# REPORTS OF INTERNATIONAL ARBITRAL AWARDS

# RECUEIL DES SENTENCES ARBITRALES

**Interpretation of the air transport services agreement between the United States of America and France**

22 December 1963

VOLUME XVI pp. 5-74

NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

# CASE CONCERNING THE INTERPRETATION OF THE AIR TRANSPORT SERVICES AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND FRANCE, SIGNED AT PARIS ON 27 MARCH 1946

**PARTIES: France, United States**

---

**COMPROMIS: 22 January 1963**

---

**ARBITRATORS: Arbitral Tribunal: R. Ago; P. Reuter; H. de Vries**

---

**AWARD: 22 December 1963**

---

**DECISION INTERPRETING THE AWARD: 28 June 1964**

---

Meaning of expression "Near East" — Treaty interpretation — Principles of — Context — Preparatory work — Subsequent conduct of the Parties — Interpretation of the Award.

---

Signification de l'expression "Proche-Orient" — Interprétation des traités — Principes d'interprétation — Contexte — Travaux préparatoires — Conduite postérieure des Parties — Interprétation de la sentence.

---

# COMPROMIS OF ARBITRATION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE FRENCH REPUBLIC, SIGNED AT PARIS ON 22 JANUARY 1963

The Government of the United States of America and the Government of the French Republic:

Considering:

1. That there is a dispute between them relevant to the interpretation of the Air Transport Services Agreement between the United States of America and France, signed at Paris on March 27, 1946, and of its Annex;

2. That they have been unable to settle this dispute through consultation;

3. That Article X of the Air Transport Services Agreement as amended provides that:

> Except as otherwise provided in this Agreement or its Annex, any dispute between the Contracting Parties relative to the interpretation or application of this Agreement or its Annex which can not be settled through consultation shall be submitted for an advisory report to a tribunal of three arbitrators, one to be named by each Contracting Party, and the third to be agreed upon by the two arbitrators so chosen, provided that such third arbitrator shall not be a national of either Contracting Party. Each of the Contracting Parties shall designate an arbitrator within two months of the date of delivery by either Party to the other Party of a diplomatic note requesting arbitration of a dispute; and the third arbitrator shall be agreed upon within one month after such period of two months.
>
> If either of the Contracting Parties fails to designate its own arbitrator within two months, or if the third arbitrator is not agreed upon within the time limit indicated, the President of the International Court of Justice shall be requested to make the necessary appointments by choosing the arbitrator or arbitrators, after consulting the President of the Council of the International Civil Aviation Organization.
>
> The Contracting Parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report. A moiety of the expenses of the arbitral tribunal shall be borne by each Party.

and

4. That the Government of the United States of America on October 12, 1962 submitted to the Government of France a diplomatic note requesting arbitration of this dispute;

Have decided to submit the dispute to an arbitral tribunal and for this purpose have agreed as follows:

*Article I*

The Tribunal is requested to decide the following questions:

1. Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation

services between the United States and Turkey via Paris and does it have the right to carry traffic which is embarked in Paris and disembarked at Istanbul, Ankara or other points in Turkey, or embarked at Istanbul, Ankara or other points in Turkey and disembarked at Paris?

2. Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation services between the United States and Iran via Paris and does it have the right to carry traffic which is embarked in Paris and disembarked at Tehran or other points in Iran, or embarked in Tehran or other points in Iran and disembarked at Paris?

*Article II*

Each Party shall be represented before the Tribunal by an agent who shall be responsible for its part in the proceedings. Each agent may nominate a deputy to act for him and may be assisted by such advisors, counsel, and staff as he deems necessary. Each Party shall communicate the name and address of its respective agent and deputy to the other Party and to the members of the Tribunal.

*Article III*

A) The proceedings shall consist of written pleadings and oral hearings.

B) The written pleadings shall be limited, unless the Tribunal otherwise directs, to the following documents:

1. A memorial, which shall be submitted by the Government of the United States of America to the French agent within four weeks after the date of signature of this Agreement;

2. A counter-memorial, which shall be submitted by the Government of France to the United States agent within four weeks after the date of submission of the United States memorial;

3. A reply, which shall be submitted by the Government of the United States of America to the French agent within three weeks after the date of submission of the French counter-memorial;

4. A surrejoinder, which shall be submitted by the French Government to the United States agent within three weeks after the date of the submission of the American reply.

Each document shall be communicated to each member of the Tribunal and to the other Party in six copies and shall not be made public, except as provided in paragraph B of Article VI of this compromis. Any written document shall annex the originals, if obtainable, or copies of all such documents, except for those which have already been published.

C) The oral hearings shall be held at a time to be fixed by the President of the Tribunal and shall be held in private at such place and time as the Tribunal may determine.

D) The Tribunal may extend the above time limits at the request of either Party for good cause shown.

*Article IV*

A) The Parties shall present their written pleadings and any other documents to the Tribunal in English or in French.

B) The Parties shall present their oral arguments in English or in French. The Tribunal shall make the necessary arrangements for interpretation of the oral pleadings.

C) The Tribunal shall provide for the keeping of a verbatim record of all oral hearings.

*Article V*

A) The Tribunal shall, subject to the provisions of this Compromis, determine its own procedure and all questions affecting the conduct of the arbitration.

B) The decisions of the Tribunal on all questions, whether of substance or procedure, shall be determined by a majority vote of its members.

C) The Tribunal, after consultation with the two agents, shall arrange for a place of hearing, and may engage such technical, secretarial, and clerical staff and obtain such services and equipment as may be necessary.

*Article VI*

A) The Tribunal shall render its decision after the date of the closing of the oral hearings. The conclusions of the Tribunal may be adopted by a majority vote of the members. The decision shall state the reasons of the members for the conclusions reached, and shall include the dissenting opinion of any member. A signed copy of the decision shall be immediately communicated to each of the agents.

B) The decision shall be made public at a date agreed upon by the Parties. The record shall not be made public except by agreement of the Parties.

*Article VII*

Any dispute between the Parties as to the interpretation of the decision shall, at the request of either Party, and within four weeks after the rendering of the decision, be referred to the Tribunal for clarification.

*Article VIII*

A) Each Party shall be responsible for the remuneration and other expenses of the member of the Tribunal whom it has nominated, and shall bear its own expenses incurred in and for the preparation of its case.

B) The remuneration of the third member who has been selected by the two members nominated by the Parties, or by the President of the International Court of Justice, as the case may be, and all general expenses of the arbitration, shall be borne equally by the Parties. The Tribunal shall keep a record and render a final account of all general expenses.

*Article IX*

The provisions of Articles 59, 60 paragraph 3, 63 paragraph 3, and 64 to 84 of the Convention of October 18, 1907 for the pacific settlement of international differences shall be applicable with respect to any points which are not covered by the present Compromis. The Parties reserve the right to have recourse to the privilege provided for in paragraph 1 of Article 83. They will, in such case, exercise this privilege within a period of six months.

*Article X*

This Compromis shall come into force on the date of signature.

In witness whereof, the undersigned, being duly authorized by their respective Governments, have signed this Compromis and have attached their seals.

Done in duplicate at Paris this twenty second day of January 1963 in English and French, each of which shall be of equal authenticity.

| *For the Government of the United States of America* | *For the Government of the Republic of France* |
| --- | --- |
| Jacques J. REINSTEIN | Augustin JORDAN |
| [Seal] | [Seal] |

# DECISION OF THE ARBITRATION TRIBUNAL ESTABLISHED PURSUANT TO THE ARBITRATION AGREEMENT SIGNED AT PARIS ON 22 JANUARY 1963 BETWEEN THE UNITED STATES OF AMERICA AND FRANCE, GIVEN AT GENEVA ON 22 DECEMBER 1963

## I. Introduction

### 1. *The Arbitration Agreement and the organization of the Arbitration Tribunal*

A dispute has arisen between the Government of the United States of America and the Government of the French Republic concerning the interpretation of the Air Transport Services Agreement between the United States of America and France, signed at Paris on March 27, 1946, and the Annex thereto.

The Governments have been unable to settle this dispute through negotiation and have consequently decided, in accordance with the proposal made by the Government of the United States of America on October 12, 1962, to submit this dispute to an Arbitration Tribunal of three members organized in conformity with Article X of the Air Transport Services Agreement as amended by the Exchange of Notes signed at Paris on March 19, 1951, which provides that:

> Except as otherwise provided in this Agreement or its Annex, any dispute between the Contracting Parties relative to the interpretation or application of this Agreement or its Annex which cannot be settled through consultation shall be submitted for an advisory report to a tribunal of three arbitrators, one to be named by each Contracting Party, and the third to be agreed upon by the two arbitrators chosen provided that such third arbitrator shall not be a national of either Contracting Party. Each of the Contracting Parties shall designate an arbitrator within two months of the date of delivery by either Party to the other Party of a diplomatic note requesting arbitration of a dispute; and the third arbitrator shall be agreed upon within one month after such period of two months.
>
> If either of the Contracting Parties fails to designate its own arbitrator within two months, or if the third arbitrator is not agreed upon within the time limit indicated, the President of the International Court of Justice shall be requested to make the necessary appointments by choosing the arbitrator or arbitrators, after consulting the President of the Council of the International Civil Aviation Organization.
>
> The Contracting Parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report. A moiety of the expenses of the arbitration tribunal shall be borne by each Party.

The Governments also agreed, in an Exchange of Letters of December 8, 1962-January 9, 1963, to consider the decision of the Arbitration Tribunal in this dispute, as binding upon the Parties.

The Arbitration Agreement was signed at Paris on January 22, 1963, and came into force on the date of signature.

In accordance with Article X of the above Agreement, on October 26, 1962, the Government of the French Republic designated as Arbitrator Mr. Paul Reuter, Professor of the Faculty of Law and Economic Sciences of Paris, Member of the Permanent Court of Arbitration.

On November 19, 1962, the Government of the United States of America designated as Arbitrator Mr. Milton Katz, Professor of the Faculty of Law of Harvard University. The latter having had to resign due to other commitments, on June 28, 1963, the Government of the United States of America designated in his stead Mr. Henry P. de Vries, Professor of Colombia University Law School, Assistant Director of the Parker School of Foreign and Comparative Law.

The arbitrators designated by the two Parties not having been able to agree upon the choice of the third Arbitrator within the time limit indicated, the Parties themselves applied to the President of the International Court of Justice, who, after consultation with the President of the Council of the Civil Aviation Organization, designated as the third Arbitrator on March 26, 1963, Mr. Roberto Ago, Professor of the Faculty of Political Sciences of the University of Rome, Member of the Permanent Court of Arbitration and member of the International Law Commission of the United Nations.

### 2. *The questions referred to the Tribunal*

By the provisions of Article I of the Arbitration Agreement, the Tribunal is requested to decide the following questions:

1. Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation services between the United States and Turkey via Paris and does it have the right to carry traffic which is embarked in Paris and disembarked at Istanbul, Ankara or other points in Turkey, or embarked at Istanbul, Ankara or other points in Turkey and disembarked at Paris?

2. Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation services between the United States and Iran via Paris and does it have the right to carry traffic which is embarked in Paris and disembarked at Tehran or other points in Iran, or embarked in Tehran or other points in Iran and disembarked at Paris?

### 3. *The course of the proceedings*

In conformity with Article II of the Arbitration Agreement, the Government of the United States of America advised that its Agent in the Arbitration was the Honorable Abram Chayes, Legal Adviser to the State Department, assisted by Messrs. Richard B. Bilder and Thomas Ehrlich, of the Legal Adviser's Office, as Counsel. They were joined by Mr. Joseph Goldman of the Civil Aeronautics Board, and Mr. Norman Seagrave, acting as Experts.

For its part, the Government of the French Republic advised that its Agent was Mr. J. J. de Bresson, Legal Adviser to the Ministry of Foreign

Affairs, assisted by Mr. Michel Virally, Professor at Geneva University and at the Graduate Institute for International Studies, and by Maître André Garnault, Member of the Bar by the Court of Appeals of Paris, as Counsel. They were joined by Mrs. d'Haussy and Miss Lanusse, acting as Experts.

The Tribunal appointed as Registrar Mr. Philippe Cahier, Assistant Professor at the Graduate Institute for International Studies.

The Government of the United States of America delivered its Memorial on February 22, 1963, and its Reply on April 11, 1963; the Government of the French Republic delivered its Counter-Memorial on March 22, 1963, and its Surrejoinder on May 3, 1963; each of these documents, together with Exhibits, have been duly communicated to each member of the Tribunal and to the other Party, in conformity with Article III of the Arbitration Agreement.

Convened by the President, the Tribunal met in Geneva, in the Alabama Room of the Hôtel de Ville, on September 19, 1963, and established its rules of procedure in accordance with Article V of the Arbitration Agreement, taking into account also the provisions of Articles 59, 60 paragraph 3, 63 paragraph 3, and 64 to 84 of the Convention of October 18, 1907, for the Pacific Settlement of International Disputes, mentioned in Article IX of the Arbitration Agreement.

The oral argument took place from September 20 to 28, 1963. At the sessions of September 21, 22, 23, 24, 26 and 28, the Tribunal heard the argument and rebuttal of the Honorable Abram Chayes, Agent, for the Government of the United States of America, and Mr. J. J. de Bresson, Agent, Professor Michel Virally and Maître André Garnault, for the Government of the French Republic, Counsel.

The Agent of the Government of the United States of America confirmed in his argument and in his reply the affirmation previously set forth in the written pleadings, that the two questions referred to the Tribunal should be answered in the affirmative.

The Agent of the Government of the French Republic confirmed, for his part, in his argument and in his rebuttal, the affirmation previously set forth in the written pleadings, that the two questions referred to the Tribunal should be answered in the negative.

During their oral arguments both Parties expressed the opinion that the Tribunal should determine its jurisdiction on the basis of a broad interpretation of the Arbitration Agreement. In this connection, at the conclusion of the oral argument, the President asked the Agents, on behalf of the Tribunal, if the Parties were prepared formally to confirm their agreement on this point, and that if, consequently, the terms employed by the Arbitration Agreement to indicate the questions that the Tribunal had been requested to decide, should be interpreted to mean that the Tribunal would be free if it deemed proper to do so, to consider not only the terms of Route 1 of Schedule II of the Annex, but also the Agreement and the Annex as a whole, as well as all the formal and informal understandings which followed, as well as the practice of the Parties. The question was also asked whether, with the agreement of the Parties, the Tribunal would be free, if it so deemed proper, either to give a single answer to the two questions appearing in the Arbitration Agreement or to reverse the order of the said questions. The replies of the Agents of the Parties were affirmative on both points. The Tribunal took due note thereof.

## II. History of events

### 1. *Initial steps by the United States for an Aviation Agreement with France. The Draft delivered on March 23, 1945*

The background of the events which have led the Parties to submit their dispute to the present arbitration is as follows:

Commercial aviation relations between the United States of America and France were governed up to 1946 by the Air Transport Agreement concluded between the two Governments by an Exchange of Notes dated July 15, 1939.

Following the 1944 Chicago Conference on Civil Aviation, and in view of the failure of the effort to secure adoption of a multilateral treaty governing international air transport, with exchange of commercial right in this field, the American Government took the initiative of promoting a network of bilateral agreements to further the expected development of international air traffic. [1]

Within the framework of this activity, a draft agreement on air transport intended to supersede the 1939 Agreement was transmitted to the Minister of Foreign Affairs of France by a letter from the Ambassador of the United States of America in Paris, on March 23, 1945. The aims and objectives of the proposed agreement were defined as follows in the Preamble and in Article 1:

> Having in mind the resolution recommending a standard form of agreement for provisional air routes and services, included in the Final Act of the International Civil Aviation Conference signed at Chicago on December 7, 1944, and the desirability of mutually stimulating and promoting the sound economic development of air transportation, the two Governments parties to this arrangement agree that the further development of air transport services between their respective territories shall be governed by the following provisions:
>
> "*Article 1*
>
> "The contracting parties grant the rights specified in the Annex hereto necessary for establishing the international civil air routes and services therein described, whether such services be inaugurated immediately or at a later date at the option of the contracting party to whom the rights are granted."

The relation of the new agreement to that of July 15, 1939, as well as the possibility of terminating or amending the latter were stated as follows:

> "*Article 8*
>
> "The present agreement supersedes the air transport agreement concluded between the two contracting parties by an exchange of notes dated July 15, 1939; provided, however, that operating rights which have been granted by either contracting party to an airline of the other contracting party, shall continue in force according to their terms.
>
> "*Article 9*
>
> "This agreement or any of the rights for air transport services granted

---

[1] In this connection, see Frederick, *Commercial Air Transportation*, Fifth Ed., Homewood, 1961, p. 282:

> Circumstances, therefore, forced the United States to adopt a policy of bilateralism. Between the years 1944 and 1954, bilateral air transport agreements have been entered into with 45 countries, based largely on what has come to be known as the 'Bermuda Agreement' entered into between representatives of the United States and the United Kingdom at Bermuda in 1946.

thereunder may, without prejudice to the proviso in Article 8, be terminated by either contracting party upon giving one year's notice to the other contracting party.

"*Article 10*

"Except as may be modified by the present agreement, the general principles of the air navigation arrangement between the two contracting parties, which was also effected by an exchange of notes signed July 15, 1939, shall continue in force in so far as they are applicable to scheduled air transport services, until otherwise agreed upon by the two contracting parties.

"*Article 11*

"In the event either of the contracting parties considers it desirable to modify the routes or conditions set forth in the attached Annex, it may request consultation between the competent authorities of both contracting parties, such consultation to begin within a period of sixty days from the date of the request. When these authorities mutually agree on new or revised conditions affecting the Annex, their recommendations on the matter will come into effect after they have been confirmed by an exchange of diplomatic notes."

The Annex to the draft agreement envisaged the grant of commercial right to United States airlines on 8 routes, and to French airlines on one route. The text of the Annex was as follows:

A. Airlines of the United States authorized under the present agreement are accorded rights of transit and non-traffic stop in French territory as well as the right to pick up and discharge international traffic in passengers, cargo, and mail at Paris, Marseille, Algiers, Tunis, Dakar, Pointe Noire, Guadeloupe, Martinique, French Guiana, and Noumea on the following routes:

1. The United States over a North Atlantic route to Ireland and thence to Paris and beyond via intermediate stops in Switzerland, Italy and Greece to the Near and Middle East, in both directions.

2. The United States via intermediate points in Portugal and Spain to Marseille and beyond to Rome, in both directions.

3. United States via intermediate points in Portugal and Spain to Algiers and Tunis and beyond to Cairo, in both directions.

4. United States via Caribbean and South American points to Dakar and beyond via points in Africa and Spain to Paris, in both directions.

5. United States via Caribbean and South American points to Dakar and beyond to South Africa, in both directions.

6. United States via Caribbean and South American points to Pointe Noire and beyond to South Africa, in both directions. (It is understood that this is to be used merely as an alternative to route 5 above on express flights between the United States and South Africa.)

7. United States via Caribbean points to Guadeloupe, Martinique, and French Guiana and beyond, in both directions.

8. United States via points in the Pacific to New Caledonia and beyond to Australasia, in both directions.

B. Airlines of France authorized under the present agreement are accorded rights of transit and non-traffic stop in the territory of the United States, as well as the right to pick up and discharge international traffic in passengers, cargo, and mail at New York, on the following route:

1. France via Ireland and thence over a North Atlantic route to New York, in both directions.

### 2. *Proposed Amendments to the Draft, submitted on July 16, 1945*

By a subsequent letter of July 16, 1945, the Ambassador of the United States officially transmitted to the Minister of Foreign Affairs of France a copy of a telegram from the State Department describing the North Atlantic Routes from the United States to Europe that had been decided upon by the Civil Aeronautics Board (CAB) and approved by the President of the United States, the establishment of which, as the Ambassador stressed, was dependent upon the granting of appropriate permission by the countries concerned. The text of the telegram was as follows:

> Civil Aeronautics Board with President's approval today announced issuance of certificates to three US airlines to operate commercial services as described below:
>
> Pan American Airways, one route from US via Newfoundland, Foynes, London, Brussels, Prague, Vienna, Budapest, Bucharest, Istanbul (with another route sector Vienna, Belgrade, Istanbul), Ankara, Beirut, Baghdad, Karachi (with another route section Ankara, Teheran, Karachi) to Calcutta another route from US via Bermuda and Azores to Lisbon with one sector proceeding to London and another to Barcelona and Marseille.
>
> American Export Airlines, one route from US via Labrador, Greenland, Iceland, Norway, Stockholm, Helsinki and Leningrad to Moscow. Another route from US via Newfoundland, Foynes, London, Amsterdam, Berlin and Warsaw to Moscow. Also one connecting link from Iceland to London via Glasgow and another from Amsterdam to Stockholm via Copenhagen.
>
> Transcontinental and Western Air one route from US via Newfoundland, Foynes, Paris, Switzerland, Rome, Athens, Cairo, Palestine, Basra, Dhahran to Bombay. Another route from US via Newfoundland, Lisbon, Madrid, Algiers, Tunis, Tripoli, Benghasi to Cairo also a connecting link from Madrid to Rome.
>
> Above route patterns are tentative and flexible in the sense that certificates cover countries and general areas and airlines above authorized may serve other points in their areas, after further approval from Board in announcing these route decisions. CAB recognizes that establishment these services is dependent on granting of appropriate permission by countries concerned. Inauguration of services also must await availability of four motored aircraft for commercial operation.

In correlation with the decisions of the CAB, the Ambassador of the United States addressed the following proposal to the Minister of Foreign Affairs of France:

> In order that the draft Air Transport Agreement submitted in the note under reference shall conform with the decision of the Civil Aeronautics Board, the Secretary of State has directed that I suggest to Your Excellency the following modifications of routes 1, 2 and 3 as outlined in Paragraph A of the Annex to the draft Air Transport Agreement.
>
> 1. United States via intermediate points over a North Atlantic route to Ireland and thence to Paris and beyond, via intermediate stops in Switzerland, Italy and Greece to the Near East and India; in both directions.
>
> 2. United States via intermediate points to Lisbon, Barcelona and Marseille; in both directions.

3. United States to Cairo, via Lisbon, Madrid, Algiers, Tunis, Tripoli and Benghasi, in both directions.

In addition, my Government would like to add, after Route No. 8 of Paragraph A of the Annex, the following:

Rights of transit and non-traffic stop are granted United States airlines in the territory of France on a route between Portugal and the United Kingdom, and on a route between Spain and Italy.

### 3. *Transmission of CAB Docket No. 855* et al. *of June 1, 1945*

On the basis of these proposals, discussions were held between the Parties. In the course of these conversations, the communication effected by the letter of July 16, 1945, was followed by the transmission of the certified copy dated August 28, 1945, of the "Opinion and order adopted by the Civil Aeronautics Board on June 1, 1945, in the North Atlantic Route Case, Docket No. 855 *et al.*".

The CAB decision of June 1, 1945, referred to eleven applications made by American aviation companies for air services "across the North Atlantic between the United States and Europe, extending through the Middle East to India".

In its considerations the CAB stressed in the following terms the interdependence existing between a national decision concerning the structure of the proposed air services and the negotiation of the international agreements necessary to achieve them:

While it is true that many international arrangements must still be concluded, it has not been our policy to delay proceedings with respect to our own air carrier authorizations until landing rights and other necessary aeronautical privileges are firmly in hand. To do this might unnecessarily delay the inauguration of service. By completing our proceedings and transmitting our decision to the President for his approval as required by the Act we resolve the domestic problems and make it possible for the President to grant his approval whenever such action will be consistent with our course of dealings in foreign affairs. In fact, it may not be possible in all cases to conduct the necessary international negotiations until a determination has been made as to our proposed air service pattern and until other matters relating thereto have been settled. Of course, it is recognized that United States air carriers cannot operate into or through foreign countries without their permission, obtained through inter-governmental agreements or other appropriate arrangements.

Having taken the basic decision that North Atlantic services should be allocated to more than one air transport enterprise, the CAB selected the three following companies: PAA, American Export Airlines and TWA. These companies were granted certificates for a period of seven years for the operation of three fundamental routes.

In connection with the description of these routes the CAB made the following preliminary observations:

In the issuance of certificates to engage in foreign air transportation the Board is not required in all cases to designate specific points without the United States to be served. The Act recognizes and contemplates the need in particular cases of an authorization to serve areas constituting a general route rather than designated points composing a specific route. Under section 401 (f) of the Act, we must specify the terminal and intermediate points to be served without the United

States in foreign air transportation only insofar as we "shall deem practicable, and otherwise shall designate only the general route or routes to be followed". The record in the present proceedings shows this to be a proper instance for the exercise of the statutory discretion conferred upon us. The need for flexibility in the face of rapidly changing conditions is best accommodated within a service pattern defined by areas along general routes in the foreign air transportation here involved, instead of the usual point-to-point pattern for domestic carriers. No exclusive rights are granted any carrier by the area concept. We have also indicated the initial service plan designating the specific points to be served by the holders of such certificates. It is contemplated that changes in such service plan may be initiated within the area assigned to a particular carrier upon compliance with the provisions of the applicable economic regulation.

On the basis of a consideration of all of the facts of record including historical data relating to flow of traffic across the North Atlantic, future prospects for development of commerce and trade in this area, and other pertinent statutory considerations we find that the public convenience and necessity require the establishment of service by separate United States air carriers. These general routes which are shown on the map which accompanies this opinion are fully described in terms of three distinct areas as follows: (For purposes of area identification the political boundaries as of January 1, 1937, are used.)

The route descriptions, which were also marked out on an annexed map, were as follows:

*Northern route composing the following area*:

Newfoundland
Labrador
Greenland
Iceland
Shannon Airport or other airport serving the Shannon estuary
United Kingdom, including Northern Ireland
Netherlands
Denmark
Norway
Sweden
Finland
Estonia
Latvia
Lithuania
that portion of Germany which lies north of the 50th parallel
Poland
intermediate point Leningrad and the terminal point Moscow in the Union of Socialist Soviet Republics.

*Central route composing the following area*:

Belgium
that portion of Germany which lies south of the 50th parallel
Czechoslovakia
Austria
Hungary
Yugoslavia
Rumania
Bulgaria
Turkey

Lebanon
Iraq
Iran
Afghanistan
and intermediate and terminal points within that portion of India which lies north of the 20th parallel

*Southern route composing the following area*:

(1) Newfoundland
Eire
France, except Marseille
Switzerland
Italy
Greece
Egypt
Palestine
Trans-Jordan
Iraq
Saudi Arabia
Yemen
Oman
and intermediate and terminal points within Ceylon and that portion of India which lies south of the 20th parallel

(2) Portugal
and (*a*) beyond Portugal, intermediate points within the following areas:
Spain, except Barcelona
Italy
and (*b*) beyond Portugal, intermediate points within the following areas:
Algeria
Tunisia
Libya
Egypt

In the framework of the "general routes" so described, the CAB went on to specify the points initially designated for the operation of the service:

The pattern set forth above would limit directly duplicating United States air carrier competition to the major gateway points of London and Lisbon and would, in our opinion, form a sound basis for the establishment and maintenance of service by separate United States carriers. The record supports the finding that the entire route pattern with the exception of certain segments should develop commercial traffic of sufficient volume and character to support its operation fully and economically. This objective, of course, would not be reached in the immediate post-war period but can be expected only after a development of the traffic potential. The points which will be initially designated for rendering service within the general route areas above described shall be as follows and as indicated on the map referred to hereinbefore:

*Northern route*

Between the co-terminal points Chicago, Ill., Detroit, Mich., Washington, D.C., Philadelphia, Pa., New York, N.Y., and Boston, Mass.; a point in Newfoundland; a point in Labrador; a point in Greenland; a point in Iceland; Foynes, Eire; Glasgow, Scotland; London, England; Amsterdam, Holland; Copenhagen, Denmark; Stavanger, Norway; Stockholm, Sweden; Berlin, Germany; Warsaw,

Poland; Helsinki, Finland; Leningrad, U.S.S.R.; and the terminal point Moscow, U.S.S.R.

*Central route*

Between the co-terminal points Chicago, Ill., Detroit, Mich., Washington, D.C., Philadelphia, Pa., New York, N.Y., and Boston, Mass.; a point in Newfoundland; the intermediate points in Foynes, Eire; London, England; Brussels, Belgium; Prague, Czechoslovakia; Vienna, Austria; and (*a*) beyond Vienna, the intermediate points Budapest, Hungary; Bucharest, Rumania; Istanbul, Turkey; Ankara, Turkey; Tehran, Iran; Karachi, India; and (*b*) beyond Vienna, the intermediate points Belgrade, Yugoslavia; Istanbul, Turkey; Ankara, Turkey; Beirut, Lebanon; Baghdad, Iraq; Karachi, India; and the terminal point Calcutta, India.

*Southern route*

(1) Between the co-terminal points Chicago, Ill., Detroit, Mich., Washington, D.C., Philadelphia, Pa., New York, N.Y., and Boston, Mass.; a point in Newfoundland; the intermediate points Foynes, Eire; Paris, France; Berne, Switzerland; Rome, Italy; Athens, Greece; Cairo, Egypt; Jerusalem, Palestine; Basra, Iraq; Dhahran, Saudi Arabia; and the terminal point Bombay, India.

(2) Between the co-terminal points Chicago, Ill., Detroit, Mich., Washington, D.C., Philadelphia, Pa., New York, N.Y., and Boston, Mass.; a point in Newfoundland; the intermediate point Lisbon, Portugal; and (*a*) beyond Lisbon, the intermediate point Madrid, Spain; and the terminal point Rome, Italy; and (*b*) beyond Lisbon, the intermediate points Algiers, Algeria; Tunis, Tunisia; Tripoli, Libya; Benghasi, Libya; and the terminal point Cairo, Egypt.

### 4. *The Provisional Agreement of December 28 and 29, 1945*

In the course of the discussions between the Parties, an Exchange of Notes dated December 28 and 29, 1945, arranged the matter on a provisional basis. By Note of December 28, the Ambassador of the United States in Paris made the following proposal to the Minister of Foreign Affairs of France:

As Your Excellency is aware, it is the desire of my Government to see the restoration of international civil air services at the earliest practicable date. I venture to inquire, therefore, if Your Excellency's Government would be disposed, in view of the existing Agreement, to grant authorization for American air carriers to operate over the following routes:

1. The United States via intermediate points over a North Atlantic route to Paris and beyond via intermediate stops in Switzerland, Italy and Greece to the Near East and India; in both directions.

2. The United States via intermediate points over a North Atlantic route to Lisbon, Barcelona, and Marseille; in both directions.

In making this request, I should state that my Government desires that the American carriers concerned shall have the right to pick up and discharge international traffic in passengers, mail and cargo at the points in French territory named above.

Although it is unknown at this moment the number of schedules the American operators would be prepared to perform, it is hoped that Your Excellency's Government would be disposed to permit a greater frequency than the two flights weekly accorded in the Air Transport Agreement under reference.

To which the Minister of Foreign Affairs replied in his letter of December 29:

> I have the honor to inform Your Excellency that pending the conclusion of a new general agreement on this matter, the French Government is quite disposed, with reference to the Arrangement for the Operation of Air Transport Services dated July 15, 1939, to grant to United States air carriers the right to pick up and discharge, in international traffic, passengers, mail and cargo at Paris and Marseille on the above-mentioned routes, under the following conditions:
>
> A. The Government of the United States will grant to French airlines the same rights on the following routes:
>
> 1. France via intermediate points over a North Atlantic route to New York and Washington; in both directions.
>
> 2. France via intermediate points over a North Atlantic route to Montreal and Chicago; in both directions.
>
> B. In the establishment and technical and commercial operation of the long range services mentioned above, the airlines of each of the two countries shall take into consideration the interests of the airlines of the other in order not to affect unduly the services which the latter perform on all or part of the same routes.
>
> The right of the airlines of each country to embark and disembark, in the cities and on the routes enumerated above, passengers, mail and goods destined to or coming from third countries, is granted to permit more economical operation of the long range services performed by the said airlines, such services to retain as their primary objective the linking of the country of which each airline is a national to the country of ultimate destination.
>
> I would add that the French Government will consider favorably the requests which may be presented to it by the Government of the United States for flights in addition to the two per week provided in the existing Agreement, it being understood that the French Government will have the benefit of the same frequencies.

### 5. *The Anglo-American Bermuda Agreement and its Transmission to the French Government*

Shortly after the adoption of the provisional agreement referred to above, on February 11, 1946, the United States and the United Kingdom concluded in Bermuda the Air Services Agreement, which was to have a considerable influence on post-war civil aviation bilateral agreements. The Bermuda Agreement consisted of an agreement properly speaking, with thirteen Articles and an Annex, together with two Schedules describing the seven and the thirteen routes which could respectively be served by the airlines of the two companies. In the Schedule (*b*) the description of the routes to be served by the American companies was as follows:

ROUTES TO BE SERVED BY AIR CARRIERS OF THE UNITED STATES

(In both directions; stops for non-traffic purposes omitted)

| | *Point of Departure* (Any one or more of the following) | *Intermediate Points* (Any one or more of the following if desired) | *Destination in U.K. Territory* (Any one or more of the following if desired) | *Points Beyond* (Any one or more of the following if desired) |
|---|---|---|---|---|
| 1. | *Chicago<br>Detroit<br>Washington<br>Philadelphia<br>New York<br>Boston<br>Baltimore | Gander<br>Greenland<br>Iceland<br>Shannon | London<br>Prestwick | Amsterdam<br>Helsinki<br>Copenhagen<br>Stavanger<br>Oslo<br>Stockholm<br>Warsaw<br>Berlin<br>Frankfurt<br>Moscow<br>Leningrad<br>Points in the Baltic countries |
| 2. | *New York<br>Chicago<br>Philadelphia<br>Baltimore<br>Washington<br>Boston<br>Detroit | Gander<br>Greenland<br>Iceland<br>Shannon | London<br>Prestwick | Brussels<br>Munich<br>Prague<br>Vienna<br>Budapest<br>Belgrade<br>Bucharest<br>Istanbul<br>Ankara<br>A point in Iran<br>Beirut<br>A point in Syria<br>A point in Iraq<br>A point in Afghanistan<br>Karachi<br>Delhi<br>Calcutta |
| 3. | *Chicago<br>Detroit<br>Washington<br>New York<br>Boston<br>Baltimore<br>Philadelphia | Gander<br>Shannon<br>Greenland<br>Iceland<br>Paris<br>A point in Switzerland<br>Rome<br>Athens<br>Cairo | Lydda | A point in Iraq<br>Dhahran<br>Bombay<br>Calcutta<br>A point in Burma<br>A point in Siam<br>A point or points in Indo-China<br>A point or points in China |

| *Point of Departure* (Any one or more of the following) | *Intermediate Points* (Any one or more of the following if desired | *Destination in U.K. Territory* (Any one or more of the following if desired) | *Points Beyond* (Any one or more of the following if desired) |
|---|---|---|---|
| 4. *Chicago<br>Detroit<br>Washington<br>New York<br>Boston<br>Baltimore<br>Philadelphia | Gander<br>Azores<br>Lisbon<br><br>(*a*)<br>Algiers<br>Tunis<br>Tripoli<br>Benghazi<br>Cairo<br><br>(*b*)<br>Madrid<br>Rome<br>Athens<br>Cairo | Lydda | From Lydda to point beyond as described in Route 3 |

*Notice will be given by the aeronautical authorities of the United States to the aeronautical authorities of the United Kingdom of the route service patterns according to which services will be inaugurated on these routes

.....*omissis*

The text of the Bermuda Agreement was delivered to the French Government by a letter of February 27, 1946, from the United States Ambassador. Referring to the provisional Agreement concluded by the Exchange of Notes of December 28 and 29, the letter said:

> As Your Excellency is aware, a permanent Air Transport Agreement between our respective countries has been the subject of conversations for sometime. In this connection, I am pleased to enclose ten copies of the Air Transport Agreement between the Governments of the United States and Great Britain recently concluded at Bermuda. The Secretary of State has directed that I request the competent French authorities to review these documents and inform him as to what, if any, sections Your Excellency's Government might wish to have included in a permanent Air Transport Agreement with the United States.

The same letter announced the arrival in Paris of the President of CAB and of the President of the United States Delegation which had negotiated the Bermuda Agreement, to negotiate the permanent agreement with France.

6. *The Final Negotiations and the Conclusion of the Agreement of March 27, 1946*

The final negotiations thus began on March 11, 1946, and on March 27 the Air Transport Services Agreement between the United States of America and France was signed. It came into force on the date of its signature. Like the Bermuda Agreement, it consisted of an Agreement properly speaking with thirteen Articles and an Annex in eight Sections, together with two Schedules, the first listing five routes which could be served by French air carriers, and the second eight routes which could be served by United States air carriers.

The description of Schedule II was the following:

SCHEDULE II

*Routes to be served by the air carriers of the United States*

(Points on any of the routes listed below may, at the option of the air carrier, be omitted on any or all flights.)

1. The United States via intermediate points over the North Atlantic to Paris and beyond via intermediate points in Switzerland, Italy, Greece, Egypt, the Near East, India, Burma and Siam to Hanoi, and thence to China and beyond; in both directions.

2. The United States via intermediate points over the North Atlantic and Spain to Marseille and beyond via Milan, Budapest and points south of the parallel of Budapest to Turkey and thence via intermediate points to a connection with Route 8 and beyond on said route; in both directions.

3. The United States via intermediate points over the North Atlantic, and Spain to Algiers, Tunis, and beyond via intermediate points in Egypt, and beyond via Route 1; in both directions.

4. The United States via intermediate points to Dakar, Pointe Noire, Brazzaville, and beyond via intermediate points to the Union of South Africa; in both directions.

5. The United States via intermediate points to Guadeloupe, Martinique, and beyond via intermediate points to French Guiana, and beyond in South America; in both directions.

6. The United States via intermediate points in the Pacific Ocean to New Caledonia and beyond on one or more routes to Australasia (including Australia and New Zealand); in both directions.

7. The United States via intermediate points in the Pacific Ocean and Manila to Saigon, and beyond to Singapore and Batavia; in both directions.

8. The United States via intermediate points in the Pacific Ocean, Manila, Hong Kong, Macao, and China to Hanoi and beyond via Siam, Burma to India and beyond; in both directions.

Note 1: For the purposes of the present Schedule, the term "North Atlantic" shall mean that part of the North Atlantic Ocean north of a line from Key West, Florida, to Bermuda, the Azores and Lisbon, including these points.

Note 2: It is understood that the rights granted in respect of Hanoi and Saigon shall be in effect from the date of the present Agreement for a period of one year and automatically renewed thereafter except in the event of denunciation with three months' advance notice at the expiration of any annual period.

The aims and purposes of the Agreement were defined as follows: In the Agreement:

The Government of the United States of America and the Provisional Government of the French Republic,

considering

— that the possibilities of commercial aviation as a means of transport have greatly increased,

—that it is desirable to organize the international air services in a safe and orderly manner and to further as much as possible the development of international cooperation in this field, and

— that the Agreements hitherto contracted between the two governments with respect to the operation of air services should be replaced by a more general agreement in harmony with the new conditions of air transport,
have appointed their representatives, who, duly authorized, have agreed upon the following:

*Article I*

The Contracting Parties grant to each other the rights specified in the Annex hereto for the establishment of the international air services set forth in that Annex, or as amended in accordance with Article XIII of the present Agreement.

. . .

*Article VII*

a) In addition to the rights mentioned in Article I of the present Agreement, each Contracting Party grants to all air carriers of the other Contracting Party for international air services (and for all operational flights incidental to such services):

1) The right to fly across its territory without landing;

2) The right to land in such territory for non-traffic purposes.

b) In order to carry out the purposes of paragraph a) above, each Contracting Party may designate the airways to be followed within its territory by any air carrier of the other Contracting Party, and the airports which any such services may use.

. . .

*Article XI*

The present Agreement supersedes the Air Transport Agreement concluded between the two Contracting Parties by an exchange of notes signed July 15, 1939, as well as the Provisional Arrangement of December 28 and 29, 1945.

and in the Annex:

*Section I*

The Government of the United States of America grants to the Government of the French Republic the right to conduct air transport services by one or more air carriers of French nationality designated by the latter country on the routes, specified in Schedule II attached, which transit or serve commercially the territory of the United States of America.

*Section II*

The Government of the French Republic grants to the Government of the United States of America the right to conduct air transport services by one or more air carriers of United States nationality designated by the latter country on the routes, specified in Schedule II attached, which transit or serve commercially French territory.

*Section III*

One or more air carriers designated by each of the Contracting Parties under the conditions provided in this Agreement will enjoy, in the territory of the other Contracting Party, rights of transit, of stops for non-traffic purposes and of commercial entry and departure for international traffic in passengers, cargo and mail at the points enumerated and on each of the routes specified in the schedules attached at all airports open to international traffic.

In order to assure satisfactory operations pursuant to the Agreement, to provide for the possibility of adjustments and changes possibly suggested by experience, to guarantee respect by the air transport enterprises for the principles and purposes of the Agreement itself, and finally to regulate the duration of the latter, the following provisions were inserted in the text:
In the Agreement:

*Article VIII*

In a spirit of close collaboration, the aeronautical authorities of the two Contracting Parties will consult regularly with a view to assuring the observance of the principles of and the implementation of the provisions outlined in the present Agreement and its Annex.

. . .

*Article XIII*

a) This Agreement, including the provisions of the Annex thereto will come into force on the day it is signed.

b) Either Contracting Party may at any time request consultation with the other with a view to initiating any amendments of this Agreement or its Annex which may be desirable in the light of experience. If a multilateral air convention enters into force in relation to both Contracting Parties, such consultation shall take place with a view to amending the present Agreement or its Annex so as to conform to the provisions of such a convention.

c) Except as otherwise provided in this Agreement or its Annex, if either of the Contracting Parties considers it desirable to modify the terms of the Annex to this Agreement it may request consultation to begin within a period of sixty days from the date of the request. Any modification in the Annex agreed to by said aeronautical authorities shall come into effect when it has been confirmed by an exchange of diplomatic notes.

d) When the procedure for a consultation provided for in paragraph (b) of the present Article has been initiated, either Contracting Party may at any time give notice to the other of its desire to terminate this Agreement. Such notice shall be simultaneously communicated to the Provisional International Civil Aviation Organization or its successor.

This Agreement shall terminate one year after the date of receipt of the notice to terminate by the other Contracting Party unless the notice is withdrawn by agreement before the expiration of this period. In the absence of acknowledgement of receipt by the other Contracting Party, notice shall be deemed to have been received fourteen days after the receipt of the notice by the Provisional International Civil Aviation Organization or its successor.

Done at Paris March , 1946[1], in duplicate in the English and French languages, each of which shall be of equal authenticity.

---

[1] By an exchange of notes dated Feb. 19 and Mar. 10, 1947, between the American Embassy at Paris and French Ministry of Foreign Affairs it was agreed that the date of signature was omitted inadvertently and that this passage should read "Done at Paris, March 27, 1946.

and in the Annex:

*Section IV*

It is agreed between the Contracting Parties:

a) That the two governments desire to foster and encourage the widest possible

distribution of the benefits of air travel for the general good of mankind at the cheapest rates consistent with sound economic principles; and to stimulate international air travel as a means of promoting friendly understanding and good will among peoples and insuring as well the many indirect benefits of this new form of transportation to the common welfare of both countries.

b) That in the operation by the air carriers of either Contracting Party of trunk services described in the present Annex, the interests of the air carriers of the other country shall, however, be taken into consideration so as not to affect unduly the services which the latter provide on all or part of the same route.

c) That the air transport services offered by the carriers of both countries should bear a close relationship to the requirements of the public for such services.

d) That the services provided by a designated air carrier under this Agreement and its Annex shall retain as their primary objective 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; and
— that the right of the air carriers of either country to embark and to disembark at points in the territory of the other country international traffic destined for or coming from third countries at a point or points specified in the Schedules attached, shall be applied in accordance with the general principles or orderly development to which both governments subscribe and shall be subject to the general principle that capacity shall be related:

1) to traffic requirements between the country of origin and the countries of destination,

2) to the requirements of through airline operation, and

3) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

. . .

*Section VII*[1]

Changes made by either Contracting Party in the routes described in the Schedules attached except those which change the points served by these airlines in the territory of the other Contracting Party shall not be considered as modifications of the Annex. The aeronautical authorities of either Contracting Party may therefore proceed unilaterally to make such changes, provided, however, that notice of any change is given without delay to the aeronautical authorities of the other Contracting Party.

If such other aeronautical authorities find that, having regard to the principles set forth in Section IV of the present Annex, interests of their air carrier or carriers are prejudiced by the carriage by the air carrier or carriers of the first Contracting Party of traffic between the territory of a third country, the authorities of the two Contracting Parties shall consult with a view to arriving at a satisfactory agreement.

---

[1] The French text of Section VII was as follows:

Toute modification des lignes aériennes mentionnées aux tableaux ci-annexés, qui affecterait le tracé de ces lignes sur des territoires d'Etat tiers autres que ceux des Parties Contractantes, ne sera pas considérée comme une modification à l'Annexe. Les autorités aéronautiques de chaque Partie Contractante pourront en conséquence procéder unilatéralement à une telle modification sous réserve toutefois de sa notification sans délai aux autorités aéronautiques de l'autre Partie Contractante.

Si ces dernières estiment, eu égard aux principes énoncés à la Section IV de la présente Annexe, que les intérêts de leurs entreprises nationales sont affectés par le fait qu'un trafic est assuré entre leur propre territoire et la nouvelle escale en pays tiers par les entreprises de l'autre pays, elles se concerteront avec les autorités aéronautiques de l'autre Partie Contractante afin de parvenir à un accord satisfaisant.

7. *Initial Implementation of the 1946 Agreement. The Question of the Beirut Service at the end of 1950 — beginning of 1951*

In application of the procedure laid down in Article XIII above, an amendment to the route schedules of the Annex of the Agreement was adopted by an Exchange of Notes of June 23-July 11, 1950 in order to add a stop on the territory of the other Contracting Party, to route 4 of Schedule I (Miami) and to route 2 of Schedule II (Nice) respectively.

Until the final months of 1950, the application of the Agreement of March 27, 1946, did not give rise to any disputes between the Parties. On the basis of the said Agreement, the American Company TWA inaugurated the service that it is still operating on route 1 of Schedule II, via Paris, with services to Cairo, some of which were to be extended, in 1947, to Bombay, and subsequently also to Colombo, Bangkok and Manila.

On September 23, 1950, the Government of the United States notified the French Government that, pursuant to a decision of CAB, Pan American World Airways Inc. had been designated as the second American air carrier authorized to serve route 1 of Schedule II, via Paris. Following this notification, PAA informed the French Director of Air Transport that it was going to operate a New York-Shannon-Paris-Rome-Beirut service.

During consultations between the Governments which took place in Washington in December 1950 and in Paris in February and March 1951, in application of Articles VIII and IX, the question of the service to Beirut was raised by the French Delegation, which stated that in its opinion, the implicit inclusion of Beirut in the term "Near East", such as it appeared in the description of route 1, was open to question and that it would be advisable to discuss points in the Agreement which were too vaguely defined. The American Delegation asserted that Beirut was included in the term "Near East" as used in the description of route 1 and that, consequently, the cessation of this service, as envisaged by the French authorities, could not be ordered. No mention of this discussion was made in the Minutes of the discussions of March 19, 1951. Instead, by common agreement, the following declaration was inserted:

> *Paris-Beyrouth* — Au cours des discussions la délégation française a attiré l'attention de la délégation américaine sur l'inquiétude que lui causait l'apparition d'un transporteur américain sur la relation Paris-Beyrouth et sur les craintes qu'elle éprouvait concernant la mise en œuvre éventuelle des capacités excessives entre ces deux points. La délégation française a déclaré que la France attachait un intérêt particulier au service aérien entre Paris et Beyrouth en raison des relations politiques et culturelles traditionnelles entre la France et les Etats du Levant. La délégation américaine a pris acte des déclarations de la délégation française et a indiqué que son Gouvernement non seulement réaffirmait, en ce qui concerne les services entre Beyrouth et Paris, la validité des clauses de capacité contenues dans l'accord, mais avait, de plus, l'intention d'informer, sous une forme appropriée, le transporteur américain exploitant la ligne Paris-Beyrouth des craintes exprimées par le Gouvernement français et de l'intérêt qu'il porte à cette relation afin que soit évitée l'exploitation, par la compagnie américaine, de services pouvant affecter indûment l'exploitation d'Air-France sur cette route.

An Exchange of Notes bearing the same date led to a number of amendments to Schedules I and II of the Annex, among others the substitution of Rome for Milan as a stop on route 2 of Schedule II, but left the description of route 1 unchanged.

The service to Beirut via Paris–Rome operated by PAA continued without causing further difficulties with on service per week in 1951 and 1952, and two services per week in 1953 and 1954. During the first two years, a free connection service from Beirut to Damascus was also operated.

### 8. *The Question of the Tehran Service in the Spring of 1955*

On April 5, 1955, PAA which had received from CAB the authorization to serve Tehran via Paris, delivered to the Secretary General of Civil and Commercial Aviation in Paris the new time-tables for services to France that were to come into effect on April 24. In addition to a weekly service to Beirut, two weekly services to Tehran via Paris-Rome-Beirut and Damascus were listed.

During a discussion which took place a short time afterwards between the Secretary General of Civil and Commercial Aviation and the American Air Attaché, which is recorded in a telegram of May 2, 1955, from the Ambassador of the United States in Paris to the State Department, the French official asserted that American air carriers did not have the right to serve Tehran via Paris under the Agreement, and put forward as reasons:

(a) that Tehran lay too much to the north to be included in a "reasonably direct" route to India, and

(b) that Iran was part of the Middle East and not the Near East.

The Air Attaché replied that to his knowledge the terms "Middle East" and "Near East" were generally interchangeable and that Tehran was not so far from the direct line to India as to constitute a detour from the "reasonably direct route". The conversation ended with the statement made by the French official that the matter was still being studied and that he expected that it would be the subject of a communication to the Embassy.

On May 9 the Secretary General of Civil and Commercial Aviation had another conversation with the Civil Air Attaché of the American Embassy and with the Director for France of PAA, and this conversation, too, was recorded, in a dispatch of May 11 from the Air Attaché to the State Department. During this second meeting the explanations given by the Americans concerning the frequency of PAA services to Beirut and Tehran seemed to allay some of the hesitations of the French official, who did not continue to insist on the points raised previously. Following this meeting, the latter wrote a letter to the Director for France of PAA, on May 14, 1955, indicating that the application of the time-tables delivered on April 5 gave rise to no objections on his part. The letter also contained the following sentence:

> En ce qui concerne la desserte de Damas et Téhéran, j'ai pris note des explications que vous m'avez données à ce sujet lors de notre récent entretien.

However, in another letter, of June 4, 1955, also written by the Secretary General of Civil and Commercial Aviation to the Director for France of PAA, the French official added the following clarification:

> Je vous rappelle également que Téhéran n'étant pas prévu au Tableau II (Route 1), c'est seulement à titre temporaire et compte tenu des assurances que vous aviez bien voulu me donner que votre compagnie éviterait, sur cette route, de porter préjudice aux compagnies françaises, que j'avais approuvé votre desserte de Téhéran.

The service to Tehran via Paris-Rome-Beirut and Damascus, inaugurated by PAA in 1955 with two services per week, was to be increased to

three services per week in 1956, three in 1957 (in two of which there was no stop in Damascus), two in 1958 (plus a limited service to Beirut), four in 1959 (in two of which there was no stop in Damascus) and four in 1960 and 1961, all from that time on without stop in Damascus. Until the final months of 1961, this service did not give rise to any further incidents.

9. *The Inauguration of the New York-Istanbul line via Paris at the end of 1955. French Reactions and the Flights to Turkish points of call with "Blind Sector Rights"*

On the other hand, another difficulty arose when the Director for France of PAA sent, on September 10, 1955, a letter to the Secretary General for Civil and Commercial Aviation delivering to him the winter time-tables for services to France. In these, PAA, which had been authorized to do so by the CAB, had made provision for a service to Istanbul via Paris and Rome with four flights per week. In his letter of reply of October 11, 1955, the French official answered in particular:

> J'ai constaté que votre Compagnie mettait en exploitation une nouvelle ligne reliant New York à Istanbul via Paris à la fréquence de quatre services par semaine.
>
> Cet itinéraire n'est pas conforme à l'Accord puisque la Turquie figure uniquement à la route 2 du Tableau II et que la desserte de Paris est couverte par la route 1.
>
> Il doit donc être entendu que l'exploitation de cette ligne ne comporte aucun trafic commercial entre Paris et Istanbul.
>
> En ce qui concerne les horaires proprement dits, leur application n'appelle de ma part aucune objection.

This reply brought about the intervention of the Ambassador of the United States in Paris, who, on October 21, 1955 sent a note to the Minister of Foreign Affairs, in which the American position was defined in the following terms:

> It is the view of the United States in this matter that while Turkey is not specifically mentioned in Route 1 above referred to, that country is nevertheless included in that route since the route description includes the term "Near East", which is commonly considered, in customary present-day practice, to include Turkey. Therefore, under the afore-mentioned Agreement on Air Transport Services, the United States is entitled to authorize its designated carrier to serve Istanbul, via Paris, under Route 1 above mentioned.
>
> The Embassy accordingly has the honor to request the appropriate intervention of the Ministry of Foreign Affairs in this matter, in order that there may be no denial of the right of the designated United States carrier, Pan American World Airways, to participate in the carrying of commercial traffic between Paris and Istanbul in the operation of its services over this route. If, in view of the near approach of the advertised date for the inauguration of the services in question, namely 31 October next, it is not possible to effect a resolution of this matter prior to commencement of the service, the Embassy requests that interim approval for participation in this traffic by the United States carrier be accorded pending definitive resolution of the matter.

Six days later, on October 27, the Civil Air Attaché of the American Embassy sent the following letter to the Secretary General for Civil and Commercial Aviation:

> I have the honor to submit to you, under instruction from my Government, the following notification of change of route by an air carrier of the United States:

Under authorization of the United States Civil Aeronautics Board, the Pan American World Airways proposes to operate between Paris and Istanbul, this route being consistent with the Agreement on Air Transport Services between the United States and France signed at Paris on March 27, 1946.

This notification of change is submitted to you in accordance with Section VII of the Annex to the Air Transport Services Agreement above referred to, *omissis*.

On November 3, 1955, the Minister of Foreign Affairs replied to these two communications by a note to the Ambassador of the United States. With regard to the scope attributed to the term "Near East" in the American note, the French position was defined in the following terms:

Les Autorités américaines, en effet, précisait la note de l'Ambassade, considèrent que l'expression "Proche-Orient" figurant à l'accord aérien franco-américain (Tableau II, paragraphe 1) couvre l'étendue du territoire turc.

Le Ministère des Affaires Etrangères n'estime pas pouvoir partager sur ce point l'interprétation donnée à l'accord par la note de l'Ambassade. Il lui apparaît, en effet, que le tracé de la route, tel qu'il est prévu au paragraphe 1, indique, sans équivoque, qu'il n'a pas été dans l'intention des négociateurs français d'accorder aux sociétés de transport américaines les droits commerciaux en Turquie. Ce point de vue se fonde sur une double considération: Il ressort clairement du tracé de la route n° 1 que celle-ci ne saurait comporter d'escale en Turquie puisque le Proche-Orient y figure entre l'Egypte et les Indes; le fait, d'autre part, que la Turquie est expressément mentionnée au paragraphe 2 du tableau des routes, alors qu'elle ne l'est pas au paragraphe 1, constitue, aux yeux des Autorités françaises, une justification supplémentaire de leur interruption.

As to the notification of the change of route pursuant to Section VII, which was the subject of the letter sent by the United States Civil Air Attaché, the position of the Minister of Foreign Affairs was stated in the following terms:

Le Ministère ne peut, d'autre part, faire sienne l'interprétation donnée à la Section VII de l'accord par la communication faite au S.G.A.C.C. par l'Attaché Civil de l'Air près l'Ambassade des Etats-Unis. Il estime en effet que les dispositions de ce texte visent uniquement les modifications concernant les escales sur un même territoire. En d'autres termes, les Autorités françaises, qui n'auraient pas d'objection à ce qu'une ligne américaine remplaçât, par exemple, l'escale d'Ankara par celle d'Istanbul, ne peuvent, en revanche, donner leur agrément à la création d'une escale commerciale nouvelle sur le territoire d'un Etat qui, aux termes de l'accord, n'en comporte pas.

The note of the Minister of Foreign Affairs ended as follows:

Les raisons ci-dessus exposées amènent le Ministère des Affaires Etrangères à exprimer à l'Ambassade des Etats-Unis le désir du Gouvernement français de voir la PAA s'abstenir de toute activité commerciale entre Paris et Istanbul jusqu'à ce que les autorités compétentes des deux pays aient réglé le problème soulevé par la demande de la société américaine.

In view of the situation, PAA warned by the United States Ambassador of the inadvisability of operating commercial traffic between Paris and Istanbul in the face of official opposition from the French Government, inaugurated the New York-Paris-Rome-Istanbul line with the four sched-

uled weekly services, but without traffic rights between Paris and Istanbul. The four services were soon extended to Ankara, still under the same conditions. On May 16, 1956, the Department of Air Transport replied in the following terms to the letter from the Director for France of PAA, who had transmitted the summer time-tables for 1956:

> Ces horaires font apparaître le prolongement sur Ankara de la ligne New York-Paris-Rome-Istanbul exploitée à la fréquence de quatre services par semaine.
>
> Je vous rappelle qu'en ce qui concerne le trafic de votre Compagnie sur la Turquie les droits commerciaux ne lui sont pas acquis. Comme vous le savez cette question fera l'objet d'un examen particulier au cours des conversations qui doivent avoir lieu ces prochains jours avec les Autorités américaines.

The Franco-American consultations which took place from May 23 to May 29, 1956, did not however, bring to light a possibility of resolving the difference of opinion which had arisen concerning the possibility of serving Turkey via Paris. The French opposition to the exercise of commercial rights between Paris and Turkish stops was renewed in the letter from the Department of Air Transport to the Director for France of PAA dated May 3, 1957.

### 10. *The 1957-1959 Crisis. The Minutes of the Discussions of July 20-August 5, 1959, and the Exchange of Notes of August 27, 1959*

A far more extensive crisis affecting aviation relations as a whole between the two countries arose during the negotiations which took place in Paris from October 15 to 22, 1957, and in Washington from December 10 to 18 of the same year. As counter-part to a service to a point on the West Coast of the United States requested by the French Delegation, the American Delegation requested services on the following routes:

1. From Paris to Austria, Czechoslovakia, Hungary, the Balkan countries, Istanbul, the Near East and beyond.
2. From Paris to Frankfurt and beyond.
3. Paris-Africa.
4. Madrid-Lisbon-Paris and beyond.
5. London-Paris and beyond.
6. Scandinavia, Germany, Paris and beyond.
7. Deletion of Houston on French route No. 3.
8. Deletion of the French route No. 5 Martinique via Guadeloupe to New York.
9. Clarification of Scheduling of services to the Near East.

The crisis gradually became more acute and on July 24, 1958, the French Government gave notice of its intention to cancel the 1946 Agreement as of July 24, 1959, which would have brought about an interruption of air services between the two countries. Negotiations nevertheless went on in 1958 and 1959, and resulted in the Agreement remaining in effect. In the course of the discussions, in July and August 1958, and later in July 1959, the American request to obtain for the United States traffic rights "beyond Paris to Turkey and the Near East and beyond", was repeated. In a document delivered by the Americans on August 1, 1958, the following was specifically requested:

*For the United States*

a) to obtain rights beyond Paris to Turkey and the Near East and beyond
b) to add Tahiti and Bora Bora on Route 6
c) to delete Washington from French Route 1
d) to delete Houston from French Route 3.

As the French negotiators however had insisted on counterparts that were judged excessive by their American partners, no arrangement relative to the Turkish question could be recorded when the result of the discussion of the problems relative to the application of certain sections of the Annex was reported in the Minutes of the negotiations of July 20-August 5, 1959, nor when on August 27, 1959, an Exchange of Notes took place extending the 1946 Agreement and amending the route descriptions of the route Schedules listed in the Annex.

Item III of the Minutes mentioned above, although conceived in general terms, was still of interest in relation to the Turkish question, because it recorded coinciding points of view on the interpretation of Section VII of the Agreement, which had been invoked by the Americans with the aim of obtaining for themselves traffic rights between Paris and the stops in Turkey. The text was as follows:

III. ROUTE CHANGES — SECTION VII OF THE ANNEX

During the discussions, the French Delegation expressed concern over an interpretation of Section VII of the Annex which would permit either contracting party to make changes in its routes under Section VII by way of adding third country points within a segment of specifically enumerated series of points, third countries, or named area descriptions comprising several countries which did violence to the concept of the originally negotiated route. The French Delegation also expressed interest that changes in a route should lie within the general path of the route after taking account of the requirements of through airline operations. The French Delegation also stated it did not feel that an attempt should be made under Section VII to add a point to one route on the ground that such point was specified on another route appearing in the Annex.

The United States Delegation expressed sympathy with its understanding of the views expressed by the French Delegation. The United States Delegation stated that it could assure the French Delegation that at no time would it undertake under Section VII of the Annex to add a point to one route on the ground that such point was specified on another route appearing in the Annex. The United States Delegation also expressed the idea that changes in a route should lie within the general path of the route after taking account of the requirements of through airline operations and the authorization and concept of the description of the route.

Further, the United States Delegation stated that it could give assurance that at no time would the United States undertake under Section VII to add points on a route in the Annex within a segment of specifically enumerated series of points, third countries, or named area descriptions comprising several countries, which did violence to the concept of the originally negotiated route and which did not lie within the general path of a route after taking into account the requirements of through airline operations, except that this limitation would not apply to the addition of points either within named countries or within named area descriptions comprising several countries, which points could, of course, be added without regard to Section VII.

The French Delegation expressed appreciation of the agreement with the view stated by the United States Delegation and stated that this expression met the points of their concern. In addition, the French Delegation gave reciprocal assurance to the United States Delegation on this matter of the addition of points.

On the foregoing basis, the two delegations agreed that Section VII need not be changed.

As for the Exchange of Notes, as far as route 1 of Schedule II is concerned, it only made those corrections necessary to record the changes that had come about in the meantime in the political geography of the Indian sub-continent. The Route Description now read as follows:

1) The United States, via intermediate points over the North Atlantic to Paris and beyond, via intermediate points in Switzerland, Italy, Greece, Egypt, the Near East, Pakistan, India, Ceylon, Burma, Thailand, Hanoi and beyond to China and beyond; in both directions.

11. *The Extension of the Turkish Line to Baghdad. The Exchange of Notes of April 5, 1960*

In 1959 and 1960, PAA operated three weekly services on the New York-Paris-Rome-Istanbul-Ankara line, one of which was extended to Baghdad, still without traffic rights between Paris, Istanbul and Ankara.

Other difficulties arose, however, between the two countries in connection with various questions and in particular with the French desire to make a stop at Montreal on the Paris-Los Angeles line. In the course of the negotiations which took place, the American representatives attempted to obtain an easing of the French position with regard to Istanbul, by requesting traffic rights or at any rate stopover rights between Paris and Istanbul, while the French negotiators stated their intention to shut down completely the PAA New York to Istanbul via Paris service if France did not obtain satisfactory terms. The negotiation led finally to the Exchange of Notes of April 5, 1960, by which the two parties granted each other certain concessions. The American Note recorded the agreement in the following terms:

After recent discussions on this subject, it is the Embassy's understanding that agreement has been reached on an exchange of air transit rights to accord the following advantages to air carriers of both countries.

(1) French carriers may serve Los Angeles via Montreal (without traffic rights between Montreal and Los Angeles).

(2) United States carriers may operate to Paris via London (without traffic rights between London and Paris) for services to and from United States west coast points.

(3) United States carriers may operate all-cargo services via London to French points presently authorized on United States routes to and from the United States east coast (without traffic rights between London and such French points).

It is also the Embassy's understanding that there will be no interruption of Pan American World Airways' existing service between Paris and Istanbul.

The French note confirmed the agreement, stipulating:

Comme suite à la démarche effectuée par l'Ambassade de France à Washington le 26 février dernier, l'Ambassade des Etats-Unis d'Amérique, au nom de son

Gouvernement, propose au Gouvernement français, dans la note citée en référence, qu'il soit procédé à un échange de droits de trafic en matière aérienne sur les bases suivantes:

1°) Les avions français sont autorisés à desservir Los Angeles via Montréal (sans droits de trafic entre Montréal et Los Angeles);

2°) Les avions des Etats-Unis sont autorisés à desservir Paris via Londres (sans droits de trafic entre Londres et Paris) sur les lignes qu'ils exploitent à partir de ou à destination de la côte occidentale des Etats-Unis;

3°) Les avions des Etats-Unis sont autorisés à assurer des services de fret via Londres jusqu'aux points en France actuellement desservis par des compagnies américaines à partir de ou à destination de la côte orientale des Etats-Unis (sans droits de trafic entre Londres et les points en France dont il s'agit).

Le Gouvernement français donne son plein assentiment aux propositions qui précèdent. Il est également d'accord pour qu'il n'y ait aucune interruption dans le service assuré par les Pan American World Airways entre Paris et Istanbul, étant toutefois précisé que ladite ligne ne comporte pas de droits de trafic entre Paris et Istanbul.

On the basis of this arrangement, PAA operated in 1961, still with the same limitations, three weekly services via Paris-Rome-Istanbul-Ankara, this time all of them extended to Baghdad.

12. *The Difficulties Arising out of the Substitution of Tehran for Baghdad at the end of 1961*

On September 11, 1961, the Director for France of PAA delivered the winter time-tables for 1961-1962 to the Director of Air Transport. In these time-tables, on two of the three services operated via Istanbul-Ankara, the final destination Tehran was substituted for Baghdad. To the four weekly services to Tehran via Beirut were thus added two services also to Tehran but via Turkey.

The Director of Air Transport replied to this communication on October 11, 1961, making the following remarks:

J'ai constaté qu'il était prévu, aux horaires valables à partir du 29 octobre, une modification de l'itinéraire des services PA.114/115 passant par ISTANBUL le terminus étant reporté de BAGDAD à TÉHÉRAN.

A cet égard je vous rappelle que l'échange de lettres du 5 avril 1960, intervenu à la suite des conversations franco-américaines ayant eu lieu en février de la même année, confirme l'accord du Gouvernement français "pour qu'il n'y ait aucune interruption dans le service assuré par la PAA entre PARIS et ISTANBUL étant toutefois précisé que ladite ligne ne comporte pas de droits de trafic entre PARIS et ISTANBUL".

L'itinéraire prévu jusqu'à TÉHÉRAN présente une certaine différence par rapport à l'itinéraire de la ligne tel qu'il était au moment des conversations, d'autant plus que votre Compagnie a continué à desservir sur cette même ligne à la fois ISTANBUL et ANKARA, bien que cette dernière escale n'ait pas été mentionnée à l'échange de lettres. Je pense donc que la PAA reprendra l'itinéraire tel qu'il se présentait en février 1960.

At the same time, on October 12, this French official wrote to the Civil Air Attaché of the United States Embassy making the same observations and requesting the American governmental authorities to notify PAA of the impossibility of operating the route envisaged by it.

The letter of October 12 was followed by another of November 9, 1961, in which the Director General of Air Transport reiterated the point of view of the French Government on the matter as compared with that of the American Government, in the following terms:

> Par une lettre citée en référence, vous avez bien voulu me faire connaître le point de vue de votre gouvernement sur la question des modifications intervenues dans le programme de PAA qui ne dessert plus Istanbul sur Bagdad mais sur Téhéran.
>
> Vous me précisez à ce sujet que l'échange de notes de 1960 n'a pas pu avoir pour conséquence d'interdire à la PAA de modifier les escales de sa route, ce droit pouvant être exercé sur la route exploitée par la PAA comme sur toutes les autres routes de l'Accord.
>
> Je vous rappelle toutefois que l'échange de lettres du 5 avril 1960 fixe le régime juridique de l'escale d'Istanbul dans des conditions très particulières qui dérogent quelque peu des formules habituelles de l'Accord franco-américain. Il ne s'agit pas en effet d'autoriser la PAA à passer par Istanbul via Paris sous le couvert de la route américaine n° 1, mais de garantir que le service effectivement exploité par la PAA ne pourra pas être interrompu. Les intentions des négociateurs américains de cet échange de lettres sont sur ce point très claires puisque la note de l'Ambassade des Etats-Unis entend que soit confirmé:
>
> "there will be no interruption of Pan American World Airways *existing service* between Paris and Istanbul"
>
> Au surplus, même en admettant qu'à condition de ne pas prendre du trafic entre Paris et Istanbul, Pan American Airways peut desservir Istanbul sur n'importe quel point de la route américaine n° 1, cela ne donnerait pas à cette Compagnie le droit de desservir Téhéran, point qui ne figure ni explicitement ni implicitement dans la rédaction de cette route; c'est donc par l'effet d'une bienveillance à laquelle les autorités françaises ne sont nullement tenues que PAA dessert cette escale non prévue à l'Accord aérien.
>
> La question m'apparaît donc assez complexe et je serais très heureux d'avoir à ce sujet des discussions approfondies avec les autorités américaines. Toutefois je suis très sensible au préjudice que causerait à PAA une désorganisation de son programme d'hiver qu'elle a d'ailleurs dès à présent mis en exploitation.
>
> C'est pourquoi j'autorise — *a posteriori* — la PAA à assurer ce programme, étant entendu toutefois que cette autorisation n'est valable que pour cinq mois (c'est-à-dire jusqu'au 1er avril 1962) et que je n'ai pas l'intention de la renouveler si le problème n'a pu, dans l'intervalle, être réglé par l'accord entre les deux pays.

On the basis of the provisional authorization thus received which was valid until April 1, 1962, and subsequently extended until June 1, and later until October 1, 1962, in view of the discussions which had taken place in the meantime between the American and French authorities, PAA operated in 1962 two weekly services on the New York-Paris-Rome-Istanbul-Ankara-Tehran line, without traffic rights between Paris, Istanbul and Ankara, but with traffic rights between Paris and Tehran.

### 13. *The Interruption of Commercial Rights on Flights to Tehran as from October 31, 1962*

No agreement having been reached during this period between the competent authorities of the two countries, on September 24, 1962, the Director of Air Transport replied to the letter by which the Director for France of PAA had submitted the 1962-63 winter programme, reiterating the point of view already expressed in his letters of the previous year as well

as in the course of the discussions that had subsequently been held. After recalling the non-acceptance of the proposals that the French Aviation Authorities had submitted to the American Authorities indicating the conditions for agreeing to regularize PAA's Tehran service, the letter terminated with the following paragraph:

> Aucune entente n'étant intervenue depuis, j'ai le regret de vous faire savoir qu'il ne m'est pas possible d'approuver sur ce point le programme proposé et que votre Compagnie devra prendre toutes dispositions utiles pour cesser de desservir Téhéran sur les lignes passant par Paris à partir du 1er octobre prochain.

After a fresh delay of a few days granted verbally, this decision was subsequently to be confirmed by a letter from the Secretary General of Civil Aviation of October 19, 1962. From October 31, 1962, PAA services to Tehran both via Istanbul and Ankara and via Beirut were thus operated without traffic rights between Paris and Tehran and also between Paris, Istanbul and Ankara.

### 14. *Diplomatic Exchanges of 1962-63 and the Signature of the Arbitration Agreement*

The situation having thus come to a dead end, the Government of the United States of America informed the French Government by the Note of its Ambassador in Paris of October 12, 1962, that having noted that it had not been possible to settle by consultation the question that divided them, it had reached the conclusion that it was necessary to submit the question to arbitration under the terms of Article X of the Air Transport Services Agreement. The American Government indicated the questions which, in its opinion, should be submitted to the Arbitration Tribunal for an advisory report in conformity with the provisions of Article X; and at the same time requested that, during the Arbitration, the French Government should abstain from all action tending to deprive PAA of the right to serve Turkey and Iran via Paris or tending to change the existing situation.

Following a later exchange of letters, the Note of the Ambassador of the United States dated January 9, 1963, in conclusion set forth the agreement of the two Parties both on the point that the Arbitration Agreement should not deal with the substantive aspects of the dispute, and on the principle that the decision of the Tribunal should be binding on the Parties, as well as on the text of the Arbitration Agreement proposed in the Note of December 3, 1962, from the Minister of Foreign Affairs of France.

On January 22, 1963, the Arbitration Agreement was thus signed in Paris by the representatives of the two Governments.

## III. Summary of the Arguments of the Parties

The Parties to the present dispute have stated their respective arguments in particularly profound and efficient fashion during the successive stages of the written procedure and oral hearings. Their arguments have above all dealt with the problems concerning: a) the customary meaning of the term "Near East"; b) the interpretation of the text of the Agreement of March 27, 1946, and in particular the description of Schedule II of the Annex; c) the consideration of the negotiations leading up to the conclusion of the Agreement; d) the possibility of using or not using, in this case, the procedure provided for in Section VII of the Annex; and e) the examination of the course of conduct of the Parties subsequent to the entry into force of the Agreement. These arguments may be summarized as follows:

1. *The customary meaning of the term "Near East"*

The Parties have been fundamentally agreed on recognizing the propriety of recourse to the different means of interpretation liable to be of assistance in establishing their intention at the time the Agreement was concluded. Despite this, a difference of substance arose concerning the meaning to be attributed to the term "Near East" as it is used in the description of route 1 in Schedule II of the Annex.

Having noted that no definition of this term appears either in the text of the Agreement, or in a contemporaneous statement by the Parties, the *American* Government has made a considerable effort, above all in its Memorial, to show that governmental, administrative, aeronautical and geographic usage, in both the United States and France, is in favour of a broad meaning of the term "Near East". It was asserted that this term, which is very often considered a synonym of "Middle East", is used in a great majority of instances to designate the great "land bridge" between Europe and Africa to the west, and the Indian sub-continent to the east. It would thus also include both Turkey and Iran. In the course of the oral procedure, although it was recognized — as the French argument put forward — that usage is not uniform in its employment of the term "Near East", the American side maintained that there is nevertheless a considerable measure of agreement in recognizing that this term includes Turkey and Iran. Taking the principle asserted by the Permanent Court of International Justice in its Decision regarding the *Legal Status of Eastern Greenland* as a basis, it was thus reaffirmed that the burden was on the French representatives to adduce reasons why the term should not be given its usual and ordinary meaning.

The *French* Government, for its part, made an analysis of governmental and administrative practice, and above all of civil aeronautical usage, which sought to contradict the American assertions and show the impossibility of using these elements or geographic criteria as grounds for establishing a precise concept of "Near East", and as a basis for answering the question whether or not Turkey and Iran were included in it. Basing itself above all on considerations of political history, the French Government went on to claim that the concept of "Near East" existing at the time of the negotiation of the Agreement — shared, as it was, by both governments — was quite different from that of "Middle East", and designated the Arab part of the former Ottoman Empire. In view of the uncertainty prevailing in this respect, this interpretation should thus be regarded as the more probable.

2. *The interpretation of the text of the Agreement of March 27, 1946*

The *French* Government stressed in particular that, rather than seeking to establish the "natural and ordinary" meaning of the term "Near East" in the various usages, its specific and "contractual" meaning in the particular international agreement in which it was used should be established.

To this purpose the French Government inferred certain rules from the nature and purpose of air transport agreements, among them, notably, the principle that the general path of a route is determined by the countries and cities successively mentioned, and by the order of the words which reflect the geographic order of the countries referred to, and corresponds to the order in which these countries can in fact be served by following a reasonably direct route between them. Thus it is contended that the wording of route 1 in Schedule II of the 1946 Agreement, where the expression "Near East" comes after Egypt, shows that if Turkey and Iran were in fact

covered by this expression, it would have to be recognized that after touching Egypt, the route in question must go back to Turkey and Iran and thence on to India, which would be absurd, and would conflict with the rules for interpreting treaties. In the view of the French Government, the term "Near East" as it is used in the Agreement, covers precisely the area across which India can be reached from Egypt by intermediate points situated on a relatively direct line, and which comprises essentially Palestine, Iraq and the Persian Gulf region. The line operated by TWA, which passes through Cairo, Basra and Dhahran, would in effect correspond to route 1 of the Agreement.

The French Government also proceeded to a comparison of routes 1 and 2 of the Schedule, to show that the concept of "Near East" and "Turkey" were intended to be quite different. In the view of the negotiators, it was claimed, route 2 should not have passed through the "Near East" as used in the Agreement, and this was why this term did not appear in it whereas Turkey was mentioned. The French Government pointed out that, in its opinion, the various routes of Schedule II ought to be considered as distinct and autonomous, and should retain their individuality unless and until a contrary indication was established. As no merger of route 2 with route 1 in the area concerned had been provided for, this meant that for the negotiators the area crossed by route 2 lay outside what they considered the Near East.

The *American* Government, on the other hand, based its position on what, in its view, was the true purpose of the 1946 Agreement, namely to establish a main trunk air route around the world linking America to the great traffic centers of Europe, and from Europe to India, China and beyond. The creation of this vast air service required great flexibility so that the operation could be economically feasible; and in particular a sufficiently broad term would have to be used to describe the region situated between Greece and Egypt to the west, and India to the east, so as to provide the possibility for adjustment to future conditions.

In the light of these considerations, the American Government termed artificial the concept of the linear route defended by the French Government, countering with the idea of the air route as a network of rights permitting a series of different operations, and which could comprise either a fan or a bundle of different paths. It pointed out, in particular, that the theory of the linear route would have led to absurd results in the specific case, by excluding from the "Near East" Syria and the Lebanon which were certainly included in it, and by making a single area of Palestine, Iraq, and the Persian Gulf region, although these countries had no common elements that made them a regional unit. The American Government observed at the same time that, since the French included the Persian Gulf region in the "Near East", and since a direct line from Cairo to Karachi touched Iran, the latter country should in any case be included in the route, on the same grounds as Iraq or Palestine. It also added that no argument could be drawn from the fact that Egypt was mentioned on the path of route 1, because this term had been inserted on the initiative of the United States in order to provide a more solid guarantee against the danger of its being excluded. It was not conceivable that by inserting the mention of Egypt, the Americans should have meant to restrict the path that they had originally envisaged for the route, and which had been adopted in the provisional arrangement of December 1945. Finally, the American Government invoked the existence of the omission of stops clause at the top of the Schedules of Routes, which permits the air carrier to omit some of the points of

call listed. In the American view, this clause showed the inadmissibility of the concept of the route as a series of points. In particular, if the points of call situated in Greece and Turkey were omitted on route 1, this would result in direct lines from Italy, or even Switzerland, to India, all passing through Turkey and Iran.

To all this the *French* Government replied with the general observation that the "purpose" of a treaty throws light in its interpretation only to the extent that the signatories have sought to achieve it in common accord, and that it was not a question of considering the aims of one of the parties only. The flexibility required in the concept of route ought not, it was contended, to prevent taking into account both the equilibrium established in the agreement between the interests of the two parties, and, above all, the consequences of the linear structure of a route like route 1 of Schedule II, which consisted of a "sequence" of geographic places. When the expression employed in the description of a route like this indicated a region, the degree of flexibility would evidently be greater, but it would not, nevertheless, permit the structure of the route to be modified, nor a departure to be made from a reasonably direct line between the States designated by name. As to the omission of stops clause, this, it was said, did not affect the geographic description of the route. The American position on this point would have the result of rendering the whole Schedule of Routes practically useless, since it would permit unlimited modifications of the routes. The right to omit certain points of call could not be converted into the right to add new points of call for which no provision had been made in the Agreement.

The *American* Government pointed out that it had not suggested unlimited flexibility, but reaffirmed that the system of route description adopted in the Agreement concluded by the United States with France comprised a greater freedom of choice than the French side was prepared to recognize, and than that accepted in certain agreements with other countries. The American Government also denied having sought to interpret the Agreement purely in the light of American interests, but maintained that, as far as the portion of route 1 designated by the expression "Near East" was concerned, the equilibrium between the objectives sought by the two parties was in reality established on the basis of those which the United States wished to achieve, French interests in the area being minimal.

### 3. *The negotiations leading up to the conclusion of the Agreement*

The *American* Government recalled the failure of the Chicago Conference, during which it had upheld the principle of maximum freedom in aviation matters, against the opposition of the French and the English. Thus, following this failure, the aim of a series of bilateral treaties negotiated on American initiative had been to obtain the maximum possible flexibility in the choice of routes. It was the attainment of this objective that had prompted the submission to the French Government of the first draft agreement in March 1945. This project envisaged a route to Greece and the Near and Middle East, and was initially to be affirmed by the provisional agreement of December 1945, in which, still at the American suggestion, the mention of Middle East was replaced by that of India.

Referring to the decision taken in the meantime by the CAB concerning the North Atlantic routes, the American Government stressed the fact that this decision, which aimed at a temporary allocation of routes among the various American air transport carriers, and which was itself characterized by a concern for flexibility, had no more than a purely domestic

value. It was by international treaties that the vast program envisaged by United States aviation policy could be achieved.

The basic stage in the negotiation of bilateral agreements was to be represented by the Bermuda Agreement with the United Kingdom, an agreement which for the first time laid down certain essential criteria in the matter. Nevertheless, due to British resistance, in the Bermuda Agreement the description of the routes was very rigid and precise, and established a "point by point" control along the whole route. Recalling that the text of this agreement had immediately been transmitted to France to serve as an example for the negotiations, the American Government pointed out as particularly significant the fact that the United States-France agreement, whilst it very closely followed the Bermuda model in other respects, had clearly deviated from it in the system of route description. Instead of the point by point control, it was stated, the United States-France agreement had adopted a far more flexible and variable system which at times designated cities, and more frequently countries and even a region such as the Near East. France, it was alleged, had agreed to a manifest deviation from the United States-United Kingdom agreement on this point because its interests did not lie in this region, but in others such as Indo-China, and above all in flights to America itself. This, it was claimed, was why it readily accepted the American proposal to describe this portion of route 1 by a term whose meaning was particularly vague and wide.

The *French* Government contested the assertion that France had not been interested in a precise definition of the air routes, all the more so because, at the Chicago Conference, it had been hostile to the principle of a large measure of freedom in aviation matters. As far as route 1 in particular was concerned, it maintained that, even if the Syrian and Lebanese Mandates had just expired, France's political and cultural interests in these countries had remained of considerable importance. The French Government also recalled its interests in Iran and Turkey. Nor should the importance, from the French point of view, of the transit areas giving access to the possessions which still existed at the time in India and the Far East be underestimated. As to the access to the American market, it was argued that this could certainly not have constituted the sole French concern, given that France already had this access by virtue of the 1939 Air Agreement. For all these reasons, it was urged, it was inconceivable that the French negotiators had allowed the term "Near East" to figure in the Agreement without being interested in what was meant by this term, and without having a precise idea of it.

This precise idea, the French representatives declared, had resulted from a series of facts which had reassured the French Government as to American intentions, and had eliminated its initial concern. In the first place, the notification on July 16, 1945, of the basic details of the CAB Decision of June 1, 1945, concerning the three great North Atlantic routes, accompanied by the proposal to modify the route envisaged in the original draft United States-France agreement so that it would conform to the CAB Decision, had, it was contended, given the French authorities a concrete picture of the path of route 1 as it was envisaged by the American side. The route allocated by CAB to TWA, which was the one destined to serve Paris, was in fact, after Cairo, to go on to Bombay via Palestine, Basra and Dhahran. A study of the complete text of Docket 855 containing the CAB Decision, which was transmitted a short time afterwards, had, it was claimed, enabled the French authorities to gain a better understanding of why the route destined to pass through the Near East was different from

the one destined to pass through Turkey and Iran, and had convinced them that by the term "Near East" in the description of route 1, the Americans only wished to indicate the area situated between Egypt and India. Finally, it was asserted, the communication of the Bermuda Agreement — in which line 3, which coincided with route 1 of the draft agreement with France, mentioned at the point in question "Lydda, a point in Iraq, Dhahran" — had definitively confirmed the French negotiators' conviction as to the restricted sense of the term in question, and had thus led them to abandon the reticent position that they had adopted up to the time, and to consent to the conclusion of the Agreement. Thus, the contention was, at the time the Agreement was signed, both Parties had a perfectly clear idea of the path of the route; and France had accepted the use of the vague expression "Near East" because the political status of the area situated precisely between Egypt and India was not yet clearly defined at the time.

The *American* Government denied that the CAB Decision could have represented an indication of American intentions at the international level and have shown the maximum flexibility that they were seeking to attain in the negotiations. This decision, it was alleged, could only have given an idea of the indispensable minimum that was required, which did not prevent the American negotiators from attempting to obtain a greater flexibility whenever this was possible. The aviation treaties concluded by the United States with a large number of countries, such as Ireland, Switzerland, Greece, China and others, were there to prove it. Only, it was claimed, when the other party expressly insisted on limitations, would the United States accept a strict definition of routes, as in the agreement with the United Kingdom or in that concluded with Egypt. But the French had never asked for anything of this kind, it was maintained. If, in the negotiations with France, it had been desired to follow the CAB Decision, then the description of the route as it appeared in this Decision would have been incorporated in the Agreement. On the contrary, the Parties employed the term "Near East" and not an enumeration of cities or countries, which, it was advanced, showed that they had wished to cover a more extensive region and adopt a criterion of greater flexibility.

The American Government also denied the French assertion as to a coincidence between the southern route described by the CAB and route 1 of the 1946 Agreement. Such coincidence would have resulted in Syria, and Lebanon, as well as the north of Iraq being excluded from route 1, whereas the French recognized today that Beirut, Damascus and Baghdad are in the Near East and that these cities should be served in the framework of route 1. Similarly, route 2 of the treaty did not correspond to the central route listed by the CAB.

In the view of the *French* Government, its negotiators, in agreeing to the use of the term "Near East" instead of the enumeration of a series of points, had in effect accepted the principle of a certain broadening and greater flexibility of the route, but had nevertheless understood that this flexibility was always to be confined to the interior of the area envisaged for the route in question in the CAB Docket 855 and which emerged from the map annexed to this dossier. Now, the CAB Decision had clearly excluded Turkey and Iran from the areas attributed to the southern route, and had allocated them to the central route. Thus, it was asserted, the flexibility agreed to did not permit these two countries to be added to the area of the Agreement. As to Beirut, Damascus and Baghdad, it was alleged that the French had only accepted services to these cities on condition that the

Americans agreed to a limitation in the frequency of flights to these points of call. If the points of call in question had in reality been included in the term "Near East" in the description of route 1, it was claimed that the Americans would certainly not have bowed to the request for a limitation of this kind.

4. *The possibility of using, in the specific case, the procedure provided for in Section VII of the Annex*

The history of events has shown that the American Government, in the face of French opposition to its project to serve Istanbul via Paris with commercial traffic rights, had invoked, as a subsidiary measure, the possibility of modifying route 1 of Schedule II so as to include Istanbul, on the basis of the unilateral procedure provided for in Section VII of the Annex to the Agreement of March 27, 1946. The French Government had contested this possibility.

In the course of the procedure, the *American* Government upheld the validity of its position and extended its application to Iran as well, as a subsidiary measure. The Minutes of the negotiations of July 20-August 5, 1959, in fact recognized that new points can be added to the path of a route, on condition that they are situated within the general path of his route. It was contended that Istanbul and Ankara were situated in the general path of route 1 by virtue of the omission of stops clause. This was all the more valid in the case of Tehran, it was argued, since the Cairo-Karachi line touches Iran. Although, up to the present, the American Government had made no notification concerning Iran on the basis of Section VII, it declared that, if necessary, it was prepared to do so after the arbitration.

The *French* Government contested the merit of these conclusions, recalling that the normal procedure for effecting modifications to the Agreement, including the Schedule of Routes, was the consensual procedure provided for in Article XIII, which had in point of fact been used for the modifications adopted in 1951, 1959 and 1960. It was argued that the unilateral procedure provided for in Section VII was of an exceptional nature, and could only be used for modifications of secondary importance. Any additions on the basis of this procedure should thus be strictly limited to points situated within the path of the routes defined in the Schedules, and inside the States or areas crossed by them. As Turkey and Iran did not figure in the area of route 1, it would be impossible to add the Istanbul, Ankara or Tehran points of call to the route in question by the mechanism of Section VII. It was maintained that the need to give a restrictive interpretation to Section VII had been additionally confirmed by the opposition shown by the Americans themselves every time that other countries had attempted to use this clause or analogous clauses in other agreements to their own advantage.

The *American* Government having replied that, in its opinion, the addition of points situated in States other than those envisaged in the description of the route should be able to be effected on the basis of Section VII, because, otherwise, this clause would no longer have any meaning, the *French* Government confirmed its position. It added that the PAA services to Tehran, Istanbul and Ankara constituted neither a "minor" modification of route 1, nor a deviation from this route, but in reality the creation of new routes with these stops as their terminal points. Thus, it was argued, Section VII could not be used for a purpose of this nature.

The discussion having continued, the *American* side grounded its arguments on a consideration of economic objectives — basically tied in with the problems of so-called fifth freedom traffic — which Section VII was said to have been designed to cover. The aim of this clause was to enable, in the light of experience, the path of a route to be deviated from at certain points which had proved to be not very profitable for intermediate traffic, to other more profitable points. Section VII, it was claimed, provided a unilateral procedure for these changes, at the same time giving the other Party the faculty of objecting *ex post facto* to such changes in cases where it could show that the interests of its own carriers had been prejudiced by the new intermediary traffic thus brought into being. Given the purpose it was designed to fulfil, Section VII, it was contended, had a clearly distinct function from that of Article XIII. It did not have an exceptional character, should not be interpreted restrictively, and its application should not be limited to areas that had already explicitly been mentioned.

Applying these principles to the specific case, the American side went on to recognize that the initial intention, as it emerges from the CAB Decisions and from the agreements with the United Kingdom and Egypt, was to serve Lydda, Basra and Dhahran, in the Near East. However, it was found later on that traffic was not developing adequately on flights to the Arab points of call. Consequently, when conditions changed and made operations possible more to the north, it became necessary to provide for new "intermediate points" in the real traffic centers of Beirut, Baghdad and Damascus; and then still more to the north in Turkey and Iran. If it were true, as the French claimed, that the two latter countries were not included in the description of route 1, then they could be added by virtue of Section VII. The French idea that only points situated in the area comprised between Egypt and India could be added to this route, was, it was submitted, based on confusion between the specific path of the route and the general path; it was the latter and not the former which, according to the interpretation given by the parties themselves in 1959, should be taken into consideration for the application of Section VII. In connection with this idea, the American side strove to show that the concrete examples cited by the French Government as proof of the fact that Section VII had in practice been interpreted restrictively were not pertinent, giving other examples taken from the history of the practical application of analogous clauses in other aviation treaties, which, it was claimed, were in favour of a broader interpretation of such clauses. Finally, the French argument that PAA was serving Tehran, Istanbul and Ankara as terminal points, was countered by the objection that along the whole route there were flights that stopped at intermediate points.

The *French* side again insisted on the limited and exceptional scope of Section VII, both because of the unilateral nature of the procedure provided for, and because of the fictitious theory according to which modifications effected under it to the path of routes should not be considered as modifications to the Annex. The procedure in question, which it was argued, in reality provided the necessary counterpart to strict control of routes, should only be applied to modifications within two fundamental limitations. The first, an economic limitation, would enable Section VII to be used for adding to a route a supplementary point without traffic rights, or even with traffic rights but subject to the condition that the interests of the carriers of the other party were not affected. The second limitation, a geographic one, required that new points added be not only situated in territories other than those of the contracting States, but also directly

related to the path of the route described in the Schedules of the Agreement. A careful analysis of the Minutes of the 1959 negotiations would, it was asserted, confirm these conclusions and refute the American theory as to the breadth to be given to the concept of "general path of the route". The limits of the general path were precisely those that the American Government wished to attribute to a so-called specific path. In attempting to resort to Section VII to add Turkey and Iran to route 1, the American Government was thus attempting to go back on the undertakings given in 1959.

5. *The conduct of the Parties subsequent to the entry into force of the Agreement*

The conduct followed by the Parties since 1946, which has been recounted in detail in the history of events section, was examined in its different aspects by the Parties themselves. It was considered on one hand in relation to the consequences of the inauguration of the PAA line to Beirut via Paris, and its subsequent extension to Damascus and Tehran; and on the other in relation to the difficulties arising out of the inauguration of the PAA service from Paris to the Turkish points of call and its subsequent extension to Tehran.

As regards the first point, the *American* Government stressed the French authorities' attitude towards the opening of the Beirut service in 1950, and the Tehran service via Beirut and Damascus in 1955. It recalled that, once PAA had given the necessary assurances regarding the frequency of flights, this service had been able to continue operating for between six and seven years without giving rise to objections from the French Government. These facts, it was maintained, constituted the proof that the French had accepted the interpretation that route 1 of Schedule II of the 1946 Agreement included the Lebanon, Syria, and also Iran, in the region indicated by the term "Near East". In any case, the absence of objections during a prolonged period, in addition to the fact that, as a result of this French conduct, PAA had made heavy investments on the Iranian route would, it was argued, prevent the French from adopting a different attitude today. The American side also pointed out that the discussion and the initial authorization for the Tehran service, as well as the interruption of traffic rights on this sector in 1961, were linked with questions of frequency.

The *French* Government recalled, in turn, that up to 1950 there had been no difficulties as TWA had respected the route schedule agreed upon. It was only in 1955 that the Americans had considered the possibility of being able to serve Iran on route 1. It stressed in particular the initial objections that had been raised in connection with the Beirut service, and above all, later, about the Tehran service. It recalled: the assurances obtained in both cases as regards the respect for French interests and limitation of frequencies; the fact that the authorization for the Tehran services had been granted by the French authorities as a favour, and that it was provisional and revocable; and also that its position of principle that this point of call was not on the path of route 1 had been reaffirmed at the time. It was submitted that all these facts proved that the French authorities had never departed from their interpretation of the path of the route in question. The French authorities, it was claimed, had been obliged to interrupt fifth freedom traffic to Tehran after the extension of the Turkish services to this point, because PAA, in attempting in this way to increase traffic on Iran flights, had, it was contended, violated the initial understanding. This, it was argued, had made it necessary to take up again in full the defence of the position of principle.

As regards services to the Turkish points of call, the *American* Government admitted that PAA's initiative in the autumn of 1955 had provoked a firm and immediate reaction from the French authorities — which had not been the case with Tehran — and that the authorities had never agreed that the service in question be operated with exercise of traffic rights between Paris, Istanbul and Ankara. Just the same, it was claimed, the American authorities had shown the same firmness in defence of their point of view, and they had not accepted the French theory that Turkey was not included in route 1, even when they had attempted to solve the question differently during successive negotiations. The *French* Government contested this point of view, and recalled that the theory that the Turkish points of call did belong to route 1 had not been put forward by the Americans during the successive 1958, 1959 and 1960 negotiations; quite to the contrary, it was contended, they had tried to obtain rights in "Turkey, the Near East and beyond", which manifestly contradicted the original American position.

The argument between the two Parties dealt extensively with the interpretation of the Exchange of Notes of April 5, 1960, and the talks leading up to it. From the *French* point of view, this document had granted permanent "blind sector rights" to the Turkish stops in exchange for other advantages, and had constituted a definitive settlement of the question; whereas, from the *American* point of view, the incorporation in this document of the principle that there should be no interruption of the "existing service" between Paris and Istanbul had been nothing more than the result of a temporary *modus vivendi* which had left open the underlying question.

## IV. Opinion

### 1. *Interpretation of the text of the Agreement of March 27, 1946*

In the opinion of the Tribunal, it would not be possible to arrive at a satisfactory interpretation of those clauses of the United States-France Aviation Agreement involved in the dispute submitted to the present Arbitration, nor at a proper definition of the rights and obligations deriving therefrom, if a given expression such as "Near East", which appears in the description of route 1 of Schedule II of the Annex to the Agreement, were to be isolated. The sense in which this expression was employed at the place referred to cannot be determined without reference to the context.

The Tribunal is in effect convinced — and in this it is in line with case law and doctrine of international law — that it is only against its context that the meaning of a term employed in a clause of a treaty should be sought. The Permanent Court of International Justice has approved the worth of this principle in its Advisory Opinion No. 2 of August 12, 1922, regarding the *Competence of the International Labor Organisation*, in which it stated:

> it is obvious that the Treaty must be read as a whole and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.[1]

The same Court reaffirmed this criterion in its Advisory Opinion No. 11 of May 16, 1925, regarding the *Polish Postal Service in Danzig* stating that:

[1] Publications of the P.C.I.J., Series B, Nos. 2 and 3, page 22. Further on in the same Opinion the Court confirmed the principle in the following terms: ". . . the context is the final test, and in the present instance the Court must consider the position in which these words are found and the sense in which they are employed in Part XIII of the Treaty of Versailles". (*Ibid.*, page 35.)

> it is a cardinal principle of interpretation that words must be interpreted in the sense they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd;

and further stressing the value of an interpretation:

> by reference to the various articles taken by themselves and in their relation to one another [1]

Interpretation, as a logical operation that seeks to establish with the maximum possible certainty what the common intention of the Parties was, can only succeed in determining the meaning to be attributed to a term appearing in a clause of the treaty, in the framework and as a function of the clause as a whole. In its turn, a clause should be interpreted with reference to the content of the treaty considered in its entirety; and, if the Agreement comprises other instruments which complete or modify it, all these instruments should, if necessary, be taken into consideration in the interpretation of the clause.

In the view of the Tribunal, this is all the more indispensable because, in this specific case, the expression "Near East" is not an expression which in current speech has a unique meaning that is generally agreed upon and clearly defined. As is evident from an examination of the abundant documentation furnished by the Parties, neither in geographical, historical or diplomatic language, nor in the administrative practice of States, nor in general civil aviation usage can a clear and uniform use of this term be found. It is thus not possible to attribute to it a "natural" meaning that can be regarded as authoritative until the contrary is proved, as, for example the meaning attributed by the Permanent Court of International Justice to the expression "Greenland" in the treaties examined in its Decision of April 5, 1933, regarding the *Legal Status of Eastern Greenland.* It happens, in point of fact, that the term "Greenland" is employed in a single and constant sense, which enabled the Court to assert that:

> the natural meaning of the term is its geographical meaning as shown in the maps. [2]

On the other hand, it must be remarked, and the Parties themselves finally admitted it, that the use of the term "Near East" is very vague and variable. It is sometimes used as the equivalent of "Middle East", and sometimes, on the contrary, in contradistinction to the latter expression to designate a different region. The efforts of geographers to establish a measure of order in the various usages do not appear to have been crowned with success up to the present. In certain cases, the term "Near East" is certainly employed in a very wide sense and seems to cover more or less all the countries lying east of a line which may also include some States in Europe or Africa, and west of the boundaries of the Indian sub-conti-

[1] Publications of the P.C.I.J., Series B, No. 11, pp. 39 and 40. Judge Anzilotti has defined the principle in question in the same terms in his individual Opinion regarding the *Case of the Customs Regime between Germany and Austria (Protocol of March 19, 1931)*, Publications of the P.C.I.J., Series A/B, No. 41, p. 60. The Institut de Droit International, in Article I of the Resolution on the Interpretation of Treaties adopted at Granada in 1956, asserted that: "the terms of the provisions of the treaty should be interpreted in the context as a whole".

[2] Publications of the P.C.I.J., Series A/B, No. 53, p. 52.

nent; in other cases the term appears to be used to designate a far more limited area bounded more or less by the frontiers of the countries which, taken together, used to constitute prior to the 1914-18 War, the Arab part of the Ottoman Empire. It is moreover evident that no choice could be made between the two usages on the basis of a purely statistical predominance of examples that might be cited in favour of each of them, a predominance which would in any case be very difficult to establish. If then the term "Near East" were to be taken isolated and *in abstracto*, it would become impossible to give any indication of the boundaries of the area that the Parties may have wished to designate by using the term in question. An interpretation which, on this basis alone, led to Turkey and Iran being included in this area, could not be considered to be more legitimate or more arbitrary than an interpretation which resulted in the exclusion of the said countries, or of only one of them, from the said area.

If, then, the words "Near East" are considered in their context it will be seen that they are employed together with a series of other geographical terms of a different nature which, taken as a sequence, make up the description of route 1 in Schedule II of the Annex to the Agreement of March 27, 1946, where the eight routes that can be served by United States air carriers are enumerated. These words do not appear in the description of any other route, nor in any other clause of the Agreement or its Annex. The changes made in the description of route 1 at the time of the Amendment effected by the Exchange of Notes of August 27, 1959, did not affect their use. In the opinion of the Tribunal, one must thus above all take into consideration the position occupied by the term "Near East" in the sequence of terms used to describe route 1; therein lies an essential element in determining what the intention of the Parties may have been when they spoke of the "Near East" in this specific place. One should also take into account the non-specific nature of the term in question, compared with the others that appear either in the description of the same route, or in those of other routes; and finally, the criteria adopted by the Agreement in defining the various routes, as well as the very concept of an air route that emerges therefrom.

In the sequence describing route 1, the term "Near Eeast" is placed between the term "Egypt" and the term "India", the latter single term having been replaced in 1959, by the three successive terms, "Pakistan", "India", and "Ceylon". Since the general description of the route follows a more or less uniform direction and progression from west to east, and because this fundamental notion of direction is confirmed by the use of the expression "in both directions" at the end of the description, the Tribunal considers that there is to be found here, from a mere reading of the text, an initial indication that the Parties, in speaking in this place of the "Near East", must have had in mind an area situated *grosso modo*, to the east of Egypt and to the west of Pakistan and India.

If, now, the term "Near East" is compared with the others, it will be seen that this term is the only one on the whole route that designates not a State or a given city, but a region which may comprise several States. With the exception of stretches of ocean, mention of regions — and far more extensive ones — only occurs in the description of route 5, where the expression "South America" is employed, and in that of route 7, where the expression "Australasia (including Australia and New Zealand)", is to be found.

However, both the latter expressions appear in the indication of the final portion of the routes they are respectively used to describe; and the

final portion of a route is sometimes indicated by resorting to a still vaguer concept, when the term employed is "beyond". This is the case with route 1, among others, its final destination being "China and beyond". Now, when an area with such vast boundaries as those of a continent, or as vague as those implied by the expression "beyond", is indicated at the end of a route description, it does not seem that the value of such an indication can be the same as in the quite exceptional case where an area is mentioned in the description of the actual body of the route, and where its mention is preceded by the indication "via intermediate points in . . .".

In many cases, an international air route is planned in such a way as to allow its terminal portion to fan out: in the vast area covered by the more or less vague and extensive term employed to designate the final destination, several individual and even quite different destinations may then be envisaged, without regard to their respective positions, their connection, nor above all, to that requirement for a fundamentally unique direction which, on the contrary, necessarily governs the determination of the path of the route prior to the indication of the final destination. In narrower limits, an analogous situation also arises where the initial part of the route is concerned, a vast country often being indicated at the outset, preceded only by the preposition "from", and where, therefore, we must picture, inversely, a sort of convergence of a fan of routes coming from different points in the territory of the country of departure, and drawing together as they progressively approach the single path subsequently followed by the route.

When, on the contrary, the indication of an area is given in the intermediate portion of a route, it seems that it can only be understood if it is accepted that the area in question constitutes a geographical region in which a point or a series of different points ought to be situated, but all of them equally characterized, in the actual terms employed in the Schedule of Routes, by the fact that they are "intermediate points" between those in the country mentioned before them and those in the country listed after. And however broad a meaning be given to the adjective "intermediate", it seems evident that one could not so qualify a point which involves a turn around in relation to points designated by the term immediately preceding, nor a clear deviation from that notion of a "reasonably direct route" which set forth in Article 1 of the International Air Transport Agreement proposed by the Chicago Conference of December 7, 1944, certainly inspired the conclusion of the subsequent bilateral agreements, as a general principle indispensable to the orderly development of air traffic.

In all cases, including the one submitted to the Tribunal for arbitration, where the description of an international air route is effected by using a series of terms which, with certain exceptions represented by various obligatory points, designate not specific places, but entire States or even regions comprising several States, the resulting configuration of the route to some extent resembles a vast air corridor. The latter represents what may be called the general path of the route, as opposed to the specific path or itinerary formed by the series of points lying within the general path, that will in fact be stops for the air carriers of the country to which the route has been assigned. [1] Because, whatever the system used to describe a given air route, the latter must, in the last analysis, necessarily constitute a series

[1] In the History of Events section above, we have seen that the terminology employed by the CAB defines the two as "*general route*" and "*specific route*".

of "points" and not States or regions. It is "points" that are in fact served by air carriers, and, what is more, it is in connection with the service of points such as Tehran, Istanbul or Ankara, that the present dispute has arisen.

The system of describing the route by indicating its general path, i.e., a series of zones rather than points, has obviously, for the country to which the route is assigned, the advantage of leaving it greater freedom in the concrete determination of the specific path of the route than the system which consists in directly indicating the specific path itself. The latter system, adopted, for example, in the United States — United Kingdom Bermuda Agreement, and partially in the Agreement of June 15, 1946, between the United States and Egypt, is certainly not as flexible, although sometimes, in cases of this kind, the possibility of choosing between different points listed as alternatives, or the inter-play of other clauses, permits relaxation of the excessive rigidity which might otherwise result.

In any event, it cannot be denied that the system used in the United States-France Agreement of March 27, 1946, is characterized as particularly flexible. The general path of the route in effect comprises the bundle of possible lines, the choice of the specific itinerary or itineraries being left, within certain limits, to the State whose air carriers are authorized to serve the route. Under the Agreement, this State appears to be the holder of a series of potential rights in air traffic to the various points situated on the general path of the route.

However, as the Tribunal sees it, even without reference to subsequent restrictions possibly imposed by specific clauses of the Agreement, the rights mentioned here and the possibility of a choice between itineraries touching different points, are already in themselves subject to a double limitation. The first, a purely practical one, stems from the fact that the choice of points that can be served within the corridor is necessarily limited to places possessing airports open to international traffic. The second, of a legal nature, results from the fact that, unless a different agreement has been concluded between the interested parties, the outer limits of the corridor representing the general path of the route cannot be exceeded. And wherever these outer limits are not clearly established because, instead of a State with given boundaries, a region with imprecise frontiers has been indicated, the criterion for determining these limits can only be furnished by consideration of the fundamental direction of the route, and by the requirement that the area indicated contains points which can reasonably be considered as "intermediate" between those in the country listed before them and those in the country listed after them.

A general conclusion of this kind cannot to any extent be weakened by the sole fact that the route Schedules appearing in the Annex to the Agreement of March, 27 1946, are prefaced, in brackets, by the so-called omission of stops clause, by virtue of which any point on a route enumerated may, at the option of the air carrier authorized to operate it, be omitted on any or all flights operated by that carrier. This clause, which was conceived with the aim of permitting a diversification of services on a given route, does no more than provide the possibility for the carrier operating a route to omit certain points of call scheduled on the route, either on some or all flights. But it is obvious that a simple measure of this kind could not modify the general path of the route as it appears in the route description listed in the Agreement: the power to effect a modification of this kind is certainly not included in the powers granted to carriers. A change of such importance as the alteration or extension of the general path of an interna-

tional air route can only be effected by appropriate consensual action of the Governments concerned.

A further element may, in the opinion of the Tribunal, prove likely to throw more light on the matter for the purposes of a direct interpretation of the text of the 1946 Agreement: this is the comparison of the respective paths of certain of the routes described in Schedule II of the Annex. A comparison of these paths may, in fact, enable a better idea to be gained of the characteristics given to the routes by the negotiators at the time when they planned and described them.

It would seem that the paths that can most usefully be compared are those of routes 1, 2 and 3 of Schedule II. If, in particular, a comparison is made between route 1 and route 2, it may be noted that both these routes, one of which is intended, in France, to take on Paris traffic, and the other Marseilles traffic, maintain a separate structure even beyond the air frontiers of metropolitan France. The first goes south to Switzerland, Italy, Greece and Egypt and then crosses the Near East, via intermediate points, and reaches India. The second initially goes east via Milan, Budapest and points south of the parallel of Budapest, to Turkey and beyond via intermediate points, until it connects on Indian territory with route 8, which comes in the opposite direction from the West Coast of the United States. A merger of route 2 with route 1 is not expressly provided for, although it would certainly have been logical to plan for it in preference to the connection with route 8, if the two routes were to be linked in a region situated to the west of India. Provision is made, on the other hand, for a link between route 1 and route 3, which after running the length of Spain and North Africa, goes precisely to "Egypt and beyond on route 1". Thus, where the merger of a route with route 1 is to be effected, it is expressly indicated.

This leads to the conclusion that the Parties did not intend the area traversed by route 2 via Turkey and intermediate points between Turkey and Pakistan or India, to be part of the general path assigned to route 1, whatever its geographical definition. The intention of the Parties in describing in this manner the two basic routes serving different points of French territory seems to have been to maintain these routes quite separate until they reached India. In the vast area separating Europe from the Indian sub-continent, each of them would have been assigned a general path, in both cases oriented from north-west to south-east, the first however being situated more to the north so as to cover above all Turkey and Iran, while the other, less broad, was more to the south.

The various elements that can be taken into consideration for the purpose of interpretation of the text of the Agreement of March 27, 1946, and in particular of Schedule II of the Annex thereto, lead the Tribunal to the conviction that this text does not authorize a conclusion that it was the intention of the Contracting Parties, at the time when they concluded the Agreement, to include the areas in which are situated respectively the Istanbul and Ankara stops and the Tehran stop in the general path of the route described as route 1 in Schedule II of the Annex, and in particular in the portion of this general path which is indicated by the term "Near East".

2. *Documentary history of the negotiations leading up to the Agreement*

After seeking to determine the intention of the Parties on the basis of a direct interpretation of the Agreement itself and of the Annex thereto, the Tribunal must verify whether the results obtained by this means are or are

not confirmed by an examination of the history of the negotiations leading up to the Agreement in question, as it appears in the documentation provided by the Parties.

The documentary history of the negotiations, or as it is generally called, the "legislative history", is in fact rightly considered by case law and doctrine to be a proper subsidiary guide for the interpretation of treaties. This principle was initially asserted by the Permanent Court of International Justice in its Decision of February 4, 1932, regarding the *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig Territory*, in which it stated:

> This text not being absolutely clear it may be useful, in order to ascertain its precise meaning, to recall here somewhat in detail the various drafts which existed prior to the adoption of the text now in force. [1]

The same principle was subsequently formulated in the most explicit manner by the Court in its Decision of March 17, 1934, regarding the *Lighthouses Case between France and Greece*, in which it is stated:

> Where the context does not suffice to show the precise sense in which the Parties to the dispute have employed these words in their Special Agreement, the Court in accordance with its practice, has to consult the documents preparatory to the Special Agreement in order to satisfy itself as to the true intention of the Parties. [2]

In the case herein submitted for arbitration, the Tribunal felt all the more prompted to undertake an examination of the negotiations leading up to the conclusion of the 1946 Agreement, because the preparation of these negotiations was lengthy and because it comprised important measures

---

[1] Publications of the P.C.I.J., Series A/B, No. 44, p. 33.

[2] Publications of the P.C.I.J., Series A/B, No. 62, p. 13. Although it maintained "that there is no occasion to have regard to preparatory work if the text of a Convention is sufficiently clear in itself", the Court also made an examination of the preparatory work, even in cases of this kind, both to make certain that this preparatory work "would not furnish anything calculated to overrule the construction indicated by the actual terms" of the text under consideration (Decision No. 7, of September 7, 1927, regarding the *Case of the S.S. "Lotus"*, Publications of the P.C.I.J., Series A, No. 10, p. 17), and "in order to see whether or not it confirmed . . . the conclusion reached on a study of the text of the Convention"; (Advisory Opinion of November 15, 1932, on *Interpretation of the Convention of 1919 concerning employment of women during the night*, Publications of the P.C.I.J., Series A/B, No. 50, pp. 378-380). In his dissenting opinion regarding the latter Opinion, Judge Anzilotti had stressed the need to "refer to the preparatory work . . . to verify the existence of an intention not necessarily emerging from the text but likewise not necessarily excluded by that text" (*ibid.*, p. 388).

The importance of preparatory work in the Decision of the International Court of Justice in the *Case of the Aerial Incident of July 27, 1955*, and in the work of the United Nations International Law Commission in connection with Treaty Law, has also been stressed (See ROSENNE, *Travaux préparatoires*, the "International & Comparative Law Quarterly", 1963, pp. 1378 *et seq.*).

*Preparatory work* has been used as a means of interpretation in numerous arbitration decisions. It is expressly mentioned in *Article 19. Interpretation of Treaties* of the "Draft Convention on the Law of Treaties" prepared for the codification of international law by Harvard Law School ("Supplement to the American Journal of International Law", 29, 1935, pp. 937 *et seq.*); and in Article 2 para. 2 of the Resolution of Granada of 1956 of the Institut de Droit International.

and actions. Moreover, both Parties have largely resorted in their pleadings to subsidiary methods of interpretation, and in this framework have attributed a preponderant place to the documentary history of the negotiations; they have also, in general, expressly recognized the legitimate nature and the particular value of a study of the preparatory work.

The history of the negotiations and of their preparation has been dealt with at length above in the History of Events section. The first American proposals for exchanges of view between the two Governments regarding a revision of the 1939 Arrangement were made just after the 1944 Chicago Conference. As we have seen, the measures initiated by the Government of the United States were to be of a more precise nature starting on March 23, 1945, and were to take the concrete form of a series of proposals and communications; the purpose was first to submit a preliminary draft agreement to the French Government, and later to define its scope more fully. These proposals do not appear to have evoked from the French Government a precise statement of its attitude, and the Exchange of Notes of 28-29 December 1945 did nothing more than sanction a provisional régime.

The draft Agreement submitted with the letter of March 23, 1945, from the Ambassador of the United States to the Minister of Foreign Affairs of France, contained in Schedule A of the Annex, as also noted, a description of route 1 which, after the words "Italy and Greece", used the terms "Near East and Middle East" without further clarification as to the meaning attributed to these terms. However, the Tribunal notes that the delivery of this draft was to be followed by two further communications from which the French Government could gain some enlightenment as to the structure of aviation policy in the United States, and the scope of the applications that had been addressed to France for authorization to serve routes.

By his letter of July 16, 1945, the Ambassador of the United States, acting on the instructions of the State Department, in effect informed the Minister of Foreign Affairs that the American domestic procedure, which comprised definitions of international air routes and allocation of these to American air carriers, had been completed: the Civil Aeronautics Board (CAB) had worked out and allocated these routes, and the President of the United States had given his approval. It emerged from the Ambassador's letter that the CAB's program was not without effect on the scope of the Agreement to be concluded with France. In effect, the Ambassador proposed that the draft agreement which had been transmitted by the letter of March 23, 1945, should be amended so as to conform (*shall conform*) to the CAB decision; in order to achieve this, the description proposed for route 1 became "Paris and beyond, via intermediate stops in Switzerland, Italy and Greece, to the Near East and India". Furthermore, in order to throw more light on the origin and scope of this amendment as well as of those that were proposed for the other routes, the Ambassador enclosed with his letter a telegram from the State Department in which the first of the two routes allocated to Transcontinental and Western Air (TWA) was described, the itinerary indicated being "from US via . . . Paris, Switzerland, Rome, Athens, Cairo, Palestine, Basra, Dhahran to Bombay".

During subsequent conversations, the American authorities transmitted a second document to the French authorities: the complete CAB record containing the "Opinion and Order" regarding the "North Atlantic Route Case" (Docket No. 855 *et al.*). The essential passages of this dossier, of which the copy delivered was certified on August 28, 1945, have been reproduced above in the History of Events section. This document provided

important clarifications of the general conception of international air transport adopted in the United States, as well as on the make-up of the routes proposed. It appeared in particular that the indication of the specific route effected by a point-to-point description, was, in the case of international routes as opposed to American domestic routes, to be accompanied by a broader description, i.e., by the indication of a general route referring to areas within which a certain flexibility could thus be allowed for the specific route. Now, the description of the general path of the southern route enumerated, after Greece, the following countries: "Egypt, Palestine, Trans-Jordan, Iraq, Saudi Arabia, Yemen, Oman and intermediate and terminal points within Ceylon and that portion of India which lies south of the 20th parallel". In addition, a graphic image of the routes allocated was given in the map annexed to the Decision, and the Tribunal notes from it that the area attributed to the general path of the southern route was in point of fact made up of a sort of great corridor whose northern limit passed approximately through the following points: north of Milan, Trieste, north of Athens, south of Cyprus, Jerusalem (included), Basra (included), terminating half-way between Karachi and Bombay. The map also showed the areas allocated to two other routes, the northern and the central, and it emerges from the passages cited above that the CAB Decision stressed that it was a question of three distinct areas each of which was to be allocated to a different company.

In the opinion of the Tribunal, these communications as a whole thus provided the French authorities with a concrete idea of the future routes envisaged by the American Government, both in respect of their orientation and their breadth; they also showed that from the American point of view, these routes were distinct both in their "general" aspect and in their "specific" aspect, and that consequently each of them retained a quite distinct individuality. The Tribunal also notes that in none of these documents did Turkey or Iran figure in the general path of the "southern route".

Finally, the Tribunal believes that it is necessary to take into account the last communication which, still on the American initiative, preceded the start of the final negotiations; namely, the communication effected on February 27, 1946, by the Ambassador of the United States, of the Bermuda Agreement concluded on February 11, 1946, with the United Kingdom. It must have been assumed from the letter of February 27, written on behalf of the American Secretary of State, that the Bermuda Agreement was being proposed as a basis of discussion for the final negotiation of the Agreement to be concluded between the United States and France, since this letter requested the French authorities not only to study the United States-United Kingdom Agreement, but even to indicate which parts of the latter should, in their opinion, be incorporated in the future United States-France Agreement.

Now, among the routes described in the Bermuda Agreement, there was one which confirmed that the "southern route" described in the CAB Decisions was the one which was to figure in the international agreements to be concluded by the United States: in fact, after Athens, it took the following itinerary: "Cairo, Lydda, a point in Iraq, Dhahran, Bombay, Calcutta, a point in Burma, a point in Siam, a point or points in Indo-China, a point or points in China". This, once again, could not do otherwise than give the French Government the impression that the American Government was logically pursuing on the international level a policy of conformance between the provisions of international agreements and the decisions of its domestic aviation authorities, thus creating harmony and symmetry between what

had been established at the domestic level and what was agreed upon at the international level.

In this connection, the Tribunal cannot give decisive weight to the consideration that the Bermuda Agreement, in its description of routes, followed a different technique from the one which was to be adopted in the United States-France Agreement. It is true that the former gives the specific path of the route, indicated point by point, whereas the latter gives instead the general path of the route, in a description in which, in addition to a few "points", it is areas that in reality predominate, namely States or even a region comprising several States. But as the Tribunal has already had occasion to point out in passing, the difference between the criterion of "flexibility" which was to prevail in the United States-France Agreement, and the criterion of "rigidity" or "point-by-point control", which inspired the United States-United Kingdom Agreement, is greatly lessened if various factors are taken into account. Quite frequently, in fact, in the latter Agreement, the choice of the point through which the air route is to pass is not made, and is left to the discretion of the air carrier; or else an alternative choice is admitted between different points,[1] with the result that, due also to the provisions of Section IV of the Annex to the Bermuda Agreement,[2] the method of describing air routes in the two agreements ends up by being more similar than might be thought at first sight.

Further, the Tribunal notes that a study of the Decisions adopted by the CAB in the docket 855 *et al.*, which are described in the History of Events section, shows that in its Decisions the American aviation authority describes the same route twice: once giving the general path, and a second time indicating the specific path (point-by-point) that the route was to follow within the limits of the general path. It emerges from this that a certain unity of conceptions in fact inspires the agreements concluded by the United States on the one hand with France, and on the other with the United Kingdom. Both agreements refer — one using the first system to describe route 1 in Schedule II, and the other using the second system to describe route 3 in Schedule b) — to the same route which, in the CAB Decisions, is in fact the subject of two descriptions: one giving its specific path and the other its general path. The structure of the route thus remains essentially the same.

The comparative analysis of the Decisions of the American aviation authorities and of the two international agreements concluded by the United States, with the United Kingdom and France respectively, as a result of these Decisions and in order to obtain the foreign authorizations indispensable for their execution, thus shows in particular: *a*) that the route in question was conceived in substantially the same form in both agreements; and *b*) that the United States in both cases had sought and attained the objective of fully satisfying the necessities resulting from the decisions adopted in their domestic juridical system by means of the rights they obtained through these international instruments.

The essential result at which the United States Government must have been

---

[1] Precisely because of this, the route structure in the United States-United Kingdom Agreement is described by BIN CHENG as "semi-flexible": *The Law of International Air Transport*, London, 1962, p. 394.

[2] Section IV of the Annex to the United States-United Kingdom Agreement is largely homologous to Section VII of the Annex to the United States-France Agreement, but it appears destined to play a more important role precisely because of the different technique employed in describing routes.

aiming in assuming the role of promoter of these treaties to be concluded with foreign countries, on which the possibilities of putting into effect the program established by its aviation authorities largely depended, was evidently to obtain from the said countries the necessary authorizations. This is confirmed by the passage in the CAB Decision, cited in the State Department telegram delivered to the French Government on July 15, 1945, which pointed out that the establishment of the services envisaged was "dependent on granting of appropriate permission by countries concerned". The request that the American Government made, in consequence, for the description of the route indicated in its first draft to be modified so that it would "conform" to the CAB program, is a further confirmation of this. This also seems to be of importance from the point of view of that ascertaining of "the purposes of the treaty" to which the Parties have referred in their pleadings and which is in its turn recognized as a legitimate subsidiary means of interpreting treaties. [1]

Conformity between the requirements of the program established in the domestic framework and the rights obtained at the international level, correlation and coincidence, in particular, between the routes described in the CAB Decisions, and the routes indicated in the international agreements, such then seem to have been the fundamental objectives that the American negotiators sought to attain, and the desire to achieve them no doubt governed their conduct during the negotiations.

Certainly, the Tribunal recognizes that, in special cases, the same negotiators may have wished to obtain more extensive rights from their foreign partners, so as to be able to enjoy a still more extensive freedom of action in such cases. However, if in the contested region, the American Government had wished to extend the area included in the general path of the route well beyond what emerged from the programs and documents that it had itself communicated, it would certainly have done so; but no evidence has been presented to the Tribunal that the American Government in fact enlightened the French Government on this point in such a way as to avoid any ambiguity caused by its action and to forestall any controversy.

In this connection, it does not seem that an argument can be advanced in favour of the contrary thesis from the fact that the American negotiators proposed — and the Agreement used — the expression "Near East" instead of the more precise terms which figures in the Decision adopted at the domestic level by the American aviation authorities. It is true that the description given by the CAB of the "southern route", which, starting from France, also touched in succession Switzerland, Italy, Greece and Egypt, enumerated, in the following order, after the latter country, Palestine, Trans-Jordan, Iraq, Saudi Arabia, Yemen and Oman; and the description of the specific path which was to be followed within the said general path indicated the following points of call: "Jerusalem, Palestine, Basra, Iraq and Dhahran, Saudi Arabia". But the fact that, at the time when the Agreement was being negotiated with France, the American negotiators

[1] The International Court of Justice used the consideration of the "purpose" of a Convention as a criterion of interpretation, in its decision of November 28, 1958, regarding "*The case concerning the application of the Convention of 1902 governing the guardianship of infants (Netherlands v. Sweden)*, I.C.J. Report, 1958, pp. 68 & 69. Article 19 of the "Draft Convention" of Harvard Law School in point of fact begins with the assertion that "A treaty is to be interpreted in the light of the general purpose which it is intended to serve". The "taking into consideration of the purpose of the treaty" also figures under c) of Article 2 of the Resolution of Granada of the Institut de Droit International.

proposed and had adopted the synthetic term "Near East", cannot be considered as an indication of an intention to depart, at that point, from the parallelism in the description of the route followed up to then at both the domestic and international levels. In the opinion of the Tribunal, the most plausible explanation of the recourse, in the text of the Agreement, to a geographical term designating a region rather than a series of States, should be sought in the fact that the political status of the territories concerned did not, at the time, appear to be very definite or stable. This same reason enables us to understand why, in the description of route 2, after the mention of Turkey, the expression "thence via intermediate points to a connection with route 8" was used. The mention of countries whose political status and very existence as States might shortly have been subject to modifications was always possible in the framework of a domestic decision in which greater precision was required, and which in any case was easy to amend; but it seemed, on the contrary, less called for in an international agreement for which it was necessary to guarantee that its application would be durable and not subject to modifications.

On the contrary, the American authorities contributed by similar communications delivered on three different occasions, to establishing in the mind of the French Government a well-formed idea of both the general and the specific path of the route that was being proposed, and on which it was being requested to grant rights. By so doing, they allowed the negotiators of the other Contracting Party to convince themselves that, in what was being proposed and what was being asked of them, the term "Near East" was not being employed in the widest of its various possible meanings, but to designate a region that, in spite of its breadth was nevertheless limited to the cartographic indications furnished by the Americans on their own initiative. The American Government, in the opinion of the Tribunal, must thus accept the fact that conduct of this nature during the preliminary negotiations could be urged aginst it on an issue of interpretation of the Agreement which resulted.

Even the fact that, in the description of route 1 in Schedule II, the mention of Egypt between that of Greece and that of the Near East, was added on American initiative in the final phase of the negotiations, in reality constitutes one further element in support of the inferences that the Tribunal feels it must draw from the conduct of the American side during the negotiations leading up to the Agreement. In proposing the insertion of Egypt between Greece and the Near East in the sequence of countries and regions mentioned in the description of route 1, the entire sequence remaining dominated by the premise "via intermediate points in . . .", the American negotiators above all gave their partners a further element of geographical clarification that was of great importance in furnishing a more concrete image of the route. But, above all, they once again contributed to confirming in the minds of the French negotiators the idea of complete coincidence between what they were being requested to subscribe to in the Agreement, and what appeared both in the American domestic decisions that the Agreement was to make effective, and in the United States-United Kingdom Agreement that had been proposed as a model.

In these circumstances, the Tribunal is of the opinion that, even in the case where a doubt had remained as to the merit of the conclusion that seeks to attribute — on the basis of a simple examination of the text of the United States-France Agreement of 1946 — a limited meaning to the term "Near East" employed therein, a restrictive interpretation of the term in question must also be applied because of its coincidence with the

idea conveyed by the American negotiators to the French during the negotiations leading up to the Agreement. This is a case in which, of two possible interpretations, the choice of that which involves less extensive obligations for the obligated Party seems to be especially justified. [1]

Consequently, the Tribunal believes that it can terminate the examination of this point with the finding that the analysis of the preliminary negotiations strengthens the indications that the Tribunal had found from the analysis of the text of the Agreement of March 27, 1946, and the Annex thereto, and thus leads it to conclude that the Istanbul and Ankara as the Tehran stops cannot be considered to have been included by the Contracting Parties, at the time of the Agreement, in the region designated by the term "Near East" in the description of route 1 of Schedule II.

3. *The question of the applicability of Section VII of the Annex to the Agreement, in this case*

Having reached this conclusion, the Tribunal cannot, moreover, follow the view that the Contracting Parties, through not granting the path of route 1 breadth enough to include the stops in question, could at the same time have intended to agree that these points of call could be added to the path of route 1 by the special unilateral procedure provided for in Section VII of the Annex.

In this connection, the Tribunal does not feel called upon to give an opinion on all the detailed aspects of the question that have been the subject of discussion between the Parties in connection with Section VII of point III of the Minutes of the negotiations of July 20-August 5, 1959, which produced the Parties' own interpretation of the text of this Section. Nor does it feel called upon to analyse the situation that might arise if, subsequent to a change in the path of a route being effected by one of the Contracting Parties on the basis of Section VII, the other Party should contend, by virtue of para. 2 of the same Section, that the interests of its national carriers would be prejudiced.

In fact, in the case submitted to the present arbitration, the dispute which has arisen between the Parties is not one of those simple disagreements which might arise in a situation such as the one just mentioned, where in practice it is a question of the frequency of flights and of reciprocal respect for certain interests. The disagreement between the Parties is far more fundamental, since one of the Parties is making prior objection to the modification envisaged by the other, and maintains that this modifica-

[1] The Permanent Court of International Justice, in its Decision No. 16 of September 10, 1929, concerning the *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder*, (Publications of the P.C.I.J., Series A, No. 23, p. 26), while recommending the greatest prudence in this connection, admitted that "that interpretation should be adopted which is most favourable to the freedom of States", in cases where "in spite of all pertinent considerations, the intention of the parties still remains doubtful".

In the arbitration decision of July 18, 1932, in connection with the *Case of the vessels "Kronprinz Gustaf Adolf" and "Pacific"* between Sweden and the United States (United Nations Reports, *Judgments, Advisory Opinions and Orders* II, p. 1254), the Arbitrator Borel observed that "considering the natural state of liberty and independence which is inherent in sovereign States, they are not to be presumed to have abandoned any part thereof, the consequence being that the high contracting Parties to a Treaty are to be considered as bound only within the limits of what can be clearly and unequivocally found in the provisions agreed to and that those provisions, in case of doubt, are to be interpreted in favour of the natural liberty and independence of the Party concerned".

tion is not included in those for which the unilateral procedure in question was intended.

In the view of the Tribunal, the essential consideration in this matter is that the special unilateral modification procedure provided for in Section VII regarding the path of routes in territories other than those of the Contracting States only seems to have been intended — despite some obscurities in the text and even a number of differences between the English and French texts — to permit of modifications of the specific path or paths lying within the general path of the route, and not for the purpose of unilaterally changing the general path itself.

In fact, a concrete possibility for using Section VII appears to exist above all in connection with that portion of each route which is described by the indication of specific points, rather than in relation to the other portion described by the indication of areas. This emerges, moreover, from the passage in point III of the Minutes of the negotiations of July 20-August 5, 1959, where it is stated that the addition to a route of points situated in third countries or in regions specifically enumerated in the Schedule of Routes could be effected "without regard to Section VII".

The interpretation according to which Section VII cannot be utilized to change the general path of a route, is above all suggested by the wording itself of the English text of the clause in question, which is without doubt the original text, and which speaks of "changes *in* the routes". At the same time, this interpretation is the one which appears best to correspond to the spirit of the provision as a whole, which is to provide for a procedure of a rather exceptional nature, hardly suitable for such serious modifications as changes of the general path of the route. Finally, this interpretation is definitely confirmed in point III of the Minutes of the negotiations of July 20-August 5, 1959, already mentioned above. It emerges, in fact, from a perusal of this instrument, despite the ambiguities in its text, that the two Parties clearly and expressly accepted the principle that the procedure described in Section VII of the Agreement was only to be used for introducing into the path of a route new points situated "within the general path of the route after taking account of the requirements of through airline operations" and respecting "the authorization and concept of the description of the route". [1] The principle of the need to respect the general path of the route, which in point of fact corresponds to the "faisceau général des lignes de la route" is thus clearly affirmed.

Since the interpretation of the text of the Agreement of March 27, 1946, confirmed by the study of the preparatory work, does not permit the Tribunal to conclude that the Contracting Parties intended such points as Ankara, Istanbul or Tehran to be considered as situated on the general path of route 1, this conclusion at the same time excludes the belief that the Parties could have intended to agree that these points could be added to the route in question by the mechanism of the unilateral procedure provided for in Section VII.

The Tribunal does not feel called upon to enquire into the question as to whether a measure, like the one put into effect in the present case — which seeks, not to modify the path of an itinerary by replacing certain points of call by others, but rather to establish alongside the itinerary originally adopted and maintained unchanged, other itineraries serving different points — could in all cases be regarded as a modification affecting the path

[1] In the French text: « La description de la route telle **qu'elle** figurait dans le tableau des routes ».

of an air route under the provisions of Section VII. In fact, the essential purpose of this provision seems, rather, to have been to permit a particularly rapid procedure to be used for carrying out certain adjustments to the paths of lines operated by air carriers, so as to meet the needs of the changing realities of international air traffic, in order that flights to uneconomical points of call appearing in the itineraries originally envisaged could be replaced by others to more profitable points of call on modified itineraries. But the consideration of this question, which otherwise might have arisen, in reality no longer seems to be called for once it is recognized that, in any case, the special unilateral procedure provided for in Section VII cannot be used to add to a route points of call which, like those called into question in the present arbitration, do not come within the limits of the general path of the route. In the opinion of the Tribunal, an addition of this kind, unlike measures coming under the provisions of Section VII, should be considered "as modifications of the Annex" and consequently of the Agreement itself. Thus it is only on a consensual basis that its implementation could be envisaged.

4. *The practice followed in the application of the Agreement as a means of its interpretation*

In the opinion of the Tribunal, a careful examination of the conduct of the Parties subsequent to the conclusion of the Agreement can be of great importance for the purposes of the present Arbitration, but each of its different aspects should be taken into consideration quite separately.

In the first place, account has to be taken of the practice of the Parties in the application of the Agreement, as a supplementary means of interpreting this instrument. This method may be susceptible of either confirming, or contradicting, and even possibly of correcting the conclusions furnished by the interpretations based on an examination of the text and the preparatory work, for the purposes of determining the common intention of the Parties when they concluded the Agreement. As early as 1922, the Permanent Court of International Justice indicated this means in its Advisory Opinion of August 12 of that year, regarding the *Competence of the International Labor Office*, in which it stated:

> If there were any ambiguity, the Court might, for the purposes of arriving at the meaning, consider the action which has been taken under the Treaty. [1]

Later, in its Advisory Opinion of March 3, 1928, regarding the *Jurisdiction of the Courts of Danzig*, the same Court indicated that the consideration of "the manner in which the Agreement has been applied" as a principle of interpretation that it should use in the case under examination. [2] In its turn, the International Court of Justice in its Decision of June 15, 1962, regarding the *Case concerning the Temple of Préah Vihéar (Cambodia v. Thailand)*, in point of fact took into consideration the subsequent conduct of the Party concerned and found in it a confirmation of the consent given at the outset by this Party. [3]

---

[1] Publications of the P.C.I.J., Series B, Nos. 2 and 3, p. 39.

[2] Publications of the P.C.I.J., Series B, No. 15, p. 18;

The intention of the Parties, which is to be ascertained from the contents of the Agreement, taking into consideration the manner in which the Agreement has been applied is decisive. This principle of interpretation schould be applied by the Court in the present case.

[3] I.C.J., Report, 1962, pp. 32 and 33:

Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated

In this connection, however, the Tribunal cannot do otherwise than remark that the practice followed in the application of the Agreement of March 27, 1946, does not appear to furnish elements which contradict the conclusions of the Tribunal as to the scope of the description of route 1 of Schedule II, and in particular of the meaning of the term "Near East". It may be noted, in fact, that the application of the Agreement which followed on its conclusion, and which continued without change and without causing trouble up to the autumn of 1950, was based in practice, as far as this point is concerned, on absolute conformity between the path of the route described in the Agreement and the path of the "southern route" as described in the CAB Decisions of June 1, 1945.

The difficulties began at a later time, when, in the summer of 1950, CAB changed its policy: it no longer, as in 1945, made provisions for each different route to be allocated to a different air carrier, but on the contrary for a single international route to be served, competitively, by more than one carrier. [1] Following on this, the program of the United States Government and PAA — which made provision for flights, via Paris, to new and increasingly distant points of call situated in areas that the French Government did not consider as lying within the path of route 1 as described in Schedule II — began progressively to be elaborated and put into practice. In the face of this action, the attitude of the French authorities was characterized, from that time on, by an equally progressive stiffening in defence of its position of principle. There is an appreciable difference between the timid reaction manifested during the winter of 1950-51, qualifying as "open to discussion" [2] the implicit question of Beirut in the term "Near East" as it appeared in the description of route 1, and the categorical assertion of the Spring of 1955 that "no provision was made in Schedule II (Route 1)" for Tehran. This was to become far more marked when, in the autumn of 1955, the question arose first of the Istanbul service, and later of the Ankara service, and immediate objections were raised that the itinerary from Paris to the Turkish points of call did not conform to the Agreement, since "Turkey appears solely in Route 2 of Schedule II, and the Paris service is covered by Route 1", and since in the path of route 1, the Near East "is listed between Egypt and India". At this moment, France took a firm stand against the idea of a possible addition of these points of call to route 1 under the procedure provided for in Section VII. At the same time, the contrary point of view as to the extent of the general path of route 1 under the 1946 provisions was firmly defended and maintained by the American authorities. The latter certainly did not abandon

thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for 50 years, enjoyed such benefits as the Treaty of 1904 conferred on her . . . France and through her Cambodia relied on Thailand's acceptance of the map . . . The Court considers further that, looked at as a whole, Thailand's subsequent conduct confirms and bears out her original acceptance . . ..

The consideration of the "subsequent conduct of the parties in applying the provisions of a Treaty" is put forward as a means of interpretation in Article 19 of the "Draft Convention" of Harvard Law School. The "practice followed in the effective application of the Treaty" figures as a subsidiary legitimate means of interpretation in Article 2, para. 2b) of the Resolution of Granada of the Institut de Droit International.

[1] See FREDERICK, Commercial Air Transportation, *cit. supra*, p. 163:

Ultimately the Board took action to develop competition on all routes, which, in its opinion, exhibited two carrier traffic potential . . .

[2] It is worth recalling that on the map annexed to the CAB Decisions contained in Docket 855 *et al.*, Beirut appeared as situated almost astride the demarcation line of the southern and central routes.

the principle that not only Tehran, but also the Turkish stops ought to have been considered as being situated within the "Near East" as that term is used in the description of route 1 in Schedule II; they continued to do so even when they made the proposition, as a subsidiary measure, of adding Istanbul and Ankara to the path of this route by the mechanism of Section VII.

A definite difference of opinion having thus clearly come to light, it follows, that from the moment that this occurred, the practice of the Parties in the application of the Agreement can no longer be used as a supplementary means of interpreting the Agreement itself, because it would only be of import for this purpose if it brought to light the same positions of principle or, at least, positions that were not directly opposed. The attitude adopted by the Parties when confronted by the questions arising out of the application of the Agreement could evidently be considered for other purposes. For the moment, however, the Tribunal will limit itself to pointing out that it finds in the attitude in question no elements that cast doubt on the conclusions that it was able to arrive at from an examination of the text and the preparatory work, as to the common intention of the Parties at the time the Agreement of March 27, 1946, was concluded and, in particular, of the wording of the description of route 1 in Schedule II of the Annex.

Nor does the Tribunal find in the practice followed by the Parties in the application of the Agreement, any elements likely to contradict the conclusions reached as to the interpretation of Section VII of the Annex. On the contrary, the Tribunal's conviction that the unilateral procedure provided for in the said Section cannot be used to modify the general path of a route nor, in particular, to add to route 1 of Schedule II stops which, like Istanbul, Ankara or Tehran, are not included in the general path of this route, seems to find further confirmation in the practice of the Parties. In this connection, the Tribunal does not believe that it is incumbent upon it to examine the practice followed by other States in the application of more or less analogous clauses contained in aviation agreements concluded between them. So far as the United States-France Agreement is concerned, and whatever the reasons for it may have been, it is a fact that, throughout the history of its application, modifications to the paths of various routes were never effected on the basis of the procedure provided for in Section VII of the Annex. All the modifications made have been adopted by virtue of a consensual procedure and have been sanctioned in Exchanges of Notes between the two Governments. The only factor of real importance to be found in the practice followed by the Parties subsequent to the entry into force of the Agreement, in connection with Section VII, is thus the interpretation of this clause that was given by the Parties themselves in the Minutes of the negotiations of July 20-August 5, 1959. The Tribunal has already had occasion to refer to the importance of this document in Item 3 supra.

### 5. *The subsequent conduct of the Parties*

#### A. *The concession from 1955 of the right to serve Tehran*

As the Tribunal sees it, it is from another aspect that careful consideration must be given to the conduct of the Parties and to the attitude adopted by each of them, in particular from the time when the first differences of opinion as to principle arose regarding the application of the Agreement.

This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the Agreement, but also as something

more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the Parties and on the rights that each of them could properly claim. [1]

Here the Tribunal is not referring solely, nor even primarily, to the conclusion of subsequent agreements properly speaking which were expressly sanctioned in formal documents such as the Exchanges of Notes of June 23 -July 11, 1950, March 19, 1951, August 27, 1959, or April 5, 1960; these resulted either in modifications being made to an article of the Agreement of March 27, 1946, or to the wording of the Schedules of Routes, or to extension of the duration of the Agreement itself, or again as with the Minutes of the negotiations of July 20-August 5, 1959, in the proposal that an interpretation of Section VII of the Annex be attempted. What the Tribunal particularly has in mind are cases where express or implied consent has been given to a certain claim or the exercise of a certain activity, or cases where an attitude — whether it can rightly or not be described as a form of tacit consent — certainly has the same effects on the resulting juridical situation between the Parties as consent properly speaking would have. [2] The Tribunal is referring in particular to assumptions such as the following: the interested party has not in fact raised an objection that it may have had the possibility of raising, [3] or it has abandoned, or not renewed

---

[1] In its Decision of June 15, 1962, regarding the *Case concerning the Temple of Préah Vihéar (Cambodia v. Thailand)*, the International Court of Justice seems to have taken into consideration the conduct of the Parties not only as a subsidiary means in case of doubt as to the interpretation to be given to the instrument under examination, but also as a possible source of a modification in the juridical situation, in the event that it had been sought to draw a different conclusion from the simple interpretation of the instrument in question. According to the Court, in fact:

> Both parties, by their conduct, recognized the line and therefore in effect agreed to regard it as being the frontier line. (I.C.J., 1962, p. 33.)

[2] This identity of effects eliminates the practical consequences of the doctrinal divergence between the partisans of the theory according to which acquiescence is equivalent to tacit consent (e.g. FITZMAURICE, *The Law and Procedure of the International Court of Justice, 1951-4: General Principles and Sources of Law*, "British Yearbook of International Law", XXX, 1953, pp. 27 *et seq.*; and even more clearly MACGIBBON, *The Scope of Acquiescence in International Law, ibid.*, XXXI, 1954, pp. 143 *et seq.*; and *Customary International Law and Acquiescence, ibid.*, XXXIII, 1957, pp. 144 *et seq.*) and those for whom acquiescence, while it is a phenomenon that is equivalent in its effects to tacit consent, should in theory be distinguished from it (for example, SPERDUTI, *Prescrizione, consuetudine et acquiescenza*, "Rivista di diritto internazionale", 1961, pp. 7 *et seq.*).

[3] ANZILOTTI, *Corso di diritto internazionale* vol. I, introduzione — *Teorie generali*, 4th Edition, Padua, 1955, p. 292, had already observed that silence after regular notification of a fact, when the State could express its protests and reservations, can certainly be interpreted as an acceptance of the fact and an abandoning of conflicting claims that the said State could have put forward. The fact of not having raised objections at the time when they could have been raised, was considered to imply acquiescence in the Decision of December 18, 1951, of the International Court of Justice regarding the *Fisheries Case (United Kingdom v. Norway)* (I.C.J., Report, 1951, p. 139). In his comments on this Decision, FITZMAURICE, *The Law and Procedure*, *op. cit.*, p. 33, merely drew attention to the fact that the absence of opposition does not necessarily of itself imply that there has been consent or acquiescence on the part of the State concerned, and that this should be judged from the circumstances.

The International Court of Justice subsequently largely applied this principle in its Decision of November 18, 1960, regarding the *Case concerning the Arbitral Award made by the King of Spain on December 23, 1906, (Honduras v. Nicaragua)*. The Court, in fact, concluded:

at a time when the opportunity occurred, the objection that it raised at the outset; or while objecting in principle, it has in fact consented to the continuance of the action in respect of which it has expressed the objection [1]; or again, it has given implied consent, resulting from the consent expressed in connection with a situation related to the subject matter of the dispute.

The conduct of the authorized French authorities herein, especially between 1950 and 1955, reveals, in effect, many examples of this kind.

The history of the events of this period shows above all that the objection initially raised by the French representative to PAA's right to serve Beirut via Paris-Rome was not renewed at the time when the Minutes of the consultations of March 19, 1951, were drawn up, during which the question of Beirut had been discussed. This attitude, it is true, may have resulted from assurances given by the American negotiators of respect for the special French interests in the Levantine States; it may also have resulted from an uncertainty that existed as to the actual exclusion of Beirut from the path of route 1; in point of fact, these doubts had not been entirely eliminated by the examination of the maps forwarded by the CAB, and had already emerged in the expression "open to discussion" used by the French side at the time the objection was formulated. However, it is a fact that as a result of this attitude, an agreement was reached between the two Governments concerning both a renunciation by the French side of discussions as to whether Beirut was included in route 1, and the special consideration that the Americans undertook to give the French interests in this region. Thus the French Government no longer continued to contest the rights of American air carriers to serve Beirut via Paris in the conditions agreed upon; and it must have been considered the consent so given as being also valid for neighbouring States, since later on it raised objections neither to the free transfer services from Beirut to Damascus operated by PAA in 1951 and 1952, nor to the regular service, on Tehran flights, of the Damascus stop, inaugurated in 1955, nor to the Baghdad service from Ankara started in 1959. It should be noted that neither Syria nor Lebanon were listed among the areas allocated to the general path of the southern route by the CAB Decision of June 1, 1945, whereas Iraq was on this list, although the annexed map only included in the said path the southern part of this country (Basra). But whatever the status of these three countries may have been in the original framework of the 1946 Agreement, insofar as the path of route 1 was concerned — a question which the Tribunal is not called upon to consider — what is certain is that as a result of the attitude adopted by the Parties from 1951 on, the right of American carriers to serve the points in question via Paris had been definitively vested and could no longer be contested, at least while the American side did not depart from the assurances given.

More delicate and more important aspects of the question, for the purpose of the present arbitration, are to be found in the attitude adopted towards

. . . that no objection was taken by Nicaragua to the jurisdiction of the King of Spain as Arbitrator, either on the ground . . ., or on the ground . . ., the Court considers that it is no longer open to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the Award. (I.C.J., Report, 1960, p. 209);

and that:

In the judgment of the Court, Nicaragua by express declaration and by conduct recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition. (I.C.J., Report, 1960, p. 213).

[1] Referring to the written answer submitted by the United Kingdom in the *Fisheries Case*, FITZMAURICE, *The Law and Procedure*, *cit. supra*, p. 29, recalls that recourse to simple formal protest in cases where concrete measures could have been taken to put an end to the situation which is the subject of the protest, "can in the end be construed as a . . . tacit acquiescence in the situation".

the problem raised by the Tehran service. The history of events shows that PAA's claim to serve Tehran via Paris, Rome, Beirut and Damascus, had been brought to the knowledge of the French authorities by the letter of April 5, 1955, transmitting this company's summer timetables; the new service was to be inaugurated on April 24. It also shows that the Secrétaire Général à l'Aviation Civile et Commerciale had clearly formulated his objections to the Tehran service, giving juridical reasons for these objections, in an initial conversation with the American Civil Air Attaché of the United States Embassy. However, he had also stated that a note would probably be transmitted to the United States Embassy on this subject, and this note never appeared. In addition, although it is true that the same high official was to have another conversation with the Civil Air Attaché a few days later in the presence of the Director for France of PAA, it is also true that, in the first letter written subsequently to the latter, dated May 14, 1955, he limited himself to stating that:

> En ce qui concerne la desserte de Damas et Téhéran j'ai pris note des explications que vous m'avez données à ce sujet dans notre récent entretien.

It should be noted that in the same letter, the Secrétaire Général à l'Aviation Civile et Commerciale approved the timetables transmitted on April 5 and by so doing, gave his implicit consent to the PAA Tehran service via Paris. It was only in a second letter sent to the same person on June 4, that is to say nearly a month and a half after the New York-Paris-Tehran service via Rome, Beirut and Damascus had started operations, that the French official considered it necessary to recall that:

> Téhéran n'étant pas prévu au Tableau II (Route 1), c'est seulement à titre temporaire et compte tenu des assurances que vous avez bien voulu me donner que votre compagnie éviterait, sur cette route, de porter préjudice aux compagnies françaises, que j'avais approuvé votre desserte de Téhéran.

Apart from the clear and unequivocal reaffirmation of the refusal, in principle, to admit that Tehran was situated on the path of route 1 as described in Schedule II of the Annex to the Agreement, the French aviation authorities confirmed in fact once again the consent that had already been given previously for PAA to operate the New York-Paris-Rome-Beirut-Damascus-Tehran line, albeit with certain conditions as to itineraries and flight frequencies. He added, it is true, that this consent was given "à titre temporaire".

Nevertheless, in the view of the Tribunal, it seems very difficult to admit that, in making a reservation of this nature, the French official could have meant to say that he reserved the right to withdraw the consent given at his own discretion whenever he saw fit to do so. Because of his experience and his position at the head of civil and commercial aviation services, he knew very well that one cannot take the responsibility of granting an air carrier the authorization to operate a new service requiring important installations and investments, one day, only to withdraw it the next without a weighty reason. The reservation concerning the temporary character of the authorization granted could thus only have another meaning, namely that it stressed on the one hand, that this authorization did not signify the abandonment of the position of principle, that it was not by virtue of a right deriving from the 1946 Agreement that the Tehran

service was allowed, but only by virtue of the authorization itself; and on the other hand that the permission to operate the new service was being given within certain limits and under certain conditions. The possibility of suspending the authorization granted was thus only envisaged in the exceptional hypothesis where it would have been necessary to resort to it either to ensure that the limitations and conditions set were respected, or to defend legitimately the principle that the French were anxious to safeguard.

All possible doubt as to what was in fact the permanent nature of the consent given, disappears, moreover, when we consider the attitude adopted by the French authorities in the years that followed. Neither at the time when it periodically transmitted its timetables, nor when the capacity on the line was increased (three services in 1957, four in 1959), did PAA receive any reminder from the French authorities of the temporary nature of the authorization granted. Such a series of similar attitudes, reiterated over a period of seven years, throws decisive light on the true scope of the initial consent given by the French authorities when the question of the Tehran service arose for the first time. In 1955, France indisputably undertook to permit the operation of aviation services on the Paris-Tehran via Beirut route, with exercise of commercial rights, subject to certain capacity limitations which were, by the way, liberally extended later on. The only real reservation that conditioned this undertaking was that the operations envisaged could be suspended in the event that this measure became necessary for safeguarding, in a more extensive framework and in exceptional circumstances, the position of principle that France had adopted regarding the scope of the 1946 Agreement. In reality, it was only to be a reason of this nature that was to lead the French authorities to suspend the exercise of commercial rights on the Paris-Tehran service, effective October 31, 1962. At this time, and in connection with the Turkish stops, the renewal of the dispute of principle concerning route 1 rights deriving from the 1946 Agreement appeared once again to call into question — when the Paris-Rome-Istanbul-Ankara-Tehran service was inaugurated — the matter of the source of PAA's right to serve the Iranian stop. In spite of this measure, taken after a series of successive delays and with arbitration imminent, the services to Iran nevertheless were maintained, although without commercial rights between Paris and Tehran; this confirms that the French authorities were aware of the impossibility of completely going back on what had so long been granted, even in defence of their position of principle; they were also aware of the need to respect, at least in some measure, the rights that had undeniably been granted and sanctioned by prolonged use. Moreover, it seems evident that the suspension measure could only be temporary, and above all could not be maintained in force after the question of principle had been decided by arbitration.

Thus an analysis of the conduct of the Parties leads the Tribunal to conclude that, as a result of the attitude adopted by the French authorities from and after May 14, 1955, the right to serve Tehran via Paris, Rome, Beirut and Damascus had been established and could no longer be contested save in exceptional circumstances. But the Tribunal also believes that it should once again state that, in its opinion, it was not by virtue of the Agreement of 27 March, 1946, but rather by virtue of an agreement that implicitly came into force at a later date, that the right in question was in fact accorded; and precisely by the effect of the consent given by the French authorities from and after May 14, 1955, to the timetables proposed by PAA, which made provision for the Tehran service, consent

which was constantly confirmed by the attitude of these authorities in the course of the years that followed.

B. *The authorization to serve the Turkish stops without commercial rights*

With regard to the question that arose in the autumn of 1955 when PAA put forward its claim initially to serve Istanbul and later on Ankara as well, the elements which can be gleaned from an examination of the conduct of the Parties differ appreciably from those found in connection with Tehran. They are, in fact, from all points of view, more precise and more immediate.

When first notified by PAA of its project to serve Istanbul, the Secrétaire Général à l'Aviation Civile et Commerciale formulated, in his letter of October 11, 1955, a legal objection that Turkey was not included in the path of route 1, but only in that of route 2, which could not serve Paris. Nevertheless, the execution of PAA's project was not completely stopped. The operation of the New York-Paris-Rome-Istanbul line was authorized, but subject to the proviso that it should include no commercial traffic between Paris and Istanbul. This attitude was confirmed shortly afterwards by the Minister of Foreign Affairs. To the note from the United States Embassy of October 21, 1955, which claimed that Turkey should be included in the term "Near East" and to the letter of October 27 from the Civil Air Attaché, proposing that the question be resolved by recourse to the modification procedure provided for in Section VII of the Agreement, the Ministry replied as early as November 3 by a double refusal to accept the American points of view, and by the request that no commercial activity be exercised between Paris and Istanbul. On the other hand he admitted the possibility of solving the problem raised by the American company's request by concluding a new agreement to be negotiated between the competent authorities of the two countries. But this could not be achieved during the consultations which followed, the counterpart requested by the French as the price of their consent to the Istanbul service being considered too high by the Americans. The French position was thus reaffirmed unchanged on several occasions, and particularly in the letter of May 16, 1956, at the time of the extension of the line to Ankara, and in the letter of May 3, 1957. During the Franco-American meetings of 1958 and 1959, the attempt to obtain commercial rights between Paris, Turkey and the Near East, was once again made by the American negotiators, but once more no agreement on an exchange of reciprocal benefits that could include the granting of the said rights, could be reached. In 1960, when the American authorities refused to grant France the possibility of making a stop at Montreal, subject to conditions similar to those France had granted for Istanbul, the French authorities even threatened to interrupt PAA's service to Turkey completely. Finally, by the Exchange of Notes of April 5, 1960, which recorded certain mutual concessions, France, which in the meantime had also opposed the American request for at least "stopover" rights between Paris and Istanbul, in the end gave a formal undertaking not to interrupt PAA's service between Paris and Istanbul on the terms in which it had operated up to that time. Since then the situation of the Turkish stops remained unchanged, and it was, rather, the substitution of Tehran for Baghdad as the terminal point of the New York-Paris-Rome-Istanbul-Ankara line that set off the crisis which was to lead the Parties to resort to arbitration on the questions arising out of both the Turkish and the Iranian stops.

Therefore, in the conduct of the Parties with regard to the Istanbul and Ankara question, the Tribunal is obliged to point out, above all, the absence

of any weakening in the French position regarding the refusal either to admit that the Turkish stops come within the path of route 1, or could be added to it by the mechanism of Section VII, or to grant anything more than mere "blind sector rights" on the flights in question, unless they obtained an adequate counterpart from the United States. On the other hand, although it can certainly not be maintained that the American authorities have ever abandoned their thesis of principle, even when the Exchange of Notes of April 5, 1960, took place, it must at the same time necessarily be recognized that they have not insisted on following up the application of Section VII that they proposed in 1955, and that their subsequent efforts have above all been deployed in two directions:

a) to attempt to reach a new agreement comprising commercial rights, or at least stopover rights between Paris, Istanbul and Ankara; and

b) in any event to consolidate the authorization that they had obtained to serve the Turkish stops, even without commercial rights, and to convert this authorization into a permanent right.

It was this second objective that the American authorities attained by the Exchange of Notes of 1960.

In consequence, the situation in this sector appears to be sufficiently clearly defined. The interpretation of the text of the Agreement of March 27, 1946, and the analysis of the preparatory work have not permitted the Tribunal to conclude that the Istanbul and Ankara stops are included in the general path of route 1 of Schedule II, and that consequently, American carriers have the right to serve the said stops by virtue of this Agreement. On the other hand, the conduct subsequently followed by the Parties does permit the Tribunal to conclude that by virtue of a subsequent agreement, for which the way had already been paved by the authorization given by the French authorities on October 11, 1955, and definitively confirmed by the Exchange of Notes of April 5, 1960, American carriers have acquired the right to serve the Istanbul and Ankara stops, although without commercial rights between Paris and the aforesaid stops, and that this right can no longer be contested at the present time.

## V. Decision of the Tribunal

For the above reasons, the Tribunal, by unanimous decision, replies as follows to the questions submitted to it by the terms of Article 1 of the Arbitration Agreement:

### A. *Question No. 1*

Considering that the question asked was the following:

> 1) Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation services between the United States and Turkey via Paris and does it have the right to carry traffic which is embarked in Paris and disembarked at Istanbul, Ankara or other points in Turkey, or embarked at Istanbul, Ankara or other points in Turkey and disembarked at Paris?

Considering that the question stated above comprises two points which call for separate answers;

The Tribunal:

*With regard to the first point*

Considering that the interpretation of the provisions of the Agreement of March 27, 1946, and in particular of the terms of route 1 of Schedule II of the Annex to that Agreement, does not permit of the conclusion that the right to provide international aviation services between the United States and Turkey via Paris was granted to a United States airline under the provisions of the said Agreement and of the Annex thereto;

Considering that the Tribunal is empowered, by virtue of the consent of the Parties, formally confirmed by the Agents at the close of the oral hearings, to take into account, for the purposes of its reply, not only the Agreement of March 27, 1946, and the Annex thereto, but also all the formal and informal agreements which followed, as well as the conduct of the Parties;

Considering that the right in question has been recognized in a United States airline by the Exchange of Notes of April 5, 1960, between the two Governments, which definitively confirmed the authorization for the exercise of the said right granted by the French authorities on October 11, 1955;

Decides that the answer to be given on this point is that a United States airline *has* the right to provide international aviation services between the United States and Turkey via Paris;

*With regard to the second point*

Considering that the interpretation of the provisions of the Agreement of March 27, 1946, and in particular of the terms of route 1 of Schedule II of the Annex to that Agreement does not permit of the conclusion that the right to carry traffic which is embarked in Paris and disembarked at Istanbul, Ankara or other points in Turkey, or embarked at Istanbul, Ankara or other points in Turkey, and disembarked at Paris, has been granted to a United States airline under the provisions of the said Agreement and of the Annex thereto;

Considering that the Tribunal is empowered, by virtue of the consent of the Parties, formally confirmed by the Agents at the close of the oral hearings, to take into account, for the purposes of its reply, not only the Agreement of March 27, 1946, and the Annex thereto, but also all the formal and informal agreements which followed, as well as the conduct of the Parties;

Considering that no authorization to exercise the right in question has been granted to a United States airline by the French authorities and that, in addition, this right was not recognized by the Exchange of Notes of April 5, 1960, between the two Governments;

Decides that the answer to be given on this point is that a United States airline *has not* the right to carry traffic which is embarked in Paris and disembarked at Istanbul, Ankara or other points in Turkey, or embarked at Istanbul, Ankara or other points in Turkey and disembarked at Paris.

B. *Question No. 2*

Considering that the question asked was the following:

> 2) Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation services between the United States and Iran via Paris and does it have the right to carry traffic which is embarked in Paris

and disembarked at Tehran or other points in Iran, or embarked in Tehran or other points in Iran and disembarked at Paris?

Considering that the question stated above comprises two points which call for separate answers;
The Tribunal:

*With regard to the first point*

Considering that the interpretation of the provisions of the Agreement of March 27, 1946, and in particular of the terms of route 1 of Schedule II of the Annex to that Agreement, does not permit of the conclusion that the right to provide international aviation services between the United States and Iran via Paris has been granted to a United States airline under the provisions of the said Agreement and of the Annex thereto;

Considering that the Tribunal is empowered, by virtue of the consent of the Parties, formally confirmed by the Agents at the close of the oral hearings, to take into account, for the purposes of its reply, not only the Agreement of March 27, 1946, and the Annex thereto, but also all the formal and informal agreements which followed, as well as the conduct of the Parties;

Considering that the right in question has been acquired by a United States airline by virtue of the implicit agreement ensuing from the consent given by the French authorities on May 14, 1955, and constantly confirmed by the attitude of the said authorities throughout the years that followed;

Decides that the answer to be given on this point is that a United States airline *has* the right to provide international aviation services between the United States and Iran via Paris;

*With regard to the second point*

Considering that the interpretation of the provisions of the Agreement of March 27, 1946, and in particular of the terms of route 1 of Schedule II of the Annex to that Agreement does not permit of the conclusion that the right to carry traffic which is embarked in Paris and disembarked at Tehran or other points in Iran, or embarked in Tehran or other points in Iran and disembarked at Paris, has been granted to a United States airline under the provisions of the said Agreement and of the Annex thereto;

Considering that the Tribunal is empowered, by virtue of the consent of the Parties, formally confirmed by the Agents at the close of the oral hearings, to take into account, for the purposes of its reply, not only the Agreement of March 27, 1946, and the Annex thereto, but also all the formal and informal agreements which followed, as well as the conduct of the Parties;

Considering that a United States airline has the right in question, subject to certain limitations regulating services and flight frequencies, by virtue of the implicit agreement ensuing from the consent given by the French authorities on May 14, 1955, and constantly confirmed by the attitude of the said authorities throughout the years that followed;

Considering that the interruption of the exercise of this right required by the French authorities, effective October 31, 1962, appears to have been dictated solely by the concern of the French Government, above all in view of the imminence of arbitration, to safeguard its position of principle as to the foundation of the right in question, and that, consequently, it can only be of a temporary nature and could not be prolonged after the termination of the present arbitration;

Decides that the answer to be given on this point is that a United States airline *has* the right to carry traffic which is embarked in Paris and disembarked at Tehran or other points in Iran, or embarked in Tehran or other points in Iran and disembarked at Paris.

DONE at Geneva, December 22, 1963

*The President of the Arbitration Tribunal*
Roberto AGO

*The Clerk of the Tribunal*
Philippe CAHIER

# DECISION INTERPRETING THE AWARD OF THE ARBITRAL TRIBUNAL ESTABLISHED PURSUANT TO THE ARBITRATION AGREEMENT SIGNED AT PARIS ON JANUARY 22, 1963 BETWEEN THE UNITED STATES OF AMERICA AND FRANCE

By letter of May 16, 1964, addressed to the President of the arbitral tribunal established pursuant to the arbitration agreement signed at Paris on January 22, 1963, copies of which letter were addressed to the two other arbitrators, the Governments of the United States of America and of the Republic of France have requested by mutual agreement that the Arbitration Tribunal rule on the following question:

> Les deux parties demandent au Tribunal de définir, par voie d'interprétation de la sentence, la nature et l'étendue du droit pour une entreprise aérienne des Etats-Unis d'exploiter des services aériens internationaux entre les Etats-Unis et l'Iran via Paris et de transporter du trafic embarqué à Paris et débarqué à Téhéran ou en d'autres points en Iran, ou embarqué à Téhéran ou en d'autres points en Iran et débarqué à Paris, tel que le reconnaît la sentence rendue le 22 décembre 1963.

The Tribunal has met at Geneva on June 27 and 28, 1964, and has taken due note of the fact that the Parties have provided that the decision requested to the above question should be reached on the basis of an informal deliberation by the members of the Tribunal without pleadings or oral argument.

After due deliberation the Tribunal, unanimously, adjudged the following answer to the request of the Parties for interpretation of the award;

In its award of December 22, 1963, the Tribunal deciding the second point of Question No. 2 set forth in the Arbitration Agreement held "that a United States airline *has* the right to carry traffic which is embarked in Paris and disembarked at Tehran or other points in Iran, or embarked in Tehran or other points in Iran and disembarked at Paris".

Further, in its decision the Tribunal pointed out that the right mentioned was acquired by a United States airline, not pursuant to the Agreement of March 27, 1946, and particularly the description of Route 1 of Schedule II of the Annex to the said Agreement, but "subject to certain limitations regulating services and flight frequencies, by virtue of the implicit agreement ensuing from the consent given by the French authorities since May 14, 1955, and constantly confirmed by the attitude maintained by the said authorities throughout the years that followed".

The Tribunal found that such an implicit agreement contains the characteristics of an agreement separate from but complementing the Agreement of March 27, 1946, and following the same general principles.

The Tribunal has specially considered the extent of the "limitations regulating services and flight frequencies" subject to which, as it stated in its award, the right to serve Tehran via Paris was acquired by a United States airline by virtue of the implicit agreement mentioned.

In this respect, in the opinion of the Tribunal, that the right in question was acquired by virtue of an agreement implicitly resulting from the consent given by the French authorities since May 14, 1955, to the timetables proposed by Pan American Airways which provided for service of Tehran via Paris, Rome, Beirut and Damascus leads to the following consequences:

1) *As to routing:*

The right to serve Tehran from the United States via Paris, with commercial rights, has been acquired by a United States airline on the route Rome, Beirut, Damascus. Pursuant to the "omission of stops" clause at the head of Schedule II of the Annex to the Agreement of March 27, 1946, this right includes the option of flights with commercial rights to Tehran via Paris over the same route but omitting one or more stops in Rome, Beirut or Damascus.

2) *As to flight frequencies:*

The right to serve Tehran from the United States via Paris with commercial rights between Paris and Tehran on the route Rome, Beirut, Damascus, with or without omission of stops has been acquired by a United States airline with a frequency of four flights a week.

In the opinion of the Tribunal the limitations of route and flight frequencies so defined are those resulting from agreements successively realized between the Parties and applied until the suspension decided by the French authorities from October 31, 1962. Obviously they can be modified by mutual agreement of the Parties themselves in subsequent negotiations.

The preceding opinions do not affect the continuing right of a United States airline to serve Tehran from the United States via Paris on the route Rome-Istanbul-Ankara, but without commercial rights between Paris and Tehran, a right which has been exercised without dispute ever since October 31, 1962.

DONE at Geneva the 28th of June 1964

*The President*
Roberto AGO

*The Arbitrator*
Paul REUTER

*The Arbitrator*
Henry de VRIES

*The Clerk of the Tribunal*
Philippe CAHIER