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ARBITRATION OF THE UNITED STATES-FRANCE AIR TRAFFIC RIGHTS DISPUTE

BY PAUL B. LARSEN†

I. INTRODUCTION

FEBRUARY 22, 1964, the day the arbitration tribunal announced its decision in the United States-France air traffic rights dispute¹ may be considered a landmark date in international arbitration. It was the first time in the history of bilateral air transport agreements² that rights granted under an agreement became the object of arbitration.³

The United States-France case is characterized by general agreement between the parties on arbitral procedure, accomplished by a tight pre-arbitration agreement, and willingness of the parties to arbitrate. While compulsion to settle disputes exists in most bilateral air transport agreements, including the United States-France Air Transport Services Agreement of 1946,⁴ attempting the method is a different matter. Although many air transport disputes are suitable for arbitration, not until the United States-France case did two parties prove that it can be an effective means of settlement. Thorough study of the issues by a competent tribunal contributed toward making this a model for later arbitrations. The issues expose practices which, in the light of the award, will be worth study by governments and carriers.

A curious feature is that the contracting governments pleaded the case, although the airlines whose traffic rights are concerned were the real parties

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¹ Decision of the Arbitration Tribunal, Established pursuant to the Arbitration Agreement Signed at Paris, on January 22, 1963, Between the United States of America and France, Decided at Geneva on December 22, 1963. *Int'l Legal Materials*, July, 1964, p. 668.

² Approximately 600 bilateral agreements are registered with ICAO.

³ Department of State Bulletin, 506, March 30, 1964. For a general bibliography on arbitration, consult B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Part IV: General Principles of Law in Judicial Proceedings (1953); Cheng, *International Law in the United Nations*, 8 Year Book of World Affairs 170-195 (1954); Cheng, *Law of International Air Transport* 454-464 (1962); J. C. Cooper, *New Problems in International Civil Aviation Arbitral Procedure*, 2 *Arbitration Journal* 119-124 (1947); M. Domke, *International Civil Aviation Sets New Pattern*, 1 *International Arbitration Journal* 20-29 (1945); R. O. Hingorani, *Dispute Settlement in International Civil Aviation*, 14 *Arbitration Journal* 14-25 (1959); D.H.N. Johnson, *The Constitution of an Arbitral Tribunal*, 30 *British Yearbook of International Law* 152-177 (1953); P. B. Larsen, *Arbitration in Bilateral Air Transport Agreements*, Bind 2, *Arkiv for Luftrett* 145-164 (1964); R. H. Mankiewicz, *Pouvoir Judiciaire du Conseil et Règlement Pour la Solution de Différends*, 3 *Annuaire Français de Droit International* 384-394 (1957); L. Rabcewicz-Zubkowski, *Le Règlement des Différends Internationaux Relatifs à la Navigation Aérienne Civile*, 2 *Revue Française de Droit Aérien* 340-396 (1948); J. L. Simpson and H. Fox, *International Arbitrations* (1959); E. Wessberge, *L'arbitrage et les accords internationaux de transport aérien*, 14 *Revue Générale de l'Air* 3-15 (1951).

⁴ United States-France Air Transport Services Agreement, Mar. 27, 1946, 61 Stat. 3445, T.I.A.S. No. 1679.

in interest. The pressure of the interested United States carrier on its government is evident throughout the arbitration.⁵

The United States requested the arbitration, thus indicating a significant change in United States policy on the method of settling bilateral air transport disputes: prior to 1962, the government had relied on negotiations.

Although the tribunal decided in favor of France on the legal interpretation of the United States-France bilateral air transport agreement, its final decision favors the United States on a question which is both legal and equitable, *i.e.* would it be fair to deprive Pan American Airways (PAA) of traffic rights which it had obtained legally by French permission, and which France had permitted the airline to enjoy for a considerable period of time? In permitting the tribunal to determine the basis for the award,⁶ the parties made room for equitable considerations.

II. EVENTS LEADING UP TO THE ARBITRATION

J. Parker Van Zandt was a member of a school of political geographers⁷ which much influenced world air transport thinking at the time of the Chicago Convention⁸ and thus also in 1946, when the United States-France Air Transport Services Agreement was being negotiated. Van Zandt found that the world could naturally be divided up into eight major trade regions⁹ and air transport should be conceived in terms of commercial intercourse among them. His proposed region of "Greater Europe" consisted of the British Isles, Continental Europe, Mediterranean Africa and Mediterranean Asia. A map of the Western Hemisphere from his book *The Geography of World Air Transport*, includes Palestine, Jordan, Lebanon, Syria, Turkey and the Northern parts of Iraq and Iran, as part of Mediterranean Asia.¹⁰

To indicate the influence of the regional concept, it is important to note that the International Civil Aviation Organization (ICAO) has set up a decentralization scheme which roughly corresponds to Van Zandt's eight major areas.¹¹ Each ICAO region holds separate meetings and main-

⁵ Air France, being a nationalized industry, has identity of interest with the French government. See J. Gourrier, *Le Nouveau Statut d'Air*, Revue Générale d'Air 356-361 (1953).

⁶ For a discussion of law which arbitration tribunals shall apply see Simpson and Fox, *op. cit. supra* note 3, at Chapter 7.

⁷ J. Parker Van Zandt, *The Geography of World Air Transport*. 10 (1944). See Documentation Française: Les GRANDES REGIONS ECONOMIQUES DANS LA GEOGRAPHIE MONDIALE DU TRANSPORT AERIEN, Notes et Etudes Documentaires, No. 124 of August 27, 1945. Also see Paul-Emile Victor, Bases d'une Géopolitique de l'Air, 10 Revue Générale d'Air 249-250 (1947); Elsworth Huntington, *Geography and Aviation*, 2 Air Affairs 49, 53 (1947). The contemporary influence of Van Zandt's philosophy is noted by E. Pépin, *Géographie de la Circulation Aérienne* 62 (1956) and the philosophy is adopted by M. Dacharry, *Géographie du Transport Aérien*, Air France Relations Exterieures (1959). Javier Rubio García-Mina, *La Geografía ECONOMICA EN LA DETERMINACION DE LAS RUTAS DE TRANSPORTE AEREO*, Revista de Ingeniería Aero-náutica n.29 2-8 (1956-57) attacks Van Zandt's theories on the ground that the proposed regions are arbitrary and do not give due importance to certain commercially important areas such as Australia.

⁸ The Chicago Convention, 60 Stat. 1180, 15 U.N.T.S. 295 (1944).

⁹ Van Zandt's eight regions were Greater Europe, North America, Union of Socialist Soviet Republics, Africa, Middle America, South America, Asia and Oceania, *op. cit. supra* note 7, p. 9-10.

¹⁰ *Id.* at 10.

¹¹ ICAO originally had ten regions, but early changed to eight regions. The present ICAO regions are the North Atlantic, the European-Mediterranean, the Caribbean, the Middle East, the Pacific, the South American/South Atlantic, the South East Asia, and the African-Indian Ocean regions. See ICAO A10-WP/17, TE 3 (20/3/56), p. 1. Also see Memorandum on ICAO 24-25,

tains separate offices. The International Air Transport Association (IATA) has divided the world into three regions, the so-called Traffic Conferences, which meet separately each year.¹² The second IATA Conference consists of Europe, Africa and the Middle East, including Iran.¹³

It can reasonably be concluded that contemporary regional concepts influenced the negotiators of the United States-France Agreement of 1946. One can note here the same tendency to describe air routes generally so that specific points within the region could be changed in accordance with shifting economic needs for air service. Under this theory a region might be well served by one airline. It failed to provide for a situation in which competing airlines would attempt to take advantage of the imprecise wording in the route description. In 1946, neither party could foresee the importance of a point-by-point description of air routes in the Near East. Global air transport was in its infancy. The future commercial value of traffic rights in the Near East was not appreciated. Neither party envisaged in 1946 that French aviation would at a later date wish to restrict United States competition in the area.

In the 1946 bilateral Air Transport Services Agreement, France granted the United States two routes through the Near East. Route One¹⁴ goes from the United States to Paris and beyond via Switzerland, Italy, Greece, Egypt, the Near East, India, Burma, Thailand, Hanoi to China and beyond. Route Two¹⁵ goes from the United States over Spain to Marseille and then via Milan and Budapest to Turkey and beyond, meeting another United States air route in India. Trans World Airlines (TWA) began services on Route One, from which it has not deviated, and on which it still operates. Route Two is only indirectly relevant to the dispute, for the essence of the "Near East" problem is the commercial traffic rights in Paris.

In 1950, the Civil Aeronautics Board decided to permit PAA to compete with TWA on Route One.¹⁶ Both airlines were thus able to offer service to Paris and beyond. PAA, however, informed the French authorities that it was going to offer air service on a route from the United States, via Paris and Rome to Beirut in Lebanon. Beirut was not specifically mentioned in Route One of the 1946 Agreement between the United States and France, and the French government doubted PAA's right to serve it. France questioned the inclusion of Beirut within the definition of "Near East." Old political and cultural French interests in Syria and Lebanon were also stressed as giving France a particular interest in the air service between France and Beirut. In spite of these reservations, PAA was given permission to serve Beirut, subject to the usual regulation of capacity, included in the 1946 Agreement.¹⁷ The French objection to PAA's Beirut service, as well as its eventual consent, were to become decisive elements to the Arbitration Tribunal's opinion.

¹² (1960); M. Sheffy, *The Air Navigation Commission of the International Civil Aviation Organization*, 25 J. Air L. & Com. 312 (1957).

¹³ There are three official regional IATA Conferences, but since these Conferences meet with each other to iron out common problems, there actually are six regional IATA Conferences. Sir William Hildred, Lecture to the Institute of Air and Space Law, January 17, 1964.

¹⁴ Facts About IATA No. PRO - 15,000 - 7/55.

¹⁵ U.S.-France Agreement, *op. cit. supra* note 4, at Annex, Schedule II.

¹⁶ *Ibid.*

¹⁷ North Atlantic Route Transfer Case, CAB Docket No. 3589; 1950 U.S. Av. 335.

¹⁸ Minutes of the discussion between the two parties, March 19, 1951, quoted in the Decision, *op. cit. supra* note 1.

Tehran, Iran, was not served by PAA until 1955, when the airline notified the French government that in the future its route over Paris and Rome to Beirut would be extended to Tehran. France objected again, on the ground that Tehran was not in the Near East within the meaning of Route One of the 1946 Agreement, but that this city was located in the Middle East, which the Agreement did not permit the United States to serve via Paris. Neither, France argued, was Tehran on a reasonably direct route to India. The United States disagreed. It argued that the terms "Near East" and "Middle East" are commonly used synonymously and that Tehran indeed was on a reasonably direct route to India.

The outcome was that PAA was permitted to fly to Tehran under the same conditions it flew to Beirut.¹⁸ The French government called it a "temporary" permit, but the arrangement was not disturbed by France until just before the time of the arbitration. Consent to PAA service to Tehran weakened the French position, as will be shown later.

When PAA in 1955 planned a service to Istanbul via Paris and Rome, the airline was told by France that it could not embark traffic in Paris for disembarkment in Istanbul, nor vice versa, because Istanbul was not explicitly part of Route One, and was not included in the Paris "beyond" rights to the "Near East." The United States Ambassador in Paris intervened. He maintained that the term "Near East" usually is thought to include Turkey and that, therefore, PAA could serve Turkey on Route One. France, however, in line with its previous objections to United States service in this region, explained that in its opinion Turkey was not within "Near East," on Route One. Turkey was expressly mentioned in Route Two, thereby excluding it from Route One; neither would France permit the United States unilaterally to extend Route One to a new country, Turkey, on the basis of Section VII of the Annex to the 1946 Agreement¹⁹ because that section was not intended for such major changes in a route. French opposition to United States interpretation of "Near East," at this point, later became crucial to the Tribunal's review of the problem. France's refusal to allow changes under Section VII was also to influence the Tribunal's understanding of the wording of that section.

As a result of French unwillingness to bend, the United States Ambassador advised PAA not to operate commercial traffic between Paris and Istanbul. PAA was, however, permitted to operate without embarkation rights on the flight to and from Paris. Under the same conditions, the Istanbul service was later extended to Ankara in Turkey.²⁰

The 1957-59 crisis in the United States-France air traffic rights relationship ended with only a partial solution of the problem regarding air service

¹⁸ ABC World Airways Guide 350 (May, 1955).

¹⁹ Section VII: 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 the 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.

²⁰ Airways Guide, *op. cit. supra* note 18, at 346 (March, 1956).

to Turkey via Paris. The parties vaguely agreed that unilateral changes made under Section VII must lie within the general path of a route.²¹ A rider was attached to a 1960 agreement²² which extended French service to California. The rider provided that the "existing service" by PAA between Paris and Istanbul would not be disturbed by France. This guaranteed PAA's practice of flying between Istanbul and Paris, without commercial traffic rights, and it later became of great legal consequence for the establishment of the route to Turkey.

Soon afterwards, the Istanbul-Ankara schedule was extended to Bagdad, without French opposition.²³

According to the World Airways Guide,²⁴ PAA served Tehran via Istanbul since 1956. In 1961, however, PAA officially notified the French government that the airline would substitute Tehran for Bagdad on some of the Paris-Istanbul-Bagdad flights. France bluntly reiterated that PAA had no right to fly beyond Istanbul and that it should confine its activities to that city. Temporary permission for commercial traffic rights between Paris and Tehran via Istanbul expired. From October 31, 1962, PAA did not embark passengers in Paris for Tehran, and vice versa.

The negotiations had reached a deadlock, but by October 12, 1962, the United States Ambassador in Paris had already notified the French government that the United States desired arbitration.²⁵ Article X of the 1946 Agreement, as amended in 1951,²⁶ provides for compulsory arbitration at the demand of either party.

Article I of the separate Arbitration Agreement of 1963²⁷ describes the two issues to be arbitrated: (1) Under the United States-France Air Transport Services Agreement, does a United States air carrier have the right to provide service between the United States and Turkey via Paris, and may it embark passengers in Paris for Turkey, or vice versa? (2) Under the United States-France Air Transport Services Agreement, does a United States air carrier have the right to provide service between the United States and Iran via Paris, and may it embark passengers in Paris for Iran, and vice versa?

III. CONDUCTING THE ARBITRATION

A. *The Agreed Basis For The Arbitration*

The United States and France agreed in Article X of the 1946 Agreement to arbitrate future disputes. Arbitration clauses are usually included in bilateral air transport agreements²⁸ although they never seem to be used.

²¹ Decision of the Arbitration Tribunal, *op. cit. supra* note 1, at 44.

²² Exchange of Notes, April 5, 1960, T.I.A.S. 5135.

²³ Airways Guide, *op. cit. supra* note 18, at 396 (July, 1958).

²⁴ *Id.* at Sept. 1956.

²⁵ Decision of the Arbitration Tribunal, *op. cit. supra* note 1, at 47-52.

²⁶ U.S.-France Air Transport Services Agreement, *op. cit. supra* note 4, as amended 139 U.N.T.S. 151 (1951).

²⁷ The Arbitration Agreement of 1963 with France, Jan. 22, 1963, [1963, Part 1] 14 U.S.T. & O.I.A. 120, T.I.A.S. No. 5280; 57 Am. J. Int'l L. 1029-1032 (1963).

²⁸ It is interesting to note that the Soviet bloc practice is to omit arbitration clauses in their bilateral air transport agreements. See: U.S.S.R.-Pakistan, 7 Oct. 1963, ICAO Reg. No. 1729; U.S.S.R.-India, ICAO Reg. No. 1380, 393 U.N.T.S. 3, as amended 13 Nov. 1962, ICAO Reg. 1656; U.S.S.R.-Ghana, 6 April 1962, ICAO Reg. No. 1731. Also see Larsen, *op. cit. supra* note 3, at 148; compare Dmitri Ramzaitsev, *The Law of International Trade in the New Soviet Legislation*, Journal of Business Law 6 (July, 1963) which indicates extensive Soviet arbitration practice in commercial dealings.

In addition to this provision, the United States and France drafted a separate, more detailed document in 1963 outlining the way the specific "Near East" issues would be arbitrated.²⁹ Although the parties were compelled to arbitrate disputes under Article X of the 1946 Agreement, they apparently felt that the 1963 compromise would provide a more orderly basis for the arbitration. Since the Arbitration Agreement of 1963 does not abrogate Article X of the 1946 Agreement, they are both applicable, and must be read together.

By oral stipulations before the Tribunal, the parties also agreed that the Tribunal should apply a broad interpretation of the Arbitration Agreement. This meant that the scope of the arbitration was not limited to the words describing Route One, but included all the formal and informal understandings into which the parties later had entered. Under such a liberal interpretation of the scope of its jurisdiction, the Tribunal could weigh the *practices* of the parties.

Implicit in agreements for arbitration is that the parties accept the customary international law which has accrued regarding arbitration as a method of peacefully settling international disputes.³⁰

B. Binding Effect Of The "Advisory Opinion"

The Arbitration Tribunal, by Article X of the 1946 Agreement, is merely called upon to give an advisory opinion to the parties.³¹ However, the parties, by an exchange of letters,³² explicitly bound themselves to accept the Tribunal's decisions. Therefore, the parties received an ordinary arbitration award, not an advisory opinion as described in Article X. Actually any distinction between the two terms is unnecessary.

C. The Arbitration Tribunal

Choosing arbitrators is crucial, for if one party does not desire an award, it can cause the arbitration to collapse at this point.

Bilateral air transport agreements in the period immediately after the Chicago Convention provided for arbitration by the PICAQ (subsequently ICAO) Council.³³ Later agreements avoided the use of the ICAO Council in arbitration, because this large body is not suited for such a role.³⁴ The amendment version of Article X in the 1946 Agreement has not quite eliminated the use of the ICAO Council. This article provides for an independent, non-institutional arbitration tribunal, consisting of three arbitrators. Such a tripartite arbitration tribunal has frequently replaced the ICAO Council.³⁵

²⁹ Arbitration Agreement of 1963, *op. cit. supra* note 27.

³⁰ Simpson and Fox, *op. cit. supra* note 3, at 131.

³¹ The Advisory Opinion constitutes an arbitration, according to Cheng, *The Law of International Air Transport*, *op. cit. supra* note 3, at 458. The parties in Art. X promise to use their "best efforts" to put the opinion into effect. In the U.S.-France arbitration, the parties have the legal powers to put the opinion into effect, and this writer believes that under these circumstances, the parties are bound by international law to put the opinion into effect.

³² U.S.-France Exchange of Letters, Dec. 8, 1962-Jan. 9, 1963 as quoted in the Decision of the Arbitration Tribunal, *op. cit. supra* note 1, at 2.

³³ Article X of the U.S.-France Agreement of 1946, before it was amended, *op. cit. supra* note 26, is a case in point.

³⁴ Goedhuis, *Questions of Public International Air Law*, 81 *Recueil La Haye* 205 at 267 (1952). Also see Cheng, *op. cit. supra* note 31, at 460; and Hingorani, *op. cit. supra* note 3, at 15; and Larsen, *op. cit. supra* note 3, at 152, 158-160.

³⁵ U.S.-Denmark, Aug. 6, 1954, [1954, Part 2] 5 *U.S.T. & O.I.A.* 1423; U.S.-Germany, Apr. 16, 1956, [1956, Part 1] 7 *U.S.T. & O.I.A.* 527, T.I.A.S. No. 3536; U.S.-India, Feb. 3, 1956,

The Arbitration Tribunal must be named with descriptive certainty. Otherwise arbitration may not be enforceable.³⁶ The United States-France Agreement of 1946 sufficiently describes the nominating process. Article X, as amended, provides that each party shall appoint one arbitrator. The two party-selected arbitrators shall in turn appoint the third member of the tribunal. If they cannot agree on the third arbitrator, the President of the International Court of Justice shall appoint the third person. However, the I.C.J. President must first consult with the President of the ICAO Council. ICAO's arbitration role could not have been made smaller, but it still exists.

The French government appointed Professor Paul Reuter, a French national and Legal Consultant to the French Foreign Ministry. The United States government appointed Professor Milton Katz, succeeded by Professor Henry P. de Vries, both law professors and United States citizens. Since the party-appointed arbitrators could not agree on the selection of the third member, the President of the International Court of Justice consulted with ICAO Council's President and on March 26, 1963, appointed Italian Professor Roberto Ago to the Tribunal. Insistence that the third arbitrator not be a national of either of the parties is a common provision in recent bilateral agreements,³⁷ necessary to achieve impartiality. If the President of the International Court of Justice is of the nationality of one of the parties, an alternative appointing authority should be stated in the bilateral.³⁸

D. Time Limits

Time limits within which the contracting parties must appoint arbitrators are necessary in order to avoid delay or complete frustration of arbitration. The United States-France Agreement of 1946 provides that each contracting party must choose its appointee to the arbitration tribunal within two months after receipt of demand for arbitration from the other party. The third arbitrator must be appointed within one additional month (Article X). However, no time limits were provided for the appointment of the third arbitrator in the event the President of the I.C.J. had to act. The demand for arbitration was presented to France on October 12; three months later, naming of the tribunal had not yet been completed. In fact, five months, and fourteen days expired before the third arbitrator was finally named by the President of the International Court of Justice, indicating the need for providing in the arbitration clause against unnecessary delay when third members of the Tribunal cannot be agreed upon by the party-appointed arbitrators.

Time limits for submission of the written pleadings to the Tribunal are provided for in the Arbitration Agreement (Article III); the Tribunal

[1956, Part 1] 7 U.S.T. & O.I.A. 275, T.I.A.S. No. 3504; U.S.-Korea, Apr. 24, 1957, [1957, Part 1] 8 U.S.T. & O.I.A. 549, T.I.A.S. No. 3807; U.S.-Iran, Apr. 17, 1958, [1958, Part 1] 9 U.S.T. & O.I.A. 407, T.I.A.S. No. 4021; Norway-Burma, (1953) 174 U.N.T.S. 49; The E.C.A.C. Model Draft, 1959 Standard Clauses for Bilateral Agreements, Article 13. Also see Cooper, *op. cit. supra* note 3; and Mankiewicz, *op. cit. supra* note 3, at 384.

³⁶ Greece v. United Kingdom, I.C.J. Rep. (1953) illustrates this point. Also see D.H.N. Johnson, *op. cit. supra* note 3, at 163-165.

³⁷ ECAC Model Draft, *op. cit. supra* note 35; U.S.-Japan, Sept. 15, 1953, [1953, Part 2] 4 U.S.T. & O.I.A. 1948, T.I.A.S. No. 2854; U.S.-Denmark, (as amended in 1954) *op. cit. supra* note 35; U.S.-Germany, (1955) *op. cit. supra* note 35; U.S.-India, (1956) *op. cit. supra* note 35; U.S.-Korea, (1957) *op. cit. supra* note 35; Norway-Burma, *op. cit. supra* note 35.

³⁸ United Kingdom-Yugoslavia, (1959) 359 U.N.T.S. 340, for example, provides such an alternative.

may extend them. The Tribunal is not required to state its opinion within a time limit. However, the parties must file any requests for clarification of the Tribunal's decision within four weeks after its rendition (Article VII). Review of the arbitral award must be demanded within 6 months (Article IX).

E. Place Of The Arbitration

The Tribunal, after consultation with the parties, was empowered to fix the place where the arbitration would be held. Its location was not mentioned in Article X of the 1946 Agreement. None of the bilateral air transport agreements provide for the location of arbitration. By giving the Tribunal the power to arrange the matter,³⁹ procrastination of a party in agreeing to a location is avoided. The oral arguments before the Tribunal took place in Geneva, Switzerland, September 20-28, 1963.

F. Procedure

No procedure for the Tribunal is found in the arbitration clause of the 1946 Agreement. The implication that the arbitrators themselves may establish the procedural rules was removed by the explicit procedural rules provided for in the Arbitration Agreement of 1963. It lays down the number of permissible written pleadings (Article III). It requires the Tribunal to write an opinion stating its reasoning and its conclusions. The Tribunal decides by majority vote and if there is a dissenting opinion, it must be included in the written Decision (Articles V and VI).

The same agreement incorporates a large part of the Convention for the Pacific Settlement of International Disputes of October 18, 1907.⁴⁰ It shall apply where the Arbitration Agreement of 1963 has not made provisions: in case of death of an arbitrator (Article 59); it governs the change of place of arbitration (Article 60 (3)), and certain extensions of time limits. Conduct of the Arbitration, as well as regulation of review of the Decision by the Tribunal are found in this convention, and made applicable (Articles 64-84) to the extent that no conflict with the Arbitration Agreement exists.

It is interesting to note that the parties have specially reserved the right to review the arbitral award, upon discovery of new facts. The new information must be of a decisive character, in order to justify review by the Tribunal. The demand for review must be made within six months after the Decision has been pronounced (Article IX).

Within these limits, the Tribunal is permitted to establish its own procedure.⁴¹ Dr. Domke has emphasized the need for procedural provisions to guide arbitration tribunals dealing with air law problems.⁴² The inclusion of arbitration procedure from the 1907 Convention for the Pacific Settlement of International Disputes thus must be considered as a major advantage of the Arbitration Agreement of 1963.

The Arbitration Decision is final, like a judgment. It cannot be attacked

³⁹ Arbitration Agreement of 1963, *op. cit. supra* note 27, at Art. III and V.

⁴⁰ Convention for the Pacific Settlement of International Disputes of October 18, 1907, T.S. 536; 35 Stat. 2228; 2 Am. J. Int'l L. Supp. 43 (1908). This Convention was the product of the Hague Peace Conferences of 1899 and 1907; in spite of failure to provide for compulsory arbitration of international disputes among parties to the Convention, it has had considerable impact as a source of international arbitration rules.

⁴¹ Arbitration Agreement of 1963, *op. cit. supra* note 27, at Art. VI.

⁴² M. Domke, *op. cit. supra* note 3, at 20.

except as previously agreed upon by the parties.⁴³ By providing both for clarification and review in the Arbitration Agreement, the arbitral award assumes even more of the character of a judgment, which can also be clarified and be reviewed. Both are excellent provisions, tending to improve the award. This requires that the Tribunal remain for a short time, as in the United States-France arbitration, after it has pronounced the award, rather than expire because its powers have terminated.⁴⁴

G. Expenses

Since the parties in private arbitration selected the tribunal themselves, they also must pay all the expenses incurred by their tribunal. In the private arbitration between the United States and France, it was agreed that the parties themselves would pay the expenses of the arbitrators appointed by them. All other expenses were to be shared equally.⁴⁵

IV. IMPORTANT FACTORS AFFECTING THE DECISION

Given the procedural machinery for dispute settlement, the Tribunal began to consider the facts of the United States-France disagreement.

A. Interpretation Of "Near East"

The contractual meaning of "Near East" must be interpreted in the light of the context of the bilateral agreement. In this the Tribunal agreed with France. Since the term "Near East" does not have a meaning commonly agreed upon, it is particularly important to look to the context for a definition. The case of *The Legal Status of Eastern Greenland*⁴⁶ on which the United States relied, is not in point, because in that case the word "Greenland" had a determined meaning; "Near East" has not. "Near East" sometimes describes the entire area between Europe-Asia in the West, and India in the East. At other times, "Near East" signifies only the countries which before World War I constituted the Arabian section of the Ottoman Empire.⁴⁷

The Arbitration Tribunal agreed with France that the sequence in which "Near East" appears in the Route description is important, because the sequence indicates what the negotiators meant by the term. It appeared to the Tribunal that the negotiators had in mind the area between Egypt in the West and Pakistan-India in the East.⁴⁸

In the Tribunal's opinion, "Near East" would correspond to a vast air corridor between Egypt and Pakistan-India. It describes a very general, rather than a particular, path of a route. Being general, great flexibility in changing points within that path is permitted.⁴⁹

The omission of points provision, which precedes the Route One description, was considered to be of no interpretive importance. Reading it narrowly, the Tribunal thought that it does not indicate anything beyond its factual permission.

⁴³ See the provisions for clarification in Art. VII and the provisions for review in Art. IV of the 1963 Arbitration Agreement, *op. cit. supra* note 27.

⁴⁴ Simpson and Fox, *op. cit. supra* note 3, at 264.

⁴⁵ Arbitration Agreement of 1963, *op. cit. supra* note 27, at Art. VIII.

⁴⁶ *The Legal Status of Eastern Greenland*; publications of the P.C. I.J. series A/B, No. 53, p. 52 (1933).

⁴⁷ Decision of the Tribunal, *op. cit. supra* note 1, at 71-74.

⁴⁸ *Id.* at 77-79.

⁴⁹ *Ibid.*

The Tribunal concluded that Turkey and Iran were not included in the 1946 description of Route One because a route through Turkey to India is found in Route Two. The parties had not provided for a merger of Route One with Route Two.⁵⁰ Therefore, Istanbul, Ankara and Tehran were not intended to be part of Route One.

B. Consideration Of The Negotiations Preceding The 1946 Agreement

The legislative history of the 1946 Agreement was particularly important to the Tribunal. There tends to be agreement with the French argument about the CAB Route Decision,⁵¹ which, the Tribunal finds, was communicated to France for the purpose of making the draft agreement conform with the CAB Decision. On the map, the CAB's Southern Route was confined to South of (below) a line drawn South of Cyprus, through Jerusalem, through Basra, ending halfway between Karachi and Bombay. A definite impression of what the United States wanted was thereby conveyed to the French government.⁵²

The United States also transmitted the Bermuda Agreement⁵³ to France during the negotiations stage of the 1946 Agreement. It requested the French government to consider the Bermuda Agreement a basis for negotiation by asking France to indicate which parts of the Bermuda Agreement it wished to include in their new air transport agreement. The Tribunal agreed with France that its negotiators were further induced by the description of Route Three in the Bermuda Agreement to think that the United States wanted a route corresponding to the CAB's Southern Route.⁵⁴

By having Egypt inserted just before the words "Near East" in American Route One of the 1946 Agreement, the United States yet further confirmed in the French negotiators' minds that United States wanted intermediate points on a line from Egypt to India, *i.e.*, in conformity with the CAB's Southern Route. The French negotiators were consequently justified in assuming that Route One of the 1946 Agreement would coincide with the CAB's Southern Route. As the Tribunal sees it, therefore, Istanbul, Ankara and Tehran were not intended by the parties to be included within Route One under the description of "Near East."⁵⁵

C. Interpretation Of "Route Changes"

Only "changes in the routes" are permitted by Section VII. The Tribunal states that this means changes within the general path of a route. Section

⁵⁰ *Id.* at 80-82. However, several routes in Schedule II of the Annex to the 1946 Agreement overlap. For instance, Route Two overlaps Route Eight and Route Three overlaps Route One, in their final stages.

⁵¹ North Atlantic Route Case, CAB Docket No. 855 (1945).

⁵² Decision of the Arbitration Tribunal, *op. cit. supra* note 1, at 87-89.

⁵³ United States-United Kingdom, 60 Stat. 1499, 3 U.N.T.S. 243 (1946).

⁵⁴ Decision of the Arbitration Tribunal, *op. cit. supra* note 1, at 87-89.

⁵⁵ *Id.* at 93. In spite of French permission to U.S.A. to grant several U.S. carriers the right to compete on routes (Annex to the 1946 Agreement, Sec. II) it appears that France, putting so much meaning into The CAB Route Decision, expected that only one U.S. carrier would serve each route. France, itself, intended a system of "chosen" carriers. Contrary to possible French expectation, the United States in 1950 permitted two carriers to serve Route One. Since Route One through the "Near East" is flexible, France should have anticipated that a second carrier (PAA) would schedule different stops on Route One than those utilized by the established carrier (TWA). If this was indeed a French dilemma, it should have carried some weight with the Tribunal and placed considerations of the CAB Route Decision and the Bermuda Agreement in the right perspective.

VII cannot be used to add Istanbul, Ankara and Tehran to Route One because they are outside of the general path of that Route⁵⁶ as defined by a 1959 agreement.⁵⁷

It should be remembered, however, that the French and English versions of the 1946 Agreement are equally authoritative (Article VII). The French version of Section VII uses the expression *Toutes modification des lignes aeriennes*, where the American version says "Changes made by either Contracting Party in the routes." The French word *modification* implies a smaller alteration than the word "change." It is apparent that the French government relied on the narrower French version by arguing that only minor changes in the route are allowed. The Tribunal follows the French interpretation of Article VII, and even in the English version of its Decision, uses the word "modifications" instead of "changes."

Had Route One been described precisely, point-by-point instead of in general regional terms, Section VII would not have been so important: it could not have been used to add countries.

D. Consideration Of Subsequent Practice

The practice of the parties in interpreting the 1946 Agreement supported the Tribunal's conclusion that Istanbul, Ankara and Tehran were not added to Route One and that these points are not now within the term "Near East" as used in the 1946 Agreement. France never agreed to the American interpretation which would include the three cities within Route One. Neither did France ever consent to a change in Route One under Section VII. However, *the French failure to continually refuse to recognize PAA's right to serve Beirut and Tehran was considered crucial* by the Tribunal. By failing after 1951 to continue active protest to PAA's right to serve Beirut, France consented to the legality of this service. Similarly, French failure to object to PAA service to Damascus in 1952, 1953 and 1955 and its failure to object in 1959 to the addition of Bagdad to the Ankara flight constitutes consent to these services via Paris. As long as PAA observed the condition of the French consent, it was allowed to continue to serve these points.⁵⁸

The Tribunal concluded the service to Tehran via Beirut and Damascus was not within Route One.⁵⁹ Therefore, this service was not authorized by the 1946 Agreement. However, independently of that Agreement, France in 1955 gave PAA permission to perform this flight to Tehran via Paris subject to flight limitations. The French permit of 1955 was followed by uninterrupted PAA service on the route without French objection. When granted, PAA's service was called "temporary," but in view of the long service and the known responsibility involved in giving the initial permission, the Tribunal considered PAA's permit a permanent one. By calling the permit a temporary one, France only accomplished that the Tehran service should not be based on authority arising out of the 1946 Agree-

⁵⁶ Decision of the Arbitration Tribunal, *op. cit. supra* note 27, at 95-98.

⁵⁷ Minutes of Negotiations of July 20-August 5, 1959, quoted in the Decision of the Arbitration Tribunal, *op. cit. supra* note 1, at 42-44. Also see Art. XIII of the 1946 Agreement, which states that major changes must have the consent of both parties.

⁵⁸ Decision of the Tribunal, *op. cit. supra* note 1, at 108-109.

⁵⁹ PAA operated a free shuttle service from Beirut to Damascus from 1951; see Airways Guide, *op. cit. supra* note 18, at 314. Later it substituted Damascus for Beirut on two weekly flights to Tehran.

ment. Instead, the service to Tehran was founded on a right independent of the 1946 Agreement, *i.e.*, the 1955 permission followed by prolonged use.⁶⁰ The interruption by France of commercial traffic on the route to Tehran in 1962 is of no consequence. France at this time knew that it could not deprive the United States carriers of these rights.

The Tribunal found no French consent to regard Turkey as being within Route One. Only by virtue of the exchange of notes between the parties in 1960, did the United States obtain authority to serve Istanbul via Paris without commercial traffic rights.⁶¹

V. THE DECISION OF THE ARBITRATION TRIBUNAL

Can a United States carrier serve Turkey via Paris? Yes: Not by virtue of the 1946 Agreement, since Turkey is not within "Near East," in Route One; but as a consequence of French permission of 1955 to serve Istanbul, confirmed by the 1960 exchange of notes.

Does a United States Airline have commercial traffic rights between Paris and Turkey? No: Neither does the 1946 Agreement authorize the service to Turkey, nor does the subsequent permission to serve Turkey include commercial traffic rights.

Does a United States carrier have the right to serve Iran via Paris? Yes: Not by virtue of the 1946 Agreement, but because of the French consent, commencing in 1955, to the service Paris-Rome-Tehran, and subsequent practice.

Does a United States airline have commercial traffic rights between the United States and Tehran via Paris? Yes: Not by virtue of the 1946 Agreement, but by French consent to vesting of these rights in a United States airline, and subsequent use of the rights. The interruption of commercial traffic rights in 1962 was of no fundamental importance because of the immediate prospect of arbitration.

VI. THE ARBITRATION AWARD AND ITS ENFORCEMENT

Logically, an award must determine the obligations of both parties, it must settle the dispute without leaving issues open and the Tribunal's language must be so clear that a similar, objective interpretation by both parties results.

By virtue of the letters during December 8, 1962—January 9, 1963, the award as pronounced was made binding on the parties.

In addition to the questions submitted by the parties, the Tribunal expressed its opinion on contingent matters such as the French consent to the Beirut service. This raises the problem of whether the Tribunal kept within its competence, because lack of jurisdiction and exceeding of competence by a Tribunal renders its decision void.⁶² In other words, are the parties bound by the Tribunal's opinion on the Beirut-Damascus service? The parties permitted the Tribunal to determine its jurisdiction on a liberal

⁶⁰ Decision of the Arbitration Tribunal, *op. cit. supra* note 1, at 109-113.

⁶¹ *Id.* at 114-117.

⁶² The International Law Commission Draft Convention on Arbitral Procedure of 1958 provides for annulment of an award when the arbitration tribunal exceeds its delegated powers. See Report of the International Law Commission covering the work of its Tenth Session, April 28-July 4, 1958; United Nations General Assembly Official Records, Thirteenth Session Supplement No. 9 (A/3859) at Art. XXV. See also Cheng, General Principles of Law, *op. cit. supra* note 3, at 261.

interpretation of the Arbitration Agreement.⁶³ Although the two questions posed to the Tribunal do not directly mention Beirut and Damascus, the issues of traffic rights to these two cities are so closely related to the question of the service to Tehran, that the Tribunal under its broad powers of jurisdiction could consider traffic rights at these two points. The opinion rendered on service to Tehran is based on French consent to PAA serving Beirut and Damascus, and the Tribunal's discussion of that service was part of a logical thought progression. Thus, it would be logical for France and the United States to consider themselves bound by that opinion. The law of International Arbitration permits the Tribunal to decide ancillary claims which cannot be separated from the dispute.⁶⁴ The traffic rights to Beirut and Damascus are so closely related to the question of the service to Tehran that the parties are legally bound by the Tribunal's opinion on this question.

France and the United States disagree in their interpretation of the award, and have decided to ask for clarification pursuant to Article VII of the 1963 Arbitration Agreement. The Tribunal neglected to mention whether there is a limitation in frequency of service to Tehran via both Turkey and Beirut. This issue is not one of the formal questions to the Tribunal which were concisely answered. However, it illustrates what promises to be a major problem in forthcoming air transport arbitrations: language so clear, and phrasing so complete, that minor points will not destroy the usefulness of the Decision.⁶⁵

The arbitral award goes into effect immediately, unless otherwise provided for by the Tribunal or the parties. The Tribunal did not postpone the effectiveness of the award, neither did the parties by any of the agreements leading up to the arbitration agree to a postponement. Therefore, the award became binding as soon as pronounced at the public sitting of the Tribunal.⁶⁶

Confusion about interpretation of the Tribunal's Decision (Article VII) and discovery of new facts (Article IX) may cause excusable delay in making the award effective, although time limits are provided.

Failure of a party to obey an arbitral award would bring enforcement into issue. It is a violation of international law if a country fails to observe an arbitral award which is binding.

As a retaliation, in case of non-compliance with the award, the party which seeks to enforce it can abrogate the agreement, in this case the 1946 Agreement, under which the Arbitration arose. The United Kingdom seriously threatened to deny United States carriers landing rights for failure to comply with the rates agreed upon at the IATA "Chandler"

⁶³ Decision of the Arbitration Tribunal, *op. cit. supra* note 1, at 6. Also see Cheng, General Principles of Law, *op. cit. supra* note 3, at 276-277 stating that the Arbitration Tribunal may determine the extent of its jurisdiction.

⁶⁴ Simpson and Fox, *op. cit. supra* note 3, at 176, 179.

⁶⁵ The arbitration is now closed. The points of clarification which France demanded under Article VII have been decided: (1) a United States air carrier has the right to serve Tehran, via Damascus, with full traffic rights, only on the route Rome-Beirut-Damascus, with the right to omit any of the points; (2) the United States carrier is only allowed four flights a week; (3) the United States carrier is not allowed commercial rights when serving Tehran via Paris on the route Rome-Istanbul-Ankara. The Tribunal has thus solved the most interesting procedural problem in the arbitration.

⁶⁶ Convention for the Pacific Settlement of Disputes, *op. cit. supra* note 40, at Art. 80.

Conference.⁶⁷ Denial of landing rights is therefore a real possibility as a method of enforcement of an arbitration award. The Arbitration Tribunal, itself, has no power of enforcement at its disposal, however.⁶⁸ A delinquent state cannot be legally forced to obey an award. Nothing has been able to force Albania to pay damages to United Kingdom incurred in the Corfu Channel Case.⁶⁹ Neither did Columbia cease to give asylum to Haya de la Torre as required by the International Court of Justice.⁷⁰ Both cases illustrate how weak is the position of the winning party to an international dispute.

VII. LESSONS OF THE UNITED STATES-FRANCE ARBITRATION

A. *Viability Of Private Arbitration For The Settlement Of Air Transport Disputes*

States prefer to settle disputes by negotiations; they do not want to go to trial before the International Court of Justice, as shown by the few cases which are there presented. Arbitration is the middle road.

There are several reasons why parties might prefer arbitration over a court trial. Arbitration is often a quicker method of solving a dispute, although some arbitrations have been known to take more time than court cases.⁷¹ It is less formal than a court trial. The parties to private tripartite arbitration have more to say about who will serve on the arbitration tribunal than they would about the composition of a court, because the parties directly assist in choosing the tribunal. They can thus seek suitable arbitrators for their air transport arbitration. An arbitration is usually a less expensive mode of dispute settlement than a court trial; but it may be noted that the parties carry the expenses of the Arbitration Tribunal directly. The parties to air transport agreements frequently have compulsory arbitration clauses.

Sometimes institutionalized arbitration by ICAO is used,⁷² but now more frequently, provision is made for private arbitration. Significantly, private arbitration was permitted to function in the United States-France Arbitration. Dr. Leo Gross expresses:

The more arbitration becomes generalized and institutionalized, the more sweeping, if less explicit, become the reservations of which the Connally Reservation has rightly come to be regarded as a symbol.⁷³

Dr. Gross concludes that institutionalized arbitration is frequently found in agreements, but is rarely used, because the parties do not wish to submit to compulsory institutionalized arbitration.

The private arbitration provided for in the United States-France bilateral air transport agreement was acceptable to the parties. They did not mind submitting to a tribunal chosen by themselves. The simplicity of the proceedings is appealing: it comes closer to negotiation between

⁶⁷ Aviation Weekly 36 (June 3, 1963).

⁶⁸ See Simpson and Fox, *op. cit. supra* note 3, at 264.

⁶⁹ Corfu Channel Case, I.C.J. Rep. (1949).

⁷⁰ [1950] I.C.J. Rep. 266.

⁷¹ Johnson, *op. cit. supra* note 3, at 175.

⁷² Institutional arbitration is arbitration by an association to which both parties belong. In private arbitration the parties select an arbitration tribunal agreeable to both.

⁷³ Gross, *Some Observations on the International Court of Justice*, 56 Am. J. Int'l L. 39 (1962).

parties than does the formalized institutional arbitration. The arbitration proves that persons suitable to serve as arbitrators exist, and that countries need not avoid arbitration for lack of qualified arbitrators.

It may seem strange that there was no dissenting opinion, particularly since the issues were so controversial and all the arguments, except consent and usage, favor France's position. It is to be expected that the two party-appointed arbitrators will disagree⁷⁴ although it would be a mistake to consider a nationally appointed arbitrator as an attorney for his country. He is entirely independent.⁷⁵ The resolute and unanimous decision, however, indicates that the arbitrators worked among themselves to convince each other, and the results cast credit on the use of arbitration in bilateral air transport agreements.

B. Changing United States Attitude Toward Arbitration

There has been an increase in the general use of arbitration over the last thirty years.⁷⁶ The United States-France Arbitration may indicate that bilateral air transport agreements may be part of that trend. The arbitration clauses in the agreements have greatly improved and they are beginning to see use.

The United States had a backlog of unsolved air transport disputes with foreign countries during the nineteen fifties. Particularly toward the end of that period there was no American progress in policy making. Disagreements under the bilaterals were increasing, and negotiations did not solve the disputes.⁷⁷ The Kennedy Administration took a hard look at situations irritating to foreign partners in air agreements. A policy change ensued. In April, 1963, a presidential policy statement indicated that arbitration would be one of the methods to be used to settle disputes arising under the bilateral agreements.⁷⁸ The decision in 1962 to solve the dispute with France by arbitration must be seen as a by-product of the new American policy.

A joint communique issued by the United States and Italy, released on March 23, 1964, further evidences the policy change. On United States proposal, Italy agreed to arbitrate the issue of whether all-cargo services are within or outside of the bilateral air transport agreement between the two countries.⁷⁹

The decision to use arbitration is significant. There is a great difference between having agreed to settle future disputes by arbitration, on the one hand, and actually using this device. The parties may be satisfied with stalemated negotiations, or they may denounce agreements when a stalemate occurs. It requires a definite act by a party to demand arbitration. That is why one may speak about countries' willingness to arbitrate, although compulsory arbitration is agreed upon. A familiar lament about the arbitration clauses is that they have not been used in spite of the existence of suitable disputes.

⁷⁴ Simpson and Fox, *op. cit. supra* note 3, at 40.

⁷⁵ For explication of this theme, see Cheng, General Principles of Law, *op. cit. supra* note 3, at 283.

⁷⁶ Contini, *International Commercial Arbitration*, 8 Am. J. Comp. L., 283 (1958).

⁷⁷ Johnson, *The International Aviation Policy of the United States*, 49 Dep't State Bull. 507 (1963).

⁷⁸ Pres. J. F. Kennedy, Statement on International Air Transport Policy 10, released April 24, 1963.

⁷⁹ Vol. L, No. 1295, Dep't State Bull., 628 (April 20, 1964).

The interest in the United States for arbitration is not limited to United States air rights disputes abroad. Spokesmen for the State Department have let it be known that the United States is equally willing to arbitrate disputes relating to the air rights of foreign countries in the United States.

C. Role Of Airlines In International Aviation Law And Diplomacy

PAA initiated the dispute with France. It interpreted the term "Near East" to include both Turkey and Iran. After it had made the interpretation, it called upon the United States government, a party to the bilateral with France, to defend it.

It is really the existence of the airlines which is at stake. Airlines are delegated the privileges which a contracting state obtains under a bilateral air transport agreement. They have a tendency to consider air rights as their property and believe that their government acts on their behalf in obtaining traffic rights. In fact, it is the United States Government's duty to promote the welfare of United States carriers.⁸⁰ PAA, and other international air carriers, use the United States government whenever possible, to obtain foreign traffic rights. On the other side, Air France, which is an arm of the French government, seeks to limit PAA's expansion and competition. Consequently, the airlines are the real parties in the arbitration between the United States and France. They both furnish arguments for their states and are, indeed, the subjects of arbitration.

Because of the airlines' strong private interest, the proceedings assume the character of a commercial arbitration between two airlines. The competitiveness with which arguments are brought forth in the United States-France Arbitration indicates how the airlines bring pressure to bear on their governments to further their cause.

The United States-France Arbitration is a now common instance of airline "diplomacy." A recent case has been the international fares dispute. Although United States international carriers are privately owned, and although IATA is a non-governmental body of the world's airlines which fixes international rates, the CAB directly interfered on behalf of United States international carriers during the 1963 "Chandler" crisis, in order to prevent an increase in fares. The CAB ordered United States carriers to maintain fares lower than the IATA Conference fares, and it entered into direct negotiations with other governments on this point.⁸¹

PAA's push for new traffic rights into Beirut, Damascus, Bagdad, Tehran, Istanbul and Ankara was lucrative for the airline; it did not improve French relations with the United States. On a de facto basis, the arbitration favored PAA.

Although PAA is not a government controlled enterprise, as is Air

⁸⁰ Federal Aviation Act of August 23, 1958, 72 Stat. 731, § 102.

⁸¹ The CAB sent observers to the subsequent IATA conference at Salzburg, which was of course pressure through presence in support of the American stand for lower fares. Shortly afterwards, the CAB chairman led a U.S. government delegation visit to several European countries to obtain lower international fares for U.S. carriers. Again, the government teams negotiated directly with other governments much to the unhappy surprise of foreign airlines, although government interference is more familiar to them. See "Pan Am, BOAC Reach Fare Compromise," *Aviation Weekly*, Dec. 9, 1963. The U.S. international carriers bless and promote efforts on their behalf.

Not only have the U.S. international carriers influenced foreign relations, but they caused dissension in the U.S. Government between the CAB and State Department, which resulted in greater responsibility being given to the State Department to conduct U.S. air transport relations with foreign countries. See Johnson, *op. cit. supra* note 77, at 507.

France, it is clear that as a private company, dedicated to profit as well as service, it can interpret agreements and involve the government to a surprising degree. Within the American system, it is difficult to determine the point at which private interests cease, and government interests begin. In the words of President Kennedy's Policy Statement,

Entrepreneurs of daring and vision launched our air transport industry. We believe that the system should continue to benefit from that irreplaceable stimulus to growth brought by competitive enterprise.⁸²

⁸² Pres. Kennedy's Policy Statement, *op. cit. supra* note 78, at 2.