International Air Cargo Services: The Italy - U.S.A. Air Transport Agreement Arbitration

by M. A. Bradley *

Although most of the nine hundred and forty air transport agreements [1] in force between states provide for arbitration as a means for the settlement of disputes, there have only been two arbitration proceedings in relation to those agreements — The France-United States Air Transport Arbitration [2] and the Italy-United States Air Transport Arbitration.[3] The failure to use arbitration is not due to a lack of disputes.[4] In fact, states prefer to settle disputes by consultation rather than arbitration.[5]

The United States was a party to both proceedings and, in fact, initiated them.[6] This action was clearly inspired by one of the rec-

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[1] Aeronautical Agreements and Other Arrangements, I.C.A.O. Document 8563-LGB/228, lists air transport agreements registered with I.C.A.O. up to 31st December, 1965. The number quoted does not include agreements not registered with I.C.A.O.

[2] The decision of the Arbitration Tribunal, decided on December 22, 1963, is published in 3 International Legal Materials 668 (1964) and in I.T.A. (Institut du Transport Aérien) Study 66/2-E (1966).

[3] Italy - U.S. Air Transport Arbitration; Advisory Opinion of Tribunal (given at Geneva, July 17, 1965) is published in 4 International Legal Materials, 974 (1965).

[4] In the Annual Report of the U.S. Civil Aeronautics Board (36-37 and Appendix 14) there appears a list of countries with which U.S. negotiated in 1964. It can be safely assumed that two of the five formal negotiations listed and the majority of the thirty one informal negotiations listed involved disputes about the interpretation and application of the air transport agreements concerned. From his personal experience the writer has found that where the airlines of states, parties to an agreement, are operating in competition, disputes are frequent.

[5] In the absence of authoritative statements one can only surmise the reasons. Both parties lose control of the dispute. There is the danger of an adverse decision which would financially have more adverse results than a compromise. Suspicion exists as to the impartiality of arbitral tribunals. It is better to cut one's losses by compromise rather than suffer the losses from unilateral restrictions during the period — not less than twelve months — that the matter is under arbitration. Perhaps the major reason is that the benefit of a favourable decision may be lost by the losing state giving twelve months notice of termination of the agreement.

[6] France - U.S.A. Arbitration, n. 2, *supra*, 670, and Italy - U.S.A. Arbitration, n. 3 *supra*, 977.

ommendations made in 1963 by an interagency steering committee and approved by the President [7] that arbitration should be used as one of the means for securing relief in the situation where a foreign government, unilaterally and, in the U.S. Government's view, in violation of the provisions of the relevant air transport agreement, imposed restrictions on the operations of U.S. airlines into its territory.[8]

The matter in dispute in the Italy-U.S.A. arbitration clearly falls within that class. The Italian Government refused to permit U.S. airlines operating all-cargo services into Italy to increase the frequency of their all-cargo services or to substitute larger aircraft for the aircraft already being used. The Italian Government contended that all-cargo services lay outside the terms of the Air Transport Agreement between Italy and the United States.[9] The U.S. Government took the contrary view. The interpretation placed on the Agreement by the Italian Government had far-reaching implications, for the whole corpus of air transport agreements. To a large extent

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[7] A statement of U.S. International Air Transport Policy, prepared by an Inter Agency Steering Committee comprising the Administrator of the Federal Aviation Agency and representatives of the Bureau of Budget, the Civil Aeronautics Board, the Agency for International Development, the Department of State, the Department of Commerce and the Department of Defence, was released from the White House on April 24, 1963. The Committee was created in 1961 to review and make recommendations on U.S. international air transport policy. The statement is apparently a synthesis of the recommendations of the Committee. The President in releasing the report said: "I am directing the officials of this Government concerned with air transport to be guided by this policy statement in carrying out their statutory responsibilities."

[8] The range of remedies that are in practice available to the U.S. Government are limited. While in the absence of statistical information it is impossible to reach informed conclusions, it seems that U.S. airlines, in most cases in which restrictions are imposed by foreign governments, are obtaining more benefits from enjoyment of the rights under the agreements than their foreign competitors. Consequently denunciation which may in any case be politically undesirable is likely to do more harm to U.S. interests than foreign interests. Reprisals in kind are unlikely to be effective in an environment where the foreign airline is at a disadvantage. Thus, the only practical weapons left are persuasion and arbitration. Furthermore, pressures from U.S. airlines probably limit the possibilities for compromise, e.g. by surrendering a portion of the rights already held or by granting additional privileges to the other Government. See International Air Transportation Problems, Hearings before the Aviation Sub-Committee of the Committee of Commerce, U.S. Senate, 87th Congress, 1st Session, 22nd Sept. 1961.

[9] Air Transport Agreement between the Governments of Italy and the United States, signed at Rome on 6 February 1948, 73 U.N.T.S. 113; amended by an exchange of notes effective 24 March, 1950, 89 U.N.T.S. 394, and by an exchange of notes effective 4 August, 1960, 388 U.N.T.S. 338.

the texts of air transport agreements have been standardized and the interpretation of the Italian Government, if the possibility of other constructions arising from the practice of the parties is ignored, applies with equal force to many other air transport agreements.

Events leading to the Dispute [11]

All-cargo air services were inaugurated by Trans World Airlines (T.W.A.) to Italy in January 1947 under a temporary agreement and prior to the conclusion of the definitive agreement in February, 1948. All-cargo services were suspended in May, 1950 and were not resumed by T.W.A. until October, 1958. When the dispute arose, T.W.A. was operating four all-cargo services a week. Pan American Airways (P.A.A.) commenced operation of the all-cargo services to Italy in September 1960. The frequency was altered from time to time rising to a maximum of four a week. At the time of the dispute P.A.A. was operating two services a week. Alitalia commenced operating cargo services in 1961 and was averaging three services a week at the commencement of the dispute.[12]

The Dispute [13]

The occasion for the dispute was the submission on 10th June, 1963, by the United States Embassy in Rome of a time-table providing for an increase in the frequency of P.A.A.'s cargo services from two to four services a week. On July 3, the Italian Government advised the Embassy that it could not consent to the increase in frequency, as it would aggravate the imbalance already existing between Italian and United States services. The increase in service was not justified by the traffic demand. The air transport agreement regulated only combination services and did not mention all-cargo

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[10] The Japanese Government in its dispute with U.S.A. over the Japan - U.S.A. air transport agreement appears to have adopted the Italian interpretation when it stopped the operation of a new all-cargo service by Pan American Airways in June 1965. In an exchange of notes on December 28, 1965 (54 Dept. of State Bull. 141 (1966), the parties agree inter alia that all-cargo services are permitted by the agreement.

[11] Opinion of the Tribunal, Italy - U.S. Abitration, n. 3, *supra* 976-977.

[12] A most important practical consideration is that Alitalia probably did not have aircraft available to match the combined T.W.A. and P.A.A. frequency. To operate jet cargo services it hired jet aircraft from a U.S. company, Airlift International Inc., n. 3, *supra*, 977.

[13] N. 3, *supra*, 977.

services which were being operated on the basis of a reciprocal concession outside of the agreement. Subsequent approaches for consent to an increase in the frequency of T.W.A.'s cargo services and the substitution of jet aircraft for the piston engined aircraft used on T.W.A.'s existing cargo services were rejected on similar grounds.

The U.S. Government requested consultations in pursuance of Article 10 of the Agreement. These were held in March 1964 and, as no agreement could be reached as to the basic issue of whether the agreement authorized cargo services, it was agreed to refer the dispute to arbitration. An interim arrangement was reached under which eight jet cargo services a week could be operated, four by the U.S. airlines and four by the Italian airline.

Constitution of the Arbitral Tribunal

On March 23, 1964 the United States invoked the arbitration clause, Article 12, of the agreement and a Compris of Arbitration was signed at Rome on 30th June, 1964.[14] In pursuance of the arbitration clause the United States nominated Professor Stanley B. Metzger of Georgetown University, Washington, D.C. The Italian Government nominated Professort Riccardo Monaco of Rome University. The third member selected by the national nominees to be President of the Tribunal was Professor Otto Riese of the University of Lausanne.

The members of the Tribunal disagreed. Professor Riese and Metzger in a joint opinion held that the U.S. interpretation was cor-

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[14] The arbitration clause — article 12 — provides, interalia, that any dispute between the parties relating to the interpretation or application of the agreement or its annex which cannot be settled through consultations — in accordance with article 10 — shall be submitted for an advisory report to a tribunal of three arbitrators, one to be named by each party and the third to be agreed upon between the arbitrators so named or, failing agreement, by the President of the Council of the International Civil Aviation Organization. It further provides that the executive authorities of the parties will use their best efforts to put into effect the opinion expressed in any advisory report. The compris of arbitration (3 Intl. Leg. Mats. 1001) inter alia specifies the question for the tribunal, the periods within which arbitrators are to appointed, the rules for the conduct of proceedings and the place for hearing and provides for a decision by a simple majority, clarification of the Tribunal's opinion if requested and the sharing of the costs of the arbitration. For a discussion of arbitration under air transport agreements, see Paul B. Larsen, Arbitration in Bilateral Air Transport Agreement 2 Arkiv for Luftrett 147 (1964) and Arbitration of the United States — France Air Traffic Rights Dispute, 30 J. Air L. & Com. 231 (1964).

rect. Their opinion is described as the opinion of the Tribunal and in this note they are referred as the Tribunal. Professor Monaco dissented.

Issue Considered by the Tribunal

The question put to the Tribunal was as follows :

> Does the Air Transport Agreement between the United States of America and Italy, as amended, grant the right to a designated airline of either party to operate scheduled flights carrying cargo only ? [15]

The resolution of this question rested primarily on the construction of certain provisions of the agreement. Article 1 defines, subject to the normal provisio, "except where the text otherwise provides," "air service", by incorporating Article 96(a) of the Chicago Convention [16] in the agreement, as "any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo." Under Article 2 each government grants to the other the rights specified in the Annex (to the Agreement) for establishing the international civil air routes and services described therein. Sections I and II of the Annex provide that each government grants to the other government the right to conduct air transport services by one or more carriers designated by that other government on the routes, specified in the appropriate schedule, which transit or serve commercially the first government's territory. These provisions were crucial in view of the Agent of the United States to answering the question. However Section III upon which the main thrust of the Italian Agent's argument rested provided: "One or more air carriers designated by each of the contracting parties... will enjoy, in the territory of the other contracting party, rights of transit and stop for non-traffic purposes, as well as the right to embark and disembark [17] international traffic in passengers, cargo and mail at the points enumerated..."

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[15] Article 1 of the Compris of Arbitration id. The phrase "designated airline" is used in the question, as under the agreement rights exchanged may only be exercised by airlines that have been designated by each contracting party. The agreement contains provisions (Articles 3 and 7) which permit the aeronautical authorities of one party to withhold rights from an airline designated by the other party if the airline does not satisfy the conditions specified in the agreement.

[16] Convention on International Civil Aviation concluded at Chicago on 7th December 1944, 15 U.N.T.S. 295.

[17] The words "as well as the right to embark and disembark..." are a literal translation of the Italian text of the Agreement. The authentic English text reads "as well as the right of commercial entry and departure for..." The first is used as it appears to have been preferred by the Tribunal.

The Italian Argument

The Italian Government argued that Section III was the decisive provision. The phrase "passengers, cargo and mail" used in that provision excluded application of the definition of air services as the specific reference was a case of the text providing otherwise. The word "and" in the phrase was used in a cumulative sense. Consequently when read as a whole Section III granted only the right to operate combination services.[18] The subsequent conduct of the parties was not relevant as there was no ambiguity in the text and in any event it lacked continuity. All-cargo services had been conducted on the basis of special concessions or tacit authorizations.[19]

United States Argument

The United States Government argued that Sections I and II of the Annex were the key provisions. These provisions constituted the exchange of rights between the parties and when used in conjunction with the definition of air service in the Chicago Convention conferred the right to conduct air services for the carriage of passengers, cargo or mail. Sections III should be construed in harmony with these provisions. It was unthinkable that a contradiction should exist between it and these provisions. Indeed Section III referred only to types of load and not the means of transport employed. "And" and "or" are used indiscriminatingly to describe the whole system of commercial air services.[20] The subsequent conduct of the parties in allowing all cargo services to be operated was evidence that the agreement was intended to cover cargo services.[21]

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[18] N. 3, *supra*, 978. Auxiliary argument are — (a) as international all-cargo air services were not well established in1948, they could well have been left without international regulation; (b) all-cargo services constituted a distinct type of traffic not amenable to the same form of regulation as combination service; (c) as the agreement had been proposed by the United States the contra profertem principle had to be applied; and (d) the principle that the interpretation which least restricts the sovereignty of states must be applied.

[19] N. 3 *supra*, 978.

[20] N. 3 *supra*, 978. In support of these points it was pointed out: (a) The Chicago Convention, n. 16 *supra*, and the Bermuda agreement (agreement with the United Kingdom, signed 11th February, 1946, 3 U.N.T.S. 253) upon which the Agreement with Italy was based, was clearly intended to regnlate all scheduled commercial services and (b) "and" and "or" are used indiscriminately in the Chicago Convention and other agreements, in the Italian translation of article 6 of the Agreement and in other Italian agreements.

[21] N. 3 *supra*, 978. The U.S. also argued that if the agreement did not cover all-cargo services these would be illegal in violation of Article 6 of the Chicago Convention which provides that no scheduled international air service may be

Opinion of the Tribunal [22]

The Tribunal concluded that the agreement authorized the operation of all-cargo services. They first decided that Section III on its true construction authorized all-cargo services even if "and" in the section is given a cumulative meaning. No doubt "to cover their bets" they then held that in any event "and" was used in the sense of "or". They next found an intention on the part of the contracting parties at the time of the negotiation of the agreement to authorize cargo services; amongst other things by an extraordinary process of reasoning they imputed to the Italian Government knowledge of the effect of the Bermuda Agreement [23] in relation to cargo services. Subsequent conduct in the form of operation of cargo services was held to be evidence of the intentions of the parties.

The Italian argument was that the words "to embark and disembark international traffic in passengers, cargo and mail" controlled the type of service that could be provided. It had to be a combination service, i.e. a service intended for the carriage of all three types of traffic. The Tribunal decisively rejected this interpretation:

> "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 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 loads for carriage by air and grants the right — without however imposing any obligations — 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."[24]

Another and, it is submitted, more persuasive form of reasoning would lead to the same conclusion. The words "in passengers, cargo and mail" were inserted after "international traffic" to remove any doubts about the composition of traffic. Sections I and II exchange the right to conduct services and incidentally define the type of services that may be conducted, namely, services for the public transport

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operated over or into the territory of a contracting State, except with the special permission or other authorization of that state... The Italian answer which appears to a conclusive one, if main contention was correct, was that there were tacit authorizations. Article 6 does not require the permission or authorizations to be in writing.

[22] N. 3 *supra*, 979-984.

[23] N. 20 *supra*.

[24] N. 3 *supra*, 980.

by air of passengers, cargo or mail. The purpose of Section III is to define:

(a) the persons who may take the benefit of the Agreement, namely, airlines designated by each party;

(b) the type of air rights which the services may exercise, namely, transit and traffic rights;

(c) the class of traffic which the traffic rights entitled the airlines to, namely, international traffic.

It is surprising that the Tribunal should find it necessary to hold that "and" in Section III means "or", after, without doing violence to the ordinary meaning of the words, it had concluded that all-cargo services were included within the Agreement. It does detract from the force of their first finding. They reasoned that "and" was used as equivalent to "or" by reference to the indiscriminate use of these words in the Chicago Convention,[25] in the Agreement and on the view that it was incomprehensible that Section III should permit only combination services when the Governments in Sections I and II exchange the right to operate combination and cargo services.[26]

The Tribunal felt that the interpretation was supported by the intentions of the parties. There were no travaux préparatoires to refer to; consequently they based their inferences as to the parties' intentions on related instruments and their subsequent conduct.

It was apparent, the Tribunal said, that the objective of the American Government was to secure an agreement containing the principles of the Bermuda agreement[27] and covering all types of traffic. The Tribunal felt that the Italian Government must have

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[25] Sloppiness in the drafting of the Chicago Convention seems hardly relevant to the agreement with Italy, unless it is used to show, as seems to be the case, that it is the custom of those who draft civil aviation agreements to use alternative and co-ordinating conjunctions indiscriminately. Does this now sanctify the practice if there be one ?

[26] Another possible approach is that the parties deliberately changed to "and" relying upon the particular over-riding the general.

[27] n. 20 *supra*. The distinctive principles which the Bermuda agreement pioneered are — (a) the capacity that the airlines of each party may provide is related primarily to the traffic originating in or destined for its territory and secondarily, subject to certain specified principles, to the traffic moving between third countries, the capacity provided being subject to ex post facto review, and (b) tariffs charged by the airlines of the parties are subject to the approval of these parties. There are differences of opinion as the interpretation of the capacity principles. See McCarrol, The Bermuda Capacity Clauses in the Jet Age, 29 J. Air L. and Com. 115, (1963) and Jack., J. Roy. Aero. Soc., July 1965, 471.

been aware of this objective and must have been familiar with the content and purposes of the Bermuda agreement. It therefore with full knowledge of the facts accepted the United States proposals. It is essential to the Tribunal reasoning that the text of the Bermuda agreement should be unambigious and that it should have been accepted as the basis of the agreement with Italy. If the text of the Bermuda agreement is not free of ambiguity on the question in issue in the arbitration it is obviously essential that at the date of the negotiations for the 1948 agreement the Italian Government should have been aware, despite any material ambiguity, of the interpretation accepted by the parties to the Bermuda agreement.

The argument of Italy in relation to its agreement with U.S.A. applies with equal force to the Bermuda agreement as textually they are in all material respects identical.[28] Knowledge of the scope of the Bermuda agreement is imputed to Italian Government, because, in a press communique issued by it at the signing of the 1948 agreement, the Italian Government stated the 1948 agreement was based on the Bermuda agreement and because the representatives of the Italian Government had attended an international conference in November 1947 at which Bermuda principles were discussed at length. The fact that an agreement is based on another does not make them identical in effect. The effect of an agreement, which serves as the basis for the second agreement, may be affected materially by travaux

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[28] The Tribunal considered that two clauses in the Bermuda Agreement put it beyond doubt that it covered cargo services, the capacity and change of gauge clauses. The same capacity clause is used in the 1948 Agreement and it was not relied on by the Tribunal as an aid to interpreting that agreement. The fact is that the traffic rights granted and the type of services to be operated are governed in the Bermuda agreement by the equivalent of Sections I, II and III of the Annex to the 1948 agreement. The capacity clause merely controls the quantity of capacity which the services may provide. The change of gauge clause permits, and prescribes the conditions under which, the airline of one party may switch to smaller aircraft in the territory of the other party for onward operation of its services. It argued further that the exclusion of cargo services was inconsistent with the objective of the Bermuda agreement — to establish a legal regime for all international commercial civil aviation, an objective which, in their view, was reflected in the Chicago Convention and the 1948 agreement. It would have been stated clearly that all-cargo services were excluded in all three instruments which were intended to create a regime intended to benefit international civil aviation as a whole. While it is true that the parties to the Bermuda agreement did express the hope that the Bermuda agreement would serve as a model for air transport agreements generally and for the multilateral air transport agreement then being considered by I.C.A.O. (Joint statement, 19 Sept. 1946, 15 Dept. State Bull. 577 (1946), it is difficult to see what relevance this hope has to the scope of the 1948 agreement.

préparatoire, confidential interpretative understandings,[29] or practice. These matters will be known only to the parties to the model agreement. It seems most unjust to impute to the Italian Government an interpretation which may rest on extraneous material not available to it. As to attending an international conference at which the Bermuda agreement was, *inter alia*, discussed, the Tribunal's own statement that the reference to the 1947 conference cannot be used in interpreting the disputed 1948 agreement because these antecedents have no bearing on it is clearly correct. The Tribunal's explanation of the reference is that it shows that Italy was acquainted with the regime established by the Bermuda agreement. As discussion at the conference in question revolved in the main around the issue of the principles to govern capacity, it is submitted that the reference proves nothing.[30]

The statement of the Tribunal that "at all events, all-cargo air services were already known and being operated at the time the Bermuda agreement and the 1948 Italian-American agreement were concluded and this fact is decisive" [31] explains why they embarked upon this line of reasoning. Furthermore, as the Tribunal must have been aware, cargo services have been operated all over the world within the framework of agreements expressed in identical terms.

Subsequent conduct of the parties is the basis upon which the Tribunal relied to show its answer was consistent with the intentions of the parties. For six years all-cargo services had been operated

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[29] It is a common practice for the parties to air transport agreement to record in confidential memoranda their understandings of the interpretation and effect of provisions of the agreement over which there was dispute in the course of the negotiations.

[30] The Conference to which the Tribunal refers is the Commission on Multilateral Agreement on Commercial Rights in International Air Transport which met at Geneva in November 1947 (I.C.A.O. Dec. 5230 A 2 - EC/10). The Commission failed to agree upon a multilateral argument for the exchange of traffic rights (for a summary of the work of the Commission and its antecedents, see Cribbet, 54 J. Roy, Aero. Soc. 669, (1950). In the 800 pages of documentation and records of the Commission there is no reference to all-cargo services. What significance should be attached to this is incapable of a definite answer. The participants may have assumed cargo services were to be included or, more probably, never addressed their minds to the question.

[31] N. 3 *supra*, 983. The writer believes that, irrespective of the weight that is given to the remark, it is inconceivable that the negotiatiors in the 1948 negotiations overlooked the fact that cargo services were operating and that they must have intended the agreement to cover them. It is contrary to normal negotiating practice not to make a record that a party is permitting the continuance of a state of affairs under protest and without prejudice to its remedies.

without protest and without either party applying for permission. Each party had notified the other by letter of the inauguration of cargo services without requesting or being granted permission and filed timetables when the services were varied.[32] Both parties therefore acted on the basis that the agreement covered all-cargo services. The Tribunal considered that the conduct was insufficient to justify them finding that a tacit agreement existed.[33] The United States apparently did not raise this argument.[34] The subsequent conduct, however, was evidence of the intentions of the parties, evidence which was consistent with the Tribunal's interpretation of the agreement. In effect the Tribunal felt that the "tacit concessions" argument of Italy was an inherently improbable one.

The Tribunal considered that evidence of practice under other air transport agreements to which the disputants were parties was of minor importance in view of the clear evidence of the meaning of the agreement from its language and the practice of the parties.

Dissenting Opinion

Professor Monaco considered that general agreements entered into between third party states were not applicable. The sole source of the obligations and rights of the parties was the agreement. In his view the agreement should be divided into two parts, the normative part containing provisions of a general character and definitions, and the second part — he seems to mean the Annex — containing provisions relating to the economic and commercial content of the agreement. The distinguishing feature of the second part was that it was "generally capable of being revised or amended" to meet changing circumstances. Article 2 in the normative part was only effective

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[32] The filing of timetables does not necessarily amount to in application for permission. Many countries require the filing timetables for various purposes, e.g. to ensure that the air traffic control service are aware of the services and that the services are being operated in accordance with the agreement.

[33] In the Franco-American Arbitration, n. 2 *supra*, the Tribunal held that the French interpretation of the Franco - U.S.A. air transport was correct, but that, by subsequent conduct and acquiesence, tacit agreements had arisen, which authorized the operation by U.S. airlines to the places challenged by the French Government.

[34] N.3 *supra* 983. Tactically it would have been most dangerous for the U.S.A. to have so argued. It would have provided a useful compromise for the Tribunal — to find for Italy on principle and for the U.S. on the grounds of an implied agreement resulting from subsequent conduct. But such a finding would have placed in doubt the scope of the rights granted to U.S. under its other agreements.

to the extent that Section III defined the content of the grant. The role of Sections I and II was conjunctive. They related the content of the grant in Section III with Article 2. The definition of air service only applied in relation to general principles and definitions but not to the content of the grant contained in Section III. The use of "and" to join "passengers, cargo and mail" clearly excluded the possibility of all-cargo services. The basic principle of treaty interpretation is that it must be read as a whole to find the intention of the parties.[35] Although the economic and commercial provisions are segregated in the Agreement from the rest of the provisions, the definitions are expressed to apply to Annex as well as the body of the Agreement. Finally Sections I and II quite clearly are more than conjunctive. They grant the right to operate air services. Section III defines the content of the rights the air services may enjoy.

Professor Monaco rebutted arguments contrary to his thesis. As it is a right (and not an obligation) to embark and disembark traffic, the three types of load do not have to be embarked or disembarked simultaneously. The service must only be technically and operationally a combination service. He distinguishes between the means of transport and the type of service. The former has not been indicated.[36] Section III controls the type of service. It mentioned only combination services.

The definition of "air service" does not apply to Section III, as a different formula is used. Section III is, in any event, reconcilable with Sections I and II (this argument suggests lack of confidence in the validity of his main argument), as the first two sections deal with the general and Section III with the specific. He regarded the Bermuda agreement as irrelevant. The agreement does not refer to it and the intent of the parties can only be found in the agreement. The objective of the U.S. Government is only decisive to the extent that it was shared by the Italian Government. But even if at the time of signature cargo services were covered, cargo services have since become a separate category of operation.

The last argument is that the Annex provides "for an equilibrium reflecting actual operational possibilities." At the time the agreement was negotiated Italy could not possibly operate all-cargo services. It would be contrary to the principle of assent and to sovereignty

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[35] O'Connel, International Law, 275 (1965).

[36] Sections I and II when read in conjunction with the definition of air service clearly describe the means of transport and the service that may be provided by the means of transport.

as exemplified by the Chicago Convention to interpret the agreement extensively to restrict the sovereignty of a party to a greater degree than intended by that party. Section III reflected the situation that Italy was precluded from operating cargo services.[37] This argument was bolstered by reference to Section V which provides that there shall be fair and equal opportunity for the carriers of the contracting parties to operate on any route between their respective territories... Equal opportunity implies the operation by or the possibility for both parties to operate the same type of service. But Italy did not even envisage operating all-cargo services, and consequently, cargo services could not be regarded as being included in the grant of rights in the absence of express provision. The writer finds it is difficult to see what relevance Section V has to the grant of the rights. Their source is Sections I-III. Section V appears to be one of the principles which governs the exercise of these rights. On this view Section V has nothing to do with the scope of the rights exchanged. It might, however, justify measures against the airlines of one party to ensure that the airline of the other party has a fair and equal opportunity to exercise the right to operate services of a particular kind. The effect of provisions similar to Section V have been the subject of conflicting interpretations.[38]

Professor Monaco found that the operation of cargo services between 1947 and 1952 and from 1958 "absolutely cannot be regarded as indicating an intention of the two parties to include all-cargo services." He accepted the "tacit concessions" argument, pointing out that it was practice to grant temporary authorizations. The force of this argument is however weakened by the international practice of granting temporary authorizations in writing. He considered that in 1961 the Italian Government did not seek authority for its airlines to operate cargo services, because it assumed that under the principle of reciprocity it was entitled to do so. Again practice is a fundamental obstacle. A temporary authorization usually is unilateral in the sense that it grants the right to the other country to operate a service into the grantor's territory. The grantee in the absence of express provision as to grantor's rights to operate a service which he accepts

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[37] This is surprising. Its airline could have, as it did in 1961, hired aircraft.

[38] Section V is based on a similar provision in the Bermuda agreement. Contradictory interpretations are placed upon it. One view is that it prohibits unfair competition and discriminatory practices and does not imply allocation of frequencies or a duty to remove inherent disabilities under which an airline may labour. The other view taken by a number of countries is that it does imply, in appropriate circumstances, allocation of frequencies. It implies practical equality, e.g. the operation of aircraft of equivalent attractiveness.

either expressly or by acquiesence, e.g. by operation of the service, cannot be considered bound. The argument of tacit concession is, in the writer's view, a flimsy disguise for the fact that the Italian Government itself believed until 1963 that cargo services were authorized by the agreement.

The U.S. Government must find the decisions of the Tribunal unsatisfactory. The extent to which the Tribunal relied on matters that were special to the Italy-U.S. agreement makes it possible to distinguish the decision in the event that the same question is raised by other governments. This could seriously hinder the present development now being sponsored by the U.S. Government of international air cargo services.[39]

The reaction of the Italian Government has been to give notice of termination of the agreement.[40] It seems clear that the issue of all-cargo services was only a symptom of more fundamental disagreements. Italy desires to extend its routes across the U.S.A. to points in South America and the Pacific and to introduce a system of allocation of frequencies.[41] The last reflects the desire of its airline, Alitalia, for protection from "uncontrolled, all-powerful and overwhelming competition" [42] and is consistent with Italian international air transport policy.[43]

While it is probable that the U.S. airlines are earning more revenue from their operations into Italy than the Italian airline is

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[39] For example, Statement on U.S. International Air Transport Policy, n. 7 *supra*, and remarks by the Chairman of the Civil Aeronautics Board before the International Aviation Club 28/1/65 (C.A.B. Press Release).

[40] Aeroplane, 16 June, 1966, 12; Article 9 of the agreement provides that the agreement shall terminate one year after notice of termination is given by either party.

[41] Aeroplane & Commercial Aviation News 25 Nov. 1965, 14; Aeroplane, n. 40 *supra*, and Aeronautica, 13th November 1965. Negotiations were held in November 1965 in which it was reported that U.S. was prepared to permit some extension of Italy's routes in return for extensions of its routes, but refused to accept frequency limitations, Il Tempo, 15th November 1965.

[42] Quoted from the 1965 Annual Report of Alitalia, reported in Aeroplane July 21, 1966, 8.

[43] The agreements which Italy has with Australia (I.C.A.O. No. 1688) and Canada (335 UNTS 281) contain articles making provision for predetermination of frequencies. It is believed that certain other agreements which do not contain express frequency controls are the subject of confidential understandings to that effect.

earning from traffic picked up or discharged in the U.S.A.,[44] Italy stands to lose far more than the U.S.A. should they fail to reach agreement. The revenue earned by Alitalia from its services to U.S.A. is a far higher proportion of its total revenue than is the case for the U.S. airlines.[45] Consequently, the loss of operating rights would have far more serious effects on Alitalia. By virtue of the range of points which U.S. airlines serve in Europe they should be able to retain most of the revenue from their Rome traffic by disembarking or embarking it at other places in Europe for on carriage by other airlines. This course is not open to Alitalia, as its only other landing place in North America is Montreal. It is unlikely that the Canadian Government would welcome Alitalia operating the frequency of service necessary to serve its United States traffic.[46]

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[44] In 1964 U.S. airlines carried 132,869 passengers between the United States and Italy and Alitalia 143,968 (Avi-Week and Space Technol. October 25, 1965). These figures do not include the considerable traffic which U.S. airlines carry between Italy and third countries or the similar type of traffic carried by Alitalia. In all probability the U.S. airlines when their carryings to third countries and their all-cargo services are taken in to account are in a better position than Italy.

[45] On a conservative basis Alitalia earned from the carriage of passengers between United States and Italy in 1964 $40,000,000 and $7,600,000 from the carriage of traffic between U.S.A. and countries between Italy and U.S.A. To this should be added the revenues from the carriage of traffic to and from points being beyond Rome e.g. to and from Athens and Nairobi through Rome.

[46] The Canada Italy agreement, n. 43 *supra*, provides for allocation of frequencies. Canada may therefore control Alitalia's frequencies.