Advisory Opinion of the Arbitral Tribunal Constituted in Virtue of the Compromis Signed at Rome on 30 June 1964 by the Governments of the United States of America and of the Italian Republic

In the dispute between

The Government of the United States of America

represented by its Agent, Mr. Andreas F. Lowenfeld, Acting Deputy Legal Adviser, Department of State
assisted by:

Mr. Allan I. Mendelsohn,
Mr. Lee R. Marks,
Department of State
Mr. Joseph B. Goldmann,
Civil Aeronautics Board
} Counsel

Mr. Norman Seagrave,
Pan American World Airways
Mr. Warren Baker,
Trans World Airlines
Mr. Elias Rodriguez,
U.S. Embassy, Rome
Mr. Brewer
} Expert Advisers

and

The Government of the Italian Republic

represented by its Agent, Professor Antonio Malintoppi, Chancellor, University of Camerino
assisted by:

Mr. Giuseppe Guerreri,
Assistant at the University of Rome
Miss Simone Dreyfus,
Maître-assistant, Law School of Paris University
} Counsel

Mr. Maurizio Amolat
Mr. Carlo Guelfi
} Expert Advisers

concerning the interpretation of certain provisions of the Air Transport Agreement concluded between the Government of the United States and the Government of the Italian Republic on 6 February 1948,

the Arbitral Tribunal, constituted in virtue of the Compromis signed at Rome on 30 June 1964, and composed of

Mr. Otto Riese, President of the Arbitral Tribunal, Honorary Professor at the University of Lausanne, former Divisional President at the Federal Court of Justice, Karlsruhe, former Judge at the Court of Justice of the European Communities

Mr. Stanley D. Metzger, Arbitrator, Professor, Georgetown University, Washington

Mr. Riccardo Monaco, Arbitrator, Professor, Rome University, Judge at the Court of Justice of the European Communities

Registrar: *Mr. Philippe Cahier*, Associate Professor, Graduate Institute of International Studies, Geneva

delivers the following Advisory Opinion:

I. Introduction

(1) *The Compromis of Arbitration and the Constitution of the Arbitral Tribunal*

In 1963 a dispute arose between the Government of the United States of America and the Government of the Italian Republic regarding the interpretation of the Air Transport Services Agreement between these two countries, signed at Rome on 6 February 1948, and the Annex thereto.

As consultations between the two Governments, provided for under the Agreement, failed to settle the dispute, the Government of the United States of America submitted to the Government of Italy on 23 March 1964 a formal request that the dispute be submitted to an arbitral tribunal, in accordance with Article 12 of the said Agreement, which provides as follows:

> Except as otherwise provided in the present Agreement or its Annex, any dispute between the contracting parties relative to the interpretation or application of the present 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 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 the third arbitrator is not agreed upon, within the time limitation indicated, the vacancy thereby created shall be filled by the appointment of a person, designated by the President of the Council of I.C.A.O., from a panel of arbitral personnel maintained in accordance with the practice of I.C.A.O. The executive authorities of 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.

The Compromis of Arbitration was signed at Rome on 30 June 1964. It was drawn up in English and Italian, each text having equal authenticity.

In accordance with Article 12 of the 1948 Agreement the Italian Government designated as arbitrator, on 14 May 1964, Mr. Riccardo Monaco, Professor at the University of Rome, and the Government of the United States of America designated, on 18 May 1964, Mr. Stanley D. Metzger, Professor at Georgetown University, Washington.

The arbitrators designated by the two parties agreed to ask, by letter dated 30 June 1964, Mr. Otto Riese, Honorary Professor at the University of Lausanne, former Judge at the Court of Justice of the European Communities, to act as third member and President of the Arbitral Tribunal. This proposal was accepted by letter of 6 July 1964.

(2) *The Question Submitted to the Tribunal*

The question submitted to the Arbitral Tribunal is contained in Article I of the Compromis of Arbitration and is worded as follows:

Does the Air Transport Agreement between the United States of America and Italy of February 6, 1948, as amended, grant the right to a designated airline of either party to operate scheduled flights carrying cargo only?

(3) *The Proceedings*

In accordance with Article III, paragraph 1, of the Compromis of Arbitration the Tribunal met at Geneva on 20 July 1964; it established its procedural rules, fixed the dates for submission of papers in the hearings and invited the parties to indicate the names of their agents and counsel.

By letters dated 4 August 1964 and 2 September 1964 the Government of the United States of America (Department of State) advised that it had designated —

Mr. Andreas F. Lowenfeld, Acting Deputy Legal Adviser, Department of State, as Agent,

Mr. Allan I. Mendelsohn,
Mr. Lee R. Marks,
Department of State
Mr. Joseph B. Goldmann
Civil Aeronautics Board
} as Counsel

By letters dated 21 August 1964 and 8 September 1964 the Government of the Italian Republic (Ministry of Foreign Affairs) advised that it had designated —

Mr. Antonio Malintoppi, Professor, Chancellor, University of Camerino, as Agent,

Mr. Giuseppe Guerreri,
University of Rome
Miss Simone Dreyfus,
Maître-assistant, Law School of Paris University
Mr. Angelo Caruso,
Inspector-General, Ministry of Transport and Civil Aviation
Colonel Leonida Quercetto
} as Counsel

The Arbitral Tribunal appointed as its Registrar Mr. Philippe Cahier, Associate Professor, Graduate Institute of International Studies, Geneva.

The written memorials were submitted within the prescribed time limits — that of the Italian Government on 3 September 1964, and that of the United States of America on 4 September 1964.

Following application by the Agent of the Italian Government, the time limit for the submission of counter-memorials was extended, by order dated 5 August 1964, until 15 November 1964 and these documents were submitted in good time.

By order dated 27 December 1964 the date for the opening of oral proceedings was fixed for 26 January 1965.

The oral pleadings took place at Geneva from 26 to 29 January 1965. In the course of its sittings the Tribunal heard, in submissions and replies, for the Government of the United States of America, Mr. Andreas F. Lowenfeld, Agent; for the Italian Government, Professor Antonio Malintoppi, Agent, and Miss Simone Dreyfus, Counsel.

The Agent of the Government of the United States confirmed in his submission and replication the plea already made in the written submissions, which was to the effect that the question submitted to the Arbitral Tribunal should receive an affirmative reply.

The Agent of the Italian Government, for his part, confirmed in his submission and replication the plea already made in the written submissions,

which was to the effect that the question submitted to the Arbitral Tribunal should receive a negative reply.

During the oral pleadings the Agent of the Italian Government filed seven documents concerning the negotiations which took place in 1961 between his Government and that of the United Kingdom with regard to the commercial rights to be included in an amendment to the 1948 Italo-British Air Agreement. These documents were produced with a view to serving as evidence of the manner in which that Agreement has been applied in practice, such practice being said to imply that all-cargo services were subject to special permission and were consequently not covered by the Agreement ("something additional and new").

These documents were submitted to discussion. The Agent of the American Government entered an express reserve, declaring that, if the Tribunal wished to consider the points apparently sought to be established by such documents, the complete dossier of these negotiations should be entered, in the form of a certified true copy; the Agent of the American Government furthermore objected on the grounds that the negotiations in 1961 could not refer to the interpretation of the 1948 Italo-British Agreement, since the London-New York route was opened to the Italian carrier only in 1962.

After the closure of the oral proceedings the Agent of the Italian Government further submitted to the Tribunal, in April 1965, a Note Verbale sent by the United Kingdom's Foreign Office to the Italian Embassy in London on 28 March 1965 confirming that the British Government had granted as early as 1958 rights to Italian carriers to operate a scheduled air service on a route "points in Italy-London/New York/Chicago".

This Note Verbale, together with the covering letter from the Agent of the Italian Government attached thereto, was duly communicated to the Agent of the American Government, who replied by letter dated 4 May 1965. In these circumstances the Tribunal did not deem it necessary to reopen the discussion on this point.

II. Statement of facts

The Origin of the Air Transport Agreement of 6 February 1948 between the Government of the United States of America and the Government of the Italian Republic

The question submitted to the Tribunal relates to the Air Transport Agreement of 6 February 1948 between the United States of America and Italy, the text of which was published in "Gazzetta ufficiale della Repubblica Italiana" (Official Gazette of the Italian Republic) of 27 July 1948, No. 172, pp. 2691 ff., and also in the "Treaties and Other International Acts Series", publication No. 3513 of the United States Department of State, [1] so that it is not necessary to reproduce it here.

This bilateral agreement is modelled on the Bermuda Agreement which was concluded in 1946 between the United States and the United Kingdom and which supplemented the 1944 Chicago Convention on International Civil Aviation, to which Italy adhered in 1947. For a clearer understanding of the function of the disputed 1948 Italo-American Agreement it is therefore expedient briefly to refer to the origins of the above-mentioned two instruments, the scope of which will be considered in greater detail in the Opinion of the Tribunal below (under No. 5).

[1] See also United Nations *Treaty Series*, vol. 73, 1950, pp. 132 ff.

In November 1944 delegates from 54 countries met at Chicago to establish an international framework for post-war civil air transport. In response to President Roosevelt's urging "to write a new chapter in the fundamental law of the air" the Conference first set out to draw up an international Convention applicable to all international civil air transport. Following thorough discussion it became evident that this objective could not be attained because of differing points of view respecting economic regulation. The United Kingdom, putting forward the view of a group of States, appealed insistently for the establishment of "order" in the air, accompanied by a concept of strict regulation of tariffs and frequencies, predetermination of the traffic potential with division of the market and precise limitations of the rights under what has been called the "fifth freedom", i.e. the right of an air carrier to embark or disembark traffic not originating in the country of the air carrier or not destined thereto. The United States, putting forward the view of another group of States, proposed a minimum of governmental regulation, this approach being based on the idea that extensive regulation of capacity and tariffs would stifle the competition necessary for the development of international aviation.

These differences were not overcome at the Chicago Conference nor at the meeting of the Commission on the Multilateral Agreement on Commercial Rights in International Air Transport held in Geneva in 1947. A compromise solution was not achieved until the Bermuda Conference in 1946. The Chicago Conference had, however, succeeded in establishing the basic framework of post-war international civil aviation through the Chicago Convention on International Civil Aviation which dealt with questions other than that of the right to operate scheduled commercial services; it had also drawn up a Form of Standard Bilateral Agreement intended to be used in the bilateral exchange of rights regarding the operation of scheduled international services. The Conference could only recommend that similar bilateral agreements be negotiated with a view to specifying, *inter alia*, the routes and rights granted. Even though the participants in the Chicago Conference did not reach agreement regarding the granting of rights relating to scheduled commercial services their discussions are instructive for the purpose of the case before us.

Despite the differences which became apparent with regard to general regulation of capacity and tariffs, no delegation at any time proposed any restrictions whatsoever regarding the type of equipment utilised or the type of service offered. The Chicago discussions bore mainly on capacity in a general sense, i.e. on a restriction of the total traffic carried, whether passengers, cargo or mail, without going into any detail on the question of whether such types of traffic should be carried separately or together.

In January 1946 United States and United Kingdom delegations met at Bermuda to negotiate an agreement on post-war air transport. This agreement was based on the Form of Standard Agreement for Provisional Air Routes drawn up by the Chicago Conference, to which was added what has since been called the "Bermuda formula" representing a compromise between the divergent approaches which had become apparent at the Chicago Conference. This compromise solution contains very flexible general principles and provides for *ex post facto* review of capacity and frequency, factors which have enabled it to be adapted to a large number of other bilateral agreements.

The negotiations with a view to the conclusion of the Air Transport Agreement between the United States and Italy began in autumn 1947, shortly after the Peace Treaty with Italy came into force. As we have

pointed out, the groundwork for the 1948 Bilateral Agreement had been prepared two years beforehand in the Air Transport Agreement between the United States and the United Kingdom, generally known as the Bermuda Agreement. The Agreement between the United States and Italy, as signed on 6 February 1948 is basically identical to the original Bermuda Agreement.

The essence of the Agreement is contained in Article 2 which specifies that each contracting party grants to the other party the rights as specified in the Annex, i.e. such rights as are "necessary for establishing the international civil air routes and services therein described". This Article, with Sections I, II and III of the Annex, which described the rights exchanged, represent the basic provisions of the Agreement here in dispute.

The 1948 Agreement between the United States and Italy was amended on two occasions with respect to the routes specified in the schedules, but did not undergo any further change. See exchange of notes of 21 and 24 March 1950 and exchange of notes of 4 August 1960. In accordance with Article 3 of the Agreement the Government of the United States designated "Trans-continental and Western Air Inc." (hereafter referred to as TWA) as its air transport company by Note Verbale of 5 May 1948 and "Pan American World Airways" (hereafter referred to as Pan American Airways or PAA) by Note Verbale of 22 September 1950. On 7 February 1950 the Italian Government designated the "Linee Aeree Italiane" Company (which subsequently became Alitalia) as its air transport company under the terms of the agreement. All these designations remain in force.

All-cargo Services between the United States and Italy prior to the present dispute

On 10 July 1945 the United States Embassy in Rome lodged a request with the Italian Government "to grant temporary rights to the United States Government for United States civil air services to perform transit and make non-traffic stops in Italian territory and the right to pick up and set down international traffic in cargo, mail and passengers at Rome". By its Note of 16 July 1945 the Italian Government acceded to this request and granted a "temporary concession . . . of rights of transit and non-commercial landing in Italian territory, and of rights to take on and set down cargo, mail and passengers at Rome". In conformity with this authorization TWA inaugurated a service between New York and Rome on 31 March 1946 and, by an exchange of notes on 4 September and 1 October 1946, TWA was authorised to make an intermediate stop at Milan.

On 31 January 1947 TWA inaugurated its flight 940-41 operating weekly all-cargo services between New York and Tel Aviv in both directions, with eight intermediate stops, including Rome. On 1 April 1950 TWA added Milan as an additional traffic stop on its transatlantic cargo service. TWA continued to serve Milan and Rome by this one weekly round trip service until 1 December 1950.

By reason of the urgent need for air transport caused by the Korean crisis TWA suspended its transatlantic cargo service from 11 May 1950 to 1 September 1952. In September 1952 TWA resumed its transatlantic cargo service, but did not resume cargo service to any point in Italy before 26 October 1958, at which time the weekly service between New York and Milan and Rome, via intermediate points, was resumed. In September 1959 TWA increased its New York-Rome cargo services to four round trips weekly, subsequently reducing them to three in December of the same year. In June 1962 a fourth weekly round trip was added. Thus when the present dispute arose TWA was offering four cargo services a week in each direction between Italy and the United States.

Pan American inaugurated cargo service between the United States and Italy on 20 September 1960, operating one weekly flight in each direction. On 24 November 1960 Pan American increased its frequency to four flights a week in each direction. In June 1962 it reduced its cargo services between the United States and Italy to three flights a week. When the present dispute arose Pan American was offering two cargo services a week in each direction between the United States and Italy.

Alitalia inaugurated its first scheduled cargo service between the United States and Italy on 18 January 1961. The number of Alitalia weekly cargo services varied during the following years but in summer 1963 it averaged three a week.

In each case the cargo services had been commenced in apparently the same manner in which other changes in service were effected. The cargo services were operated only on the routes specified in the respective schedules to the Agreement.

Origin of the present dispute

On 10 June 1963 Pan American submitted to the United States Embassy in Rome a new timetable for its New York-Rome cargo services, providing for an increase in the number of weekly services in each direction from two to four as from 10 July 1963. In accordance with its normal procedure the Embassy transmitted this timetable to the Italian aeronautical authorities on the same day.

On 3 July the Italian Ministry of Foreign Affairs sent the United States Embassy in Rome a Note Verbale declaring that "The Italian Aeronautical Authorities regret that they cannot consent to the increased frequency in the cargo service scheduled by the Pan American Company to begin July 10 next, and therefore the said company may operate only two weekly frequencies as heretofore". The Note added that "the imbalance already existing between Italian and United States services would be further aggravated with the introduction of two new cargo services, to the detriment of Alitalia, which would suffer serious harm from increased cargo services and consequent capacity, which are not justified by the demands of the traffic". The Note from the Italian Ministry of Foreign Affairs continued: "the Air Agreement . . . concluded between Italy and the United States of America on February 6 1948 regulates only the matter of mixed transports (i.e. passengers, mail and cargo), as is apparent from Section III of the Annex to the Agreement, [1] and not that of exclusively cargo services, which are not mentioned at all". The Note concluded by declaring that cargo services "are to be understood as having been operated on the basis of a reciprocal concession *outside the agreement*" and that "the increase in . . . services of the United States air lines during the summer of 1963, amounting to 43 per cent as compared with the previous year, has already brought about, also in the cargo sector, a surplus of available capacity which does serious harm to the Italian air line".

On 6 July 1963 the United States Embassy in Rome transmitted to the Italian authorities the new TWA timetable, which provided for an increase of two frequencies a week as of 7 August, i.e. an increase of from four to six

[1] The provisions of Section III of the Annex are as follows:

"One or more air carriers designated by each of the contracting parties under the conditions provided in the present Agreement and the Annex thereto will enjoy, in the territory of the other contracting party, rights of transit and of stops for non-traffic purposes, as well as the right of commercial entry and departure for international traffic in passengers, cargo and mail at the points enumerated on each of the routes specified in the schedules attached."

flights a week. By Note Verbale of 15 July 1963 the Italian authorities rejected the new TWA timetable for the same reasons as had been invoked in the case of Pan American.

In a Note dated 19 September 1963 the United States put forward their point of view, declaring that all-cargo services were included in the grant of rights set forth in Sections I and III of the Annex to the Agreement and requested that the Italian Government give prompt consideration to the matter. Following these exchanges, the United States carriers maintained cargo services on the basis of their previous timetables.

Recent developments in the dispute

On 3 December 1963 TWA transmitted to the Italian aeronautical authorities, through the intermediary of the United States Embassy, a timetable due to become effective from 3 January 1964. This timetable did not provide for any increase in frequencies but indicated the substitution of jet equipment on all four TWA cargo flights serving Rome. By its Note of 10 December 1963 the Italian Government refused its authorisation for the proposed substitution of jet aircraft and pointed out that to utilise such aircraft would more than double TWA's cargo capacity. The Note reiterated the Italian position, i.e. that the cargo services were not covered by the Agreement and were performed only on the basis of "temporary concessions". A second Note dated 12 December 1963 again indicated the same position.

Within a week the United States requested that official consultations take place in accordance with the provisions of Article 10 of the Agreement and that the Italian Government authorise the use of jet aircraft for all the cargo services during such consultations and without prejudice to the position of one or other of the Governments. The Italian Government replied on the following day, 18 December, signifying its agreement to the consultations but refusing to authorise the use of jet aircraft "until an agreement on the matter is reached through consultations".

The consultations between the two Governments were held at Rome from 9 to 20 March 1964. No agreement was reached as regards the legal status of the cargo services and it was agreed to submit the dispute to arbitration. The consultations had, however, led to an interim arrangement covering cargo services operated by jet aircraft, while awaiting the outcome of the arbitration. As indicated in the joint communiqué issued at the close of the consultations: "The two delegations agreed to an interim arrangement for prompt commencement of scheduled all-cargo jet services pending the outcome of the arbitration, to be operated through eight jet all-cargo services per week, of which up to four may be operated by the designated airlines of the United States and up to four by the designated airlines of Italy."

On the close of the consultations Pan American and TWA submitted their timetables to the Italian authorities through the intermediary of the United States Embassy; these timetables provided for the utilisation of jet aircraft for all the cargo services. In accordance with the interim arrangement Pan American and TWA each operated two jet cargo services a week from the beginning of summer, 1964. Prior to the consultations Alitalia had concluded an agreement with Airlift International Inc. (formerly Riddle Airlines) for the hire of a DC-8F jet aircraft to operate cargo services. This agreement had been approved by the Civil Aeronautics Board on 30 March 1964 and Alitalia had then inaugurated a jet cargo service between Milan and New York.

On 23 March 1964 the United States invoked the arbitration clauses of Article 12 of the 1948 Agreement; the Compromis of Arbitration was signed at Rome on 30 June 1946.

The facts resumed above have not been contested in the course of the present dispute, but the agent of the Italian Government emphasised in his pleadings on 27 January 1965 (verbatim record, page 4/10) that his Government "does not agree with the interpretation of the facts, be it in the matter of actions or omissions, nor do we agree with the interpretation of the diplomatic correspondence as suggested by the opposite party".

III. Summary of the contentions of the parties

While the Government of the United States holds that all-cargo services performed by scheduled air lines are covered by the 1948 Italo-American Agreement the Government of the Italian Republic maintains the contrary view.

The arguments put forward by the parties to the present dispute in support of their respective views relate principally to the following problems, which can be only briefly reviewed here:

(1) *Is the starting point for the interpretation of the text to be found in Section III of the Annex, or in Sections I and II, or in all three Sections?*

The *Government of the United States* holds that the Agreement should be read as a whole so as to render consistent Sections I and II and Section III of the Annex, and emphasises that Sections I and II of the Annex grant the two contracting parties the right to conduct "air transport services" on specified routes, the concept of "air services" being defined in Article 96(a) of the Chicago Convention, a provision which is also applicable to the present Agreement in virtue of Article 1(d) thereof.

The *Italian Government*, on the contrary, holds that the decision should be based essentially on Section III of the Annex, which specifies the commercial rights granted to the carriers of the two countries and it emphasises that Article 1 of the Agreement excludes any recourse to the definitions contained therein when the Agreement or its Annex provides otherwise, as would be the case of Section III of the Annex.

(2) *Are all-cargo services excluded from the scope of the Agreement by reason of the fact that Section III of the Annex employs the formula "passengers, cargo* and *mail"?*

The *Government of the United States* maintains that there is no such exclusion, and advances several reasons:

(a) It would be contrary to common sense to presume that there exists a contradiction between Section III and Sections I and II, which beyond all doubt include all-cargo services.

(b) Section III of the Annex refers only to types of load, and not to the means of transport employed.

(c) The words "and" and "or" are used indiscriminately to describe the whole system of commercial services.

These views are confirmed, in the opinion of this Government, by the origin of the Agreement, which is based on the Chicago Convention and on the Bermuda Agreement which were intended to regulate all scheduled commercial air services without exception; by the fact that the words "and" and "or" are used indiscriminately in the Chicago Convention and in similar bilateral agreements; by the equivalent meaning of these

two words in this context, as has been shown by reference to international jurisprudence, to dictionaries, to the Italian translation of Article 6 of the Agreement, and also the Agreement between Italy and Argentina, to the text of the Agreement between Italy and India, and to the 1949 Agreements between Italy and, respectively, France, Spain, etc.

The *Italian Government* insists that the Agreement must be interpreted on the basis of its text, i.e. according to the sense which the terms employed, read in their context, normally possess and in accordance with their ordinary meaning. This principle cannot be set aside unless textual interpretation would lead to an ambiguity or an unreasonable result.

The word "and" has, however, a cumulative sense and could not be equivalent to the word "or", which has an alternative sense. This point of view is based on a very searching philological study. In consequence, in accordance with the wording of Section III of the Annex, only the right to operate combination services was granted. The examples cited by the opponents do not prove anything because they relate to special and different hypotheses, as is revealed by a study of each of them.

The context does not in any way invalidate the contention that the Agreement is only intended to regulate combination services.

This interpretation, based on the wording of Section III of the Annex, does not lead to an unreasonable result because all-cargo services, which were still not well established at the time, could well have been left without international regulation, which could have been provided at a later date; on the contrary, it would be unreasonable to subject all-cargo services, which constitute a distinct type of traffic, to the same system as services carrying passengers, cargo and mail as regards the determination of permitted capacity. The I.C.A.O. study on trends and development of the air cargo industry throughout the world shows that in 1948 the carriage of cargo was merely complementary in character.

As regards preparatory proceedings, such do not exist for the 1948 Agreement; Italy, because of the special situation in which it found itself at that time, was unable to participate in the Chicago Conference and has evidently neither participated in the British-American negotiations of Bermuda.

The Agreements with third-party countries do not have the scope invoked by the opponents (a plea developed in greater detail in the Italian Counter Memorial, pp. 32 ff.).

On the other hand the 1961 discussions between Italy and the United Kingdom, several documents relating to which were filed by the Agent of the Italian Government during the oral pleadings (January 1965), show that all-cargo services are considered as requiring special regulation.

Finally, the Agreement in dispute was proposed by the American Government, with the result that interpretation *contra proferentem* must be applied, as well as the principle in accordance with which the interpretation which least restricts the sovereignty of States must be placed on this international agreement.

(3) *Subsequent conduct*

The *Government of the United States* invokes the conduct of the parties subsequently to the conclusion of the disputed Agreement as additional evidence concerning the intentions of the parties and the objective of the Agreement. It emphasises that all-cargo services had been operated from 1948 (and even before) until 1963, without advance authorisation or permission having ever been requested or granted. If, however, the disputed

Agreement did not cover cargo services these would have been illegal and prohibited in accordance with Article 6 of the Chicago Conference.

The *Italian Government* opposes this ground, claiming that it can be taken into account only if there exists ambiguity of the text, which is not the case in the matter at issue because of the very clear meaning of the word "and". Furthermore, this plea should be rejected because it lacks the character of continuity. In the view of the Italian Government, since the conclusion of the 1948 Agreement all-cargo services were conducted only on the basis of special concessions or tacit authorisations, granted for reasons of goodwill and at discretion; consequently, an official request would have been superfluous because the practice had not given rise to any difficulties. As soon as the capacity offered by the opposing party became excessive the Italian Government objected.

IV. Opinion of the Tribunal

(1) An Arbitral Tribunal called upon to rule on the interpretation of an international agreement must, in accordance with the principles generally recognised, in the first place analyse *the text* of the provisions in dispute.

See for example: *Advisory Opinion of the Permanent Court of International Justice concerning the frontier between Turkey and Iraq*, dated November 21, 1925 (P.C.I.J., Series B, No. 12, p. 19): "The Court must therefore, in the first place, endeavor to ascertain from the wording of this clause what the intention of the Contracting Parties was; subsequently, it may consider whether — and, if so, to what extent — factors other than the wording of the Treaty must be taken into account for this purpose." The same Court, in its *Opinion on the Polish Postal Service at Dantzig*, dated May 16, 1925 (P.C.I.J., Series B, No. 11, p. 39), states: "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context." This principle was confirmed in the *Advisory Opinion of March 3, 1950 on the competence of the General Assembly for the admission of a State to the United Nations* (I.C.J., Reports, 1950, p. 8) and *Advisory Opinion of June 8, 1960 on the Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization* (I.C.J., Reports, 1960, pp. 159-160). The *Courts of Justice of the European Coal and Steel Community*, in its judgement of December 21, 1954 (Notice 1/54) also bases itself essentially on interpretation in accordance with the wording of the Treaty. See also *Restatement, The Foreign Relations Law of the United States* (American Law Institute, Proposed Official Draft, 1962), Sections 149, 150.

The first issue before us is the interpretation to be placed on *Section III* of the Annex to the Italo-American Agreement of 1948. Article 2 of this Agreement refers to the Annex for the rights granted to the parties for establishing international civil air routes and services; and it is in Section III (and not Sections I and II) of the said Annex that the rights granted to the air carriers of the two countries are laid down.

This provision is worded as follows:

English text:

> One or more air carriers designated by each of the contracting parties under the conditions provided in the present Agreement and the Annex thereto will enjoy, in the territory of the other contracting party, rights of transit and of stops for non-traffic purposes, as well as the right of commercial entry and departure for international traffic in passengers, cargo and mail at the points enumerated on each of the routes specified in the Schedules attached.

Italian text:

> Le imprese di trasporto aereo designate da ciascuna delle Parti Contraenti secondo le disposizioni dell'Accordo e del presente Allegato, godranno, nel territorio dell'altra Parte Contraente, dei diritti di transito e di scalo per fini non di traffico, cosi come del diritto di caricare e di scaricare passeggeri, merci e posta in traffico internazionale, nei punti indicati in ciascuna delle rotte specificate negli elenchi allegati.

(2) Since according to this wording the rights, granted to the air carriers under the conditions provided in the present Agreement and the Annex thereto, are incorporated in the scope and the system of the agreement in dispute, the Tribunal must also take account of the other articles of the Agreement and Annex, in particular Sections I and II of the Annex; this obligation arises from the fact that the text to be interpreted must be read in its context; and the context "is constituted by the body of the provisions of the agreement with which the text under discussion is logically related" (*Charles de Visscher:* Problèmes d'interprétation judiciaire en droit international public; Paris, 1963, p. 59). In this connection it will be noted that by Sections I and II of the Annex the two Governments reciprocally grant each other the right to conduct "air transport services" on specified routes.

The term "air services" is defined in paragraph (a) of Article 96 of the Chicago Convention of December 7, 1944 on international civil aviation, and according to Article 1 (d) of the Agreement in dispute the definitions contained in paragraphs (a), (b) and (d) of Article 96 of the Chicago Convention shall be applied to the present Agreement and its Annex "except where the text provides otherwise" ("salvo nei casi ove il testo provveda altrimenti").

The definition of the term "air services" contained in Article 96 (a) of the Chicago Convention is worded as follows:

> For the purposes of the present Convention — (a) Air services means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo.

This definition speaks of "public transport of passengers, mail *or* cargo"; whereas Section III of the Annex contains the formula "passengers, cargo *and* mail".

(3) Since the formula used in Section III of the Annex differs from that contained in Article 96 of the Chicago Convention the definition contained in the latter cannot be applied at the outset of our analysis for the purpose of interpreting Section III of the Annex. The interpretation of this Section must therefore be based in the first place on the wording thereof.

If the formula "transport of passengers, cargo *and* mail" is interpreted purely on grammatical methods, it must be held that the word "and" does not normally have the same meaning as the word "or".

As has been shown by numerous citations from dictionaries and grammars and by a detailed philological study in the course of the written and oral proceedings, in ordinary language and in legal terminology the word "and" is a conjunction, having a cumulative sense, co-ordinate or co-ordinating; this holds equally good both for the English word "and" and the Italian word "e".

However, closer analysis of the text of Section III reveals that, if we accept this meaning of the word "and", the wording by no means implies that all-cargo services are excluded and not covered by the provisions of this Section.

Again, the Italian text of Section III merely states that the air carriers have in particular the right to embark and disembark passengers, cargo and mail ("il diritto di caricare e di scaricare passeggeri, merci e posta in traffico internazionale").

Attributing its normal cumulative sense to the word "and", the text merely declares that the carriers have the right to embark and disembark one *and* the other of these three types of load, i.e. that they can embark and disembark passengers, embark and disembark cargo, embark and disembark mail. The text thus enumerates cumulatively possible types of load for carriage by air and grants the *right* — without, however, imposing any obligation! — to carry them all; on the other hand, this text does not pronounce on the type of the means of transport to be employed — the nature, equipment, type or utilisation of the aircraft performing the carriage, nor of the kind or character of service. It therefore does not follow directly from the text that only combination services are permitted.

If it were desired to interpret the text in another fashion, namely to the effect that it only permitted passengers, cargo and mail to be embarked or disembarked at one and the same time, such an interpretation would be incompatible with the objective of the Agreement, as will be illustrated below. It is furthermore clear that the text does not in any way specify an obligation to embark or disembark simultaneously the three types of load. Such a requirement would in any case be meaningless, since it would be absurd to introduce into an Agreement governing scheduled air services between the two countries a provision to the effect that an aircraft which was not carrying passengers as well as cargo and mail could not disembark what it was carrying or that the carrier performing the air transport could not, for example, embark passengers and cargo if there were no mail for carriage at the same time. Nor, in these circumstances, can it be concluded that there exists an obligation that the aircraft involved should be scheduled for combination service offering at least the possibility of carrying these three types of load together. The text is silent on this point and, on the basis of its wording, does not justify such a conclusion.

The same interpretation must be given to the English text ("the right of commercial entry and departure for international traffic in passengers, cargo and mail"). The system of commercial rights applies to all carriage by air regardless of the means of transport employed, or of the kind or character of service, so that it includes both combination services and all-cargo or all-mail services, as will be explained in greater detail below, under No. 5.

Thus neither the English nor the Italian text of Section III of the Annex, interpreted in the normal sense of the terms used, excludes all-cargo services. In consequence any conclusion to that effect cannot be founded on the text; it could only rest on a deduction concerning the scope of the text, thus on interpretative reasoning according to which the two texts of Section III necessarily determined the type of the means of transport to be employed and the kind or character of service. But since the text is silent on this point, such an interpretation would be purely gratuitous, unless it were based, not on the text, but rather on the real intentions of the parties, which as will be seen hereinafter, do not support such an interpretation.

Accordingly, even on a bare textual analysis, using the word "and" in Section III in its normal cumulative sense, all-cargo services are included in, not excluded from the right of commercial entry and departure for international traffic on the part of designated air carriers.

It should be stated at this point that since the Tribunal is of the opinion, for the reason stated herein both above and below, that the meaning of the Agreement is clear and not ambiguous, neither the theory of interpretation *contra proferentem* nor the principle according to which the interpretation to be placed on an international agreement should be that which least restricts the sovereignty of States, can be applied to the case in point; in these circumstances, it is not necessary for the Tribunal to pronounce on these principles, the second of which, in particular, is fairly controversial.

See: *Judgement of the Permanent Court of International Justice relating to the Territorial jurisdiction of the International Commission of the River Oder* (Series A, No. 23, p. 26): "Nor can the Court . . . accept the Polish Government's contention that, the text being doubtful, the solution should be adopted which imposes the least restriction on the freedom of States. This argument, though sound in itself, must be employed with the greatest caution"; see also *the decision of the Franco-Spanish Arbitral Tribunal in the Lake Lanoux case* (Revue générale de droit international public, 62, 1958, p. 99): "It has been advanced . . . that these modifications should be interpreted in a restrictive manner because they are in derogation of sovereignty. The Tribunal cannot admit of such an absolute formula"; see also: *Bernhardt*, Die Auslegung völkerrechtlicher Verträge (Cologne-Berlin, 1963, pp. 143 ff.).

The affirmative answer to the question asked of the Tribunal which thus appears to be called for by the foregoing analysis is supported, not contradicted, by an analysis of other evidence relating to the meaning of the Agreement to which the attention of the Tribunal has been called by the parties.

See: *Advisory Opinion of the Permanent Court of International Justice concerning the frontier between Turkey and Iraq* (P.C.I.J. Series B, No. 12, p. 22): *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization* (I.C.J., Reports, 1960, pp. 161 ff.); *Restatement, Foreign Relations Law*, op. cit., section 150, regarding the relevance of evidence other than the Agreement itself.

(4) The conclusion that all-cargo services are covered by the 1948 Agreement is also ineluctable if it is accepted that the text of Section III of the Annex [covered such carriage if it were] established that the word "and" has, in the case in point, the meaning of "or" ("o"), which has the sense of an alternative.

This appears to be the case in the matter before us.

It is apparent that the word "and" is sometimes used as an equivalent to the word "or", as the *Permanent Court of International Justice* stated in the case concerning *Certain German Interests in Polish Upper Silesia (Chorzow Factory Case)*, in its Decision of August 25, 1925 (P.C.I.J., Series A, No. 6, p. 14), when it declared: "the word 'et . . . in both ordinary and legal language', may, according to circumstances, equally have an alternative or cumulative meaning".

This statement was made in respect of a case in point, but it can also be applied in the matter now before us. In point of fact the case before us embraces circumstances which reveal that the word "and" has been used in Section III of the Annex as equivalent to the word "or". In these circumstances the natural and ordinary meaning of the term must be set aside.

See: *Resolution of the Institute of International Law, adopted April 11-20, 1956*, at Granada, (Yearbook of the Institute, 1956, pp. 358 ff.):

> Article 1:
>
> (1) Since the agreement of the parties is based on the text of the treaty, the natural and ordinary sense of the terms thereof must be taken as the basis of the interpretation...
>
> (2) If, however, it is established that the terms employed must be understood in a different sense, *the natural and ordinary sense of these terms is set aside.*

See also a more recent judgement of the *International Court of Justice in the South-West Africa Case* (I.C.J., Reports, 1962, p. 336):

> This contention is claimed to be based upon the natural and ordinary meaning of the word employed in the provision. But if this rule of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.

For a similar opinion see: *Guggenheim*, Traité de droit international public (Geneva, 1953, Vol. I, p. 133); and *Charles de Visscher*, op. cit., pp. 17 ff.

In the present case it appears from the context, the objective aimed at in the Agreement and from the intentions of the parties, that the word "and" was employed as equivalent to the word "or":

(a) At several points in the text of the Agreement, of its Annex and of the Chicago Convention, the words "and" and "or" have been employed indiscriminately, as if they were interchangeable.

Thus it may well be asked if the word "and" does not mean "or" in the Italian text immediately preceding the formula used in Section III of the Annex "passeggeri, merci e posta", i.e. in the phrase "diritto di caricare *e* di scaricare"; in point of fact this right is obviously granted for the two operations, embarkation and disembarkation, in an alternative sense, since it is clear that disembarkation can be effected without simultaneous embarkation and *vice versa.*

Yet other examples could easily be cited; but it is sufficient to mention the following cases:

In Article 6 of the 1948 Agreement the word "or" used in the English text is in the Italian text sometimes rendered by "e" and sometimes by "o", as if the two terms were interchangeable.

Similarly, the Chicago Convention, on which the Agreement in dispute is based, employs in Article 5 (2) the word "or", whereas in Article 7 the same formula recurs using the word "and"; again, Article 96 speaks of "transport of passengers, mail *or* cargo", whereas the note drawn up at Chicago in the course of the conference and appended to the Form of Standard Agreement for Provisional Air Routes, to which the Resolution contained in the Final Act of the Conference refers (*Revue française de droit aérien*, 1947, p. 61) speaks of the right to embark and disembark passengers, cargo *and* mail.

(b) For the reasons set forth above under No. (2), Sections I and II of the Annex must be taken into account also in interpreting Section III.

These Sections grant to the respective Governments the right to conduct air transport services ("servizi di trasporto aereo") on specified routes.

The concept of air services is defined in Article 96(a) of the Chicago Convention as "scheduled air service performed by aircraft for the public transport of passengers, mail *or* cargo".

Since the text of Sections I and II of the Annex do not contain any provisions derogating therefrom, this definition applies to these two Sections in virtue of Article 1 (d) of the 1948 Agreement.

The fact that Section III of the same Annex employs a different formula, i.e. "and" instead of "or", does not by any means hinder the application of the above-mentioned definition to Sections I and II, since Section III does not speak of "air services", the concept of which definition is at issue here.

It would however be incomprehensible for the Annex to permit carriers to operate only combination services, while at the same time granting the Governments the right to operate all-cargo services as clearly results from the alternative sense of the word "or" which must be attributed to the text of Sections I and II in virtue of the above-mentioned definition.

The fact that such a divergence certainly cannot respond to the intentions of the parties constitutes another indication of the way in which the word "and" is used in Section III as an equivalent to the word "or".

(5) There are other indications to show that, in accordance with the intentions of the parties and the objective sought in the 1948 Agreement, all-cargo services were not excluded:

(a) The Italo-American Agreement of 1948 is based on the 1946 Bermuda Agreement, the text of which it reproduces to a large extent.

For a clear understanding of the Agreement in dispute and in order to take account of the intentions of the parties and of the objective of the Agreement it is therefore necessary to examine also the Bermuda Agreement (Appendix W to the American Memorial).

That Agreement was concluded between the United States of America and the United Kingdom in February 1946. Its objectives were to fill the gaps as regards commercial rights for scheduled air services, on which the 1944 Chicago Conference on civil aviation had been unable to reach agreement.

It is not necessary to review in detail here the régime envisaged by the Chicago Convention as regards civil rights in international air traffic, known as the "five freedoms of Chicago"; this system is well known to any jurist specializing in aviation law (see *Riese-Lacour*, Précis de droit aérien, Paris, 1951, pp. 80 ff.). It will suffice to recall that Article 1 of the Chicago Convention acknowledges the sovereignty of each State over the atmospheric space above its territory; that in Article 6 the right of scheduled services to transitor serve the territory of a contracting State is subject to express special permission or authorisation from such State. This rule is mitigated only in respect of the carriers of those States which are parties to the International Air Services Transit Agreement, a complementary agreement also drawn up at the Chicago Conference. In virtue of this agreement the said carriers enjoy the first two freedoms of Chicago (transit rights, right to non-commercial, technical, stops). In contrast, the 3rd, 4th and 5th freedoms, the so-called commercial freedoms, permitting the embarkation and disembarkation of passengers, mail and/or cargo, were not granted to scheduled airlines under the Chicago Convention, so that they must be granted either by special permission or under a bilateral agreement. The Chicago Conference had to limit itself to including in its Final Act a recommendation to States that they conclude such bilateral agreements and the Form of Standard Agreement on this subject which we referred to above.

Following this recommendation, and with a view to establishing a legal framework for international civil aviation, the Bermuda Agreement was concluded between the United States of America and the United Kingdom on February 11, 1946.

This Agreement achieved a compromise between the American desire to obtain the greatest possible freedom of traffic, with a minimum of control, and the British desire to have economic supervision of scheduled air services. Thus the Bermuda Agreement grants to the scheduled services of the two countries the 5th freedom of Chicago, subject to precise limitations and supervision of tariffs and frequencies.

This Agreement, achieved after lengthy negotiations, was intended to govern all kinds of scheduled air transport between the two countries, in a flexible manner.

It must be pointed out that this Agreement, like the above-mentioned Standard Form of Agreement inserted in the Final Act of the Chicago Conference, employs, as does Section III of the 1948 Agreement in dispute, the formula "commercial entry and departure for international traffic in passengers, cargo *and* mail" without excluding all-cargo services and without any restriction regarding the type of equipment, or the kind or character of service, the capacity operated being subject to *ex post facto* review.

The Bermuda Agreement does not contain any express provision excluding all-cargo services, nor can such an exclusion be presumed. The very fact that Section V of the Annex to the Bermuda Agreement makes provision governing the case where there occurs a change of size of aircraft ("change of gauge"), without introducing restrictive measures based on the utilisation of the aircraft, would conflict with such a presumption (Revue française de droit aérien, 1947, p. 119). Above all, the objective of the Agreement — to establish a legal framework for all international commercial civil aviation — does not permit such a presumption. This objective is also reflected in the Chicago Convention to which the Agreement expressly refers and the Preamble of which declared that the contracting Governments were agreed on these principles in order that "international civil aviation may be developed in a safe and orderly manner and that international air transport services may be [established on the basis of equality of opportunity and] operated soundly and economically" (just as the Preamble to the 1948 Italo-American Agreement underlines the desire to promote air communications between the two countries). Neither in the Chicago Convention, nor in the Bermuda Agreement, nor, finally, in the Italo-American Agreement, do we find all-cargo services excluded from a régime intended to benefit international civil aviation as a whole. If it had been intended to exclude all-cargo services from this régime, this would certainly have been stated clearly, since this form of air transport was already known and practised, even if only to a limited extent — only later did it attain its present large scale; this is clearly shown by the study of trends and developments in the air cargo industry throughout the world, published by I.C.A.O. (document 8235-C/937), included in the submissions of the Italian Government. At all events, all-cargo air services were already known and being operated at the time the Bermuda Agreement and the 1948 Italo-American Agreement were concluded, and this fact is decisive. Besides, it is a well-known fact that the jurists called upon to establish a régime for international air navigation, being conscious of the never-ending technical advances and of the possibilities of its future evolution, have hitherto always tended to allow for future developments insofar as they can be foreseen. Yet, when the Agreements in question were concluded, the establishment of all-cargo

services was not only foreseeable but indeed already practically an accomplished fact. In these circumstances it cannot be contended that the authors of these Agreements wished to exclude this type of transport, leaving it without any legal basis, or reserving it for subsequent agreements. If such had been their intention they would not have failed to state so clearly.

Finally, it is apparent from the Final Act of the Bermuda Conference that the régime established at that Conference was intended to govern all types of air transport without exception, since it is provided therein, in quite a general manner, that the primary objective is 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" (Appendix W to the American Memorial, p. 19), which without doubt also includes the demand for cargo transport.

(b) In a press communiqué published by the Italian Ministry of Foreign Affairs (Appendix X to the American Memorial) it was specifically acknowledged, following the conclusion of the disputed 1948 Agreement, that the Agreement was based on the so-called Bermuda formula, which itself derives from the Chicago Convention to which Italy adhered in 1947. The fact that this press communiqué also mentions that the principles of that Convention were adapted to the needs of the traffic between the two countries does not in any way invalidate the finding that the Agreement in dispute was based on the Bermuda Agreement, because the reference in question is to the principles established by the Chicago Convention whereas the matter before us relates to the Bermuda Agreement.

(c) Even if it is thus established that the Bermuda Agreement served as a model and a basis for the Agreement proposed to Italy by the United States in 1948 (in the same way as it served as a model for a large number of similar bilateral agreements entered into by the United States) the Bermuda Agreement cannot, nevertheless, be described as "preparatory work" for the disputed 1948 Agreement, since Italy was not a participant in the Bermuda negotiations.

Despite this, account can justifiably be taken of the régime envisaged under the Bermuda Agreement, since Italy was aware, as indicated in the above-mentioned press communiqué that it was to serve as the basis for the disputed 1948 Agreement, and was also well acquainted with the Bermuda Agreement.

As was pointed out in the course of the proceedings, this emerges from the fact that an Italian delegation played an active part in the meeting of the Commission on the multilateral agreement on commercial rights in international civil air transport, held at Geneva in November 1947 under the chairmanship of Professor Amstutz. During that meeting the problem of permitted capacity and the question of the rules laid down under the Bermuda Agreement were discussed at length. The Italian delegation even submitted a proposal concerning capacity, and the Head of the Italian delegation, Professor Ambrosini, spoke in detail on this proposal at the sitting on November 11, 1947 (I.C.A.O. document 5230, A 2 — EC/10, Vol. II, part I; the Italian proposal is given as document MAC/46 on page 97 of Vol. I). The attempt to reach a multilateral agreement was, incidentally, unsuccessful.

This reference to the 1947 Geneva meeting obviously cannot be used in interpreting the disputed 1948 Agreement, because these antecedents have no bearing on it. The Tribunal mentions them solely to show that at the time the 1948 Agreement was concluded the Italian Government was

acquainted, if not with the preparatory work for the Bermuda Conference, then at least with the régime established by the Bermuda Agreement and the provisions thereof which served as a basis for the disputed 1948 Agreement.

(d) It is apparent from the foregoing that the objective aimed at by the American Government in the disputed 1948 Agreement was to secure the adoption of rules corresponding to those provided under the Bermuda Agreement and covering all types of air traffic, without excluding all-cargo service.

As for the Italian Government, it must have been aware of this objective, since it was acquainted with the content and principles of the Bermuda Agreement and it was therefore with full knowledge of the facts that it accepted the proposals. In these circumstances, even if it believed (although erroneously, in the Tribunal's opinion) that the use of the word "and" in Section III of the Annex to the Agreement could favor its wish to permit combination services only, it could not merely retain this conviction as a "mental reservation" without making it known to the other party and without insisting that the exclusion of all-cargo services be clearly set forth in the text of the Agreement.

(e) Finally, it should also be emphasised that the disputed Agreement could not be understood as meaning that all-cargo services were covered only to the extent to which such services were possible at the time when the Agreement was concluded, so that the régime provided for therein would not be applicable if greater capacities were employed, such as are at present possible, thanks to the introduction of jet aircraft. Such a restrictive interpretation conflicts with the objective of the Bermuda Agreement, as explained above, with the text of the disputed Agreement which is drafted in quite general terms, and, finally, with the fact that the said Agreement and its Annex make provision (particularly in Sections IV and IX of the Annex) for protective measures designed precisely to offset possible disadvantages resulting from an increase in capacity. Therefore no grounds subsist for presuming the existence of a reserve of this nature respecting the future development of capacity available.

(6) Another indication that the parties did not intend to exclude all-cargo services from the application of the 1948 Agreement is to be found in their subsequent conduct.

(a) The conduct of the parties in their application of the 1948 Agreement is not, of course, in itself decisive for the interpretation of the disputed text; it can however serve as additional evidence as regards the meaning to be attributed to the text on the basis of the objective sought and the intentions of the parties.

See: *Advisory Opinion of the Permanent Court of International Justice concerning the competence of the International Labor Organization with respect to agricultural labor* (P.C.I.J., Series B, August 12, 1922, pp. 39-41).

For this purpose only the conduct of the parties subsequent to the conclusion of the 1948 Agreement can be taken into consideration.

United States carriers operated all-cargo services from 1948 to 1950, when they had to suspend them as a result of the Korean crisis; these services were resumed in 1958 and continued until 1963 when notice of the present dispute was first given by the Note Verbale of the Italian Ministry of Foreign Affairs dated July 3, 1963 (Appendix J to the American Memorial).

In 1961 Alitalia inaugurated its all-cargo service.

Now, all these services were notified simply by letter (for example, Appendix LL to the American Memorial) without one side or the other having ever requested or granted special permission.

From such practice it appears that both parties acted from 1948 up to July 1963 on the basis that the 1948 agreement did cover all-cargo services.

If the parties had been of the opinion that such services were not covered by the Agreement they would have been obliged to apply for special permission before operating them. Such permission would certainly not have been superfluous because if the services in question were not covered by the Agreement they could not legally have been performed without it. This results clearly from Article 6 of the Chicago Convention (and also from the domestic legislation of the United States, section 402 A, United States Federal Aviation Act, 1958).

(b) It has been put forward as an objection that the all-cargo operations in question lacked continuity. It is correct that only a constant practice, observed in fact and without change can constitute a rule of customary international law.

However, in the case in point the matter at issue is not to deduce a legal standard from the practice followed but merely to reveal the interpretation the parties gave to the provisions in dispute, which can serve as additional evidence in ascertaining the intentions of the parties and illustrate their intent as of the time the Agreement was concluded. For this purpose a shorter period of continuity is sufficient.

See: *Opinion of the International Court of Justice concerning the international status of South-West Africa* (I.C.J., Reports, 1950, pp. 135-136): "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning have considerable probative value when they contain recognition by a party of its own obligations under an instrument". *Charles de Visscher*, op. cit., p. 125, adds: "In the latter case it can even be held that it is not necessary that the attitude to be maintained have the character of more or less prolonged behaviour".

The position would be different if the point at issue involved concluding from practice that there had been a subsequent amendment of the Agreement, as was upheld by the *Arbitral Tribunal* in the *dispute between the Government of the United States of America and the Government of the French Republic regarding the interpretation of the Agreement concerning air transport services* (sentence of December 22, 1963). But in the case before us neither the Tribunal nor the parties would wish to draw such a conclusion from the conduct of the parties.

Be that as it may, in the case in point continuity cannot be denied, even though the actual operations extended only over some six years. What counts is that throughout the periods during which all-cargo services were being operated by one or other of the parties the said practice was followed without exception. For this reason, continuity in practice cannot be denied.

At no time did the parties declare that they considered that such services were operated under special permission granted outside the framework of the 1948 Agreement or under concessions granted as a matter of good will or at discretion. Even when in 1958 TWA resumed its all-cargo services, after the Korean crisis, no authorization, permission, or "special concession" was requested or required, and the same applies to the case of PAA in September 1960; finally, Alitalia inaugurated its all-cargo service in January 1961 without applying for special permission in advance and merely notifying its intention of operating the service. It was only in 1963 when

the American carriers were considering increasing the frequencies of their cargo services, and particularly when they wished to operate their all-cargo services with jet equipment having a much greater payload capacity, that the Italian Government, whose carriers did not possess similar equipment at that time, invoked the non-applicability of the Agreement to such services.

Such conduct must also be taken into consideration as an indication of the intention of the parties.

(7) So far as agreements between the parties to this dispute and third countries are concerned (e.g. Italian-British or U.S.-Indian agreements), while the Tribunal considers that evidence of the parties' practices in respect of third States may constitute evidence of their intentions in regard to each other, it also considers that evidence of this kind in the instant case is of minor importance in view of the clear evidence of the meaning of the Agreement furnished by the foregoing analysis of the language of the Agreement, and by the practice of the parties in relation to each other under the Agreement. Nonetheless, the Tribunal has considered the evidence adduced by both parties in respect of their practices in relation to third States so far as all-cargo operations are concerned. The Tribunal is of the opinion that most of this evidence, which, as indicated, appears to be of minor importance in this case, is consistent with, rather than contradictory to, the text of the Agreement and the practice of the parties in relation to each other under it, as analyzed heretofore. To the extent that some of it may not be so consistent or may be neutral, the Tribunal is of the view that it is either overborne or offset by the contrary evidence on this aspect of the case. And, as has been indicated, the Tribunal considers that, under the circumstances of this case, this factor (practice with third parties) is of marginal significance at all events.

(8) It is not for the Tribunal to pronounce on the question of whether the disputed Agreement and the other agreement based on the Bermuda Agreement still constitute an appropriate, fair and equitable solution, in view of the development of civil aviation and the growing importance of all-cargo services. This question has not been submitted to the Tribunal; it is a question for Governments.

If any amendment appears appropriate it can only be effected following negotiations between the two Governments and the conclusion of a new Agreement.

The 1948 Agreement furthermore provides a number of means, in Sections IV to IX of its Annex, for the safeguarding of the legitimate interests of the two parties, and the applicability of such provisions is in no way restricted by the present Advisory Opinion.

On the afore-mentioned grounds,

Having considered the documents submitted, and

Having heard the submissions of the parties,

THE ARBITRAL TRIBUNAL

by two votes to one, gives *an affirmative reply* to the question submitted to it, and declares:

The Air Transport Agreement between Italy and the United States of February 6, 1948, as amended, grants the right to a designated airline of either party to operate scheduled flights carrying cargo only.

Arbitrator R. Monaco appends to the Advisory Opinion a statement of his dissenting opinion.

GIVEN at Geneva, on 17 July, 1965

Otto RIESE Stanley D. METZGER

READ in closed session at Geneva, the parties having been convoked, on 17 July 1965.

Registrar: *President of the Arbitral Tribunal:*

Philippe CAHIER Otto RIESE

DISSENTING OPINION

by

Mr. Riccardo MONACO

1. To my great regret I must state that I cannot agree with the opinion handed down by the majority of the members of the Arbitral Tribunal. For that reason, availing myself of the provision contained in Article V, paragraph 2, of the Compromis of Arbitration dated 30 June 1964, I have decided to append my dissenting opinion to the Advisory Opinion given by the said Tribunal.

I differ from the opinion expressed by the majority on several points of law. The points in question are juridical arguments which, while based on the particularities of the case before us, are directly related to the general theory of the interpretation of international agreements.

In my view, when an international agreement of a special nature is under consideration for purposes of interpretation, it is impossible to depart from the method on which any attempt to interpret rules of international law must be based. Even though the juridical aspects applicable to air transport and the relevant international agreements have evolved along special lines, I do not believe that it is possible to distort certain basic facts, to the extent of making the letter and the scope of general agreements, or at least agreements conceived in a general framework, entered into between third-party States applicable to a particular legal agreement, the interpretation of which is in dispute.

Despite the fact that the majority opinion invokes fairly frequently international jurisprudence and even theory respecting interpretation, the distortion of method and of concept to which I have referred is so apparent that I find myself under the obligation of giving an opinion different from that of the other members of the Arbitral Tribunal.

The foregoing summarises the grounds on which my opinion is based.

2. The structure of the Italo-American bilateral air transport Agreement, like practically all the bilateral air agreements in force, comprises two parts: the first part is the normative part of the agreement, i.e. that which includes definitions, general principles and provisions of a purely normative nature; the second part, in contrast, represents the economic and commer-

cial content of the Agreement since it contains the specification of routes and of the traffic rights relating to these routes.

The normative character of the provisions contained in the first part of the Agreement and the primarily economic character of the second part appear quite clearly if it is borne in mind that it is precisely the second part, and only the second part, which is generally capable of being amended or revised in the light of the factual situation which, as regards civil aviation, undergoes constant and very rapid development.

However Article 2 of the Italo-American Air Transport Agreement, an article which is included in the first part of the agreement, can only take effect as regards the reciprocal grant which the parties make, in principle, of the rights required for the operation of international air services. The content of such grant is set forth in the second part of the Agreement, called the Annex, more precisely in Section III thereof.

3. The purpose of Sections I and II of the Annex, under the system described above, is to ensure the relationship between the provisions of Article 2 of the Agreement and the provisions of Section III of the Annex. These sections merely provide that the rights which the two parties exchanged reciprocally in virtue of Article 2 of the agreement will be exercised by the airlines to be designated by the two Parties.

Section III, which provides that the traffic rights will be exercised by the airlines designated by each of the contracting Parties "under the conditions provided in the present Agreement and Annex thereto", refers of course to the designation of the airlines and to the conditions governing such designation.

If such be the system established by the Bilateral Agreement, the reference to the Chicago Convention, in particular Article 96(a) of that Convention, for the purpose of defining the phrase "air services" contained in Article 1(d) of the Agreement and Sections I and II of the Annex can only be applicable as regards general principles and definitions. The reference cannot therefore affect — as is moreover established by the reservation expressly made in Article 1 of the Agreement — the content of the rights which the two parties exchanged in virtue of the Bilateral Agreement.

4. The system of the Bilateral Agreement must indisputably be examined within the framework and on the basis of the principles contained in the Chicago Convention, but in the meaning that it was precisely the Chicago Convention which laid the foundations for the whole system. In that Convention it is affirmed in Article 1 that a State has sovereignty over the space above its territory, and in Article 6 the lines to be followed in developing the system of international air transport are indicated as follows: "no scheduled international air seirvice may be operated over or into the territory of a contracting State, except with the special permission or other authorisation of that State, and in accordance with the terms of such permission or authorisation".

The sole source of the obligations and rights of the two Parties in dispute is the Bilateral Air Transport Agreement and the content of these rights and obligations must therefore be determined by reference to the common intention of the Parties as manifested in the Agreement.

5. The intention of each of the Parties to grant to the airline designated by the other Party the right to operate international air services on its territory is contained only in Section III of the Annex. The divergent interpretations given to this Section by the two Parties constitute the basis of the present dispute.

It must first of all be pointed out that the word "and" does not generally have the same meaning as the word "or", since the former is indisputably a conjunction having a cumulative and co-ordinating meaning. This observation can also be made insofar as the English language is concerned.

Consequently, if the word "and" be given its normal meaning, Section III of the Agreement certainly excludes and does not make provision for the operation of all-cargo services.

It would appear in this connection that we should avoid begging the question in that an endeavour is made to exclude a given view (the exclusion of all-cargo services) after having rejected a view which had already been accepted (the normal meaning of the word "and").

In point of fact, in addition to the right (which moreover, involves no obligation) of commercial entry and departure of passengers, of commercial entry and departure of cargo, of commercial entry and departure of mail, there exists in accordance with the terms of Section III the right of commercial entry and departure of passengers, plus cargo, plus mail. It is the three types of load which must be regarded as cumulative because, firstly, of the comma and, subsequently, of the word "and", and not the three operations of entry and departure. It is of importance to emphasise this interpretation because, as will be seen, these operations may, in accordance with the provisions of the Agreement, be reduced to fewer than three activities relating to the three types of load. It cannot be objected that, if the Italian text were to be interpreted differently, there would be incompatibility with the English text, because the word "and" has the same philological and grammatical meaning as the word "e" in Italian. This point has already been made above. In any event if, by way of a *reductio ad absurdum*, such incompatibility were to be admitted, the interpretation of the more restrictive text would still have to be applied.

6. The text of the Agreement imposes no obligation on the parties to embark *simultaneously* the three types of load, for the simple reason that it merely provides for the *right* (and consequently the faculty of exercising that right) to carry passengers, plus mail, plus cargo. It is obvious that the exclusive carriage of cargo, i.e. carriage of cargo alone, performed by an aircraft built specifically for such carriage and as such incapable, for example, of carrying passengers, is not included in the Agreement because it was never envisaged in the provisions thereof. But combination service by aircraft capable of carrying only passengers and mail cannot be regarded as excluded (because not provided for in the Agreement), since such carriage represents a "minus" in relation to the right to carry not only two but three types of load at the same time.

In other words, a service which has the technical and operational characteristics of combination service (as well as the aircraft capable of operating such services) must be considered as being covered by the Agreement, even in cases where only passengers and mail, or passengers and cargo, or even, in theory, a single type of load, were embarked. While both parties have the right (and not the obligation) to embark the three types of load at the same time on combination services, it is certainly possible to embark, for reasons imposed by the exigencies of traffic, only one type of load on such services (i.e. something less than what is permissible), on condition that to do so does not alter the nature of the service, which is and must always remain a combination service.

A correct interpretation of the English text of the Agreement cannot but lead to the same conclusions. The exchange of traffic rights between the

two countries cannot fail to take account of the type of services through which these rights are to be exercised. There can be no doubt that all-cargo services today represent (as they have already done for a long time) a category quite distinct, both by reason of the means of transport and of the technical and operational requirements thereof, from any other type of service, and consequently from the combination service provided for in Section III of the Agreement.

7. There is no point in consulting the above-mentioned Section III for a specification of the type of means of transport to be employed, since such specification cannot come within the scope of the Agreement. Rather than *means of transport*, the Agreement must specify the *type of service* which the two parties are exchanging. The Agreement, beyond doubt, provided for *combination services* and made no explicit mention of all-cargo services. Even if the type of means of transport had been indicated (but it was not considered necessary to be so) such an indication could not amend the nature of the services, which is and must only be that of combination services. Otherwise one would arrive at the absurd conclusion that, for a service to be considered as an all-cargo service, the fact that an aircraft were to carry only cargo because of fortuitous exigencies of traffic would suffice and not the far more important fact of the intention determining the operation of such service by the airline exercising the traffic rights it has secured.

Consequently, if all-cargo services are not expressly provided for in the Agreement they must be regarded as excluded. Even if a different view were to be maintained — quite an extremist view — it could never lead to the conclusion that such types of services are included in the Agreement. If any ambiguity exists, the interpretation principle of *contra proferentem* must be applied, together with the principle according to which the interpretation to be adopted is that which least restricts the sovereignty of the State.

In the phrase "the right of commercial entry *and* departure", the word "and" can only have a conjunctive meaning, i.e. to the effect that to the right of entry there must be added the right of departure, since the two operations are bound up with and conditioned by each other. The fact that these two rights were granted does not necessarily mean that they must be exercised simultaneously by the airline, since what is involved is a right (a faculty) and not an obligation. It is therefore not necessary to attribute to the word "and" the alternative meaning of "or" in order to enable the airline to perform only one of these operations since, under certain traffic conditions, the departure can take place even if there is no simultaneous entry and vice versa, but always within the scope of the right granted, which is that of entry and departure of cargo, mail and passengers.

8. The definition contained in Article 96 (a) of the Chicago Convention can be applied in all cases except where the text provides otherwise (Article 1 of the Agreement). If, as a hypothesis, the above-mentioned definition were to be held applicable to Sections I and II this would not change anything because these sections make provision in a general manner for an exchange of rights to operate air services, i.e. they relate only to the object of the grant of rights. The different formula employed in Section III cannot but be interpreted as being an expression of the clear intention of the Parties to depart from the definition contained in Article 96(a) of the Chicago Convention.

This is one of the cases where the text "provides otherwise". It is also a case where the will of the contracting Parties must take precedence over any other definition

It is pointless to endeavour to find discrepancy or incompatibility between Sections I and II (on the basis of which it has been claimed that all-cargo services can be regarded as authorised) and Section III on the basis of which only combination services are authorised, because these sections form a single logical context which has, firstly, a generic content and, secondly, a specific content. In other words, Section III merely serves to specify the content of the rights which were provided for in a generic way in Sections I and II. There is therefore no dualism between the object of Sections I and II and that of Section III, but rather an identity of object and complementary functions.

It follows that the terminology employed by the two Parties in Section III, which makes provision for combination services only, is the only legitimate terminology in the matter before us, since it consists of a determination freely made by the two Parties in accordance with Article 1 of the Agreement.

9. A literal interpretation of the Agreement highlights the intention of the Parties and the very object of the Agreement, which excludes, as regards the content thereof, any reference to other normative texts and which derogates from the Chicago Convention. It should be noted in particular that there is no juridical relationship between the Italo-American Agreement and the Agreement signed at Bermuda between the United States and Great Britain.

As is known, the Bermuda Agreement was the fruit of a compromise between the views put forward by the United States and Great Britain as regards capacity. The purely generic solution reached at Bermuda excluded any predetermination of capacity and limited itself to laying down some general criteria, the most important of which stated that the main object of any air service is to provide "capacity adequate to the traffic demands between the country of which such airline is a national and the country of ultimate destination of traffic", i.e. capacity adequate for 3rd- and 4th-freedom traffic, called, in consequence, primary justification traffic. The possibility of undertaking an "*ex post facto review*" represents, under the system of the Bermuda Agreement, the only means available to a Party to initiate discussion on the activities of the airlines of the other Party, where they conflict with the general principles respecting capacity. The conclusion must be drawn that in practice the supervision which a Party may exercise over the activities of the airlines of the other Party and over the frequency of services is very limited and practically non-existent.

The negotiations between Italy and the United States in 1947 developed on the basis of a draft submitted by the Government of the United States which, from a formal viewpoint, was in conformity with the Bermuda Agreement. Apart from this factual relationship between the two texts, a relationship which refers, moreover, exclusively to the drafting, the Italo-American Agreement contains no reference to the Bermuda Agreement such as would enable us to take account of the latter in interpreting the former Agreement. The content of the Italo-American Agreement can only be established on the basis of the concessions which the two parties reciprocally made to each other in voluntary restriction of their sovereignty.

10. Irrespective of the objective sought by the Government of the United States in negotiating the Bermuda Agreement, and even admitting that the

regulation of all-cargo services was included in that objective, it is quite certain that such objective cannot affect the interpretation of the Italo-American Agreement, the object of which can only be established on the basis of the assent and the common intention of the two Parties concerned.

Italy signified its assent to the conclusion of the Air Transport Agreement with the United States, establishing that the object of the grant of traffic rights was the operation of combination services.

It may be granted that cargo transport was already a reality when the Agreement was signed and, in point of fact, the right to carry cargo on the combination services is amply guaranteed by the rights which were granted.

What cannot be admitted, and this, moreover, is in accord with the conclusions of the study published by I.C.A.O., is that the transport of cargo by air had at that time been so developed and organised as to enable the carriage of cargo by all-cargo air services to be regarded as being a category apart. Moreover, the fact that all-cargo air services, even though not developed at the time, were nevertheless capable of being further developed as of the date of signature of the Agreement does not imply that the two parties intended to include in the grant of rights the right to operate all-cargo air services.

In a system such as that governing international air transport, in which competition between airlines is very severe and is at the same time bound up with many factors which are subject to rapid change, the main function of a bilateral agreement, as laid down in its basic provisions, i.e. in the Annex, must be to provide, in the grant of rights, for an equilibrium reflecting the actual operational possibilities. On the Italian side, there was no possibility, at the time the Agreement was entered into, of operating all-cargo air services.

It would therefore be contrary to the principle of assent, and, consequently, contrary to the basic principles contained in Articles 1 and 6 of the Chicago Convention to interpret the Italo-American Agreement in an extensive manner, giving it a scope which would restrict the sovereignty of one of the two Parties to a greater degree than intended by that party.

11. In employing in Section II of the Annex the phrase "passengers, mail and cargo" it was intended, on the Italian side, to refer to the factual situation existing with regard to international air transport (a situation which precluded the operation of all-cargo services) for the purpose of determining the content of the concessions to be made.

The need to refer to the existing factual situation for the purpose of interpreting the content of the Agreement is clearly indicated by the following provision contained in Section V of the Annex to the Agreement: "there shall be a fair and equal opportunity for the carriers of the contracting Parties to operate on any route between their respective territories covered by the present Agreement and Annex".

"Equal opportunity" implies, in respect of both Parties concerned, the operation or the possibility of operating the same type of service. But Italy and the Italian airlines did not, when the Agreement was concluded, even envisage the possibility of operating all-cargo services. Consequently, this type of service cannot be regarded as being included in the reciprocal grant of traffic rights, in the absence of explicit provision therefor by the Parties.

12. Since it is a subsidiary element in interpretation, recourse to the behaviour of the Parties can only be justified if literal interpretation does not lead to clear and unequivocal results. This is not the case in the matter before us. Moreover it would appear that the behaviour of the Parties

revealed no elements which would enable us to conclude that the two Parties wished to include all-cargo services in the Agreement. The behaviour of the Parties, in the present case, can only be examined in relation to the circumstances at the time the Agreement was concluded and in the years immediately following.

In this connection a preliminary comment is necessary: in no case could the existence of American all-cargo services during a period preceding the date on which the Agreement itself was entered into (i.e. from 1947) be taken as a basis for the interpretation of the 1948 Agreement. Obviously the only true application of an international agreement is the practice subsequent to the conclusion thereof and not that which preceded the Agreement.

The Italian Government could hardly have raised objections or expressed reservations concerning the operation by TWA of all-cargo services — services which that airline was, moreover, operating on the basis of a temporary concession dating from 1947, i.e. before the Agreement was concluded. In not opposing the operation of such services (and it would have been entitled to do so) at the time when they commenced the Italian Government unilaterally authorised such services on the basis of a temporary concession.

The temporary concession is an administrative device fairly widely employed in international civil aviation; it is a device to which recourse is had when an air service is not authorised or provided for under a bilateral air agreement.

Since the all-cargo services operated by American airlines were authorised by means of temporary concessions the Italian Government could reasonably think that the all-cargo services operated by the Italian airline from 1961 were approved by the American Government on the basis of temporary concessions, in view of the principle of reciprocity.

Consequently, the behaviour of the parties, i.e. the operation of all-cargo services by the American airlines from 1947 to 1950 and subsequently from 1958 up to the present time, and by the Italian airline from 1961 up to the present time, absolutely cannot be regarded as indicating an intention of the two Parties to include all-cargo services in the 1948 Agreement.

The system of temporary concessions operated satisfactorily for the Parties until 1963. The American airlines then requested, first, an increase in frequencies and then an increase in capacity, which would have altered the equilibrium existing between the respective concessions, and the Italian Government availed of its right to withhold approval of the new services by the American airlines. These services, which were not authorised by the bilateral Agreement, were completely dependent on unilateral approval by each Party at its discretion.

13. The conclusion which must be arrived at, on the basis of the foregoing is therefore as follows:

The Air Transport Agreement between Italy and the United States of February 6, 1948, as amended, does not grant the right to a designated airline of either Party to operate scheduled flights carrying cargo only.

Luxemburg, July 1, 1965

(Signed)
Riccardo MONACO
