* art. 1. B. CHENG, *supra* note 11, at 3; ANTHONY SAMPSON, EMPIRES OF THE SKY: THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 69-70 (1984); Michael Milde, *The Chicago Convention—After Forty Years*, 9 ANNALS AIR & SPACE L. 119, 121-22 (1984) (citation omitted).

may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."[17] Accordingly, the United States and other aviation powers entered into a series of bilateral negotiations with a number of foreign governments with the objective of concluding air transport agreements which would secure important landing rights abroad for their international carriers.[18]

The post-World War II era saw explosive proliferation of bilaterals, beginning with *Bermuda I* between the United States and United Kingdom in 1946. *Bermuda I* became the prototype for bilaterals throughout the world over the next thirty years.[19] In addition to representing an essential compromise between the world's two leading civil aviation powers, *Bermuda I* reinforced the role of national governments in formulating international civil aviation policy.[20]

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[17] Chicago Convention, *supra* note 2, art. 6; *see* Barry Diamond, *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 J. AIR L. & COM. 419, 412-22 (1975); *see also* Brian Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257 (2000) (referring to the "mercantilist Chicago Convention," though Havel nowhere explains why he believes the Convention to be mercantilist). Actually, the Chicago Conference that produced the Chicago Convention also drafted companion Transit and Transport Agreements, the latter of which would have significantly advanced the Open Skies objectives had it been endorsed by a sufficient number of states to enter into force. The Chicago Convention itself deals only peripherally with economic issues, and instead focuses on safety, navigation and security, creating the ICAO to oversee such issues.

[18] In spite of their failure to reach consensus on a multilateral means of economic regulation, nations attending the Chicago Conference succeeded in adopting a Form of Standard Agreement for Provisional Air Routes as a model for future bilateral air transport agreements between nations. Despite the proliferation of these early agreements, however, it soon became evident that the Standard Chicago Agreement would not serve as the dominant model for future bilateral air transport agreements. That role would be reserved for the bilateral concluded between the United States and Great Britain two years later, the so-called *Bermuda I* Agreement. Air Services Agreement with the United Kingdom, Feb. 11, 1946, U.S.-U.K. 60 Stat. 1499 [hereinafter *Bermuda I*].

[19] Peter Haanappel, *Bilateral Air Transport Agreements—1913-1980*, 5 INT'L TRADE L.J. 241 (1980).

Prior to 1946, the *Chicago Conference* had already drafted a Form of Standard Agreement, for provisional air routes. Most of the world's bilaterals are not, however, patterned on this latter Form of Standard Agreement, but rather on the 1946 *Bermuda Agreement*. McGill Center for Research of Air & Space Law, LEGAL, ECONOMIC AND SOCIO-POLITICAL IMPLICATIONS OF CANADIAN AIR TRANSPORT 522 (1980); SAMPSON, *supra* note 13, at 72.

[20] *See generally* NICHOLAS MATEESCO MATTE, TREATISE ON AIR-AERONAUTICAL LAW 229-50 (1981).

Bilaterals concluded by the United States with other nations typically address six major issues: (1) entry (designation of carriers and routes); (2) capacity; (3) rates; (4) discrimination and fair competition; (5) security; and (6) dispute resolution.[21] It is the last of these categories that is of relevance to the instant discussion.[22]

The *Bermuda I* bilateral contains several provisions relating to the settlement of disputes. Article 8 of the agreement provides that either nation may request consultation between the aeronautical authorities of both nations in the event that it considers it desirable to modify the terms of the annex of the agreement (i.e., routes to be operated on by carriers designated by each nation and rates to be charged by such carriers). Article 13 of the agreement provides that either nation may request consultations with the other for the purpose of initiating amendments either to the agreement itself or to the annex "which may be desirable in the light of experience;"[23] pending the outcome of such consultation, either party is free to give notice to the other of its desire to terminate the agreement.[24] If notice to renounce is given by either party, the bilateral will terminate one year after such notice is received by the other party, unless such notice is subsequently withdrawn.[25] After such notice expires and the bilateral is renounced, air operations may continue under principles of comity and reciprocity.[26]

Article 9 of the agreement contains perhaps the most important dispute settlement provision. In the event that any dispute between the parties relating to the interpretation or application of the agreement cannot be settled through consultation, Article 9 requires that such a dispute be referred to the [P]ICAO.[27] The [P]ICAO, in turn, would consider the dispute and issue an

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[21] The present discussion analyzes only the more important provisions found in modern bilaterals. Such agreements typically contain a number of additional provisions which address a wide array of subjects. For a listing of other provisions typically included in modern bilaterals, see BETSY GIDWITZ, THE POLITICS OF INTERNATIONAL AIR TRANSPORT 153-54 (1980).

[22] Briefly, *Bermuda I* called for consultations between the aggrieved governments and reference to the ICAO for an advisory report. Termination of the bilateral could be only upon one year's notice. *Bermuda I*, *supra* note 18. *Bermuda I* is reprinted in PAUL DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 419-24 (1987).

[23] *Bermuda I*, *supra* note 18, art. 13.

[24] *Id.*

[25] *Id.*

[26] Today, a matrix of more than 2,500 bilateral air transport agreements governs the practices of airlines in international aviation. Only rarely have they been renounced.

[27] *Bermuda I*, *supra* note 18, art. 9. [P]ICAO refers to the "Provisional" International Civil Aviation Organization, which came into existence in 1945 on an interim basis with the signing

"advisory report";[28] such a report, however, due to its "advisory" nature, would not be binding on either party to the agreement.

Professor Bin Cheng has identified three possible approaches to the settlement of specific types of conflicts arising under bilateral air transport agreements.[29] Under the first approach, all disputes arising under the agreement are to be settled by negotiation (i.e., consultation); such an approach

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of an Interim Agreement at the Chicago Convention, to be replaced by ICAO upon its formulation in 1947.

[28] *Id.*

[29] Professor Bin Cheng has discussed in detail the need for timely and effective dispute settlement mechanisms in international air transportation. *See generally* Bin Cheng, DISPUTE SETTLEMENT IN BILATERAL AIR TRANSPORT AGREEMENTS, *in* SETTLEMENT OF SPACE LAW DISPUTES 97 (Karl Heinz Böckstiegel ed., 1980). Dr. Gertler has acknowledged the potential danger that "the relief mechanism of bilateral air agreements may be inflexible and too cumbersome to invoke in situations requiring an urgent corrective measure." Z. Joseph Gertler, *Nationality of Airlines: A Hidden Force in the International Air Regulation Equation*, 48 J. AIR L. & COM. 51 (1982). Most bilaterals do provide for dispute settlement, most by arbitration. Z. Joseph Gertler, *Bermuda Air Transport Agreements: Non Bermuda Reflections*, 42 J. AIR L. & COM. 779, 820 (1976). Involuntary disruption of air services due to a breakdown in the interpretation and/or application of a bilateral may lead to disastrous economic losses, both direct and indirect, as well as substantial social inconvenience. As a result, bilaterals must contain mechanisms for both dispute prevention and dispute resolution. *Id.* Due to the potentially disastrous economic and social consequences which might stem from a breakdown in aviation relations, it is clearly preferable to implement a system which recognizes potential problem areas before they assume the status of full-blown disputes. Essential to any such system, according to Cheng, is effective communication between parties to the agreement; regular consultations between the two nations might identify potential difficulties at an early stage and facilitate an early resolution of the issue. *Id.*

Professor Cheng has stated that consultation can facilitate at least six different purposes. *Id.* First, it can serve as a means for the joint supervision and control by the contracting states of the "two-tier" operation of the bilateral; consultation enables the states to control and supervise both the operation of the agreement and the observance of its terms by the designated airlines. Second, consultation can serve as an appellate jurisdiction in the "two-tier" structure when changes proposed by the carrier of one state have been disapproved by the other. *Id.* at 100. Third, consultation can serve as a means of elevating an issue to the international level; it can enable a contracting state to gather information about a given situation and, if necessary, to make its own views known to the other state, or to keep the other state informed of a given situation so that, in the event it decides to do so, it can make its views known. *Id.* at 102. Fourth, it can be used for the purpose of reviewing changed circumstances as a matter of good will. *Id.* at 103. Fifth, consultation can be used for the purpose of changing the bilateral itself. *Id.* Finally, it can serve as a means for settling disputes and as a pre-condition to submitting a dispute to a third party. *Id.* at 104. This is also an area in which preventive law can play an important role in diminishing the likelihood of conflict and confrontation between governments and their commercial enterprises.

is typically found in the bilaterals of those nations which have traditionally refused to submit to third-party settlement of disputes.[30] Under the second approach, the bilateral provides for a general method for the settlement of disputes in addition to negotiation, but no specific procedure for specific disputes.[31] Under the third approach, special procedures for the settlement of certain types of disputes are provided either in the absence of, or in addition to, a general method of settling all disputes arising under the bilateral.[32] An examination of existing bilaterals concluded by the United States reveals that most such bilaterals can be classified as containing procedures consistent with either the second or third approach identified by Professor Cheng.[33]

In the event that consultation between the parties is unable to produce a satisfactory settlement, U.S. bilaterals typically provide for resolution via some form of arbitral or adjudicatory forum. Many early bilaterals, including a number of U.S. bilaterals currently in force, require that the dispute be referred to the ICAO for an advisory (*i.e.*, non-binding) report.[34]

The *Bermuda I* model ceased to be the template for U.S. aviation negotiations with its "open skies" initiative of the late 1970s. Well before that policy shift, the strong trend in the post-*Bermuda I* era reveals a retreat from designation of the ICAO as a dispute settlement forum; most existing U.S. bilaterals provide for compulsory arbitration by an ad hoc tribunal.[35] In recent

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[30] Cheng, *supra* note 29, at 105-06.

[31] *Id.* at 105.

[32] *Id.*

[33] Aside from those types of disputes for which some bilaterals specify a certain type of settlement mechanism, virtually all existing U.S. bilaterals, whether they be of the general pre-1978 *Bermuda I* type or the post-1977 type, require that the parties to the dispute first attempt to settle their differences through some form of consultation. The specific language employed in the bilateral with respect to consultation varies from agreement to agreement; some U.S. bilaterals provide merely for "consultations." *See, e.g.*, Protocol Relating to United States Air Transport Agreement of 1950 U.S.-Isr., Aug. 16, 1978, art. 12, 29 U.S.T. 3144; T.I.A.S. No. 9002.). Others provide for "formal consultations." *See, e.g.*, Agreement on Air Transport Services, U.S.-Belg., Oct. 23, 1980, art. 17, 32 U.S.T. 3515; T.I.A.S. No. 9903. At least one agreement provides for "direct negotiations through diplomatic channels." *See, e.g.*, Agreement on Air Transport Services, U.S.-Rom., July 25, 1979, art. 16, 30 U.S.T. 3872, T.I.A.S.N. 9431. Although the language of these provisions varies, an identical intent is clearly evident in virtually all existing U.S. bilaterals, namely, that disputes must first be addressed through consultations between the contracting parties to the agreement.

[34] *See, e.g.*, Air Transport Services Agreement, United States-Syria, June 21, 1955, art. 10, 6 U.S.T. 2163, T.I.A.S. No. 3285.

[35] Some agreements do not require arbitration, however. For example, Article 16 of the Agreement Between the United States and the People's Republic of China Relating to Civil Air

years, efforts have been made in drafting such provisions to make them truly compulsory by ensuring that neither party can block arbitration by refusing to cooperate in the establishment of the arbitral tribunal.[36] In addition, efforts have been made to accelerate the arbitral process.[37]

The typical post-*Bermuda I* arbitral clause permits each nation to designate one of three arbitrators who will comprise the arbitral tribunal. The third arbitrator, who typically may not be a national of either contracting party, is to be selected by the two arbitrators already chosen.[38]

With respect to the decision or award of the arbitral tribunal, most pre-1978 U.S. bilaterals incorporate language which is non-binding in nature; these bilaterals typically provide that each nation "shall use its best efforts consistent with its national law to put into effect" any such decision or award.[39] Attempts have been made in numerous post-1977 liberal bilaterals, however, to make such decisions or awards truly binding upon both parties. Instead of merely requiring the "best efforts" of the parties, these newer bilaterals typically provide that each nation "shall, consistent with its national law, give full effect to any decision or award of the arbitral tribunal."[40] In the event that a nation

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Transport provides, *inter alia*, "the Parties shall, in a spirit of friendly cooperation and mutual understanding, settle [any dispute arising hereunder] by negotiation or, if the parties so agree, by mediation, conciliation, or arbitration." 33 U.S.T. 4559, T.I.A.S. No. 10326 (Sept. 17, 1980), 3 CCH AV. L. REP. ¶ 26,255a.

[36] Cheng, *supra* note 29, at 107.

[37] *Id.*

[38] While some U.S. bilaterals do not identify procedures to be utilized in the event that either nation fails to designate an arbitrator or that a third arbitrator cannot be agreed upon, a number of arbitral clauses provide that either party may request that the president of ICAO or the president of the ICJ appoint an arbitrator or arbitrators as the case requires. Typically, if the two designated arbitrators are unable to agree on a third arbitrator, the bilaterals provide that the third arbitrator shall be appointed by the President of the ICJ (*see, e.g.*, Air Services Agreement Between the United States and Austria, U.S.-Aus., Mar. 16, 1989, art. 14(2)(b), T.I.A.S. No. 11,265, 3 CCH AV. L. REP. ¶ 26,210a; Air Transport Agreement Between the United States and Germany, July 7, 1955, U.S.-F.R.G., art. 13(2), 275 U.S.T. 527, T.I.A.S. No. 3536, or the President of the ICAO; Air Transport Agreement Between the United States and Canada, art. 17(7)(b) (Feb. 24, 1995), 3 CCH AV. L. REP. ¶ 26,246a; Air Transport Agreement Between the United States and Costa Rica, art. 14(2)(b) (May 8, 1997), 3 CCH AV. L. REP. ¶ 26,264a). However, some bilaterals are silent on the issue of a deadlock in selecting a third arbitrator, saying only that that individual "shall not be a national of either contracting party." *See, e.g.*, Air Transport Agreement Between the United States and Colombia, Oct. 24, 1956, U.S.-Colom. art. 12, 14 U.S.T. 429, T.I.A.S. No. 5338.

[39] *See, e.g.*, Agreement on Air Transport Services, Aug. 11, 1952, U.S.-Japan, art. 15(3), 4 U.S.T. 1948, T.I.A.S. No. 2854.

[40] *See, e.g.*, Agreement on Air Transport Services, U.S.-Belg., *supra* note 33. Similarly, Article 14(8) of the Air Transport Agreement between the U.S. and the Russian Federation, Jan. 14, 1994, provides, "Each Party shall, consistent with its national law, give full effect to any

fails to give full effect to any such decision or award, some liberal bilaterals provide that the other nation "may take such proportionate steps as may be appropriate."[41]

The ICAO noted that arbitration is "a process so costly and time-consuming that its use in air transport regulation has been extremely rare."[42] To facilitate it, the ICAO has created a model clause on dispute resolution for insertion into bilateral air transport agreements.[43] Under it, any dispute that cannot be resolved by consultation may be submitted to a mediator or dispute settlement panel appointed from a roster of aviation experts maintained by the ICAO. Mediation should be completed within sixty days of engagement, and costs are to be apportioned equally. The parties are to participate in good faith, and to be bound by any decision rendered.[44]

The relatively few instances in which arbitral tribunals have been commissioned, and the decisions rendered by them, will be explored below. Before doing so it is important to stand aside for a moment and recognize that, although arbitrations arising under bilaterals are de jure disputes between governments, they are de facto disputes between airlines, or between an airline and a foreign airport or governmental institution.[45]

B. United States v. France (1963)

While many bilaterals contain clauses for compulsory arbitration of disputes upon the insistence of either party, none had been invoked prior to 1962. Most international aviation conflicts had instead been resolved between the governments and/or airlines through consultation or negotiation. Hence, the 1963 arbitral decision involving a controversy which arose with France over U.S.-flag rights beyond Paris was a landmark in the history of dispute resolution.[46]

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decision or award of the arbitral tribunal."

[41] *See, e.g.*, Agreement on Air Transport Services, Oct. 1, 1979, art. 15, U.S.-Fiji, 32 U.S.T. 3747, T.I.A.S. No. 9917.

[42] ICAO, Manual on the Regulation of International Air Transport § 2.3 (ATConf/4-WP5 Appendix, Doc. 9626).

[43] ICAO, Consolidated Conclusions, Model Clauses, Recommendation and Declaration (ATConf/5 March 31, 2003).

[44] *Id.* Agenda Item 2.6.

[45] The arbitrations described below were de facto disputes between: *Pan Am v. Air France* (1963); *Pan Am & TWA v. Alitalia* (1965); *Pan Am v. Air France* (1978); *Sabena v. Aer Lingus* (1981); *Pan Am & TWA v. British Airports Authority* (1992); and *Qantas v. Northwest Airlines* (1993).

[46] Paul Larsen, *Arbitration of the United States-France Air Traffic Rights Dispute*, 30 J. AIR

The conflict arose over interpretation of the traffic rights conferred by the U.S.-France Air Transport Services Agreement of 1946.[47] Under it, Route One granted U.S.-flag carriers the opportunity to operate between the United States to Paris, and thence to Switzerland, Italy, Greece, Egypt, "the Near East," India, Burma, Thailand, Vietnam, China, and beyond. Route Two allowed U.S.-flag service from the United States via Spain to Marseille, then via Milan and Budapest to Turkey and beyond.[48] Trans World Airlines (TWA) was immediately certified to serve Route One; competitive service by Pan American (Pan Am) from the United States to Paris, thence to Rome and Beirut, was inaugurated in 1950.[49] France argued that Beirut was not included in the term "Near East," but allowed service to begin nevertheless. In 1955, Pan Am announced its intention to fly beyond Beirut to Tehran.[50]

France again objected on the same grounds, but acquiesced in the new service.[51] However, the French government refused to allow fifth-freedom movements by Pan Am between Paris and Istanbul, although Pan Am continued to serve the market without embarking passengers at Paris. Similar service was begun to Ankara, Turkey, shortly thereafter.[52]

In 1958, France formally announced its intention to terminate the bilateral. Notice of renunciation was withdrawn just prior to its effective date, in return for an expansion of routes for the French-flag carrier, allowing it to serve Los Angeles and San Francisco.[53] In 1960, the United States and France exchanged

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L. & COM. 31 (1964).

[47] United States-France Air Transport Services Agreement, Mar. 27, 1946, U.S.-Fr. 61 Stat. 3415, T.I.A.S. No. 1679.

[48] *Id.* The U.S.-France bilateral was renegotiated in 1998.

[49] Larsen, *supra* note 46.

[50] Professor Lowenfeld observed:

> Shortly before Pan American proposed service to Istanbul in 1955, it proposed to extend its Paris-Rome-Beirut service to Tehran, Iran. The Secretary General of Civil and Commercial Aviation told the United States air attaché that United States carriers did not have the right to serve Tehran via Paris under the Agreement, (a) because Tehran lay too much to the north to be included in a reasonably direct route to India; and (b) because Iran was part of the Middle East and not the Near East. The United States air attaché replied that those two terms were interchangeable. Several further exchanges followed between French and American officials and Pan American, but the service was in fact inaugurated, and maintained (with varying frequencies) until 1961.

ANDREAS LOWENFELD, AVIATION LAW II-24 (1972).

[51] Larsen, *supra* note 46.

[52] *Id.* at 234.

[53] LOWENFELD, *supra* note 50, art II-24. The U.S. also received operating rights to serve both London and Paris on flights from California, but without fifth-freedom rights between the

notes, giving France access to California via Montreal (but without fifth-freedom rights), and providing that "existing service" by Pan Am between Paris and Istanbul would continue undisturbed.[54] But, in 1962, the French government informed Pan Am that all its traffic rights between Paris and Tehran would be suspended.[55]

Negotiations between the two governments reached an impasse in 1962, prompting the United States to invoke the compulsory arbitration clause, Article X, of the bilateral.[56] Two bilateral interpretation questions were submitted to the ad hoc three-member arbitration panel: (1) whether a U.S. carrier may provide service between the United States and Turkey via Paris, and embark and disembark in Paris passengers destined to or originating in Turkey; and (2) whether a U.S. carrier may provide service between the United States and Iran via Paris, and embark and disembark in Paris passengers destined to or originating in Iran.[57]

The Arbitration Tribunal concluded that neither Turkey nor Iran was included in Route One of the 1946 bilateral, in the former case because a route to India via Turkey was specified in Route Two.[58] Nevertheless, the Tribunal attached great weight to French consent in allowing such service to be inaugurated and continued for several years. It concluded that a U.S. carrier could continue to serve Turkey via Paris, not by virtue of the 1946 bilateral, but as a result of French consent beginning with the inauguration of service in 1955,

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European capitals. *Id.*

[54] Exchange of Notes Between the United States and France, Apr. 5, 1960, U.S.-Fr., T.I.A.S. No. 5135.

[55] LOWENFELD, *supra* note 50.

[56] Professor Lowenfeld summarized the heart of the controversy:

> The amount of money directly involved in the dispute-that is revenue from Paris-Turkey and Paris-Tehran passengers carried by Pan American-was estimated at about $400,000 per year. Most of these passengers would, presumably, go over to Air France if Pan American could not take them. If Tehran were to be prohibited entirely to planes stopping at Paris (as contrasted with blind sector rights) the loss to Pan American would be much greater-perhaps as much as $2,000,000—because its entire route structure would have to be rearranged. Beyond this, however, both sides saw the arbitration as a symbolic test. The United States felt that France had been harassing the American carriers with a view to once more renegotiating the Agreement; and France felt that the United States, not content with its undue advantage of 1946, had continued to reach out for more.

Id. at II-25 (citations omitted).

[57] Arbitration Agreement with France, Jan. 22, 1963, U.S.-Fr. art. I, 14 U.S.T. 120, T.I.A.S. No. 5280. 57 AM. J. INT'L L. 1029-31 (1963).

[58] Pan Am-Air France (U.S. v. Fr.), 668 I.L.M. 80-82, *decided at* Geneva (Dec. 22, 1963).

and confirmed by the 1960 exchange of notes. However, neither the 1946 agreement nor subsequent practice gave Pan Am the authority to provide fifth-freedom local service in the corridor. As to Iran, the Tribunal also found that a U.S. carrier had the right to serve it, not by virtue of the bilateral, but as a result of informal French consent to the Paris-Rome-Tehran U.S. service inaugurated in 1955. The United States also had the right to continue fifth-freedom service in this market, again by virtue of French consent.[59] Although France had the specific legal questions of whether the service violated the explicit terms of the bilateral resolved in its favor, the United States won both an economic and equitable victory with the Tribunal's finding that Pan Am should not be deprived of service begun with French consent, explicit or implicit, and sustained over a long period of time.[60]

C. United States v. Italy (1965)

The second dispute in the history of international aviation to be submitted to arbitration was one between the United States and Italy involving all-cargo service to Rome. TWA began passenger service to Italy in 1946 under a temporary air services agreement;[61] the following year it added all-cargo flights to the market. In 1948, the two governments concluded a bilateral[62] on the *Bermuda I* model, which became the focus of the controversy. Under the agreement Pan Am was given authority to enter the market in 1950.[63] TWA's all-cargo service to Italy was interrupted that year by the war in Korea and did not resume until 1958; once-a-week service was increased to four weekly TWA all-cargo flights in 1959. Pan Am initiated all-cargo service to Italy in 1960 and increased its service to two flights per week in 1963. Alitalia began all-cargo service in the market in 1961, and increased its service to three flights a week in 1963.[64]

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[59] Larsen, *supra* note 46.

[60] *Id.* at 232; *A Review of U.S. International Aviation Policy, Hearings before the Subcomm. on Investigations & Oversight of the House Comm. on Pub. Works and Transp.*, 97th Cong., 2d Sess. 438 (1982) (testimony of Donald C. Comlish) [hereinafter Comlish Testimony].

[61] *See* North Atlantic Route Case, 6 C.A.B. 319 (1945).

[62] Air Transport Agreement with Italy, Feb. 6, 1948, 62 Stat. 3729, U.S.-Italy [hereinafter 1948 U.S.-Italy Bilateral].

[63] *See* North Atlantic Route Transfer Case, 11 C.A.B. 676 (1950).

[64] Paul B. Larsen, *The United States-Italy Air Transport Arbitration: Problems of Treaty Interpretation and Enforcement*, 61 AM. J INT'L L. 496, 499 (1967) [hereinafter *U.S.-Italy Arbitration*]. *But see* Stanley D. Metzger, 61 AM J. INT'L L. 1007 (1967) (criticizing Larsen's articles).

In 1963, both Pan Am's proposal to expand its all-cargo service to four weekly flights and TWA's proposal to expand to six weekly flights were rejected by the Italian government.[65] Alitalia was in no position to meet the enhanced competition because of an equipment shortage. The United States formally objected to the action of the Italian government with a diplomatic note on September 19, 1963. The crisis came to a head in December of that year, when TWA announced its intention to substitute jet aircraft in the market, which would thereby more than double its capacity.[66]

Consultations between the two governments were held in early 1964, with Italy taking the position that all-cargo service was not authorized by the 1948 bilateral, which explicitly authorized carriers of the two nations to transport "passengers, cargo and mail."[67] Italy read this phrase in the conjunctive, as a requirement for combined passenger and cargo service.[68] It has been suggested that the delaying tactics of the Italian government were designed to give Alitalia time in which to acquire jet cargo aircraft.[69] When consultations failed to resolve the dispute, the arbitration clause of the bilateral was invoked by the United States in June 1964, and a tripartite tribunal was commissioned to resolve the dispute.[70] By a vote of two to one, the tribunal upheld the United States' position, resting its decision on the interpretation of identical language of *Bermuda I* (upon which the 1948 U.S.-Italy Bilateral had been based) and the practice of the airlines of both nations to provide all-cargo service in the market without objection until 1963.[71]

The United States was slow to exercise its newly won rights to expand its all-cargo service in the market for fear that Italy might renounce the 1948 U.S.-Italy Bilateral. The bilateral included other valuable passenger rights which neither the United States nor its airlines were eager to jeopardize. However, the U.S. Civil Aeronautics Board (C.A.B.) authorized a third carrier, Seaboard, to provide all-cargo service in the market in 1966.[72] Upon the inauguration of Seaboard's service, Italy denounced the 1948 U.S.-Italy Bilateral, beginning

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[65] *U.S.-Italy Arbitration*, *supra* note 64, at 500.

[66] *Id.*; Martin Bradley, *International Air Cargo Services: The Italy-U.S.A. Air Transport Agreement Arbitration*, 12 MCGILL L.J. 312, 314-15 (1966).

[67] 1948 U.S.-Italy Bilateral, *supra* note 62, art. III.

[68] *Id.* art. XII.

[69] LOWENFELD, *supra* note 50, at III-62.

[70] *See* Bradley, *supra* note 66, at 315.

[71] *U.S.-Italy Arbitration*, *supra* note 64, at 508-09.

[72] Transatlantic Route Renewal Case, C.A.B. Order E-23230 (1966). During this period, Italy also sought increased operating rights to Los Angeles, and beyond New York to Mexico City. *See* LOWENFELD, *supra* note 50, at II-82.

the one-year termination clock.[73] The negotiations during the ensuing twelve months failed to produce an agreement, and accordingly the 1948 U.S.-Italy Bilateral was terminated on May 30, 1967.

Air transport service between the two nations nevertheless continued, but with the Italian government maintaining its all-cargo restrictions and threatening fifth-freedom restrictions.[74] After thirty-three rounds of negotiations between the two governments, the two nations concluded a new bilateral in 1970. Then, the Italian government objected to the landing of the new and larger Boeing 747 Freighter (B747F), which it argued was not in existence when the new bilateral was signed.[75]

D. United States v. France (1978)

Perhaps the most interesting of the arbitrations in which the United States has been involved concerned a subsequent dispute between the United States and France over Pan Am's "change of gauge" operations[76] between London and Paris. In 1978, Pan Am proposed service between San Francisco and Paris via London, flying a Boeing 747 (B747) from San Francisco to London, and offloading the remaining passengers onto a smaller Boeing 727 (B727) aircraft for the duration of the London-Paris journey. The French objected, arguing that such "change of gauge" operations were not permitted under the US-France bilateral.[77] The French government banned the new service, insisting that the U.S. first enter into negotiations by which the French would be given a privilege of equal value. However, the United States took the position that Pan Am's proposed operations were already permitted under the existing bilateral. Efforts to resolve the conflict by consultations and exchange of diplomatic notes between the two nations proved unsuccessful.[78]

Pan Am proceeded to commence the "change of gauge" operations on May 1, 1978. After twice issuing warnings to the carrier, on May 3 the French gendarmes seized the B727 at Paris Orly Airport, refused to allow the

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[73] *U.S.-Italy Arbitration*, *supra* note 64, at 516.

[74] LOWENFELD, *supra* note 50, at II-82.

[75] *See A Review of U.S. International Aviation Policy, Hearings Before the House Comm. on Public Works and Transportation*, 97th Cong. 438 (1982) (testimony of Donald C. Comlish).

[76] "Change of gauge" is a term borrowed from the early railroad industry. It involves substituting equipment of a different size along a through route, and transferring the passengers from the larger to the smaller aircraft. *See* Lori Damrosch, *Retaliation or Arbitration-or Both? The 1978 United States-France Aviation Dispute*, 74 AM. J. INT'L L. 785 (1980).

[77] 61 Stat. 3445, *amended by* 1 U.S.T. 593; 2 U.S.T. 1037; 10 U.S.T. 1791; 13 U.S.T. 1860; 20 U.S.T. 2684.

[78] Damrosch, *supra* note 76, at 785-86.

passengers to disembark, and ordered the plane returned to London.[79] Pan Am suspended the service and brought an action in French courts seeking reversal of the decision.[80] On May 4, the U.S. government requested expeditious arbitration of the dispute under Article X of the bilateral.

Absent a satisfactory response on behalf of the French government, the C.A.B. issued a decision under Part 213 of its Economic Regulations[81] suspending Air France's service to Los Angeles via Montreal, effective July 12.[82] The U.S. government contended that the government of France had "taken action which, over the objections of the United States Government, will impair, limit, terminate and deny operating rights and deny the fair and equal opportunity of U.S. carriers to exercise the operating rights provided for in the United States-France Air Transport Services Agreement"[83] On July 11, the day before the suspension was to become effective, the United States and France entered into an Arbitral *Compromis* providing for an expeditious arbitration of the dispute and requiring that the CAB's suspension order be vacated.[84]

On December 9, 1978, the arbitral tribunal rendered its decision, concluding that France had wrongfully denied Pan Am's "change of gauge" operations which were implicitly authorized by the bilateral and that C.A.B.'s threatened invocation of its Part 213 sanctions was lawful.[85] The substantive treaty

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[79] Comlish Testimony, *supra* note 60, at 438-39.

[80] Damrosch, *supra* note 76, at 786.

[81] Although concerns about the unfair competitive practices of foreign air carriers were voiced in the United States as early as 1961, the first U.S. economic regulatory mechanism designed to combat foreign anti-competitive practices was promulgated in 1970 as Part 213 of the U.S. C.A.B.'s Economic Regulations. 14 C.F.R. pt. 213 (1985). Part 213 empowered the C.A.B., upon finding that the "public interest" so required, to insist that a foreign carrier file its schedules with the Board. Where the foreign carrier was operating pursuant to an existing bilateral, the C.A.B. could require the foreign carrier to file its schedules only upon a C.A.B. determination that the foreign carrier's government had limited, terminated, or denied the operating rights of a U.S. carrier under the bilateral or had otherwise denied it a fair and equal opportunity to exercise such rights. Upon such a finding, the C.A.B. could issue an order (subject to presidential veto) blocking the inauguration or continuation of those operations set forth in the schedule. The C.A.B. was sunsetted on December 31, 1984, and its responsibilities were transferred to the U.S. Department of Transportation [U.S.D.O.T.]. *See* Paul Dempsey, *The Rise & Fall of the Civil Aeronautics Board—Opening Wide the Floodgates of Entry*, 11 TRANSP. L.J. 91 (1979).

[82] *See* C.A.B. Order 78-5-106 (1978); C.A.B. Order 87-6-82 (1978); C.A.B. Order 78-6-202 (1978); *and* Paul Dempsey, *The International Rate and Route Revolution in North Atlantic Passenger Transportation*, 17 COLUM. J. TRANSNAT'L L. 393, 430-40 (1978).

[83] C.A.B. Order 78-5-45 (1978).

[84] *See* C.A.B. Order 78-7-33 (1978); Dempsey, *supra* note 82, at 440.

[85] Case Concerning the Air Services Agreement of 27 March 1946, Arbitral Award (United States v. France), Dec. 9, 1978, 54 I.L.R. 304 (1979) [hereinafter 1978 U.S.-France Arbitration].

interpretation question was whether Pan Am's "change of gauge" in London to smaller aircraft on its San Francisco-Paris flight violated the United States-France Bilateral. The tribunal ultimately answered this question in the negative, and therefore concluded that French authorities had on May 3, 1978, unlawfully suspended Pan Am's service in that market.[86] France raised major procedural defenses to the United States' claims.

On May 18, 1978, Pan Am brought an action before the Administrative Tribunal of Paris seeking a determination that the suspension of its service was *ultra vires*. France argued that the Arbitral Tribunal could not properly reach the issues before it until Pan Am had exhausted the judicial remedies available in the Paris Administrative Tribunal under French law.[87] The Arbitral Tribunal held that the requirement of exhaustion of local remedies is inapplicable where the dispute is between two governments over issues of treaty interpretation involving the conduct of air transport services.[88]

See generally Damrosch, *supra* note 76, at 788. This controversy illustrates the effective use of unilateral sanctions under Part 213 as a means of facilitating expeditious implementation of a bilateral's arbitration provisions. As one commentator noted:

> One result of the U.S. action was that France had substantially more interest in a speedy resolution of the dispute than before the entry of the first part 213 order. Thus, the threat of retaliation served as a substitute for effective international judicial mechanisms to enforce a preexisting commitment to arbitrate.

Damrosch, *supra* note 76, at 779.

However, the *Compromis* tended to disfavor the interests of Pan Am, for although it established a relatively prompt date for conclusion of the arbitration (i.e., December 10), it allowed Pan Am to continue its change of gauge operations for only one-half of the days since the dispute commenced on May 1. Since the *Compromis* was not signed until mid-July, Pan Am had already lost the opportunity to participate in much of the summer peak season. Hence, total maintenance of the status quo, from May 1 to July 14, and partial maintenance of it between July 14 and December 10, inured to the benefit of the French-flag carrier, Air France, and to the detriment of the U.S.-flag carrier, Pan American. *Id.* at 801-02; Stanley Rosenfield, *International Aviation: United States Government-Industry Partnership*, 16 INT'L L. 473, 488, 495 (1982).

[86] 1978 U.S.-France Arbitration, *supra* note 85, at 305-06.

[87] *Id.* at 309. For an argument in favor of the increased use of domestic courts for the resolution of international disputes, *see* RICHARD FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 212-35 (Robert Kogod ed., 1981).

[88] *See* 1978 U.S.-France Arbitration, *supra* note 85, at 324-25 (holding

> 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 refusal to grant reparation for this unlawful act, *viz.*, a denial of justice.

(quoting Swiss Confederation v. Federal Republic of Germany (No. 1), 25 I.L.R. 33, 42 (1958))).

France also objected to the C.A.B. Orders of May 9 and May 31, 1978, issued under Part 213 to the Board's Economic Regulations.[89] The May 9 order required Air France and U.T.A. to file their existing and new schedules with the Civil Aeronautics Board. The C.A.B. threatened to curtail Air France's thrice weekly service between Paris and Los Angeles; the order was suspended as soon as an Arbitral *Compromis* had been signed between the two governments.[90] France contended that these unilateral actions were improperly designed to coerce it to submit to binding arbitration and to agree to the expedited procedures and interim arrangements (including a partial resumption of Pan Am's operations) provided for in the *Compromis*.[91]

A prior international wrong, exhaustion of alternative remedies, and necessity and proportionality have been advanced as the requirements imposed by customary international law upon retaliation.[92] France took the position that the C.A.B.'s Orders were unjustified under the law of reprisals and under the rule of proportionality.[93] It contended that reprisals may only be initiated in the case of necessity, where other legal alternatives for resolution of the dispute do not exist. Clearly, the alternative of arbitration still existed under Article X of the 1946 bilateral; the United States had not exhausted its noncoercive remedies. France also alleged that the measures taken by the United States were disproportionate to the harm suffered in that the deprivation of Air France's three weekly flights to Los Angeles (which were clearly authorized under the bilateral) caused it to suffer an economic prejudice far exceeding that endured by Pan Am (services which at least arguably fell

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For a review of the opportunities domestic tribunals offer for adjudication of international legal disputes, see generally FISHER, *supra* note 87, at 212-35.

[89] C.A.B. Order 78-6-82 (1978); C.A.B. Order 78-6-292 (1978).

[90] 1978 U.S.-France Arbitration, *supra* note 85.

[91] *Id.*; Damrosch, *supra* note 76, at 803.

[92] Derek Bowett has proffered an interesting model for assessing the lawfulness of economic reprisals, which includes three succinct requirements:

1. A prior international delinquency against the claimant State. (This would exclude reprisals against economic measures not in themselves unlawful.)
2. Redress by other means must be either exhausted or unavailable.
3. The economic measures must be limited to the necessities of the case and proportionate to the wrong done.

Derek Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1, 9-10 (1972) (citations omitted); Paul Dempsey, *Economic Coercion and Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto*, 9 CASE W. RES. J. INT'L L. 253, 261-62 (1977).

[93] 1978 U.S.-France Arbitration, *supra* note 85.

outside the scope of the bilateral since the Pan Am aircraft landing in Paris had not originated in the United States).[94]

Must a nation explore all political and legal alternatives for dispute resolution before it may institute unilateral coercive measures to compel compliance with international legal obligations?[95] The Tribunal noted the general obligation for negotiation established by Article 33 of the UN Charter, as well as Article VIII of the United States-France Bilateral, which imposes analogous obligations of consultations to resolve aviation disputes arising thereunder.[96] But it could find no customary rule of international law which prohibits countermeasures[97] from being employed until the available arbitral or judicial machinery has been instituted.[98] However, once the arbitral or adjudicatory tribunal is commissioned to resolve the controversy, the parties' rights to employ coercive measures are reduced to the extent that the tribunal has the means necessary to achieve the interim result sought by their employment.[99]

Indeed, it would seem that U.S. threats of retaliatory sanctions were instrumental in upsetting the status quo sufficiently as to diminish France's superior position and give it a strong incentive to engage expeditiously in the third-party arbitration mechanism mandated by Article X of the bilateral.[100]

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[94] *Id.*

[95] While establishing no general rule prohibiting the use of coercive means during negotiations, the Tribunal offered these words of caution:

> It goes without saying that recourse to countermeasures involves a great risk of giving rise, in turn, to further reaction, thereby causing an escalation which will lead to a worsening of the conflict. . . . They should be used with a spirit of great moderation and 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 countermeasures during negotiations, especially where such countermeasures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.

Id. at 339-40.

[96] *Id.* at 339.

[97] *See* ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 45 (1984).

[98] *Id.* at 340; Damrosch, *supra* note 76, at 796-97.

[99] 1978 U.S.-France Arbitration, *supra* note 85, at 340-41. Conversely, where the tribunal lacks adequate ability to resolve interim measures to protect the aggrieved party, it may not lose its unilateral right to engage in coercive conduct. *Id.* at 341.

[100] As one commentator has aptly noted, "the threat of retaliation served as a substitute for effective international judicial mechanisms to enforce a preexisting commitment to arbitrate." Damrosch, *supra* note 76, at 799. She also provided an excellent explanation of the occasional need to upset the status quo:

> If only one party has been injured, the expectation of possible gain from

Hence, the threat or employment of coercive means may sometimes be used in eliminating the incentive for delay and encouraging a prompt resolution the dispute.

The Tribunal also addressed what it described as the well known rule requiring proportionality of countermeasures:[101] "that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach."[102] France had argued that the U.S. denial of Air France's thrice-weekly service from Los Angeles far exceeded the injury suffered by Pan Am as a result of the French government's refusal to allow its change of gauge at London.[103] But in the Tribunal's view, a strict economic comparison of economic injury suffered by the two carriers was only part of an appropriate assessment of proportionality.[104] An evaluation also had to be made of the importance of the questions of principle arising from the alleged breach.[105] Taking into account the broader policy ramifications of the French interpretation of its bilateral as prohibiting change of gauge upon U.S. air transport relations with other nations with which it has concluded similar bilaterals, the Tribunal concluded that the coercive means employed by the United States were not disproportionate to the French actions to which they responded.[106] Hence, the immediate economic injury suffered must be evaluated in the context of this broader policy controversy in order to appraise whether the countermeasures are proportionate to the harm suffered, although this

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> arbitration is likely to be asymmetrical in the early stages of a treaty dispute. One party believes itself the victim of unlawful action; the other party enjoys the status quo and has little incentive to participate in facilitating an arbitration that might change that status quo. The aggrieved party can suggest that adjudication will help keep relations amicable; or it can point to a preexisting arbitration treaty or arbitration clause in the treaty in dispute; or, where appropriate, it can invoke the compulsory jurisdiction of the [ICJ]. But since it is of course rare to find a tribunal already in place at the inception of the dispute with jurisdiction to change the status quo by entering and enforcing interim protective orders, the claimant state will almost always be at a severe disadvantage.

Id. at 798.

[101] The Arbitral Tribunal used the term "counter-measures" repeatedly. *See also* ZOLLER, *supra* note 97, at 137.

[102] 1978 U.S.-France Arbitration, *supra* note 85, at 338.

[103] *Id.* at 319.

[104] *Id.* at 338.

[105] *Id.*

[106] *Id.*

weighing and balancing of competing interests can only be performed in general approximations.[107]

The Arbitral Tribunal's decision in the 1978 *United States v. France* dispute was silent as to the international law requirement of a prior international delinquency against the claimant state. However, its acceptance as a principle of customary international law appears to be largely unquestioned (although commentators disagree as to whether the breach of a treaty obligation need be "material," and as to whether the responding state must have a "good faith" belief in the existence of a prior legal wrong). The criterion of exhaustion of noncoercive methods of dispute resolution does not mean that the domestic courts of the offending government must first be given an opportunity to provide a remedy. Nor does this mean that economic reprisals must be withheld until an arbitral or adjudicatory tribunal is commissioned to hear the case. Also, the requirement of proportionality in responding to coercion is not limited merely to an assessment of the comparative economic injury endured by the two parties, but also embraces the political importance which the governments attach to the legal questions at issue.[108]

One commentator has pointed out that the real conflict between the two governments was not the legal issue of whether change of gauge rights beyond London to Paris were conferred by the bilateral. According to Professor Richard Bilder, France's denial of Pan Am's efforts was predicated upon its desire to force the United States to give it over-the-pole operating rights to the west coast of the United States.[109] The United States' decision to submit the legal issue to arbitration, employing the C.A.B.'s Part 213 as a coercive catalyst to get the French to the negotiating table, irritated the French and

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[107] *Id.* One source has summarized the Tribunal's liberal definition of the principle of proportionality:

> First, it permits states to apply countermeasures that would be disproportionate in an economic sense, in order to enforce a principle. Second, it implies that considerations of principle are all the more weighty when third countries are watching. Figuring third-country reactions into the proportionality formula is novel but sensible, especially in the aviation context. Because of the worldwide network of essentially similar agreements, the way two states interpret and apply their bilateral agreement can have repercussions far beyond the particular case.

Damrosch, *supra* note 85, at 792.

[108] Bowett, *supra* note 92, at 5.

[109] Richard Bilder, *Some Limitations on Adjudication as an International Dispute Settlement Technique*, 23 VA. J. INT'L L. 1, 6 (1982).

frustrated their real objective.[110] Professor Bilder has noted this example as reflecting one of the disadvantages of third-party dispute resolution: "A tribunal must necessarily focus narrowly on the immediate 'legal' issue before it, which may have little to do with the true source of contention between the parties."[111] In several bilaterals concluded since the early 1990s, the U.S. has inserted clauses specifically authorizing change of gauge operations. This should reduce the likelihood of future disputes on the subject.

E. Belgium v. Ireland (1981)

To date, the only international aviation dispute brought to arbitration not involving the United States was between Belgium and Ireland over the interpretation of the capacity clause in their bilateral. The original *Bermuda I* model capacity clause had precluded any explicit predetermination of capacity, and instead limited it to the general provision that "air services are to provide capacity adequate to the traffic demands between the country of which such airline is a national and the country of ultimate destination of traffic."[112] The Belgium-Ireland Bilateral provided that the capacity offered over the route in question "shall be adapted to traffic needs" and take into account the mutual interests of the airlines serving the routes so that their operations are not "unduly affected."[113]

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[110] *Id.*

[111] *Id.* at 4.

[112] Jacques Naveau, *Away From Bermuda?*, 8 AIR L. 44, 44-45 (1983). *Bermuda I*-type agreements left to the discretion of carriers the levels of capacity offered, although there were vague provisions requiring that: (a) air services should be closely related to traffic demand; (b) there should be a fair and equal opportunity for the air carriers of the two nations to operate over the designated routes; and (c) the "interest of the air carriers of the other government shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same route." Moreover, each nation enjoyed the right of ex post facto review of capacity. *Id.*; United States Standard Form of Bilateral Air Transport Agreement, arts. 8-10 (1953). *See Bilateral Agreements*, *supra* note 19, at 241, 250. The capacity language of *Bermuda I*-type bilaterals has been described as "deliberately vague." Gertler, *supra* note 29, at 803. The ex post facto review provisions thereof have been rarely used. *Id.* at 803-04.

[113] Article VIII of the 1955 Belgium-Ireland bilateral provided:

> (1) The transport capacity provided by the contracting parties' airlines on the agreed services shall be adapted to traffic needs.
>
> (2) On joint routes, the airlines designated by the contracting parties shall take into account their mutual interests so that their respective air services shall not be unduly affected.

Naveau, *supra* note 112, at 46-47.

Belgium argued that excessive capacity existed in the market, that capacity was imbalanced in favor of Aer Lingus (the Irish-flag carrier), and that the ten weekly flights of the two nations should be reduced to eight, to be divided equally between the carriers of both nations, Aer Lingus and Sabena (the Belgian-flag carrier). The average load factors in the market during the preceding two years had ranged between thirty-six percent and forty-three percent.[114] Ireland responded that the market had no overcapacity considering such factors as revenues, costs, and expanding traffic, and that there existed no universal rule on the subject of capacity divisions under bilaterals. Further, Ireland maintained that equalizing capacity share would fail to take into account Aer Lingus' role in developing the market or prior capacity agreements concluded between the two governments.[115]

For the sake of expediting resolution of the controversy, a single arbitrator was elected under Article X of the bilateral, Henrik Winberg, who had formerly served as Sweden's Director of General Civil Aviation, and ECAC's

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[114] Belgium maintained:

a) that excess capacity had been created;
b) that there was an imbalance in traffic carried;
c) that these two problems, contrary to the agreement, created a third problem, for they unduly affected the services of the carrier designated by Belgium;
d) that these discrepancies should be corrected by reducing the total number of services to 8, to be shared equally by the two designated airlines: 4 for Sabena and 4 for Aer Lingus;
e) that such an equal distribution was stipulated by the agreement, and that equality was also set as an objective by the designated airlines.

Id. at 48.

[115] Ireland maintained:

a) that there was no overcapacity in this case, i.e., taking the route characteristics into account—level of revenues, costs, and expanding traffic—as aviation agreements could not set a universal rule in this respect;
b) that, on the contrary, prospects for traffic growth were favourable, particularly because the market had been insufficiently developed so far (in terms of tourism);
c) that there were grounds for maintaining adequate frequency to ensure market development;
d) that a reduction in frequency would be contrary to the public interest (particularly with the requirements for schedules associated with traffic to and from Brussels, the EEC headquarters);
e) that an equal share in capacity would not take into account the effort made by Aer Lingus, which alone had created and developed the route over the years, or the capacity adjustments already accepted since the advent of Sabena on the market in 1979.

Id. at 48-49.

president.[116] As a matter of general principle, Mr. Winberg found the existence of excess capacity inimical to the development of a sound aviation industry.[117]

But Winberg also assessed the historic contribution of Aer Lingus to the market, pointing out that the carrier determined capacity exclusively prior to 1979, reducing its service as Sabena entered the market, and that sixty percent of the traffic originated in Ireland. Nevertheless, passenger load factors had been but forty percent during the prior two years—"a very low figure compared with other European routes operated by the designated airlines and other European airlines."[118] Mr. Winberg concluded "that overcapacity has existed on the Brussels-Dublin route for two years, that future growth is not likely to remedy this situation and that a reduction of capacity is needed as early as possible."[119] He therefore ordered that the existing ten roundtrips in the Sunday evening-Friday evening time period be reduced in number. But he did not feel that there should be an equal division of frequencies, suggesting that Sabena reduce its four roundtrips by one, and that Aer Lingus yield two of its six roundtrips.[120] These reductions would, he thought, produce an average load factor of fifty percent in the market,[121] and thereby increase the profitability of both carriers' operations.

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[116] *Id.* at 47-48.

[117] Specifically, he found:

> —Air transport is a collective transport mode, which is necessarily limited to certain days and times for the operation of services.
>
> —Any excess capacity is prohibited by the need to avoid operations that do not comply with sound airline service economics.
>
> —The airlines should take their mutual interests into account so that their respective services are not unduly impaired. In particular, this means that an airline may not provide excessive capacity likely to endanger the viability of the other carrier's operations on a given route or to limit, on that route, its role of operating the various categories of traffic on the most profitable basis.

Jacques Naveau, A *New Arbitration Verdict Involving a Bilateral Agreement: Arbitration On the Belgium/Ireland Capacity Clause*, 38 I.T.A. WKLY. BULL. 975 (1981) [hereinafter New Arbitration Verdict].

[118] Naveau, *supra* note 112, at 54.

[119] *Id.* at 55.

[120] *Id.* at 56.

[121] *See id.* at 50, 57. Jacques Naveau, *A New Arbitration Verdict Involving a Bilateral Agreement: Arbitration On the Belgium/Ireland Capacity Clause*, 38 I.T.A. WKLY. BULL. 980-81 (1981).

F. United States v. United Kingdom (1992)

Among the general objectives established by the Chicago Convention is the obligation of ICAO to "develop the principles and techniques of air navigation and to foster the planning and development of international air transport so as to" *inter alia*, "[a]void discrimination between contracting States."[122] In addition to this broad policy directive to assist in achieving an international aviation environment free of discrimination are the specific provisions of Article 15 of the Chicago Convention, which require ICAO's members to give foreign carriers nondiscriminatory treatment in the use of their airports and air navigation facilities, and to assess airport and user fees at a level no higher than those charged local aircraft in the performance of like or similar services.[123]

The United States-United Kingdom passenger market is the largest in the transatlantic sphere. Sir Winston Churchill described these two nations as separated by a common language. Indeed, they have held vigorous debates over the policy differences between them in the field of aviation.

A long-standing dispute between the two governments has focused on allegations of discriminatory and excessive landing fees and user charges at British airports. One aspect of these which caused irritation was a distance-based formula whereby landing fees increased with the distance flown, thereby falling most heavily upon transatlantic carriers. Because the fees were not related to the costs of providing such services, the United States in 1975 found under its Fair Competitive Practices Act (FCPA)[124] that they were excessive and discriminatory. As a consequence, the distance-based formula was eliminated for most British airports immediately, although they were retained at Scottish airports until late 1979.[125] However, other aspects of these charges continued to cloud Anglo-American aviation relations.

In 1977, the British Airports Authority (BAA)[126] revised its fee schedule to impose a steep increase in peak-period charges. As a portion of the peak

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[122] Chicago Convention, *supra* note 2, art. 44(g). *See* Edwin Bailey, *Article 15 of the Chicago Convention and the Duty of States to Avoid Discriminatory User Charges: The US-UK London Heathrow Airport User Charges Arbitration*, 19 ANNALS AIR & SPACE L. 81 (1994).

[123] Bailey, *supra* note 122. *See* Rod Margo & William MacCary, *The Chicago Convention and the Resolution of Landing Fee Disputes*, 19 ANNALS AIR & SPACE L. 501 (1994).

[124] International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. § 1159(b) (West Supp. 1989).

[125] C.A.B. *Report to Congress* 102 (1979).

[126] At this writing, BAA owns seven airports in the U.K., including Heathrow, and operates ten foreign airports. *See* BAA, Corporate: About BAA, http://www.baa.com/main/corporate/about_baa_frame.html (last visited Feb. 5, 2004).

factor, BAA added a weight element.[127] These weight-based runway charges allegedly discriminated against the wide-bodied aircraft used by transatlantic carriers:

> For example, the British Airways Trident requires more runway strength than the B-747, and the British Airways Concorde greater runway length than the B-747, but each Trident landing costs only about one-ninth that of a B-747, and each Concorde landing costs a fraction of the B-747 cost. Parking charges, also weight-based, are disproportionately high for B-747 aircraft relative to spatial requirements.[128]

After the peak period rates were announced, U.S. carriers asked their government to take retaliatory action under the FCPA. The U.S. government declined to take such action, but continued to negotiate with the British on the issue, repeatedly requesting access to more cost data. However, a provision prohibiting excessive or discriminatory user charges was incorporated as a part of the newly negotiated bilateral, the U.S.-U.K. Air Services Agreement of 1977 (*Bermuda II*).[129]

U.S. air carriers are authorized to serve London's Heathrow Airport and other U.K. destinations pursuant to *Bermuda II*.[130] Prior to 1991, the two U.S. flag carriers designated by the United States under *Bermuda II* to serve Heathrow were Pan Am and TWA. In 1991, Pan Am and TWA sold their Heathrow operating authorities to United Airlines and American Airlines, respectively.[131]

To prohibit unfair, arbitrary, and discriminatory fees, many bilaterals, including *Bermuda II*, require that airport fees, rates, and charges be just, reasonable and nondiscriminatory. Given the difficulty that Pan Am and TWA were having at Heathrow, *Bermuda II's* airport pricing provisions, negotiated in 1977, were more detailed than most. Not only must such fees be reasonable

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[127] C.A.B. *Report to Congress* 115-16 (1977).

[128] *A Review of U.S. International Aviation Policy, Hearings Before the House Comm. on Public Works and Transportation*, 97th Cong., 1st and 2d Sess. 52 (1982) (statement of C.E. Meyer, Jr.).

[129] C.A.B. *Report to Congress* 115-116 (1977). *See generally* Dempsey, *supra* note 82.

[130] Agreement Concerning Air Services, July 23, 1977, U.S.-U.K., 28 U.S.T. 5367, as amended Apr. 25, 1978, 29 U.S.T. 2680, Dec. 27, 1979, 32 U.S.T. 524, Dec. 4, 1980, 33 U.S.T. 655, Feb. 20, 1985, May 25, 1989, and Mar. 11, 1994.

[131] Samuel Witten, *The U.S.-U.K. Arbitration Concerning Heathrow Airport User Charges*, 89 AM. J. INT'L L. 174 (1995); PAUL DEMPSEY & LAURENCE GESELL, AIRLINE MANAGEMENT: STRATEGIES FOR THE 21ST CENTURY 10-18 (1997).

and nondiscriminatory, but the governments also were obliged to use their "best efforts" to ensure that charges were equitably apportioned among categories of users, were based on sound economic principles, and resulted in no more than a reasonable return on investment, after depreciation. Article 10(2) provided: "Neither Contracting Party shall impose or permit to be imposed on the designated airlines of the other Contracting Party user charges higher than those imposed on its own designated airlines operating similar international air services."[132] Article 10(3) provided:

> User charges may reflect, but shall not exceed, the full cost to the competent charging authorities of providing appropriate airport and air navigation facilities and services, and may provide for a reasonable rate of return on assets, after depreciation. In the provision of facilities and services, the competent authorities shall have regard to such factors as efficiency, economic, environmental impact and safety of operation. User charges shall be based on sound economic principles and on the generally accepted accounting principles within the territory of the appropriate Contracting Party.[133]

Article 10(5) required each government to use its "best efforts" to encourage the competent airport authorities and airlines "to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles set out in this Article."[134] In *Bermuda II*, the parties also reaffirmed their adherence to the Chicago Convention, and noted that the obligations agreed to in the bilateral were complementary to those in the Chicago Convention. Thus, *Bermuda II's* Article 10 amplifies the requirements of Chicago's Article 15.[135]

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[132] Convention on International Civil Aviation, Dec. 7, 1994, art. 10(2), 61 Stat. 1180. Accord, *id.* art. 15, which reads::

> Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher, (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

[133] Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Norther Ireland (July 23, 1977), CCH Avi. ¶ 26,540c.

[134] *Id.* art. 10(b).

[135] Bailey, *supra* note 122, at 88-89.

Article 16 provided that "[e]ither Contracting Party may at any time request consultations on the implementation, interpretation, application or amendment of this Agreement or compliance with this Agreement." Under Article 17, disputes not settled by consultation may be resolved by binding arbitration.[136]

After failing to secure adequate cost data from the British government, the United States hired an independent consultant to assess the user charges. In a report concluded in the spring of 1979, the consultant found that charges at Heathrow seemed to exceed any identifiable costs. The study was tendered to the BAA for comment, but no response was forthcoming. Further discussions between the two governments led the United Kingdom to eliminate some of the discriminatory elements of the fees in late 1979, including the distance rule formula for Scottish airports.[137]

U.S. officials continued to seek reliable cost data. The U.S. government called for formal consultations with the U.K. in 1981.[138] In 1982, the BAA was persuaded to postpone an increase in charges.[139] Frustration with governmental inertia led many carriers to file suit in British courts seeking a reduction of allegedly excessive landing fees.[140] Pan Am instituted an action against the BAA in the U.K. High Court seeking to recover $10.5 million in "excessive and illegal" fees which had been collected between April 1 and August 31, 1980.[141] TWA and eighteen foreign airlines[142] formed a British Airports User Action Group and brought a parallel action in the High Court against John Nott (the Secretary of State for Trade) and BAA.[143] These

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[136] Witten, *supra* note 131, at 176-77.

[137] C.A.B. *Report to Congress* 102 (1979).

[138] *A Review of U.S. International Aviation Policy, Hearings Before the House Comm. on Public Works and Transportation*, 97th Cong., 1st and 2nd Sess. 591 (1982) (statement of Robert D. Hormats).

[139] C.A.B. *Report to Congress* 82 (1932); *A Review of U.S. International Aviation Policy, Hearings Before the House Comm. on Public Works and Transportation*, 97th Cong., 1st and 2nd Sess. 1217-18 (1982) (testimony of Robert D. Hormats).

[140] *A Review of U.S. International Aviation Policy, Hearings Before the House Comm. on Public Works and Transportation*, 97th Cong., 1st and 2d Sess. 35 (1982) (statement of C.E. Meyer. Jr.).

[141] J. PLAIGNAUD, ITA STUDY ON AERONAUTICAL CHARGES 31 (1981). Pan Am challenged the Airport Authority Act of 1955, which allowed BAA to impose fees that covered costs plus a six percent return on capital assets. *Id.*

[142] The plaintiff carriers were Air Canada, Air France, Air Mauritius, Alitalia, Austrian, BWIA International, Lufthansa, Flying Tiger, Gulf Air, Iberia, KLM, Sabena, Saudi Arabia, Scandinavian Airlines System, Swissair, TWA, and Trans Mediterranean Airways. *Id.*

[143] *Id.*

conflicts appeared, falsely, to have been resolved.[144] The U.K. government lowered Heathrow fees when the U.S. Department of Transportation threatened to triple fees for British carriers at New York's John F. Kennedy Airport.[145]

Although some changes were made pursuant to a 1983 Memorandum of Understanding (MOU) between the two governments, the system remained a focus of intergovernmental dispute, culminating in a U.S. demand for arbitration in 1988.[146] In requesting arbitration, the U.S. government alleged that the U.K. government had not adequately supervised the operator of Heathrow Airport, permitting BAA to impose charges on U.S. airlines that were excessive and discriminatory.[147] A three-member arbitration panel was established in January 1989. It held hearings at The Hague from July 2 to August 2, 1991, and issued a 369-page decision on November 20, 1992.[148]

The arbitration panel ruled that the U.K. had failed to use its best efforts to ensure that landing fees charged at Heathrow between 1983 and 1989 were fair and reasonable.[149] The panel assessed the legal status of the 1983 MOU entered into by the U.K. and U.S. governments in order to resolve problems

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[144] C.A.B. *Report to Congress* 73 (1983).

[145] Matt Scocozza, Speech before the 45th Annual Meeting of Delta Nu Alpha Transportation Fraternity, Inc., at San Antonio, Texas (Oct. 3, 1985) [hereinafter Scocozza Speech].

[146] On Dec. 16, 1988, the U.S. initiated the arbitration with a note from the Department of State to the British Embassy in Washington, D.C. Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law: Organization of American States*, 88 AM. J. INT'L L. 719, 738 (1994). A year earlier, this author had suggested that such a complaint might be filed at ICAO:

> [E]ven assuming that the ICAO Council is a body which can render only a political decision reflecting the position of member governments, there may be instances when the complaining party believes that it would win where, for example, landing fees at a popular international airport are exorbitant and discriminate against foreign carriers. The offended governments might be inclined to direct their Council representatives to vote that the fees violate Article 15 and the Council's 1981 Policies on Charges for Airports and Route Air Navigation Facilities. The potential sanctions under Articles 87 and 88 are among the most severe available to any multilateral organization. Their threat would likely compel the losing party to comply with the Council's determination expeditiously.

DEMPSEY, *supra* note 3, at 302.

[147] U.S., U.K. Resolve Airport Fee Dispute, D.O.T. Says; U.K. Agrees to Pay $29.5 Million Settlement, PR NEWSWIRE, Mar. 11, 1994.

[148] Witten, *supra* note 131, at 184; Bailey, *supra* note 122.

[149] Carole A. Shifrin, *Commons Panel Offers Bilateral Compromise*, AVIATION WK. & SPACE TECH., Mar. 21, 1994, at 33.

regarding the interpretation and application of *Bermuda II*.[150] The U.K. argued that the MOU on airport user charges was not a legally binding international agreement.[151] The Arbitration Panel concluded that the MOU was "a potentially important aid to interpretation but is not a source of independent legal rights and duties capable of enforcement in the present Arbitration."[152]

On March 11, 1994, the United States and U.K. exchanged diplomatic notes settling the Heathrow arbitration. The U.K. government paid the U.S. government $29.5 million in settlement of the dispute.[153] It also agreed to phase out the international peak pricing at Heathrow in four installments over a period from April 1, 1995-1998, and assured that no such fee would be imposed again before April 1, 2003.[154] The settlement was reached after five months of intensive negotiations, following five years of litigation over Heathrow's landing fees, which itself followed five years of failed attempts to resolve the problem through negotiations. The British government also agreed to drop its claim that some U.S. airports overcharged U.K. carriers.[155] Language in the Arbitration Panel's ruling had concerned U.S. airport operators because it suggested that a compensatory ratemaking scheme might violate the bilateral.[156]

G. Australia v. United States (1993)

Under the U.S.-Australia bilateral,[157] the United States may designate a carrier to serve the North Pacific route from the United States to any two points in Australia (chosen from Brisbane, Cairns, Melbourne and Sydney) via Canada, Japan, Southeast Asia, and the Philippines. For many decades, neither nation had equipment to fly the route. In June 1991, Northwest Airlines was

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[150] Ian Sinclair, *Book Review and Note: The Concept of Treaty in International Law*, 91 AM. J. INT'L L. 748 (1997).

[151] James McNeill, *International Agreements: Recent U.S.-U.K. Practice Concerning the Memorandum of Understanding*, 88 AM. J. INT'L L. 821 (1994).

[152] Nash (Leich), *supra* note 146, at 742-43.

[153] Conrad K. Harper, *Friedmann Award Address*, 35 COLUM. J. TRANSNAT'L L. 265, 266 (1997).

[154] Nash (Leich), *supra* note 146, at 740.

[155] *U.K. to Pay U.S. $29.5 Million in Heathrow Fee Dispute*, AVIATION DAILY, Mar. 17, 1994, at 5.

[156] *U.S. and U.K. Settle Heathrow Charges; U.K. Drops Claim Against U.S. Airports*, AIRPORTS, Mar. 15, 1994, at 100.

[157] Air Transport Agreement Between the United States and Australia, Dec. 3, 1946, U.S.-Aust., 61 Stat. 2464 [hereinafter U.S.-Australia Bilateral].

designated to serve the New York-Osaka-Sydney route,[158] and began providing service over it on October 27, 1991. Soon, between 80-85% of Northwest's traffic on the route was local Japanese-Australian passengers, with no link to the United States, and therefore arguably violative of the "primary objective" provision of the capacity provision in Annex B, Section IV of the bilateral.[159] The "primary objective" clause requires that the traffic on the fifth-freedom route in question should be primarily based on traffic going to or coming from an airline's country of registry.[160] Given the enormous circuity of routing New York passengers bound to Sydney through the out-of-the-way locale of Osaka, adding more than ten hours to the journey, it is no wonder that few Americans or Australians were interested in Northwest's offering, and that the traffic on the route was primarily Japanese headed to Australia, or Australians headed to Japan—seventh-freedom[161] traffic not authorized under the bilateral. But

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[158] D.O.T. Order 91-6-26 (1991).

[159] Section IV(4) of the U.S.-Australia Bilateral provides, "the total air transportation services offered [by the airlines] over the routes specified in this Annex shall bear a close relationship to the requirements of the public for such services." Section IV provides,

> That the services provided by [the airlines over these routes] shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country which designates such airline and the country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries . . . 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 should be related:
>
> (a) to the traffic requirements between the country of origin and the countries of destination;
>
> (b) to the requirements of through airline operation; and
>
> (c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

U.S.-Australia Bilateral, *supra* note 157, annex B, § IV.

[160] Bilaterals modeled on *Bermuda I*, such as the U.S.-Australia Bilateral, provide that the "primary objective" of the provision of capacity is to meet traffic demands between the country of nationality of the air carrier and the country of destination of the traffic, with fifth-freedom traffic capacity bearing a relationship to the carrier's combined third- and fourth-freedom traffic on the route in question. Air Services Agreement with the United Kingdom, Feb. 11, 1946, U.S.-U.K. 60 Stat. 1499. Specifically, Annex B(ii) of the U.S.-Australia Bilateral, which addressed North Pacific route capacity, provided "the primary purposes of such service is the carriage of traffic originating in or destined for the designated airline's territory." U.S.-Australia Bilateral, *supra* note 157, annex B, §ii.

[161] "Seventh-freedom" allows an airline operating totally outside its territory of registry to pick up passengers or cargo in another country, and take it to a third country. DEMPSEY, *supra* note 3, at 50.

the bilateral also called for ex post facto review of capacity, and not unilateral freezing of it.[162]

On December 1, 1992, the Australian government notified Northwest Airlines that two of its three weekly Osaka-Sydney flights would be limited to no more than fifty percent fifth-freedom traffic, and the third would have none, conditions that would make the route economically infeasible. On January 22, 1993, Northwest Airlines filed an FCPA complaint before the U.S. D.O.T., asking it to suspend Qantas' service between Los Angeles and Sydney, and filed suit in an Australian court challenging the legality of the restrictions.[163]

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[162] In *Bermuda I*, the United States and the U.K. agreed that the designated carriers of each nation would be free to institute at their discretion capacity and designated fifth-freedom traffic arrangements, subject to the general principle that the primary objective of each nation's carriers should be 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. Should one nation have reason to believe that a carrier of the other had instituted capacity or fifth-freedom arrangements in excess of the relevant traffic demands, that nation could request an ex post facto review by both governments of the carrier's actions.

Under *Bermuda I*, in the event that either nation becomes dissatisfied with capacity offered by carriers on a particular route, Article 9 of the Final Act provides for a system of regular and frequent consultations between governmental authorities of the two nations. In conjunction with the consultation, dispute, and renunciation provisions set forth in articles 8, 9, and 10 of the Agreement, Article 9 of the Final Act establishes the so-called ex post facto review procedure of capacity, which is considered by many commentators to be one of the essential elements of *Bermuda I*. PRICING AND CAPACITY, *supra* note 12, at 33. If either nation invoked the ex post facto review mechanism, governmental authorities of both nations might enter negotiations or, if necessary, submit the dispute to arbitration.

The original Bermuda Agreement left the determination of capacity and frequency of services in the first instance to the designated airlines, which were to act in accordance with predetermined guidelines. The guidelines obliged airlines to take into account each other's interests so as not to affect unduly each other's services; capacity was primarily to be related to traffic demand between the territories of the Contracting Parties and only secondarily to the requirements of fifth-freedom traffic (and traffic picked up or discharged at intermediate points). In the event of dissatisfaction with capacity and frequency of services, ex post facto review by governmental authorities might lead to negotiations or, eventually, arbitration. *See* Barry Diamond, *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 J. AIR L. & COM. 412, 444-47 (1975); Ralph Azzie, Specific *Problems Solved by the Negotiation of Bilateral Air Agreements*, 13 MCGILL L.J. 303 (1967); Harold A. Jones, *The Equation of Aviation Policy*, 27 J. AIR L. & COM. 221, 231 (1960); MCGILL CENTER FOR RESEARCH OF AIR & SPACE LAW, LEGAL, ECONOMIC AND SOCIO-POLITICAL IMPLICATIONS OF CANADIAN AIR TRANSPORT 522, 545 (1980); Christer Jonnson, *Sphere of Flying: The Politics of International Aviation*, 35 INT'L ORG. 273, 282 (1981) (providing a succinct summary of the comprehensive results of the Bermuda negotiations).

[163] *See* David Field, *Australia Flight Spat Is Settled*, WASH. TIMES, June 18, 1993, at C3.

Consultations were held between the U.S. and Australian governments in Canberra on February 8-9, 1993.[164] The inability of negotiations to resolve the dispute led Australia to call for arbitration under Article 12 of the 1952 bilateral on April 1,[165] and within thirty days, two of the three arbitrators had been appointed.[166] On April 29, 1993, the Australian government notified the U.S. government that, because Northwest had failed to comply with restrictions imposed upon fifth-freedom operations in the market, Northwest's opportunity to serve the Osaka-Sydney route would be revoked on May 30, and upon reapplication only two of the three weekly flights would be reauthorized, and fifth-freedom traffic would be capped at fifty percent.

The U.S. D.O.T. found Australia's actions "an unjustifiable and unreasonable restriction" on Northwest's exercise of rights under the bilateral.[167] It noted that "the denial of operating authority is the maximum penalty that a bilateral aviation partner can impose. Australia is compounding this serious violation of an aviation agreement by unilaterally interpreting the Bermuda capacity principles, principles that we regard as being of fundamental importance."[168] Citing the second 1998 U.S.-France Arbitration, described above, the U.S. D.O.T. acknowledged that

> countermeasures must not be clearly disproportionate to the alleged breach in light of (1) the injuries suffered by the company or companies concerned, and (2) the importance on the questions of principle arising from the alleged breach. . . . [S]anctions should be used with moderation and should be aimed at restoring equality between the Parties and encouraging the parties to continue negotiating toward a solution.[169]

Finding that negotiations had failed, the U.S. D.O.T. concluded that effective upon the date of the Australian government's restriction of Northwest's Osaka-

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[164] Complaint of Northwest Airlines, Inc. Against the Government of Australia, D.O.T. Order 93-2-15 (1993).

[165] *Australia Mulls Resolving Northwest Dispute Through Arbitration*, AVIATION DAILY, Feb. 12, 1993, at 247.

[166] *U.S.A. and Australia Seek Arbitration*, FLIGHT INT'L, June 16, 1993. *See* Abeyratne, *supra* note 3, at 816.

[167] D.O.T. Order, *supra* note 164.

[168] Complaint of Northwest Airlines, Inc., Against the Government of Australia, D.O.T. Order 93-5-13 (1993).

[169] *Id.* at 3-4.

Sydney service (June 30), Qantas would lose three of its ten weekly frequencies in the Los Angeles-Sydney market.[170]

On June 17, 1993, the U.S. and Australian governments announced they had reached an agreement providing that the two nations would attempt to conclude a new bilateral by the end of the year, Northwest would be allowed to substitute Detroit for New York on the route in question (which, given Northwest's hub there, would generate more traffic for it than would New York), local traffic between Osaka and Sydney would not exceed fifty percent of the total passengers on Northwest's flights, and that the arbitration would be aborted.[171] Northwest subsequently abandoned the Osaka-Sydney route as unprofitable. In settling the dispute, the United States avoided a decision that likely would not have found that Northwest's presence in the market satisfied the "primary objective" requirement.

III. ADJUDICATIONS BEFORE THE ICAO COUNCIL

A. The Chicago Convention

Some 188 nations—virtually the entire world community—have ratified the Chicago Convention. Chapter XVIII of the Chicago Convention establishes a mechanism for dispute resolution of disagreements arising between member states on issues of interpretation of the convention or its annexes.[172] If negotiations between the governments fail to resolve the conflict, they may submit it to the Council for decision.[173] No Council member may vote on any dispute in which it is a party.[174] Appeals of the Council's decision may be

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[170] *Id.* at 4. *See also* D.O.T. Order 93-5-31 (1993) (finalizing these sanctions).

[171] Field, *supra* note 163; *Australia-U.S. Aviation Sanctions Lifted*, PR NEWSWIRE, June 17, 1993.

[172] The Chicago Convention was preceded by the Interim Agreement on International Civil Aviation, Dec. 7, 1944, 59 Stat. 1516, which established the Interim Council on the Provisional International Civil Aviation Organization (PICAO), and gave it broad jurisdiction over the settlement of aviation disputes. Article III § 6(8) thereof gave the Interim Council power to "act as an arbitral body on any differences arising among member States relating to international civil aviation matters which may be submitted to it." Article VII § 9 gave the Council authority to review airport use charges and "report and make recommendations thereon. Gerald FitzGerald, *The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council*, 1974 CAN. Y.B. INT'L L. 153, 154-55 (1974) [hereinafter *ICAO Jurisdiction*].

[173] "[B]efore any request is filed with the ICAO Council for its decision, it is necessary for the aggrieved Contracting States to try to settle the matter by negotiation." R.C. Hingorani, *Dispute Settlement in International Aviation*, 14 ARB. J. 14, 16 (1959). *See* B. CHENG, *supra* note 11, at 479-84.

[174] Chicago Convention, *supra* note 2, art. 84; *see* Adam Schless, *Loosening the Protectionist*

made to the International Court of Justice (ICJ) or an ad hoc arbitral tribunal,[175] whose decision shall be final and binding.[176]

Chapter XVIII also includes some rather stringent sanctions for noncompliance with decisions rendered thereunder. When the Council concludes that an airline is not conforming to a final decision, member states shall not allow the carrier to pass through their airspace.[177] Also, any state found in default may have its voting powers in the Assembly suspended, a remedy so draconian it is unlikely to ever be invoked.[178]

The Chicago Conference also produced two additional multilateral agreements providing for the exchange of traffic rights—the Transit Agreement and the Transport Agreement.[179] They employ identical language regarding the

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Grip On International Civil Aviation, 8 EMORY INT'L L. REV. 435, 466 (1994).

[175] Chicago Convention, *supra* note 2, art. 85.

[176] *Id.* art. 86; *see* Isabella Diederiks-Verschoor, *The Settlement of Aviation Disputes*, 20 ANNALS AIR & SPACE L. 335, 335 (1995) (noting that the ICJ has played no significant role in resolving aviation disputes), *and* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 849, 866 (1995) (describing the ICAO dispute resolution process as "perhaps the best example" of the regime management model in a commercially related field).

[177] Chicago Convention, *supra* note 2, art. 87.

[178] *Id.* art. 88.

> The specialized agencies, exercising as they do higher degrees of supervision over specific patterns of transnational interaction, are in a proportionately better position to contribute to an enforcement program [than is the United Nations]. Since they are closer to specific value flows, they are more capable of precipitating immediate indulgences and deprivations upon enforcement targets. The ICAO may announce termination of landing and overflight rights and may restrict or cancel other privileges.

Michael Reisman, *Sanctions and Enforcement*, *in* 3 *The Future of the International Legal Order* 312 (C. Black & R. Falk eds., 1971) [hereinafter Sanctions and Enforcement].

[179] The Chicago Conference actually drafted two additional agreements: the International Air Services Transit Agreement, 59 Stat. 1693 (1951), which entered into force on January 30, 1945 [hereinafter Transit Agreement], and the International Air Transport Agreement, 59 Stat. 1701 (1953) [hereinafter Transport Agreement], which has not entered into force.

The Transit Agreement provides for the privileges of: (1) flying across each contracting state's territory and of landing for non-traffic purposes; (2) taking on passengers, mail, and cargo destined for the territory of the state whose nationality the aircraft possesses; and (3) taking on passengers, mail, and cargo destined for the territory of any other contracting State, and delivering passengers, mail, and cargo coming from any such territory.

Acceptance of the Transport Agreement has been rather limited and slow. *See generally* WENCESLAS J. WAGNER, INTERNATIONAL AIR TRANSPORTATION AS AFFECTED BY STATE SOVEREIGNTY 140-43 (1970). By 1984, 95 nations had accepted the Transit Agreement, while only 12 were parties to the Transport Agreement. By 2002, 118 nations had ratified the Transit Agreement, while still only 12 were parties to the Transport Agreement. Status of Certain International Air Law Instruments, I.C.A.O. J., Nov. 6, 2002, at 36-38. Though it initially

settlement of disputes. When a nation suffers injury under the agreements, it may request the Council to examine the problem. The Council would then call the parties into consultation. Should consultations fail to resolve the controversy, the Council "may make appropriate findings and recommendations."[180] The agreements also address disputes concerning their interpretation or application; should negotiations between the states fail to resolve them, the conflict resolution provisions of Chapter XVIII of the Chicago Convention may be employed.[181]

As noted above, many of the early bilateral air transport agreements designated the ICAO as the dispute resolution arbitral or adjudicatory forum.[182] The newer agreements have largely abandoned reference to ICAO in this capacity, although some give authority to the president of the ICAO Council to assist in designating arbitrators. Moving away from the ICAO as a forum for dispute-resolution, most bilaterals today call for dispute resolution via arbitration.[183] Typically, they provide that each state selects an arbitrator, and the two arbitrators select a third. In some bilaterals, if they cannot agree, the third arbitrator is selected by the president of the ICAO.[184] No conflict has ever been submitted to the ICAO for arbitration, although the ICAO has helped to designate arbitral panels on occasion.[185]

In 1957, the Council promulgated Rules for the Settlement of Differences, which established adjudicatory procedures for disputes submitted to it under Chapter XVIII.[186] Significantly, Article 14 of the Rules allows the Council to

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championed it, the United States withdrew from the Transport Agreement in 1946. Press Release, Withdrawal of the United States of America, Dep't of State (July 25, 1946).

[180] Transit Agreement, *supra* note 179, art. II, § 1; Transport Agreement, *supra* note 179, art. IV, § 2.

[181] Transit Agreement, *supra* note 179, art. IV § 3.

[182] Michael Milde, *Dispute Settlement in the Framework of the International Civil Aviation Organization*, *in* SETTLEMENT OF SPACE LAW DISPUTES 87, 88 (Karl-Heinz Böckstiegel ed., 1979).

[183] Shadrach Stanleigh, *"Excess Baggage" at the FAA: Analyzing the Tension between "Open Skies" and Safety Policing in U.S. International Civil Aviation Policy*, 23 BROOK. J. INT'L L. 965, 966 (1998).

[184] *See, e.g.*, Air Transport Agreement between the United States of American and Canada, Jan. 17, 1966, U.S.-Can. art. XV, 17 U.S.T. 201; Dennis Foerster, *Caged Birds in Open Skies: Comments on the Emergence of a Dominant Carrier*, 1 ASPER REV. INT'L BUS. & TRADE L. 171 (2001).

[185] Foerster, *supra* note 184.

[186] Rules for the Settlement of Differences, ICAO Doc. 7782/2 (2d ed. 1975) [hereinafter Rules]. *See* Hingorani, *supra* note 173, at 15-25. The rules provide different procedures for the handling of disagreements vis-à-vis complaints. Gerald FitzGerald, *The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council*,

ask the parties to engage in direct negotiations at any time.[187] During such negotiations, the formal complaint mechanism of Article 84 of the Chicago Convention is suspended, although the Council may impose specific time limits on the negotiations.[188] The Council may render any assistance that is likely to facilitate successful conclusion of the negotiations, including the designation of a conciliator.[189] Article 14 departs from the adjudicatory focus of most of the Rules, emphasizing mediation or conciliation and the good offices of the Council as a means of dispute resolution.[190] As Professor Thomas Buergenthal has noted, "This provision indicates that the Council considers that its main task under Article 84 of the Convention is to assist in *settling*, rather than in *adjudicating*, disputes."[191] The ICAO has been more successful in assisting the consensual resolution of disputes than have most of the other organs of the UN.[192]

In fact, the overwhelming number of aviation disputes between nations are resolved informally, rather than through adjudication or arbitration.[193] Since the promulgation of the Chicago Convention of 1944, only five disputes have

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1974 CAN. Y.B. INT'L L. 153, 158 (1974).

[187] Rules, *supra* note 186, art. 14(a).

[188] *Id.* art. 14(2).

[189] *Id.* art. 14(3).

[190] ICAO Dispute Settlement, *supra* note 182, at 89. Richard N. Gariepy & David L. Botsford, *The Effectiveness of the International Civil Aviation Organization's Adjudicatory Machinery*, 42 J. AIR L. & COM. 351, 358-59 (1976). The India-Pakistan dispute of 1952 prompted the ICAO Council to adopt rules emphasizing the use of negotiation as a means of dispute resolution. Professor FitzGerald has noted that "[a]pparently, the Council was even at that time aware of its possible inadequacy as a judicial body, and was reluctant to discharge the judicial functions conferred on it by the Chicago Convention." FitzGerald, *supra* note 186, at 157.

[191] THOMAS BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 136 (1969).

[192] *See* Garrett Hardin, *Living on a Lifeboat*, 24 BIOSCIENCE 561 (1974) (describing the cause of the impotence of the United Nations succinctly thus: "The United Nations is a toothless tiger, because the signatories of the charter wanted it that way"). Former U.N. Ambassador Jeane Kirkpatrick expressed the failures of the agency in the arena of dispute resolution as follows:

> A mediator has to be above the conflict, and the conflict-resolution machinery at the United Nations is not above politics; it is a part of world politics. And it is not realistic to believe that any reform of the U.N. structure is possible to make it an effective instrument of conflict resolution.

Patricia J. Seth, *The U.N.'s Midlife Crisis*, NEWSWEEK, Oct. 28, 1985, at 52.

[193] *See* John Noyes, *The Functions of Compromissory Clauses in U.S. Treaties*, 34 VA. J. INT'L L. 831, 860-61 (1994).

been submitted to the ICAO Council for formal judicial resolution. In none of them did the Council issue a formal decision on the merits of the case.[194]

B. India v. Pakistan (1952)

The first dispute submitted to the ICAO Council for adjudication was a complaint by India against Pakistan, filed with the Council in April of 1952.[195] India alleged breach of the Chicago Convention and the Transit Agreement by Pakistan's refusal to permit Indian aircraft to fly over its territory to and from Afghanistan. Under the Transit Agreement, each signatory state permits scheduled international airlines of other signatories the privilege to fly across its territory without landing, and the privilege to land for non-traffic purposes.[196]

Because no rules of procedure had then been promulgated, the Council appointed a working group of three Council representatives to assist it in devising appropriate procedures. The working group suggested, *inter alia*, that the parties "enter into further direct negotiations as soon as possible with a view to limiting to the greatest possible extent the outstanding issues."[197] By June 1953, the parties had reached an amicable resolution of the controversy, and so informed the Council.[198]

C. United Kingdom v. Spain (1969)

The second complaint was filed by the U.K. against Spain, alleging Chicago Convention violations by Spain's establishment of a prohibited zone near Gibraltar.[199] All the pleadings were filed while bilateral discussions proceeded between the parties, at the UN and in other private forums. In November 1969, the Council President reported that the parties had informed

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[194] Milde, *supra* note 182, at 90.

[195] ICAO Doc. C-WP/1169 (1952). *See* Report of the Council, ICAO Doc. 7367 (A7-P/1) 74-76 (1963). *See generally* Hingorani, *supra* note 173, at 16-20; B. CHENG, *supra* note 11, at 100-04.

[196] Transport Agreement, *supra* note 179. Under Article II § 2 thereof, disagreements may be submitted to the ICAO Council under Chapter XVII of the Chicago Convention.

[197] ICAO Doc. 7291 C/845 at 162-65 (1952).

[198] ICAO Doc. 7361 C/858 at 15-26 (1953); ICAO Doc. 7367 A7/P/1 74-76 (1953); 166 U.N.T.S. 3 (1953). *See* FitzGerald, *supra* note 186, at 156.

[199] FitzGerald, *supra* note 186, at 185.

him that they wished the complaint deferred *sine die*.[200] Consideration was thus deferred indefinitely.[201]

D. Pakistan v. India (1971)

The most interesting of the early disputes was perhaps the third complaint, which made its way through the ICAO Council and was appealed to the ICJ, filed by Pakistan against India in February 1971. It was triggered by India's suspension of Pakistani flights over its territory after Indian nationals hijacked an Indian aircraft, flew it to Pakistan, and blew it up, allegedly with the complicity of the Pakistani government.

On January 30, 1971, two Indian nationals, allegedly members of the Kashmir National Liberation Front (KNLF), hijacked an Indian aircraft en route to Jammu, India, and diverted it to Lahore, Pakistan. Upon landing, the twenty-eight passengers and four crew were released, but the hijackers remained in possession of the aircraft and threatened to blow it up unless their demands were met. The hijackers sought asylum in Pakistan and the release of thirty-six KNLF prisoners held by India. Pakistan granted asylum to the pair while they retained control of the plane, and allowed them to visit the terminal by turns to receive food and contact others. India refused to release any prisoners, and, two days after the hijacking began, the hijackers blew up the plane as the Pakistani authorities and media looked on. The aircraft, its cargo, and its baggage were destroyed. It took forty-eight hours after their release by the hijackers for the passengers and crew to be returned to the Indian border thirty-six miles from Lahore.

There has always been a great deal of tension in relations between India and Pakistan, and this has been especially true in the volatile Kashmir and Jammu, which occupy the extreme northern portions of both countries. The border which the two countries share in those regions is disputed, and, despite agreements between India and Pakistan to determine the future of the Kashmir and Jammu regions according to the wishes of the people of those regions, India has left its obligations under such agreements unfulfilled. As a result, India has had to deal with terrorist activities in Kashmir and Jammu which have been applauded, if not aided, by Pakistan. The suspension of service

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[200] ICAO Doc. 9803, c/994 27 (1969). *See* Milde, *supra* note 182.

[201] Relations between the U.K. and Spain over Gibraltar continued to affect aviation relations for decades. *See* Paul Dempsey, *Competition in the Air: European Regulation of Commercial Aviation*, 66 J. AIR L. & COM. 979, 1032 (2001).

effectively isolated East and West Pakistan from feasible air transportation. The hijacking itself was inspired by the Kashmir uprising of 1965.[202]

In August and September of 1965, an uprising in Kashmir fueled tensions along the border, and the two countries engaged in armed conflict in the region. During the conflict, which lasted almost three weeks, air traffic between the two nations was suspended. This posed a particular hardship for Pakistan because India's immense geographical size separated what was then East and West Pakistan.[203] The suspension lasted until the signing of the Tashkent Declaration in early 1966.[204] The declaration was intended to help normalize relations between the two states, and, under its general terms, an agreement was reached permitting the resumption of overflights of each other's territories, but not permitting landings. That status quo continued until the 1971 hijacking.

India unilaterally suspended Pakistan's overflight privileges on February 4, 1971, five days after the hijacking. Both India and Pakistan were parties to the Chicago Convention and the Transit Agreement,[205] and Pakistan sought to invoke the dispute resolution mechanisms of the ICAO Council with an application and complaint filed with the Council. The complaint alleged violations of Article 5 of the Chicago Convention and Article I of the Transit Agreement, which together grant contracting parties the privilege of overflying or making non-traffic stops in the territories of other contracting parties, whether the international air services are scheduled or unscheduled.

The proceedings before the Council ran into an early road block. India filed a preliminary set of objections, challenging the jurisdiction of the Council on May 28, 1971. The thrust of India's argument was that both the Chicago

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[202] The counter-memorial of Pakistan filed with the ICJ discussed a bilateral entered into by India and Pakistan to determine the future of Jammu and Kashmir through a fair and impartial plebiscite. Pakistan also accused India of preventing the plebiscite from ever taking place. Counter-Memorial of Pakistan (India v. Pak.), 1971 I.C.J. Pleadings, at 373 [hereinafter I.C.J. Pleadings].

[203] When overflight privileges were unilaterally suspended by India in 1972, Pakistan was forced to route its flights through Colombo, Sri Lanka, doubling the distance to be traveled from approximately 1,300 nautical miles to more than 2,600. *See* Memorial of India, India v. Pak., 1973 I.C.J. Pleadings, at 91.

[204] Tashkent Declaration, Jan. 10, 1966, India-Pak., 560 U.N.T.S. 39. Mediated by the Soviet Union, the Tashkent Declaration required the two nations to honor a cease-fire and encouraged cross-border dialogue. Fakiha Khan, Note, *Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute*, 29 GA. J. INT'L & COMP. L. 361, 376-77 (2001); Brian Farrell, *The Role of International Law in the Kashmir Conflict*, 21 PENN ST. INT'L L. REV. 293, 304 (2003).

[205] Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, 84 U.N.T.S. 389.

Convention and the Transit Agreement were suspended in 1965 between the two states and that air traffic between them was instead governed by the special agreement under the Tashkent Declaration. Under both the Chicago Convention and the Transit Agreement, the Council was given jurisdiction over disagreements between contracting states relating to the interpretation or application of the Convention or the Agreement respectively.[206] India argued that there was no disagreement relating to the interpretation or application of either the Chicago Convention or the Transit Agreement, and therefore, the Council had no jurisdiction to resolve disputes concerning the special agreement under the Tashkent Declaration.[207]

Pakistan responded that any dispute between two contracting states relating to the "suspension" or "termination" of the Chicago Convention or the Transit Agreement should be regarded as a disagreement relating to the "interpretation" or "application" of the Convention or Agreement, and was, therefore, within the Council's jurisdiction.[208] In any event, the Tashkent Declaration merely reinstated the Convention and Transit Agreement; it created no special air transport regime.

On July 29, 1971, the Council affirmed its jurisdiction over the Pakistani complaint. India appealed that decision to the ICJ pursuant to Article 84 of the Chicago Convention. Proceedings before the Council were held in abeyance pending the outcome of the appeal.

The central issue before the ICJ was whether Pakistan's complaint disclosed the existence of a disagreement relating to the interpretation of application of the Chicago Convention or the Transit Agreement. The ICJ characterized the issue in a liberal way, stating that the legal question was whether or not the dispute could be resolved without any interpretation or application of the relevant treaties at all.[209] If it could not, the ICJ concluded, then the ICAO Council must be competent to hear the case.

India took the position that absolutely no interpretation or application of the Chicago Convention or the Transit Agreement was necessary. The two treaties were allegedly irrelevant, because: (1) they were not in force or were suspended between the parties; or (2) the phrase "interpretation or application" does not include the terms "suspension" or "termination." India asserted that the treaties were terminated or suspended either in 1965, during the outbreak

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[206] Chicago Convention, *supra* note 2, arts. 84-88. Transit Agreement, *supra* note 180, art. II, § 2.

[207] Memorial of India, *supra* note 203, at 46.

[208] *Id.* at 50.

[209] *Id.* at 62.

of hostilities, and subsequently replaced by a special agreement under the Tashkent Declaration, or in 1971, when Pakistan materially breached its obligations under those treaties in its actions toward the hijackers.

The ICJ responded that even India's defenses required some degree of interpretation or application of the treaties.[210] The Court voted 14-2 to uphold the jurisdiction of the ICAO Council to hear the case.[211] India's contention that the special agreement replaced the treaties required interpretation or application of Articles 82 and 83 of the Chicago Convention. Article 82 requires the contracting states not to enter into obligations or understandings inconsistent with the treaty's terms. Article 83 requires that any new agreements which were not inconsistent with the obligations imposed by the Chicago Convention be registered with the Council.

As to India's argument that Pakistan breached its obligations under the treaties by its actions arising out of the 1971 hijacking, the ICJ answered that a finding of a material breach requires a conclusion that a violation of a provision essential to the accomplishment of the purpose of the treaty has occurred.[212] Such an analysis inherently required an examination of the treaties concerned.[213]

Finally, the ICJ turned to India's position that the treaties were suspended or terminated and, therefore, the dispute did not involve interpretation or application of those treaties. Article 89 of the Chicago Convention allows a contracting state to disregard its obligations under the Convention in times of war or national emergency. Pakistan argued that this provision only granted a license to ignore obligations during those special circumstances. After the emergency or war has ended, the resumption of all obligations occurs automatically. India interpreted the provision differently. The Indian viewpoint was that the purpose of Article 89 was to make it clear that the Convention did not affect rights the parties held under special circumstances in international law. The ICJ concluded that the very fact that the parties disagreed as to the provision's meaning proved the existence of a disagreement relating to the interpretation or application of the Convention and, even if there is only one such disputed provision, the Council is vested with jurisdiction.[214] As one

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[210] *Id.* at 66.

[211] Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. 46, 70. *See* Kriss E. Brown, *The International Civil Aviation Organization is the Appropriate Jurisdiction to Settle Huskit Dispute Between the United States and the European Union*, 20 PENN. ST. INT'L L. REV. 465, 484 (2002).

[212] *Id.* at 67.

[213] *Id.* at 67-68.

[214] *Id.* at 1091. *See generally* Herbert W. Briggs, *Unilateral Denunciation of Treaties: The*

commentator noted, the decision makes it clear that "the unilateral denunciation of a treaty will not enable a party to escape the application of the clauses in the treaty pertaining to the settlement of disputes relating to the treaty."[215]

The ICJ decision, issued August 18, 1972, cleared the way for consideration of the merits of the case by the ICAO Council. The conflict was essentially rendered moot when Bangladesh emerged as a new nation, replacing East Pakistan. In July 1976, India and Pakistan issued a joint statement discontinuing the proceedings before the ICAO Council.[216]

E. Cuba v. United States (1998)

Relations between the United States and Cuba disintegrated once Fidel Castro came to power, nationalized U.S. commercial interests in Cuba, aligned Cuba with the Soviet Union, invited Soviet missiles in, and used Cuba's armed forces to support emerging Marxist revolutionary movements in Latin America and Africa. In the 1960s, the United States banned Cuban aircraft from U.S. airspace, ostensibly for national security reasons. In 1988, the no-fly prohibition was amended to allow Air Cubana to fly over New York state and to enter U.S. airspace during inclement weather.[217]

With the collapse of the Soviet empire, the national security rationale began to wear thin. In 1995, Cuba filed a formal complaint with the ICAO Council, objecting to the no-fly policy against Cuban commercial aircraft as violative of the Chicago Convention and Transit Agreement.[218] Clearly, it was.

Under the International Air Services Transit Agreement, signatory nations have the right to have their commercial aircraft fly over the territory of other signatories. For decades, U.S.-flag carriers have flown over Cuba, particularly on flights south from the busy Miami hub. By the mid-1990s, some 120 U.S. commercial aircraft were flying over Cuba each day, paying the Cuban government about $6 million a year in overflight fees, but saving approximately $150 million a year in fuel and other costs than if they were forced to avoid Cuban airspace.[219] In contrast, Cubana's flights to Toronto and Montreal were forced to take a circuitous route some thirty minutes and 200 miles longer than a direct route, costing it nearly half a million dollars a year.[220]

Vienna Convention and the International Court of Justice, 68 AM. J. INT'L L. 51, 57-61 (1974).

[215] *See* FitzGerald, *supra* note 186, at 184.

[216] Milde, *supra* note 182.

[217] Peter Kaplan, *Cubans May Fly Over U.S.*, WASH. TIMES, June 20, 1998, at A1.

[218] Transport Agreement, *supra* note 180.

[219] Kaplan, *supra* note 217.

[220] *Cuban Aviation Starting to Spread Its Wings*, SAN ANTONIO EXPRESS-NEWS, Jan. 2, 1996,

Aviation relations soured again in February 1996, when the Cuban Air Force shot down two civilian aircraft flown by a Cuban refugee group in international airspace, killing the four Cuban Americans aboard.[221] ICAO investigated the incident and condemned the military action as a violation of international law.[222] Nevertheless, ICAO was determined to help resolve the overflight issue. As an ICAO spokesman noted,

> We as an intergovernmental body do not get involved in disputes between states unless asked to mediate by both sides. . . . We have an interest in ensuring that there are harmonious relations between member states, particularly those with contiguous regions, and our purpose is to work to ensure that countries continue to let civil aviation function without hindrance.[223]

When it became clear that, if forced to render a formal decision, the ICAO Council would rule against it, the United States agreed to resolve the dispute in June 1998.[224] Under the ICAO-brokered agreement, Cubana would be allowed to use two designated routes over the United States to access Canada, and the United States would provide normal FAA air traffic control services at cost.[225] The United States also elicited certain confidential commitments from the Cuban government. Two hours after the agreement was signed, Cuban airlines were allowed to fly over U.S. territory.

F. United States v. Fifteen European Nations (2000)

Though some commentators urged ICAO to take a stronger role in economic regulatory issues,[226] for its first half century, the principal disputes

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at 9A [hereinafter *Cuban Aviation*].

[221] Christoper Marquis, *U.N. Faults Cuba in Plane Action*, TIMES-PICAYUNE, June 20, 1996, at A16.

[222] Dalia Acosta, *Cuba-U.S.: Back at the Negotiating Table*, INTER PRESS SERVICE, Dec. 4, 1996.

[223] *Cuban Aviation*, *supra* note 220.

[224] Kaplan, *supra* note 217.

[225] *U.S. Allows Cuban Planes Fly to Canada*, XINHUA NEWS AGENCY, June 18, 1998.

[226] As this author has written:

> In addition to the comprehensive, but largely dormant, adjudicatory and enforcement jurisdiction held by ICAO under Articles 84-88 of the Chicago Convention, the agency also has a solid foundation for enhanced participation in economic regulatory aspects of international aviation in Article 44, as well as the Convention's Preamble. Unless it very soon assumes the role its con-

addressed by it were of a political, rather than a commercial, nature. It first asserted that role in its dispute-resolution capacity in a case involving an environmental dispute with profound commercial implications—the European effort to adopt airport noise rules that fell disproportionately hard on U.S. airlines. This was the first dispute filed for adjudication with the ICAO Council that involved an issue other than an airspace restriction.

Unlike North America, where airports are normally constructed on the periphery of urban areas, European airports are usually surrounded by dense population concentrations.[227] It comes as no surprise then, that the European Union (EU) has been among the world's leaders in efforts to restrict noise emissions from aviation.[228] However, this leadership has often drawn criticism from nations outside the EU, which view the noise limitations as being used to restrict market access by non-EU carriers and to protect European aircraft manufacturers. Yet the EC/EU[229] has soldiered on with its attempts to reduce noise pollution. The EU Council's most recent action on the subject has proven to be its most controversial yet, prompting a series of threats from the United States, whose carriers, aircraft manufacturers, and aircraft reconditioning firms stood to lose considerable sums of money.[230]

Regulation 925/1999 established significantly more stringent standards for noise emissions than the ICAO standards, promulgated under Annex 16 to the Chicago Convention, demand.[231] A full understanding of the regulation would

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> stitutional framers had in mind for it in 1944, the regulatory void over non-tariff barriers in international service industries such as air transport will soon be filled by the empire builders of UNCTAD or GATT. ICAO has the expertise the international aviation industry needs to establish useful ground rules to enhance the free flow of commerce. ICAO must become more deeply involved in economic regulatory matters, lest it lose that opportunity to an agency less well equipped to handle the complex trade problems unique to aviation. Moreover, as a general rule, multilateral consensus is preferable to the current regime of unilateral insistence.

PAUL DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 302 (1987).

[227] Benedicte Claes, *Aircraft Noise Regulation in the European Union: The Hushkit Problem*, 65 J. AIR L. & COM. 329, 341 (2000); PAUL DEMPSEY, AIRPORT PLANNING & DEVELOPMENT: A GLOBAL SURVEY 235-69 (2000).

[228] Claes, *supra* note 227, at 342.

[229] The European Community (EC) has transformed itself into the EU with the Treaty of Maastricht.

[230] Claes, *supra* note 227, at 346-47. It has been estimated that within a year of the regulation's enactment, U.S. firms lost $2.1 billion in cancelled orders for such things as hushkits and spare parts, and suffered a deleterious impact on accelerated air fleet depreciation. *Id.*

[231] Council Regulation (EC) 925/1999, 1999 O.J. (L115).

require an elaborate explanation of the technical aspects of ICAO noise emission standards.[232] Suffice it to say that aircraft are divided into four categories termed Chapters 1, 2, 3, and 4, after the relevant chapters of Volume I, Part II of Annex 16 to the Convention on International Civil Aviation, third edition.[233] Chapters 3 and 4 set considerably higher standards for reducing aircraft noise than Chapters 1 and 2.[234] Most Member States independently banned Chapter 1 aircraft in 1988,[235] while the EU Council banned Chapter 2 aircraft in 1990.[236] However, nothing in these earlier efforts at limiting aircraft noise prevented a carrier from reconditioning its aircraft or changing their operating profile and then having them "recertificated" as meeting the standards of Chapters 3 or 4.[237] As a result, many carriers took these less expensive options of "hushkitting" their aircraft rather than scrapping their non-compliant aircraft.

The EU was displeased by these less-than-absolute measures, for while the reconditioned aircraft met the Chapter 3 standards, they were still not as quiet as newer aircraft specifically manufactured to meet those standards.[238] Therefore, Regulation 925/1999 was drafted with a particular eye towards closing this loophole. The regulation sets a baseline for evaluating aircraft by defining a "civil subsonic jet aeroplane" as one with a maximum take-off weight of 34,000 kg or with nineteen or more passenger seats, and with an engine "by-pass ratio" of more than three-to-one.[239] The by-pass ratio is the

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[232] *See* Claes, *supra* note 227 (containing detailed discussion of how aircraft noise is measured and classified under the ICAO's standards). *See also* Kriss E. Brown, *The International Civil Aviation Organization Is the Appropriate Jurisdiction to Settle Hushkit Dispute Between the United States and the European Union*, 20 PENN. ST. INT'L L. REV. 465 (2002).

[233] Council Regulation (EC) 925/1999, *supra* note 231, at pmbl. ¶ 5.

[234] Claes, *supra* note 227, at 339-40.

[235] *Id.* at 339. Chapter 1 includes such aircraft as the Boeing 707, the Hawker Siddeley Trident, and the Aérospatiale Caravelle. *Id.* at 339-40.

[236] Council Directive 89/629/EEC, 1989 O.J. (L363) 27; Chapter 2 includes the Boeing 727, early models of the Boeing 737, and early models of the McDonnell Douglas DC-9. Claes, *supra* note 227, at 333-34.

[237] Reconditioning is done in one of two ways. The aircraft's existing engines may be modified through the use of a "hushkit" or, in a process called "re-engining" the engines may be entirely stripped and replaced with engines having a higher rating. Changing an aircraft's operating profile means altering the way the aircraft is operated, such as not loading it to full capacity, flying only to airports at particular elevations, flying only during certain times of day, etc.

[238] Council Regulation (EC) 925/1999, *supra* note 231, at pmbl. ¶ 5.

[239] *Id.* art. 2(1). Please note that there is an error in the text of the regulation as published, which states that the aircraft must have a by-pass ratio of *less* than three, however a full reading of the regulation and other relevant sources makes clear that it must be *greater* than three.

volume of air drawn into the engine compared to the volume of air actually used in the fuel burning process.[240] (This technical detail became the focus of the EU-U.S. dispute.) The regulation defines "recertificated civil subsonic jet aeroplane" as those meeting the size requirements laid out above, but which were initially designed to meet Chapters 1 or 2 noise restrictions and have subsequently been reconditioned or placed under operational restrictions in order to comply with Chapter 3 limits.[241]

The regulation barred member states from registering recertificated aircraft after April 1, 1999, although recertificated aircraft registered as of that date would not be stripped of their registration provided that they have remained continuously registered in a Member State.[242] Recertificated aircraft that are registered in a Member State could not be operated within the EU as of April 1, 2002, unless they had operated in the EU prior to April 1, 1999.[243] Furthermore, as of April 1, 2002, recertificated aircraft registered outside the EU would not be permitted to fly to airports in the EU unless they had been on the register of their home country as of April 1, 1999, and had operated in the EU between April 1, 1995, and April 1, 1999.[244] There are certain exemptions, however, which Member States may grant, including for emergencies and other conditions of "an exceptional nature," as well as for aircraft that operate exclusively outside of the EU's territory.[245] The regulation also does not apply to the overseas possessions of the Member States.[246]

Northwest Airlines, which had invested most heavily in "hushkitting," rather than replacing, its aging fleet, would be hit hardest.[247] On January 15,

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[240] Claes, *supra* note 227, at 331 n.10.

[241] Council Regulation (EC) 925/1999, *supra* note 231, art. 2(2). However, if an aircraft has been "re-engined" and its new engines meet the three-to-one bypass ratio it will not be considered as being recertificated, but will instead be treated like an aircraft which was initially designed to meet Chapter 3 standards. *Id.*

[242] *Id.* art. 3(1)-(2).

[243] *Id.* art. 3(4).

[244] *Id.* art. 3(3). The date requirements in Article 3(3) appear to be designed to prevent carriers whose home territories are far from the EU from transferring older short-range aircraft, which would not have been able to reach the EU ordinarily, to carriers based on the EU's periphery.

[245] *Id.* art. 4(1)-(2).

[246] *Id.* art. 5.

[247] The massive debt burden imposed by the Alfred Checchi $4 billion leveraged buy-out of Northwest made it difficult for the airline to retire aging aircraft. Paul Dempsey & Laurence Gesell, AIRLINE MANAGEMENT: STRATEGIES FOR THE 21ST CENTURY 122-24 (1997). Northwest opted instead to hushkit and refurbish all its DC-9s whose average age was then twenty-four years, so as to be able to fly them another fifteen years. Susan Carey, *Northwest Airlines Plans to Renovate Some DC-9s Rather than Replace Them*, WALL ST. J., Aug. 9, 1994, at A2. As a

1999, Northwest filed a complaint with the U.S. Department of Transportation under the Federal Aviation Act[248] against the EU Council and fifteen member states against the hushkit rules.[249] The United States filed a formal Article 84 complaint with ICAO against the fifteen EU member states (for the EU itself is not formally an ICAO member) on March 14, 2000.[250] EU Transport Commissioner Loyola de Palacio responded by stating that by inaugurating the ICAO formal complaint mechanism, the United States had made resolution of

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result of hushkitting and new aircraft cancellations, by the dawn of the Twenty-First Century, Northwest Airlines had the oldest fleet of aircraft of any major airline by a significant margin, surpassing even TWA's fleet for that ignoble distinction. In 1991, Northwest's fleet was thirty-five percent older than the industry's average; by 1998, Northwest's fleet was sixty percent older than the industry's average. According to the 2001 Global Fleet Handbook, Northwest continues to have the oldest fleet of any major U.S. airline, at a geriatric 20.4 years. *Fleet Study Sees Overcapacity, Aging Planes at Northwest*, AVIATION DAILY, Mar. 27, 2001, at 3.

[248] 49 U.S.C. § 41310 (2000) (providing remedies under U.S. law against foreign discriminatory practices).

[249] Complaint of Northwest Airlines, Inc., Against the Council of the European Union and the 15 Member States, D.O.T. Order 99-1-10 (1999). Northwest argued that the rules constituted an "unjustifiable or unreasonable . . . practice against an air carrier" and "imposes an unjustifiable or unreasonable restriction on access of an air carrier to a foreign market." The D.O.T. deferred reaching the merits while negotiations between the governments took their course. D.O.T. Order 2001-11-18 (2001).

[250] *U.S. Files Formal Complaint Over Hushkit Rule*, WEEKLY BUS. OF AVIATION, Mar. 20, 2000, at 131. The thrust of the U.S. complaint was as follows:

> [T]he regulation raised various questions concerning its compatibility with the Convention on International Civil Aviation (Chicago Convention) and the international noise standards established pursuant to the Convention. Most notably, the regulation does not rely on performance standards (that is, how much noise an aircraft actually makes) as its basis for imposing restrictions. Rather, the regulation's restrictions affect only specified aircraft and engine technology and equipment, without reference to noise levels. . . . [T]he technology and equipment affected by the regulation—including "hushkits"—are largely products of U.S. companies, and the aircraft employing the affected equipment are largely owned and operated by U.S. airlines. Furthermore, the regulation does not affect all aircraft utilizing the specified technology. Certain aircraft registered in, or having a history of operating into, Europe are not affected by the regulation. . . . [T]he conditions for exemption from the regulation's restrictions gave preference to aircraft that remained on a registry of any EU member state during the relevant period, and therefore . . . the regulation ran afoul of Chicago Convention provisions prohibiting contracting states from discriminating among aircraft on the basis of state of nationality.

Sean Murphy, *Contemporary Practice of the United States Relating to International Law: Admissibility of US-EU "Hushkits" Dispute Before the ICAO*, 95 AM. J. INT'L L. 410, 410-11 (2001).

the dispute more difficult and compromised development of Stage 4 standards.[251]

The dispute between the EU and the United States stemmed principally from Regulation 925/1999's use of an aircraft's engine by-pass ratio to evaluate its noise emission status rather than directly imposing a standard of how much noise an aircraft can emit. The EU argued that the engine by-pass ratio is an appropriate measure of the loudness of an aircraft and is less subjective than setting a specific decibel level, as decibel levels can vary according to environmental conditions.[252] The United States countered that there are aircraft models with by-pass ratios less than those prescribed by the regulation which have lower noise emissions than aircraft that are capable of meeting the regulation's standards.[253] The issue of protectionism for European manufacturers was also raised by the United States, as U.S.-based corporations are the only suppliers of hushkits, and many of the engine models produced by U.S. manufacturer Pratt & Whitney do not meet the by-pass ratio requirement.[254]

The EU agreed to delay implementation of Regulation 925/1999 by one year to give U.S. carriers an opportunity to eliminate more of their non-compliant aircraft through attrition or advanced re-engining rather than scrapping them.[255] Yet postponing its implementation was deemed by many observers as unlikely to forestall the U.S. government from taking some form of retaliatory action, either unilaterally or multilaterally through the ICAO and/or the WTO. The United States chose to resist the EU over such a seemingly minor issue because it was widely believed in the aviation community that Regulation 925/1999 represented a first step towards banning all Chapter 3 aircraft,[256] which would encompass a majority of the fleets of U.S. carriers. The EU did nothing to assuage the fears of U.S. carriers or manufacturers, but rather was pressing for revising the Chicago Convention to increase the stringency of noise limitation standards.[257]

The EU member states responded to the U.S. complaint on July 18th with preliminary objections, alleging:

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[251] *U.S. ICAO Complaint Complicates Hushkit Dispute Resolution, EU Says*, AVIATION DAILY, Mar. 16, 2000, at 2, *available at* 2000 WL 9301904.

[252] Tom Gill, *Europe Breaks Rank on Noise*, AIRLINE BUS., Apr. 1999, at 32.

[253] Claes, *supra* note 227, at 369.

[254] Gill, *supra* note 252, at 32.

[255] Colin Baker, *The Next Chapter*, AIRLINE BUS., Mar. 2000, at 54.

[256] *Id.* at 55-56.

[257] *Id.*

* The U.S. is asking the ICAO Council to deviate from its past practice and go beyond its proper function as set out in Article 84 of the Convention. Its request must be rejected as inadmissible.
* The Respondent objects that the ICAO Council is not a court of equity with wide ranging general jurisdiction. It can only rule on disagreements concerning the application and interpretation of the Convention and its Annexes, not order States to take any action that it "deems proper and just."
* The Respondent underlines its commitment to seeking a resolution of the differences underlying this dispute within ICAO and reiterates its willingness to enter into negotiations with the U.S. for the purpose of resolving this dispute.
* As a consequence, the ICAO Council has no jurisdiction to handle the matter presented by the Applicant.[258]

A senior U.S. official responded by saying, "This is a weak attempt to delay the inevitable—that the EU's ban is wrong and must be overturned."[259] After receiving written briefs from both parties, hearing oral argument, and permitting voting members of the Council to question the agents for the parties, on November 16, 2000, the ICAO Council rendered its decision on the preliminary objections.[260] The Council voted 26-0 in favor of the United States.[261] The three principal objections were handled as follows:

Absence of Adequate Negotiations. The EU argued that, "[a]lthough the Parties have held technical discussions on the Regulation and the need for stricter noise standards in ICAO, none of the questions of interpretation and application of the Convention raised by the U.S. in its Memorial have been discussed"[262] in formal negotiations between the parties, as is required by

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[258] Preliminary Objections Presented by the Member States of the European Union, Disagreement Arising Under the Convention on International Civil Aviation Done at Chicago, Dec. 7, 1944, at 2, para. 7 [hereinafter EU Preliminary Objections].

[259] *European Union Rejects ICAO as Forum to Resolve Noise Dispute*, WORLD AIRPORT WK., Aug. 29, 2000. Another source revealed that the EU's allegation that the United States had failed to adequately negotiate with the EU to resolve the dispute "particularly grates." *European Union Rejects ICAO as Forum for Hushkit Disputes*, WORLD AIRLINE NEWS, Aug. 18, 2000.

[260] Decision of the ICAO Council on the Preliminary Objections in the Matter *United States and 15 European States*, Nov. 16, 2000 [hereinafter ICAO Council Decision]. The United States was represented by David Newman of the Legal Advisors Office of the U.S. Department, whose thirty-minute rebuttal to the EU's one and a half hour argument carried the day.

[261] Murphy, *supra* note 250, at 411-14; *see also* Claes, *supra* note 227, at 339.

[262] *European Union Rejects ICAO as Forum for Hushkit Disputes*, *supra* note 259.

Article 84 of the Chicago Convention[263] as a condition precedent for instituting the Council's quasi-judicial dispute resolution procedures. According to the EU, the "ICAO Council should not, in Article 84 proceedings, be asked to adjudicate political disputes between individual contracting states."[264]

The United States responded that, in fact, it had raised these issues with the EU member states before filing its complaint, and had engaged in negotiations on these issues for more than three years. Further, the United States pointed out that the ICAO Rules for the Settlement of Differences, simply require a party filing a dispute to assert that "negotiations to settle the disagreement had taken place between the parties but were not successful."[265]

On this point, the ICAO Council found that the exhibits submitted by the parties established that the negotiations between them fulfilled the requirements for filing a dispute before it. The ICAO Council therefore denied the EU's first objection.

Failure to Exhaust Local Remedies. Second, the EU argued that the United States was not bringing this case because it was concerned about the noise situation around EU airports or the operation of European civil aviation services, but instead because it claimed that the Regulation "targets" U.S. owners and manufacturers of aircraft, jet engines and hushkits; however, these parties have local remedies available to them in the EU member states which they have not exhausted. The United States responded that "the local remedies rule applies only to claims brought by a state on behalf of its nationals, where injury to the state is derivative; it does not apply to claims of direct injury to a state for violation of an international agreement."[266]

The ICAO Council concluded that the United States was not required to exhaust local remedies, since it sought "to protect not only its nationals, but also its own legal position under the Convention."[267] Moreover, the Council found that the exhaustion of local remedies was not a condition precedent to filing a dispute before the ICAO Council.

Scope of the Relief Requested. Third, the EU argued that the United States was "seeking to create new obligations under the Convention going beyond what has been agreed between the parties and to impose on the Respondent

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[263] Article 84 of the Chicago Convention provides, in relevant part: "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council."

[264] *European Union Rejects ICAO as Forum to Resolve Noise Dispute*, *supra* note 259.

[265] Rules, *supra* note 186, art. 2, ICAO Doc. 7782/2.

[266] Murphy, *supra* note 250.

[267] *Id.* at 412.

obligations that have not been contracted."[268] This was an incorrect application of Article 84 of the Chicago Convention, according to the EU, and should be dismissed as inadmissible. The United States responded that the ICAO Council was indeed competent to fashion such relief, but that in any event, the EU's objection was not preliminary in nature and need not be ruled upon by the Council until it had resolved the merits of the case.[269] The ICAO Council agreed with the United States that this objection was not preliminary, and therefore deferred judgment until it reached the merits.

Following the Council's decision, the EU Member States did not exercise their right to appeal it to the International Court of Justice. They instead filed their countermemorial on December 2.[270] The Council's order had invited the parties to resume negotiations to resolve the dispute, which they agreed to do, with the facilitation of the ICAO Legal Counsel, Dr. Ludwig Weber. ICAO Council President Dr. Assad Kotaite brought his "good offices" to bear on the problem. With Dr. Kotaite flying between Washington and Brussels, and after protracted negotiations, the dispute was diffused with an agreement between the United States and EU concluded at ICAO's Montreal headquarters in October 2001.[271] The United States formally withdrew its ICAO complaint following the EU's repeal of the noise regulations in April 2002, though it pursued its complaint against Belgium, which had imposed a flight curfew at Brussels.[272] The EU, however, objected to the withdrawal unless Belgium were included, so the U.S. withdrawal of the complaint was aborted. After the EU revoked the noise regulation on December 30, 2002. The EU then notified Belgium that its noise regulations were inconsistent with Community law and threatened to bring suit before the EU Court of Justice. Belgium subsequently formally declared the law would not be applied, and the United States settled the dispute with all fifteen EU Member States on December 6, 2003. It is no wonder that ICAO has been described as "among the most quietly effective international organizations."[273]

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[268] *European Union Rejects ICAO as Forum for Hushkit Disputes*, *supra* note 259.

[269] *Id.*

[270] Murphy, *supra* note 250, at 412.

[271] *Business Briefs*, SEATTLE TIMES, Oct. 31, 2001, at E3. *See* Council President Acts as Dispute Conciliator, Meets with High-Lever Authorities Over Noise Regulation, http://www.icao.int/icao/en/jr/5602_up.htm (last visited July 16, 2003).

[272] *U.S. Drops Hushkit Complaint, Pursues Case Against Belgium*, AVIATION DAILY, June 14, 2002, at 2.

[273] David Marcella, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT'L L.J. 81, 120 (1999).

Though the ICAO Council addressed important procedural questions, it is unfortunate that the Council failed to rule on the central issue—whether ICAO environmental standards establish the maximum requirements that may be imposed, or whether they are a minimum that can be enhanced by individual governments. The issue has profound importance in all areas of ICAO competence, including safety, navigation, and security.[274] Believing that consensus is the most effective way to resolve differences between nations, ICAO Council President Kotaite established an ad hoc working group he named "Friends of the President" to attempt to reach consensus regarding noise issues. He appointed delegates from Belgium, France and the United Kingdom and several other nations to the group. In October 2001, the ICAO General Assembly adopted by consensus the Friends' recommendation of a "balanced approach" to airport noise in Resolution A33-7, calling upon member States to identify the noise problem and resolve it by achieving the maximum environmental benefit in the most cost-effective manner. It calls upon States to assess: (1) source reduction; (2) land use planning and management; (3) noise abatement operational procedures; and (4) operating restrictions.[275] Operating restrictions upon aircraft are to be imposed only after "such action is supported by a prior assessment of anticipated benefits and of possible adverse impacts."[276] States are encouraged to refrain from imposing operating restrictions on aircraft that comply with Volume 1, Chapter 4 of Annex 16.[277] This effectively requires that deference be given by national and local governments and airports to ICAO noise standards.

IV. THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice has made important contributions to dispute resolution. One source observed that

> as the principal judicial organ of the United Nations: (1) [the ICJ] is a factor and actor in the maintenance of international peace and security; (2) it is the most authoritative interpreter of the legal obligations of states in disputes between them; (3) it has acted as

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[274] U.S. security requirements imposed upon foreign airlines and airports, for example, are far more stringent than those imposed by ICAO. *See* Paul Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT'L L. 649 (2003).

[275] ICAO Ass. Res. A33-7 Appendix C. Airport Noise: Transport Council Adopts New Hushkits Legislation, EUROPE ENVIRONMENT, Apr. 9, 2002.

[276] ICAO Ass. Res. A33-7 Appendix D.

[277] *Id.*

> the supreme interpreter of the United Nations Charter; and (4) it is the only truly universal judicial body of general jurisdiction.[278]

However, jurisdiction of the ICJ is only reluctantly conferred by states and is frequently avoided.[279] Though ICAO has nearly universal jurisdiction, a relatively small number of states accept the compulsory jurisdiction of the ICJ.[280] In ten of the twelve aviation disputes brought before the ICJ, the Court concluded it had no jurisdiction over the parties, and dismissed the cases. In only one of the twelve cases (i.e., *Libya v. United States* (1992)) did the ICJ reach the merits of the complaint.

A. The Cold War Cases

In the 1950s, the United States filed six cases with the ICJ against the Soviet Union, and its allies (Czechoslovakia and Hungary), alleging armed attacks by Warsaw Pact military aircraft against U.S. military aircraft.[281] Because none of the respondents had submitted to the jurisdiction of the ICJ, all of these complaints were dismissed.[282] It is unclear why the United States continued to file them, given the ICJ's unwillingness to accept jurisdiction. Perhaps the United States wanted to expose the lawlessness of its Communist adversaries in the court of world public opinion.

On July 27, 1955, an El Al civilian aircraft en route from Vienna to Tel Aviv departed from its flight path and entered Bulgarian air space where it was shot down by Bulgarian military aircraft, killing all fifty-eight persons on board. Declaring the attack "a grave violation of accepted principles of

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[278] Peter Bekker, *The 1998 Judicial Activity of the International Court of Justice*, 93 AM. J. INT'L L. 534, 536 (1999); *see generally* THE INTERNATIONAL COURT OF JUSTICE AT THE CROSSROADS (Lori Damrosch ed., 1987).

[279] *See* Jonathan Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, 81 AM. J. INT'L L. 855 (1987); Daniel Hylton, *Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419 (1994).

[280] Douglas Ende, *Reaccepting the Compulsory Jurisdiction of the International Court Of Justice: A Proposal for a New United States Declaration*, 61 WASH. L. REV. 1145 (1986).

[281] Aerial Incident of 7 October 1952 (United States v. U.S.S.R.), 1956 ICJ 9 (Order of Mar. 14); Aerial Incident of 4 September 1954 (United States v. U.S.S.R.), 1958 ICJ 158 (Order of Dec. 9); Aerial Incident of 7 November 1954 (United States v. U.S.S.R.), 1959 ICJ 276 (Order of Oct. 7); Treatment in Hungary of Aircraft and Crew of the United States of America (United States v. Hung., United States v. U.S.S.R.); Aerial Incident of 10 March 1953 (United States v. Czech.), 1956 ICJ 6 (Order of Mar. 14).

[282] Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445, 1460-61 (1985).

international law," the United States, U.K. and Israel brought complaints before the ICJ.[283] The Court dismissed the claims for want of jurisdiction.[284] More than three decades would elapse before the ICJ was again asked to adjudicate an aviation dispute.

B. Libya v. United States (1992)

The Convention on Offenses and Certain Other Acts Committed on Board Aircraft requires that control of a hijacked aircraft be restored to the aircraft commander and passengers be permitted to continue their journey.[285] The Convention for the Suppression of Unlawful Seizure of Aircraft declares hijacking to be an international "offense" and requires the state to which an aircraft is hijacked to extradite or exert jurisdiction over the hijacker and prosecute him, imposing "severe penalties" if he is found guilty.[286] The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation expands the definition of "offense" to include communications of false information and unlawful acts against aircraft or air navigation facilities, and requires prosecution thereof. Under each convention, contracting parties are obligated to punish the described offenses by "severe penalties,"[287] take "such measures as may be necessary" to establish their jurisdiction over the offense and its parties,[288] take the individual into custody,[289] make a prelimi-

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[283] Aerial Incident of 27 July 1955 (Isr. v. Bulg.), 1959 ICJ 127 (Judgment of May 26); Aerial Incident of 27 July 1955 (U.K. v. Bulg.), 1960 ICJ 264 (Order of Aug. 3); Aerial Incident of 27 July 1955 (United States v. Bulg.), 1960 ICJ 146 (Order of May 30).

[284] Aerial Incident of 27 July 1955 (Isr. v. Bulg.), Preliminary Objections, 1959 ICJ 127 (Judgment of May 26). *See* Andreas Lowenfeld, *The Downing of Iran Air 655: Looking Back and Looking Ahead*, 83 AM. J. INT'L L. 336, 339 (1989).

[285] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219, *reprinted in* 58 AM. J. INT'L L. 566 (1964) [hereinafter Tokyo Convention]. All subsequent citations are to the materials reprinted.

[286] Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133 (1971) [hereinafter Hague Convention].

[287] Hague Convention, *supra* note 286, art. 2; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1974, 24 U.S.T. 565, 10 I.L.M. 1151 [hereinafter Montreal Convention].

[288] Hague Convention, *supra* note 286, art. 4; Montreal Convention, *supra* note 287, art. 5.

[289] Hague Convention, *supra* note 286, art. 6(1); Montreal Convention, *supra* note 287, art. 6(1).

nary inquiry into the facts,[290] and notify the perpetrator's state of nationality.[291] Additionally, the provision regarding prosecution requires:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the laws of that State.[292]

All three conventions require that disputes between contracting states be resolved first by negotiation, then by arbitration, and, on appeal, by the ICJ.[293] Contracting states are required to report promptly to ICAO any information regarding the circumstances of offenses, the action they took to return the aircraft and to facilitate continuation of the passengers' journey, and the results of any extradition or other legal proceedings.[294]

The Hague and Montreal Conventions have been criticized for their ambiguity.[295] The provisions regarding sanctions for aircraft hijacking and other unlawful offenses do not actually require prosecution or extradition; rather, they impose an obligation only to present the case to the appropriate authorities who decide, at their discretion, whether prosecution is appropriate.[296] There is no uniformity in state actions regarding prosecution

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[290] Hague Convention, *supra* note 286, art. 6(2); Montreal Convention, *supra* note 287, art. 6(2).

[291] Hague Convention, *supra* note 286, art. 6(4); Montreal Convention, *supra* note 287, art. 6(4).

[292] Hague Convention, *supra* note 286, art. 7; Montreal Convention, *supra* note 287, art. 7.

[293] Hague Convention, *supra* note 286, art. 12(1); Montreal Convention, *supra* note 287, art. 14. *See* Paul Dempsey, *The Role of the International Civil Aviation Organization on Deregulation, Discrimination, and Dispute Resolution*, 52 J. AIR L. & COM. 529, 558-71 (1987).

[294] Hague Convention, *supra* note 286, art. 11; Montreal Convention, *supra* note 287, art. 13.

[295] Claude Emanuelli, *Legal Aspects of Aerial Terrorism: The Piecemeal vs. the Comprehensive Approach*, 10 J. INT'L L. & ECON. 503, 510-11 (1975); Mark E. Fingerman, Comment, *Skyjacking and the Bonn Declaration of 1978: Sanctions Applicable to Recalcitrant Nations*, 10 CAL. W. INT'L L.J. 123, 127 (1980); Ruben Kraiem, Recent Developments, 19 HARV. INT'L L.J. 1037, 1041 (1978).

[296] R.I.R. Abeyratne, *The Effects of Unlawful Interference with Civil Aviation on World Peace and Social Order*, 22 TRANSP. L.J. 450, 487-88 (1995); Dionigi Fiorita, *Aviation Security: Have All the Questions Been Answered?* 20 ANNALS AIR & SPACE L. 69, 88 (1995).

or extradition,[297] and the failure of the conventions to define the term "severe penalties" has enabled several states to avoid rigorous punishment of skyjackers, particularly those persons deemed to be political refugees.[298] This allows states to comply with the literal requirements of the conventions, while doing little to discourage the proscribed offenses.[299]

One case that illustrates the practical deficiencies of the Montreal Convention of 1971 is *Libya v. United States*.[300] Libya brought the case against the United States on grounds that the United States had breached the requirement for arbitration of disputes arising under the Montreal Convention. The facts involved the attempt of the United States to bring to justice two Libyan nationals who had allegedly put a bomb aboard the Pan Am 103 flight that exploded over Lockerbie, Scotland. The Montreal Convention required Libya either to prosecute or extradite those committing an offense that destroys civil aircraft. Libya contended that it was prosecuting the alleged perpetrators under its domestic law. It also relied on Article 14, which provides that any dispute over the interpretation or application of the Convention that cannot be settled by negotiation should be submitted to arbitration. The United States and the U.K. insisted that Libya promptly surrender the suspects for trial to British authorities, disclose all it knew about the crime, and pay appropriate compensation. Libya asked the ICJ both to promptly take provisional measures to preserve the rights of Libya and to order the United States to cease and desist in its violations of the Montreal Convention and in its threats of the use of force against Libya.[301]

Technically, it appeared that Libya had complied with the Convention and the United States had not. The United States, however, was convinced that the Libyan government was involved in the criminal act; hence, the United States would not accept Libya's willingness to prosecute the suspects. The United States persuaded the U.N. Security Council to weigh in on the issue, and the Security Council issued two resolutions of relevance. Resolution 731 noted the

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[297] R.I.R. Abeyratne, *Some Recommendations for a New Legal and Regulatory Structure for the Management of the Offense of Unlawful Interference with Civil Aviation*, 25 TRANSP. L.J. 115, 116 (1998). Dr. Abeyratne identifies four problems with the Conventions: (1) not enough states are signatories; (2) there is no enforcement provision; (3) most political offenses are exempt from extradition; and (4) the obligations to search for and arrest suspects are not sufficiently rigorous. *Id.* at 119.

[298] Mark E. Fingerman, Comment, *Skyjacking and the Bonn Declaration of 1978: Sanctions Applicable to Recalcitrant Nations*, 10 CAL. W. INT'L L.J. 123, 128 (1980); Kraiem, *supra* note 295, at 1041.

[299] Fingerman, *supra* note 298, at 127-28.

[300] 31 I.L.M. 662 (1992).

[301] *Id.*

Security Council's concern about the persistence of acts of international terrorism in which states are directly involved, illegal activities against international civil aviation, and the investigation of the Lockerbie explosion that implicated officials of the Libyan government. The resolution also urged Libya to cooperate fully in establishing responsibility for the terrorist acts against Pan Am 103.[302] Several weeks later, the Security Council issued Resolution 748, which demanded that Libya immediately comply with the obligations set forth in Resolution 731 and cease and desist from all forms of terrorist acts.[303]

The ICJ examined U.S. behavior in light of these two resolutions and found that, under Article 25 of the UN Charter, both Libya and the United States were obligated to carry out the decisions of the Security Council. The ICJ found that these obligations "prevail over their obligations under any other international agreement, including the Montreal Convention."[304] Therefore, the relief that Libya requested was denied.

It took years of Security Council sanctions[305] against Libya to persuade it to surrender the two suspects to the U.K. for trial before a Scottish court in the Netherlands. The court found that Pan Am 103 had been brought down by plastic explosives in a Toshiba radio cassette player within a suitcase checked from Malta via Frankfurt by Al Megrahi.[306] He was head of airline security, and had been involved in military procurement for the Libyan Jamahariya Security Organization (JSO).[307] Mr. Megrahi had entered Malta under an alias,

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[302] U.N. Security Council Res. 731 (Jan. 21, 1992).

[303] U.N. Security Council Res. 748 (Mar. 31, 1992). Further, Resolution 731 provided that all states should prohibit aircraft originating from or destined to Libya from taking off from, landing in, or overflying their own territory. U.N. Security Council Res. 731 (Jan. 21, 1992). States were required to prohibit their nationals from supplying Libya with aircraft or aircraft components, aviation engineering or maintenance, certifications of airworthiness for Libyan aircraft, or payment on insurance contracts or provisions of new insurance for Libyan aircraft. U.N. Security Council Res. 748 (Mar. 31, 1992).

[304] Libya v. United States, at ¶ 42.

[305] U.N. Security Council Res. 883 (Nov. 11, 1993) expressed concern about the "continued failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism, and in particular its continued failure to respond fully and effectively to the request and decisions in resolutions 731 (1992) and 748 (1992), constitute a threat to international peace and security." The Security Council therefore called upon states to freeze Libyan funds and financial resources, close all Libyan Airlines airports in their territories, prohibit its commercial transactions, and refuse to provide Libya with aircraft, component parts, aviation engineering, training, or insurance. *See also* U.N. Security Council Res. 1192 (Aug. 27, 1998).

[306] Her Majesty's Advocate v. Al Megrahi, 40 I.L.M. 582 (High Court of Justiciary at Camp Zeist, The Netherlands, Jan. 31, 2001).

[307] JSO was subsequently renamed the External Security Organization.

purchased clothing there that was packed in the suitcase with the explosive device, and associated with members of the JSO and Libyan military who had purchased MST-13 timers, one of which detonated the bomb over Lockerbie, Scotland.[308] In 2002, Libya offered to accept responsibility for the explosion of Pan Ann 103 over Lockerbie, and pay its victims $5 million each (or $10 million each if the United States lifted sanctions against it within eight months).

C. Iran v. United States (1996)

Mistaking it for a military aircraft, the U.S.S. Vincennes fired missiles which brought down Iran Air flight 655 Airbus 300 commercial aircraft shortly after taking off from Bandar Abbas on July 3, 1988, en route to Mecca, Saudi Arabia. All 290 passengers and crew aboard the civilian aircraft were killed.

Five years earlier, on September 1, 1983, Soviet military aircraft shot down a civilian airliner that had strayed over its territory—Korean Airlines flight 007—killing all 269 persons aboard. In 1984, after ICAO conducted an investigation[309] into the incident, the ICAO Assembly unanimously adopted one of the few amendments to the Chicago Convention, Article 3 bis, which essentially restated a customary principle of international law: "every State must refrain from resorting to the use of weapons against civil aircraft in flight and . . . in case of interception, the lives of persons on board and the safety of aircraft must not be endangered."[310] Paradoxically, the Soviet Union decried the destruction of Iran Air flight 655 as a "terrorist act" and a "monstrous crime."[311]

The Vincennes had been on patrol with as many as sixteen U.S. Navy vessels and of British, French, and Italian warships protecting oil tankers from attack during the prolonged Iran/Iraq war.[312] On May 17, 1987, an Iraqi Air Force F-1 Mirage fired on the U.S.S. Stark, mistaking it for an Iranian frigate.

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[308] Her Majesty's Advocate v. Al Megrahi, at 582.

[309] The Chicago Convention authorizes the ICAO Council to investigate, upon request, "any situation which may appear to present avoidable obstacles to the development of international air navigation; and after such investigation, issue such reports as may appear to it desirable." Chicago Convention, *supra* note 2, at art. 55(e).

[310] ICAO: Amendment of Convention on International Civil Aviation with Regard to Interception of Civil Aircraft, May 10, 1984, 23 I.L.M. 705, 706.

[311] John Deverell, *Aftermath of a Tragedy: Bloody Rage and Power Politics*, TORONTO STAR, July 9, 1988, at D1.

[312] *Id.*

According to one source, this apparently prompted the U.S. Navy to adopt a "shoot first and verify the kill later" rule of engagement.[313]

Iran Air flight 655 had never been a military threat to U.S. naval forces in the Persian Gulf, but was mistaken for an F-14 undertaking an armed attack by crew members under "combat-induced stress."[314] Until minutes before the missile launch, military transmissions from the Vincennes warning the incoming aircraft had not been received by Iran Air 655, for they had been broadcast on military frequencies.[315]

Shortly after the incident, Iran asked ICAO to conduct a complete investigation. On March 17, 1989, the ICAO Council adopted a resolution encouraging all states to "take necessary action for civil aircraft navigation safety, particularly by assuring effective coordination of civil and military activities." It also reminded states of the general principle of international law requiring them to refrain from using force against civil aircraft, and encouraged states to ratify Article 3 bis.[316]

Dissatisfied with what it perceived to be velvet glove treatment given the United States by ICAO, exactly two months later, Iran brought an action against the U.S. government before the ICJ, on grounds that the destruction of the civilian aircraft was both a violation of the Chicago Convention and the Montreal Convention of 1971.[317]

The United States was on weak legal grounds. Article 51 of the UN Charter allows an act of self defense "if an armed attack occurs." Here, no such attack actually occurred, and evidence held by the U.S. Navy in presuming one was about to occur was thin.[318] Moreover, the perceived attack was not on U.S. soil, over which it could claim sovereignty,[319] but on a U.S. vessel. Not only was the U.S. legal case poor, its moral position was miserable. Though relations between the two governments collapsed with the

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[313] Sompong Sucharitkul, *Procedure for the Protection of Civil Aircraft in Flight*, 16 LOY. L.A. INT'L & COMP. L. REV. 513, 517 (1994).

[314] David, *supra* note 273, at 83 n.5.

[315] Lowenfeld, *supra* note 284, at 336.

[316] Sucharitkul, *supra* note 313, at 532.

[317] Concerning the Aerial Incident of 3 July 1988 (Iran v. United States), 1989 I.C.J. 132 (Dec. 13) [hereinafter Iran-United States Aerial Incident]. The disposition of the complaint by ICAO was not to Iran's satisfaction, and prompted the ICJ filing. Stephen Schwebel, *The Performance and Prospects of the World Court*, 6 PACE INT'L L. REV. 253, 261 (1994).

[318] *See* Sucharitkul, *supra* note 313, at 528.

[319] Under Article 1 of the Chicago Convention, "every State has complete and exclusive sovereignty over the airspace above its territory." Chicago Convention, *supra* note 2, art. 1.

unlawful seizure of the U.S. embassy in Tehran and holding U.S. citizens hostage for months on end,[320] the killing of civilians was indefensible.

On February 22, 1996, the two governments informed the ICJ that they had agreed to discontinue the case because they had concluded "an agreement in full and final settlement of all disputes, differences, claims, counterclaims and matters directly or indirectly raised by or capable of arising out of, or directly or indirectly related to or connected with, this case."[321] With the out-of-court settlement between the parties, the case was dismissed. The ICJ never reached the merits of the dispute, which would likely have been resolved in Iran's favor.

Under the terms of the settlement, no compensation technically was paid by the United States to the Iranian government. However, shortly after the incident, President Reagan had offered *ex gratis* payments by the U.S. government to families of the victims of approximately $300,000 per family.[322]

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[320] The 1978 *United States v. France* Arbitral Accord had barely been decided when events in Iran gave the U.S. government a first-hand opportunity to put into practice the legal enforcement devices apparently approved by the *United States v. France* Tribunal. The Shah had been deposed in a revolution by Islamic fundamentalists, and when the former monarch was admitted to the United States for medical treatment, religious zealots protested by seizing fifty-two Americans in the U.S. Embassy in Tehran and holding them hostage. Worldwide appeals for release of the hostages were unavailing.

On November 14, 1979, U.S. President Jimmy Carter declared a national emergency and ordered the blocking of all Iranian governmental property in the United States. Executive Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). On November 29th, the United States brought the case to the ICJ. The World Court handed down a unanimous interim decision ordering the hostages freed. Case concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 19 I.L.M. 139 (1980). In addition to freezing governmental assets, the United States severed all diplomatic and trade relations with Iran. On April 24, 1980, a commando raid to rescue the hostages was aborted when U.S. helicopters collided on the ground near Tehran. On May 24, the ICJ, although decrying the use of force while legal action was pending, again decided unanimously that the hostages should be released. Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 3 (May 24), at 44. *See* Michael Koehler, *Two Nations, A Treaty, and the World Court: An Analysis of United States-Iranian Relations Under the Treaty of Amity Before the International Court of Justice*, 18 WIS. INT'L L.J. 287, 297 (2000).

[321] Iran-U.S. Aerial Incident, *supra* note 317, 3 VII 88 (ICJ Order 13 XII 89, at 132. The agreement also settled claims filed by Iran before the Iran-U.S. Claims Tribunal concerning banking matters. Alexander Watson, State Department Briefing, FED. NEWS SERVICE, Feb. 22, 1996 [hereinafter Watson Briefing].

[322] Watson Briefing, *supra* note 321. In 1997, payments totaling $29 million were authorized to be paid to the surviving family members of 125 who perished aboard the flight. William J. Clinton, Statement by Bill Clinton on Iran, U.S. NEWSWIRE (May 14, 1997).

D. Pakistan v. India (2000)

On September 21, 1999, Pakistan filed a complaint against India in the ICJ for India's destruction of a Pakistani military aircraft, allegedly over Pakistani territory.[323] Pakistan argued that both it and India had accepted the compulsory jurisdiction of the ICJ under Article 36 of the Statute of the Permanent Court of International Justice. Specifically, Pakistan argued that British India had acceded to the General Act for Pacific Settlement of International Disputes of 1928. India argued that the General Act was no longer in force, referred to institutions such as the League of Nations that were no longer in existence, and argued that, in any event, India has never deemed itself subject to that legislation since her independence either by succession or otherwise. India also insisted that under Article 36(2) of the statute, it had included a reservation excluding the jurisdiction of the court as to disputes involving India and any other state which "is or has been a member of the [British] Commonwealth of Nations."[324]

By a vote of 14-2, the ICJ found that it was unclear whether the General Act of 1928 survived the demise of the League of Nations.[325] Though the U.K. had acceded to the General Act, India was not a party at the time the instant complaint was filed, and therefore it provided no basis for jurisdiction. Further, under its reservation to Article 36, India had reserved jurisdiction over disputes with other British Commonwealth nations (which includes Pakistan). The ICJ therefore dismissed the complaint.[326] Though the opinion cautioned the parties to resolve their disputes peacefully, the result is that the ICJ is powerless to resolve any of the intractable issues between Pakistan and India, including the contentious territorial dispute over Kashmir. Though the ICJ had earlier ruled that the ICAO Council could hear aviation disputes between the two nations, the Chicago Convention is limited in its application to civil, and not state, aircraft.[327] Hence, the destruction of a military aircraft could not be brought before ICAO for adjudication.

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[323] Pieter H. F. Bekker et al., *Public International Law: International Courts and Tribunals*, 35 INT'L L. 595 (2001).

[324] *Id.* at 598.

[325] Peter H.F. Bekker, *Aerial Incident of 10 August 1999 (Pakistan v. India)*, 94 AM. J. INT'L L. 707, 708-09 (2000); Detra Chandler, *Developments at the International Court of Justice* 7 NEW ENG. INT'L & COMP. L. ANN. 199, 202-03 (2001).

[326] Case Concerning the Aerial Incident of 10 August 1999 (Pakistan v. India), Press Communique 2000/10bis (June 21, 2000). John Schmertz, Jr. & Mike Meier, *International Court of Justice Declines Jurisdiction in Pakistan/India Dispute*, 6 INT'L L. UPDATE (Aug. 2000).

[327] Chicago Convention, *supra* note 2, art. 3.

V. CONCLUSIONS

A. Political Means of Dispute Resolution

Political or diplomatic (and sometimes, coercive) methods are the ones most commonly employed in resolving international disputes. These include a variety of communications and consensual efforts to resolve controversies between governments, including exchanges of notes, formal and informal diplomatic discussions, consultations, and negotiations. They often provide an amicable avenue for exploring the differences of positions and achieving some compromise mutually acceptable to both parties. When this occurs, the solution selected is more likely to be long-lived.

But there are significant disadvantages to dispute resolution by political means. First, where the states have unequal bargaining power, "might makes right"; the nation in the strongest bargaining position will usually prevail on the major issues, even where an objective evaluation would not result in a conclusion that it stood in the most compelling legal or equitable position.[328] Winning an aviation dispute may be less important, for example, than prevailing on an issue in a more important commercial sphere or preserving political relationships. Second, good negotiators are taught to ask for more than they want or need, so that they have some room in which to bargain. This overstating of issues and positions tends to distort truth and may itself exacerbate the conflict between the governments. Third, if a solution is achieved, it may be neither as objective nor as impartial as one which would be rendered by a third party, but may instead reflect relative bargaining leverage or distorted reality.

Some of these difficulties can be diminished if a neutral third party, whether a state or an international organization, such as ICAO, provides its good offices to assist the parties in achieving a satisfactory resolution of the dispute, and/or performs inquiry, mediation, and conciliation.[329] The advan-

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[328] *See generally* Louis Sohn, *The Role of Arbitration in Recent International Multilateral Treaties*, 23 VA. J. INT'L L.J. 171, 171-72 (1983).

[329] *See* 2 OPPENHEIM'S INTERNATIONAL LAW 8-20 (Hersch Lauterpacht ed., 7th ed. 1952) [hereinafter Lauterpacht]. Good offices can be distinguished from mediation in that the former consists of various efforts to encourage negotiations between the parties, while the latter consists of the direct conduct of such negotiations on the basis of proposals submitted by the mediator. *Id.* at 10. Conciliation is defined as "the process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts (usually after hearing the parties and endeavoring to bring them to an agreement) to make a report containing proposals for settlement, but which does not have the binding character of an award of judgment." *Id.* at 12.

tages of informal third-party assistance are several: (a) it avoids any deleterious impact upon the authority and autonomy of the nations involved that might arise by imposing unwelcome binding decisions upon them; (b) although arbitration and adjudication require a concentrated focus on the resolution of specific factual and legal issues, mediation, conciliation, and good offices are not so constrained, and the inquiry can proceed in whatever direction the parties prefer, including a comprehensive evaluation of all aviation grievances between the two governments; and (c) a consensual solution is likely to be longer-lived than one imposed by third parties through legal means.[330] ICAO has been exceptionally successful in using its good offices to resolve and diffuse conflicts brought before it.

As noted above, the most commonly employed method of settling international disputes is via political means: informal and/or formal diplomatic consultations and negotiations with foreign governments. If political or legal means fail to resolve the dispute, the ultimate alternative is coercion or threat thereof, including reprisals and retaliation.[331] Sanctions have also been threatened to encourage hard bargaining or to force the submission of the dispute to arbitration (as was the case in the second *United States v. France* arbitration, and the *Australia v. United States* arbitration). Hence, various combinations of political, legal, and coercive means may be tailored to the particular controversy to secure a satisfactory resolution. Moreover, the exhaustion of political methods of dispute resolution is a condition precedent to the utilization of legal methods of dispute resolution: arbitration or adjudication.

B. Legal Means of Dispute Resolution

Highly prophetic were the words of Professor John Cobb Cooper, written in 1947:

> In the exercise of its sovereignty every nation has the right (as well as the duty itself) to develop its air power, as represented in part by its air transport, to the extent needed by its domestic and foreign commerce and other legitimate objectives. But some-

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[330] Gerald P. McGinley, *Ordering a Savage Society: A Study of International Disputes and a Proposal for Achieving Their Peaceful Resolution*, 25 HARV. INT'L L. J. 43, 71-72 (1984). *See generally* Vratislave Pechota, *Complementary Structures of Third-Party Settlement of International Disputes*, *in* DISPUTE SETTLEMENT THROUGH THE UNITED NATIONS 149 (Kventaka Raman ed., 1977).

[331] Lauterpacht, *supra* note 329.

> where an impartial forum must exist in which the legitimacy of these objectives can be challenged by other nations directly concerned. The development of air transport of one nation may injuriously affect another or cause a dangerous dispute. Again there must be a forum and machinery to remedy such a situation. World organization may well require sufficient international control so that air transport does not become an instrument of unfair nationalistic economic competition or political aggression and thus the source of serious international misunderstanding and dangerous ill feeling.[332]

For the most part, legal means have played only a limited role in dispute resolution. States have resisted turning over their conflicts to third parties,[333] despite the widespread pressure of mandatory arbitration clauses in bilaterals and the existence of international organizations with adjudicatory powers.[334] As we have seen, only six aviation disputes have been submitted to arbitration (*United States v. France* (1964); *United States v. Italy* (1965); *United States v. France* (1978); *Belgium v. Ireland* (1981); *United States v. United Kingdom* (1992), and *Australia v. United States* (1993)), and only five have been submitted to ICAO for resolution (*India v. Pakistan* (1952); *United Kingdom v. Spain* (1969); *Pakistan v. India* (1971); *Cuba v. United States* (1998); and *United States v. Fifteen European Nations* (2000)). A dozen were submitted to the ICJ.

Note that in all aviation arbitrations but one (*Australia v. United States* (1993)), the arbitration panel issued a decision addressing the merits of the complaint. In none of the disputes formally submitted to ICAO did the Council render a decision on the merits,[335] though ICAO successfully brokered several dispute resolutions informally. In ten cases, the ICJ was unable to render a decision on the merits because it lacked jurisdiction over the respondent. In only one aviation case (*Libya v. United States* (1992)), did the ICJ render a decision on the merits of the complaint, though in other cases it

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[332] JOHN C. COOPER, THE RIGHT TO FLY 192-93 (1947).

[333] Bilder, *supra* note 109, at 1-2; JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 97-99 (2d ed. 1959).

[334] *See generally* Martin Domke, *The Settlement of Disputes in International Agencies*, 1 ARB. J. 145 (1946); K. OELLERS-FRAHM & N. WUHLER, DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW (1984).

[335] Both ICAO and the ICJ rendered opinions in the second *Pakistan v. India* (1971) dispute. In this case, the ICJ was asked by India to assess the question of jurisdictional competence of ICAO, which was upheld by the ICJ.

rendered decisions on procedural and jurisdictional questions. It is likely that the ICJ would have reached the merits in *Iran v. United States* (1998), if the United States had not settled the case on the courthouse steps. This suggests that parties should seek arbitration if they really want to have a decision that defines their legal rights and responsibilities. If, instead, they want the dispute resolved through conciliation and mediation without a formal decision, they should submit their complaint to ICAO. Unless the states are willing to submit the dispute to the ICJ, it is unlikely to be able to address the merits.

Absent a treaty commitment, states are under no customary international legal obligation to refer their disputes to an arbitral or adjudicatory forum.[336] Ordinarily, the bilateral air transport agreement dispute settlement provisions provide the opportunity for binding arbitration on issues arising under the bilateral. The near-universal ratification of the Chicago Convention provides the vehicle for dispute resolution by the ICAO Council. But most nations have exerted reservations to the jurisdiction of the ICJ. In the absence of a treaty commitment, the customary practice of the world community is to allow each nation unilaterally to resolve interpretative questions arising as a result of its treaty commitments.[337] Whatever constraints or inhibitions there may be on arbitrary decision making are those which exist for all of international law: "common interest, policed by need for reciprocity and fear of retaliation."[338]

The reasons why nations are reluctant to resort to legal means of dispute resolution are numerous.[339] Some may be unwilling to tender the question to

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[336] Lauterpacht, *supra* note 329, at 22; Bernard Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277, 284 (2001).

[337] *See* Brian Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257 (2000) (advancing the idea of a multilateral agreement on mandatory arbitration, including the waiver of sovereign immunity to facilitate direct actions by airlines against foreign governments). Professor Havel provides an interesting constitutional argument for surrendering sovereignty to a multinational legal regime. This is a rather breathtaking proposal, given that commercial aviation disputes have historically been resolved by government to government negotiation and arbitration. Additionally, governments do not submit themselves to potential liability lightly.

[338] M. MCDOUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 8 (1967); *see also* FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 127-40 (1982).

[339] Professor Bilder points out that even where a party believes itself to be in a strong legal and equitable position, it may be reluctant to submit the question to binding arbitration or adjudication because of the uncertainty of the result: "No matter how careful the parties are selecting arbitrators or judges, no matter what the judges' reputations, any judge may simply fail to understand an issue, have unconscious biases, try to avoid responsibility by compromising, or simply reach a wrong decision." Bilder, *supra* note 109, at 4. In the international legal order "[u]nilateral remedies are the norm, and each state has first to rely on its own forces. Resort to courts and tribunals is exceptional, not only, as often said, because the judicial settlement of

a third party for fear of an adverse resolution. Although legal methods offer a means of securing an answer to a controversial legal question, the answer may not be the one that a participant would prefer to hear.[340]

Similarly, a nation in a superior bargaining position may have that strength seriously diluted if the dispute is submitted to a neutral third party, an advantage it may not wish to lose. Others may object to the perceived absence of bias in the decisional tribunal,[341] or the dearth of precedent or clear legal norms to govern the decision makers.[342] Moreover, the actual underlying cause of the dispute may differ from the legal issue that is submitted to arbitration or adjudication.[343] Thus, the tribunal may be focusing on an ostensibly important legal question when the real friction between the governments arises in a political or economic dimension. Still other nations "may be concerned about the expense, inconvenience, and delay involved in arbitral or international court proceedings, lack of familiarity with international court procedures, or uncertainty regarding the enforceability of any eventual judgment."[344] Hence, many governments prefer the give-and-take of consultations and negotiations in which a consensual resolution is pursued.

Between the two primary alternatives of third-party dispute resolution, arbitration has several advantages over adjudication in the settlement of international conflicts. These include a more expeditious and economical resolution of the issues (owing in part to the informality of their procedures, which is itself an independent advantage of arbitration), the privacy of proceedings (which avoids the potential embarrassment of focused media attention), and greater input in the selection of decision makers.[345] Moreover, most bilaterals include explicit arbitration clauses which require the submis-

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disputes is not compulsory, but also because resort to courts and tribunals is not always the most appropriate means to settle disputes." ZOLLER, *supra* note 97, at 4.

[340] Bilder, *supra* note 109, at 4. *See generally* LILLIAN RANDOLPH, THIRD-PARTY SETTLEMENT OF DISPUTES IN THEORY AND PRACTICE 41-42 (1973).

[341] *See generally* M. MCDOUGAL ET AL., *supra* note 338, at 258-60; *see* Paul Larsen, *The United States-Italy Air Transport Arbitration: Problems of Treaty Interpretation and Enforcement*, 61 AM. J INT'L L. 496, 517 (1967) (noting that the ICAO Council has been criticized as being ill-suited to arbitration or adjudication, because of the fact that its membership is comprised of the political representatives of member states).

[342] Bilder, *supra* note 109, at 3.

[343] *Id.* at 4, 6.

[344] *Id.* at 3.

[345] Larsen, *supra* note 341, at 498-99; McGinley, *supra* note 330, at 70. A nation as prosperous as the United States may have an advantage in judicial forums by virtue of the vast resources of legal talent in its departments of State and Transportation that it can commit to the case.

sion of disputes to an arbitral panel, once consultation and negotiation alternatives have failed to resolve the dispute; this is an advantage over attempting to secure jurisdiction over recalcitrant nations before an international adjudicatory body, such as the ICJ. As one commentator noted: "The primary problem confronting both the Permanent Court of International Justice under the League of Nations and the International Court of Justice under the United Nations has been the reluctance of nations to submit themselves to the compulsory jurisdiction of either court."[346] Indeed, nations rarely invoke the jurisdiction of the ICJ, and as we saw in the *Cold War Cases* and *Pakistan v. India* disputes, several have rejected its jurisdiction.[347]

Although the ICAO Council has been designated as a potential forum for both arbitration and adjudication, international aviation disputes have rarely been brought before it, even though 181 nations—virtually the entire world community—have ratified the Chicago Convention, and are therefore subject to its dispute resolution requirements. Moreover, that Convention conferred upon the agency strong enforcement powers of voting suspension and revocation of air transit rights for delinquent members.[348]

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[346] Harold J. Owen, *Compulsory Jurisdiction of the International Court of Justice: A Study of Its Acceptance by Nations*, 3 GA. L. REV. 704, 704 (1969).

[347] McGinley, *supra* note 330, at 44-45. Professor McGinley has succinctly summarized some of the principal reasons why many states are reluctant to consent to ICJ decision-making:

> [T]his lack of success [can be attributed] to a variety of factors, including a pro-Western bias in the substantive law applied by the judges; the inability to predict the outcome of any case submitted to the Court due to the sketchy nature of international law itself; a fear of losing and the impact that such loss would have on the status and reputation of the state in question; the political bias of the judges or their inability to deal adequately with the complex matters raised by international disputes; the expense, delay, and the often unwelcome publicity invoked in airing a dispute before the Court.
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> These weaknesses, however, merely reflect a deeper problem—that the Court's institutionalized dispute resolution process does not fit the social order in which it functions. . . . [The ICJ] represents an institutionalized dispute settlement process developed in relatively sophisticated, homogeneous, domestic societies; yet the Court operates in an international community which in terms of its social cohesion and its authority-power structure is essentially diverse and primitive in nature.

Id. at 45-46 (citations omitted).

[348] Articles 87 and 88 of the Chicago Convention provide that the ICAO Assembly may suspend the voting rights of any member which fails to conform with an arbitral decision or of the ICJ; where the ICAO Council determines that an airline is not conforming to a decision of the ICJ or arbitral body, member states must suspend their operations in their territory. 15 U.N.T.S. 92 (1944). Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1, 24 (1960).

There are many reasons why so few disputes have been submitted to the ICAO Council for adjudication under Chapter XVIII of the Chicago Convention. First and foremost is the nature of the Council itself.[349] The principal difficulty of utilizing ICAO as an adjudicatory tribunal is its political composition. As Dr. Edward Warner, first President of the ICAO Council, noted, "No international agency composed of representatives of states could be expected to bring judicial detachment to the consideration of particular cases in which large national interests are involved."[350] The Council is a political body comprised of governmental representatives appointed for their technical, administrative or diplomatic skills, or indeed, their political relationships in their home country, rather than their legal abilities.[351] Hence, they do not possess that measure of dispassionate independence and autonomy of an unbiased neutral decision maker that one normally expects of a judge.[352] For example, during the second *Pakistan v. India* proceeding, several Council members requested postponement of a vote while they consulted their respective governments to obtain instructions.[353] Despite the fact that Council

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[349] One commentator has noted that "the ICAO Convention contains its own, somewhat unusual, partially political, and arguably awkward dispute settlement procedures that are both apparently compulsory and little used . . . ." Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277, 277 (2001).

[350] Edward Warner, *The Chicago Air Conference*, 23 FOR. AFF. 406, 415 (1945).

[351] THOMAS BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 123-24, 195 (Richard B. Lillich ed., 1969).

[352] Prof. Michael Milde has noted:

> [T]he Council of ICAO cannot be considered as a suitable body for adjudication in the proper sense of the word—i.e., settlement of disputes by judges and solely on the basis of respect for law. The Council is composed of States (not independent individuals) and its decisions would always be based on policy and equity considerations rather than purely legal grounds. . . .
>
> Truly legal disputes (recognized by States concerned as being purely legal) can be settled only by a true judicial body which can bring into the procedure full judicial detachment, independence and expertise. The under-employed ICJ is the most suitable body for such type[s] of disputes.

Milde, *supra* note 182, at 95 (emphasis in original).

[353] *Id.* at 90. As Professor FitzGerald has eloquently noted:

> In the case of the ICAO Council, the persons sitting on the bench are demonstrably the national representatives of the respective member states. They are not, for the purposes of considering disagreements or complaints, divested of their character as national representatives. Hence, there is at the outset a contradiction in the ICAO procedure for the settlement of disputes which provides that representatives of states sitting as such will be called upon to act in a judicial capacity. Indeed, a perusal of the minutes of the Council meetings of July 28-29, 1971, shows that some of the members

members may act under the direction of their respective governments, they have shown themselves capable of reaching a decision, as reflected most recently in the *United States v. Fifteen European Nations* case.

Beyond the problem of the absence of an impartial decision maker is the potential cost of lengthy adjudicatory proceedings in consumption of parties' time and money.[354] The sheer size of today's ICAO Council (36 members, as of 2003) would suggest the likelihood of a lengthy evidentiary and decisional process, and the nightmare of a plethora of separate and conflicting opinions.[355]

> wanted to defer decisions because they wished to await instructions from their governments. Other representatives had already apparently received their instructions. . . .
>
> In short, it is a contradiction in terms to say that a state can be a judge. It is also a contradiction to hold that a representative who receives instructions from a state as to how he should act with respect to a particular disagreement could be seen to act judicially.

Id.

Gerald FitzGerald, *The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council*, 1974 CAN. Y.B. INT'L L. 153, 168-69 (1974) (citations omitted). In the postwar euphoria in which the Chicago Convention was concluded, it was no doubt anticipated that the world community would cooperate on the basis of man's higher virtues and aspirations. But nations, being creations of man, reflect the full spectrum of human strengths and weaknesses. Hence, the assumptions upon which adjudicatory jurisdiction was conferred to ICAO may have been specious.

[354] BUERGENTHAL, *supra* note 351, at 124.

[355] See Havel, *supra* note 337, at 257, in which Professor Havel points out that ICAO has pitifully little dispute resolution experience on which to draw. Actually, the early bilateral air transport agreements referred to ICAO as the forum for dispute resolution, as does the Chicago Convention, and ICAO Council has been formally asked to adjudicate several. Dissatisfaction with ICAO as a judicial forum led nations to insert an arbitration clause in their bilateral now the near universal means of dealing with bilateral air transport agreement problems that cannot be resolved in negotiations between governments. With respect to arbitrations between governments on commercial aviation issues, there have been several. Professor Havel points out that "with globalization . . . the technical and jurisprudential absurdity of trying to straightjacket the international aviation, space and telecommunications industries with domestic legal systems will become increasingly obvious." Brian Havel, *International Instruments in Air, Space and Telecommunications Law: The Need for a Mandatory Supranational Dispute Settlement Mechanism, in* INTERNATIONAL BUREAU OF THE PERMANENT COURT OF ARBITRATION, ARBITRATION IN AIR, SPACE & TELECOMMUNICATIONS LAW 11, 56 (Kluwer ed. 2002). His case would have been strengthened had he discussed why the arbitrations or adjudications discussed herein were unsatisfactory means of dispute resolution, why bilateral consultations and negotiations between governments on commercial aviation issues do not provide an adequate remedy, or why unilateral sanctions (as actual or threatened tariff or route suspension, or countervailing tariffs, as the United States has imposed on occasion) do not facilitate satisfactory dispute resolution.

Although ICAO has been given comprehensive adjudicatory powers by virtue of the Chicago Convention, and wide-ranging arbitral powers under a plethora of bilaterals,[356] it has exhibited no enthusiasm for exercising either, preferring instead to use its good offices to bring the parties to a resolution of the dispute.[357] In each of the five cases filed, delay in the proceedings and/or ICAO's role in conciliation and mediation has enabled the parties to resolve the controversy. The 1957 rules suggest a preference for consultations and negotiations rather than adjudication and sanctions. Mediation, conciliation, and the prudent use of good offices are sometimes the more efficient and effective means of conflict resolution, and the ones preferred by the ICAO itself.[358] Of course, the existence of Chapter XVIII's adjudicatory machinery may itself encourage nations to resolve their disputes amicably.[359] It undoubtedly gives the Council additional leverage in its efforts at mediation and conciliation.[360]

However, some commentators argue that ICAO's dispute resolution mechanism ought to be employed to deal with problems of economic discrimination in international aviation. Dr. Gertler has noted that, despite ICAO's shortcomings:

> it is not quite understandable why States have not approached the ICAO concerning some discriminatory practices, such as complaints over landing fees, given the clear mandate of Article

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[356] For example, Article 9 of *Bermuda I* provided that "any dispute between the contracting parties relating to the interpretation or application of this agreement or its annex which cannot be settled through consultation shall be referred for advisory report to the Interim Council of the [ICAO]." Article III § 6(8) of the Interim Agreement gave the Council authority to act "as an arbitral body on any differences arising among member states relating to international civil aviation matters." News & Notes, *British-U.S. Agreement on Air Transport Disputes*, 1 ARB. J. 37 (1946).

[357] B. CHENG, *supra* note 11, at 460.

[358] MILDE, *supra* note 182, at 94; Gariepy & Botsford, *supra* note 190, at 351, 358-59. The final chapter in John Murphy's recent book recommends that the United Nations also be employed as a forum for dispute resolution principally via negotiations. conciliation, and similar means. J. Murphy. *The United Nations and the Control of International Violence* (1982). For a review of the role the U.N. has played in employing good offices for the resolution of international conflicts, *see* Vratislav Pechora, *A Study of the Good Offices Exercised by the United Nations Secretary-General in the Cause of Peace*, *in* DISPUTE SETTLEMENT THROUGH THE UNITED NATIONS 577 (Kuentaka Raman ed., 1977).

[359] Milde, *supra* note 182, at 94; Gariepy & Botsford, *supra* note 190, at 351, 359, 361-62.

[360] Gariepy & Botsford, *supra* note 190, at 361-62. "When the Council invites the parties to enter into further negotiations, for example, it is rather difficult for them to decline such an invitation, for there is always the possibility—real or imagined—that this uncompromising stance might affect the Council's decision in the case." BUERGENTHAL, *supra* note 351, at 195.

> 15 of the Convention. By precedent setting decision making, the ICAO Council could achieve more significant progress towards an orderly flow of international air transport commerce than is possible in isolated bilateral contexts through unilateral national protective measures.[361]

Another source insists, "[t]he ICAO must be the organization to maintain a cohesive policy in an industry that must transcend boundaries to fully realize its potential."[362] Now that it has broken the mold of serving only as a forum for disputes over airspace, and taken on conflicts in the commercial and environmental sphere, perhaps it can become a forum for resolving a wider variety of aviation conflicts, even though the ultimate resolution may be nonjudicial in form.

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[361] Gertler, *supra* note 29, at 51, 83-84.
[362] Brown, *supra* note 232, at 465, 482.