

the Council. Nothing urged by India's counsel in his submissions to the Court in this context has served to raise any doubt in my mind concerning the correctness and propriety of the President's rulings and of the procedure followed by the Council.

As regards the second category, the brief answer to India's objections is that Article 15 of the Rules for the Settlement of Differences has no relevance to a decision on a preliminary objection. The subject of Preliminary Objection and Action Thereon is dealt with in Article 5 of the Rules. This Article is comprised in Chapter III of the Rules, which deals with Action upon Receipt of Applications. The Article is self-contained and comprehensive. The procedure for dealing with a preliminary objection is prescribed in paragraph (4) of Article 5 which runs as follows: "If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question as a preliminary issue before any further steps are taken under these Rules." This is exactly what the Council did.

Article 15 of the Rules is contained in Chapter IV which prescribes the procedure to be followed in respect of "Proceedings", which start after a preliminary objection has been disposed of and which relate to the merits of the case. Article 15 which is headed "Decision" obviously has reference to a decision on the merits, and does not relate back to a decision on a preliminary objection disposing of the question as a preliminary issue before the commencement of proceedings on the merits.

The record of the discussion before the Council does not show that India urged compliance by the Council with the requirements of Article 15. Even before the Court some of the alleged irregularities were mentioned for the first time in the oral submissions of counsel and the list was expanded in reply. Be that as it may, it is clear that Article 15 of the Rules has no application to a decision on a preliminary objection. The Council rightly proceeded on that assumption and not a single member gave expression to a difference of view.

Judge LACHS makes the following declaration:

*Feeling as I do that there are certain observations which should be made on some aspects of the Judgment, I avail myself of the right conferred by Article 57 of the Statute of the Court and append hereunder the following declaration.*

1

While I fully agree with the findings of the Court concerning its competence to entertain the appeal, I wish to comment further on the interpretation of Article 84 of the Chicago Convention on International Civil

Aviation and Section 2 of Article II of the International Air Services Transit Agreement.

In examining the sense and import of “the decision”, as used in Article 84, its strict verbal meaning should constitute a point of departure but cannot be conclusive, for there is no qualifying word to relieve us of the task of interpretation. It is true that the use of the definite article and the singular (“the decision”) relates that term directly to the action to be taken by the Council under the first sentence of the Article. This would seem to point to the conclusion that “the decision” contemplated must be one whereby the Council disposes of “any disagreement between two or more contracting States relating to the interpretation or application” of the Convention and its Annexes which “cannot be settled by negotiation”.

However, it is not only by decisions on substance that the Council can dispose of disagreements. Hence it is not only from such decisions that appeal may be made—and I do not, in this connection, find it possible to maintain that the Rules for the Settlement of Differences can be so construed as to restrict appealability to any greater extent than the Convention itself. Moreover, had the drafters definitely wished to exclude appeals on issues other than those of substance, they could easily have done so by suitably qualifying the term “decision”: there are well-known precedents for such drafting.

This is, of course, not to say that appeal is allowable “from every order, or any order of the Council”, which, as counsel for Pakistan suggested, would “defeat the very purpose of the Convention” (hearing of 27 June 1972). The matter has to be viewed in the light of the repercussions which the decision in question could have on the positions of the Parties in regard to the case. In the present instance we are concerned with a decision on a jurisdictional issue, and so a line has to be drawn and the question answered as to the side of the line on which “decisions on jurisdiction” lie. The answer is of course implicit in the crucial importance which such decisions invariably have (as stressed in para. 18 of the Judgment). This is borne out by the entire history of international adjudication, where these issues are much more vital than in the municipal context.

There is, however, a more general aspect to these issues. Great caution and restraint have been exercised by this Court and its predecessor when ascertaining their own jurisdiction. As Judge Lauterpacht pointed out: “Nothing should be done which creates the impression that the Court, in an excess of zeal, has assumed jurisdiction where none has been conferred upon it.” (*The Development of International Law by the International Court*, 1958, p. 91.)

This restraint has had its *raison d'être* in the clear tendency not to impose more onerous obligations on States than those they have expressly

assumed. However, in regard to appeals from other fora, this very criterion imposes limits on the Court's caution in assuming jurisdiction.

Indeed, the same reasons which underlie the necessity of interpreting jurisdictional clauses strictly impel one to adopt an interpretation of provisions for appeal that would lend maximum effect to the safeguards inherent in such provisions. For, as between the "lower forum" and "the court of appeal", there exists as it were a see-saw of jurisdictional powers. Hence to apply a restrictive interpretation of rights of appeal—and thus of the powers of the "court of appeal"—would obviously entail an extensive interpretation of the jurisdictional powers of the "court of first instance". This would in fact imply more onerous obligations on the States concerned: something which (as indicated above) international tribunals have continuously endeavoured to avoid. To restrict the rights of States to seek relief from what they deem to be wrongful decisions would to some extent, at least, defeat the very object of the institution of appeals. If that is so in general, it applies in particular to issues of jurisdiction, which, as indicated earlier, are in the international field comparable in importance to issues of substance. Thus this aspect confirms the justification for the exercise of what the Judgment describes (para. 26) as "a certain measure of supervision by the Court" (cf. resolution of 25 September 1957 by the Institut de droit international, *Annuaire 1957*, pp. 476 ff.).

## II

While I agree that the ICAO Council is competent to entertain the Application and Complaint submitted to it, I wish to comment on some procedural issues which have been raised in regard to the decision from which an appeal has been made. India advanced a series of submissions on the subject (Memorial of India, paras. 93-99 and 106 D). Pakistan for its part, denied them (Counter-Memorial, para. 59).

Article 54 (c) of the Convention on International Civil Aviation provides that: "The Council shall . . . determine its organization and rules of procedure." Within the powers thus vested in it, the Council approved, on 9 April 1957, the "Rules for the Settlement of Differences". These were intended to "govern the settlement of . . . disagreements between Contracting States which may be referred to the Council", and "the consideration of any complaint regarding an action taken by a State party to the Transit Agreement" (Art. 1 (1) and (2)).

In the light of these provisions the contracting States have the right to expect that the Council will faithfully follow these rules, performing as it does, in such situations, quasi-judicial functions, for they are an

integral part of its jurisdiction. Such rules constitute one of the guarantees of the proper decision-making of any collective body of this character and they set a framework for its regular functioning: as such, they are enacted to be complied with.

The records of the meeting of the Council on 29 July 1971 do indicate that some provisions of the Rules for the Settlement of Differences were departed from. In general, of course, not all departures from established rules affect the validity of decisions, but there are some which may prejudice the rights and interests of the parties. It is therefore reasonable, if one of the parties concerned should submit before this Court that procedural irregularities occurred, that these submissions should attract the Court's attention. Thus the objections raised by India are well taken.

I therefore regret that the Court has not gone into the matter and has limited itself to giving "a ruling as to whether the Council has jurisdiction in the case" (Judgment, para. 45). To pronounce upon any formal deficiencies the Court may find in the decision-making of the Council, or to draw that body's attention to them, would surely come within that "supervision by the Court over those decisions" referred to in a passage of the Judgment (para. 26) which I mentioned earlier and to which I fully subscribe.

Moreover, it is to be taken into account that the Council, in view of its limited experience on matters of procedure, and being composed of experts in other fields than law, is no doubt in need of guidance, and it is surely this Court which may give it. Such guidance would be of great importance for the further conduct of this case and future cases, and in the interest of the confidence of States entrusting it with the resolution of disagreements arising in the field of civil aviation.

Judges PETRÉN, ONYEAMA, DILLARD, DE CASTRO and JIMÉNEZ DE ARÉCHAGA append separate opinions to the Judgment of the Court.

Judge MOROZOV and Judge *ad hoc* NAGENDRA SINGH append dissenting opinions to the Judgment of the Court.

(Initialled) F. A.

(Initialled) S. A.