SEPARATE OPINION OF JUDGE DE CASTRO [1]

[Translation]

Exercising the right conferred upon me by Article 57 of the Statute, I venture to set out in detail a few of the reasons which determined my vote.

Dissenting and separate opinions are criticized, especially in countries which follow the Latin system, because they weaken the authority of judgments: it is not the Court, it is said, but only a tiny majority which takes the decision; furthermore, in separate opinions, some of the arguments on which the judgment rests are called into question by members of the majority.

On the other hand, such opinions are evidence of the life and of the evolution of legal doctrine. Some dissenting opinions are the law of the future; others are the expression of the resistance of old ideas. Personally, I think separate opinions have their uses: they give judges an opportunity to explain the reasons for their votes. The drafting of a judgment is a very delicate task, for it must, with great prudence, reflect the "consensus" of the majority and it must do so clearly, simply and unambiguously. In these circumstances, if the arguments which a judge regards as conclusive do not find expression in the judgment, a separate opinion makes it possible for them to be stated. Separate opinions provide a means for making known the reasons for the votes of members of the majority and this may be useful for the purposes of critical studies by commentators.

In the case submitted to the Court, there are, to my mind, important questions to which it was not possible to give due consideration in the Judgment. With the limited objects I have mentioned, I should like to give in some detail my opinion on a few of the points raised in this case.

I. Pakistan's Objections to the Court's Jurisdiction

1. Pakistan's attitude with regard to the Court's jurisdiction has undergone a progressive change.

At the meeting of the ICAO Council on 18 October 1971, the Chief Counsel of Pakistan, Mr. Pirzada, maintained that "the Appeal by India in respect of our Complaint filed under Section 1 of Article II of the Transit Agreement is incompetent" and that his Government reserved the right "to raise these issues and objections as to competency thereof

[1] Passages in the oral proceedings indicated by the symbol C.R. 72/. . . may be located through the Table of Concordance printed at the end of *I.C.J. Pleadings, Appeal relating to the Jurisdiction of the ICAO Council.*

before the International Court of Justice at the appropriate time" (Rejoinder of Pakistan, para. 40). Such an objection has not been raised.

In the Counter-Memorial, Pakistan claims that Article 36 of the Statute is irrelevant, in view of the reservation in the Government of India's declaration accepting the Court's jurisdiction, concerning disputes with States members of the Commonwealth of Nations. Pakistan also claims that the appeal brought by India against the Council's decision is inadmissible because it is Section 1 and not Section 2 of Article II of the Agreement which should be applied (Counter-Memorial of Pakistan, paras. 24 and 25).

In the Rejoinder of Pakistan, some of India's assertions are disputed, but on the jurisdiction of the Court it is confined to a simple affirmation that "the decision of the Council on any matter relating to a Complaint is not subject to appeal" (Rejoinder, para. 40).

It was at the public sitting of 27 June 1972 that Pakistan's Chief Counsel before the Court, Mr. Bakhtiar, denied that the Court had jurisdiction to determine India's appeal against the decision of the Council on its own jurisdiction. Up to that point, Pakistan had disputed the possibility of appeal against the Council's decision with regard to the Transit Agreement (Art. II, Sec. 1), but had not advanced any argument against the possibility of appeal against the Council's decision concerning the dispute indicated in Pakistan's Application, to the extent that that dispute related to the Convention (Art. 84).

Despite this procedural irregularity, the Court must deal explicitly with its own jurisdiction since this has been called in question.

2. Appeal does not lie against a complaint based on Section 1 of Article II of the Agreement, because it does not lead to a decision of the Council, but to consultations and recommendations to the parties and—if the contracting State concerned unreasonably fails to take suitable corrective action—to possible recommendations to the Assembly. But appeal does lie against the Council's decision on its own jurisdiction to deal with a disagreement concerning the Transit Agreement, because Pakistan based its claims, in reply to India's objection, on Article 84 of the Convention and Article II, Section 2, of the Agreement.

India's preliminary objection, by its very nature, prevented the Complaint being dealt with on the basis of Section 1 of Article II of the Agreement. What was argued was not the action taken by India, but the Council's jurisdiction to examine such action. It thus follows that in the Council the discussion was centred on the interpretation of treaties in general, and that of the Convention and the Agreement in particular (see the remarks of Mr. Pirzada, Annex E to the Memorial of India, *(b)*, Discussion, paras. 25 ff., *(c)*, Discussion, paras. 28 ff.). In Pakistan's reply to India's preliminary objections, the following passages may be found:

"There exists a disagreement between India and Pakistan relating to the interpretation or application of the Convention and the Transit Agreement" (Annex D to the Memorial of India, para. 11 *(a)*).

"Pakistan's Application is within the scope of Article 84 of the Convention, Article II (2) of the Transit Agreement and Article 1 (1) of the Rules" (*ibid.*, paras. 25 and 26; see also para. 18).

"The Council has jurisdiction to entertain and decide any dispute regarding the interpretation and/or application of the Convention and the Transit Agreement and to make appropriate findings and recommendation under the Transit Agreement" (*ibid.*, para. 39 *(d)*).

The question which was argued in the Council, and decided by it, is the question of its jurisdiction to interpret the Agreement, taking into account the objection raised by India [1]. Once India had raised an objection, Pakistan's Complaint could not be dealt with under the special procedure laid down for complaints (Arts. 23 *et seq*, of the Rules for the Settlement of Differences). India's objection changes the nature of the question laid before the Council. It no longer concerns action taken by India under the Agreement (Art. II, Sec. 1): from that moment there is a disagreement as to the possibility of applying the Agreement, as to its termination or its suspension, and that disagreement implied a further disagreement as to its interpretation (Art. II, Sec. 2).

Article II, Section 2, of the Agreement refers back to Chapter XVIII of the Convention, Article 84 of which reserves a right of appeal from the Council's decision [2].

It may also be noted that it appears that Pakistan's Complaint and Application, and the Memorials attached thereto, are almost identical, although they were filed separately in compliance with the Rules (Annex B to the Indian Memorial, Complaint, note).

3. India had founded the Court's jurisdiction on Article 37 of its Statute, Article 84 of the Convention and Article II, Section 2, of the Agreement. At the public sitting of 27 June 1972, Pakistan contended

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[1] The question put to the vote in the Council was as follows:

"The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the International Air Services Transit Agreement." (Annex E to Memorial of India, *(e)*, Subjects discussed and action taken, para. 2.)

The question put to the Council is not whether Pakistan's Complaint is or is not justified but, as the President of the Council explained, whether "the Council has no jurisdiction to consider the Application under the Transit Agreement" (*ibid.*, para. 91). This question is raised because India maintains that the Agreement has come to an end or is suspended and that, consequently, the Council has no jurisdiction under the Agreement.

[2] See in this sense the Note presented by the Secretary General of ICAO on Article 86 (Annex C to the Indian Reply, para. 5).

that Article 37 is a transitory provision of the Statute, which speaks of "as between the parties to the present Statute"; but the Statute was promulgated before Pakistan came into existence (C.R. 72/6, p. 39). In support of this argument counsel for Pakistan quoted various Judgments of the Court (*I.C.J. Reports 1959*, pp. 139, 140, 142; *I.C.J. Reports 1961*, pp. 27-32, *I.C.J. Reports 1962*, p. 602).

But the expression "as between the parties to the present Statute" also occurs in Article 36, paragraph 5. This provision relates to declarations made under Article 36 of the Statute of the Permanent Court, deemed to be acceptances of the compulsory jurisdiction of the present Court. Article 37 however concerns treaties or conventions in force providing for reference of a matter to the Permanent Court (the case of Article 84 of the Convention and Article II, Section 2, of the Agreement).

The Judgments of the Court which Pakistan has quoted relate to the application of Article 36, paragraph 5, of the Statute, and not Article 37. The Court's doctrine on Article 37 is contrary to the argument of Pakistan. The Court, as it has itself stated, cannot "accept the dissolution of the Permanent Court as a cause of lapse or abrogation of any of the jurisdictional clauses concerned, [and] it must hold that the date at which the Respondent became a party to the Statute is irrelevant" (*I.C.J. Reports 1964*, p. 34). "It was not the primary purpose to specify one tribunal rather than another, but to create an obligation of compulsory adjudication. (Such an obligation naturally entailed that a forum would be indicated.)" (*Ibid.*, p. 38.) On the dissolution of the Permanent Court, "another tribunal the [International Court of Justice]... is supplied by the automatic operation of some ... instrument [the Statute of the Court] by which both parties are bound". (*Ibid.*, p. 39.)

Nothing in the argument of Pakistan could justify the Court's reversing its previous rulings on this point.

4. The kernel of the whole new argument of Pakistan is its interpretation of Article 84 of the Convention. On this interpretation, the Article should be applied to final decisions or decisions on the merits—the decisions contemplated by Article 15 of the Rules for the Settlement of Differences—, but it does not apply to decisions on preliminary objections, against which therefore appeal does not lie.

(a) This interpretation is based first of all on the letter of Article 84. Attention is drawn to the fact that the Article mentions "the decison" of the Council and not "any decision" of the Council; and that "the word 'settlement' ought to mean that when the matter could not be settled by negotiation then it ought to be decided by the Council" (C.R. 72/6, p. 25). If appeal were allowed—so the argument continues—from any Order of the Council "that will defeat the very purpose of the Convention" (*ibid.*, p. 26). However, a reading of Article 84 without any preconceived view leads us to give it a different meaning. It refers to "any disagreement" which cannot be settled by negotiation. It does not of course refer to every kind of disagreement which could be resolved by an Order. It refers to disagreements which could be settled by negotiation and which relate to

the interpretation or application of the Convention. The number of possible disagreements is limited, and decisions on these do not include any kind of Order whatsoever. They must be important decisions, and decisions of a certain general interest. Decisions on questions of jurisdiction cannot therefore be excluded from this category without specific reason. Against the over-restrictive interpretation of Article 84 advanced by Pakistan, it may be observed that Article 86, under the heading "Appeals", tells us that, apart from decisions on the operation of international airlines, "on any other matter, decisions of the Council shall, if appealed from, be suspended". How can it be conceived that questions relating to the jurisdiction of the Council were to be excluded from these "other matters"[1]? A decision by the Council on its jurisdiction is not just any sort of Order (comparable, for example, to an Order on the admission of evidence). It is a final decision and one of general importance if it deals with a question of interpretation of the Convention. In the Pakistan *v.* India case, if the Council upholds India's preliminary objection, the procedure is terminated, with the result that Pakistan is finally non-suited with regard to its Application and Complaint [2].

The disagreement as to the jurisdiction of the Council can be *settled* by decision of the Council or by negotiation. The Secretary General of ICAO, when informing the parties of the Council's decision of 29 July 1971, said that he desired "once more to draw your attention [i.e., the Parties' attention] to the Council's resolution of 8 April 1971 in which the Parties were invited to negotiate" (Annex II to the Counter-Memorial of Pakistan [3, 4]).

(b) Pakistan's argument is also based on certain articles of the Council's Rules for the Settlement of Differences. The reasoning may be summarized as follows: Article 5, on preliminary objections, makes no mention of appeal. Thus a decision on a preliminary objection is not a decision against which an appeal lies under Article 18. The decisions

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[1] See also the Note by the Secretary General of ICAO already quoted above (Annex C to the Reply, footnote).

[2] I see no reason why preliminary objections relating to jurisdiction should be treated differently according to the decisions taken upon them or why the appeal should be upheld only when jurisdiction is denied. Such a distinction has no foundation in law. Moreover, a party may have an interest, worthy of protection, in appealing from the decision dismissing the objection. It may be added that decisions on objections to jurisdiction are also of general interest since, as judicial decisions, they may become a source of law.

[3] Although the jurisdiction of a court is not subject to the will of the parties to a case, there are possibilities for negotiations concerning jurisdiction. A State may waive a preliminary objection to jurisdiction, either explicitly or tacitly *(forum prorogatum)*, and this may happen as a result of negotiations.

[4] The phrase in Article 84 "Any contracting State may . . . appeal" must be interpreted as giving to "any contracting State involved in this dispute" the right to appeal. An appeal is open to the parties to a dispute. Intervention, which is governed by Article 19 of the Rules, is another matter.

against which appeal may be brought are the decisions refered to in Article 15, and not those mentioned in Article 5.

Now, in the first place, the nature of the norms contained in these Rules must be taken into account. They are intended to extend and supplement the norms of the Convention. They cannot be interpreted in a contrary sense to the norms from which they derive their binding force.

Article 84 of the Convention must be taken as the starting point in order to solve the problem of appeals, and it is starting from that Article that the provisions of the Rules must be studied. These Rules serve as an auxiliary means of interpretation, or as data which may corroborate a given interpretation.

It is true that Article 5 does not mention any possibility of appeal against decisions on preliminary objections. But if this had been done, the drafting would have been excessively, and unnecessarily, complicated. It would have been necessary to distinguish between the various categories of preliminary objections. The question was in fact settled by Article 84 of the Convention, which only allows appeal against decisions of one kind, namely, those which relate to the interpretation of application of the Convention.

According to Pakistan, Article 18, paragraph 2, of the Rules "indicates the narrow scope of appeals, and that also shows that appeal does not lie against every order" (C.R. 72/6, p. 26). This is perfectly true, but it is not an argument which supports the Pakistan contention. Appeal does not lie against any kind of order. Limits to the right of appeal are laid down, because, under Article 84, appeal only lies in cases brought by virtue of clauses *(a)* and *(b)* of paragraph 1 of Article 1, that is to say in a disagreement between two or more contracting States relating to the interpretation or application of the Convention (Art. 1, para. 1 *(a)*, of the Rules; Art. 84 of the Convention), or disagreement between two or more contracting States relating to the interpretation or application of the Transit Agreement (Art. 1, para. 1 *(b)*, of the Rules; Art. II, Section 2, of the Agreement).

The limits laid down by Article 18 are the same as those fixed by Article 84 of the Convention and Article II, Section 2, of the Agreement. It is thus still those two Articles which are decisive on the question of appeal [1].

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[1] The division of the Rules for the Settlement of Differences into chapters and parts may have raised doubts, but without any real foundation.

Article 5, in Chapter III, prescribes the procedure relating to preliminary objections. Chapter IV governs the ordinary procedure applicable to disagreements. But the two chapters do not constitute water-tight compartments, any more than do Parts I and II (see, for example, Arts. 5 and 18).

Articles 3, 4 and 6 are to apply to ordinary procedure and are found in Chapter III. Chapter IV contains rules relating to preliminary objections (e.g., Arts. 16, 17 and 18); notifications are dealt with in the same Article 18. There are also provisions which are not applicable to preliminary objections (e.g., Arts. 7 to 15).

5. Pakistan advances another reason to explain why appeal from a decision of the Council upholding its own jurisdiction was not provided for in the Convention: "The reason is the universally established rule of international law that every international tribunal has the jurisdiction to determine its own jurisdiction" (C.R. 72/6, p. 28).

But the question of the *compétence de la compétence* arises when there are no rules laying down an appeal procedure. When there are rules as to appeal, the court (or arbitrator) cannot itself decide whether or not it is possible to appeal against its own decision. Interpretation of the extent of the rule as to appeal falls within the jurisdiction of the higher court. The lower court cannot deprive the appeal court of its jurisdiction, by arrogating to itself the power to give its own interpretation of the rule as to appeal; its jurisdiction is limited by the possibility of appeal. It is the higher court which has the jurisdiction to decide on its own jurisdiction, to say on appeal whether, in a given case, it is possible to appeal against the decision of the lower court.

The Council could not, and did not, give a decision denying India's right of appeal to this Court. It is this Court which has jurisdiction to interpret Article 84 of the Convention, and consequently to say whether or not India can validly appeal from the Council's decision.

The Council has, with full awareness, recognized the appeal, and, in application of Article 86 of the Convention, treated its own decision as suspended. Through its president, it mentioned the possibility that the case might be brought before this Court (Memorial of India, Annex E, *(e)*, Discussion, para. 19; Reply of India, Annex E, 73rd Session). At the meeting of the Council, the representative of India announced his Government's intention to appeal to the Court (Memorial of India, Annex E, *(e)*, Discussion, paras. 152, 159, 177).

At the request of certain members of the Council, the Secretary General of ICAO prepared a note on Article 86 of the Convention, and in particular on the passage "on any other matter, decisions of the Council shall, if appealed from, be suspended until the appeal is decided". He explained that the decision suspended by the appeal might, for example, "be one affirming or negating the jurisdiction of the Council in a particular matter" (Reply, Annex C, footnote).

The attitude of the members of the Council is also not without significance. No member objected when it was stated that there would be an appeal by India. The representative of Pakistan only challenged the Government of India's right of appeal with reference to the Complaint filed under Section 1 of Article II of the Transit Agreement (Pakistan Rejoinder, para. 40).

6. Pakistan also accuses India of self-contradiction. The Court has jurisdiction to deal with the appeal if the Convention is in force (Art. 37 of the Statute) but India claims that the Convention has been terminated or suspended. How can it be said, at the same time, that the Convention is in force and that it is not?

The question is of no practical importance if the Court rules against

the Indian argument, and decides that the Convention is in force between India and Pakistan.

In any event, I consider that the dilemma on which Pakistan seeks to impale India is unreal. When a preliminary objection as to jurisidiction is raised before a court, it is because the litigant does not accept the jurisdiction of the court; he denies that the court has jurisdiction, but he raises an objection to avoid having judgment go against him by default. An appeal does not change the litigant's position in law. The same preliminary objection raised by India before the Council is now before the Court.

The Court's jurisdiction does not result from the Convention being in force between India and Pakistan, but from the right of appeal to the Court laid down by Article 84 of the Convention; thus what is necessary is that the Convention and the Article should be in force with regard to the Court.

It is the Convention which gives the right of appeal and, for the Court, the Convention is in force. India, or Pakistan, or any other party to the Convention, may appeal to the Court against a decision by the Council concerning its jurisdiction.

The Court has jurisdiction to take a decision regarding its own jurisdiction, if an objection denying that a treaty is in force is raised. The Council also can consider the question of its jurisdiction when India contends that the Convention and the Agreement are not in force as between India itself and Pakistan. The Court is here a court of appeal. Appeals have a twofold effect, suspensory and devolutive—devolutive effect because it is the case as a whole which is transferred to the higher court, with all the questions it entailed before the court of first instance. In order to reject or uphold the objection raised by India the Court must decide whether the Convention is in force, just as the Council was able to do.

7. The question of the appeal to this Court is of undeniable importance, both for the Court and for international organizations. The Court cannot evade its responsibility. For such organizations, it is necessary that there should be a supervisory body, to exercise supervision over complicated legal decisions, and over the interpretation and application of their constitutional and internal rules.

An appeal from a decision concerning jurisdiction is quite normal in municipal law. It is not contrary to the nature of international organizations. It is indeed a fact that the administrative and technical nature of the ICAO Council makes it a practical necessity that there should be the widest possibility of appeal to a judicial body such as the Court, with regard to the interpretation of the Convention and of the Agreement.

It must not be forgotten that it is one of the desiderata of the international community that the possibility of appeal should be extended to cover all the decisions of international organizations. The Institute of International Law has studied the possibility of establishing a right of appeal in respect of all decisions of these organizations ("Recours judiciaire à instituer contre les décisions d'organes internationaux", *Annuaire de l'institut de droit international 1957*, pp. 274 ff.).

It must be borne in mind also that when sovereign States have established an appeal as a safeguard in respect of the decisions of international organizations, it is a right which it is in their interests to preserve undiminished.

II. The Jurisdiction of the ICAO Council under the Convention

India's appeal to the Court is based on questions relating to jurisdiction which have already been raised before the Council. These are of great importance and of general interest.

In brief, the main questions raised by India relate to the following points:

(1) The words "interpretation" and "application" in Article 84 of the Convention, and Article II, Section 2, of the Transit Agreement, cannot be interpreted as applying to questions relating to the suspension or termination of the Convention or the Agreement.
(2) No question of interpretation or application can arise with regard to a treaty which has ceased to exist or which has been suspended.
(3) A State may terminate any treaty whatever in case of breach by the other party.
(4) A State may terminate a treaty simply by declaring the existence of such a breach.

I will take these Indian arguments one by one.

1. It is observed in the Memorial of the Indian Government that disagreements between States pertaining to the Convention or the Transit Agreement may arise in one of four ways: (1) disagreements as to interpretation, (2) disagreements as to application, (3) disagreements arising from action taken under the Convention or the Agreement, and (4) disagreements pertaining to termination or suspension of the Convention or the Transit Agreement by one State as against another (Memorial of India, para. 72). India then contends that only the first two types of disagreement can be considered by the Council under the terms of the Convention, and only the first three types of disagreement can be considered by the Council as far as the Agreement is concerned. According to India, the Council is not competent to consider the fourth type of disagreement, which is concerned with termination or suspension of the Convention or the Transit Agreement (*ibid.*, para. 73).

As the chief counsel of India said in his address to the Council, this distinction "is the crux of the case" (Memorial of India, Annex E, *(a)*, Discussion, para. 7). His argument is that since the text of the treaties does not use the expressions "suspension" and "termination", which have very clear meanings, it must follow that the Council has no jurisdiction in this connection.

India's argument is based on an incorrect premise, namely, that the four causes of disagreement are of the same kind, whereas in fact they are of different kinds.

Interpretation is a general function and one to be carried out as a preliminary step. It signifies the search for and ascertainment of the true meaning of the Convention and the Agreement, with reference to any action, any situation or any fact. For example, it involves ascertaining whether the application effected is or is not a correct one, classifying the actions of States, determining whether they have carried out their duties or committed any breach of their obligations, and whether the established reservations in favour of State sovereignty have been respected.

The basic postulate underlying the Indian objections is that the Convention and the Agreement have been terminated or suspended with regard to Pakistan; Pakistan's conduct, according to India, implies a breach of the obligations undertaken by Pakistan, and it is this which is the cause of the termination or suspension. But to reach such a conclusion one has to interpret the Convention and the Agreement. To ascertain whether Pakistan has committed a breach of its obligations towards India, one needs to know what those obligations are; to ascertain whether a breach of this category or that gives rise to termination or suspension, it is necessary to know what are the appropriate sanctions for such a violation, and what the relevant procedure is for those sanctions to be imposed. The answer to these questions depends on the meaning (interpretation) of the rules to be applied (the Convention and the Agreement).

In the preliminary objections made by India before the Council (28 March 1971), it is explained that the "policy of political confrontation bordering on hostility" on the part of Pakistan, and "the hijacking of an Indian aircraft" were the cause of the termination or suspension of the Convention and the Agreement, the conduct of Pakistan amounting "to the very negation of all the aims and objectives, the scheme and provisions, of the Convention . . . and of the . . . Agreement" (Memorial of India, Annex C, paras. 5 and 6) [1].

It is apparent that India is offering its own interpretation of the Convention and the Agreement, that it is putting Pakistan's conduct in a particular category, by regarding it as contrary to the aims and objectives, the scheme and provisions, of each of these instruments. As soon as this interpretation differs from that advanced by Pakistan, there is a disagreement as to the interpretation of the Convention and the Agreement (Art. 84 of the Convention, Art. II, Sec. 2, of the Transit Agreement).

The form of words by which jurisdiction is conferred on a body to settle disputes the subject of which is the interpretation, or the inter-

[1] It is also stated that "Pakistan by its conduct has repudiated the Convention vis-à-vis India, since its conduct has militated against the very objectives underlying, and the express provisions of, the Convention . . . Pakistan's conduct also amounts to a repudiation of the Transit Agreement vis-à-vis India. In the circumstances, India has accepted the position that the Convention and the Transit Agreement stand repudiated, or in any event suspended, by Pakistan vis-à-vis India" (Memorial of India, Annex C, para. 22).

pretation and the application, of a treaty, confers on that body jurisdiction to interpret "all or any provisions [of the Treaty], whether they relate to substantive obligations" or not (*I.C.J. Reports 1962*, p. 343), which logically includes the legal consequences of the violation of such obligations *(pacta sunt servanda)*. This is a conclusion which is of general application, whether the organ having jurisdiction is ICAO or an organ of another organization [1].

The Indian argument is based on a narrow conception of the word "interpretation". "Where such a method 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" (*I.C.J. Reports 1962*, p. 336).

India has advanced a supplemental argument based on the absurdity of entrusting the settlement of legal questions to the Council. The Council is composed of persons without legal training; it is composed not of men but of States; it is an administrative or technical body. It is therefore not equipped to carry out judicial functions, still less to decide questions touching the rights of sovereign States. How then can Article 84 of the Convention and Article II, Section 2, of the Agreement be understood as conferring power on the Council to pass judgment as to the termination or suspension of a treaty?

The impression that has thus been given to us of the Council's functions is not supported by the Chicago Convention. The power which the Articles mentioned confer upon the Council apparently extends to all the rules contained in the Convention; but the interpretation of the rules contained in a convention is a legal function, not an administrative function. The Council have to decide disputes between States as to the interpretation and application of the Convention and the Agreement. The Council is also to insure that the rights of contracting States are fully respected (Art. 44 *(f)*) and report to contracting States any infraction of the Convention (Art. 54 *(j)*), and these functions are also legal functions.

The interpretation of the rules of the Convention may relate to questions touching the sovereignty of the contracting States over the airspace above their territory—I am thinking here of the problem of prohibited areas (Art. 9 of the Convention), which has given rise to disputes between States which have been brought before the Council (two such cases are known to me), and which bristle with legal problems [2].

The Council is made up for the most part of aviation experts. But when it is in their interest to do so, States take care to send qualified lawyers to the Council, and to give instructions which have been carefully worked out beforehand in their foreign ministries.

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[1] Cf. Article 36, para. 2 *(a)*, of the Court's Statute. In the Mandate for German South West Africa, disputes relating to "the interpretation or the application of the provisions of the Mandate" were to be submitted to the Permanent Court of International Justice (Art. 7).

[2] The interpretation of Article 89 may also give rise to disputes touching the sovereignty of States.

The very possibility of an appeal to this Court demonstrates the importance attached to the legal functions of the Council when it has to decide questions which involve interpretation or application of the Convention or Agreement.

It does not therefore seem that there is any "inherent limitation" (C.R. 72/3, p. 23) in the jurisdictional clauses, resulting from the nature and composition of the Council.

Arguments as to restrictive interpretation of declarations of acceptance of compulsury jurisdiction do not apply (and India seems to concede this: C. R. 72/3, p. 25) to jurisdictional clauses, which must be interpreted according to their aims and objectives. But the provisions of Article 84 of the Convention and Article II, Section 2, of the Agreement are clauses of special jurisdiction. The attitude of States at the Vienna Conference cannot be relied on to limit the jurisdictional clauses in the Convention and the Agreement. At Vienna, apart from the particular circumstances of the time, which are well known, the hesitation of States is to be explained by their fear of writing a blank cheque for treaties of all kinds. In the Convention, on the other hand, the objective of the jurisdictional clause is concrete and clearly defined.

The observation that States would not welcome a judgment upholding the Council's jurisdiction seems to be entirely contradicted by the actual attitude of the States, or representatives of the States, at the time of the vote taken in the Council. The interpretation given by the Council to the jurisdictional clause is not contrary to sound principles, but is a step in the right direction, which is to strengthen international organizations.

To ascertain the true meaning of a clause, one must not play with words. When jurisdiction is conferred on a body to intepret a treaty, jurisdiction is given above all to say whether or not the treaty is in force, that is to say whether or not it has been terminated or suspended. The question which has arisen is not whether a State has the right to suspend or terminate a treaty under general rules of international law, but whether it may do so under the rules of the treaty. The question is this: does breach by one party of its contractual obligations entitle the other to declare its own obligations at an end? It must not be overlooked that it is categorizing the conduct of the parties as lawful or otherwise which enables one to say whether there has been a breach of the Convention by one party or by both, and if there has been a breach, what are the proper sanctions. To do this one has to interpret the Convention and the Agreement.

For example, one would certainly need to interpret Article 89 of the Convention in order to ascertain whether a certain State had acted lawfully, in accordance with the Convention, if in a situation of hostility, of acute confrontation, of cold war, it took the view that it had freedom of action to do away with the privileges granted by the Convention, and perhaps even to declare the effects of the Convention suspended vis-à-vis another State.

But it does not appear to be correct to interpret the jurisdictional clause as conferring the possibility of saying: I may, as and when I

wish, avoid the sanctions which follow a breach committed by me of my contractual obligations, by saying that I regard the treaty as at an end vis-à-vis the injured party, or that I have not ceased to fulfil those obligations, because I have declared a suspension of the treaty.

2. The second contention of India has an impressive appearance of logic. The argument is that a power or faculty conferred by a treaty comes to an end *ipso facto* at the moment when the treaty ceases to exist. Thus the Council's jurisdiction to pass judgment on the disagreement between India and Pakistan came to an end with the termination of the Convention and the Agreement vis-à-vis Pakistan (breach by Pakistan of its obligations).

This reasoning is not acceptable. It confuses different causes and categories of termination of treaties.

The termination of a treaty may depend on a cause which is external to what is contained in the treaty *(ab extra)*, or on a cause which originates from the very operation of the treaty. When one party accuses another of a breach of the obligations resulting from the treaty, it is an existing treaty which is involved. In order to ascertain whether there have been breaches, the treaty must be interpreted; it is a question of interpretation of a treaty which is still in existence.

Breach of an obligation resulting from the treaty does not involve *ipso jure* the termination of the treaty. It entitles the injured party to invoke the breach as a ground for terminating the treaty, or suspending its operation (see Art. 60 of the Vienna Convention)[1]. This right is without prejudice to the provisions of the treaty applicable in the event of a breach (Art. 60, para. 4, of the Vienna Convention), and thus to the provisions concerning disagreements over breaches of obligations (jurisdiction to settle disputes).

The Vienna Convention also makes the consequences of breaches of its obligations by one party to the treaty subject to the general rules concerning the settlement of disputes as to the existence and effects of the breach (Arts. 65 and 66).

The material breaches of which India accuses Pakistan do not by themselves put an end to the treaty, and do not put an end to the jurisdiction of the Council. On the contrary, it falls within the jurisdiction of the Council to decide whether or not Pakistan has committed breaches, and if so, whether they are material. It will be for the Council to decide these questions which pertain to the merits, and it is then that India, may, if it wishes, rely on the breach of a material obligation in order to terminate the treaty or suspend its operation.

[1] It should not be overlooked that the rule opens the possibility of raising the *exceptio inadimpleti non est adimplendum*. The breach of an obligation is not the cause of the invalidity or termination of the treaty. It is a source of responsibility and of new obligations or sanctions. Alongside this, it is the material breach of a treaty which entitles the injured party to invoke it in order to terminate or suspend the operation of the treaty. See the Report of the International Law Commission, 1966 (Art. 57 of the draft) (*Yearbook of the I.L.C.*, 1966, Vol. II, pp. 253-255).

It is not correct that the principle laid down in Article 60 of the Vienna Convention is *dehors* the Chicago Convention. On the contrary, it is a principle which follows from the contractual nature of treaties. There is no frontier between treaties and international law; there is no frontier which leaves the content of treaties outside international law. On the contrary, it is thanks to international law that treaties have a legal significance. The rules of international law are not outside treaties, they give legal force to treaty rules. The principle *pacta sunt servanda* (Vienna Convention, Art. 26) is not *dehors* treaties; it is this principle which makes it possible to call for performance in good faith of contractual obligations. Article 60 is a complement and the sanction of the principle *pacta sunt servanda*. It is the breach of rights or obligations having their source in the agreement which lies at the root of the *exceptio non adimpleti*.

3. A fundamental point in the argument put forward in the Memorial of India, to the effect that the Convention and Agreement are terminated or suspended vis-à-vis Pakistan, is based on the application of Article 60 of the Vienna Convention and on certain observations of the Court in its Advisory Opinion on *Namibia* (*I.C.J. Reports 1971*, pp. 47 and 49). Perhaps one of the sources of the error in the construction of the Indian argument may be found here: it does not take into account the differing nature of treaties.

The draftsman of the Vienna Convention did not conceive of Article 60, paragraph 1, as imperative and general; quite the contrary. There must be taken into account, above all, the rules peculiar to each treaty, not only because of the principle *pacta sunt servanda* (Arts. 26, 56 and 58), but also because of the reservations made in Article 42, paragraph 2, and Article 60, paragraph 4. The differences between bilateral and multilateral treaties, and those which give rise to an international organization, must also be taken into account.

The Vienna Convention "applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization" (Art. 5).

In the course of the discussions at the Vienna Conference, emphasis was laid on the need for the utmost respect for the peculiarities of international organizations. The States did not wish to weaken the growing achievements and the effectiveness of international organizations [1]. In any treaty creating an organization a distinction is to be drawn between: (1) the constituent instrument of the organization, which is subject to the *lex generalis* on the coming to birth of treaties, and (2) the constitution which sets up the *lex specialis* or rules to govern the life and functioning

[1] See in this sense, Article 20, paragraph 3, of the Vienna Convention. See also the report of the International Law Commission 1966, on Article 17 (*Yearbook of the I.L.C.*, 1966, Vol. II, pp. 202-208, particularly para. 20).

of the organization. It is this special aspect which is responsible for the classification of this type of treaty by writers among "treaty-laws" or "Vereinbarungen".

From the moment of its creation, an international organization is a new juridical reality. It is an entity having its own rights and obligations, its own purposes and functions, and thus a certain legal personality (*I.C.J. Reports 1949*, pp. 179-181). It has the tie of legal personality, which excludes the autonomy of its several members (*I.C.J. Reports 1970*, p. 34, para. 40).

Whatever the nature of its legal personality may be, each organization has a constitution which provides it with a general rule to which all its members are subject. Their rights and obligations towards each other flow from this constitution. It is the fact that the organization is a legal person which prevents the legal relationships between its members being considered as governed by a series of independent bilateral treaties. The life of the organization is not governed disjunctively by an accumulation of bilateral treaties. Members of the organization are linked together by the constitution, and their relationships are governed by the constitution. Such relationships are those resulting from the status of member of the organization, and not the status of a party to bilateral treaties. This is of the very essence of organizations; it is required by the common interest, and is a necessity for their functioning and effectiveness.

The State which is in breach of those of its obligations or duties which derive from this constitution, towards another member State of the organization, is not in breach of a single bilateral treaty between them, it is in breach of the constitution of the organization. The effects of such a breach are governed by that constitution. It is only in a supplementary way that the general rules of international law, those enshrined in the Vienna Convention, may be applied [1].

[1] India has referred to the Advisory Opinion given by the Court in the *Namibia* case (*I.C.J. Reports 1971*, p. 47), and drawn the conclusion that Article 60 of the Vienna Convention applies generally to all treaties, and thus to the Convention and the Transit Agreement. But the observations to be found in the Opinion must not be taken out of context. In the Advisory Opinion it was said that "[the] General Assembly . . . determines that . . . material breach had occurred in this case" (p. 47, para. 95) and the 1962 Judgment was cited to the effect that "this Mandate, like practically all other similar Mandates" was "a special type of instrument composite in nature and instituting a novel international régime. It incorporates a definite agreement . . ." (*I.C.J. Reports 1971*, p. 46, para. 94). The Court, here as elsewhere, had in contemplation the very particular nature of the Mandate. In a mandate or a trust, the power of revocation is regarded as implicit. The Mandator, the League of Nations, grants the mandate for the benefit of the people under trusteeship. The United Nations, the successor to the League of Nations, has the right and the obligation to withdraw the mandate, trust or guardianship, in any case where the mandatory, the trustee or the guardian commits a breach of his obligations towards the people of whom he was appointed trustee.

The Advisory Opinion in the *Namibia* case does not support India's contention. This is yet another example of the fact that the nature of each treaty must be taken into account for the purposes of application of Article 60.

Therefore in order to ascertain the consequences of the breaches of which India accuses Pakistan, one must above all take into account the constitutional significance of the Convention and the Transit Agreement.

ICAO is one of the most perfected international organizations. Its legal personality is clear, as is also its legal independence with regard to its members. In the Convention, it was sought to bring out the full juridical personality of the Organization for the exercise of its functions in the territory of each State, subject to the sole reservation of the laws of the State concerned (Art. 47).

The Organization has its own aims and objects, which are independent of the particular interests of each member State, namely those of the international community (Preamble and Art. 93*bis*); and each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of the Convention (Art. 4).

The Convention lists the rights and obligations of the members of the Organization; it set up organs (the Assembly and the Council) to ensure their implementation, and even provides for sanctions against States which do not comply with their decisions (Arts. 84 to 88 of the Convention; Art. II of the Agreement). It was in order to facilitate the achievement of the objects and principles of the Organization, it was to facilitate its functioning, that a system was set up for settlement of disputes between States as to the exercise or the breach of their rights and obligations (Art. 84 of the Convention; Art. II of the Agreement).

Two further groups of provisions may be mentioned which throw light on the system of the Organization.

In the first place there are those provisions which lay down the principle of non-discrimination between member States. In the solemn enumeration of the objectives of the Organization, one objective is to "avoid discrimination between contracting States" (Art. 44 *(g)*). In the very preamble to the Convention, there is mention of "equality of opportunity", and in several other articles stress in laid on the prohibition of any distinction between the aircraft of contracting States (Arts. 9, 11, 35). Still with a view to avoiding special relationships between States which are preferential or discriminatory, it was laid down that "the Contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings" (Art. 82 of the Convention).

Secondly, there are the provisions governing the way in which States' obligations come to an end. Article 95 lays down the rules for denunciation of the Convention, that is to say, for leaving the Organization. It does not recognize the possibility of denunciation vis-à-vis a single member State. This would seem to be inadmissible as contrary to the principles of non-discrimination and legal personality. Are these principles the *raison d'être* of Article 89? In case of war, the provisions of the Convention do not affect the freedom of action of any of the contracting States con-

cerned, whether as belligerents or as neutrals; the same principle is applied when a contracting State declares a state of national emergency. It should be observed that even a state of war does not involve the termination of the Convention between the contracting States; the point is that there are no bilateral treaties between them. It is the Convention itself, which is still in force, which confers upon the States concerned freedom of action with regard to the obligations undertaken by them.

It would seem that the following conclusions may be drawn:

(1) Treaties creating organizations are subject to special rules, and not to the rule laid down in Article 60 of the Vienna Convention.

(2) The rules of the Chicago Convention do not recognize the possibility of a State declaring the Convention at an end vis-à-vis one other State.

(3) The special rules of the Convention and the Transit Agreement exclude any possibility of applying the rule laid down in Article 60 of the Vienna Convention.

(4) The interpretation of Article 84 of the Convention, and Article II of the Transit Agreement, advanced by India, is contrary not only to the letter and to the purpose of those Articles, but also to the system of ICAO as an international organization.

4. India contends further—and this is the last point in its argument—that it had power to put an end to its obligations toward Pakistan by unilateral declaration. This argument has been advanced in a somewhat unusual way. The chief counsel for India explains it thus:

> "... assume hypothetically that a State has acted in such a way that my overflying that State's territory is unsafe—that destroys the very objective, the very purpose, of the Convention and the Transit Agreement. If because of that I terminate the Agreement, I have terminated in rightfully. Suppose I get panicky and hastily jump to the conclusion—I will assume wrongly jump to the conclusion—that my overflying the territory of the other State is unsafe. Suppose that the view I have taken is an unduly apprehensive one and the correct view should be that it is all right for me, it is safe enough for me, to overfly, then I have wrongfully terminated the agreement. But whether I have terminated it rightfully or wrongfully is a dispute as to termination. That is the important point." (Memorial of India, Annex E, *(a)*, Discussion, para. 24.)

Consequently, according to the chief counsel for India, since there is no disagreement as to the interpretation or the application of the Convention, but a dispute over its termination, the Council has no

jurisdiction to determine this dispute or disagreement. The Convention and the Agreement have thus come to an end vis-à-vis the other State [1].

The errors in the Indian argument have already been pointed out. The closely reasoned and logical argument of the chief counsel for India shows most clearly the practical importance of the question raised in this case, and its general importance for the functioning of international organizations.

The direct consequence of the doctrine which India advances before us is to confer on member States the possibility of freeing themselves at will from their obligations as members of the Organization vis-à-vis another member State. It affords a convenient cover for a *non volumus*. It is enough to accuse the other party of breach of an obligation, and to treat the breach as an appropriate ground for putting an end to the treaty. A State might act thus in order to withdraw a breach on its own part from the jurisdiction of the Council; it might also declare that the Convention had come to an end vis-à-vis another member State in order to exert pressure on that State to make a discrimination in its own favour. In any event, the Organization would be reduced to impotence when faced with this manœuvre designed to evade the jurisdiction of the Council, whatever may be the breach of the obligations flowing from the Convention or the Agreement; it would be sufficient to dress it up artificially, or simply to take a dispute over the existence of a breach of the treaty and baptise it a dispute over the termination of the treaty.

The explanations given by the chief counsel for India also make it clear how far the Indian contention is contrary to the uniformity and internal tie appropriate to the nature of organizations, and how in practice it disregards the principle of non-discrimination, to substitute therefor another principle, that of optional discrimination.

It has been said that the consequences of an interpretation are the touchstone of that interpretation. Any interpretation which leads to absurdity, which opens the door to fraud, which disregards the aims and the object of the rule to be interpreted, must be rejected. But these are the inescapable results of the Indian contention.

It may therefore be concluded without hesitation that Article 84 of the Convention and Article II of the Transit Agreement confer jurisdiction on the Council for all questions relating to the breach of obligations deriving from the Convention or the Agreement, because it has juris-

[1] The argument here set forth seems to be pervaded by what is a fairly common source of confusion, namely the belief that the absence of any tribunal having compulsory jurisdiction arbitrarily leaves States free to terminate or suspend treaties. The true position is that a declaration of termination or suspension must be objectively justified to be valid. This also has important practical consequences: an arbitrary declaration does not suspend the treaty and does not terminate it, it will continue to be in force and will have to be treated as being in force by third States, by the international community, and in the present case, by the Court (Arts. 36 and 37 of the Statute).

diction to settle any dispute as to the interpretation or application of the Convention and Transit Agreement.

III. Objections by India as to the Method Followed by the Council to Reach its Decision

In the Memorial of India, the nullity of the decision of the Council is asserted, in view of the way in which the decision was adopted.

Before embarking on an examination of the grounds on which India asks the Court to declare the Council's decision unfair and prejudicial to India, and bad in law, it would seem useful briefly to recall the meaning of nullity. Nullity is a very serious sanction. Its application is confined to acts *contra legem*. For absolute nullity, which is here in question, it is necessary that the act under scrutiny should have been incompatible with the law. For this, it is necessary that the law should be imperative or prohibitive, that the act be contrary to the object of the law, and that the defect in the act should have not been put right. For a judgment or other decision to be declared null and void, it must be defective with regard to its results, its substance, its essence, and not merely with regard to the reasoning, or to inessential aspects of it.

India's criticism of the method followed by the Council is addressed to five points:

1. The way in which the question of jurisdiction was put to the Council. The proposals put to the vote were drawn up negatively, namely "the Council has no jurisdiction . . .", whereas the point should, it is asserted, have been expressed affirmatively: "the Council has jurisdiction . . ." (Memorial of India, para. 93 and Annex E, *(e)*, Discussion, paras. 58 et seqq.). India's reasoning appears to be based on the belief that if a preliminary objection is raised, the Council must take a decision on its own jurisdiction and not on the preliminary objection (see Art. 5, para. 4, of the Rules for the Settlement of Differences, and what was said on this by the representative of India in the Council, Memorial of India, Annex E, *(e)*, Discussion, para. 76).

But the express terms of the French text of this provision of the Rules (Art. 5, para. 4) seem to say the contrary. Once the preliminary objection is raised, "le Conseil . . . rend une décision sur *cette* question préjudicielle", that is to say that the Council must give a decision on the preliminary objection, which is "cette question préjudicielle". The Council does not have to take a decision on its own jurisdiction as if this was a preliminary issue. It must take a decision on the objection; it must uphold the objection or dismiss it [1].

This procedure presupposes a presumption in favour of the jurisdiction of the Council. It is the normal consequence of the procedural machinery. A judgment or judicial decision must correspond to the submissions of the applicant; if it does not, it will be defective as a decision *ultra petita*.

[1] Except where one of the parties does not appear (Art. 16 of the Rules).

It is also well known that *reus in excipiendo fit actor* [1]. India asks the Council to declare "that the Council has no jurisdiction to hear them [Pakistan's Application and Complaint] or handle the matters contained therein" (Memorial of India, Annex C, para. 39).

On a preliminary objection, the former respondent becomes the applicant, and it is therefore on him that the burden falls of proving the grounds of his objection [2]. The Council had to decide whether there were any reasons for it to declare that it had no jurisdiction. Is it not therefore logical that it should have asked itself "Has the Council no jurisdiction . . .?" This is what India advanced in the written text of its objection. It does not therefore appear that the Council's decisions are defective because the questions were incorrectly put.

2. India complains that the Council did not afford its members further time to study the issues after having heard the parties, on the basis of a full verbatim record, and to consult their Governments as to the weight of the arguments put forward during the oral proceedings; furthermore, one member of the Council was not present throughout the oral proceedings (Memorial of India, paras. 93-99).

All these arguments seem somewhat lame; no provision can be found to support them.

The procedure adopted by the Council is not contrary to equity. The members of the Council and their Governments had had reasonable time to acquaint themselves with India's objection, and to study it, and the grounds put forward in support of it. Far from being contrary to the law, this procedure is in accordance with it. The Rules lay down that the Council, after hearing the parties, shall decide the question (Art. 5, para. 4). After the hearing, the discussion is closed and its decision must be given without further time. With regard to "the time-limits . . . fixed", the Council "may" extend them at its discretion (Art. 28 of the Rules). Certain members of the Council took the view that the time-limit before taking the decision should be extended, and this was in fact proposed. A vote was taken, and the proposal was not adopted; it received 8 votes as against the 14 which were necessary (Memorial of India, Annex E, *(e)*, Discussion, para. 42) [3].

As to the absence of one member of the Council during the oral proceedings, there is no provision in the Rules which treats this as invalidating the vote. In any event, the point would seem to be irrelevant, because the vote was not necessary for the dismissal of the objection raised by India.

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[1] *Agere etiam is videtur, qui exceptione utitur; nam reus in exceptione actor est*, D. 44.1.1.

[2] "*Reus exceptiones quas obiicit probare videtur*"—*Decio, in tit. de reg. juris, regula* 43, 5. See also Art. 62, paras. 2 and 3, of the Rules of Court.

[3] The chief counsel of India seems to have admitted, with reference to time-limits that "it is their [the Council's] decision" (Memorial of India, Annex E, *(e)*, Discussion, para. 82).

3. In the Indian Government's Reply, it is claimed that for questions relating to the Transit Agreement, a majority of 14 votes was required, and the decision of the Council on India's objection received only 13 votes (*ibid.*, para. 78). This observation is not to the point, because the vote was not on the jurisdiction of the Council, but on the *lack* of jurisdiction of the Council. It was on this that the vote was taken. On the Indian proposal there was one Aye, 13 Noes, and 3 abstentions.

It may be added that India's argument as to the calculation of the votes, notwithstanding the authority of the memorandum by the Secretary General of ICAO (Annex D to the Indian Reply) is not convincing. Article 52 of the Convention states that "decisions by the Council shall require approval by a majority of its members". But Article 66 *(b)* provides that "Members of the . . . Council who have not accepted . . . the Transit Agreement . . . shall not have the right to vote on any questions referred to the . . . Council under the provisions of the . . . Agreement". In view of the object and spirit of these Articles, they must be interpreted in the sense that decisions on questions raised under the Agreement must be taken by a majority of the members entitled to vote. The abstentions of the members of the Council which are not signatories to the Agreement, or have not accepted it, should not be counted in calculating the majority, because one can only talk of abstentions with reference to those who are able to vote.

A rule of law may not be interpreted in a way which leads to an absurd result *(reductio ad absurdum)*. Can the abstentions (which are required by Art. 66) of the members of the Council which have not signed or accepted the Agreement, prevent decisions on questions relating to the Agreement being taken, even if the members which have signed and accepted the Agreement have voted unanimously for such decisions?

4. India argues further that the Council's decision is vitiated because the proposals put to the vote by the President were neither introduced nor seconded by any member of the Council, as required by Rules 41 and 46 of the Rules of Procedure.

This objection seems to be the result of a misunderstanding. The President did not in this case put forward any proposal; he put to the vote the questions raised by India in its preliminary objections.

5. At the very last moment, towards the end of the public hearing of 23 June 1972, India made a fresh objection to the validity of the Council's decision [1], and referred to the text of the decision, as reported in the Pakistan Counter-Memorial (Annex II). Article 15 of the Rules for the Settlement of Differences states that the decision of the Council shall

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[1] Is India's objection contrary, on that account, to the procedural rules? This is not a question of jurisdiction on which the Court would have to take a decision *proprio motu*.

Is it possible on appeal to argue that the Council's decision was invalidated on a ground which was not advanced before the lower tribunal?

Is not India's silence throughout the whole of the proceedings until the hearing of 23 June a case of acquiescence?

be in writing and shall contain "(v) the conclusions of the Council together with its reasons for reaching them". But the decision does not give any reasons, and it is argued that this invalidates the decision.

The criticism thus made by India is ambiguously expressed. If one compares the text of the decision with Article 15, referred to above, it is apparent that the text does not comply with any of the formal requirements of the Article. What we have before us is not a decision within the meaning of Article 15, it is the official notification of a resolution adopted by the Council.

The problem of the validity of the Council's decision is thus not the problem raised by India. India claims that the decision is invalid for breach of a formal requirement, but what we are concerned with is not a decision within the meaning of Article 15.

The problem is thus whether a decision within the meaning of Article 15 is necessary for a valid settlement of the preliminary issue raised by India. India has not brought any evidence of the Council's practice in similar cases, and has not addressed any thorough legal argument to the Court on the point. India simply states that according to Article 5, if a preliminary objection is raised, the Council *shall decide*, and that according to Article 15, *decisions* must contain the conclusions *with reasons*, whereas the Council has given no *reasons*.

It is somewhat startling that the Secretary General and Legal Officers of ICAO, the members of the Council, and even the Representative of India, did not point out that the Council had not really taken any decision, that in fact nothing valid had been done, since there had been a failure to take account of Article 15.

Without being an expert in the procedure of ICAO, it seems to me that we may find in the Rules for the Settlement of Differences a satisfactory explanation for the Council's conduct.

It would seem that in those Rules a distinction is made between two procedures. One is governed by Article 5; it is a procedure which might be regarded as interlocutory, short and simple, by which, after the parties have been heard, a decision is taken, yes or no, to proceed or not to proceed with the application. The preliminary issue raised by the preliminary objection is not governed by Chapter IV, which applies to ordinary proceedings. Chapter IV contemplates a more formal and complicated procedure. It is this procedure which is terminated by the decision provided for in Article 15; this is a true judgment, a final decision which presupposes the close of the proceedings; the decision is given "after the close of the proceedings" (Art. 15, para. 4), and it must respect formal requirements which are not necessary when it is the preliminary issue which has to be decided. The decision under Article 15 puts an end to the case for the Council. The decision dismissing the preliminary objection, on the other hand, means that the procedure can continue, and this explains why the Council at this stage continues to invite the parties to the dispute to engage in negotiations.

There is no doubt as to the nature of the Note of 30 July 1971 on the

preliminary objections of India (Annex II to the Counter-Memorial of Pakistan). It is a communication by which Pakistan (and there was no doubt an identical communication to India) was informed that on 29 July 1971 the Council had decided not to uphold the preliminary objections, and that accordingly the time-limit set for delivery of the Counter-Memorial began to run as from 29 July. The Secretary General drew the attention of the parties to the Council's resolution of 8 April 1971 in which they were invited to negotiate.

It is apparent that we are here in the frame of reference of Article 5, and not at all in that of Article 15.

Furthermore it cannot be said, as India has done (C.R. 72/5, p. 45), that the Rules of Procedure are statutory rules, having the same force as the constituent instrument of the Council. The Rules for the Settlement of Differences were not adopted by vote of the Parties to the Convention, or of the members of the Assembly; it was the Council which approved them on 9 April 1967. It is not the constituent instrument of the Council, but something which the Council itself has produced. The Council reserves to itself powers over the procedure (Art. 28), and Article 33 tells us that "the present Rules may, at any time, be amended by the Council".

Since it was the Council which approved its Rules of Procedure, the interpretation given by it of those Rules in the exercise of its functions *(facta concludentia)* ranks as an authoritative interpretation [1]. There is thus a strong presumption that the decision taken by the Council is in conformity with the true meaning of the Rules.

IV. The Special Agreement of 1966

India has contended that the question of overflights of its territory by aircraft of Pakistan is not governed by the Convention and Transit Agreement, but by the Special Agreement of 1966 (which has been suspended) between India and Pakistan. The consequence is thus that the ICAO Council has no jurisdiction to take a decision on a question which is outside the Convention and Transit Agreement.

India's argument does not seem to take into account Article 82 of the Convention, and Articles 30, paragraph 4, and 41, paragraph 1, of the Vienna Convention. In the case of a multilateral treaty, and *a fortiori* in the case of the constituent instrument of an international organization, two of the parties to the treaty can only conclude an agreement to modify the treaty as between themselves if the possibility of such a modification is provided for by the treaty, or the modification is not prohibited and is not incompatible with the object and purpose of the treaty as a whole. The Convention, in Article 82, imposes an obligation on all contracting

[1] In the sense of what has been called an "interprétation institutionnelle".

States not to contract obligations or understandings which are inconsistent with the terms of the Convention.

The 1966 Agreement may be interpreted in two ways. One can either hold that it contains provisions incompatible with the Convention, or that its provisions are compatible with the Convention.

On the first hypothesis (incompatibility), it was not possible for the Council to consider these provisions, because, being contrary to the obligations undertaken by India and Pakistan, they are null and void *(contra legem)*.

On the other hypothesis (compatibility), the 1966 Agreement respected all the imperative provisions of the Convention. It could not, therefore, exclude the rules in the Convention concerning the jurisdiction of the Council to take decisions on the interpretation or the application of the Convention and Agreement, so that the Council has jurisdiction to state whether India has or has not committed a breach of its obligations towards Pakistan under the Convention, or the Transit Agreement, and to state also, if appropriate, whether the provisions of the 1966 Agreement are, or are not, compatible with those of the Convention [1].

(Signed) F. DE CASTRO.

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[1] Possibly taking into account the very special circumstances of the relationship between the two States, and a teleological interpretation of Article 89 of the Convention.