No. 26663

AUSTRALIA
and
UNITED STATES OF AMERICA

Exchange of notes constituting an agreement concerning airline capacity (with annexes). Washington, 23 March 1989

Authentic text: English.

Registered by Australia on 8 June 1989.

AUSTRALIE
et
ÉTATS-UNIS D'AMÉRIQUE

Échange de notes constituant un accord relatif à la capacité de remplissage des lignes aériennes (avec annexes). Washington, 23 mars 1989

Texte authentique : anglais.

Enregistré par l'Australie le 8 juin 1989.

EXCHANGE OF NOTES CONSTITUTING AN AGREEMENT[1] BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA CONCERNING AIRLINE CAPACITY

I

DEPARTMENT OF STATE
WASHINGTON

March 23, 1989

Excellency:

I have the honor to refer to recent consultations between our two Governments relating to capacity on the agreed routes contained in the Air Transport Agreement between the Government of the United States of America and the Government of the Commonwealth of Australia, signed at Washington on December 3, 1946, as amended subsequently,[2] including by an Exchange of Notes of today's date.

I have the further honor to propose that the provisions of the attached Annexes shall govern capacity by the designated airlines of each Contracting Party on the agreed routes from August 20, 1988. Annex A contains provisions on capacity on South Pacific routes. Annex B contains provisions on capacity on North Pacific routes. Annex C contains provisions on capacity on the Guam/Northern Marianas route. Annex D contains agreed understandings on the interpretation of the agreed provisions in Annexes A, B and C.

I have the further honor to propose that if the above proposals are acceptable to the Government of Australia this note and Your Excellency's note in reply shall constitute an Agreement between our two Governments which shall enter into force on the date of your reply, effective from August 20, 1988.

For the Secretary of State:
[*Signed — Signé*][3]

His Excellency F. Rawdon Dalrymple
Ambassador of Australia

[1] Came into force on 23 March 1989, the date of the note in reply, with retroactive effect from 20 August 1988, in accordance with the provisions of the said notes.
[2] United Nations, *Treaty Series*, vol. 7, p. 201, and annex A in volumes 290, 1216 and 1535.
[3] Signed by Jeffrey N. Shane — Signé par Jeffrey N. Shane.

ANNEX A

MEMORANDUM OF UNDERSTANDING UNITED STATES–AUSTRALIA; SOUTH PACIFIC ROUTE 1 CAPACITY

In order to ensure the sound application of the principles set forth in Section III of the Annex to the Air Transport Agreement between the Government of Australia and the Government of the United States of America, done at Washington on 3 December 1946, as amended (called the Agreement), and in particular to ensure adequate service for the public; to permit development of services; and to implement capacity increases between the two countries operated by designated airlines of either Contracting Party, the Contracting Parties have reached the following understanding applicable to capacity increases on scheduled services for passengers and freight in combination on United States route 1 and Australian route 1:

1. (*a*) A designated airline of a Contracting Party proposing to increase capacity will file with the other Contracting Party a schedule reflecting the increase, specifying whether the increase invokes paragraph 4 (*a*) or 6 (*a*) of this Memorandum, or specifying that the increase is greater than that provided in those paragraphs. This filing will be made at least 60 days prior to the effective date of the capacity increase, unless the receiving Contracting Party permits a shorter time.

(*b*) A Contracting Party receiving a schedule filing will, no later than 45 days in advance of the effective date of the schedule, take whatever steps are required to inform the designated airline of approval, objection or disapproval of the capacity increases, as appropriate, under the terms of this Memorandum.

2 (*a*) For the purposes of this Memorandum, the following will not be regarded as involving an increase in capacity:

(i) Changes in aircraft seating configurations; or

(ii) Supplementary services (extra sections).

(*b*) Changes in aircraft seating configurations may be introduced upon the filing of a notice by the designated airline with the other Contracting Party.

(*c*) The supplementary services (extra sections) referred to in sub-paragraph (*a*) (ii) of this paragraph are flights operated in conjunction with a previously authorized schedule of the designated airline proposing to operate the supplementary service in order to relieve peak demand for capacity between the United States and Australia caused by seasonal pressures or special events. Such supplementary services may not be operated for a period longer than 4 consecutive months and are not intended to circumvent the provisions of this Memorandum. Supplementary services will not be included in base capacity but passengers on such services, except for the purpose of calculating load factors under paragraphs 6(*a*)(iii) and 6(*b*) of this Memorandum, will be included in base traffic for the purposes of the calculations of permissible capacity increases pursuant to this Memorandum. Applications for services meeting the standards of this sub-paragraph may be filed on short notice.

3. (*a*) If the Contracting Party receiving a filing for a capacity increase believes that operation of the level of additional capacity would be inconsistent with Section III of the Annex to the Agreement, that Contracting Party, not later than 45 days prior to the date it is proposed that the capacity increase would become effective, may object in writing to the other Contracting Party. The objection will be based on specific concerns related to the capacity principles set out in that Section. Within 15 days of receipt of an objection, the Contracting Party receiving that objection will notify the other Contracting Party of whether the filing will be modified or withdrawn in the light of the concerns expressed in the objection. Within this period of 15 days either Contracting Party may then request consultations concerning the filing. Should consultations be requested, the Contracting Parties will conclude the consultations within 25 days of the receipt of the request, unless otherwise agreed. Consultations may be conducted through diplomatic channels.

(*b*) If consultations are held pursuant to this paragraph and the Contracting Parties fail to reach agreement concerning an increase in capacity greater than that guaranteed under paragraph 4(*a*) of this Memorandum, or if neither Contracting Party requests consultations on the filing in question, the Contracting Party receiving the filing may disapprove that portion that is in excess of the guarantees, or would not be allowed under paragraph 5 of this Memorandum.

(*c*) If consultations are held pursuant to this paragraph and the Contracting Parties fail to reach agreement concerning an increase in capacity for which there is an entitlement under paragraph 6(*a*) of this Memorandum, the Contracting Party receiving the filing will approve that increase promptly thereafter. If neither Contracting Party requests consultations on this filing, the Contracting Party receiving the filing will approve it promptly.

(*d*) If consultations are held pursuant to this paragraph and the Contracting Parties fail to reach agreement concerning an increase in capacity under paragraph 4(*a*) of this Memorandum, or if neither Contracting Party requests consultations on the filing in question, the Contracting Party receiving the filing will not disapprove that increase except as provided in paragraph 5 of this Memorandum.

(*e*) If consultations are held pursuant to this paragraph and the Contracting Parties fail to reach agreement concerning an increase in capacity greater than that guaranteed under paragraph 6(*a*) of this Memorandum, or if neither Contracting Party requests consultations on the filing in question, the Contracting Party receiving the filing may disapprove that portion that is in excess of the guarantee.

4. (*a*) Except as provided in paragraph 5 of this Memorandum, any designated airline will be entitled, during any 12-month period commencing at the option of the airline on either March 1 or September 1, to increase its capacity, measured in aircraft seats it is operating at the time of the filing, by the greatest of:

(i) 2 additional B-747 equivalent round-trip services per week or their equivalent on route one;* or

(ii) That airline's percentage growth in revenue passenger traffic between the United States and Australia on route 1 during the most recent 12-month period for which statistics are available;** or

(iii) The total percentage growth in revenue passenger traffic between the United States and Australia on route 1 during the most recent 12-month period for which statistics are available.

At the option of the airline the capacity entitlements may be exercised within the 18-month period following the effective date of the entitlement, chosen pursuant to paragraph 4(*a*) above, by means of a single capacity increase, or through a combination of two or more capacity increases, provided that the capacity entitlement determined under this paragraph will be calculated only once in any year. Where the capacity entitlement referred to above results in a residue of seats upon conversion into weekly frequencies, the airline may operate an additional weekly frequency provided such residue is 50 percent or more of the seat capacity of the aircraft which will be operated.

(*b*) The data source used to determine specific airline growth under sub-paragraph (*a*) (ii) of this paragraph shall be the statistics reported by that airline to its Government. The data source used to determine total traffic growth between the United States and Australia under sub-paragraph (*a*) (iii) of this paragraph shall be the sum of the statistics reported by all designated airlines to their respective Governments.

* In the event that a mix of aircraft is sought to be operated under this provision the following coefficients shall apply: B-747 = 1; B-747SP, DC-10 or L-1011 = 0.75; B-767 or DC-8 = 0.5.

** Unless otherwise agreed between the Contracting Parties, paragraph 4 (*a*) (ii) will not apply to a newly designated airline (which is not a replacement for another airline on this route) until 4 years of continuous service by the airline filing for the increase have elapsed.

(*c*) Percentage growth in revenue passenger traffic referred to in sub-paragraphs (*a*)(ii) and (iii) of this paragraph will be calculated on the basis of the growth in the on-flight United States–Australia uplift/discharge (origin/destination) passenger traffic carried on route 1 over the most recent 12-month period for which statistics are available. On-flight United States–Australia uplift/discharge (origin/destination) passenger traffic will mean revenue passengers uplifted in the territory of one Contracting Party and discharged on the same flight at a point in the territory of the other Contracting Party.

5. (*a*) With respect to capacity increases filed under this Memorandum, if the receiving Contracting Party concludes that the proposed capacity would be inconsistent with Section III of the Annex to the Agreement, that Party may disapprove such filing provided:

(i) The proposed capacity would result in the designated airlines of the other Contracting Party operating 62.5% or more of the capacity offered by United States and Australian airlines in the United States–Australia market on route 1; and

(ii) The revenue passenger traffic of the designated airlines of the receiving Contracting Party has not increased by 6% or more on route 1 over the most recent twelve-month period for which statistics are available.

(*b*) The revenue passenger traffic referred to in sub-paragraph (*a*) (ii) of this paragraph will be calculated pursuant to the definition provided in paragraph 4(*c*) of this Memorandum.

(*c*) Only such portion of the filing which exceeds the 62.5% criterion of sub-paragraph (*a*)(i) of this paragraph may be disapproved.

6. (*a*) Notwithstanding any other provision of this Memorandum, each designated airline, provided it has fully used its entitlements granted under other paragraphs of this Memorandum, will be entitled to:

(i) Operate a minimum of 4 round-trip frequencies per week between the United States and Australia on route 1, without limitation as to aircraft type;

(ii) Operate any level of capacity that had been operated by that airline on route 1 at any time within the most recent 18 months; and

(iii) Operate a level of capacity necessary to reduce its average load factor to 70% on its regularly scheduled services on route 1 provided that an average of 55% or more of the revenue passenger traffic onboard is U.S.-Australia uplift/discharge (origin/destination) passenger traffic.

(*b*) The operation of a level of capacity necessary to reduce an airline's load factor to 70% on its regularly scheduled services referred to in sub-paragraph (*a*)(iii) of this paragraph shall be calculated on the basis of statistics reported by that airline to its Government, with such statistics reflecting: (1) All revenue passenger traffic, irrespective of point of uplift/discharge (orgin/destination) on route 1; and (2) U.S.-Australia uplift/discharge (origin/destination) revenue passenger traffic carried into and from the territory of the other Contracting Party on route 1 during the most recent 12-month period for which statistics are available. Where the calculation of such capacity results in a residue of seats upon conversion into weekly frequencies, the airline may operate an additional weekly frequency provided such residue is 50 percent or more of the seat capacity of the aircraft to be operated.

7. Each Contracting Party shall have the right to designate one additional airline on route 1 during the three years from the effective date of this Memorandum. This airline shall have the right to operate a minimum of four round-trip frequencies per week between the United States and Australia, without limitation as to aircraft type.

8. If under the application of paragraph 5 of this Memorandum a circumstance arises that the capacity increase proposals of all the airlines of one Contracting Party cannot be fully approved under the entitlements of paragraph 4(*a*) of this Memorandum, the available

capacity shall be allocated by that Contracting Party equally among the airlines proposing the increases, provided that the Contracting Party performing such allocation shall retain the right to allocate on other than an equal basis in individual cases, and provided further that, following any allocation, notification shall be provided to the other Contracting Party.

9. (*a*) Subject to sub-paragraph (*b*) of this paragraph, and provided that the Agreement remains in effect, this Memorandum will enter into effect on August 20, 1988, and will remain in effect for three years, and thereafter will remain in effect unless either Contracting Party notifies the other in writing of its intention to terminate this Memorandum on a date it specifies.

(*b*) At any time after three years from the date of commencement of this Memorandum, either Party may request consultations, which will be held within 60 days from the date of the request, to amend the Memorandum. Unless mutually arranged otherwise, if at the conclusion of such consultations, agreement cannot be reached on amendments proposed by either Party, this Memorandum will terminate one month from the date of conclusion of the consultations.

(*c*) The arrangements in sub-paragraph (*b*) of this paragraph will not preclude either Party from seeking amendments to this Memorandum within three years from the date of its commencement.

ANNEX B

MEMORANDUM OF UNDERSTANDING UNITED STATES–AUSTRALIA; NORTH PACIFIC ROUTE 2 CAPACITY

The two delegations confirmed their understanding that services by the designated airlines on the agreed routes will be operated in accordance with the principles set forth in Section III of the Annex to the 1946 Agreement.

The two delegations acknowledged in that connection that two elements of the capacity principles set forth in Section III were particularly important in the context of designated airline operations over the North Pacific route:

(i) That the interests of any airline of the other Contracting Party 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; and

(ii) That the primary purpose of such service is the carriage of traffic originating in or destined for the designated airline's own territory.

The Contracting Parties therefore agreed that for services of the designated airlines operating on United States route 2 and Australian route 2 the following will apply:

1. (*a*) A designated airline of a Contracting Party proposing to increase capacity will file with the other Contracting Party a schedule for the North Pacific route reflecting the increase, specifying whether the increase invokes paragraph 4 (*a*) or 6 (*a*) of this Memorandum, or specifying that the increase is greater than that provided in those paragraphs. This filing will be made at least 60 days prior to the effective date of the capacity increases, unless the receiving Contracting Party permits a shorter time.

(*b*) A Contracting Party receiving a schedule filing will, no later than 45 days in advance of the effective date of the schedule, take whatever steps are required to inform the designated airline of approval, objection or disapproval of the capacity increases, as appropriate, under the terms of this Memorandum.

2. (*a*) For the purposes of this Memorandum, the following will not be regarded as involving an increase in capacity:

(i) Changes in aircraft seating configurations; or

(ii) Supplementary services (extra sections).

(*b*) Changes in aircraft seating configurations may be introduced upon the filing of a notice by the designated airline with the other Contracting Party.

(*c*) The supplementary services (extra sections) referred to in sub-paragraph (*a*)(ii) of this paragraph are flights operated in conjunction with a previously authorized schedule of the designated airline proposing to operate the supplementary service in order to relieve peak demand for capacity between the United States and Australia caused by seasonal pressures or special events. Such supplementary services may not be operated for a period longer than 4 consecutive months and are not intended to circumvent the provisions of this Memorandum. Supplementary services will not be included in base capacity but passengers on such services, except for the purpose of calculating load factors under paragraphs 6(*a*)(iii) and 6(*b*) of this Memorandum, will be included in base traffic for the purposes of the calculations of permissible capacity increases pursuant to this Memorandum. Applications for services meeting the standards of this sub-paragraph may be filed on short notice.

3. (*a*) If the Contracting Party receiving a filing for a capacity increase believes that operation of the level of additional capacity would be inconsistent with Section III of the Annex to the Agreement, that Contracting Party, not later than 45 days prior to the date it is proposed that the capacity increase would become effective, may object in writing to the other Contracting Party. The objection will be based on specific concerns related to the capacity principles set out in that Section. Within 15 days of receipt of an objection, the Contracting Party receiving that objection will notify the other Contracting Party of whether the filing will be modified or withdrawn in the light of the concerns expressed in the objection. Within this period of 15 days either Contracting Party may request consultations concerning the filing. Should consultations be requested, the Contracting Parties will conclude the consultations within 25 days of the receipt of the request, unless otherwise agreed. Consultations may be conducted through diplomatic channels.

(*b*) If consultations are held pursuant to this paragraph and the Contracting Parties fail to reach agreement concerning an increase in capacity greater than that guaranteed under paragraph 4(*a*) of this Memorandum, or if neither Contracting Party requests consultations on the filing in question, the Contracting Party receiving the filing may disapprove that portion that is in excess of the guarantees, or would not be allowed under paragraph 5 of this Memorandum.

(*c*) If consultations are held pursuant to this paragraph and the Contracting Parties fail to reach agreement concerning an increase in capacity for which there is an entitlement under paragraph 6(*a*) of this Memorandum, the Contracting Party receiving the filing will approve that increase promptly thereafter. If neither Contracting Party requests consultations on the filing in question, the Contracting Party receiving the filing will approve it promptly.

(*d*) If consultations are held pursuant to this paragraph and the Contracting Parties fail to reach agreement concerning an increase in capacity under paragraph 4(*a*) of this Memorandum or if neither Contracting Party requests consultations on the filing in question, the Contracting Party receiving the filing will not disapprove that increase except as provided in paragraph 5 of this Memorandum.

(*e*) If consultations are held pursuant to this paragraph and the Contracting Parties fail to reach agreement concerning an increase in capacity greater than that guaranteed under paragraph 6(*a*) of this Memorandum or if neither Contracting Party requests consultations on the filing in question, the Contracting Party receiving the filing may disapprove that portion that is in excess of the guarantee.

4. (*a*) Except as provided in paragraph 5 of this Memorandum, any designated airline will be entitled, during any 12-month period commencing at the option of the airline on either March 1 or September 1, to increase its capacity, measured in aircraft seats it is operating at the time of the filing, by the greatest of:

(i) One additional B-747 round-trip service per week or its equivalent on route two;* or

(ii) That airline's percentage growth in revenue passenger traffic between the United States and Australia on route 2 during the most recent 12-month period for which statistics are available; or

(iii) The total percentage growth in revenue passenger traffic between the United States and Australia on route 2 during the most recent 12-month period for which statistics are available.

(*b*) Unless otherwise agreed between the Contracting Parties, paragraphs 4(*a*)(ii) and 4(*a*)(iii) will not apply to a designated airline (which is not a replacement for another airline on this route) which commences operations on route 2 until four (4) years of continuous service by the airline filing for the increase have elapsed.

(*c*) After services have commenced by a designated airline of one Contracting Party and when a designated airline of the other Contracting Party commences services the growth entitlements for designated carriers of the first Contracting Party under sub-paragraphs (*a*)(ii) and (*a*)(iii) of this paragraph will apply if:

(i) The airline seeking the increase in capacity has operated over the preceding 12 months at an average revenue passenger seat factor of 70% or more based on the total traffic on board into/ex Australia; and

(ii) Not less than 55% of passenger traffic carried over the preceding 12 months by the airline seeking the increase was Australia-USA v.v. uplift/discharge (origin/destination) traffic.

(*d*) At the option of the airline the capacity entitlements may be exercised within the 18-month period following the effective date of the entitlement chosen pursuant to paragraph 4(*a*) above by means of a single capacity increase, or through a combination of two or more capacity increases, provided that the capacity entitlement determined under this paragraph will be calculated only once in any year. Where the capacity entitlement referred to above results in a residue of seats upon conversion into weekly frequencies, the airline may operate an additional weekly frequency provided such residue is 50 percent or more of the seat capacity of the aircraft which will be operated.

(*e*) The data source used to determine specific airline growth under sub-paragraph (*a*)(ii) of this paragraph shall be the statistics reported by that airline to its Government. The data source used to determine total traffic growth between the United States and Australia under sub-paragraph (*a*)(iii) of this paragraph shall be the sum of the statistics reported by all designated airlines to their respective Governments.

(*f*) Percentage growth in revenue passenger traffic referred to in sub-paragraphs (*a*)(ii) and (*a*)(iii) of this paragraph will be calculated on the basis of the growth in the on-flight United States–Australia uplift/discharge (origin/destination) passenger traffic carried on route 2 over the most recent 12-month period for which statistics are available. On-flight United States–Australia uplift/discharge (orgin/destination) passenger traffic will mean revenue passengers uplifted in the territory of one Contracting Party and discharged on the same flight at a point in the territory of the other Contracting Party.

5. (*a*) With respect to capacity increases filed under this Memorandum, if the receiving Contracting Party concludes that the proposed capacity would be inconsistent with Section III of the Annex to the Agreement, that Party may disapprove such filing provided:

(i) The proposed capacity would result in the designated airlines of the other Contracting Party operating 62.5% or more of the capacity offered by United States and Australian airlines in the United States–Australia market on route 2; and

* In the event that a mix of aircraft is sought to be operated under this provision the following coefficients shall apply: B-747 = 1; B-747SP, DC-10 or L-1011 = 0.75; B-767 or DC-8 = 0.5.

(ii) The revenue passenger traffic of the designated airlines of the receiving Contracting Party has not increased by 6% or more on route 2 over the most recent twelve-month period for which statistics are available.

(*b*) The revenue passenger traffic referred to in sub-paragraph (*a*)(ii) of this paragraph will be calculated pursuant to the definition provided in paragraph 4(*f*) of this Memorandum.

(*c*) Only such portion of the filing which exceeds the 62.5% criterion of sub-paragraph (*a*)(i) of this paragraph may be disapproved.

6. (*a*) Notwithstanding any other provision of this Memorandum, each designated airline provided it has fully used its entitlements granted under other paragraphs of this Memorandum will be entitled to:

(i) Operate any level of capacity that had been operated by that airline on route 2 at any time within the most recent 18 months;

(ii) Operate a level of capacity necessary to reduce its average load factor to 70% on its regularly scheduled services on route 2 provided that an average of 55% or more of the revenue passenger traffic onboard is U.S.-Australia uplift/discharge (origin/destination) passenger traffic.

(*b*) The operation of a level of capacity necessary to reduce an airline's load factor to 70% on its regularly scheduled services referred to in sub-paragraph (*a*)(ii) of this paragraph shall be calculated on the basis of statistics reported by that airline to its Government, with such statistics reflecting (1) All revenue passenger traffic, irrespective of point of uplift/discharge (origin/destination) on route 2, and (2) U.S.-Australia uplift/discharge (orgin/destination) revenue passenger traffic carried into and from the territory of the other Contracting Party on route 2 during the most recent 12-month period for which statistics are available. Where the calculation of such capacity results in a residue of seats upon conversion into weekly frequencies, the airline may operate an additional weekly frequency provided such residue is 50 percent or more of the seat capacity of the aircraft to be operated.

7. If under the application of paragraph 5 of this Memorandum a circumstance arises that the capacity increase proposals of all the airlines of one Contracting Party cannot be fully approved under the entitlements of paragraph 4(*a*) of this Memorandum, the available capacity shall be allocated by that Contracting Party equally among the airlines proposing the increases, provided that the Contracting Party performing such allocation shall retain the right to allocate on other than an equal basis in individual cases, and provided further that, following any allocation, notification shall be provided to the other Contracting Party.

8. (*a*) Subject to sub-paragraph (*b*) of this paragraph, and provided that the Agreement remains in effect, this Memorandum will enter into effect on August 20, 1988, and will remain in effect for three years, and thereafter will remain in effect unless either Contracting Party notifies the other in writing of its intention to terminate this Memorandum on a date it specifies.

(*b*) At any time after three years from the date of commencement of this Memorandum, either Party may request consultations, which will be held within 60 days from the date of the request, to amend the Memorandum. Unless mutually arranged otherwise, if at the conclusion of such consultations, agreement cannot be reached on amendments proposed by either Party, this Memorandum will terminate one month from the date of conclusion of the consultations.

(*c*) The arrangements in sub-paragraph (*b*) of this paragraph will not preclude either Party from seeking amendments to this Memorandum within three years from the date of its commencement.

ANNEX C

MEMORANDUM OF UNDERSTANDING ON GUAM AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS ROUTE

The two delegations confirmed their understandings that services by the designated airlines on the agreed route will be operated in accordance with the principles set forth in Section III of the Annex to the 1946 Agreement.

Each of the Contracting Parties may designate an airline or airlines to operate over Route 3 with four (4) DC-10 round-trip frequencies or their equivalent per week. Three (3) frequencies may be offered commencing on April 1, 1989, and one (1) additional DC-10 or equivalent round-trip frequency for each of the Contracting Parties may be offered commencing April 1, 1990. The capacity mechanism outlined below will not apply for two years from April 1, 1989 (i.e., 1989, 3 services; 1990, 4 services; 1991, 4 services; 1992, additional service if conditions of capacity mechanism are met).

Further increases in capacity, beyond the entitlement of four frequencies, will be guaranteed on the basis of one additional DC-10 equivalent round-trip service weekly for each Contracting Party each year provided:

(*a*) An airline seeking an increase in capacity has operated in its own right, over the preceding 12 months at an average revenue passenger seat factor of 67.5% or more; and 70% or more when the total number of services on the route reaches 7 per week, based on:

— For US airlines, total traffic on board into/ex Australia on Route 3;

— For Australian airlines, total traffic on board between Australia and Guam/Northern Mariana Islands on Route 3; and

(*b*) No less than 55% of passenger traffic carried between Australia and Guam/Northern Mariana Islands over the most recent 12 months by the airline seeking the increase was Australia-Guam/Northern Mariana Islands uplift/discharge (origin/destination) traffic.

With respect to this Memorandum of Understanding, Australia-Guam/Northern Mariana Islands uplift/discharge (origin/destination) traffic will include all passenger traffic carried between Australia and Guam/Northern Mariana Islands, except traffic carried on the same or an affiliated airline between Australia and third countries which makes a stopover of less than two consecutive nights in Guam or the Northern Mariana Islands.

ANNEX D

UNDERSTANDINGS REACHED ON THE INTERPRETATION OF THE MEMORANDA OF UNDERSTANDING CONCERNING CAPACITY

1. References in the three Memoranda of Understanding to Section III of the Annex to the Air Transport Agreement between the Government of Australia and the Government of the United States of America, done at Washington on December 3, 1946, as amended, will be to Section IV of the revised Annex.

2. Airlines sometimes operate extra capacity by substituting larger for smaller aircraft. This extra capacity will be treated as supplementary services (extra sections) under paragraphs 2(*c*) of the South Pacific and North Pacific Memoranda of Understanding.

3. In calculating a load factor under sub-paragraphs 6(*a*)(iii) and 6(*b*) of the South Pacific Memorandum of Understanding and sub-paragraphs 4(*c*)(i), 6(*a*)(ii) and 6(*b*) of the North Pacific Memorandum of Understanding, services including extra capacity brought about by substituting larger for smaller aircraft will be treated as normal scheduled services irrespective of whether for other purposes the extra capacity is treated as supplementary services (extra sections).

4. Entitlements for a 12-month period referred to in sub-paragraphs 4(*a*) of the South Pacific and North Pacific Memoranda of Understanding will be calculated so as to be effective from either March 1 or September 1, depending on which period an airline chooses. The references to "time of the filing" in sub-paragraphs 4(*a*) of the South Pacific and North Pacific Memoranda of Understanding do not refer to an airline filing for additional capacity but mean either the September 1 or March 1 calculation of additional capacity entitlements.

5. A designated airline which has chosen a 12-month period referred to in sub-paragraphs 4(*a*) of the South Pacific and North Pacific Memoranda of Understanding beginning on either March 1 or September 1 may elect to change the period provided its next capacity entitlement is calculated 18 months after the commencement date of the period it chose previously.

6. Airlines must operate their capacity entitlement under the South Pacific and North Pacific Memoranda of Understanding within an 18-month period from the time the entitlement takes effect, or the unused portion will lapse.

7. The base capacity from which entitlements will be calculated under sub-paragraph 4(*a*) of the South Pacific and North Pacific Memoranda of Understanding will be that capacity which an airline is operating on either March 1 or September 1, depending on which period that airline has chosen.

8. A reference in sub-paragraph 6(*a*)(ii) of the South Pacific Memorandum of Understanding and sub-paragraph 6(*a*)(i) of the North Pacific Memorandum of Understanding to any level of capacity that had been operated by a designated airline at any time within the most recent 18 months includes only capacity operated on scheduled services and does not include supplementary services operated by that airline. This provision in no way prevents an airline from operating supplementary services in accordance with sub-paragraphs 2(*c*) of the South Pacific and North Pacific Memoranda of Understanding.

9. The reference in brackets in sub-paragraph 4(*b*) of the North Pacific Memorandum of Understanding and in footnote * of the South Pacific Memorandum of Understanding to a designated airline replacing another airline means that the replacement airline will inherit the status of the airline it replaces.

10. In the second paragraph of the Guam/Commonwealth of the Northern Mariana Islands Memorandum of Understanding, the frequencies referred to are the total number of frequencies that each Contracting Party may allocate among its designated airlines.

11. The services in parentheses mentioned at the end of the second paragraph of the Guam/Commonwealth of the Northern Mariana Islands Memorandum of Understanding may be introduced from April 1 of each of the years referred to.

12. The reference in the final paragraph of the Memorandum of Understanding on Guam/Commonwealth of the Northern Mariana Islands to two consecutive nights is to the time spent in Guam and/or the Northern Mariana Islands.

13. Passenger traffic statistics will be exchanged through the diplomatic channel. Thereafter, each Contracting Party will make capacity entitlement calculations available, upon request, to the designated airlines of each Contracting Party.

14. A designated airline must nominate to the aeronautical authority of the other Contracting Party whether it wishes to be a March 1 or September 1 airline under the North Pacific and South Pacific Memoranda of Understanding, respectively. A newly designated airline may nominate its chosen period once it has been operating on the route for 12 months.

15. Under both the South Pacific and North Pacific Memoranda of Understanding, if an airline of either Contracting Party fails to qualify for a capacity entitlement under sub-paragraph 4(*a*) due to the operation of sub-paragraph 5(*a*), that airline will not be entitled to any increase in capacity at that time except capacity that may be allowed under sub-paragraph 5(*c*), unless paragraph 6 comes into effect. After six months time, however, that

airline may seek to qualify for additional capacity by changing from a September 1 to a March 1 carrier, or vice versa.

16. In the South Pacific Memorandum of Understanding, all references to U.S.-Australia uplift/discharge (origin/destination) traffic are intended to refer to the same traffic type as is mentioned in sub-paragraph 4(*c*). Similar references in the North Pacific Memorandum of Understanding are intended to refer to the same traffic type as is mentioned in sub-paragraph 4(*f*) of the North Pacific Memorandum of Understanding.

17. The reference in the third paragraph of the Guam/Commonwealth of the Northern Mariana Islands Memorandum of Understanding to "70 per cent or more when the total number of services on the Route reaches 7 per week" means the total number of services operated by the airlines of the Contracting Party seeking the increases.

II

EMBASSY OF AUSTRALIA
WASHINGTON, D.C.

23 March 1989

Your Excellency,

I have the honor to refer to Your Excellency's Note of March 23, 1989, which reads as follows:

[*See note I*]

I have the honor to confirm that the foregoing proposals are acceptable to the Government of Australia and that your Note and this Note in reply shall constitute an Agreement between our two Governments which shall enter into force on today's date effective from August 20, 1988.

[*Signed*]

F. RAWDON DALRYMPLE
Ambassador

The Honourable James A. Baker, III
Secretary of State
Washington, D.C.

[*Annexes as under note I*]