DECISION NO. 23 OF THE TRIBUNAL (SUPPLEMENTARY DECISIONS AND CLARIFICATIONS) (DETERMINATION OF USG'S REQUEST), DECISION OF 1 NOVEMBER 1993

DÉCISION N^{O} 23 DU TRIBUNAL (DÉCISIONS ADDITIONNELLES ET PRÉCISIONS) (DÉCISION RELATIVE À LA DEMANDE DU GOUVERNEMENT DES ÉTATS-UNIS), DÉCISION DU 1 NOVEMBRE 1993

DECISION NO. 23 OF THE TRIBUNAL (SUPPLEMENTARY DECISIONS AND CLARIFICATIONS) (DETERMINATION OF USG's REQUESTS)

THE ARBITRAL TRIBUNAL

Having met at The Hague on October 9, 1993 and having conferred together by correspondence and telephone discussion among its members in conformity with Rule 8, paragraph 2, of the Tribunal's Rules of Procedure and having met in London on November l, 1993

Having regard to:

- the Tribunal's Award on the First Question, delivered at The Hague on 30 November 1992
- Article 17(6) of the Air Services Agreement between the Parties of 23 July 1977 as amended ("Bermuda 2")
- Articles 13(2) and 30 of the Tribunal's Rules of Procedure
- The Tribunal's Minute of May 7, 1991, concerning periods allowed for rendering the Award on the First Question and for submission of requests for clarification thereof and for issue of such clarifications
- Decision No. 19 of the Tribunal (Supplementary decisions and clarifications: procedural directions) and Decision No. 22 of the Tribunal (Supplementary decisions and clarifications: procedural directions: variation of Decision No. 19)

Having considered

- the Requests for clarifications and supplemental decisions filed by the Government of the United States ("USG") under cover of a letter from Ms. Catherine W. Brown, Deputy Agent, dated May 17, 1993 ("USG's Requests");
- the Preliminary Comments on USG's Requests offered on behalf of the Government of the United Kingdom ("HMG") in a letter from Mr. C.A. Whomersley, Deputy Agent, dated June 11, 1993;
- the Supplemental Submission regarding requests for clarification and supplemental decisions submitted by USG under cover of a letter from Ms. Brown dated September 3, 1993;
- the United Kingdom's Observations on the Requests dated September 2, 1993 and the Annexes thereto; and
- the oral submissions of the Parties on October 9, 1993;

DECIDES THAT:

- for the reasons set out in the Annex to this Decision, the Tribunal has no power under Article 17(6) of Bermuda 2 or under Article 13(2) or Article 30(1) of the Tribunal's Rules of Procedure, or otherwise, to take any of the steps proposed by USG in it Requests and accordingly
- rejects USG's requests that the Tribunal issues any correction, clarification or supplemental decision such as is proposed in USG's Requests.

Done in London this 1st day of November 1993

(*Signed*) Isi Foighel, President

(*Signed*) Fred F. Fielding Esq.

(*Signed*) Jeremy F. Lever QC

ANNEX TO DECISION NO. 23 OF THE TRIBUNAL (REASONS)

1. INTRODUCTION, BACKGROUND AND THE PARTIES' SUBMISSIONS

Introduction

1.1 By Decision No. 9 the Tribunal separated the issue of whether HMG had failed to comply with its obligations under Bermuda 2 ("the First Question") from the question relating to relief or remedies if HMG had failed to do so.

1.2 On November 30, 1992, the Tribunal rendered its Award on the First Question. Following on requests made by the Parties, the Tribunal took decisions to correct certain typographical errors and slips in the Award as rendered and to clarify one expression used therein; those decisions are of no relevance to Decision No. 23 to which the reasoning contained in this Annex relates.

USG's Requests

1.3 Under cover of a letter dated May 17, 1993, USG sent to the Tribunal a Submission regarding requests for clarification and supplemental decisions ("USG's Requests").

1.4 USG's Requests asked the Tribunal -

- to review what USG believed to constitute an inconsistency in the Award on the First Question relating to HMG's best efforts obligation with respect to the level of charges;
- to issue a consequential correction, clarification or supplemental decision, as the Tribunal might deem appropriate;
- to consider whether the Tribunal's interpretation of the best efforts standard made an additional ruling that HMG had failed to use its best efforts with respect to the level of charges at Heathrow appropriate.

USG stated that the Tribunal might wish alternatively to instruct the Parties that it would consider those matters further in the remedial stage.

1.5 The essential basis for USG's Requests was that the Tribunal had concluded that, if HMG had fulfilled its obligations under Article 10(1) and (3) of Bermuda 2, it would have taken steps to lower the level of charges in 1984/85-1986/87; yet the Award appeared to approve HMG's use of the rates for those years as the base for the first year of the new RPI-X charging regime, 1987/88.

1.6 USG's Requests further asserted that the material relating to 1987/88, on the basis of which the Award found that HMG had fulfilled its obligations

in relation to the level of charges for that year, related exclusively to BAA as a whole whereas the Award had elsewhere ruled that the relevant rate of return for the purposes of the Arbitration was that for Heathrow alone.

1.7 On that basis USG's Requests submitted that, insofar as certain passages in the Award found that HMG had fulfilled its obligations in relation to the level of charges in 1987/88, those passages were inconsistent with other passages in the Award and that it was the latter passages that were correct.

1.8 USG's Requests then reviewed certain of the evidence relating to the level of charges in the years 1983/84-1986/87 and advanced certain additional computations to corroborate USG's contention that any reasonable effort by HMG to establish the initial rates to which RPI-X would operate at Heathrow would have had to take into account, but failed to take into account, the years prior to 1987/88 to ensure that monopoly profits did not result.

1.9 According to USG's Requests, any conclusion that the starting values for RPI-X did not consolidate pre-existing excessive earnings was inconsistent both with the best efforts findings by the Tribunal for the period preceding the 1987/88 charging year and also with the body of information available to HMG *ex ante*, which HMG should have used.

1.10 Additionally USG's Requests asked the Tribunal to address the question whether, under its interpretation of the best efforts standard, HMG at the time of privatization impermissibly placed its own proprietary financial interests above its obligations under Bermuda 2. According to USG's Requests, the Award does not address the question whether it was consistent with HMG's obligation to use best efforts, as interpreted by the Tribunal, for HMG to have rejected serious recommendations that the value of X be set at 2, given that, as HMG had in mind, setting the value at 1 rather than 2 increased the sale proceeds received by the U.K. Treasury on BAA's privatization by some £80 million.

1.11 USG's Requests concluded as follows:

> "For the reasons stated above, USG believes that it would be most consistent with the Award to determine that USG may seek damages for 1987/88 based on HMG's failure to lower the level of charges imposed at Heathrow for that year. Alternatively, USG submits that it would be appropriate to instruct the parties that the Tribunal will consider this matter further in the remedial phase.
>
> "In addition, USG requests that the Tribunal issue a clarification or supplemental decision, as appropriate, with respect to the implications of the best efforts standard for HMG's decision to subordinate the interests of users of Heathrow to its own financial interests at the time of privatization.
>
> "In any event, USG will ask the Tribunal to consider evidence with respect to the level of charges in 1987/88 during the remedial phase of the arbitration, for purposes of both computing money damages and determining appropriate equitable remedies."

1.12 The covering letter from USG that accompanied USG's Requests stated that the Requests were made pursuant to Article 17(6) of Bermuda 2, Rules 13 and 30 of the Tribunal's Rules of Procedure, Tribunal Decisions Nos.

15 (Amendment of Rule 30 of the Tribunal's Rules of Procedure) and 18 (Preliminary directions for further procedure for determination of relief and remedies), the Tribunal's Minute of 7 May 1991 (so far as relevant hereto, Arrangements for the substantive hearing on the First Question), and the agreement of the Parties reflected in the joint letter to the Tribunal of January 8, 1993, (Extension of deadline for requests for clarification and/or supplemental decisions).

1.13 Neither USG's covering letter nor USG's Requests themselves elaborated USG's views about the basis on which USG believed that the Tribunal had the power to do what USG's Requests asked it to do.

HMG's preliminary comments

1.14 By letter dated June 11, 1993, HMG objected that USG was seeking to reopen the whole issue of the level of user charges at Heathrow for the year 1987/88, an issue upon which (at paragraph 10.41 of the Award) the Tribunal had ruled against USG. The letter indicated that HMG would be submitting to the Tribunal that as a matter of jurisdiction the request made by the United States was not within the scope of any of the procedural provisions upon which USG relied, and that in any event as a matter of obvious principle it was not open to a party to seek to reopen in that way an issue upon which it had lost. Further, and in any event, HMG might wish to make a detailed response to the matters raised in USG's Requests.

Decisions Nos. 19 and 22 of the Tribunal

1.15 As required by Rule 30(3) of the Tribunal's Rules of Procedure, Decision No. 19 (as varied by Decisions No. 22) of the Tribunal fixed 3 September 1993 as the time limit for the filing by the Parties of any further written observations on USG's Requests and determined the further procedure for the consideration of USG's Requests.

1.16 Pursuant to the directions thus given, USG filed a Supplemental Submission regarding requests for clarification and supplemental decisions, dated September 3, 1993, and HMG filed Observations on USG's Requests for clarification and supplemental decisions dated September 2, 1993. An oral hearing was held at The Hague on October 9, 1993.

USG's Supplemental Submission and its oral submissions

1.17 By its Supplemental Submission, USG recapitulated its contention that there was an inconsistency between the finding in the Award that the 1986/87 charges should have been lowered, on the one hand, and the finding that those charges could legitimately serve as the platform for the next year's charges, on the other hand. According to USG, the inconsistency arose because, in connection with the level of charges in 1987/88, the Tribunal had considered only the setting of the value of X for the purposes of the RPI-X regime which was to apply thereafter and had failed to consider the use of the 1986/87 charges as the starting point for the price cap regulation. With respect

to the latter, USG reiterated that the Tribunal had found that the best efforts standard was satisfied for the year 1987/88 even though, according to USG, HMG had never looked specifically at the level of profitability resulting from Heathrow charges and that it had ignored BAA's record of under-estimating its future profits.

1.18 USG's Supplemental Submission elaborated USG's further contention that if, in relation to the level of charges in 1987/88, the Tribunal had applied the same objective standard as it had enunciated earlier in the Award and as it had applied in respect of earlier years, it would necessarily have concluded that HMG had failed to comply with its best efforts obligation in relation to the level of charges in 1987/88. In support of that conclusion, USG referred to evidence that was before the Tribunal and to material which, USG said, showed that the evidence referred to in the Award in support of the Tribunal's actual finding in respect of the level of charges in 1987/88 did not, or dit not adequately, support that finding. USG further relied on the Tribunal's finding that HMG had failed to comply with its obligation under Article 10(5) of Bermuda 2 to provide information about the level of charges proposed for 1987/88 and that, but for that failure, flaws and inconsistencies in HMG's approach to those charges might have come to light and been corrected.

1.19 With regard to the question whether the Tribunal has the power to grant USG’s Requests, USG’s Supplemental Submission contended that clarification under Article 17(6) of Bermuda 2 was particularly appropriate with respect to a partial award as the Parties began the second phase of a two-phase arbitration over which the Tribunal exercised continuing jurisdiction. Relying on the Oxford English Dictionary, USG submitted that "clarification", by its ordinary meaning, included not only the elimination of ambiguities, but also the correction of inconsistencies, which by their nature created ambiguities; clarification thus embraced not only the explanation of points that appeared contradictory or obscure, but also the possibility of changing elements of the Award, where that was necessary to eliminate apparant contradiction or other mistakes or "impurity".

1.20 According to USG, without such "clarification" the Award would fail to perform the object which, by the words of Article 17(1) of Bermuda 2, the Parties had shown that they intented, namely the conclusive resolution for all disputes that could not be resolved through consultation. Such failure could also create further ambiguity and confusion during the damages phase.

1.21 Secondly, USG contended that the Tribunal had never explicitly considered whether HMG had used best efforts in setting the initial level for the 1987/88 charging year and that Rule 30 of the Tribunal's Rules of Procedure clearly empowered the Tribunal to take a supplemental, reasoned decision, to make good its earlier omission.

1.22 Thirdly, USG submitted that the Tribunal had particular authority to correct an inconsistency in, and to supplement, a partial award in bifurcated

proceeding. In support of that submission USG contended that the principle of party autonomy recognized that it should be left to the parties to determine whether they did or did not want judicial review on the merits; by agreeing under Article 17(6) of Bermuda 2 and Rule 30 of the Tribunal's Rules of Procedure to permit requests for clarification of an award and requests for supplemental awards, USG and HMG had clearly intended that further rulings or interpretations by the Tribunal would be permitted.

1.23 Even in the absence of agreed upon rules of procedure, the need to fulfil the object and purpose of arbitration had led tribunals to find that they had inherent powers to revisit certain areas of an award, e.g. to correct fundamental mistakes as to jurisdiction or as to the content of applicable national law.

1.24 Finally USG's Supplemental Submission contended that the principle of finality did not preclude a tribunal, such as the present, which was not *functus officio*, from exercising an inherent power not merely to clarify but even to reconsider a final award, citing *Philadelphia-Girard National Bank*, 8 R.I.A.A. 69, at page 70 (1930); *Sabotage* Cases, 8 R.I.A.A. 160, 168; *Trail Smelter* Case 3 R.I.A.A. 1906, at page 1953 (1935); and *Effects of Awards of Compensations made by the United Nations Administrative Tribunal Advisory Opinion of July 13th, 1954*, 1954 I.C.J. Reports 47, at page 55 (discovery of new facts of decisive importance). The further case-law and legal materials to which USG drew the Tribunal's attention are listed in the Appendix hereto.

1.25 At the oral hearing on October 9, 1993, USG elaborated on the arguments contained in its written submissions. In response to HMG's written Observations, USG contended that, although a power to "interpret" might not include a power to correct, the Treaty conferred a power to "clarify" which, in USG's submission, was wider than a power to interpret.

1.26 Here, USG pointed out, the Tribunal was not *functus officio*; it continued to exist and was in the middle of proceedings. The *Jaworzina Frontier* case (P.J.I.C.), Ser. B. No. 8 (1923) and the *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case*, ICJ Rep 1959 page 395, on which HMG relied, were clearly distinguishable from the present case on their facts. Moreover, if, contrary to USG's belief, the Tribunal lacked express power to do what USG requested, it certainly had an inherent power of revision, as appeared from the decision of the International Court of Justice in *UK-France Continental Shelf (Interpretation)* Case (1978) ILR 54. In summary the Tribunal should reject HMG's contention that the Tribunal could not change the Award even if it was inconsistent.

1.27 Counsel for USG then reviewed the aspects of the Award which, according to USG, gave rise to the inconsistency in issue. The contradictions in the Award, unless clarified, would leave the Award with two different best efforts standards, which the Tribunal could not have intended. The contradiction had resulted from the fact that in relation to 1987/88 the

Tribunal had not addressed the evidence as it had, correctly, addressed it in relation to the earlier years.

1.28 In answer to questions from the Tribunal, USG submitted that "revision" unlike clarification (including elimination of inconsistencies), involved reopening and revisiting a factual question in the light of a new fact. That was not what USG was requesting in the present case where, as in the *UK-France Continental Shelf* Case, *supra*, the need was to correct a significant inconsistency.

1.29 In reply USG stressed that it was not seeking to re-open the proceedings in order to consider fresh evidence (revision in the sense of rehearing): all the relevant material was already before the Tribunal and the question fell squarely within the Tribunal's Terms of Reference, so that there could be no doubt that the Tribunal, which had an on-going existence of its own, had jurisdiction to grant USG's request.

1.30 In USG's view, the distinction sought to be drawn by HMG between correction of the mistake, on the one hand, and revision due to inconsistency on the other hand, was misconceived. In a very complicated case such as this, it would be most unsatisfactory if the Tribunal felt constrained to proceed through what would probably be lengthy further proceedings to a final award and govern the future of the Treaty relationships on the basis of a mistake. That was the rationale for the case law relating to correction, revision and clarification by tribunals of their awards.

HMG's Observations on USG's Requests for clarification and supplemental decisions and HMG's oral submissions

1.31 Part I of HMG's written Observations elaborated its earlier contention that USG's Requests were inadmissible. According to HMG, USG were asking the Tribunal to reconsider an issue which the Tribunal had both addressed and decided adversely to USG.

1.32 HMG submitted that it was a general principle of international law that, in the absence of expressly conferred power, an international tribunal had no power to modify or interpret its award (O'Connell, International Law, 2nd ed., 1970, at page 1109, citing the *Jaworzina Frontier* case (P.J.I.C.), Ser. B. No. 8 (1923) at page 38, although HMG accepted that, even in the absence of any expressly conferred power, an international tribunal has an inherent power to rectify a material error found to exist in its decision, that is one analogous to an error resulting from a slip of the pen or from the miscalculation or miscasting of arithmetical figures, citing the *UK-France Continental Shelf (Interpretation)* Case (1978) ILR 54 at page 139.

1.33 According to HMG, the powers expressly conferred on the Tribunal, as exeptions to the general rule relied on by HMG just referred to, were to be interpreted strictly. Secondly, the Tribunal should examine the real purpose of USG's request (see *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum case* I.C.J. Rep. 1950 page 395 at pages 401-

403). In the present case, USG's real purpose was to re-open matters determined against USG and, despite the formulation of the Requests, not to obtain an interpretation - or clarification of the meaning and scope - of the Award. Thirdly, the Tribunal's Rules of Procedure unlike the Rules of the International Centre for the Settlement of Investment Disputes ("ICSID"), on which the Tribunal's Rules of Procedure had been modelled, omitted any power of revision.

1.34 HMG then considered as follows USG's Requests:

(i) for correction under Rule 13(2) of the Rules of Procedure - but that Rule was expressly confined to "clerical, arithmetical or similar errors" in the Award and therefore, according to HMG, irrelevant in the present context;

(ii) for clarification under Article 17(6) - i.e., in substance, interpretation so as to define the meaning and scope of the Award as distinct from its revision (usually reserved for cases in which a new fact of a decisive nature has come to light);

(iii) for a supplementary decision under Rule 30 of the Tribunal's Rules of Procedure - but that Rule was confined to cases were the Tribunal had omitted to decide a question referred to it and was, therefore, as HMG submitted, again irrelevant.

1.35 HMG opposed USG's alternative suggestion of deferring consideration of USG's Requests until the relief and remedies phase of the Arbitration as lacking any legal basis and as inconsistent with Article 17 of Bermuda 2 and Rules 13 and 30 of the Tribunal's Rules of Procedure in so far as those provisions laid down time limits.

1.36 Part II of HMG’s Observations were concerned with the substance of USG's arguments. HMG submitted that:

(i) there was no lack of clarity in the relevant conclusions reached by the Tribunal (referring to paragraphs 8.17, 10.29 - 10.33 of Chapter 7 of the Award);

(ii) in particular there was no lack of clarity in those conclusions simply because, in considering whether HMG had been in breach of Bermuda 2 in respect of earlier years, the Tribunal had found (at paragraph 10.20 of Chapter 7 of the Award) that HMG had, in respect of those earlier years, failed to use its best efforts to lower the level of charges at Heathrow; and in any event inconsistency was different from lack of clarity;

(iii) USG's criticisms of the omission in the Award of reference to evidence relating to the realized rate of return at Heathrow in 1987/88 was misconceived since such evidence would be *ex post* whereas it was the *ex ante* position that was relevant;

(iv) the points made in USG's Requests summarised at paragraphs 1.5 and 1.6. above were misconceived because, contrary to USG's erroneous belief, the two figures for rates of return to which it referred in that connection were projected rates of return for 1986/87, and were for BAA and Heathrow respectively, thereby fully justifying the finding, at paragraph 10.30 of Chapter 7 of the Award, that contemporaneous documentation confirmed that the U.K. Department of Transport, having applied their minds to the material, were satisfied that the projected profitability associated with the proposed charges (at Heathrow as well as for BAA as a whole) would be reasonable.

1.37 With regard to USG's charge that the Award was inconsistent, HMG contended that the nature of the exercise in relation to which findings had been made in respect of the years 1984/85 - 1986/87 was in several material respects different from the nature of the exercise in relation to which findings were required to be made, and were made, in respect of 1987/88. In HMG's submission there was no inconsistency.

1.38 More generally, the evidentiary material and computations relied on by USG were such as to expose USG's true objective, which was, HMG said, to re-open an issue that had already been decided, and indeed to do so misusing calculations that had never been put to the relevant witnesses.

1.39 Finally HMG's Observations answered USG's argument that the Award did not address USG's contention that the value of X in the RPI-X formula had been adopted for illegitimate reasons. The argument was misconceived since, HMG said, the Award precisely addressed the point in question at paragraph 10.34.

1.40 At the oral hearing on October 9, 1993, counsel for HMG submitted that, by its application, USG was asking the Tribunal to reverse its decision on liability in the Award, namely the finding that HMG had not failed to use its best efforts in respect of the level of charges in 1987/88. The Tribunal had in that respect performed the task assigned to it by Article 17 of the Treaty, by Decision No. 1 of the Tribunal, and by the Tribunal's Rules of Procedure. USG's application was no more permissible now than if it were being made after a single hearing on liability and remedies, which had resulted in a single award.

1.41 Counsel for HMG drew attention to Rule 22 of the Tribunal's Rules of Procedure which expressly provided that exeptionally, the Tribunal could re-open the proceedings *before* the award had been rendered if new evidence was forthcoming of such a nature as to constitute a decisive factor or there was a vital need for clarification on certain points. In HMG's view that substantially limited the circumstances in which the proceedings could be re-opened. USG was asking the Tribunal to re-open the proceedings in a way that was precluded by Rule 22.

1.42 The *Chorzow Factory* Case, 1927 P.C.I.J. (Ser. A) No. 13, cited by USG, was authority for the proposition that, in exercising its power to "construe" its judgments, the Permanent Court of International Justice was concerned to "make clear" the fundamental intention of the Court. The same was true of "interpretation", which, in HMG's view, was the same thing as "clarification". By contrast, USG was seeking revision of the Tribunal's Award for which, save in the narrow circumstances prescribed by Rule 22, the Tribunal's Rules of Procedure (unlike Rule 49 of the ICSID Rules on which they were based) did not provide.

1.43 With regard to USG's request for a supplementary decision persuant to Rule 30 of the Tribunal's Rules of Procedure, USG's complaint was that paragraph 10.32 of Chapter 7 of the Award (where the Tribunal rejected USG's contention that the RPI-1 formula consolidated pre-existing excessive profitability) was at odds with something that was elsewhere in the Award and should therefore be set aside; according to HMG, that would not be either clarification or supplementation.

1.44 With regard to USG's case, in so far as it was based on the alleged inherent powers of the Tribunal, HMG rejected USG's suggestion that the Award was a partial award. The authorities relied on by USG related to factually different situations (tribunals entrusted with authority to adjudicate on a large group of cases for a protracted period of time; discovery of new evidence of a decisive character) or cases concerned with interlocutory decisions or where a tribunal had based itself on a fundamental assumption which was shown to have been false. Moreover in the cases in question, unlike the present case, the relevant rules of the tribunal were entirety silent as to what powers the tribunal might have to revisit its award.

1.45 Finally, counsel for HMG submitted that, contrary to USG's contention, the *UK-France Continental Shelf (Interpretation)* Case (1978) ILR 54 concerned a slip arising from differences between two sets of maps as a result of which there was a discrepancy between the *dispositif* and the Court's findings.

II. THE TRIBUNAL'S REASONS FOR ITS DECISION

2.1 For the reasons given below the Tribunal is satisfied that it has no power to accede to any of the requests made by USG and it therefore finds it unnecessary to consider the arguments on the substance save insofar as they are relevant to the admissibility of the requests. However, by pursuing that course, the Tribunal should not be understood to be acccepting that the findings relating to HMG's efforts in respect of the year 1987/88 were inconsistent with other findings made in the Award. In this connection, the Tribunal believes that it is useful to recall that, by its terms of reference, it was and is required to consider separately each of the six charging years in issue; that HMG's obligations were obligations of conduct and not of result; and that, in respect of each year, HMG's conduct fell to be considered by reference to the facts that were known or should have been known to HMG at the time

relevant to the appraisal of HMG's conduct in relation to the charges proposed for that year - a time that differed for each of the years under review.

2.2 By Decision No. 9, as already noted, the Tribunal separated the issue of breach of Bermuda 2 from that of relief or remedies if breach were established. The fact that the issue of relief or remedies was reserved for separate decision does not affect the final character of the Award on the First Question in relation to the issue of breach. The Tribunal is of the judgement that, so far as the issue of breach is concerned, the Award on the First Question is no less, and no more, final than if the issue of breach had been the only issue which, by its terms of reference, the Tribunal had been required and empowered to decide.

2.3 The amendments to the Tribunal's Rules of Procedure consequential upon the introduction of a power to give separate awards on distinct issues corroborate the separate and equal status of serial awards. In particular, paragraph (1) of Rule 22 of the Tribunal's Rules of Procedure - Closure of the proceedings - as modified in its operation by Rule 26A - More than one award (which was added by Decision No. 14 of the Tribunal in consequence of the Tribunal's decision to separate the question of breach from that of remedies) expressly requires that when the presentation of the case by the Parties is completed, the proceeding shall be declared closed and that where an award is to be limited to specific issues the required declaration shall indicate the issues in question with respect to which the proceeding is closed. Pursuant to those Rules, at the end of the substantive hearing (on August 2, 1991) the President of the Tribunal declared the proceeding closed, i.e. the proceeding in respect of the First Question with which alone that substantive hearing had been concerned.

2.4 Bermuda 2 and the Tribunal's Rules of Procedure make express provision as to the circumstances in which, after the rendering of an Award the Tribunal has the power to do anything further in relation to the issue or issues determined by the Award.

2.5 It is convenient to consider the relevant provisions in the following order:

- Article 17(6) of Bermuda 2 - clarification of an award or other decision;
- Rule 30 of the Tribunal's Rules of Procedure - supplementary decisions;
- Rule 13 of the Tribunals's Rules of Procedure - correction of accidental errors.
- In addition the Tribunal will consider what, if any, relevant inherent powers it may possess.

Article 17(6) of Bermuda 2: clarification of the Award

2.6 In the judgment of the Tribunal, the expression "clarification" where it appears in Article 17(6) of the Treaty (see page 5 of Appendix I to the Award on the First Question) means to make something clear, usually by clearing up an obscurity or removing an ambiguity. Even if an error has been

committed, there is no scope for correcting the error through the process of clarification, as that expression is used in Article 17(6) of Bermuda 2. Such correction is possible, if at all, only through one or other of the distinct processes of correction of accidental errors (which is discussed at paragraphs 2.17 *et seq*. below) or revision. Revision is a distinct process which involves changing the substance of what was earlier decided, as distinct from spelling it out more clearly or more fully. The definition of the circumstances in which revision is possible, if at all, must be found either -

(i) in the rules of the applicable legal system (the question of whether under the rules of public international law the Tribunal has an inherent power to revise its awards is considered at paragraphs 2.23 *et seq*. below or,

(ii) in the case of an arbitration, in the rules of procedure agreed by the parties as the rules that are to govern the arbitration.

2.7 Revision as a distinct process is clearly recognized by Rule 50(1)(c)(ii) of the Rules of Procedure for Arbitration Proceedings (Arbitration Rules) of the International Centre for the Settlement of Investment Disputes ("ICSID"), on which the Tribunal's Rules of Procedure were overtly modelled in this case. Article 61 of the Statutes of the International Court of Justice similarly recognizes revision as a distinct process.

2.8 One may add that USG's Supplemental Submission itself refers (at footnote 90) to "clarification, correction or supplemental decision", thus recognizing the distinctness of the three processes.

2.9 It is impossible to suppose that the drafters of Article 17 of Bermuda 2 can have intended the expression "clarification" to embrace the distinct process of "revision", especially given that Article 17 gives no indication of the circumstances in which revision might be undertaken.

2.10 Accordingly the Tribunal rejects USG's submission that the expression "clarification" where used in Article 17(6) of Bermuda 2 embraces not only the *explanation* of points that appear contradictory or obscure but also the possibility of *changing* elements in the award, if that is necessary to eliminate apparent contradiction or other mistake or "impurity".

2.11 With regard to the *application* of Article 17(6) in the present case, the Tribunal is of the view that there is no scope for the *clarification* of its Award so as to achieve any of the results sought by USG.

2.12 The relevant passages of the Award on the First Question are to be found at paragraphs 10.29 - 10.37 and 10.41 of Chapter 7; the Tribunal believes that those passages are clear and that USG's criticisms of them are directed to reversing the conclusions that they contain and not to clarifying them.

Rule 30 of the Tribunal's Rules of Procedure: supplementary decisions

2.13 Rule 30(1) of the Tribunal's Rules of Procedure (Appendix III to the Award on the First Question) provides that either Party may request "a supplementary decision" on the Award, stating in detail "any questions which, in the opinion of the requesting party, the Tribunal omitted to decide in the Award".

2.14 According to USG's Requests, the Award did not address the question whether it was consistent with HMG's obligation to use best efforts, as interpreted by the Tribunal, for HMG to reject serious recommendations that the value of X be set (for the purposes of the RPI-X formula) at 2, given that, as HMG had in mind, setting the value at 1 rather than 2 increased the sale proceeds received by the U.K. Treasury on BAA's privatization by some £80 million.

2.15 However, the Tribunal, having reviewed the relevant evidence (at paragraphs 9.28-9.33 of Chapter 7 of the Award on the First Question) reached a clear conclusion on the question, namely that USG was mistaken in its belief that a value of 1 rather than 2 was arrived at for political reasons or in order to make BAA marketable to the public on privatization at a higher price and without regard to the requirements of Article 10 of Bermuda 2 (paragraph 10.34 of Chapter 7 of the Award). Thus, the question whether the establishment by HMG of X at 1 not 2 was consistent with its obligations under Article 10 of Bermuda 2 was not an issue that the Tribunal omitted to decide: it was a question which it decided in its entirety (and which unlike many of the other issues that fell to be decided in answering the First Question, it decided against USG). Again, only a process of appeal or revision could enable USG to have the Award in that respect reversed; there is no scope for supplementing the Award to achieve such a result.

2.16 USG's further contention that the Tribunal had never explicitly considered whether HMG had used best efforts in setting the initial level of user charges for the 1987/88 charging year must also be rejected. That question was answered at paragraphs 10.30 *et seq.* and 10.41. Any decision now by the Tribunal that HMG had failed to use its best efforts in settting the initial level of user charges for 1987/88 would not supplement those paragraphs but would contradict them. Rule 30 of the Tribunal's Rules of Procedure provides no authority for the Tribunal to take such a decision.

Rule 13 of the Tribunal's Rules of Procedure: correction of accidental errors

2.17 Rule 13(2) of the Tribunal's Rules of Procedure provides that: -

> "Within 30 days after a decision or award is rendered, the Tribunal, upon the request of a party or upon its own motion, may after notice to the parties rectify any clerical, arithmetical or similar error in the decision or award."

2.18 In the judgment of the Tribunal, there are two reasons, one technical and the other substantial, why Article 13(2) cannot be invoked to make changes such as those sought in USG's requests.

2.19 In the first place USG's Requests were made on or about May 17, 1993, which was more than 30 days after the rendering of the Award on the First Question on November 30, 1992. Although, by an agreement recorded in a letter to the Tribunal dated January 15, 1993, the Parties agreed to extend the time limits for requests for clarification pursuant to Article 17(6) of Bermuda 2 and requests for supplementary decisions under Rule 30 of the Tribunal's Rules of Procedure, their agreement did not alter the time limit prescribed by Article 13(2) for requests for rectification of accidental errors. In the absence of agreement between the Parties, the Tribunal therefore lacks the power to order rectification where the request was made, as in the present case, more than 30 days after the rendering of the Award.

2.20 Secondly, and as a matter of substance, Rule 13(2) of the Tribunal's Rules of Procedure only empowers the Tribunal to correct errors in the *expression* of its true intention arising from some accidental slip. Although no doubt it enables not only "slips of the pen" and the correction of miscalculation or miscasting of arithmetical figures but also the required consequential rectification of conclusions that had been drawn on the basis of the miscalculation or miscasting, Rule 13(2) cannot be invoked to correct conclusions of fact or law contained in a decision or an award where the text accurately reflects what the Tribunal meant to say.

2.21 In the present case, the text of the Award, so far as material hereto, accurately reflects what the Tribunal meant to say about HMG's efforts in respect of both the level of charges in 1987/88 and the adoption of 1 and not 2 as the value of X for the purposes of the RPI-X formula.

2.22 Article 13(2) is therefore irrelevant to USG's Requests.

Inherent powers of the Tribunal

2.23 By Part IV.C of its Supplemental Submission, summarized at paragraphs 1.23 - 1.24 above, USG contended that, especially as the Tribunal had not yet disposed of all the questions on which by its terms of reference, it is called on to arbitrate, it possesses inherent revisionary powers, even if neither Bermuda 2 nor the Tribunal's Rules of Procedure contained any expression of agreement on the part of the Parties that the Tribunal should enjoy such powers.

2.24 The Tribunal has already recorded its conclusion that the fact that the Award here in issue disposed of only the first of the questions referred to the Tribunal, leaving for subsequent determination the question of relief and remedies, does not affect the finality of the Award. The position here is therefore the same as if the First Question had been the only question referred to the Tribunal and the contingent question of relief and remedies had been reserved far a separate arbitration.

2.25 In those circumstances the relevant inherent powers of the Tribunal are extremely limited. Certainly they would extend to the correction of accidental errors even in the absence of Rule 13(2) of the Tribunal's Rules of Procedure: see paragraph 1.32 above.

2.26 How much, if at all, further the Tribunal's relevant inherent powers extend depends, at least in part, on the terms of the powers expressly conferred on the Tribunal by agreement between the Parties, i.e. by Article 17 of Bermuda 2 and by the Tribunal's Rules of Procedure. Thus the Tribunal cannot exercise any power the existence of which is inconsistent with the terms of the Parties' agreement as a result of which alone the Tribunal has any being.

2.27 In the present case Rule 22(2) of the Tribunal's Rules of Procedure expressly provides that

> "Exceptionally, the Tribunal may, before the award has been rendered, re-open the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain points."

"Clarification", where it appears in Rule 22(2) refers, of course, to clarification of the evidence or submissions of the parties and not clarification of the evidence or submissions of the parties and not clarification of the award which, *ex hypothesi*, will not yet have been delivered where proceedings are re-opened under Rule 22(2).

2.28 The circumstances in which Rule 22(2) of the Tribunal's Rules of Procedure contemplate the re-opening of proceedings after they have been closed, pursuant to Rule 22(1) as they have been in the present case, are substantially more limited than the circumstances in which the ICSID Rules of Procedure, on which the Parties overtly modelled the Tribunal's rules of Procedure, permit a procedure to be re-opened.

2.29 In particular, the ICSID Rules of Procedure draw a distinction between interpretation and revision of an award: the power of revision conferred by Rule 50(1)(c)(ii) of the ICSID Rules of Procedure is exercisable where the change sought in the award arises from:

> "the discovery of some fact of such a nature as decisively to affect the award .... (which) was unknown to the Tribunal and to the applicant ... the applicant's ignorance of that fact ... not (being) due to negligence."

2.30 The Parties here having chosen, presumably consciously, not to incorporate such a power in the Tribunal's Rules of Procedure, it must be extremely doubtful that the inherent powers of *this* Tribunal can include the much wider and less qualified power to "revisit" its awards (to use the expression used by USG) in circumstances such as have led the *other* Tribunals, to which USG refers, to revise awards that they had rendered.

2.31 USG's Supplemental Submission cites a number of cases where, pursuant to an inherent power, tribunals have subsequently revised their earlier decision or revisited questions decided in them. However, in none of

those cases do the rules governing the tribunal's procedure appear to have made the specific and expressly limited provisions for reopening the procedure found in the present Arbitration. Moreover, in the present case -

(i) the application is to re-open the procedure in respect of a determinative award rather than to re-open an issue decided by an interlocutory ruling; and

(ii) there is no question of fraud or of the Tribunal having proceeded on the basis of a fundamental assumption that is subsequently discovered to have been mistaken.

In those respects the present case differs decisively in one way or another from all those cited by USG and, for that reason also, those cases provide no authority to support a proposition that in the circumstances of present case the Tribunal has any inherent power to re-open the proceedings as requested by USG.

2.32 Thus, any inherent power would fall far short of a power to hear an appeal from the Award on the First Question; and the arguments advanced by USG are precisely the sort of arguments that would be advanced on an appeal from the Award. Such an appeal not being possible, the Tribunal cannot entertain the arguments and rejects USG's submission that it has any inherent power to accede to USG's Requests.

Conclusion

2.33 For the foregoing reasons the Tribunal rejects USG's application to "clarify", correct or "supplement" its finding that HMG did not fail to comply with its obligations under Article 10(1) and (3) of Bermuda 2 in respect of the level of charges in 1987/88 or the choice of 1 rather than 2 for use in the RPI-X formula introduced in that year; and the Tribunal reaffirms its conclusion to that effect and to the effect that in adopting 1 rather than 2 as the value of X, HMG did not fail to use its best efforts (as that expression was interpreted by the Tribunal in the Award) by subordinating the interests of users of Heathrow to its own financial interests at the time of privatization.

2.34 It follows that the Tribunal, by Decision No. 23, has dealt fully, and at this juncture, with USG's Requests and would not expect to be called upon to consider them further at the remedial phase.

2.35 It further follows that evidence intended to provide a basis for the grant of relief or remedies in respect of an alleged failure by HMG to comply with its obligations under Article 10(1)-(3) of Bermuda 2 in respect of the level of charges in 1987/88 or in respect of the adoption of 1 rather than 2 as the value of X for the purposes of the RPI-X formula would serve no useful purpose.

APPENDIX

Further case-law and legal materials referred to by USG

(1) *Young, Smith & Co*. (1871) Claim No. 96, United States and Spanish Claims Commission under the Convention of Feb. 11-12, 1871, 3 Moore, *International Arbitration* 2184 (1898).

(2) *Shreck*, Claim No. 768 (U.S. - Mexican Claims Commission) 2 Moore, *International Arbitration* 1357 (1898).

(3) *Interpretation of Judgments Nos. 7 and 8 concerning the Case of the Factory at Chorzow*, (F.R.G. v. Pol.), 1927 P.C.I.J. (Ser. A) No. 13.

(4) *von Tiedemann v. Poland*, 6 R.D.T.A.M. 997 (1926), summarized in 3 *Annual Digest of Public International Law Cases*, 410 - 411 (1929).

(5) *Crawford v. Secretary General of the United Nations*, U.N. Doc. AT/DEC/6 (1955). *Judgment No. 61*, Judgments of the U.N. Administrative Tribunal 331 (1955).

(6) *South West Africa Cases* (1966) ICJ Rep. 4.

(7) *Wintershall v. Government of Qatar*, 15 Y.B. Com. Arb. Vol. 56 (1990).

(8) Vienna Convention on the Law of Treaties (adopted May 22, 1969) A/Conf. 39/27, May 23, 1969, Articles 31, 32.

(9) Statute of the International Court of Justice, Art. 60.

(10) Black's Law Dictionary, 606 (5th ed. 1979).

(11) Carlston, *The Process of International Arbitration*, 224 (1946).

(12) W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, 139-42 (1984).

(13) W.M. Reisman, *Nullity and Revision*, 193-94 (1971).

(14) D.V. Sandifer, *Evidence Before International Tribunals*, 449-56 (1975).

(15) C.M. Schmitthoff, "Finality of Arbitral Awards and Judicial Review", in *Contemporary Problems in International Arbitration* (Julian D.M. Lew Ed., 1987).

(16) J. Gillis Wetter, *The International Arbitral Process, Public and Private*, vol. II, 549 (1979).