

INTERNATIONAL COURT OF JUSTICE

**APPEAL RELATING TO THE JURISDICTION OF THE ICAO
COUNCIL UNDER ARTICLE II, SECTION 2, OF THE 1944
INTERNATIONAL AIR SERVICES TRANSIT AGREEMENT**

**THE KINGDOM OF BAHRAIN,
THE ARAB REPUBLIC OF EGYPT,
AND THE UNITED ARAB EMIRATES**

v.

THE STATE OF QATAR

COUNTER-MEMORIAL OF THE STATE OF QATAR

VOLUME II

25 FEBRUARY 2019

VOLUME II

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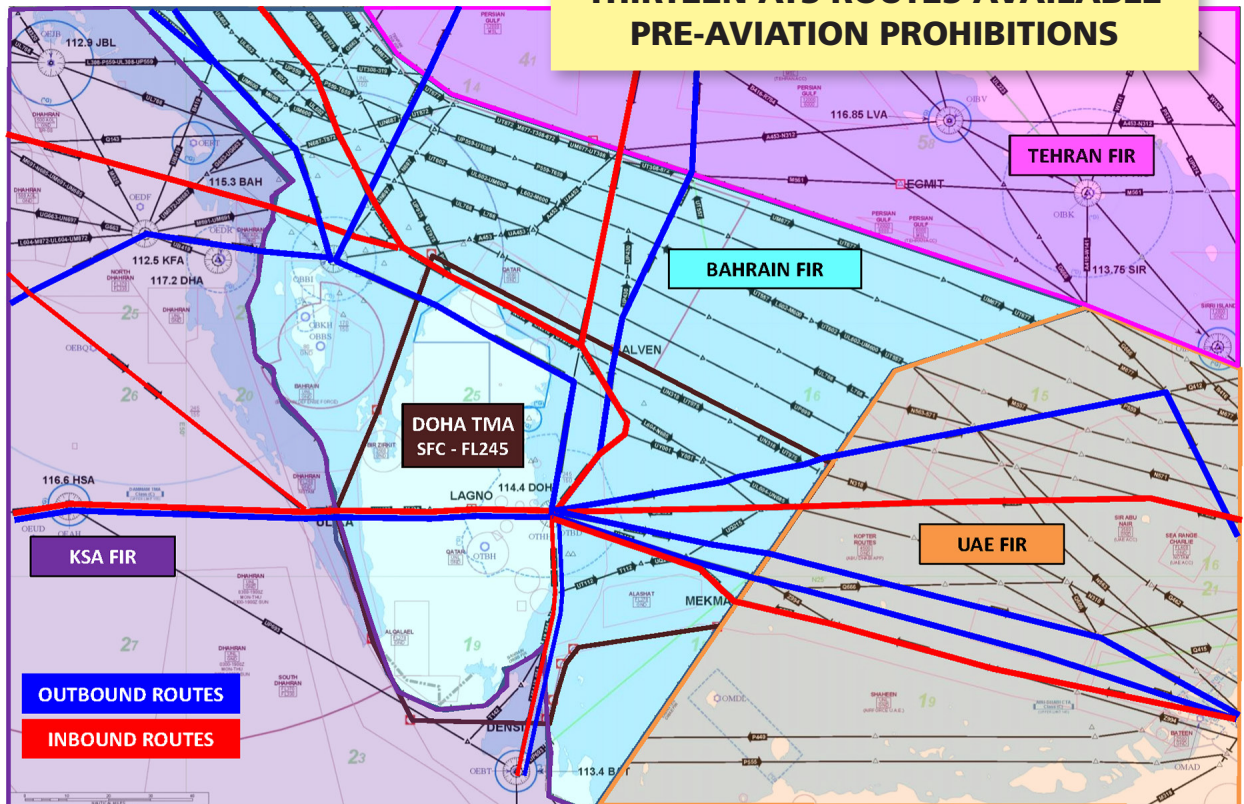
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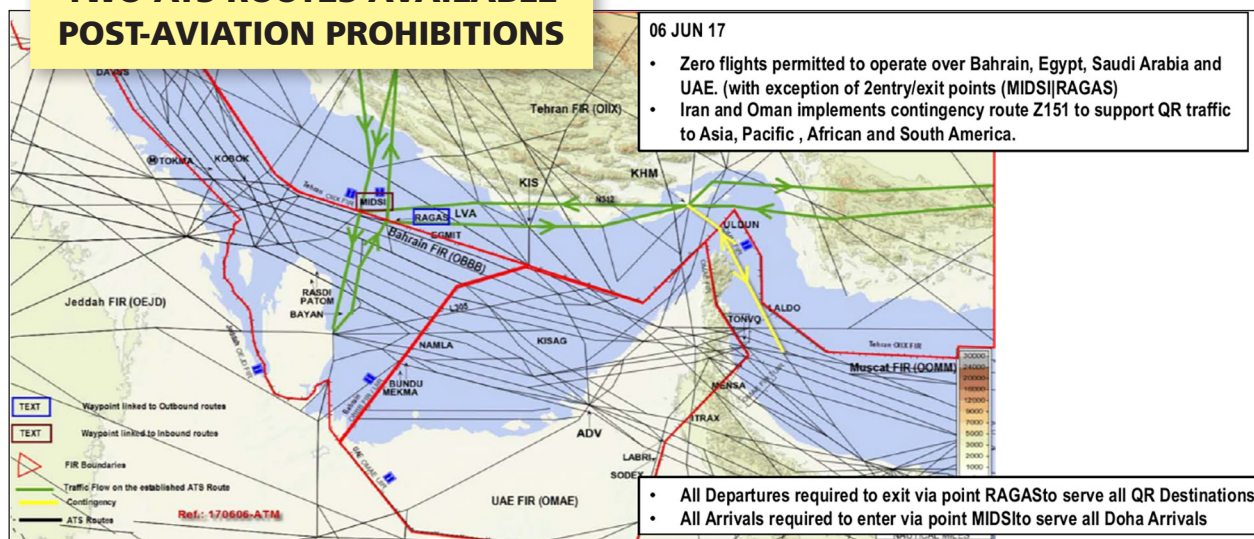
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- Annex 14 ICAO Assembly, *Resolution 38-12: Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation*, ICAO Doc. 10022 (entered into force as of 4 Oct. 2013)
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- Annex 16 Convention on International Civil Aviation, *Annex 15: Aeronautical Information Services* (15th ed., July 2016)
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- Annex 18 ICAO Council, *ICAO Annual Report: Settlement of Differences*, available at <https://www.icao.int/annual-report-2017/Pages/supporting-implementation-strategies-legal-and-external-relations-services-settlement-of-differences.aspx> (last accessed: 31 Jan. 2019)
- Annex 19 Hernán Longo, “Sharing information in order to fight against terrorism”, ICAO, Hong Kong ICAO TRIP Regional Seminar (2017), available at <https://www.icao.int/Meetings/TRIP-HongKong-2017/Documents/1.HERNAN%20LONGO.pdf>

THIRTEEN ATS ROUTES AVAILABLE PRE-AVIATION PROHIBITIONS



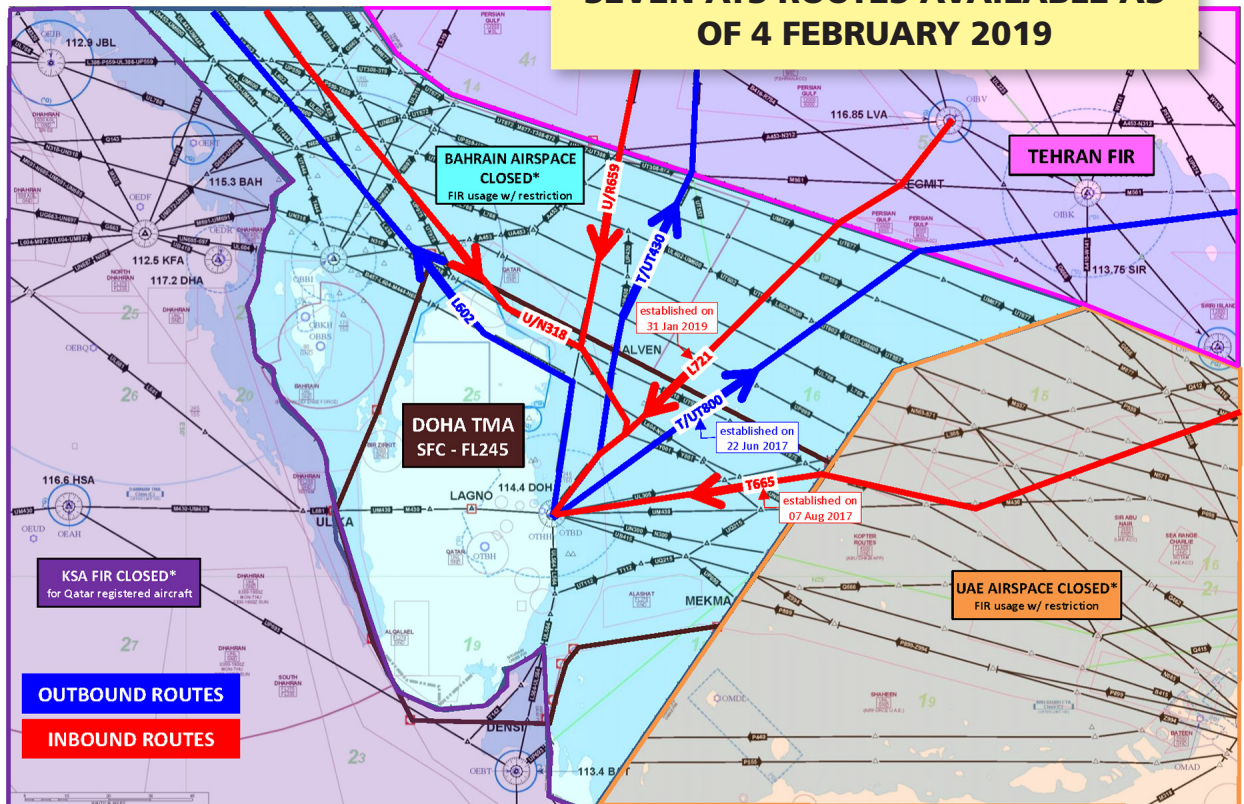
TWO ATS ROUTES AVAILABLE POST-AVIATION PROHIBITIONS



Source: Qatar Airways

Figure 2

SEVEN ATS ROUTES AVAILABLE AS OF 4 FEBRUARY 2019



Annex 1

ICAO Assembly, *Resolution A15-7: Condemnation of the Policies of Apartheid and Racial Discrimination of South Africa*, ICAO Doc. 8528 (22 June-16 July 1965)

**Doc 8528
A15-P/6**

RESOLUTIONS

ADOPTED BY THE ASSEMBLY AND INDEX TO DOCUMENTATION



FIFTEENTH SESSION OF THE ASSEMBLY

Montreal, 22 June - 16 July 1965

Issued by authority of the Secretary General

INTERNATIONAL CIVIL AVIATION ORGANIZATION

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India: Oxford Book & Stationery Co., Scindia House, New Delhi or 17 Park Street, Calcutta.

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THE ASSEMBLY:

- (1) REQUESTS the Council to prepare and maintain, as necessary, long-term and medium-term forecasts of future trends and developments in civil aviation of both a general and a specific kind, including, where possible, regional as well as global data, and make these available to contracting States. In so doing, the Council should consult with other organizations as appropriate;
- (2) AGREES that this serves the most important purpose of Resolving Clause 3 of Resolution A10-7, which is hereby superseded.

A15-7: Condemnation of the Policies of Apartheid and Racial Discrimination of South Africa

CONSIDERING that the apartheid policies of South Africa were condemned on several occasions by the United Nations Organization and particularly in General Assembly Resolutions 1761 (XVII) of 6 November 1962 and 1904 (XVIII) of 20 November 1963;

BEARING IN MIND that the apartheid policies constitute a permanent source of conflict between the nations and peoples of the world; and

RECOGNIZING, furthermore, that the policies of apartheid and racial discrimination are a flagrant violation of the principles enshrined in the Preamble to the Chicago Convention.

THE ASSEMBLY:

- (1) Strongly CONDEMNS the apartheid policies of South Africa;
- (2) REQUESTS all nations and peoples of the world to exert pressure on South Africa to abandon its apartheid policies; and
- (3) URGES South Africa to comply with the aims and objectives of the Chicago Convention.

A15-8: Consolidated Statement of Continuing ICAO Policies Related Specifically to Air Navigation

WHEREAS a statement of continuing Assembly policies related specifically to air navigation as they existed at the commencement of the 14th Session of the Assembly was adopted by that Session in Resolution A14-27, Appendices A to P inclusive;

WHEREAS certain Resolutions of the 14th Session of the Assembly contained policy pronouncements affecting that statement;

Annex 2

ICAO Assembly, *Resolution A18-4: Measures to be taken in pursuance of Resolutions 2555 and 2704 of the United Nations General Assembly in relation to South Africa* ICAO Doc. 8958 (15 June-7 July 1971)

**Doc 8958
A18-RES**

RESOLUTIONS ADOPTED BY THE ASSEMBLY AND INDEX TO DOCUMENTATION



ASSEMBLY — EIGHTEENTH SESSION

Vienna, 15 June — 7 July 1971

Issued by authority of the Secretary General

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A18-3: Ratification of the Protocol amending Article 56 of the Convention

WHEREAS the Assembly has decided to amend Article 56 of the Convention to provide for an increase in the size of the Air Navigation Commission; and

WHEREAS the Assembly is of the opinion that it is highly desirable that the aforesaid amendment should come into force before the new membership of the Commission is appointed in December 1971;

THE ASSEMBLY:

- (1) RECOMMENDS to all Contracting States that they ratify the amendment to Article 56 as soon as possible, preferably before 1 December 1971, so as to enable the Council to elect the members of the expanded Commission before 1 January 1972;
- (2) DIRECTS the Secretary General to bring this resolution immediately to the attention of Contracting States, with the objective mentioned above.

A18-4: Measures to be taken in pursuance of Resolutions 2555 and 2704 of the United Nations General Assembly in relation to South Africa

THE ASSEMBLY,

HAVING CONSIDERED Working Paper A18-WP/47 EX/13 and Resolutions 2555 and 2704 of the General Assembly of the United Nations regarding the Government of South Africa;

BEARING IN MIND Resolution 2671 of the United Nations General Assembly which, among other things, calls upon States "to prohibit airlines and shipping lines registered in their countries from providing services to and from South Africa and to deny all facilities to air flights and shipping services to and from South Africa";

RECALLING its condemnation of the apartheid policies in South Africa in Resolution A15-7;

RECOGNIZING the need for maximum co-operation with the United Nations General Assembly in implementing its Resolutions;

- (1) RESOLVES that as long as the Government of South Africa continues to violate the United Nations General Assembly resolutions on apartheid and on the Declaration on the Granting of Independence to Colonial Countries and Peoples:
 - (a) South Africa shall not be invited to attend any meetings convened by ICAO, except as provided in Articles 48(b), 53 and 57(b) of the Convention;
 - (b) South Africa shall not be provided with any ICAO documents or communications except (i) in cases where the Convention specifically requires that such documents or communications be provided and (ii) documents for meetings which South Africa is permitted to attend;
- (2) DECLARES that in case of conflict between the present Resolution and any other Assembly resolution, the present Resolution shall prevail.

Annex 3

ICAO Council, *Action of the Council: Seventy-fourth Session*, ICAO Doc. 8987-C/1004 (8 July 1971, 27-29 July 1971, 28 Sept.– 17 Dec. 1971)

Doc 8987-C/1004

ACTION OF THE COUNCIL
Seventy-fourth Session

Vienna, 8 July 1971

Montreal, 27-29 July 1971 and
28 September - 17 December 1971



*Approved by the Council and
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1972

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Resolution A17-10 (Development of a Civil Aviation Security Manual)

Resolution A17-15 (Possible Use of Radiological Searching Techniques for Identifying Weapons on Passengers or in Their Baggage)

See Subject No. 52.

16th Session of the Assembly

Resolution A16-5 (Possible Application of Systems Planning to the Introduction of New Aircraft Types)

See Subject No. 51.

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India - Suspension by India of Flights of Pakistani Aircraft over Indian Territory

- 2C(Part I, 1-7) There were five meetings on 27, 28 and 29 July for the purpose of hearing the parties and deciding on the preliminary objection filed by India which (Part II, 1-96) challenged the Council's competence to consider the application and complaint submitted by Pakistan under the Rules for the Settlement of Differences.
- 3C(Part I, 1-11) The hearing took up the first three meetings and most of the fourth, after which the Chief Counsels and Agents for India and Pakistan withdrew, though (Part II, 1-76) the two countries continued to be represented by other members of their delegations, while the Council considered the preliminary objection.
- 4C(Part I, 1-12) Four propositions based on the preliminary objection were put to the Council: (Part II, 1-86) Case 1 (Application of Pakistan under Article 84 of the Convention and Article II, Section 2 of the International Air Services Transit Agreement)
- 5C(Part I, 1-11) (i) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the Convention on International Civil Aviation. (Part II, 1-135)
- 6C(Part I, 1-9) (Part II, 1-194)

- (ii) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the International Air Services Transit Agreement.
- (iii) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the the bilateral agreement between India and Pakistan.

Case 2 (Complaint of Pakistan under Article II, Section 1 of the International Air Services Transit Agreement)

- (iv) The Council has no jurisdiction to consider the complaint of Pakistan.

When the Indian delegation objected to this formulation as prejudicial to India and contrary to Article 5 of the Rules for the Settlement of Differences, the President explained that the Council so far had been proceeding on the assumption that it did have jurisdiction; India had challenged its jurisdiction; the Council accordingly had now to decide on the challenge. The Representatives of Canada, the United States, Tunisia and the People's Republic of the Congo supported him, maintaining that the purpose of the vote was to determine whether the challenge was upheld, not whether the Council had jurisdiction.

The result of the vote on the first proposition was none in favour, 20 opposed and 4 abstentions (the Czechoslovak Socialist Republic, Japan, the Union of Soviet Socialist Republics and the United Kingdom). The Indian Delegation protested that the manner in which the vote had been taken was incorrect and inadmissible under the Rules for the Settlement of Differences, and requested a roll-call on the remaining propositions.

The President noted that only parties to the Transit Agreement* (except, of course, India) were eligible to vote on the second proposition, but the statutory majority would still be required for a decision. The result of the vote was as follows:

*The following Council members are parties to the Transit Agreement:
 Argentina, Australia, Belgium, Canada, the Czechoslovak Socialist Republic, the Federal Republic of Germany, France, India, Japan, Mexico, Nicaragua, Nigeria, Norway, Senegal, Spain, Tunisia, the United Arab Republic, the United Kingdom, the United States of America.

For:	None
Against:	Argentina, Australia, Belgium, Canada, the Federal Republic of Germany, France, Mexico, Nigeria, Norway, Senegal, Spain, Tunisia, the United Arab Republic and the United States (14)
Abstained:	the Czechoslovak Socialist Republic, Japan, and the United Kingdom (3)

After several Representatives had questioned both the necessity and the desirability of putting the third proposition to the Council - and, indeed, whether Pakistan had really sought relief from the Council under the bilateral agreement - the Representative of Pakistan, after consulting his country's Chief Counsel, stated that it had not; the bilateral agreement had been mentioned simply to reinforce the case being made for Council action under the Convention and Transit Agreement. The Indian Delegation protested, calling attention to the frequent references to the bilateral agreement in Pakistan's Application and to the fact that in the Preliminary Objection India had denied the Council's jurisdiction to handle any dispute under a bilateral agreement; they did not, however, insist upon the third question being put, having already gone on record as considering any decision taken at this meeting improper.

A roll-call vote was then taken on the fourth proposition, only parties to the Transit Agreement (except India) again being eligible to participate. The result was:

For:	the United States of America
Against:	Argentina, Australia, Belgium, Canada, the Federal Republic of Germany, France, Mexico, Nigeria, Norway, Senegal, Spain, Tunisia and the United Arab Republic
Abstained:	the Czechoslovak Socialist Republic, Japan and the United Kingdom.

The result of the foregoing votes was the rejection of propositions (i), (ii) and (iv) and hence the reaffirmation of the Council's competence to consider the Application and Complaint of Pakistan. The Indian Delegation gave notice

that India would appeal the decisions just taken to the International Court of Justice because the manner and method of the voting had been wrong and expressed the view that until judgement had been rendered by the Court no further action was possible.

In reply to questions, the President indicated that the period given to India for the filing of its counter-memorial, interrupted by the filing of the preliminary objection, would start to run again immediately and would expire in ten days; if the counter-memorial was not filed by the deadline, the Council would be informed by the Secretary General in a memorandum examining the consequences.

- 11C (Part I, 1-4)
(Part II, 7-46)
- On 18 October, the Council met to consider what its next step should be in view of India's appeal to the International Court of Justice against its decision that it had jurisdiction to consider Pakistan's application and complaint. As background documentation it had C-WP/5433, presented by the Secretary General in response to a request from some Representatives for an interpretation of Article 86 of the Chicago Convention. This paper traced the evolution of Article 86 at the Chicago Conference and concluded that if there was an appeal from any decision taken by the Council under Article 84 on any matter other than whether an international airline was operating in conformity with the provisions of the Convention, that decision would be suspended until the appeal had been decided. The examination of Article 86 in C-WP/5433 was a general one, not made in the context of the India/Pakistan dispute, but in reply to a question by the Representative of Senegal, the Director of the Legal Bureau indicated that the conclusion reached in the paper applied to decisions on disputes brought to the Council under the International Air Services Transit Agreement as well as to decisions on disputes brought under the Convention, as the Transit Agreement had no existence separate from the Convention, and that the Indian appeal mentioned both instruments, disputing the Council's jurisdiction on the ground that the Convention and Transit Agreement had not been in force between India and Pakistan since 1965.

The Agent for India suggested that copies of the Indian appeal to the International Court should be circulated to Representatives on Council, and the Chief Counsel for Pakistan, in a brief statement, maintained that the appeal in respect of Pakistan's Complaint was incompetent, misconceived and untenable and submitted that the conclusion in C-WP/5433 and the oral comment made by the Director of the Legal Bureau were open to serious question.

In the discussion that followed it became apparent that although some Representatives were ready to take a decision on the question before the Council, some others wished to have further documentation, and it was finally decided to defer further consideration of the question until the beginning of the Council phase of the next session (28 February 1972) unless the International Court decided the Indian appeal before then, in which event the President would call a meeting as soon as possible. It was understood that the Secretariat would, in the meantime, provide what additional documentation they could. On the Council's behalf the President renewed the invitation to the two parties to negotiate.

Voting in the Council on Disagreements and Complaints
Brought under the Rules for the Settlement of Differences

- 15(Part I, 8)
(Part II, 1-18)
- On this question, brought before it on 17 November as the result of a request by a Council Representative, the Council had as documentation C-WP/5465, presented by the Secretary General. The paper examined the provisions of the Convention /Articles 53, 84, 66(b) and 62/ under which the voting power of a member of the Council could be withdrawn or suspended and concluded that there was nothing in them reducing the membership of the Council from the twenty-seven specified in Article 50(a) on occasions when voting power was taken away from some member or members or affecting the requirement in Article 52 for decisions of the Council to be taken by a majority of its members (i. e. fourteen). Several members, though not challenging the legal position, found practical reasons for following the normal Council practice of taking decisions by a simple majority of votes cast when considering disagreements and complaints submitted under the Transit and Transport Agreements. No proposal was made, but it was understood that if any Representative wished to pursue the matter, it would be returned to the work programme.

Subject No. 27: Convention on International Civil Aviation

Voting in the Council on Disagreements and Complaints
Brought under the Rules for the Settlement of Differences

See Subject 26 above.

Communications Received from Pakistan and India regarding
Compliance with the Convention and the Transit Agreement

See Subject No. 15.

Annex 4

ICAO Council, 74th Session, *Minutes of the Second Meeting*, ICAO Doc. 8956-C/1001
(27 July 1971)

COUNCIL - SEVENTY-FOURTH SESSION

Minutes of the Second Meeting

(The Council Chamber, Tuesday, 27 July 1971, at 1000 hours)

CLOSED MEETING

President of the Council: Mr. Walter Binaghi

Secretary: Dr. Assad Kotaite, Secretary General

PRESENT:

Argentina	- Com. R. Temporini	Mexico	- Mr. S. Alvear López
Australia	- Dr. K. N. E. Bradfield		(Alt.)
Belgium	- Mr. A. X. Pirson	Nigeria	- Mr. E. A. Olaniyan
Brazil	- Col. C. Pavan	Norway	- Mr. B. Grinde
Canada	- Mr. J. E. Cole (Alt.)	Senegal	- Mr. Y. Diallo
Colombia	- Major R. Charry	Spain	- Lt. Col. J. Izquierdo
Czechoslovak	- Mr. Z. Svoboda	Tunisia	- Mr. A. El Hicheri
Socialist Republic		Uganda	- Mr. M. H. Mugizi (Alt.)
Federal Republic	- Mr. H. S. Marzusch	Union of Soviet	- Mr. A. F. Borisov
of Germany	(Alt.)	Socialist Re-	
France	- Mr. M. Agésilas	publics	
India	- Mr. Y. R. Malhotra	United Arab	- Mr. H. K. El Meleigy
Indonesia	- Mr. Karno Barkah	Republic	
Italy	- Dr. A. Cucci	United Kingdom	- A/V/M J. B. Russell
Japan	- Mr. H. Yamaguchi	United States	- Mr. C. F. Butler

ALSO PRESENT:

Dr. J. Machado (Alt.)	- Brazil
Mr. E. G. Lee (Alt.)	- Canada
Mr. B. S. Gidwani (Alt.)	- India
Mr. M. García Benito	
(Alt.)	- Spain
Mr. N. V. Lindemere	- U. K.
(Alt.)	
Mr. F. K. Willis (Alt.)	- U. S.
Mr. N. A. Palkhivala	- India
(Chief Counsel)	
Mr. Y. S. Chitale (Counsel)	- India
Mr. I. R. Menon (Assistant	- India
Counsel)	
Mr. S. S. Pirzada (Chief	- Pakistan
Counsel)	
Mr. K. M. H. Darabu	- Pakistan
(Assistant Counsel)	
Mr. A. A. Khan (Obs.)	- Pakistan
Mr. H. Rashid (Obs.)	- Pakistan
Mr. Magsood Khan (Obs.)	- Pakistan

SECRETARIAT:

Dr. G. F. Fitzgerald	- Sr. Legal Officer
Mr. D. S. Bhatti	- Legal Officer
Miss M. Bridge	- CSO

H. E. A. B. Bhadkamkar	- India
(Agent)	
H. E. M. S. Shaikh	- Pakistan
(Agent)	

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(Closed)

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SUBJECTS DISCUSSED AND ACTION TAKEN

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India - Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. As decided on 12 June, this was a meeting to hear the parties on the preliminary objection filed by India on Pakistan's application to the Council under Article 84 of the Convention and Article II, Section 2 of the International Air Services Transit Agreement ("Case No. 1") and its complaint under Article II, Section 1 of the Transit Agreement ("Case No. 2"). The spokesman for India was Mr. N. A. Palkhivala, the spokesman for Pakistan Mr. S. S. Pirzada, both acting in the capacity of Chief Counsel for their respective countries. The whole of the meeting was taken up with the presentation by Mr. Palkhivala of the preliminary objection in Case No. 1.
2. The preliminary objection was, in essence, that Pakistan's application was not competent and not maintainable and that the Council had no jurisdiction to handle the matters contained therein. Two main grounds for this contention were submitted.
3. The first ground was that there was no disagreement between India and Pakistan over the interpretation and application of the Convention and the Transit Agreement because these two instruments were inoperative between the two countries. India regarded the Convention - and with it the Transit Agreement, whose existence was dependent upon it - as suspended or terminated between herself and Pakistan by the latter's conduct, which, so far as India was concerned, was directly contrary to the Convention's basic purpose: promotion of the safe and orderly development of international civil aviation. Alternatively, the Convention and Transit Agreement could be considered as suspended or terminated between the two countries by India's action in suspending the flight of Pakistani aircraft over Indian territory, action India was entitled to take under two fundamental principles of general international law most recently confirmed by the International Court of Justice in its advisory opinion of 21 June 1971 on the legal consequences for States of the continued presence of South Africa in Namibia (South West Africa).
4. The first of these principles was that it was the sovereign right of a State to terminate a treaty even if the treaty made no provision for termination; a State challenging the exercise of that right must be able to point to some specific provision of the treaty denying it, and there was no such provision in the Convention or the Transit Agreement. The second principle, embodied in Article 60 of the Vienna Convention on the Law of Treaties, was that a material breach of a treaty by one of the parties - in other words, a repudiation of the treaty not sanctioned by the Vienna Convention or the violation of a provision essential to the accomplishment of the object or purpose of the treaty - was grounds for a State specially affected by it to suspend the operation of the treaty in whole or in part in the relations between itself and the

defaulting State. There could be a dispute between the defaulting and the affected State over whether the suspension was justified, but there was no provision in the Convention or Transit Agreement giving the ICAO Council jurisdiction to deal with that kind of dispute. As noted by the ICAO Assembly at its first session (Resolution A1-23), the power of the Council to act as an arbitral body was much more restricted under the Convention than it had been under the Interim Agreement, being limited to disagreements relating to the interpretation or application of the Convention and its Annexes. Moreover, the composition of the Council did not make it an appropriate forum for dealing with such complicated questions of fact and law as were involved in the present case. In this connection Mr. Palkhivala read into the record paragraphs 16 to 24 of the preliminary objection.

5. He then denied Pakistan's affirmation that Articles 54, 89 and 95 of the Convention made the Council competent to deal with the application. He argued that the relevant provisions of Article 54, (j) and (k) dealing with infractions of the Convention, were applicable only if the Convention was in operation between the State alleged to have committed an infraction and the State complaining about it. Article 89, which recognized the freedom of action of States in times of war or national emergency, was irrelevant to the present case, having nothing to do with the right of termination for material breach. Article 95, dealing with denunciation of the Convention, was also irrelevant; India had no wish to withdraw from the Convention, repudiating her obligations and privileges under that instrument vis-à-vis all Contracting States; she wanted only the suspension of its operation in relation to one State.

6. Mr. Palkhivala next dealt with three of the points in Pakistan's reply to the preliminary objection. He claimed that the first - that "application" included termination and suspension - was a clear misuse of the language and a reflection upon the competence of the drafters of the Convention; moreover, the International Court of Justice, in the Namibia case, had accepted the argument of the United States counsel that there were three distinct types of disagreements relating to international treaties: disagreements over interpretation, disagreements over application, and disagreements over termination. He declared that the second point - that India had applied the Convention and Transit Agreement between itself and Pakistan since the cessation of the 1965 hostilities - was incorrect: there had been no scheduled or non-scheduled air services between India and Pakistan since 1965; the right accorded by Article 5 of the Convention to make non-traffic stops had been completely denied; and overflights had been only by specific permission, which was directly contrary to Article 5; if Pakistan had a complaint, therefore, it should have been made in 1965. The third point - that there was no right to terminate an agreement unless the agreement provided for it - was contrary to the opinion of the International Court of Justice, which, incidentally, was an appellate tribunal in disputes referred to the Council under Article 84 of the Convention.

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7. The second ground for the preliminary objection was that since 1965 overflights of Indian and Pakistani aircraft had been covered by a special regime, not by the Convention and Transit Agreement. In support of this contention, Mr. Palkhivala read the two notifications annexed to the preliminary objection; the first, dated 6 September 1965, directed that no aircraft registered in Pakistan or belonging to or operated by the government or nationals of that country should be flown over any portion of India; the second, dated 10 February 1966, after the Tashkent Declaration, amended this directive by adding "except with the permission of the Central Government and in accordance with the terms and conditions of such permission". There was no agreement to arbitration by the Council in the event of a disagreement arising under this special regime and therefore the Council had no jurisdiction in the matter brought before it by Pakistan.

8. Mr. Palkhivala had not completed his presentation at the luncheon break.

DISCUSSION

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India - Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. The President: The Council is in session. This is the second meeting of the 74th Session. Some Council members have modified their representation for today's meeting, so I will give an indication of how things stand. Canada is today represented by the two Alternates to Mr. Gourdeau - Mr. Cole and Mr. Lee. The United States has an Adviser, Mr. Willis. Uganda is represented by the Alternate to Mr. Wakida - Mr. Mugizi. In addition to the permanent Representative, Mr. Malhotra, and his Alternate, Mr. Gidwani, we have, as representatives of India, the Agent - His Excellency Mr. Bhadkamkar, and the Chief Counsel, Mr. Palkhivala, who is assisted by Mr. Chitale and Mr. Menon. For Pakistan we have the Agent - His Excellency Mr. M.S. Shaikh, the Chief Counsel - Mr. S.S. Pirzada, and, as assistant to Mr. Pirzada, Mr. Darabu. Pakistan as a State also has as representatives Mr. Aftab Ahmed Khan, Mr. Rashid and Mr. Magsood Khan.
2. It will be recalled that the Council had established the 11th of July 1971 as the date for the filing of the counter-memorials in Cases No. 1 and No. 2, India/Pakistan. Meanwhile, on the 1st of June 1971 preliminary objections were filed by India on Cases No. 1 and No. 2. On the 12th of June 1971, in Vienna, the Council decided that it would hold a meeting on the 27th of July, today, and more meetings, if necessary, in order to hear the parties on the preliminary objection. The Secretary General subsequently circulated a reply by Pakistan, in English under memorandum of 7th July and in French and Spanish under memorandum of 9th July.
3. We shall now go to the first point on the Order of Business, which is the hearing on Case No. 1, and I should mention that by error the reference documents have been listed in a somewhat mixed up order. If you follow the chronological order, the one that should have been listed first is the memorandum of the Secretary General dated 3 June 1971 circulating the preliminary objection of India. The others follow in the order in which they are listed now.

4. It is my intention to give an opportunity first to India to present its preliminary objection, then to give an opportunity to Pakistan to reply. If other interventions by both parties are necessary, I hope they will be as brief as possible. After that, Council members will have an opportunity to participate, not yet getting into the deliberations on the merits of the case itself or on the preliminary objection, but putting questions for information purposes. After the questions and replies, the Council will have to decide if it wishes to proceed to the deliberations on whether or not it is competent. So I will now invite India to present the preliminary objection on Case 1.

5. Mr. Palkhivala: Mr. President and honourable members, I shall first deal with Case No. 1 filed by Pakistan against India. That Case represents an application made under Article 84 of the Chicago Convention, the Convention on International Civil Aviation of 1944, which for brevity's sake I shall call "the Convention" in the course of my argument. The same application is also made under Article II, Section 2, of the International Air Services Transit Agreement of 1944, which I shall call hereafter "the Transit Agreement". The second case, which represents a complaint filed under Article II, Section 1 of the Transit Agreement, I shall deal with separately after I have finished with the first one.

6. Now, Sir, the preliminary objection is twofold and the first one rests on the proposition that any dispute arising out of termination or suspension of an international treaty, of the Convention or of the Transit Agreement, cannot be the subject matter of proceedings before this honourable body. It is this proposition that I shall try to make good, first in the light of the express, and I would say explicit, provisions of the Convention and the Transit Agreement on this question and second by reference to the latest ruling of the International Court of Justice.

7. Mr. President, I think it would not be inappropriate to start with this: disputes between nations pertaining to the Convention or the Transit Agreement may arise in one of four ways. First, it may be a dispute as to interpretation of the treaty; second, it may be a dispute as to application of the treaty; third, it may be a dispute arising from action taken under the treaty; fourth, it may be a dispute pertaining to termination or suspension of the treaty by one State as against another. If I may for the sake of brevity call them cases of interpretation, application, action and termination, these four cases perhaps cover the normal gamut of international disputes and it is most important to note that under the terms of the Convention only the first two types of dispute can come before this honourable Council. As far as the Transit Agreement is concerned, the first three types of disputes can come before the Council. Therefore two disputes in

the case of the Convention, three types of disputes in the case of the Transit Agreement, but in neither case can the fourth type, which is concerned with termination, come before this honourable Council. This is the crux of the case and I would appreciate the honourable members bearing in mind the clear distinction which the words of the English language convey to anyone familiar with the language. I am sure the distinction must be equally well brought out in the translations of these treaties, which are also authoritative texts.

8. If the honourable members have a copy of the Convention, may I request them to be kind enough to refer to Article 84 to see what are the words of this Article, which is the only Article conferring jurisdiction on this Council. The words of Article 84 are:

"If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

May I, with your leave, Mr. President, emphasize the opening words of this Article - "any disagreement between two or more Contracting States relating to the interpretation or application of this Convention". If the disagreement pertains not to interpretation or application - the two types of disputes which are covered by the terms of the Article - but is a dispute of a third category which is not covered by the words "interpretation or application", this honourable Council would have no jurisdiction to deal with it.

9. Now one thing that is at the very basis of Article 84 is the continued existence, the continued efficacy, the continued operation, of the Convention as between two States. If two States agree that the Convention continues as between them - because every multilateral treaty is at the same time a treaty between any two of the many States parties to it - and if a dispute arises between them, it would be possible to say that it is a disagreement as to interpretation or application. In other words, the concept of interpretation as well as the concept of application, contemplates and postulates the continued operational existence

of the agreement. If it continues to be in operation between two States, you can interpret it, and if there is a disagreement as to interpretation, the Council will decide. If the Convention continues to be in operation between two States, any disagreement about how you apply it to existing facts can again be determined by the Council.

10. However, if one State, as a result of the conduct or misconduct of the other State, has chosen to terminate or treat as terminated this Convention vis-à-vis the wrongdoing State, then this is a dispute as to termination of the Convention by State A as against State B, and such a dispute cannot be considered by anyone familiar with the English language as a dispute as to interpretation or application, because in that case there is nothing to interpret; there is nothing to apply. You do not have in operation between the two States a convention that you can possibly interpret or apply. May I request the honourable members to bear in mind - and my proposition I shall make good by reference to the opinion of the World Court - that this power to terminate a convention or an international treaty is a power which is dehors the convention or the treaty. It is outside the convention or the treaty and it is a sovereign power which can be exercised by a State. Perhaps a State may wrongly exercise the power of terminating an international treaty. If it does so, and if there is an appropriate forum to which you can go in order to get redress, that forum may decide the matter, but my limited purpose is to show that whether another forum exists or not, which is not the subject matter here, this honourable Council is not the forum before which any State can bring the case that another State has terminated the agreement and, in the view of the complaining State, wrongly done so. This kind of dispute is a dispute as to termination, and when I come to a very important answer which the representative of the United States gave to the World Court in the South Africa case to which I will refer, you will find that the United States itself, in a very clear and unequivocal answer, made the submission I am making here: that the power to terminate an agreement is a distinct, separate power, unconnected with the question of application or interpretation.

11. May I request the honourable members to consider how these words apply in practice. There may be some words in the Convention which are ambiguous, capable of two meanings, at least in the view of one State. That State may tell another State "I do not interpret the words this way. My interpretation is 'X', your interpretation is 'Y'." and if the parties do not agree as to what is the right interpretation, this Council would decide what that interpretation is. This is the meaning of "disagreement as to interpretation".

12. Now between India and Pakistan there is no such dispute at all. It is India's case, and in fact it is Pakistan's case, that India has terminated this agreement. It is true that in the final reply Pakistan says "No, it is a case of interpretation or application, which is a matter of legal submission.", but it is categorically India's case that by Pakistan's misconduct - I am using the word "misconduct" in the legal sense, and though the facts are not really relevant for this preliminary submission, I shall deal with them very briefly in a few minutes after I have finished the legal submission - the Convention has been terminated by Pakistan qua India. Alternatively, if you were to hold that Pakistan has not terminated the Convention qua India, India has terminated, or in any event suspended, the Convention qua Pakistan. Whether we have done so rightly or wrongly is a dispute pertaining to the termination of the agreement; it is not a case of interpretation or application. If this is the real dispute between India and Pakistan, there can be no question of interpretation. We are not interpreting any article of the Convention at all. There is no word of the Convention which is in dispute between India and Pakistan, India's case being that this Convention stands terminated as between India and Pakistan.

13. If you will now look at the word "application", as I read the English language it means the way you apply the provisions of this particular Convention to an existing set of facts. So long as this Convention continues in operation, there may arise between two States a question about how a particular provision should be applied to an existing set of facts. Now you cannot possibly apply the Convention unless it is in operation. Application logically must presuppose that the Convention is in operation. If it is in operation the question is how do you apply it to an existing set of facts. If one State says "I apply it this way.", and another State says "I apply it another way.", that would be a disagreement as to application. To give you one simple example, under Article 5 aircraft of one State not engaged in scheduled international air services have the right to fly into or non-stop across another State's territory or to make stops for non-traffic purposes.

14. Now in relation to an existing set of facts a dispute may arise over whether a particular country wants to make a non-traffic stop or not, whether a particular country is overflying non-stop across the territory or is claiming some higher right. Then there are various other provisions about search of aircraft, airport and similar charges, prevention of disease, etc. In relation to a particular set of facts this difficult question of fact or law may arise: "Are these provisions being correctly applied by one State or wrongly applied by one State?" These are disputes as to application of the Convention to an existing set of facts and since the Convention has more than ninety Articles,

you can well imagine a number of questions which could arise in applying it to an existing set of facts. The word "application" therefore presupposes the existence, the operation, the efficacy of the Convention as between two States. But if you do not have that and you have the question of termination - I am not troubling the honourable members today with whether termination by India, or termination by Pakistan as we say it was, was rightful or wrongful; if there was an appropriate forum, we have no doubt that we would be able to prove to the hilt that, assuming the termination was by India, it was rightful - but I am requesting them to accept the submission, which is well founded in law, that since the dispute pertains to termination, it cannot possibly be treated as a case of interpretation or application.

15. In this connection may I request you, having seen that under Article 84 of the Convention only two types of disputes can possibly come to the honourable Council, disputes as to interpretation and disputes as to application, to turn to the Rules for the Settlement of Differences approved by the Council in April 1957. I shall refer to them hereafter as "the Rules". If you turn to Article 1, you will see how very precisely even the Rules for the Settlement of Differences are restricted to two types of differences - differences as to interpretation and differences as to application.

Article 1

The rules of Parts I and III shall govern the settlement of the following disagreements between Contracting States which may be referred to the Council.

(a) Any disagreement between two or more Contracting States relating to the interpretation or application of the Convention on International Civil Aviation".

I shall stop here because the rest of the Rule deals with something else. Then there is a sub-clause (b) which says that these Rules apply to only two types of disputes, disagreement as to interpretation and disagreement as to application. The rest of the Rules will not come into operation unless this first condition is satisfied, namely that the dispute falls within the ambit of Article 1, Clause 1(a) of these Rules.

16. I have finished showing that under the Convention only two types of disputes can go to the Council. May I now turn to the Transit Agreement to show that three types of disputes can go to the Council: first a dispute as to interpretation, second a dispute as to application and third a dispute arising from action taken under the Transit Agreement. You will note that so far as the

Convention is concerned, unless the disagreement relates to interpretation or application it cannot come before the Council, but action taken under the Transit Agreement is separately dealt with as a matter that can go before the Council. In this connection may I request the honourable members to turn to the Transit Agreement of December 1944, Article II, Section 2. It is couched in words identical to those used in the Convention:

"If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement cannot be settled by negotiation, the provisions of Chapter XVIII of the above-mentioned Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the above-mentioned Convention."

The words are "interpretation or application."

17. Now the third type of dispute which can go to the Council is dealt with in Section 1 of the same Article II:

"A contracting State which deems that action by another contracting State under this Agreement" - mark the words "under this Agreement" - "is causing injustice or hardship to it may request the Council to examine the situation. The Council shall thereupon inquire into the matter and shall call the States concerned into consultation."

I need not read the rest. I am referring to this provision now only with a view to giving a comprehensive picture of the limits of the jurisdiction of this honourable Council. I shall refer to it in more detail when I come to the second case, the complaint of Pakistan. What I am emphasizing at the moment is that Article II, Section 1 refers to a third type of disagreement or dispute which can arise between States, pertaining to action taken under the Transit Agreement. Now the words "action taken under this Agreement" harmonize with the interpretation I have already put on the words "application or interpretation". These three categories of dispute all postulate the continued operation of the Agreement. Thus you have questions of interpretation, application and action under the Agreement.

18. You have seen that the fourth type of dispute pertaining to termination is nowhere made subject to this honourable Council's jurisdiction. Even in the rules which deal with the Transit Agreement, you will find that the Council's jurisdiction is restricted to cases of interpretation, application and action under the Agreement. Of course, the Rules could not possibly confer a jurisdiction

not conferred by the Convention or by the Transit Agreement. No such jurisdiction is conferred in case of termination by the Convention or the Transit Agreement and I am only fortifying my argument by reference to the Rules, which are within the framework of the Convention and the Transit Agreement and in the latter case expressly limit the tribunal's jurisdiction to these three types of disputes.

19. In order to prove that, may I request you to turn to that part of the Rules which deals with the Transit Agreement as distinct from the Convention. It is Article I, Clause 1(b), which talks of two types of disputes: "any disagreement between two or more contracting States relating to the interpretation or application of the International Air Services Transit Agreement and of the International Air Transport Agreement (hereinafter respectively called 'Transit Agreement' and 'Transport Agreement')." The third type of dispute under the Transit Agreement is dealt with by the same Article 1, Clause 2: "The Rules of Parts II and III shall govern the consideration of any complaint regarding" - now mark the words - "an action taken by a State party to the Transit Agreement and under that Agreement". Two conditions have to be fulfilled. First, action must be taken by a State party to the Transit Agreement and, second, it must be action under the Agreement. This part of Article 1 of the Rules is exhaustive of the jurisdiction of the Tribunal to deal with cases arising under the Transit Agreement.

20. Now I come to this very important question of international law, which, fortunately for me, has been settled by the latest pronouncement of the International Court of Justice. May I first briefly explain to the honourable members in my own simple words what this principle is and then read the judgement of the World Court on that issue. After I have made my submissions the honourable members will see that what I am about to say is completely borne out by the judgement of the International Court of Justice. The principle of international law is this - when two or more States enter into a treaty the power to terminate it does not have to be conferred by the treaty itself. The right to terminate a treaty is inherent in a sovereign State. You may have an international forum before which the State wronged by the wrongful termination of the treaty by another State can go, or you may have no such international forum, but the essential point is that this right to terminate a treaty is a principle of international law, which is not to be regarded as absent because the convention or treaty does not expressly confer the power of termination. In other words, the power to terminate the treaty does not have to be conferred by the treaty itself. It is dehors the treaty. It is outside the treaty. Its source is customary international law - I am using the words of the International Court of Justice. If any State says there is no such power to terminate the treaty, that State must be able to point to an express provision in the treaty which says that the States parties

to this treaty shall have no power to terminate it at any time or shall have the power to terminate it only in certain ways. In other words, the power exists dehors the treaty and it can only be taken away by express words of the treaty and no other way. Now there are no express words of the Convention or of the Transit Agreement which at all affect prejudicially, at all take away or abridge, the sovereign right of a State to terminate the treaty.

21. The second proposition laid down by the World Court is that if one State which is a party to an international treaty commits a material breach of the treaty, the other party is not bound to sit idle, wring its hands and say "Will you kindly be good enough to observe your obligations." The other State has the right to terminate the treaty itself on the ground that the wrongdoing State cannot get away with the fruits of its wrong; if you have committed a breach of your part of the treaty, I am entitled to terminate the treaty. This is the international law.

22. Now a very difficult, sometimes very complicated, question will arise: Has the State which has purported to exercise the right to terminate the treaty done so for good grounds or bad grounds? The important point is that whether the right of terminating the Treaty been exercised on good grounds or bad grounds can only be determined by the forum which has the right to decide the dispute pertaining to the termination. Such a forum is not this honourable Council. There may or may not be other forums, and in fact this was the whole case of South Africa. South Africa argued like this: we were given this mandate over Namibia by the United Nations; this mandate is an international treaty - the World Court accepted that position - and under this international treaty there is no right to terminate the mandate. The International Court of Justice ruled that there was a right to terminate the mandate and that it had in fact been terminated on justifiable grounds, because South Africa had committed a breach of its obligations under the treaty or mandate.

23. When you have this situation where the treaty itself has no provision for termination, the World Court says that the power to terminate is outside the treaty. Now may I ask you to consider whether there can be any flaw in this logic: if this power to terminate an international treaty is outside the treaty, is not to be found in the treaty itself, it must follow that a question as to termination cannot be a question as to application or interpretation of the treaty, because application means that you are trying to apply the terms of an existing treaty and interpretation means that you are trying to construe the terms of the treaty. If a State has chosen to exercise a power which is outside the treaty, it is incomprehensible to a logical mind that its action can

be a case of application or interpretation. The Counsel for the United States, who strongly argued and argued in memorable words, if I may say so, put this point clearly beyond doubt and the World Court accepted it. He argued that there are three distinct types of cases, cases of interpretation, cases of application and cases of termination. He made cases of termination a third category and the World Court accepted that view.

24. The submission of South Africa that as there was no provision for termination the mandate could not be terminated was rejected. May I refer you to the Reports of Judgements of the International Court of Justice, 1971, the opinion given on 21st June 1971. I shall read slowly, because honourable members do not have the book before them. The heading of the opinion is "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)." May I refer you to pages 46 - 49 of this volume of the Reports. I shall read slowly in order that the very important words of the judgements may not be lost sight of. I am reading from page 46, paragraph 91: "One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship." In other words, if one State does wrong and makes civil aviation impossible for me - I am not going into facts because this is not the forum where the facts can be gone into, but 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 it 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. Honourable members may kindly note that I am not trying to shirk the issue whether my termination was rightful or wrongful. I say it was perfectly rightful, but it is necessary to lay down the correct law as to the limits of the honourable Council's jurisdiction. Therefore without having any apprehension in my mind as to whether on merits I would succeed or not - I have no apprehension whatever; we are confident that we would be able to establish to the hilt that our termination was rightful if it becomes necessary to do so - but assume it was wrongful, it is still not a case of application or interpretation of the agreement.

25. This is what the World Court says in paragraph 94. If I may give this background, the General Assembly of the United Nations had passed a resolution saying that on account of certain facts it considered that South Africa was unfit to continue the mandate over Namibia. This is what the World Court says in paragraph 94 on page 45: "In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach. For even if the mandate is viewed as having the character of an institution, as is maintained, it depends on those international agreements which created the system..." I will omit the next part which deals with the point, which is not relevant for our purpose, that the mandate amounted to an international treaty. Now this is what it goes on to say: "The Court stated conclusively in that Judgement" - the judgement of 1962 - "that the Mandate '... in fact and in law, is an international agreement having the character of a treaty or convention'." - I am now reading the very important words of the Judgement - "The rules laid down by the Vienna Convention on the Law of Treaties" - this is the Convention of 1969 - "concerning termination of a treaty relationship on account of breach by another State (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject." In other words, the World Court says that even apart from the Vienna Convention of 1969, every State has an inherent right, as a matter of customary international law, to terminate an agreement if another State has committed a breach of it. "In the light of these rules, only a material breach of a treaty justifies termination, such breach being defined as (a) a repudiation of the treaty not sanctioned by the present Convention or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

26. What I am emphasizing in this pronouncement of the World Court is that it is a rule of customary international law that one State can terminate a treaty if another State has committed a breach, and this power of termination is not to be found in the treaty itself; it is outside the treaty; it is founded in customary international law. This is made clear by paragraph 95, of which the material sentence is this: "The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in the case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship."

27. Now the General Assembly of the United Nations and the World Court have the jurisdiction to deal with the question of termination of a treaty. The United Nations can deal with that question between two nations. The World Court can deal with it. This honourable Council does not have the right under

its charter to deal with the question of termination. This is the important point. The World Court went into the facts because it was within its jurisdiction, but this larger jurisdiction to deal with questions of termination, rightly or wrongly, is not conferred on this honourable Council. I shall now read the next paragraph which is equally important, paragraph 96 on page 47. Here the World Court is dealing with the argument of South Africa that because there is no provision in the mandate for terminating the mandate the United Nations had no right to terminate it. These are very pregnant words and I submit that they apply directly to our case and have tremendous significance for it. The words are these: "The silence of a treaty as to the existence of such a right" - the right to terminate the treaty - "cannot be interpreted as implying the exclusion of a right which has its source outside the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded." In other words, the mere fact that an international treaty like the Convention or the Transit Agreement is silent as to the right of a State to terminate does not mean that there is no such right. Such a right is outside the treaty and is founded on general international law.

28. Now it is the exercise of this right outside the treaty which is not to be brought before the Council. This honourable Council is concerned with the interpretation of the treaty, action taken under the treaty, application of the treaty to existing facts. Anything outside the treaty is outside the jurisdiction of this honourable Council. I think the position is fairly simple. Of course my knowledge is limited, but I am not aware of any case where this particular point has been over-ruled by the Council, namely that though a treaty has been terminated, we still take upon ourselves jurisdiction to deal with it. On the contrary, the very first meeting of the ICAO Assembly expressly drew attention of the learned members of the Council to the fact that its jurisdiction is extremely limited. You can deal with any disputes - the word is "any" - but they must pertain to interpretation or application. As soon as you come to action outside the treaty, and termination according to the World Court is outside the treaty, it would be outside the jurisdiction of the Council.

29. May I read again the last sentence of paragraph 98 on page 48. Perhaps I had better read the whole paragraph because otherwise you will not get the connecting link. "President Wilson's proposed draft" - this was the original draft - "did not include a specific provision for revocation, on the assumption that mandates were revocable. What was proposed was a special procedure reserving 'to the people of any such territory or governmental unit the right to appeal to the League for redress or correction of any breach of the mandate by the mandatory State'... That this special right of appeal was not inserted in the Covenant cannot be interpreted as excluding the application of the general principle

of law according to which a power of termination on account of breach, even if unexpressed, must be presumed to exist as inherent in any mandate, as indeed in any agreement." Although the power to terminate a contract is unexpressed, it must be presumed to exist in every agreement. Otherwise it would be impossible for sovereign States to enter into treaties - a State would be most reluctant.

Why are so many States signatories to treaties? - because they know if the time came when, because of the misconduct of another State, they had to terminate the treaty, they would be entitled to do so. If a State was to be tied hand and foot and even for good reasons could not terminate a treaty, no State would be willing to enter into a treaty. It is open to the Convention, or to the Transit Agreement, to provide that a particular forum shall be appointed to go into the question whether termination of the Convention or Transit Agreement is proper or improper, wrongful or rightful, but there is no such provision. If there was such a provision we would go to that forum.

30. I have finished with the judgment of the World Court. Now let me read to you a very interesting answer given by the Counsel for the United States to a question put by Sir Gerald Fitzmaurice, one of the judges who sat on the bench when the Court delivered the judgement from which I have quoted.

"Question: It has been maintained" - this is what the judge puts to the Counsel for the United States - "on behalf of the United States that fundamental breaches of a contract by one party entitle the other to put an end to it. I would like to know how, in your view, exactly this would work in practice. For instance, it is evident that if a party could put an end to a contract merely by alleging fundamental breaches of it, and despite the denials of the other party, whether, on the facts or as regards the existence of the obligation, there would always be an obvious and easy way out of contracts which one of the parties found onerous or inconvenient. What safeguards would you institute in order to prevent this, and how would or should such safeguards apply in the international field, in the relations between States or between States and international organizations?"

It is a very relevant question, honourable members will see. What the learned Judge asked the United States Counsel is this: "If you, Mr. Counsel, are right in your submission that if the breach is committed by one State the other State can put an end to the contract, look at the consequences. The consequences will be that any State which finds an agreement or treaty inconvenient or burdensome could say "Well, you have committed a breach and I put an end to it."

31. Now that is the law. The United States said it is the law and that argument was accepted by the World Court. The United States Counsel himself points out the remedy. He says that the remedy lies in making an express provision in the treaty to the effect that in the event of termination a particular forum will decide whether the termination was rightful or wrongful. If one State should try to take undue advantage of another and wrongfully put an end to the treaty, this forum would decide that the termination was wrongful and redress would be given. The United States points out that the remedy is to provide a forum where you can go, a forum which will deal with questions of termination as distinct from questions of interpretation or application. This is the answer which the United States Counsel gave. I will read his exact answer. It is on page 23 of the proceedings in this case before the World Court.

"The doctrine of material breach as a basis of terminating a contract is a doctrine of municipal contract law which has been reflected in international treaty law." - under ordinary contracts, if one party commits a breach the other can treat the contract as terminated and the US Counsel says that the same doctrine has been imported into international law - "Obviously not every breach of a contract would justify the other party in terminating the contract but only a breach of such significance as, in the words of Article 60(3) of the Vienna Convention on the Law of Treaties, would constitute a 'violation of a provision essential to the accomplishment of the object or purpose of the treaty'." Now mark the important words - I am reading his exact words - "If the party alleging breach were held by an international tribunal not to have established the material breach, the termination would not be legally justified and a party which had terminated the treaty on the basis of an alleged breach would be liable for unjustified repudiation of a contract. The fact that in the international as opposed to a municipal legal system the other party cannot be assured of bringing a case involving material breach before an international tribunal except where both parties have accepted the compulsory jurisdiction of an international tribunal is a problem relating to the efficacy of international law and institutions generally and not specially to the problem of the material breach doctrine."

This is beautifully expressed and I would like to emphasize these words. I am reading them because this submission of the US Counsel was accepted in toto by the World Court. What the Counsel is pointing out is this: if A and B are two parties to a contract, a simple municipal contract relating to sale of goods, and A says that B has committed a breach of the contract, he can treat the contract as terminated, nobody can challenge the validity of his action. If he is dishonest and dishonestly terminates the contract by wrongly alleging a breach by the other party, there is a civil court to which B can go. In civil law there is in every country a municipal court. What the United States Counsel points out is that that may not be so in international law.

32. In international law there is not always a forum before which you can go. There may be no forum which can be entrusted with the jurisdiction to deal with questions of termination because unless parties agree on a forum there is no such forum. Here, for example, the parties have not agreed to any forum under the Convention or under the Transit Agreement. The parties have not agreed to any forum to decide questions of termination. The United States Counsel points out that in such a case there may be no remedy, but if there is no remedy, this is, if I may read his words again, "a problem relating to the efficacy of international law". It is not something which casts any doubt on the validity of the doctrine of termination for material breach by the other party. In other words, all that you are saying is that when under international law there is no forum, it does not mean that the right to terminate does not exist. "The best safeguard" - these are again very significant words - "against misuse of the doctrine of material breach would be through the extension of the compulsory jurisdiction of the International Court of Justice or other appropriate international tribunals over legal disputes arising between States or between States and international organizations, at least with respect to those disputes" - now mark the words - "which relate to interpretation, application and termination of international agreements." The Counsel, whoever he was, was using his words with great care and he says that the remedy lies in having an international tribunal which can deal with three types of disputes - interpretation, application and termination. Two of these types are reflected in our Convention; the third one is not. The Counsel points out - and this is the argument the World Court accepted - that in this case you may have no forum; it is a pity, but unless there is a forum expressly constituted to deal with termination, it is an international wrong which goes without remedy or redress. I am emphasizing all this with a view to showing the limits of this honourable Council's jurisdiction.

33. Before I close this chapter, may I refer you to Resolution A1-23, adopted at the first session of the ICAO Assembly in 1947 in this City of Montreal. You will find it in the volume entitled "Resolutions and Recommendations of the Assembly - 1st to 9th Sessions". May I read it to you because it expressly recognizes that there are very serious limits on the Council's jurisdiction and it cannot deal with every dispute between States relating to the Convention.

34. If I may just give you the background, the Interim Agreement, arrived at before the Convention and the Transit Agreement were reached, provided that any difference between States would be left to the arbitration of the Council - "arbitration", "any difference". The words "interpretation" and "application" did not appear; any differences would go to the Council. But when they came to draft the Convention and the Transit Agreement, they expressly reduced the

limits of the Council's jurisdiction and instead of "any difference" they said "any disagreement relating to the interpretation or application". This is very interesting. It shows that the nations originally thought that any differences would go to the Council, but afterwards changed their minds and said "No. Let only a limited category of differences go to the Council."

35. If I may read the whole resolution as it stands:

"WHEREAS the Interim Agreement on International Civil Aviation provides, under Article III, Section 6(8), that one of the functions of the Council shall be:

'When expressly requested by all the parties concerned, act as an arbitral body on any differences arising among Member States' - 'relating to international civil aviation which may be submitted to it.'

(Then the Council is to render an advisory report or decide as an arbitrator.)

"WHEREAS the Convention on International Civil Aviation contains no such provision and the competence of the Council of the Organization in the settlement of disputes, as accorded to it by Article 84 of the Convention, is limited to decisions on disagreements relating to the interpretation or application of the Convention and its Annexes;

NOW THEREFORE THE FIRST ASSEMBLY RESOLVES:

(1) That pending further discussion and ultimate decision by the Organization as to the methods of dealing with international disputes in the field of civil aviation, the Council be authorized to act as an arbitral body....."

36. The great importance of this resolution is this: the Assembly recognized that the original concept of giving all differences to the Council to deal with had been abandoned and that the competence of the Council was limited to disagreements relating to interpretation or application. So ICAO itself has recognized, from its very inception, the severe limits on its jurisdiction by comparison with the original idea, which ultimately was not accepted by the nations.

37. Now one last thing on international law - and this may conclude the first part of my argument - is the Vienna Convention of 1969, from which I would like to read. The honourable members have noted the ruling of the International Court of Justice that Article 60 of the Vienna Convention merely codifies an existing rule of international law. So it is nothing new. It is an existing rule of customary international law, which is merely codified by the Vienna Convention. I shall read only the relevant portion of Article 60. Clause 2 (b):

"A material breach of a multilateral treaty by one of the parties entitles a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State."

In other words, if there is a multilateral treaty - the Convention and the Transit Agreement are, needless to add, multilateral treaties - and if one nation does a wrong specially affecting another, the nation which is specially affected can suspend or terminate the operation of the treaty in whole or in part qua that one State only. Thus I continue to be a party to the Convention and the Transit Agreement. I will honour them qua all other parties, but qua the nation which has done me a wrong, I purport to suspend them in whole or in part, and I am entitled to do so. This is the clear right given under the Vienna Convention, but I need not dwell at length on it because, as the International Court of Justice pointed out, - and I am repeating it because it is very important - Article 60 is only a codification of an existing rule of international law.

38. Now under that rule of international law, which existed prior to the Vienna Convention, I had the right to suspend the Convention and the Transit Agreement, as against Pakistan, in whole or in part. This right was given to me not by the Convention, not by the Transit Agreement, but by international law, and I am asking you honourable gentlemen to consider how it is possible for a logical mind to put forward the proposition that is a case of application, of interpretation. It is something outside the agreement altogether. It is something outside the international treaty altogether. What is outside? - my right to suspend or terminate. It is that right which I have exercised.

39. This finishes my reading of the relevant provisions of the statute. I will call the treaty and the Rules the statute because we are a law-abiding nation and to us they have the force of law. I therefore refer to them as a statute. I have referred to the law or the statute to satisfy you as to how limited the jurisdiction of the court is. In this connection, in our preliminary objections, which necessarily have to be brief and concise because we did not want to set out the entire argument, we have, on pages 11 to 18, set out the legal propositions and I would request the honourable members to read a few portions with me, because we tried to put as concisely as we could the correct law on the subject as we understand it. On page 11 of our preliminary objections you find the relevant provisions of the Convention and the Transit Agreement set out. I will not read them now because I have already read them.

40. If I may refer the honourable members to paragraph 16 of the preliminary objections: "Under Article 84 of the Convention and under Article 1(1) of the Rules, two of the conditions which are required to be fulfilled in order to make the Application competent and maintainable, and in order that the Council may have jurisdiction to deal with it and handle the matter presented by the Applicant, are the following: (a) there should be a disagreement between the two contracting States, and (b) the disagreement should relate to the interpretation or application of the Convention. (The Transit Agreement is dealt with subsequently.)"

41. I will now read paragraph 17: "Both the aforesaid conditions postulate and presuppose the continued existence and operation of the Convention as between two States." Now the honourable members must have noted that the Vienna Convention of 1969 says that you may suspend the agreement in whole or in part. Once the agreement is suspended it is not in operation; that is the whole meaning and effect of suspension; and if it is not in operation there can be no question of construing or applying it. "If the Convention has been terminated, by repudiation, abrogation or otherwise, or has been suspended, as between two States, any dispute relating to such termination or suspension cannot possibly be referred to the Council under the aforesaid Articles of the Convention and the Rules, since in such a case no question of 'interpretation' or 'application' of the Convention can possibly arise (there being no Convention in operation as between the two States). Further, there cannot possibly be a disagreement on a point of interpretation or application of a treaty which is not in operation as between two States. In other words, so long as two contracting States accept the existence, operation and efficacy of the Convention as between them, all points of disagreement as to the interpretation or application of the Convention would be within the jurisdiction of the Council. But any question of termination or suspension of the Convention as between two States cannot be referred to the Council under the aforesaid Articles."

42. "What is stated above regarding the Convention also represents accurately the position under the Transit Agreement" - I am reading paragraph 18 - "which confers limited jurisdiction on the Council in identical words. Section 2 of Article II of the Transit Agreement and Article 1 (1)(b) of the Rules permit an application limited only to cases of disagreement between two States relating to the 'interpretation' or 'application' of the Transit Agreement."

43. Paragraph 19. "The aforesaid construction of Article 84 of the Convention, Article II(2) of the Transit Agreement, and Article 1(1) of the Rules harmonizes with Article II(1) of the Transit Agreement and Article 1(2) of the Rules which deal with complaints regarding an action taken by a State under the Transit Agreement, and not regarding termination or suspension of the Transit Agreement, which would be dehors that Agreement."

44. Now paragraph 20 is a rather important submission. Very fortunately for the honourable members, they - or at least the overwhelming majority of them - are not lawyers. This particular subject of the law is not something the honourable members are very familiar with or are professionally trained to deal with. I am

saying this with the greatest respect, because I do not hold lawyers in very special esteem, far from it; I am only stating a fact. The World Court will consist of lawyers and that is why it can deal with the questions "Was the termination rightful or wrongful? Was it or was it not in accordance with international law?" These are complicated questions of fact and law which trained juries, trained judges, may deal with. The honourable members of the Council, fortunately, as I was saying, not falling in the category of lawyers, are entrusted with other tasks, diplomatic tasks, which are tasks of trying to reconcile differences between different States, but not bearing on the question of rights exercised under international law, suspension, termination etc., which, as I said, present certain legal aspects that cannot be correctly brought before this honourable forum.

45. That is what we deal with in paragraph 20. "The composition of the Council and its powers and functions are, again, in keeping with the limited jurisdiction, which has been conferred upon it by Article 84 of the Convention, Article II of the Transit Agreement and Article 1 of the Rules, to hear international disputes. The sovereign power of a State to suspend, abrogate or otherwise terminate an international treaty - not seldom involving vastly complicated questions of fact and international law - are outside the scope of the Council's jurisdiction." To give you one instance, the International Court of Justice will hear a dispute for six months. A hearing on the merits of this dispute between India and Pakistan to decide which country really was in the wrong would go on for a large number of days, to put it very mildly and to make an under-estimate of the time involved. This Council is not a body that can take evidence, call witnesses, look at documents, find out which are fabricated documents, sit in judgment on the hilarious report made by the Commission in Pakistan which was asked to go into this question of hijacking. I am using my words very carefully in calling it a hilarious report. It says that India brought about this hijacking for its own secret purposes. It is like the President of a country being assassinated and his successor appointing a Commission which reports that the President brought about his own assassination. India is charged with this degree of lunacy, that it brought about the hijacking and burning of its own plane - got the two hijackers into the plane and supplied them with nothing more than dummy grenades and a pistol with which they were able to blow up the whole plane, which was surrounded by the police and the military forces of Pakistan! This amazing fantasy I will not deal with. I was only pointing out that if such a dispute were to go before the appropriate forum, it would mean an enormous consumption of time. For days and weeks, if not months, the dispute would go on, and ultimately the appropriate forum, if there is one, would decide who is right and who is wrong. The Council is not to be troubled with these questions which refer to this issue of international law: Has a State justifiably or unjustifiably terminated or suspended the agreement? If it has done so justifiably, all right. If it has done so unjustifiably, the appropriate forum will give the appropriate orders. I am only pointing out that this Council is not the appropriate forum for such complicated questions of fact and law.

46. Then paragraph 21: "To sum up, the scheme of the aforesaid Convention Articles is simple and clear. So long as the Convention or the Transit Agreement continues to be in operation as between two States, any disagreement as to the construction of its Articles or the application of the Articles to the

existing state of facts can be referred to the Council; and, likewise, any action taken under the Transit Agreement can be referred to the Council. But if a State has terminated or suspended the Convention or the Transit Agreement vis-à-vis another State, there cannot possibly be any question of interpretation or application of the treaty, or of action taken under the treaty, and the Council is not the forum for deciding such disputes. These disputes are usually in the realm of political confrontation between two States, often involving military hostilities not amounting to war, and these matters of political confrontation or military hostilities are outside the ambit of the Council's competence. The question of overflying raised by Pakistan is directly connected with military hostilities in the past and continues to be inextricably tied up with the posture of political confrontation bordering on hostility adopted by Pakistan. "

47. I shall not read further just now, but I should just like to make one simple submission. It is Pakistan's somewhat naïve case that the word "application" would cover termination or suspension. It just happened that on the plane I was reading "Call No Man Happy" by André Maurois, his autobiography, and there is a lovely passage where he says that to children words do not have precise meanings because the concepts of words are vague and nebulous to a child. He says that some adults go through life with this simple temperament of a child, to whom words do not convey clear-cut, definite concepts. I would submit to the honourable members that the words "interpretation" and "application" are clear-cut and precise and to equate "application" with "termination" or "suspension" or to equate "interpretation" with "termination" or "suspension" is a clear misuse of the language. These terms "application", "interpretation", "suspension", "termination" express well known legal concepts. They are known to nations; they are known to international law; they are known to municipal law; and it is a reflection upon the competence of those who drafted the Convention and the Transit Agreement to say that they did not know the distinction between interpretation and application on the one hand and termination and suspension on the other. The distinction is so clear-cut that no draftsman of an international treaty could possibly have confused these distinct, separate, independent concepts.

48. Sir, may I now read paragraphs 22, 23 and 24 and then stop. "22. The Government of India submit 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, and has been completely and totally against the principle of safety in civil aviation. It is expressly stated by Section 2 of Article I of the Transit Agreement that exercise of the privileges conferred by that Agreement shall be in accordance with the provisions of the Convention. Consequently,

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."

49. "23. Without prejudice to the above, and in the alternative, the Government of India submit that they have terminated, or in any event suspended, the Convention as regards overflying and the Transit Agreement vis-à-vis Pakistan." You will see that under international law any nation has the right of suspension in whole or in part. You need not suspend the whole agreement. You may suspend part of it qua another nation and, when the treaty is multilateral, you may suspend it qua one nation only.

50. "24. Reciprocity is of the essence of the Convention and the Transit Agreement. The conduct of Pakistan has made it impossible for Indian aircraft to overfly Pakistan. That country has shown no regard for the most elementary notions of safety in civil aviation and has made it impossible for India to enjoy its rights under the Convention, and its privileges under the Transit Agreement, over Pakistan territory." It is true that Pakistan has not imposed a ban on Indian aircraft overflying Pakistan but our right of overflight is theoretical. The conditions are such that no government with a sense of responsibility to its people would choose to fly its aircraft over Pakistan if it is in the position of India today vis-à-vis Pakistan. In other words, if a nation brings about a situation where a government with a sense of responsibility to its own people dare not overfly the territory of that other State, it is no use for that other State to say that theoretically I have given you the right to overfly. There was a famous English judge Darling, who, commenting on the principle that the doors of the courts of justice are open to rich and poor alike, added the words "So are the doors of the Ritz Hotel." It was the most expensive hotel in London at that time. Theoretically even a poor man has the right to enter the Ritz Hotel in London, but is this a right he can in practice exercise? There are many theoretical possibilities - nothing prevents us from going to the moon, but practically we just cannot do it. So the theoretical right is meaningless if in practice, as a result of a nation's conduct, I find it impossible to fly my aircraft over that nation's territory. If that is the situation I am not bound to give that nation the corresponding right to overfly my territory, because reciprocity is of the very essence of the Convention and the Transit Agreement.

51. If I may continue with paragraph 24, "Pakistan's theoretically permitting Indian aircraft to overfly Pakistan is, in the context of the facts stated above, a mockery of the principles underlying and the provisions embodied in the Convention and the Transit Agreement. In the circumstances, the Government of India submit that they had complete justification for terminating or suspending the Convention as regards overflying and the Transit Agreement vis-à-vis Pakistan. The Government of India do not set out here the full facts concerning justification, since, as stated above, the question of justification for termination or suspension of the Convention or the Transit Agreement is not within the scope of the Council's jurisdiction..." We therefore have not gone into the detailed facts, but I shall refer to some later.

52. The President: I suggest we now have a coffee break.

- RECESS -

53. The President: The Council is again in session and I give the floor to Mr. Palkhivala if he wishes to continue.

54. Mr. Palkhivala: May I refer to three Articles of the Convention which according to Pakistan's submission are supposed to lend support to their contention that there is no power to terminate the agreement and that this Council is competent to deal with the type of application Pakistan has filed. These three Articles are 54, 89 and 95.

55. With respect to Article 54, the argument urged by Pakistan is that if there is an infraction of the Convention, the aggrieved State has a right to move the Council. This Article, entitled "Mandatory Functions of the Council", says "The Council shall" - the relevant clauses are (j) and (k) - "report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council" and "report to the Assembly any infraction of this Convention where a contracting State has failed to take appropriate action within a reasonable time after notice of the infraction."

56. Now the answer is very clear and obvious but since the point has been raised, even a very obvious answer must go on record, and it is this: Article 54 deals with cases where the Convention has not been terminated, has not been suspended; while it continues to be in operation, admittedly in operation, one State commits an infraction; in such a case you invoke Article 54 and say "There is an infraction and I want the Council to deal with it." The mere fact that an infraction is referred to in Article 54 does not mean that it covers cases of suspension and termination, because in law the very word "infraction" presupposes the continued efficacy of the agreement; if the whole agreement, or the material portions of it, has been terminated or suspended, the question of infraction does not arise; it is a question of termination or suspension. So the words used here do not go against me at all, because Clauses (j) and (k) of Article 54 deal only with cases where the agreement continues to be in operation between two States.

57. Now Article 89. Pakistan says that under Article 89 you have a right to say that you are not bound to observe the terms of this Convention only in case of war or national emergency. Article 89 (War and Emergency Conditions) reads: "In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council." Again, this Article has no relevance whatever to the point at issue on this preliminary objection.

58. Article 89 says that in case of war or national emergency a nation is given freedom of action and will not be tied down to observe the terms of the Convention, even if it is not a belligerent but a neutral nation. This Article has nothing to do with what the International Court of Justice called the principle of international law that in cases of breach of the treaty by one party, another party has the right to terminate or suspend it. This right to suspend or terminate the treaty in the event of a breach by another State is not dealt with by Article 89 at all. This Article is not exhaustive of the circumstances in which the Convention can be terminated or suspended; it deals with only two. To show what, speaking frankly, I may call the absurdity of the argument, suppose this Article was not there. Is it suggested that in time of war a country would still allow aircraft of the other country to overfly, saying "This is my international contract and I do not want to be guilty of breaking it"? Surely in case of war the rule of international law must apply and even if there were no Article 89 you would still have the right to say "No more overflights. I cannot allow my enemy to overfly my territory." This is an elementary principle. Not all States were very keen to become signatories to this Convention, which was the first of its type, and certain provisions had to be put in in order to assure them that their national interests, their national security, would be safeguarded. With a view to getting wider and wider support for this Convention, this particular Article was put in, but by no process of reasoning can it be said to be exhaustive of the cases where the Convention can be suspended or terminated. It only deals with two, leaving the international law free and open. No principle of international law is superseded by Article 89. Can you read it as superseding what the World Court says is a rule of international law, namely that if one State commits a breach, another State has a right to suspend or terminate the treaty? What are the words in Article 89 which suspend this rule of international law? There are none. Therefore, again, Article 89 does not deal with our case.

59. It does, however, help me in this way. In Article 89 the word "war" is not used in the technical sense of war as distinct from military hostilities. It would cover military hostilities. Military hostilities broke out between India and Pakistan and continued for about three weeks in August/September 1965.

Now that "war" gave me the freedom of action under Article 89 and a very important point honourable members will notice is this. Freedom of action is permitted under Article 89 not just for the duration of the war - the text does not say "during the war" - but even after the war is terminated, if the essential security of the State requires some freedom of action. In our case military hostilities did break out in 1965 and since then we have never given Pakistan the right, without our permission, to overfly India at all. In fact we gave them the right to overfly with the permission of the Government of India. Now once we give it with the permission of the Government of India it means that the Convention is not in operation, because Article 5 gives the right to make flights into or in transit non-stop across another State's territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission. The whole object of this provision is that you do not need the prior permission of a State to overfly its territory or to make non-traffic stops; you are entitled to overfly and to make non-traffic stops without the Government's permission. This is the effect of the Convention.

60. Now what happened after 1965? Since 1965 the right to make stops for non-traffic purposes has been completely denied to Pakistan by us and completely denied to us by Pakistan. Since 1965 Pakistan aircraft have never made a non-traffic stop in India, and Indian aircraft have never made a non-traffic stop in Pakistan, except with special permission. Even the right to overfly has been only with the permission of our Government; I will point out the relevant notifications after I have finished the argument. After the war broke out in 1965 - I am using "war" in the broad sense, because there were military hostilities perhaps not amounting to war under international law, but, as I have already said, "war" in Article 89 is used in the sense of military hostilities, not the technical international concept of war - we denied the benefit of the Convention to Pakistan. We said that any overflying or any non-traffic stop must be with our Government's permission and that has been the position since 1965. That is a separate point I will deal with later, but I am only pointing out that once the war, in the broad sense of military hostilities, broke out freedom of action was available to us under Article 89 and that freedom of action is not limited to the period of actual military hostilities. The period is not specified; it must be as long as the nation considers necessary in its own interest - because how can any outside party decide what a nation's security requires? After a war you may need five years, seven years, in order to build up your defences in such a way that your enemy cannot attack you again. No period is mentioned in Article 89. Therefore if Article 89 helps any party at all, it helps India, not Pakistan, because, military hostilities having broken out in 1965, we had freedom of action under it which was not restricted to the period of the war and which we have exercised even after the military hostilities ceased. To sum up, Article 89 has no bearing whatever on the rule of international law; it does not supersede, it does not override, the rule of international law, which is, as the World Court said, that in the case of breach by one party, another party may suspend or terminate the contract.

61. Lastly, Pakistan says "You should have given notice under Article 95." Well, I would have to be completely out of my mind to give notice under Article 95, because Article 95 deals with a completely different topic. It has no application at all to a case like the present one, where there is misconduct on the part of one State as against another. If I may read it:

"Article 95 (Denunciation of Convention)"

(a) Any contracting State may give notice of denunciation of this Convention three years after its coming into effect by notification addressed to the Government of the United States of America, which shall at once inform each of the contracting States.

(b) Denunciation shall take effect one year after the date of the receipt of the notification and shall operate only as regards the State effecting the denunciation."

Article 95 deals with the case where a State party to the Convention wants to back out and says "I do not want this Convention." In other words, so far as that State is concerned, the whole Convention is at an end; it is at an end as regards the relations between that State and all the other States which are parties to the Convention. Now India does not want that. It has never been India's desire to withdraw from this agreement. We want to honour it, and every other State which is a party to the Convention will find that India respects that agreement. So I cannot possibly denounce; this remedy is not open to me, because, if I denounce the Convention, I denounce it as regards all the States which are parties to it. If I want to terminate or suspend the contract qua only one State, I cannot act under Article 95, because the denunciation provision does not apply. Termination or suspension of an agreement qua a single State can never be denunciation of the Convention. It is a complete misuse of words to say that it is.

62. As I said at the beginning, in this case we are really concerned with the nuance of words. What do English words mean - words which are hoary with tradition, words which have come down through the centuries, words which have acquired certain precise, clear connotations. If one is prepared to play with words and treat them as matters of no consequence, or like Alice in Wonderland say that words mean what I say they mean because I am master, not the word, if that is the attitude, of course, there is no need for further argument. But if the attitude is that this is an international treaty and must be read in a manner which international law understands, then denunciation means that you want to get out of a treaty altogether. That is what Article 95 deals with, and India has never had any desire whatever to denounce the Convention. It wants to be a party to the Convention; it continues to be a party; and it will honour its obligations under this Convention with respect to every State but Pakistan, between whom and us, unfortunately, military hostilities continue, political confrontation persists. I shall not apportion blame here. That is not my purpose; I am only stating facts.

63. Therefore, neither Article 54 (Infraction), Article 89 (War), nor Article 95 (Denunciation) is of any use in dealing with the questions that arise here.

64. Normally I would not have dealt with the facts of the case at all, because I am dealing with the legal point, but on full consideration I am inclined to the view that if I took about ten or fifteen minutes of the honourable members' time in stating some facts it would be helpful, just to satisfy you about the bona fides of my country's case, not with any other purpose. It is not with a view to satisfying you by proving by facts etc. that our termination or suspension of the contract was justified - not that, but merely to show you that it is an honest bona fide exercise of the right we have under international law to terminate or suspend the contract.

65. With that objective only, may I request you to turn to the preliminary objections of India, paragraph 5. I shall not state the facts orally. I shall only read what is here, so that you can decide for yourselves whether any self-respecting State, whether any Government that was conscious of its duty to its own citizens, could possibly act any differently from the way India has acted.

66. "Paragraph 5. For years past, Pakistan has been pursuing and continuing a policy of political confrontation bordering on hostility against India. This policy culminated in August/September 1965 in an armed attack by Pakistan against India on a large scale. On the outbreak of the conflict, the Air Services Agreement of 1948 between the two countries was immediately suspended, and there was a stoppage of air transport services of Indian aircraft to and across Pakistan and of Pakistan aircraft to and across India. The conflict was followed by an Agreement between the two countries signed at Tashkent in the Union of Soviet Socialist Republics in January 1966. As a result of this Agreement, a special arrangement was worked out whereby the two countries permitted each other to operate some overflying services. Air services as they existed prior to the conflict were, however, not restored, since Pakistan refused all other aspects of normalisation of relations as envisaged in the Tashkent Agreement. Up to date Pakistan has continued its policy of confrontation bordering on hostility against India, some instance of which are listed hereunder:" Now this is what continues to be done by Pakistan.

- "(1) Confiscation of all properties of Indian citizens and of the Government of India in Pakistan. These remain confiscated to this day.
- (2) Confiscation of all Indian river boats on East Bengal rivers which are an essential lifeline for the transport of the produce of Eastern India to the port of Calcutta.
- (3) The continued ban on passage of Indian boats and steamers on rivers, streams or waterways of East Bengal.
- (4) Continued ban on trade and commerce with India.

- (5) Continued ban on civil air flights, railway and road communications between the two countries."

(There are no civil air flights, railway or road communications between the two countries, and international airlines like SWISSAIR or PAN-AM may fly from Bombay to Karachi, but Indian airlines do not fly that way nor do Pakistan airlines. In other words, Pakistan airlines do not connect Pakistan with India; Indian airlines do not connect India with Pakistan. This has been the position since 1965.)

- "(6) Continued ban on entry into Pakistan of Indian newspapers, books, magazines, etc., printed or published in India."
(Not a single Indian newspaper can be imported into Pakistan.)

- "(7) Continued assistance with arms, ammunition and training to rebel elements in areas of Eastern India.

- (8) Continued attempts to foment, through sabotage and infiltration, disturbances in Jammu and Kashmir.

- (9) Intensive hate-propaganda against India on the radio and in the press, which continues unabated to this day."

67. "The subject matter of Pakistan's Application" - I am reading paragraph 6 - "and Complaint relates to the suspension, since 4th February 1971, of overflights over Indian territory. The conduct of Pakistan immediately preceding that date in relation to the hijacking of an Indian aircraft was most reprehensible and amounted to the very negation of all the aims and objectives, the scheme and provisions, of the Convention and the Transit Agreement."

68. If I may pause here for a minute just to consider what this Convention is. This Convention is not an exercise in lexicography; it is not merely an exercise in putting English words together, or French or Spanish words together. It has a certain objective and that objective is set out in the Preamble. Its objective is safe and orderly development of international civil aviation - safe and orderly development of international civil aviation. I am not apportioning any blame at the moment, because I am not justifying my conduct at all just now; that it not my purpose - I am on the question of law - but if between two countries safe and orderly development of international aviation is an impossibility, what do you do with the Convention as between those two countries? Do you still apply it as a formality or are you frank and honest enough to say that between these two countries it is impossible to work the very basis of this Convention? What is the point of talking of the safe and orderly development of international aviation when not a single Indian aircraft can land in Pakistan or a single Pakistani aircraft can land in India? Since 1965, as I told you, there has

been no scheduled service between India and Pakistan except by foreign airlines, which are apart, but Indian and Pakistani airlines, scheduled or non-scheduled, do not connect the two countries.

69. Now if safe and orderly development, which is the prime objective, the principal fundamental objective, of the Convention, cannot be achieved between two States, what is left? The whole substratum of the Convention is gone as between India and Pakistan, and this has been so since 1965. This complaint is made in 1971, but if Pakistan had a case the complaint should have been made in 1965, because since then we have not given the right to overfly India or to make non-traffic stops in India without our Government's permission, which is the right guaranteed by the Convention. This right has never been given to Pakistan, nor given by Pakistan to us, since 1965. So what are we hearing after six years?

70. The other Agreement - the Transit Agreement - expressly says that it is not to have an existence independent of the Convention. It is to continue, and it is to be in operation, only in accordance with the Convention. In other words, the Convention is the very basis and foundation of the Transit Agreement. If you do not observe the Convention you cannot possibly observe the Transit Agreement, and for that may I request you to turn to Article I, Section 2 of the Transit Agreement. Before I read it, I do not have to remind the honourable members that both the Convention and the Transit Agreement deal with the right to overfly another nation's territory, and the right to make non-traffic stops in another nation's territory, the only difference being that the Convention deals with non-scheduled aviation and the Transit Agreement deals with scheduled international air services. Otherwise, the subject matter, so far as this point is concerned, is the same, namely overflying and non-traffic stops.

71. Article I, Section 1 speaks of two freedoms of the air: (1) the privilege to fly across the territory of another State without landing, which I will call overflying, and (2) the privilege to land for non-traffic purposes. These are the two freedoms of the air given by Section 1 of Article I. Now look at the important Section 2 of the same Article. Section 2 says "The exercise of the foregoing privileges shall be in accordance with the provisions of the Interim Agreement on International Civil Aviation and, when it comes into force, the provisions of the Convention on International Civil Aviation, both drawn up at Chicago on 7 December 1944." So these freedoms given by the Transit Agreement are to be exercised in accordance with the Convention, and the Convention, as I have already pointed out, talks of the safe and orderly development of international civil aviation. This is what Pakistan would not permit and that is why we treat it as a repudiation by Pakistan of the Convention and the Transit Agreement and if Pakistan says "I have not repudiated them.", we say "We propose to terminate or suspend because your conduct has been such that it is impossible to have the terms of the Convention and the Transit Agreement in operation as between our two countries."

72. I would like to read again the second sentence of paragraph 6 of the preliminary objections - "The conduct of Pakistan immediately preceding that date" (4 February 1971) "in relation to the hijacking of an Indian aircraft was most reprehensible and amounted to the very negation of all the aims and objectives, the scheme and provisions, of the Convention and of the Transit Agreement." I would like now to take a minute to explain one important point. Unfortunately criminals have made many nations familiar with hijacking and the malpractices which are commonly called hijacking, but very fortunately for the decencies of international life, it seldom happens that the government of a State is either an accomplice before the fact or what is called in law an accomplice after the fact, which means that either you actively assist the hijacking, as one nation is reputed to have done - it may or may not be true - or, again as it is called in law, you harbour and comfort the criminals. When a government chooses to go out of its way to do things which amount to virtually making heroes of hijackers, it is about time that self-respecting nations say to it "If you have so little regard for the decencies of international aviation, we propose to terminate or suspend the contract as between you and us."

73. May I request you now to turn to the incidents connected with the hijacking in paragraph 7 and you can judge for yourselves. We have no evidence to show whether the Pakistan Government was an accomplice before the event, so I shall make no statement, but if any of the honourable members here has any doubt as to whether it was at least an accomplice after the event, that doubt should be removed by reading the report of the Commission appointed by the Pakistan Government. Fortunately that report is annexed to Pakistan's reply to our preliminary objections. As normal human beings with some knowledge of human affairs, you have only to read the report to see that any government that was really objective and did not want to identify itself with the hijackers could never have got such a document. The report is so unacceptable - to use the mildest term I can think of - that it makes you wonder how any government could solemnly present it to an international body. But before I come to that report let me read the summary of the facts about the hijacking starting on page 5 of the preliminary objection, after making this one further point. We do not suggest that a State can terminate or suspend the Convention or Transit Agreement if there is a hijacking incident, but it has the right to do so if the government of another State identifies itself with the hijackers or sympathizes with them. So it was not just the hijacking incident but also the Pakistan Government's identification with the hijackers that led to India's action. Kindly look at the facts narrated in paragraph 7 of the preliminary objection.

74. "(a) An Indian Airlines Fokker Friendship aircraft on a scheduled flight from Srinagar to Jammu with 28 passengers and 4 crew on board was hijacked by two persons among the passengers and diverted at gun point to Lahore in Pakistan shortly after noon on 30th January 1971. One of the two hijackers had a grenade in his hand and threatened to use it if the plane was not diverted to Lahore, while the other pointed his revolver at the pilot.

(b) The Government of India requested the Pakistan Government the same afternoon at Islamabad, and through their High Commissioner in New Delhi, for the immediate release of the passengers, crew, cargo, baggage, mail as well as the aircraft. The Pakistan Government informed the Acting High Commissioner of India in Islamabad the same afternoon of its decision to allow the plane, crew and passengers to fly back to India.

(c) The Indian civil aviation authorities and the Government of India informed the Government of Pakistan on the morning of 31st January about a relief plane being ready to take off for Lahore, together with spare crew, to bring back the passengers, crew, cargo, baggage and mail as well as the hijacked aircraft as soon as the Pakistan authorities gave the necessary clearance. Permission was given by the Director General of Civil Aviation of Pakistan the same morning for the relief aircraft to leave, but this was rendered infructuous by further instructions from the Pakistan authorities that the relief plane should not take off until further specific instructions from the DGCA Pakistan. Such permission was repeatedly deferred in spite of numerous reminders from the DGCA India. The Ministers for External Affairs and Civil Aviation of India sent messages on 1st February 1971 to the Minister of Home Affairs and the Minister-in-Charge of Civil Aviation respectively in Pakistan, requesting the immediate return of the passengers and clearance for the relief aircraft to bring back the hijacked aircraft along with the baggage, cargo and mail. The Pakistan High Commission in India consistently refused to issue visas to the crew of the relief aircraft and the spare crew."

Now this is important. Another plane, a foreign plane, was to leave Lahore for India and there was room on board for the Indian passengers. Yet the Pakistan Government would not permit them to be put on board that plane. This is the next paragraph, (d).

"(d) Pakistan took more than 48 hours to send the passengers and crew by road to the Indian border at Hussainiwala at 1500 hours (IST) on the 1st February 1971, though the distance from Lahore to Hussainiwala is only 36 miles."

A military government is in power, a foreign aircraft is hijacked, the passengers are there, and the military government which can deal with the problems of the entire nation cannot arrange for these passengers to go 36 miles under military escort! For 48 hours nothing can be done for these passengers. If I may continue:

"The Government of India had earlier made arrangements for the return of the passengers to India on board a scheduled Ariana Afghan Airlines Service from Kabul to Amritsar, which landed at Lahore at 23 hours on 31st January, but although a large number of passengers disembarked from

the plane and 30 passengers were boarded on that aircraft at Lahore, the authorities in Pakistan said that they could not make arrangements to board the passengers and crew of the hijacked aircraft on this plane because of the alleged presence of crowds at the airport."

I find it impossible to believe that if a government really wanted to do it - a military government with police and military forces at its command - it could not do so simple a thing as put 20 or 30 Indian passengers aboard a plane. Other passengers could get on board.

"(e) The Government of Pakistan not only failed to return the two persons who had hijacked the aircraft but announced that they had been given asylum in Pakistan." - The Government of Pakistan announced publicly that the hijackers were being given asylum in Pakistan. - "This was done even without first disarming them and taking them into custody for their criminal acts. On the other hand, they were treated as heroes and were freely permitted to visit, by turns, the terminal building at Lahore Airport, to put long-distance calls to their accomplices and friends in Pakistan and meet various people, besides being provided with food and other amenities which enabled them to continue their so-called occupation of the aircraft for 3-1/2 days. This was allowed to happen on the apron of the international airport at Lahore, in full view of the authorities, troops and police there, who took no action to make them vacate the hijacked aircraft."

75. Now just consider the absurdity of Pakistan's explanation of why they did this. All the passengers have been removed from the aircraft. The aircraft belongs to India. The two hijackers are on the plane. The worst the hijackers could do was to blow up the plane. That was all they could do because the passengers were safe and ultimately they did blow up the plane. What did Pakistan achieve as an internationally responsible government by allowing these hijackers to come out of the plane one after another? For 3-1/2 days these hijackers were given food and water and were looked after. And Pakistan says "We did all this because we were worried as one of the hijackers was always on it; one would come out and one would remain; so one hijacker might blow up the plane." This great concern of Pakistan for Indian aircraft and Indian property - can you imagine that being the real motive when millions and millions of dollars worth of property has been confiscated by Pakistan and not returned? Can you seriously believe that Pakistan was concerned with the safety of India's one little aircraft, which was ultimately blown up? What prevented Pakistan from taking the two hijackers into custody? The worst they could have done was to blow up the plane. Pakistan could have asked India "Are you willing to have us arrest these people and let your plane be blown up?" Would India have said "No"? Did we have any sympathy with these criminals? Now for three and a half days, mind you, these hijackers come out of the plane, first one,

then the other. They come to the terminal building. They make long distance calls, trunk calls also, to their accomplices in Pakistan, and nothing happens to them at the hands of the military and police forces at the airport.

"(f) Finally, at about 2000 hours on 2nd February these two criminals were allowed to blow up the hijacked Indian aircraft and even to prevent the fire brigade from putting out the fire."

76. Look at the absurdity of the whole story put forward by Pakistan. The Commission they appointed to report on this hijacking says that the two hijackers had only a dummy pistol, not a real one, and a grenade which was also a dummy. If so, how could the hijackers blow up the plane? What did they blow it up with if the pistol was a toy pistol and the grenade was a dummy grenade? These are some of the absurdities of the whole story, whereas the simple straightforward fact is that Pakistan wanted to make heroes of these hijackers and a situation was created where India found the position intolerable for any self-respecting country.

77. If I may read further in the same paragraph - Clause (f). "This" - the blowing up and burning of the aircraft - "took place in full view of the airport authorities, troops and police at the Lahore Airport, which is a protected area," - mind you, this is a protected area in Pakistan, under military occupation - and at a time when Martial Law was (as it still is) in force in Pakistan." Now mark this - "The Lahore TV also televised the destruction of the aircraft on a special programme and it was made to appear as if the event was an occasion for celebration. The time extended for the television programme" - the television programme normally would have ended but the time was extended by the Lahore television authorities - "was clear proof that the Pakistan authorities knew the plans of the hijackers and connived at the destruction of the aircraft. This further criminal act of destroying the aircraft occurred only a few hours after the Pakistan High Commissioner in India had assured the Government of India that his Government were committed to, and were taking all necessary measures for, the safe return of the aircraft.

78. "(g) The Government of India informed the President of the International Civil Aviation Organization Council on 1st February 1971 of the hijacking of the Indian aircraft and later about its destruction. It is understood that the President of the ICAO Council sent the following message to Pakistan:

'REGARDING UNLAWFUL SEIZURE INDIA AIRLINES AIRCRAFT
CONFIDENT PAKISTAN ACTING IN ACCORDANCE WITH ICAO
ASSEMBLY RESOLUTION A17-5 HAS PERMITTED OR WILL PER-
MIT AIRCRAFT OCCUPANTS AND CARGO CONTINUE JOURNEY
IMMEDIATELY. WOULD APPRECIATE YOUR INFORMATION
REGARDING PRESENT SITUATION. AM ALSO VERY CONCERNED
BY POSSIBILITY PROLIFERATION HIJACKINGS IN THAT PART OF
THE WORLD UNLESS SEVERE MEASURES TAKEN. THEREFORE
TRUST PAKISTAN WILL FOLLOW ASSEMBLY DECLARATION
A17-1 AND PROSECUTE PERPETRATORS SO AS TO DETER RE-
PETITION SIMILAR ACTS.'

The Government of India are not aware of the response given by Pakistan to this communication. In fact Pakistan neither permitted the aircraft with passengers and cargo to continue the journey immediately, nor returned the hijackers to India, nor prosecuted nor punished them in Pakistan."

Pakistan in the reply says that they are awaiting trial. They are very familiar with trials and I will say no more about it.

79. "(h) The Government of India had, as far back as September 1970, informed the Pakistan High Commissioner in India that certain subversive elements in Pakistan were conspiring to hijack Indian aircraft and that there was definite information about a possible attempt to hijack an Indian aircraft to Pakistan and had requested the Government of Pakistan to take adequate steps to prevent this. There was no response from the Government of Pakistan except the strange request from their High Commissioner to disclose the source from which the Government of India had obtained this information."

Imagine the attitude of a responsible government wanting to honour its international commitments about safe and orderly aviation. That government is given information by another government: "We have information that one of our plane is going to be hijacked. Please see to it that such a thing does not happen, that the hijackers do not get asylum in your country.....". What is the reply of the Pakistan Government? "Please tell us the source from which you got this information." If this is "safe and orderly development of aviation" we may as well scrap the Convention of 1944. There is no meaning to it. It is meant to be a convention among nations which intend to honour and respect its provisions. It is not intended to be a formality between nations, one of which is at liberty to make a mockery of it and then ask the other nation to adhere to its provisions.

80. These are the facts. If anyone had any doubt as to whether the Pakistan Government itself was really involved in the hijacking, either before or after the event, it would be completely removed if you look at Pakistan's reply and at the conclusions of the Commission of Inquiry which Pakistan has annexed to it. I ask you honourable gentlemen, as men of common sense and men of knowledge of world affairs, to read this Commission's report and ask yourselves whether you believe for a moment that an honest government, which had nothing to do with the hijacking or the hijackers and had no sympathy with them, could have possibly procured such a report from a Commission appointed by it. Look at the report. As I started to say earlier, it makes hilarious reading. You only have to read it to see what type of conclusions were reached by a responsible government commission. It is Annexure A to Pakistan's reply and I propose to read the whole of it.

81. The President: I do not mean to interrupt you, but is the point that you are going to make now related to the Preliminary Objection?

82. Mr. Palkhivala: Sir, it has no bearing on the legality of the Preliminary Objection. It has a bearing on the justification for the suspension or termination of the agreement and that justification is not within the Council's jurisdiction. So if the learned President rightly reminds me that if the Preliminary Objection is well founded in law - and I submit it is - then the question whether our termination was rightful or wrongful is not for the Council to consider. If that is the view then I do not have to read it at all because I would be unnecessarily wasting your time, and the learned President, if I may say, is quite logical in reminding me that on my own argument this is not relevant. I concede that point against myself straight away and I will not read it, because I see the implication of what the learned President has said. Without asking me not to read it, you have rightly reminded me that it is really not relevant. My only objective in asking the honourable members to have a look at it was to satisfy you about the bona fides of my country's case, which is not really the question before the Council because you are not concerned really with our bona fides and our justification as much as with our contention that if for any reason, good or bad, we choose to terminate the agreement, the Council has no jurisdiction to deal with it. Well, Sir, I will not read the report, but I will ask the honourable members to have a look at it later and will only make one or two comments without reading it.

83. The sum and substance of the report is this. Here is India, tremendously agitated over this hijacking, very perturbed. This is the first time in history that an Indian aircraft has been hijacked and our people, inside and outside of Parliament, are so agitated that we beg the President of the ICAO Council to intervene, we request Pakistan to send back our plane, passengers, cargo, etc., and this Commission appointed by the Pakistan Government discovers the real secret. The real secret is that Indian secret agents have somehow manoeuvred this hijacking for their own purposes! In other words, the Indian Government was behind the hijacking. It is like saying that the Jews were behind the hijacking which, according to the newspapers, was the handiwork of terrorists, but according to some Commission was the handiwork of the Jews themselves, who got their own plane hijacked. My point is that if such a report is procured by a government, it tells you volumes about the bona fides of that government. If there was not this Commission's report I could have understood a government saying "We had nothing to do with the hijacking," but if such a Commission is appointed and such a report is made available to an international body, I can only say, weighing my words carefully, that it is an insult to that body to be asked to accept it. The report says that India itself procured this hijacking by its own agents. It says that this Mohammad Hashim Oureshi, the one who blew up the aircraft, really had no grenade and no pistol. As I have already mentioned, if that was the case, could he blow up the aircraft? How could it happen? Who supplied him with the grenade to blow up the aircraft? Did the Pakistan Government supply the grenade, and what were they doing for three and a half days while the aircraft was standing on the apron of the airport, which is an area occupied by the military? It is all too absurd for words and in deference to what the learned President said, I shall not read it.

184. I am now concluding my exposition of the first ground, the first preliminary objection, but before I do so I would just like to mention three points in Pakistan's reply to our preliminary objection. The first is that the word "application" includes termination or suspension. I will not say anything more on that point because I have already cited to you the judgement of the International Court of Justice and also the answer given by the United States Counsel, which clearly shows that application is something quite different from termination.

185. The second point which Pakistan makes is that India has applied the Convention and Transit Agreement between itself and Pakistan since the military hostilities of 1965. This is completely incorrect. Since April 1965 there has been no application of the Convention or the Transit Agreement between India and Pakistan. I shall not say anything more on this point just now, because it is a separate preliminary point which I propose to deal with as a second point. I shall therefore leave it alone just now.

186. The third point made by Pakistan is that there is no power to terminate an agreement except to the extent to which the agreement itself provides for termination. In other words, if the Convention and the Transit Agreement do not provide for suspension or termination, you have no power to terminate or suspend them. This is clearly wrong. It is contrary to what the World Court understands to be the international law, and therefore Pakistan's attempt to say that there is no power to terminate or suspend has already been negated by the International Court of Justice. I take it that the honourable members of the Council will follow the ruling of the International Court of Justice, which, as you have seen, is the authority to which an appeal from decisions of the Council lies. As the appellate authority, the superior authority, its judgement would have to be followed and that judgement is categorical and clear: you do not need a provision for termination or suspension in an agreement before you can exercise the right to terminate or suspend.

187. I have finished with the point that the Application of Pakistan is misconceived because it deals with the question of termination or suspension which is outside the Council's jurisdiction. I shall now deal with the second point what we have called "Preliminary Objection No. 2, Special Régime".

188. The President: I think we should take the two cases separately. We are now dealing only with Case 1.

189. Mr. Palkhivala: Yes, I am not on the Complaint; I am only on the Application and am now putting forward my second preliminary objection to the Application. I shall first explain the position briefly and then read the relevant part of the pleadings. The point is briefly this. The Council has jurisdiction in cases which are governed by the Convention and the Transit Agreement; if two nations choose, as from a certain date and as a result of events like war, military hostilities, to have a special régime, a special agreement, between themselves regarding

overflying, it is their business; if one of them terminates or suspends such a special régime, this Council is not the forum because the agreement is not something with which this Council deals. The Council does not deal with special régimes; it deals only with the Convention and the Transit Agreement. It is my submission that the facts leave no doubt that since 1965 there has been a special régime regarding overflying. I am referring only to overflying and making non-traffic stops, nothing else, because as you have seen from the World Court's opinion and the Vienna Convention on the Law of Treaties of 1969, which only codifies existing law, a country may suspend or terminate an international treaty in whole or in part regarding another State. So I am confining myself to overflying, because that is what Pakistan wants.

90. Now as between India and Pakistan overflying has not been governed by the Convention and Transit Agreement since the military hostilities of 1965. What happened was this. In August/September 1965, when military hostilities broke out between them, the two countries, quite naturally, obviously, and inevitably, suspended overflying; neither country could make a stop, whether for traffic or non-traffic purposes, in the other country. That was clear. Thanks to the efforts of Russia we were able to come to an agreement at Tashkent in January 1966. This agreement provided that the two countries would try to restore normal relations between them. We did our best. We went out of our way to do one thing or another, but without any response from Pakistan. I shall refer to the facts presently. It is not a bold statement; I will particularize it and show by facts and figures what we did. One of the things on which normal relations had to be restored was international aviation. So some letters were exchanged between the Prime Minister of India and the President of Pakistan and we said "All right, let us come to some arrangement." What was the arrangement? - it said that with the permission of the Indian Government, Pakistan might overfly India. The words are "with the permission of the Indian Government". Now this is the very negation of the Convention and the Transit Agreement. It is the very converse of the Convention and the Transit Agreement, because they contemplate overflying without the Government's special permission, whereas the special régime after the war between India and Pakistan was that overflying could be only with the express permission of the Government. When our notification, which I shall read presently, expressly says that overflying shall be with the permission of the Government of India, how can anyone possibly still argue, as Pakistan tries to do, that the Convention and the Transit Agreement were brought back into operation after 1965? It is impossible to say that, because when I say "with my Government's permission", I say in so many words that the benefit of the Convention and the Transit Agreement is not available to you; otherwise the question of my Government's permission does not arise.

91. Now Pakistan is fully aware that from 1966, when the Tashkent Agreement was reached, up to date, Pakistan has never overflown India without the Government's permission. This permission we may give or withhold, because permission has no meaning unless the authority which is to give it has discretion not to give it. We told Pakistan "No Convention and no Transit Agreement as between you and me; overflying is with my Government's permission." Of course Pakistan returned the compliment by saying it was also with their Government's permission, which I am not disputing, but since they are the complainant and I am the defendant, I am concerned

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only with my action, not with Pakistan's. What was my action? It was clear and categorical: Hereafter overflying by Pakistan can only be with the Government of India's permission. If this is so - and I will prove it by reference to our own Government's notification, which is unchallenged - you will immediately see that there was no question of applying the Convention or the Transit Agreement as between India and Pakistan after the military hostilities of 1965. If there was a special régime, as undoubtedly there was, between India and Pakistan regarding overflying after the military hostilities of 1965, it means the Convention and the Transit Agreement are not in operation as between these two States as regards overflying. Now how can an application be made to the Council saying that the Government of India has now proposed to withdraw permission for overflying? If I choose to withdraw permission that is my right as a sovereign State, and under what document have I agreed that if under the special régime I withdraw my permission for overflying, I shall appoint the Council of ICAO as the body to whom the complaint can be made? No one has agreed to such arbitration or adjudication by the Council. Therefore it is my respectful submission that the honourable members of the Council cannot be troubled with this question, which pertains to a special régime between India and Pakistan that is completely outside the Convention and the Transit Agreement.

92. May I refer you to conclusive evidence of this, conclusive because the documents are not in dispute. Would you kindly refer to India's preliminary objections, Annexure No. 3. It reproduces two notifications, one issued during and the other after the war of 1965 - throughout my argument I have used the word "war" in place of "military hostilities" because I am not trying to be technically correct here; wherever I have used the word "war" you will take it as "military hostilities", because an international authority in Geneva, before which I had the honour to appear against my learned friend, the Attorney General of Pakistan, has held that the military hostilities of September 1965 did not amount to a war in international law and I accept that wording as correct; it is a case of military hostilities, not amounting to war, in September 1965. May I read the two notifications before the nonhonourable members have a recess for lunch.

93. The first is the notification of the Government of India dated 6 September 1965.

" WHEREAS the Central Government is of the opinion that in the interests of the public safety and tranquility, the issue of an order under clause (b) of sub-section (1) of section 6 of the Aircraft Act, 1934 (22 of 1934), is expedient:

NOW, THEREFORE, in exercise of the powers conferred by clause (b) of sub-section (1) of the said section 6, the Central Government hereby directs that no aircraft registered in Pakistan, or belonging to or operated by the Government of Pakistan or persons who are nationals of Pakistan, shall be flown over any portion of India."

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This is September 1965. Military hostilities are in progress. India says no overflying by any Pakistan aircraft. After peace was restored and the Tashkent Declaration was signed, there was a second notification, dated 10 February 1966, which is on the next page of our preliminary objections. It continues in operation even today and you will see how it reads:

" WHEREAS the Central Government is of opinion that in the interests of the public safety and tranquility, it is necessary so to do:

NOW, THEREFORE, in exercise of the powers conferred by clause (b) of sub-section 6 of the Aircraft Act, 1934 (22 of 1934), the Central Government hereby makes the following amendment to the notification of the Government of India in the late Ministry of Civil Aviation No. GSR 1299 dated the 6th September 1965, namely:-

In the said notification, after the words "any portion of India", the following words shall be inserted, namely:-

"except with the permission of the Central Government and in accordance with the terms and conditions of such permission". "

94. The effect of this notification of February 1966 is clear and undoubted. It is this. In September 1965 India said to Pakistan "No overflying at all." In February 1966 the Government of India said "Overflying only with the permission of the Central Government of India." and this is the notification in force today and means that Pakistan cannot overfly without India's permission. Therefore, as early as from September 1965, the benefits of the Convention and the Transit Agreement have not been available to Pakistan, because under both those treaties Pakistan has a right to overfly without our Government's permission. But we told them in 1966 "You may now overfly with our permission, not without it." Thus the Convention and the Transit Agreement were terminated or suspended as early as 1966. All that has happened in 1971 is that the permission has been withdrawn, but the obligation, the requirement, the necessity of obtaining permission, which meant that the Convention and the Transit Agreement were no longer in operation between the two countries, has existed since 1966. If India has terminated or suspended the Convention and the Transit Agreement as regards Pakistan, it was done in 1966, not 1971. In 1971 we have withdrawn permission, but the termination or suspension of the international treaty took place in 1966 when Pakistan was asked to obtain permission. This is a very important point which Pakistan has completely overlooked.

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95. You have the special régime of 1965/1966 and this special régime is that contrary to the Convention, contrary to the Transit Agreement, no Pakistan aircraft shall overfly India without our special permission. Therefore the special régime, which Pakistan accepted for overflying India, and we accepted for overflying Pakistan, came in 1965/1966. If in 1971 we have withdrawn permission, it has been withdrawn under the special régime and has nothing to do with the Convention or the Transit Agreement. May I stop here, Sir.

96. The President: We shall now have the break and shall reconvene at 2.30.

PRESENT:

Argentina	- Mr. J. M. Garbriel (Alt.)	Mexico	- Mr. S. Alvarez López (Alt.)
Australia	- Dr. K. N. E. Broadfield		
Belgium	- Mr. A. X. Dierckx	Nigeria	- Mr. F. A. Olaniyar
Brazil	- Col. C. Pavao	Norway	- Mr. E. Grinde
Canada	- Mr. J. E. Cole (Alt.)	Senegal	- Mr. Y. Diatta
Colombia	- Major R. Charry	Spain	- Lt. Col. J. Insuastro
Czechoslovak Socialist Republic	- Mr. Z. Svoboda	Tunisia	- Mr. A. El Micher
Federal Republic of Germany	- Mr. H. S. Marzusch (Alt.)	Uganda	- Mr. M. H. Mugel (Alt.)
France	- Mr. M. Agéfilas	Union of Socialist Republics	- Mr. A. F. Borisev
India	- Mr. V. K. Malhotra	United Arab Republic	- Mr. H. K. El Maleigy
Indonesia	- Mr. Karno Barikah	United Kingdom	- A/V/M J. B. Russell
Italy	- Dr. A. Cacci	United States	- Mr. C. F. Butler
Japan	- Mr. H. Yamaguchi		

ALSO PRESENT:

Dr. J. Machado (Alt.)	- Brazil	Dr. G. F. Fitzgerald	- Sr. Legal Officer
Mr. E. G. Lee (Alt.)	- Canada	Mr. D. S. Bharti	- Legal Officer
Mr. P. R. Joubert (Adv.)	- Canada	Miss M. Bridge	- CSO
Mr. B. S. Chidwani (Alt.)	- India		
Mr. M. García Benito (Alt.)	- Spain		
Mr. N. V. Lindemore (Alt.)	- U.K.		
Mr. F. K. Wills (Alt.)	- U.S.		
Mr. N. A. Palkhivala (Chief Counsel)	- India		
Mr. Y. S. Chitale (Counsel)	- India		
Mr. I. R. Menon (Assistant Counsel)	- India		
Mr. S. S. Mirzada (Chief Counsel)	- Pakistan		
Mr. K. M. H. Daraba (Assistant Counsel)	- Pakistan		
Mr. A. A. Khan (Obs.)	- Pakistan		

Annex 5

ICAO Council, 74th Session, *Minutes of the Third Meeting*, ICAO Doc. 8956-C/1001
(27 July 1971)

SUBJECTS DISCUSSED AND ACTION TAKENCOUNCIL - SEVENTY-FOURTH SESSIONMinutes of the Third Meeting

(The Council Chamber, Tuesday, 27 July 1971, at 1430 hours)

CLOSED MEETING

President of the Council: Mr. Walter Binaghi

Secretary: Dr. Assad Kotaite, Secretary General

PRESENT:

Argentina	- Mr. J. M. Gabrielli (Alt.)	Mexico	- Mr. S. Alvear López (Alt.)
Australia	- Dr. K. N. E. Bradfield		
Belgium	- Mr. A. X. Pirson	Nigeria	- Mr. E. A. Olaniyan
Brazil	- Col. C. Pavan	Norway	- Mr. B. Grinde
Canada	- Mr. J. E. Cole (Alt.)	Senegal	- Mr. Y. Diallo
Colombia	- Major R. Charry	Spain	- Lt. Col. J. Izquierdo
Czechoslovak Socialist Republic	- Mr. Z. Svoboda	Tunisia	- Mr. A. El Hicheri
Federal Republic of Germany	- Mr. H. S. Marzusch (Alt.)	Uganda	- Mr. M. H. Mugizi (Alt.)
France	- Mr. M. Agésilas	Union of Soviet Socialist Republics	- Mr. A. F. Borisov
India	- Mr. Y. R. Malhotra	United Arab Republic	- Mr. H. K. El Meleigy
Indonesia	- Mr. Karno Barkah		
Italy	- Dr. A. Cucci	United Kingdom	- A/V/M J. B. Russell
Japan	- Mr. H. Yamaguchi	United States	- Mr. C. F. Butler

ALSO PRESENT:

Dr. J. Machado (Alt.) - Brazil
 Mr. E. G. Lee (Alt.) - Canada
 Mr. P. R. Joubert (Adv.) - Canada
 Mr. B. S. Gidwani (Alt.) - India
 Mr. M. García Benito (Alt.) - Spain
 Mr. N. V. Lindemere (Alt.) - U. K.
 Mr. F. K. Willis (Alt.) - U. S.
 Mr. N. A. Palkhivala (Chief Counsel) - India
 Mr. Y. S. Chitale (Counsel) - India
 Mr. I. R. Menon (Assistant Counsel) - India
 Mr. S. S. Pirzada (Chief Counsel) - Pakistan
 Mr. K. M. H. Darabu (Assistant Counsel) - Pakistan
 Mr. A. A. Khan (Obs.) - Pakistan
 Mr. H. Rashid (Obs.) - Pakistan
 Mr. Magsood Khan (Obs.) - Pakistan

SECRETARIAT:

Dr. G. F. Fitzgerald - Sr. Legal Officer
 Mr. D. S. Bhatti - Legal Officer
 Miss M. Bridge - CSO

H. E. A. B. Bhadkamkar - India
 (Agent)
 H. E. M. S. Shaikh - Pakistan
 (Agent)

SUBJECTS DISCUSSED AND ACTION TAKENSubject No. 26: Settlement of Disputes between Contracting StatesPakistan versus India - Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. The Chief Counsel for India, Mr. Palkhivala, completed his presentation of the preliminary objection filed by India. Continuing from the point he had reached in his explanation of the second ground for the objection, he read into the record paragraphs 28 to 39 of the objection, emphasized the "package deal" nature of the Tashkent Declaration, and stated that the question of restoring pre-1965 rights in respect of civil aviation had never arisen. On the suggestion of Pakistan itself, only overflights had been resumed on a provisional basis, subject to each Government's permission and on the basis of reciprocity. After the hijacking incident, the Government of India had come to the conclusion that reciprocity in respect of safety of civil flights was not to be expected from Pakistan and had therefore suspended flights of Pakistani aircraft over Indian territory. Pakistan's contention that India was estopped from pleading the special regime as a defence because in the last five years she had acted on the basis that the Convention and Transit Agreement applied between the two countries was very curious indeed, as if these instruments did apply, there would be no question of permission for over-flights.
2. The Chief Counsel for Pakistan, Mr. Pirzada, then began his presentation of Pakistan's answer to the preliminary objection, dealing at this meeting with the Indian contention that this was a case of treaty termination, not of application or interpretation, and therefore the Council had no jurisdiction.
3. The first point he made was that the Convention was a very important multilateral treaty, establishing a permanent international organization and providing permanent machinery to deal with disputes. In the case "Certain Expenses of the United Nations", the International Court of Justice, dealing with the same sort of treaty - the Charter of the United Nations - had ruled that its provisions should receive a broad and liberal interpretation, unless the context of a particular provision required, or there was a provision requiring, a narrower or more restricted interpretation. India was giving a very narrow and restricted interpretation to Article 84 of the Convention. The opening words "any disagreement" were just as important as the words "interpretation" and "application", on which India had placed so much emphasis, and, taken as a whole, the Article was all-embracing, wide enough to cover a dispute as to application or non-application or as to termination, as "interpretation" included the question of whether there was termination. It was, for instance, much wider than Article 36 of the Statutes of the International Court of Justice, which gave the latter jurisdiction over legal disputes relating only to the interpretation of a treaty. Mr. Pirzada also referred to the Mavrommatis case (P.C.I.J. 1924, Series A, No. 2) and the Interpretation of Peace Treaties case (I.C.J. Rep. 1950).

4. The second point made by Mr. Pirzada was that the International Court of Justice had also stated that whether an international dispute existed was a matter for objective determination; the mere denial of its existence did not prove its non-existence. Thus the mere denial by India that the Convention and Transit Agreement were in operation between herself and Pakistan did not mean that they were not in operation. Pakistan maintained that they were very much alive; consequently there was a disagreement relating to their interpretation or application in the terms of Article 84 of the Convention and Article II, Section 2 of the Transit Agreement and the Council had jurisdiction. The expression "application" was wide enough to include adjudication of a dispute or disagreement about termination. In addition to the opinions and judgments of the International Court, he referred to the book "Unilateral Denunciation of Treaty because of Prior Violations by Other Party" by B. P. Sinha. In it the Indian author pointed out that one party to a treaty might accuse another of committing breaches of obligations in order to release itself from its own obligations. The other party might retort by charging the denouncing party with malafides. Consequently, the situation might be foreseen of a dispute arising from a divergence of opinion between the parties relative to interpretation or application of treaty obligations.

5. He maintained that the Indian contention of the existence of a sovereign right of termination outside the treaty was inapplicable in this case, because the Convention and Transit Agreement contained express provisions on suspension and termination - Articles 89 and 95 in the Convention and Article III in the Transit Agreement. He also rejected the Indian argument that Article 95 made provision only for denunciation in respect of all parties, on the ground that it was a well established principle of law that the whole included the part. Therefore, if India wished to terminate or denounce the Convention and Transit Agreement only in respect of Pakistan, she had to have recourse to the procedure prescribed in Articles 95 and III. She had not done so; she had accordingly failed to perform her obligations under the Convention and Transit Agreement; Pakistan had the right to take action under Article 89 of the Convention and Article II of the Transit Agreement; and the Council had jurisdiction in the case.

6. Turning to the argument that the right of termination was recognized in Article 60 of the Vienna Convention, he pointed out that this right was qualified. The breach must be a "material" one, the other party was entitled only to invoke it as a ground for terminating the operation of the treaty in whole or in part, and Article 60 as a whole was subject to Article 45, which provided that a State could not invoke the breach as a ground for termination or suspension of operation of a treaty if, after becoming aware of the facts, (a) it had expressly agreed that the treaty remained in force or in operation or (b) it must, by reason of its conduct, be considered as having acquiesced in its maintenance in force or in operation. In this connection it was interesting to note that on the very day India had taken the unlawful action of suspending Pakistani overflights, the Ministry of Tourism and Civil Aviation had sent a message to the President of the Council deploring the

detention of the passengers and crew of the hijacked aircraft in Pakistan for two days and the destruction of the aircraft as "contrary to the principles of the Chicago Convention and other international conventions...". In a commentary on Article 60 of the Vienna Convention, the International Law Commission had said that the formula "invoke as a ground" was intended to underline that the right arising under the Article was not a right arbitrarily to pronounce a treaty terminated; if the other party contested the breach or its character as a "material" breach, there would be a "difference" between the parties in regard to which the normal obligations of the parties, under the United Nations Charter and under general international law, to seek a solution of the question through pacific means would apply. The Commission therefore contemplated that even in cases covered by Article 60 there would have to be recourse to the machinery for settlement of disputes when there was an allegation and denial of material breach. If Article 60 was applicable in the present case, which he disputed because of the express provisions for termination in the Convention and Transit Agreement, it was subject to the doctrines of material breach and disproportionate reprisal and the Council had jurisdiction to deal with a disagreement between two States in respect thereof.

7. Mr. Pirzada also rejected the argument that if the contract ended, the arbitration clause also ended and the arbitrator therefore did not have jurisdiction, citing the judgement of the House of Lords in the case "Heyman versus Darwin" in 1942 - "Even in the case of termination, repudiation or rescission, the arbitration clause will be applicable and the arbitrator will have jurisdiction to determine whether the termination or repudiation was justifiable or not or whether the injured party may claim compensation." Thus whether Article 60 of the Vienna Convention, the advisory opinion of the International Court of Justice, or the analogy of municipal law was applied, a contract - in this case the Convention and Transit Agreement - could not be terminated by unilateral action.

8. As for the argument that the Council, because of its composition, was not an appropriate body to settle intricate and delicate questions of law, the fact remained that Article 84 empowered the Council to consider disagreements between Contracting States that could not be settled by direct negotiations, giving the right of appeal from its decision to an *ad hoc* tribunal or the International Court of Justice. Even under municipal law, parties could agree to refer questions of law as well as of fact to the arbitration of persons who were experts in their own line. Why, then, should not such questions be referred for adjudication to a body like the ICAO Council?

9. In answer to the allegations of India concerning Pakistan's conduct in the hijacking incident, Mr. Pirzada read into the record the relevant parts of Pakistan's response to the preliminary objection in support of his contention that its behaviour had been correct and honourable. He suspended his presentation at this point, indicating that he would complete it at the next meeting.

10. In reply to questions by the Representatives of the United States and Australia, he stated that no progress had been made in response to the Council's invitation of 8 April to the two parties to negotiate directly for the purpose of settling the dispute or narrowing the issues. Pakistan had accepted that invitation and, in view of the Indian Government's note of 31 May 1971 and the letter of the Director General of Civil Aviation for India of 3 June, had understood that India had accepted it too. That had also been the understanding of the Council. India had now advised that this was not the case. In a note dated 21 July 1971, in answer to one from Pakistan on 25 June expressing the hope that negotiations could start before the end of June, India's High Commissioner in Pakistan had referred to the filing of the preliminary objection and had said that there was therefore no question of holding the proposed bilateral talks in accordance with the Council's resolution of 8 April. Mr. Palkhivala explained that the Indian reply had been prompted by the belief that the negotiations should be held outside the framework of the Council resolution - India having maintained all along that Indo-Pakistan questions should be settled bilaterally without third party interference - and that the question of over-flights could not be dissociated from the other questions outstanding between the two countries; subject to these considerations India was willing to have negotiations.

11. There was a brief discussion on the kind of minutes to be issued for this series of meetings, ending with the understanding that there would be the usual "expanded summary" plus a verbatim record in the English, French and Spanish languages.

DISCUSSION

Subject No. 26: Settlement of Differences between Contracting States

Pakistan versus India - Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. The President: The Council is again in session and the Chief Counsel for India continues to have the floor.
2. Mr. Palkhivala: Thank you. If I may, Sir, I shall continue with Ground No. II, which is that there has been a special régime between India and Pakistan regarding overflying since the military hostilities of 1965. In that connection I had read a notification of 6th September 1965, which prohibited all overflying, and one of 10th February 1966, which modified the first notification to the extent that there could be overflying with the permission of the Central Government. I pointed out that the fact that the permission of the Government of India was necessary was the very negation of the Convention and the Transit Agreement because under those two treaties you do not need the Government's permission for overflying. That is where I stopped.
3. To continue the argument from that point, may I request the honourable members to turn to page 20 of the preliminary objection. If I explain the facts in my own words, I am likely to take more time than if I read the brief narration given there. To save time, therefore, I shall read the part of the preliminary objection dealing with Ground No. II.
4. " The Air Services Agreement of 1948 between the two countries covered air transit across each other's territory and India's overflights into Pakistan's airspace and Pakistan's overflights into India's airspace. A copy of the Agreement is hereto annexed and marked "I". Thus air transit and overflying each other's territory was governed by a special régime between India and Pakistan in 1948 and continues to be so governed up until today. The Convention and the Transit Agreement do not apply as between India and Pakistan as regards transit and overflying each other's territory. Consequently, as regards transit and overflying, no question can arise of interpretation or application of the Convention or the Transit Agreement as between the two countries, nor of any disagreement between them on such a question; nor can there be any question of any action by India under the Transit Agreement against Pakistan. Since there has been no action by India under the Transit Agreement against Pakistan, the question of considering any hardship

or injustice to Pakistan within Article II(1) of the Transit Agreement does not arise."

"29. In view of the fact that the question of overflying or transiting is governed by a special régime as between India and Pakistan, and not by the Convention or the Transit Agreement, the Government of India submit that the Application and the Complaint of Pakistan are incompetent and not maintainable, and the Council has no jurisdiction to entertain them or handle the matters presented therein."

Now, Sir, comes the important part of the facts.

"30. Assuming India had committed any breach of the special régime or of the Bilateral Air Services Agreement of 1948, as alleged by Pakistan, such a dispute cannot be referred to the Council under the Convention or under the Transit Agreement or under the Rules. There is no provision whatever conferring any jurisdiction on the Council to hear or handle any disputes arising out of bilateral agreements."

"31. As a result of the armed conflict in August/September 1965 between India and Pakistan, the Air Services Agreement of 1948 between the two countries was suspended. The said Agreement has since then continued to be in suspension and has never been revived." This is very important and Pakistan's denial of it is incorrect. "Since 1965 the airlines of Pakistan have never operated within India and airlines of India have never operated within Pakistan. The traffic between the two countries continues to be handled by third country airlines."

"32. Armed hostilities ceased on September 22, 1965. On January 10, 1966 the Tashkent Declaration was signed by India and Pakistan. The leaders of the two countries declared 'their firm resolve to restore normal and peaceful relations between their countries and to promote understanding and friendly relations between their peoples'. Under Article VI of the Tashkent Declaration, 'The Prime Minister of India and the President of Pakistan have agreed' - these are the exact words - 'to consider measures towards the restoration of economic and trade relations, communications as well as cultural exchanges between India and Pakistan, and take measures to implement the existing agreements between India and Pakistan'. Under Article VIII, *inter alia*, 'They further agreed to discuss the return of the property and assets taken over by either side in connection with the conflict'."

5. If I may pause here for a minute, after the armed conflict, after the hostilities of September 1965, you have the Tashkent Declaration, which is not concerned with aviation at all; it is an omnibus bilateral treaty under which both countries

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say "We shall restore normal communications and restore the old treaties." Now either the two countries obey, observe and respect the terms of the Tashkent Declaration or they do not. No one country can pick out aviation and say "I want this right to be restored", because there is no single, isolated right as regards aviation conferred by the Tashkent Declaration. The Tashkent Declaration is a package deal, an omnibus, bilateral treaty. You either take it or leave it; you take the whole or none of it; neither nation can say "I shall disregard some of the material provisions of the Tashkent Declaration, but I expect to be given the right to overfly.", taking one isolated item out of the numerous items which, as I said, are parts of the package deal represented by the Tashkent Declaration.

6. Now India's complaint - I am not making the complaint before the Council because the Council is not the body to hear it; but I am only stating a historical fact - has been that Pakistan has refused to respect and observe the terms of the Tashkent Declaration. Therefore the question of restoring their pre-1965 rights as regards aviation never arose. In fact, as will be seen from the signals between the two countries attached to our preliminary submission, Pakistan itself said "Let us resume overflying on a provisional basis." It used the word 'provisional'. We agreed to that. In our reply we said "All right, on a provisional basis let there be restoration." This restoration, the honourable members will recall, was only in respect of overflying, not non-traffic stops, which are also covered by the Convention and the Transit Agreement. Therefore one part of the Convention and the Transit Agreement was never restored. Even the part which was restored, namely overflying, was not the absolute right as conferred by the Convention and the Transit Agreement, but was subject to each Government's permission. In other words, as I was saying before lunch, the Convention and the Transit Agreement were never restored between the two countries. The bilateral treaty of 1948 was never restored. On a provisional basis, India and Pakistan, subject every time to each Government's permission, said "All right. On a provisional basis and subject to each Government's approval, let us have overflying." That is all that happened under the special régime of 1966.

7. I come now to paragraph 33 of India's preliminary objection.

"33. In response to the desire expressed by the President of Pakistan for the early resumption of overflights of Pakistan and Indian aircraft over each other's territory, the Government of India agreed to the resumption of overflights in the hope that the Tashkent Declaration would be scrupulously adhered to, assets and property seized during the armed conflict would be restored, and normal relations would be established." (This never happened.) "The general understanding of the two Governments with regard to the resumption of overflights was as follows:

- (1) The overflights of Indian and Pakistan aircraft across each other's territory were to be on the same basis as prior to August 1, 1965. This basis related to the fixing of routes, procedures for operating permission, etc."

The honourable members will recall that before 1965 Pakistan airlines used to connect Pakistan with India and Indian airlines used to connect India with Pakistan. You could fly from Delhi to Karachi or Delhi to Lahore by Indian airlines or Pakistan airlines prior to 1965, but not at any date after 1965. Therefore the old aviation freedom was never restored between the two countries. This is most important.

"(2) The resumption was limited to overflights across each other's territory. It did not include the right to land in each other's territory even for non-traffic purposes.

(3) The resumption of overflights was agreed to on a basis of reciprocity." (which after the hijacking became impossible in practice, though theoretically it continued to be possible for India to fly over Pakistan territory).

"(4) The resumption of overflights was to be on a provisional basis. [A copy of the exchange of signals establishing the afore-said understanding between the two countries regarding over-flights is contained in Annexure '2' hereto.]"

8. Will you kindly turn to Annexure 2, second signal from Pakistan to India. To save time, I am only picking out the essential words and leaving the rest unread. "We have received instructions from our Government"- that is the Pakistan Government - "that the Government of India has agreed on a reciprocal basis" - mark the words 'reciprocal basis' - "to the resumption of overflights of each other's territory." Now when two Governments say "This is reciprocal." what they mean is reciprocal for all purposes of aviation, not in the theory of law, but for practical purposes as practical governments wanting to fly across another country's territory. If our aircraft flying over our own territory - we regard Kashmir as a part of India - can be hijacked to Pakistan with the consequences you have already seen, what would be the safety of our aircraft if they were to fly over Pakistan territory? The position would be much worse and much less safe. In other words, for all practical purposes the Government of India, after the hijacking, came to the conclusion that reciprocity in the field of safety of aviation was not to be expected of Pakistan vis-à-vis India. Since for all practical purposes reciprocity was not available to India, and it would have been extremely dangerous to permit Indian aircraft to overfly Pakistan territory, India said "Well, on a reciprocal basis in 1966 we had permitted resumption of overflying. If that reciprocal basis is not available to India for practical purposes, we cannot allow overflying to Pakistan." This is the clear justification under international law for India's attitude. I am not elaborating this point because, as I have already said, the honourable members do not have to decide whether there was justification or not; they only have to decide whether this point is within their jurisdiction at all.

9. Then, will you kindly turn to the fifth page of the Annexure, where there is a signal from the DGCA Pakistan to DGCA India on the 9th February 1966. It is on page 30. I will omit the first ten or twelve lines of this signal and may I request you to turn to the last paragraph but one, on page 31, the last sentence but one: "All former routes over Pakistan territory as existed prior to 1/8/1965 will be available to IAC and AII on a provisional basis." Mark the word "provisional". The agreement was purely provisional; the special régime was on a purely provisional basis. This is Pakistan's own suggestion to India. Of course, the scheduled airlines of India and Pakistan were thinking of resuming their flights for traffic purposes, but that type of aviation freedom was never restored even on a provisional basis. Then India replies in the next signal, the one dated 9th February 1966 from DGCA India to DGCA Pakistan. The last sentence of this signal runs thus: "Flights mentioned in our SIG T00 081505 will commence operating from 10th February as suggested in your SIG T00 091127 on provisional basis."

10. Then the next signal from India to Pakistan, the last one, reads: "Reference your 3/66/AT I T00 120935 and 120937. As we have informed you in our SIGNAL YA 101 T00 081505, resumption of flights raises questions not merely of inter-airline importance such as restoration of property, staffing, etc. These matters will have to be resolved at inter-governmental level. We regret that until then it will not, repeat not, be possible to resume services. In order to facilitate decision we repeat our proposal that DGCA's India and Pakistan should meet to resolve various problems arising out of resumption. At appropriate stage two airlines could also meet as suggested by you earlier. Regarding routes NOTAMS have been issued and you must have received them." In short, the net result was that the scheduled airlines never resumed flights between the two countries, even on a provisional basis.

11. Now this is the situation and what is the essence of these signals? I have been trying to emphasize that what emerges from these signals is the following: first, that the special régime regarding aviation is purely provisional; second, that it is on a basis of reciprocity, so that if one country does not play the game the other country is not bound to give the facility; and three, that when the resumption of overflying is effected, the honourable members have already seen the notification of 10 February 66 which says it is with the permission of the Central Government. Therefore, in short, the Convention and the Transit Agreement are out; they are not in operation at all between India and Pakistan as from 1965/66.

12. If I may read further, paragraph 34 of the Preliminary Objection says:

"On the basis of the aforesaid understanding, the overflights of Pakistan and Indian aircraft across each other's territory were resumed with effect from February 10, 1966. The aforesaid understanding is hereafter referred to as 'the Special Agreement of 1966'."

13. Now comes an important paragraph which shows why the hope of the Tashkent Declaration being fulfilled was completely frustrated by Pakistan's attitude to India:

"35. The hope of normalization of relations between India and Pakistan and the restoration of the status quo ante the armed conflict unfortunately did not materialize. Normalcy was not established and has not been established up to date. Despite several gestures of goodwill and several unilateral actions on the part of the Government of India to establish normalcy, Pakistan has continued to keep up a posture of confrontation bordering on hostility towards India since March 1966. For example, India unilaterally lifted the embargo on trade on May 27 1966 and invited Pakistan to do likewise. Till now, Pakistan has not reciprocated. On June 27, 1966 India unilaterally decided to release all cargoes seized during the conflict except military contraband. India also proposed to exchange seized properties on March 26, 1966 and repeated the gesture on April 25 and December 28, 1966 and on several occasions thereafter. The only response from Pakistan was to start auctioning the vast and valuable Indian properties seized by them during the conflict and appropriate the proceeds to their National Treasury - all in violation of the Tashkent Declaration."

The Tashkent Declaration talked of restoration of properties seized during the armed conflict. India openly and officially said: "We are prepared to restore all the properties." Pakistan's response was to sell the Indian properties and take the proceeds into their own national exchequer. This was a clear violation of the Tashkent Declaration. How could India be expected, then, to restore normal aviation freedoms?

"India offered to increase cultural exchanges, liberalise visa procedures, establish bilateral machinery for settling mutual problems - all without receiving any positive response."

36. The continued policy of confrontation bordering on hostility adopted by Pakistan and the absence of normal relations between India and Pakistan since 1966 were the main reasons for the continuation of the Special Agreement of 1966 between the two countries and for the non-revival of the Air Services Agreement of 1948.

37. In view of the above, it is clear that since the Air Services Agreement of 1948 continues to remain suspended, no question can arise of any disagreement between the two countries relating to the application of that Agreement, apart from the point that any such question cannot be referred to the Council under the aforesaid Articles and the Council would have no jurisdiction to handle any such matter."

14. In paragraph 38 we point out how this Special Agreement, namely no overflying without the Government's permission, continues to operate even today:

"The Special Agreement of 1966 has governed the rights and privileges of India and Pakistan regarding air transit and overflying from February 1966 till February 1971." - when the hijacking incident resulted in the Indian Government's withdrawing its permission - "That Special Agreement, which was provisional and on the basis of reciprocity, could not continue in view of Pakistan's aforesaid conduct and the creation by Pakistan of conditions which made it most unsafe for Indian aircraft to overfly Pakistan's territory. The freedom of Indian and Pakistan aircraft to overfly each other's territory under the Special Agreement of 1966 was always subject to permission by the respective Governments and was to be exercised in accordance with the terms and conditions of that permission. Copies of the Notifications issued by the Government of India dated September 6, 1965 and February 10, 1966....., which make this point abundantly clear, are hereto annexed and marked Annexure '3'." - I have already read those notifications just before lunch and you have seen that in so many words they say quite clearly 'No overflying without the Government's permission.' - "This basic limitation was never removed."

Therefore the complaint of Pakistan in 1971 is a complaint which refers to what happened in 1965. For five years they never complained. It is now that the complaint is made. I mean the application; I am not using the word 'complaint' in the technical sense of the Rules. If the application has any substance, it should have been made in 1965/66, because from that date on, as you have seen, the Convention and the Transit Agreement have been suspended between the two countries.

15. If I may read further in paragraph 38:

"This basic limitation was never removed, and even the limited right of overflights was never put on a regular basis. The Special Agreement of 1966 was in force up to February 3, 1971, in law as well as in practice, and the right of Pakistan to overfly Indian territory was subject at all material times to the permission of the Government of India. This permission was withdrawn from February 4, 1971, and India had the right to withdraw such permission under the Special Agreement of 1966. The Government of India propose to say here nothing more regarding that Special Agreement, since Pakistan's Application and Complaint do not deal with, and do not relate to, that Special Agreement."

16. There is a summary in the form of four propositions in paragraph 39 of the Preliminary Objection:

- "a) there is no disagreement between India and Pakistan relating to the interpretation or application of the Convention or the Transit Agreement." (That is why this honourable Council has no jurisdiction. I will not read b) just now because it pertains to the second case - the Complaint, but c) and d) are relevant.)
- "c) the question of Indian aircraft overflying Pakistan and Pakistan aircraft overflying India is governed by a Special Régime and not by the Convention or the Transit Agreement; and
- d) the Council has no jurisdiction to handle any dispute under a Special Régime or a Bilateral Agreement."

17. Now, Sir, this in brief is the case of India regarding the question of jurisdiction. In the course of my argument, which I hope has not been unduly long, I have referred to the fact that in the English language the words "interpretation" and "application" are so clear, so precise and with such a clear-cut legal connotation that their meaning cannot possibly be misunderstood. I did not refer to the French and Spanish texts of the Convention and Transit Agreement, which I am aware are equally authoritative; that is only because of the limits of my own education. I am unfortunately ignorant of those two languages, which a civilized man ought to know, and it is my ignorance of them which is responsible for my not referring to those words in the two other languages. People who understand French and Spanish, however, tell me that the equivalents of the English "interpretation" and "application" are so clear, so unambiguous, that the arguments which have been heard as regards the English text would apply with equal force to the French and Spanish texts of the Convention and Transit Agreement. I ask the honourable members' pardon for not being able to say anything more regarding the words in those two languages.

18. I have come to the end of my argument on the first case except for just one fact which I wanted to mention and that is Pakistan's somewhat curious contention that India is estopped from pleading the Special Régime because India has throughout the last five years, from 1966 to 1971, acted on the basis that the Convention and the Transit Agreement apply as between the two countries. Now let us not confuse the issue by referring to anything other than overflying, because the whole Application of Pakistan is about overflying. The question of making non-traffic stops in India is out because we have never allowed Pakistan to make these stops, except perhaps on some rare occasions which I am not aware of and which have been with the special permission of the Government. So far as overflying is

concerned, if we have said, as we have categorically, that it can only be with the permission of the Government and if the Convention and Transit Agreement in turn say that permission of the Government is not necessary, I completely fail to see how any human mind can reconcile the two and say that when the Indian Government says "Take my permission.", what it means is that "I give you the rights under the Convention and the Transit Agreement." It is a contradiction in terms and my simple mind is not able to reconcile these two positions, which to me appear clearly contradictory. A government saying "Take my permission." is a government which expressly says "I do not recognize the Convention and the Transit Agreement as between our two countries.", because if these two international treaties were recognized, the question of the Government's permission can never arise. You have seen already what the Indian Government categorically said in 1966 and that notification continues in force today: that Pakistan shall not overfly India except with the Indian Government's permission. Therefore the case of Pakistan that India has accepted for the last five years the Convention and the Transit Agreement as regards overflying in its relations with Pakistan is the complete contrary, the very opposite, of the truth.

19. I have, Mr. President, finished my argument on the first case. I was wondering if you would like me to deal with the second case.

20. The President: No. We will deal with the two cases separately.

21. Mr. Palkhivala: Then all that remains is to hand over, if I may, to your office, Mr. President, these photostat copies of excerpts from the judgement of the International Court of Justice and the question and answer between the International Court and the US Counsel, because I understand that the ICAO Secretariat has not yet received copies of this judgement and the proceedings. Therefore, Sir, in order that the honourable members may be able to read the relevant provisions of the judgement for themselves, we are having photostats made from the official report of the judgement and from a typed copy of the question put to the United States Counsel and the answer given by him, which, as I have already indicated, has been endorsed and made a ruling of the International Court of Justice. The photostat copies should be ready in half an hour and if you will permit me I shall hand them over later.

22. If I may add one thing, when the Tashkent Declaration was signed, our Prime Minister wrote to the President of Pakistan. I shall read the text of her letter, written on the 3rd of February 1966, merely to show that after the Tashkent Declaration the only question which the two Governments considered was overflying with each Government's permission; the question of stops in the two countries for non-traffic purposes did not arise at all. This is what the Prime Minister of India said: "Our Foreign Minister and Defence Minister, on their

return from Tashkent, informed us of your desire for the early resumption of overflights of Pakistani and Indian planes across each other's territory. . . . " The rest is the historical part which I have already read. Not that anything turns on it, but it is one of the strange coincidences in the history of relations between the two countries that this letter is dated the 3rd of February 1966 and on the eve of the fifth anniversary of it, to be precise the 2nd of February 1971, our aircraft was blown up on Pakistan territory. Thank you, Sir. I am sorry if I have taken a little longer than I originally expected.

23. The President: Thank you very much. I now turn the floor over to the Chief Counsel of Pakistan.

24. Mr. Pirzada: Mr. President and honourable members of the Council, my endeavour will be to submit before you that the objections filed by India are misconceived, bad in law and incompetent, and I will endeavour to show to you that this august Council has jurisdiction to entertain the Application and the Complaint filed by Pakistan. I will deal with the various contentions which have been raised by the Counsel for India today in support of the said objection, but I must say that the Counsel for India did not confine himself to the legal points; here and there he touched on matters pertaining to the merits of the dispute. He has also, on occasion, made certain allegations which with regret, but with restraint and respect, I will have to revert to and repudiate on the relevant and appropriate occasion.

25. The main foundation of the argument is that this is a case of termination of the agreement or treaty and is not a case of application or interpretation and therefore, according to the Counsel for India, this body has no jurisdiction to go into it. Now I will meet the various points raised here in my own way and will try as far as possible to be concise and precise. I will not take you to Alice in Wonderland or the Ritz Hotel according to the dictum of Lord Justice Darling, as has been suggested by my esteemed friend here, but I will go somewhat on the following lines. First and foremost, as we are dealing with a very important and fundamental convention, which guarantees the freedom of civil aviation, I will submit to you what are the canons of construction or rules of interpretation applicable in such circumstances; then I will apply those rules to the various provisions and articles of the Convention and the Transit Agreement and base my contention thereon.

26. Coming first to the canon of construction applicable to the Convention as well as to the Transit Agreement, you will notice that it is a multilateral treaty and that it provides an organization and a machinery of a permanent character to deal with disputes. As soon as we have noted, among others, these two points, then the following canon of construction, which has been laid down by the International Court of Justice, is immediately attracted and becomes applicable. I am referring to the leading case "Certain expenses of the United Nations" and I am relying on a passage from the pronouncement of that august court to show what the rule of interpretation or canon of construction is in such cases. I will not trouble you with the original citation. I shall refer to certain passages given in "International Law through the Cases" by Green, third edition, pages 601 to 603. It was laid down therein that the

cardinal rule of interpretation is that the words ought to be read in their ordinary and natural sense. If so read, they make sense; that is the end of the matter. Then, proceeding further, it is mentioned and stated that "In the interpretation of a multilateral treaty which establishes a permanent international organization to accomplish certain stated purposes there are particular considerations to which regard should be had. The Charter's principles were of necessity expressed in broad and general terms. It attempts to provide against the unknown. . . . Its text reveals that it was intended - subject to amendments - to endure for all time. . . its provisions were intended to adjust themselves to the ever-changing pattern of international existence. It established international machinery to accomplish its stated purposes. Its particular provisions should receive a broad and liberal interpretation unless the context of any particular provision requires, or there is to be found elsewhere in the Charter something to compel, a narrower and restricted interpretation." Therefore what emerges and what is laid down here as a well settled principle is this: that the interpretation of a multilateral treaty like the one with which we are directly concerned here today must be large and liberal and not in any narrow sense, or, as we say in our domestic jurisdiction, especially in the common law, not in a pedantic sense. The interpretation that has been canvassed before you all along, both in the Objections and today, is a narrow one, a very narrow one. Whether we go to the English text or to the French or Spanish, the canon will be the same: that we have to give a large and liberal interpretation to the provisions because there is regular permanent machinery available under the Convention that is equally entitled to go into the matters under the Transit Agreement. Having laid down this canon of construction, I will now take you to the provisions of the Convention. If I refer to some other provisions and then come to the relevant Article, the matter will become clear.

27. Now the main Article on which we are placing reliance, and which, of course, has been referred to even by the Counsel for India, is Article 84 of the Convention. Let us read the words because I regret to say that although reference was made to the expression "interpretation or application of this Convention", and though the Article was read, it was not considered in its full context and in toto. I shall read again the relevant portion, especially the first part of it. It says: "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council." For the present the rest is not relevant. Now please take into consideration that the opening words are equally important and they are: "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention". Therefore we have to consider the

following expressions: 'any', then 'disagreement', then 'interpretation', and, lastly, 'application of the Convention'. Each one is important and I will show you that the effect of the inclusion of all these expressions is this: that it is a comprehensive clause, in fact much wider than Article 36 of the Statute of the International Court of Justice. It is all-embracing and can cover all disputes.

28. But let us go back now to these expressions. Article 36 of the Statute of the International Court of Justice talks of "interpretation of a treaty", but here we have not only interpretation, not only application, but the expression "any disagreement between two or more contracting States". In other words, "any" would certainly cover all questions, but the emphasis is also on the word "disagreement", relating, of course, to the interpretation or to the application of the Convention. Now this word "disagreement", which is synonymous with and in fact interchangeable with the word "dispute", has been considered many a time by the Permanent Court of Justice and the International Court of Justice. I will refer only to two cases to show how it has been interpreted.

29. First of all, let me refer to the case "Interpretation of Peace Treaties". Now this is a passage which deals with the elucidation of the expression "dispute" or "disagreement". "Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. In the diplomatic correspondence submitted to the Court, the United Kingdom, acting in association with Australia, Canada and New Zealand, and the United States of America, charged Bulgaria, Hungary and Romania with having violated in various ways the provisions of the Article dealing with human rights and fundamental freedoms in the peace treaty, and called upon the three governments to take remedial measures to carry out their obligations under the treaty. The three governments, on the other hand, denied the charges. There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen." Then it is added: "Inasmuch as the disputes relate to the question of performance or non-performance of obligations provided in the Articles dealing with human rights and fundamental freedoms, they are clearly disputes concerning the interpretation or execution of the peace treaties." Now the emphasis here is on a situation in which two sides hold clearly opposite views concerning the question of performance or non-performance of certain treaty obligations. I will show in due course that even assuming that the contention advanced by India is correct, the situation is the same as the one I have been speaking of and is covered by the dictum of the International Court of Justice.

30. The second case is "Mavrommatis Palestine Concessions" and in it the expression "dispute" or "disagreement" was defined and interpreted by the International Court in this way: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. The present suit between Great Britain and Greece certainly possesses these characteristics. The latter power is asserting its own rights by claiming from His Britannic Majesty's Government an indemnity on the ground that one of its subjects has been treated by the Palestine or British authorities in a manner incompatible with certain international obligations which they are bound to observe. . . . Therefore it is a dispute, because there is a conflict of legal views or interests between two States."

31. There is a third case, but I am deferring it for the present, because after I have covered other grounds it will more or less clarify the whole matter. So when there is a conflict between two States and one is asserting one view and the other is denying the same, it is a disagreement and, if it is a disagreement, then the Council has jurisdiction to go into, determine and decide it. For example, in this case, India is saying that the Convention and the Transit Agreement had been unilaterally, though unjustifiably, terminated by it and once they are terminated they are not in existence; if they are not in existence, then this Council has no jurisdiction to go into the action of India. We, on the other hand, maintain - I will show this on another independent ground - that the Convention and the Transit Agreement are very much alive and it is a case of application as well as of interpretation of the Convention. Once we say it is a case of application, the mere denial by India that it is a case of application will not be sufficient. In fact, I will show to you presently that a case of denunciation or termination of a convention or treaty is a case of application as well as of interpretation of the treaty.

32. I am referring to an Indian author himself. I am relying on the book entitled "Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party", by B. P. Sinha. The page is 2 and the paragraph reads like this: "It is likely that a State may allege violations of obligations of a treaty by other party or parties in order to justify its act or decision for unilateral repudiation of its obligations under the treaty. Motivated by policy considerations, a party to a treaty may accuse another of committing breaches of obligations in order to release itself from its obligations, which it may consider as being onerous. An accused party may retort by charging the complaining or denouncing party with mala fides" - as we do in this case - "in initiating charges of violations of treaty obligations. The complaining or denouncing party's charges of violations of obligations by other party or parties may indeed be genuine and justified and the denial of such charges by an accused party or parties may be just a smoke-screen to hide an illegal act. A complaining or denouncing party may refuse to accept the bona fides of the accused party and vice versa. Consequently, a situation may be foreseen where a dispute may arise" - kindly note these words - "from a divergence of opinion between the parties related to interpretation or application of treaty obligations." I repeat the words "A situation may arise from a divergence of opinion between the parties related to interpretation or application of treaty obligations.", and that is the situation which has arisen here. More than that, even on the language of Article 84 - and the same will be the position under Article III of the Transit Agreement - I have shown that if a disagreement of this kind arises, then it will be deemed to be a disagreement relating to the interpretation or application of the Convention and the Council certainly will have jurisdiction to determine the same.

33. I now come to the main point. It has been suggested that the question of termination of a treaty is dehors the treaty, that in fact it is the sovereign right of a State to denounce a treaty at any time it likes. Now reliance was placed on the so-called "principle of customary international law", then on Article 60 of the Vienna Convention and finally on certain observations made recently by the International Court of Justice in the famous case wherein a reference was made by the Security Council concerning Namibia. I will deal with these sub-points in a moment, but all these questions certainly would not arise under the Convention and Transit Agreement, because the principle, or alleged principle, of customary international law, Article 60 of the Vienna Convention, and what was expressed as an advisory opinion by the International Court of Justice in the case of Southwest Africa against South Africa are all concerned with cases where the convention or treaty is silent as to the mode and manner of its termination, whereas the Convention and the Transit Agreement have express provisions on termination. In fact, the Convention and Transit Agreement were evolved after mature consideration and deliberation, having regard to various exigencies and situations that might arise. If they contain any express provisions on termination, the question of having recourse to implied powers would not arise. That would be the first and foremost point.

34. Now let us see what are the provisions contained in the Convention and in the Transit Agreement. They took into consideration certain events which can take place and in those events certain rights accrue to the contracting parties. For example, they took into consideration the event of war and made provision for denunciation. So they did contemplate and in fact provide for termination, denunciation and repudiation in certain circumstances. Let us look at the Convention first. Article 89 reads: "In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council." So in the Convention we are not relying on implied powers. For example, even in municipal jurisdictions and in ordinary contracts - because there was an attempt to draw an analogy between a treaty and an ordinary contract under municipal law - either there is an express provision or if there is no provision you can rely on the doctrine of implied power to terminate those contracts. Here express provision has been made and therefore my first point would be that the Convention can be repudiated, denounced, or terminated in the manner provided and in the presence of express provisions recourse need not be had to implied powers. As I have just said, the drafters of the Convention contemplated war and in Article 89 took special care to clothe contracting States with certain rights.

35. I come now to Article 95. It says: "(a) Any contracting State may give notice of denunciation of this Convention three years after its coming into effect by notification addressed to the Government of the United States of America, which shall at once inform each of the contracting States. (b) Denunciation shall take effect one year from the date of the receipt of the notification and shall operate only as regards the State effecting the denunciation." Dealing with this, the Counselor for India says that this is a right of denunciation, not a right of termination, and secondly he urged that denunciation is denunciation in respect of all the States which are contracting parties to this multilateral treaty, the Convention, not in respect of only one State. It is a well established principle of law that the whole includes the part. If Article 95 contemplates denunciation in respect of all parties, it equally contemplates denunciation in respect of one of them. It may be India against Pakistan or vice versa, and therefore if India desired to terminate or denounce the Convention just in respect of Pakistan, it had to do so in the manner and the mode provided herein. Unless it does so there is no legal or valid denunciation or termination and Pakistan can justifiably come before this Council urging that India's unilateral or arbitrary action is illegal, and in fact its failure to perform its obligation under the Convention and the Transit Agreement immediately attracts the Complaint and the Application which have been presented by Pakistan and clothes the Council with jurisdiction to hear and determine the same.

36. Therefore my first point is that in view of the express provisions in Articles 89 and 95 and having regard to Article III of the Transit Agreement, there is no termination of the Convention or the Transit Agreement by India and that in fact they are operative, they are in existence. In any case, when we say they apply and when India says they do not apply, there is certainly a disagreement within the meaning of the Articles for the purposes of both the Convention and the Transit Agreement.

37. Now take the alternate case, the case which is being suggested by India, namely that a State has a right to terminate a treaty under customary law, which has now been given recognition in Article 60 of the Vienna Convention. Let us go to Article 60 of the Vienna Convention. First of all, the opening part of the Article is very important. It starts: "A material breach of a bilateral treaty" - first it refers to a bilateral treaty and secondly only in case of material breach by one of the parties is the other entitled to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. So in case of a bilateral treaty and then only for a material breach - not any breach, not a technical breach, not in a case where you can make a mountain out of a molehill - in case of material breach of a bilateral treaty by one of the parties, what happens? It entitles the other to invoke the breach as a ground for termination. It is only an entitlement to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. And action under

Article 60 is subject to Article 45 of the same Vienna Convention, which provides that a State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Articles 46 to 50 or Articles 60 and 62 if, after becoming aware of the facts, it either expressly agrees that the treaty is valid, remains in force or continues in operation or by reason of its conduct must be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be. I will deal with the case of estoppel by the conduct of India. I will come back to Article 45, but the point at this stage is that Article 60 itself firstly is qualified by very important conditions, namely material breach of a bilateral treaty and merely entitling the State to invoke the breach as a ground, and secondly is subject to other provisions, one of which is Article 45.

38. The International Law Commission itself, in its reports and comments, elucidated what was really intended to be covered by Article 60 of the Vienna Convention. First of all, it referred to two cases in which the question was about termination. In one case the question was raised by implication, with one party resisting termination and saying "No, the treaty is in force; therefore there is a dispute; it must be investigated and relief may be given." In the second case the question was directly raised, one party saying "We have repudiated." and the other party "There has not been a legal and proper repudiation and therefore the tribunal has jurisdiction." The Commission said that in these cases a dispute would arise and would have to be adjudicated. Now this is a commentary in the Report of the International Law Commission on the Second Part of its 17th Session, 3 to 28 January 1966, Official Records of the 21st Session, Supplement No. 9 (A/6309/Rev. 1), pages 82 and 83.

39. I will first refer to the two cases and then to the paragraph in which the Commission has elucidated this point. The two cases referred to are "Diversion of Waters from the Meuse" and "Tacna-Arica Arbitration". In the case "Diversion of Waters from the Meuse", Belgium contended that by constructing certain works contrary to the terms of the Treaty of 1863, Holland had forfeited the right to invoke the treaty against it. Belgium did not claim to denounce the treaty, but it did assert a right, as a defence to Holland's claim, to suspend the operation of one of the provisions of the treaty on the basis of Holland's alleged breach of that provision. Although it pleaded its claim rather as an application of the principle inadimplenti non est adimplendum, The Court, having found that Holland had not violated the Treaty, did not pronounce upon the Belgian contention." In the other case, the only other case that seems to be of much significance, Tacna-Arica Arbitration, Peru contended that by preventing the performance of Article 3 of the Treaty of Ancon, which provided for the holding of a plebiscite under certain conditions in the disputed area, Chile had discharged Peru from her obligations under that Article. The Arbitrator, after examining the evidence, rejected the Peruvian contention, saying that

"It is manifest that if abuses of administration could have the effect of terminating such an agreement, it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement and, in the opinion of the Arbitrator, a situation of such gravity has not been shown." So the question of justification and termination was considered relating to, concerning, and in the construction of the Treaty.

40. After referring to these cases and other provisions and opinions of jurists, the Commission concluded, in paragraph 6 on page 83, "Paragraph 1 provides that a 'material' breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. The formula 'invoke as a ground' is intended to underline that the right arising under the Article is not a right arbitrarily to pronounce the treaty terminated". - It is not a right arbitrarily to pronounce the treaty terminated. - "If the other party contests the breach or its character as a 'material' breach" - as we are doing here - "there will be a difference" - please note this expression - "between the parties, with regard to which the normal obligations incumbent upon the parties under the Charter and under general international law to seek a solution to the question through pacific means will apply." Therefore, the International Law Commission contemplated that even in the cases covered by Article 60, when there is an allegation of material breach and a denial, recourse will have to be had to the machinery provided by the treaty for the settlement of disputes, namely adjudication or negotiation or whatever provision is incorporated therein.

41. Now Article 60 and this principle found recognition in the recent case of Namibia and in the opinion expressed by the International Court of Justice, which was referred to this morning and relied upon by the learned Counsel for India. I had the honour and privilege to appear in the said case and to support the Resolution of the General Assembly revoking the mandate of South Africa over Namibia and I will in a moment explain what the point involved was. In fact it has no bearing on the point under consideration in the case before this Council. The honourable members of the Council will recall that the mandate over Namibia was given to South Africa by the League of Nations. The League of Nations was replaced by the General Assembly of the United Nations in 1946. The question arose that by various breaches of the obligations which were cast on South Africa under that mandate and by its practice of apartheid - the discrimination which the Government of South Africa as mandatary was practising against the population - it had forfeited its right to govern that territory. This became the subject matter of various advisory opinions and decisions of the International Court of Justice right from 1950 to 1971, and in the year 1950, as well as in 1962, the International Court of Justice found that by its conduct South Africa had committed breaches of the material conditions of the mandate.

Therefore the mandate stood terminated. This was eventually so determined by a resolution of the General Assembly, and eventually the Security Council made a reference to the International Court of Justice seeking its opinion as to the consequences arising out of that resolution and the obligation of the various States to honour the resolutions passed by the General Assembly and reflected in various other resolutions of the Security Council.

42. The contention of South Africa was that the mandate was irrevocable as there was no provision for revocation in it at the time of the League of Nations. It is this aspect which was dealt with on pages 46 to 47 and in paragraphs 91 to 96. The International Court of Justice therefore was dealing with a mandate which South Africa claimed was irrevocable, as in the mandate there was no provision for revocation, and hence the Court applied the analogy of Article 60 of the Vienna Convention. There was no express provision and not only this, because, if you proceed further and read paragraphs 99 to 106, it will become clear that the following propositions emerge from the advisory opinion of the International Court of Justice. First, they said that the fact that there is no express provision in the mandate does not mean that trusteeship by South Africa becomes ownership by South Africa; the mandate will still be terminable in case of material breach. They also dealt with the contention of South Africa that there had not been a unilateral and arbitrary termination of the mandate by the General Assembly. In fact they said that the opinion was expressed by this very court on earlier occasions, wherein on facts they found that South Africa was guilty of apartheid and various other acts of omission and commission and breach of obligations under the mandate. Therefore there was ample justification for the General Assembly to pass the resolution, and then in the particular jurisdiction which the International Court of Justice was exercising, it expressed that advisory opinion. Nothing has been said in this case and in this advisory opinion which militates against the submission which I have been canvassing before you, because I have pointed out two cases of the International Court of Justice which deal directly with situations arising in circumstances similar to those in which India and Pakistan have come before you today in this case.

43. Then the analogy of municipal law was given. In fact this was also referred to by the International Court. Now what happens even in municipal law? There are agreements and contracts entered into by and between parties. These sometimes make express provision for termination, rescission and repudiation. On other occasions recourse has to be had to implied powers of repudiation, rescission and termination, and in a number of cases there have been clauses in the contracts for the reference to arbitration of disputes relating to or arising under the contract. Cases have arisen wherein one party has alleged that it has repudiated the contract and therefore as the contract has gone, the arbitration clause has also gone, because if the contract is alive the part of it pertaining to arbitration is alive and if the contract goes the arbitration clause goes and the

arbitrator then does not have the jurisdiction to decide and adjudicate on the matter. That was the approach taken by some of the courts before 1942, but in that year the point was well settled in the famous case of Heyman versus Darwin. This case was decided by the House of Lords and is reported in 1942 Appeal Cases, 356. The decision was that even in case of repudiation, rescission or termination, the arbitration clause will be applicable and the arbitrator will have jurisdiction to determine whether circumstances exist wherein the party who claims to repudiate or terminate the contract was justified or whether the claim of the other party, saying that the contract was alive and that he is entitled to either damages or compensation, is valid.

44. So whether we apply Article 60 of the Vienna Convention, or whether we go to the recent advisory opinion expressed by the International Court of Justice, or whether we follow the analogy of the municipal jurisdictions and ordinary law of contracts, the fact remains that by unilateral action of one of the parties, or one of the Contracting States, the contract or the Convention cannot be said to have been terminated and in fact the tribunal in those cases, the International Court in certain other cases, and the Council in the present case, does have jurisdiction to determine the disagreement between the parties.

45. In view of these submissions, I need not trouble or detain you with other Articles of the Convention on which reliance was placed by the other side to show that only cases of infractions are covered, because, as I have said, this Article 84 is an Article of a comprehensive character, wide enough to cover a dispute or disagreement as to application or non-application or as to interpretation, which would include a dispute as to the termination thereof, and the Council will be competent and will have jurisdiction to go in this matter.

46. When I was referring to the case "Interpretation of Peace Treaties" and the Mavrommatis case, I had said there was a third case of the International Court of Justice. Mr. President, this is the case known as the Chorzów Factory Indemnity Case. It is a judgement of the Permanent Court of International Justice of 1928, Series A, No. 17, and it concerned a German interest in Polish Upper Silesia. Therein the Permanent Court held that "it is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. The reparation due by one State to another does not change its character by the fact that it takes the form of indemnity and calculation of damages. The Court observed that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation and therefore the Court retains the jurisdiction to determine the same." So a case wherein compensation is claimed or reparation is sought for failure to comply with obligations is a case of application of a treaty or a convention, and there the International Court said

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that it has jurisdiction and likewise here our submission would be that the Council has jurisdiction to determine the same.

47. Now apart from this, my alternative submission is that India itself approached this body immediately after the so-called hijacking incident. The various allegations they have made here I repudiate and deny; I will refer to them at the appropriate moment. At the present time, I am referring to the communication received by the honourable President of this Council from the Minister of Tourism and Civil Aviation of the Government of India, dated 4 February 1971, which was circulated by the President to all Council Members. Now on page 3 of this communication it is stated: "The Government of India would like to reiterate its declared policy of condemning and curbing acts of unlawful seizure of aircraft and unlawful interference with civil aviation. It deplores the detention of passengers and crew members in Pakistan for a period of two days and the destruction of the hijacked aircraft. This is contrary to the principles of the Chicago Convention and other international conventions, Article 11 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, Article 9 of the Convention for the Suppression of Unlawful Seizure of Aircraft, adopted at The Hague on 16th December 1970." So even on the 4th of February, when India purports to take the illegal action which it has taken against Pakistan, its Minister of Tourism and Civil Aviation approached this Council and made these allegations against Pakistan, one of which was that the action of Pakistan was contrary to the principles of the Chicago Convention and other international conventions. This they could state only if the Convention and the agreements were in force and in operation. Under Article 45 of the Vienna Convention this is conduct which can be taken into consideration to show that there has been no termination. I read out Article 45 a little while ago and, I repeat, the said Article provides: "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Article 46 to 50 or Articles 60 and 62 if, after becoming aware of the facts, . . . it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

48. The President: We will have a coffee break now - 15 minutes.

- RECESS -

49. The President: I invite the Chief Counsel for Pakistan to continue his presentation.

50. Mr. Pirzada: Mr. President and honourable members of the Council, before the tea-break I was dealing with Article 60 of the Vienna Convention and I was emphasizing that even under it the right of a State to invoke a breach of a treaty as a ground for termination only arises in case of material breach. Therefore what I wish to emphasize is that in cases where there is no express provision in the treaty or convention or agreement for termination and if recourse is to be had to implied powers, all the conditions contemplated by Article 60 of the Vienna Convention, and in fact by the other Articles in the said Convention, have to be complied with. In Article 60 it is not just a case of mere breach; the breach must be of a material character or, to use the words of the American Counsel in the case of South West Africa, of a fundamental character. Reliance has been placed on an answer given by that Counsel and I will explain in a moment the context in which I understood him to have given it. But the fact remains that if that ground is to be invoked by the State, it cannot be invoked at any time, according to the caprice or whim of a State, on any insignificant breach, but only in case of material breach of an obligation under that treaty.

51. Now a point hinted at by the learned Counsel this morning was that whether a treaty or a convention can be terminated and if so, under what circumstances are intricate and complicated questions of law and therefore the Convention could not have contemplated their adjudication by the Council. He referred to the composition of the Council, its technical character, and, according to him, its non-legal character. With all due respect to him, if we go to Article 84 we find that in the event of any disagreement between two or more States relating to the interpretation, construction, or application of the Convention, an effort has first to be made to settle it by negotiation and if that fails it is to be submitted to the Council. Then there is the provision: "Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with other parties to the dispute or to the Permanent Court of International Justice." So the Convention itself contemplated that all kinds of questions may arise - legal, complicated, certainly - they will arise and in the first instance they are to be determined by the Council. Later on, certain rights of appeal have been given to the Contracting States. Therefore not much reliance can be placed on the argument based on the composition of this august Council. In fact, it is our experience even with municipal jurisdictions that there are cases arising out of important contracts in which important, intricate and complicated questions of law as well as of fact are referred to domestic tribunals or arbitrators chosen by the parties. Some of the arbitrators are not lawyers but men well versed in their own line and they are quite competent to decide. They may decide questions of fact; they may decide questions of law. So it is no answer to say that because the composition of the Council is of a particular kind, intricate questions cannot be

dealt with and decided by the Council. I submit, with respect, that the Council is entitled to decide all questions in cases of disagreement as to the interpretation or application of the Convention.

52. Mr. President, in the morning my learned friend, while dealing with the legal aspects and developing his contentions on the points arising out of India's Preliminary Objections, referred to paragraphs 5, 6 and 7 of his Preliminary Objections, which deal with various allegations as to the conduct of Pakistan in the matter arising out of the hijacking of the plane. It is only for the purpose of putting the record straight that I have to take your valuable time and I seek your indulgence to read out our reply thereto, so that the record must reflect the correct position, because Pakistan has done everything which it was possible for it to do and has fulfilled all its obligations. Its conduct throughout was correct; it was honourable. The paragraphs read were, as far as I recollect, 5, 6 and 7 and I will read our replies thereto, with your permission:

"Para. 5: The statement made by India is incorrect, irrelevant and has no bearing on the issue under reference. However, to set the record straight, it is necessary to state the correct position. The 1965 conflict was the direct result of Indian army crossing the international frontiers of Pakistan following a general uprising against military occupation by India of the State of Jammu and Kashmir." -- and I repudiate the statement by my friend that Kashmir is a part of India; it certainly is not. -- "The hostilities were followed by the signing of the Tashkent Declaration by Pakistan and India. Consequently, the overflights as existing before the 1st of August 1965 were resumed in accordance with the terms of the Bilateral Agreement of 1948, the Convention and the Transit Agreement. However, because of India's refusal to implement the United Nations resolution relating to the exercise by the people of the State of Jammu and Kashmir of their right to self-determination and her persistence to settle outstanding disputes on her own terms, no understanding could be arrived at on other issues.

Para. 6: The allegations made in this paragraph are baseless and motivated by the desire to mislead the Council. Pakistan had no connection with and responsibility for the hijacking of the Indian aircraft by two nationals of Kashmir from the airspace not of Pakistan but of a territory under military occupation of India. The Government of Pakistan has since initiated prosecution against the hijackers and their accomplices. The conduct of Pakistan in relation to the hijacking incident has been in conformity with the Tokyo Convention 1963, the Hague Convention 1970, the ICAO and the UN resolutions on the subject and the practice of States in general.

Para. 7: The Indian version of the hijacking incident is a gross misrepresentation of facts." We deny all the allegations you heard in the morning. "The correct position regarding this incident is as follows:

- (a) On January 30, 1971, at 12.35 hours, Indian Airlines F-27 (Reg. VT-DMA) Service ICC-422-A, enroute from Srinagar to Jammu, contacted Lahore Air Traffic Control Radio Telephone and informed that the aircraft was being hijacked to Lahore and would be landing in 10 minutes time. Immediately on receipt of this information, fire and security services were alerted by the Airport Manager.
- (b) The aircraft landed at Lahore Airport at 12.45 hours local time. It was parked away from other aircraft, with security and fire services standing by.
- (c) Immediately on landing, the hijackers were requested to allow the passengers and the crew to disembark. This was not agreed to by the hijackers at first but after a lot of persuasion they agreed to let the crew and the passengers out at 14.32 hours local time.
- (d) The passengers and the crew were immediately taken to the passenger lounge and subsequently transported to a hotel where arrangements for their accommodation etc. had been made.
- (e) The Director General, Civil Aviation of India was informed of the safe landing of the aircraft.
- (f) The Captain of the aircraft (Capt. G. H. Ubroi) was given clearance in writing by the Regional Controller of Civil Aviation, Lahore, that he could take off at any time he wished. The receipt of this communication was acknowledged in writing by the Captain.
- (g) The Director General of Civil Aviation, India, requested permission for operating a relief flight to Lahore to transport the crew and the passengers of the hijacked aircraft back to India. The permission was immediately granted. However, before the proposed aircraft could take off from Delhi, law and order situation had deteriorated" - this is a very important point - "due to a large crowd having gathered at the Lahore airport. The Director General of Civil Aviation was informed accordingly and advised that the relief flight should not take off for Lahore until further advice.
- (h) Throughout this period one or both the hijackers remained on board the aircraft. Attempts by the Pakistan authorities to persuade them to release the plane made no headway as they refused to negotiate directly with the Government authorities. Consequently, the hijackers were allowed" - it was not the case that they were asked to come to the lounge and phone, as alleged this morning - "to contact some non-officials in the hope that they could persuade the hijackers to agree to release the aircraft. At no time hijackers came out of the plane at the same time. One of them invariably remained on board. Any attempt to disarm or arrest one would have surely blown up the aircraft as the two had threatened to do.

(i) It may be emphasized that at no time both the hijackers came off the aircraft at the same time.

(j) Throughout 30th and 31st January, 1971, negotiations continued with the hijackers in an effort to get the plane released.

(k) On February 1, 1971, the Director General Civil Aviation, India, was advised by telephone that the law and order situation at Lahore airport was still unsatisfactory but was likely to improve by afternoon. Accordingly, the Director General was requested to keep the relief aircraft in readiness to fly to Lahore at short notice. However, by mid-day the situation worsened and in the interest of safety" - and we do mean in the interest of safety; the accusation is otherwise - "it was thought inadvisable to ask the Indian aircraft to leave for Lahore." In fact it would have been endangered because the crowds were there. "Meanwhile, because of the tension prevailing in the area around Lahore airport, the Pakistan authorities arranged to send the passengers and the crew to India by road under proper escort at 1300 hours on February 1, 1971." I may pause here to say that we have on record an expression of appreciation by the Indian High Commissioner in Pakistan for the way in which we housed these passengers and provided them with other facilities.

(l) On February 2, 1971, the Government of India announced that the demand for the release of 27 political prisoners in Indian - occupied Kashmir made earlier by the hijackers as a pre-condition for the surrender of the plane was not acceptable to India. At 2000 hours on February 2nd, 1971, the hijackers blew up the aircraft. The hijackers received injuries in the process and were taken to hospital.

(m) Though Pakistan is not a signatory to the Tokyo Convention of 1963 and to the Convention for the Suppression of Unlawful Seizure of Aircraft of December 16, 1970, signed at The Hague, it condemns hijacking and is party to the U. N. Resolution 2645(XXV) of 25 November 1970 on aerial hijacking and to the Resolution adopted by the 17th Session (Extraordinary) of the ICAO Assembly at Montreal in June 1970. In pursuance of the aforesaid Resolutions, Pakistan authorities not only arranged to return the passengers and the crew to India within 48 hours, but also tried all possible means to get the plane released from the hijackers for its return to India.

(n) The Government of Pakistan had deplored the act of blowing up of the aircraft. The President of Pakistan constituted a Commission of Inquiry to inquire into the hijacking of the Indian aircraft, headed by a senior High Court judge. The Commission examined a number of witnesses, including the two hijackers. The Commission came to the conclusion that the hijacking could not have been put into execution at all without the active complicity, encouragement and assistance of the Indian Intelligence service personnel and other Governmental authorities in the Indian-held Kashmir. This was done with the object of seeking an excuse for disrupting air communications between the Eastern and the Western wings of Pakistan, to create tension between the various regions and political parties in Pakistan and to weaken Pakistan financially and to create a situation under which India could interfere actively in the internal affairs of Pakistan."

53. Then we have enclosed the conclusions reached by the Commission presided over by a senior judge of the High Court. I may also mention that the Commission examined the two hijackers and one of them has made a number of statements. I do not wish to prejudge or prejudice his trial, but I will only submit, with respect, that there is ample cogent, clear and convincing evidence available to show that he was an Indian Security agent. The commission examined and took statements from a number of other witnesses, some not merely ordinary individuals - one of them was the Prime Minister of Kashmir, another a former Prime Minister of Kashmir, and Shaikh Mohammad Abdullah, who is the accredited representative of the people of the State of Jammu and Kashmir.

54. One of the insinuations or allegations made by the learned Counsel was that when our High Commissioner was sounded about the likely hijacking he asked for the disclosure of the source of information. The facts have not been correctly stated. In the first place, he asked for the source of the information but simultaneously indicated that if the Indian authorities had any hesitation about disclosing it, they could inform INTERPOL. I may refer here to Attachment C to our Application, a note by the Ministry of Foreign Affairs of the Government of Pakistan, dated 13th February 1971, and I am referring to paragraph 6. It reads:

"The Government of Pakistan regrets that the Government of India has again levelled the baseless charge against the Government of Pakistan for instigating subversive activities against India. The Government of Pakistan has repeatedly made it clear that these charges are without any foundation. In this connection, the Government of Pakistan would like to remind the Government of India that on September 1, 1970, when the Pakistan High Commissioner in New Delhi was informed of a 'conspiracy' to hijack an Air India plane, the High Commissioner immediately asked the Indian Government to indicate in what manner Pakistan could help and requested for details of the so-called 'conspiracy' to enable the Government of Pakistan to take necessary measures. On the Government of India's refusal to disclose any details, the High Commissioner advised the Government of India to bring the facts to the notice of the INTERPOL if it felt any hesitation in taking the Government of Pakistan into confidence in this matter. It is, therefore, surprising that the Government of India should hold Pakistan responsible for the hijacking in January 1971, on the basis of a cryptic oral communication in September 1970."

55. Mr. President, I will ask your indulgence to stop here and to continue tomorrow, because I have some more grounds to cover and the fresh point I have to deal with relates to the second Objection raised by the learned Counsel.

56. The President: Thank you. Does any Council Member wish to make any point at this stage? Otherwise we will adjourn and continue tomorrow at 10 o'clock. The Representative of the United States.

57. Mr. Butler: Thank you Mr. President. At the meeting in Vienna at which the Council scheduled this meeting today I asked if we could have information on the status of negotiations. Do you have any information for the Council on that matter?

58. The President: You have already seen two letters circulated by the Secretary General and it is all the information we have. The Representative of France.

59. Mr. Agésilas: Shall we have a detailed record of this meeting ?

60. The President: Yes. There are two possibilities: either to have the usual summary, which could be prepared rather rapidly or, if you wish, to have also a verbatim of this discussion. I think it is important to decide this point either today or tomorrow, because it may have a bearing on whether or not the Council proceeds immediately after the hearing to a decision on its jurisdiction. As we have a few minutes now, I would like to hear what Representatives prefer for this particular case. The Representative of the United Kingdom.

61. Air Vice Marshal Russell: Thank you, Mr. President, I hope the two possibilities you suggested are not necessarily mutually exclusive. I think time on the one hand and completeness on the other are important here and I hope that a summary, which could be quite brief but containing the substance, can be put in hand so that we can have it rapidly. For the future--I don't think it necessary to take a decision now--but I should be very surprised if we didn't on the whole feel that under these extraordinary circumstances the work, effort and time which has to be put into a complete verbatim transcript were not going to prove entirely justified and indeed necessary.

62. The President: As you say, they are not mutually exclusive; one does not exclude the other. Any other views? The Representative of Belgium.

63. Mr. Pirson: Mr. President, I share the view of the Representative of the United Kingdom. I think we should have both - as soon as possible a summary and later the verbatim. Thank you.

64. The President: The verbatim, of course, will take time because it will have to be translated. I see that many are nodding, so I take it that for this point we are discussing now we shall have both: a brief summary plus the verbatim in due time. The Representative of Indonesia.

65. Mr. Karno Barkah: Thank you, Mr. President. I have the same idea and I would like to add that we had not asked for verbatim for the Vienna meeting because I had understood that there was a request for it at the beginning and had assumed that it would continue automatically. I just wanted to ask whether the verbatim for the Vienna meeting would be available.

66. The President: No, we had not agreed that there was going to be a verbatim for all the proceedings. It is up to the Council each time to decide. There is, of course, a provision in the Rules for the Settlement of Differences saying that the Secretary General shall keep a full record of the proceedings and this we have in our files because it will have to be available for any purpose for which it may be required in future. There is also Article 30, the second part of which says that "A verbatim transcript shall be made of any oral testimony and any oral arguments and incorporated into the record of the proceedings." We are keeping that, but distribution to the Council, which of course involves much more work, has been on the basis of a request and I understand now that for the proceedings today and tomorrow we shall have that record. The Representative of Australia.

67. Dr. Bradfield: Thank you, Mr. President. On the point raised by the Representative of the United States, the information which the Secretary General gave us in his letter of the 7th of July raised some hopes of negotiations taking place and being successful. Could we know whether any negotiations have in fact taken place up to this time?

68. The President: We have the two agents here; perhaps they could speak on that.

69. Mr. Pirzada: Mr. President, it will be recalled that at Vienna a resolution was adopted by this Council and one part of it related to negotiations between the two States. That was on the 12th of June 1971. Our understanding was - and this is borne out by the letters on record - which I shall refer to later if it becomes necessary - that India had accepted the invitation to hold negotiations with Pakistan. Therefore on the 25th of June 1971 the Government of Pakistan addressed a communication to the Government of India. I understand that a copy of this communication has been supplied to the Secretariat. If not, I will see to it that a copy is supplied and circulated. I will read the second paragraph:

"2. The Government of Pakistan has noted the willingness of the Government of India to undertake negotiations for settling the dispute in accordance with the resolution of the Council of ICAO dated April 8th 1971, which was further endorsed by the Indian Delegation at a recent meeting of the Council in Vienna on June 12th 1971, wherein the Council recommended to the parties to enter into immediate negotiations. Further, the Government of Pakistan notes that the Government of India prefers to hold the discussions in New Delhi at a mutually convenient date. The Government of Pakistan will be willing to empower its High Commissioner in India to commence these negotiations at a proximate date, if possible before the end of June 1971."

Now, we wrote as early as the 25th of June and we wanted the commencement of these negotiations, if possible, before the end June 1971. I regret to inform this honourable Council that the reply received from the Government of India dated 21st July 1971 - a copy came into our hands only yesterday - is to the following effect:

"The High Commission for India in Pakistan presents its compliments to the Ministry of Foreign Affairs, Government of Pakistan, and with reference to the Ministry's note of June 25, 1971, on the question of the Indo-Pakistan civil aviation dispute, has the honour to state as follows:

The Ministry's note is incorrect in stating that the Government of India has agreed to bilateral talks on the question in accordance with the resolution of the Council of ICAO dated April 8, 1971 and that the Indian Delegation at the meeting of the Council in Vienna on June 12 had also subscribed to this position. The High Commission would like to remind the Ministry that India had suggested bilateral talks long before ICAO Council passed its resolution of April 8 and that it had done so in accordance with India's settled policy to settle all

Indo-Pakistan questions bilaterally, step by step, without third party interference. Pakistan is no doubt aware that India has filed Preliminary Objections against ICAO's jurisdiction to entertain the Pakistan application on the question and, therefore, there would be no question of holding the proposed bilateral talks in accordance with the resolution of the Council of ICAO of April 8. This position, as well as India's concern about the normalization of Indo-Pakistan relations, was made abundantly clear by the Indian Delegation in the ICAO Council meeting in Vienna on June 12. This is clear from paragraphs 6 and 9 of the minutes of the above meeting, forwarded to the Government of India by the Secretary General of ICAO Council with his letter No. LE6/1 LE6/2 of June 15. These paragraphs are attached to this Note for ready reference."

Because of this attitude no progress has been made.

70. The President: Counsel for India?

71. Mr. Palkhivala: In reply to what the learned Counsel for Pakistan has just said, what India pointed out is merely this: if we do not protest against Pakistan saying that the negotiations are in pursuance of the very laudable suggestion made by the Council of ICAO, the allegation is that we are estopped from taking our preliminary points. So in order not to leave any room for such technical hair-splitting and such nice points of estoppel and the rest, India made it clear that if we hold negotiations with Pakistan, which we are prepared to do, do not say afterwards you are estopped from taking the preliminary points because you have done it in pursuance of the resolution of the ICAO Council. Don't bring ICAO in here, because if we don't protest at that stage you will have left the point as you have left it in your written reply and as the Council has raised the point today, India is estopped from arguing this. So merely with a view not to give more food to Pakistan to raise this point of estoppel - there is no substance in the point, as I shall point out when I come to my reply tomorrow - but merely with a view to leaving no doubt on this matter, we said: "These negotiations are not under the jurisdiction of ICAO but outside that jurisdiction." That is the first point. The second is this: India is making it clear that you cannot talk of over-flying in isolation, unconnected with anything else. There are major issues which are all inter-connected. We can live as friends, but it has to be on a wider area than merely international aviation. These are the two points we make clear and subject to them, we are willing to have negotiations.

72. The President: The Representative of Pakistan.

73. Mr. Pirzada: Mr. President, it is very difficult for us to clearly understand the stand of India. In earlier communications issued after the Resolution this Council adopted on 8 April 1971, India indicate its willingness to hold negotiations. I am referring now to the letter No. DG/148, dated 3rd June 1971, from

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the Director General of Civil Aviation, India, to the Secretary General of this Council. It reads:

"I have the honour to refer to your letter No. LE 6/1 May 19 and to state the following.

The Government of India has all along been willing to have bilateral negotiations with the Government of Pakistan for the purpose of settling the issues arising out of the hijacking of the Indian plane and related and subsequent developments. In fact, the Government of India has been of the view that bilateral negotiations with Pakistan are the only way of solving these questions. It is unfortunate that the Government of Pakistan chose to make an application and a complaint to the Council of ICAO without attempting to resolve the issues by means of bilateral negotiations. I might inform you that we have again recently reiterated to the Government of Pakistan our willingness to enter into bilateral negotiations on all related matters."

Now this reiteration of willingness is with reference to our letter wherein we clearly referred to the resolution of this Council. This is the letter by the Government of Pakistan dated 11th May 1971, and it reads:

"The Ministry of Foreign Affairs presents its compliments to the High Commission for India in Pakistan and with reference to the resolution of the Council of the International Civil Aviation Organization dated April 8th 1971 on Pakistan's application against India on the ban of our flights has the honour to state as follows.

In response to Part 1 of the said resolution, the Government of Pakistan hereby expresses its readiness to enter into immediate bilateral negotiations with the Government of India for the purpose of settling the dispute. The Government of Pakistan will be willing to open the negotiations with the High Commissioner for India in Pakistan if the latter is authorized by the Government of India to do so. Alternatively, the Government of Pakistan is willing to empower its High Commissioner in India to start the negotiations."

In reply, the Government of India in their letter dated 31st May 1971, which I circulated at Vienna, in the last paragraph states:

"It is presumed from the Pakistan Ministry of Foreign Affairs Note dated 11th May 1971 that the Government of Pakistan would be willing to undertake negotiations on the

issues outlined in the above-mentioned note from the Government of India. The Government of India would therefore be willing to undertake negotiations as suggested by the Government of Pakistan in New Delhi, the dates for which can be fixed according to mutual convenience."

They referred to the fact that this was in reply to our letter of 11th May 1971. On the basis of this correspondence, I had made a statement at Vienna that both the parties had agreed to hold negotiations in pursuance of the resolution adopted by the Council on 8 April 1971. Now India wants, if it wants at all, to hold the so-called negotiations on its own terms. You have seen the attitude of India; I need not comment on it any further.

74. The President: No more points on this? The Representative of the United States.

75. Mr. Butler: Thank you, Mr. President, on another point. Today both parties, I believe, have referred to a question and response in a recent case before the International Court of Justice. I believe it would be very useful for the Council to have the entire text of the question that was put to the US Counsel and the response that was submitted and then made part of the record. Would it be possible to have that for the Council Members? It has been cited a number of times and I think the entire text should be made available.

76. The President: The Secretariat will see whether it can obtain that text and circulate it. We will do our best to provide the official text.

Well then, tomorrow we will continue with this case. I would like to point out the following: we will continue with the hearing on Case No. 1, after which we will go to the hearing on Case No. 2. Then the first thing the Council will have to decide - and this will be part of the deliberations, so the agents will leave the room but the States as such continue to be represented if they wish - is whether it wishes to go to the decision right away, and if not, when. So that will be the sequence of events tomorrow. If the Council decides that it wishes to vote tomorrow on whether this matter is within its jurisdiction, then that will be the next step that will take place tomorrow. We had listed a Council meeting for Thursday morning to deal with another question - Resolution 39/1 - but it was understood in Vienna that that would be taken after we had completed the consideration of this particular hearing. So if by any chance we do not finish tomorrow and it is still necessary to continue with this question on Thursday morning, that other subject will have to wait until Thursday afternoon or something like that. The Representative of Senegal?

77. Mr. Diallo: Thank you, Mr. President. When you say Resolution 39/1 you are speaking of the resolution concerning South Africa? When would the later meeting be - next year or when, exactly?

78. The President: I just explained that if we do not finish with this subject tomorrow, we will continue with it Thursday morning and immediately afterwards with Resolution 39/1. It will be the morning or afternoon of Thursday.

Annex 6

ICAO Council, 74th Session, *Minutes of the Fourth Meeting*, ICAO Doc. 8956-C/1001
(28 July 1971)

COUNCIL - SEVENTY-FOURTH SESSION

Minutes of the Fourth Meeting

(The Council Chamber, Wednesday, 28 July 1971, at 1000 hours)

CLOSED MEETING

President of the Council: Mr. Walter Binaghi

Secretary: Dr. Assad Kotaite, Secretary General

PRESENT:

Argentina	- Com. R. Temporini	Mexico	- Mr. S. Alvear López (Alt.)
Australia	- Dr. K. N. E. Bradfield		
Belgium	- Mr. A. X. Pirson	Nigeria	- Mr. E. A. Olaniyan
Brazil	- Col. C. Pavan	Norway	- Mr. B. Grinde
Canada	- Mr. J. E. Cole (Alt.)	Senegal	- Mr. Y. Diallo
Colombia	- Major R. Charry	Spain	- Lt. Col. J. Izquierdo
Czechoslovak Socialist Republic	- Mr. Z. Svoboda	Tunisia	- Mr. A. El Hicheri
Federal Republic of Germany	- Mr. H. S. Marzusch (Alt.)	Uganda	- Mr. M. H. Mugizi (Alt.)
France	- Mr. M. Agésilas	Union of Soviet Socialist Republics	- Mr. A. F. Borisov
India	- Mr. Y. R. Malhotra	United Arab Republic	- Mr. H. K. El Meleigy
Indonesia	- Mr. Karno Barkah		
Italy	- Dr. A. Cucci	United Kingdom	- A/V/M J. B. Russell
Japan	- Mr. H. Yamaguchi	United States	- Mr. C. F. Butler

ALSO PRESENT:

SECRETARIAT:

Dr. J. Machado (Alt.)	- Brazil	Dr. G. F. Fitzgerald	- Sr. Legal Officer
Mr. L. S. Clark (Alt.)	- Canada	Mr. D. S. Bhatti	- Legal Officer
Mr. B. S. Gidwani (Alt.)	- India	Miss M. Bridge	- CSO
Mr. M. García Benito (Alt.)	- Spain		
Mr. N. V. Lindemere (Alt.)	- U. K.		
Mr. F. K. Willis (Alt.)	- U. S.		
Mr. N. A. Palkhivala (Chief Counsel)	- India		
Mr. Y. S. Chitale (Counsel)	- India		
Mr. I. R. Menon (Assistant Counsel)	- India		
Mr. S. S. Pirzada (Chief Counsel)	- Pakistan		
Mr. K. M. H. Darabu (Assistant Counsel)	- Pakistan		
Mr. A. A. Khan (Obs.)	- Pakistan		
Mr. H. Rashid (Obs.)	- Pakistan		
Mr. Magsood Khan (Obs.)	- Pakistan		

H. E. A. B. Bhadkamkar - India
(Agent)

H. E. M. S. Shaikh - Pakistan
(Agent)

SUBJECTS DISCUSSED AND ACTION TAKEN

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India - Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. Continuing his reply to the presentation of India's preliminary objection, the Chief Counsel for Pakistan, Mr. Pirzada, maintained that the opinion of the International Court of Justice in the Namibia case was distinguishable. He also pointed out that the answer of the United States Counsel upon which India had relied must be read in context. Having himself appeared in the Namibia case, he recalled that this answer had been to a question put by Judge Fitzmaurice, who, in his own dissenting opinion, had drawn a distinction between treating a contract as terminated and putting an end to it and had pointed out that, strictly speaking, all the party alleging breach by another could do was declare that it no longer considered itself bound to continue performing its own part of the contract; it would not necessarily follow - and certainly not from the unilateral declaration of that party - that the contract was, in the objective sense, at an end; if it did, there would be all too easy a way out of inconvenient contracts. Mr. Pirzada also read a passage from the judgment of the American Judge Dillard, who had explained the answer of the United States Counsel. He added that the majority of the judges of the International Court in the Namibia case had decided the issue of the revocation of the South African mandate on the ground that the General Assembly possessed supervisory powers and could terminate the mandate for breaches of obligation by South Africa. India possessed no supervisory powers over Pakistan; both countries had equal status and therefore a dispute between them about breaches and the alleged termination of the Convention and Transit Agreement would have to be dealt with by the Council.

2. Turning then to the second ground of the preliminary objection - that since February 1966 the relations between India and Pakistan on the matter of overflights had been governed by a special regime, provisional in character and making overflight subject to the permission of the State concerned - he noted that India's original contention had been that air transit and overflying had been governed by a special regime since 1948 (paragraph 28 of the preliminary objection), notwithstanding the fact that in 1952 India had appealed to the Council, charging Pakistan with acts violating Articles 5, 6 and 9 of the Convention and the Transit Agreement, in particular with refusing to permit Indian aircraft engaged in commercial air services to fly over West Pakistan. He called attention to Pakistan's favourable response, at that time, to the Council's suggestion that there should be bilateral negotiations and to the fact that an amicable settlement had been reached. He noted that the Chief Counsel for India had not pressed the original contention and had confined his arguments to the post-September 1965 period, perhaps because the position was clear and beyond cavil or controversy. The relations between India and Pakistan on air transit and overflying had, since 1948, been governed by the Convention, the Transit Agreement and the bilateral agreement of 1948.

3. Maintaining that the legal position before the 1965 hostilities and since February 1966 had been that the Convention and Transit Agreement were in operation between India and Pakistan, he denied that the Tashkent Declaration was a "package deal"; stated that various parts of it had been implemented; read into the record paragraphs 35 and 36 of Pakistan's reply to the preliminary objection in this connection; and quoted the letter of 6 February 1966 from the Prime Minister of India to the President of Pakistan, stating that India would be agreeable to an immediate resumption of overflights "on the same basis as that prior to 1st August 1965" and that instructions were being issued accordingly to the Indian civil and military authorities. Mr. Pirzada also referred to the Indian Government's note of 3 March 1971, in which it was clearly stated that "after Indo-Pakistan conflict of August/September 1965 they" - the Government of India - "would have been well within their right to disallow the resumption of overflight so long as relations between India and Pakistan had not been fully normalised. However, on a specific request made by the then President of Pakistan, the Government of India agreed, in February 1966, to forgo their right to demand prior settlement of outstanding issues and consented to resume mutual overflights." Having done this and agreed to the resumption of overflights in accordance with the arrangements in existence prior to 1 August 1965, India could not now talk of the so-called "package deal". He added that the phrase "on a provisional basis" in the signals exchanged between the Director General of Civil Aviation for Pakistan and the Director General of Civil Aviation for India on 9 February 1966, on which the Chief Counsel for India had relied so heavily, applied, as a complete reading of the signals made unmistakably clear, to routes and schedules, not to the restoration of overflights. Also, no special permission had been required for the overflights; the schedule of flights had simply been filed with the appropriate authorities.

4. In further support of his contention that the Convention and Transit Agreement were still in operation, he pointed out that under Article 82 Contracting States could not enter into arrangements inconsistent with the Convention, as the so-called special regime would have been; that there was no "later treaty" - as to use the phraseology of Article 30 of the Vienna Convention on the Law of Treaties; and that the investigation into an accident to an Indian aircraft in East Pakistan in 1969 had been conducted by Pakistan in accordance with the relevant provisions of the Convention and its Annexes.

5. As for the alleged danger to Indian aircraft flying over Pakistan, twenty-three international airlines were operating over Pakistan and notwithstanding the "posture of political confrontation" with which Pakistan was charged, Indian airlines had flown safely over Pakistani territory for more than twenty years. One hijacking did not change the situation and was no excuse for declaring the Convention inoperative between India and Pakistan. There had been many hijackings in other parts of the world without any such action.

6. Summing up, Mr. Pirzada stated that although Article 36 of the Statute of the International Court of Justice gave the Court jurisdiction only over the interpretation of a treaty, in cases brought before it termination and suspension had been considered part of interpretation; that the expression "any disagreement relating to the interpretation or application of this Convention and its Annexes" in Article 84 of the Convention was very wide, permitting unilateral termination on unjustified grounds to be investigated and adjudicated by the Council; that there were express provisions in the Convention on termination and suspension, but even if there had not been, the right of suspension or termination under customary international law, recognized in Article 60 of the Vienna Convention, was a qualified right; and that if a contracting State could unilaterally terminate them with respect to any other State, conventions would become merely pieces of paper, liable to be scrapped at the whim of any State.

7. The Chief Counsel for India, Mr. Palkhivala, then answered a number of the points made by the Chief Counsel for Pakistan. Commenting first on the assertion that an international treaty must be given a liberal interpretation, he suggested that there was a vast difference between giving a liberal interpretation and giving a misinterpretation. Concepts so fundamentally different as interpretation and application on the one hand and termination and suspension on the other could not be reconciled by a liberal interpretation, and no case had been cited in which a court had held that interpretation or application included termination. The question at issue here was whether the Council had jurisdiction to deal with questions of termination or suspension, not whether the termination or suspension was justified or not, and it was impossible to equate the words "any disagreement relating to the interpretation or application of this Convention and its Annexes" in Article 84 of the Chicago Convention with the description of the jurisdiction of the International Court of Justice in Article 36 of its Statute ("all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force, the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation, the nature or extent of the reparation to be made for the breach of an international obligation"). If the Council should decide that its jurisdiction extended to cases of termination or suspension, that decision was not likely to go unchallenged when there was provision in Article 84 for an appeal to the International Court of Justice.

8. In reply to the argument that there were express provisions in the Convention and Transit Agreement overriding the right of termination recognized in Article 60 of the Vienna Convention, he pointed out that there was no provision dealing with termination by one State in relation to another for material breach. The purpose of Article 89 was precisely to avoid the necessity for termination

in war or emergency conditions by recognizing the freedom of action of a Contracting State in such conditions. Article 95 was concerned with denunciation and he did not think it was capable of the construction that the denunciation could be with respect to one State. If it were, it would, in the present case, mean that the right of overflight would continue for a year until the denunciation became effective, which would be nonsensical. His own construction made complete sense: the whole basis of the Convention was reciprocity; if there was no reciprocity, or if there was a material breach, the injured State had the right, under customary international law, to consider the treaty at an end as far as its relations with the wrongdoer were concerned.

9. The part of Article 60 of the Vienna Convention cited by the representative of Pakistan (Clause 1) was inapplicable to the present case; it dealt with bilateral treaties; the treaties involved in this case were multilateral and Clause 2 of Article 60 said that a material breach of a multilateral treaty by one of the parties entitled any party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State. Article 45 of the Vienna Convention also had no bearing on this case; India had never expressly agreed that the Convention and Transit Agreement remained in force between India and Pakistan - since the hostilities of 1965 overflight had been only with the permission of the Indian Government and non-traffic stops had not been permitted, which was directly contrary to Article 5 of the Convention and Article I of the Transit Agreement. The communication to the President of the Council of 4 February 1971 - the very day India banned overflights by Pakistani aircraft - could not be considered acquiescence in the continued operation of the Convention between Pakistan and India simply because it referred to the Convention; this reference merely recognized ICAO's responsibility in regard to safety in international civil aviation; and the communication referred also to the Tokyo Convention of 1963 and the Hague Convention of 1970, to which neither India nor Pakistan was a party.

10. He found it impossible to reconcile the contention that it was safe for Indian aircraft to fly over Pakistan with the alleged helplessness of the Government of Pakistan in the face of the crowds that had gathered at Lahore Airport after the landing of the hijacked plane. It was no answer to say that twenty-three foreign airlines were safely overflying Pakistan.

11. As for the special regime, that referred to in paragraph 28 of the preliminary objection was the bilateral air services agreement of 1948. In his oral presentation he had referred only to the agreement reached in 1966, because it was unnecessary to go into the history of Indo-Pakistan relations for a decision on the question now before the Council. The letter from the Prime Minister of

India to the President of Pakistan was only a token of India's goodwill and readiness to co-operate in the restoration of normal relations; it did not mean the restoration, in practice and in law, of the operation of the Convention and Transit Agreement between the two countries. India had wanted this, but Pakistan would not have it. The signals between the DGCA's, far from disproving his case, demonstrated that the Convention and Transit Agreement had not come back into operation; if they had, the aircraft of one country would not need permission to fly over the territory of the other and they would also have the right to make non-traffic stops. The special regime dated from 1966, India's participation in the Convention and Transit Agreements from 1947 and 1945 respectively; and under Article 30(3) of the Vienna Convention the later treaty prevailed over the earlier when there were incompatible provisions.

12. Finally, he considered that the construction he was putting upon the Convention was one in harmony with the Council's functions, one that would permit it to continue its excellent work without becoming involved in issues which it was not called upon, and perhaps was not qualified, to decide, and to remain above political squabbles.

DISCUSSION

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India - Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. The President: The Council is in session. This is the 4th Meeting. Yesterday I had made an announcement regarding the composition of representation and today Canada is represented by another Alternate, Mr. Clark. Before continuing with the question we had yesterday I would like Dr. FitzGerald to give an explanation regarding a certain paper which was distributed this morning and which you all have in front of you.
2. Dr. FitzGerald: Thank you, Mr. President. I believe that yesterday the Indian representation had promised to make certain material available to the Council. The Indian Agent has very kindly made available to the Secretariat in quantity extracts from certain publications and these have been circulated to Council Representatives this morning. You will note that you have the extracts from the recent Advisory Opinion of the International Court of Justice on the South African case, in French and English, because these were obviously taken from the official Court publications. You have a photostat or Xerox copy - I do not know which it is - of Sir Gerald Fitzmaurice's questions to the United States Counsel during the proceedings before the International Court concerning the South African case, and then, of course, you have the text of Article 36 of the Statute of the International Court of Justice. We are grateful to the Agent of India for having made these papers available to the Council.
3. The President: Any questions on that point? Then we shall continue with the discussion and I invite the Chief Counsel for Pakistan to continue with his presentation.
4. Mr. Pirzada: Thank you, Mr. President. You will remember that yesterday I was making my submission in reply to the contention of the Counsel for India that under general customary international law a State has a right to terminate a treaty or suspend its operation in whole or in part. That was the argument of the Indian Counsel and I was replying thereto. You will recall that I had placed before you the language of Article 60 of the Vienna Convention and I had said that that right was not unqualified, that it was in fact a limited right. The right was limited to invoking the breach as a ground for terminating or suspending the treaty and only in case of material breach. I said material breach is a serious matter. Further, I had pointed out that as this Article 60 of the Vienna Convention is subject to the doctrine of material breach, it is also subject to another doctrine, namely, that there should be no disproportionate reprisal. For example, if a fly is sent you do not need a cannon to kill it; where a file is needed, you do not use a hammer.

5. Developing his point, the learned Counsel for India referred to the pronouncement of the International Court of Justice. Photostat copies of it have now been circulated. I think he used the expression "judgement of the Court" inadvertently, because it is not a judgement; it is an advisory opinion; and you are all aware of the well recognized distinction between an advisory opinion and a judgement. Of course it is entitled to great respect and having had the privilege of participating in it, I fully concur with the pronouncement of that august International Court. But we must understand the correct status of the pronouncement.

6. I shall first clarify what is attributed to the Counsel of the United States of America. To a question put to him by one of the Judges of that Court, he gave a certain answer and that answer is being utilised or relied upon by the Counsel for India. Now, first of all, the learned Judge who put the question was quite clear in his mind as to what he was talking about. The learned Judge was Mr. Justice Fitzmaurice and it is from the same opinion I am quoting. I must point out that Justice Fitzmaurice had given a dissenting opinion on the main point involved in the South West Africa case, but on the distinction between "terminating" and "putting an end to" the treaty there was no controversy and the principle he enunciated was correct. This is what he had in mind - I am reading from page 266:

"Because the learned Judge throughout has used the expression 'in treating the Treaty as terminated', - and now he points out why he has been using this expression - 'note the intentional use of the phrase 'in treating it as terminated' and not 'in putting an end to it'. There is an important conceptual difference. Strictly speaking, all that one party alleging fundamental breach by the other can do is to declare that it no longer considers itself bound to continue performing its own part of the contract, which it will regard as terminated, but whether the contract has in the objective sense come to an end is another matter, and does not necessarily follow, certainly not from the unilateral declaration of that party, or there will be an all too easy way out of inconvenient contracts."

I think this was quite clear and it is in this context that the question was asked and the answer was given.

7. In his answer, which was given in abstract, not in a concrete case, the American Counsel said that occasions may arise when an aggrieved innocent party may have no remedy, but that does not mean that in certain circumstances this right in a case of fundamental breach could not be exercised by another party. Here it is entirely different, because by and under the Convention Contracting States have agreed to refer to the Council for adjudication a case relating to interpretation or application of the Convention. But I will resolve this doubt also by referring to the opinion of the American Judge himself. Of course he was not sitting in that capacity, but he clearly understood the question and the answer, and I am referring now to a paragraph from the opinion of Justice Dillard. I am reading from pages 167 to 168. I quote

"I shall conclude on another note. It is true, of course, that prior to the termination of the mandate by the General Assembly there had never been a judicial determination that this was legally permissible. Furthermore, it is accurate to say the General Assembly in the exercise of its supervisory powers did not calmly and rationally analyse the extent of those powers under the grant of authority accorded by the San Francisco formula - a point made by

Professor Katz in his characteristically thoughtful book on the relevance of international adjudication. The point is troublesome but is not conclusive. Law and what is legally permitted may be determined by what a court decides, but they are not only what a court decides. Law 'goes on' every day without adjudication of any kind. In answer to a question put by a Judge in the oral proceedings, Counsel for the United States in a written reply declared "The fact that in the international as opposed to a municipal legal system the other party cannot be assured of bringing a case involving material breach before an international tribunal except where both parties have accepted the compulsory jurisdiction of an international tribunal" - it was a very qualified answer that was given, "except where both parties have accepted the compulsory jurisdiction of an international tribunal" - "is a problem relating to the efficacy of international law and institutions generally and not especially to the problem of the material breach doctrine." And now the learned Judge gives his own interpretation on this: "It is part of the weakness of the international legal order that compulsory jurisdiction to decide legal issues is not part of the system. To say this is not to say that decisions taken by States in conformity with their good faith understanding of what international law either requires or permits are outside a legal frame of reference, even if another State objects and despite the absence of adjudication."

So they are not outside a legal frame of reference if they are objected to by the other State.

8. The case before the International Court was a reference, wherein the mandate of South Africa over Namibia was terminated by the General Assembly, with the concurrence of the Security Council, for material breaches of obligations under the mandate. The General Assembly of the United Nations and the Security Council were supervisory bodies. That means they had supervisory jurisdiction over the mandatory and therefore in that superior jurisdiction they could determine the breaches. That is why that point was considered in that light by the majority of the judges and cannot be treated as a precedent. I am now referring to paragraph 103, page 49 of the Opinion which has already been circulated, wherein this point has been clearly brought out. I quote:

"The Court is unable to appreciate the view that the General Assembly acted unilaterally as party and judge in its own cause. In the 1966 Judgement in the South West Africa cases referred to above, it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League, "in pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the 'sacred trust'" was specifically recognized. Having regard to this finding, the United Nations as a successor to the League, acting through its component organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international obligations, and competent to act accordingly."

Therefore that case stands on a different footing altogether. The only proposition that was recognized was Article 60 of the Vienna Convention and nowhere was it determined that if the Contracting States through, by and under a convention have agreed to refer their disagreements relating to the interpretation or application of the treaty to a Council like this august body, then that cannot be done. I submit that if any submission is made to the contrary it is misconceived.

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9. I will leave this point now and go to the second ground. When I complete the second ground, I will summarize briefly my submissions on both points at the same time.

10. I come now to the second ground, Mr. President. The second ground, as we heard yesterday, was that after the armed conflict in August/September 1965, a new regime came into existence between India and Pakistan and, a special regime having come into existence, the relations between the two countries regarding overflights were governed by that special regime, which was provisional in character and subject to the permission of the State concerned. Before I deal with this point, let me first make a general statement. It was refreshing to note that the learned Counsel yesterday confined his contention only to the post-September 1965 period, because originally the case put up by India was that right from the beginning, since 1948, there was a special regime. Mr. President and members of the Council, may I invite your attention to paragraphs 28 and 29 of the preliminary objections filed by India. Paragraph 28:

"The Air Services Agreement of 1948 between the two countries covered air transit across each other's territory and India's overflights into Pakistan's air space and Pakistan's overflights into India's air space. A copy of the said Agreement of 1948 is hereto annexed and marked '1'. Thus air transit and overflying each other's territory was governed by a Special Regime between India and Pakistan in 1948 and continues to be so governed up till today. The Convention and the Transit Agreement do not apply as between India and Pakistan, as regards transit and overflying each other's territory."

Then this has been spelled out further in 29:

"In view of the fact that the question of overflying or transiting is governed by a Special Regime as between India and Pakistan, and not by the Convention or the Transit Agreement, the Government of India submit that the Application and the Complaint of Pakistan are incompetent and not maintainable, and the Council has no jurisdiction to entertain them or handle the matters presented therein."

Then later on they refer to the alleged August/September 1965 arrangement.

11. Before I come to that I repeat that the statement yesterday was confined to the post-September 1965 period, which means that up to that time not only the bilateral agreement but the Convention and the Transit Agreement were in operation and that is really and legally the correct position. In fact no other position could be adopted by India because India herself, as early as 1952, in respect of a very small sector, when certain flights were diverted around the Khyber Pass, approached this very Council. I am referring to the dispute between India and Pakistan of 1952. In 1952 India herself accepted the jurisdiction of the Council and lodged a complaint with the Council charging Pakistan with acts violating Articles 5, 6 and 9 of the Convention and with violation of the Transit Agreement. These are the words - in fact I have lifted the paragraph bodily from the Application then drawn up by India and filed here with this very body. India alleged in particular that Pakistan refused to permit Indian aircraft engaged in commercial air services to fly over West Pakistan. When the dispute came before the Council Pakistan adopted a very constructive and co-operative approach and responded very favourably to the suggestion of the Council for holding negotiations,

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and in pursuance of the Council's recommendations an amicable settlement was reached. See Minutes of the Council, 18th Session, Document 7361 C/858, 1953, pages 15-26 and also Report of the Council for 1952, Document 7367 A7-P/1, pages 74 to 76, 1953.

12. Now this was the position in 1952 when India knocked at the door of this body and lodged a complaint charging violation of various articles of the Convention and the Transit Agreement. So, as I was submitting earlier, whatever may be the position after September 1965, which I will come to presently, it remains beyond cavil or controversy that till September 1965 admittedly - and in view of yesterday's performance of the learned Counsel himself the position now is incontrovertible - the relations between India and Pakistan with reference to overflight were governed by and under the Convention and Transit Agreement as well as by the Bilateral Agreement of 1948. The question is "Has that position been changed or altered or modified or superseded by any other arrangement to the contrary?" My respectful answer will be "No" and that I will show through various factors, which must be placed before you in their proper perspective.

13. All conflicts are unfortunate and more unfortunate in the case of developing countries, but sometimes they are inevitable. Whatever may be the position, they did take place, and the last armed conflict between India and Pakistan, a war, took place in August and September 1965. Then the hostilities ended. They must end - there was the Security Council, there were various other efforts - and thanks to the good offices of the Government of the USSR and its esteemed leaders, the President of Pakistan and the Prime Minister of India met at Tashkent and the result was the Tashkent Declaration. Now Clause VI of that Declaration, which was signed by the then President of Pakistan and the Prime Minister of India at Tashkent on 10 January 1966, reads:

"The President of Pakistan and the Prime Minister of India have agreed to consider measures towards the restoration of economic and trade relations, communications as well as cultural exchanges between Pakistan and India and to take measures to implement the existing agreements between Pakistan and India."

This certainly was contemplated - "to consider measures towards the restoration of economic and trade relations, communications as well as cultural exchanges between Pakistan and India and to take measures to implement the existing agreements between Pakistan and India." I will come to what was contemplated and what was to be done, but the fact remains that it was clearly declared, agreed to and decided that the existing agreements - including the Convention, the Transit Agreement and the Bilateral Agreement of 1948 - were to be implemented.

14. Now yesterday a lot of allegations were hurled against us. I will come to the question of the so-called "package deal", but a variety of allegations and insinuations were made against us, and it was said that owing to our conduct this clause could not be implemented. I, with respect, submit that it is to the contrary. We have answered the various allegations in our reply to the preliminary objection. I will not trouble you with all the paragraphs. I will only refer to one paragraph. My learned friend had read paragraphs 32 to 36 of the preliminary objection. I will not trouble you with our replies; I am sure the honourable members of the Council will peruse them at the right time. But I would like to invite your attention to our replies to paragraphs 35 and 36. They are short ones and I seek your indulgence to read them. I quote:

"Paragraph 35: The statement is incorrect and the factors introduced therein are extraneous to the issue involved and therefore outside the purview of the proceedings before the Council. Without prejudice to the above, it is stated for record that in spite of the best efforts of Pakistan, relations between the two countries have not improved because of India's refusal to resolve the basic cause of tension between the two countries, namely, the Kashmir dispute, and its insistence to dictate its own terms in relation to other issues. On the other hand Pakistan has always been willing to settle peacefully all outstanding disputes with India through the accepted international procedure of negotiation, mediation and arbitration. It has also proposed the establishment of a self-executing machinery for the resolution of all outstanding disputes, but the Government of India rejected it. Thus the Government of India for its own reason has shown no intention to normalise relations with Pakistan.

Paragraph 36: The statement is misconceived and a misrepresentation of facts and law. The existence of the so-called special agreement is emphatically denied. It is a figment" - inadvertently we said "fiction" - "of imagination. As earlier stated, after the 1965 armed conflict, overflights between the two countries were resumed in terms of Article VI of the Tashkent Declaration, which called upon the parties to implement all existing agreements. The statements made in paragraphs 30 and 31 above are reiterated."

15. Now that is the other side. I am precluded by the oath of my former office and by the Official Secrets Act to disclose the details, but the then Foreign Minister of India - now again the Foreign Minister - Swaran Singh and I as the Foreign Minister of Pakistan at the time, as well as many other dignitaries and leaders, went into this exercise, and it is known to both the parties and, in fact, to a number of the esteemed members of this Council. I need not trouble you with the various events. They speak for themselves. After the Tashkent Declaration whatever could be done was done. Major portions of the Water Treaty were implemented. Then with respect to the dispute over the Raan of Kutch we went to a duly constituted tribunal and through the process of adjudication we resolved the dispute. Many other things were done, but the allegation made yesterday was that Clause VI of the Tashkent Declaration was a "package deal", which must be accepted as a whole; you could not rely on a part of it, single out aviation and say that the agreements were revived.

16. Now, as I said, whatever could be done was done, and wherever things could be normalised or achieved between the two States they were normalised or achieved. Telecommunications were revived and eventually overflights were revived, and the reason has been acknowledged by India itself in its communication of 3 March, a note handed to our High Commissioner in New Delhi. Copies are being circulated and I invite your attention to paragraph 4 of this note, received after the hijacking incident:

"The Government of India wish to remind Government of Pakistan that after Indo-Pakistan conflict of August/September 1965 they would have been well within their right to disallow the resumption of overflight so long as relations between India and Pakistan had not been fully normalised. However, on a specific request made by the then President of Pakistan the Government of India agreed, in February 1966, to forgo their right to demand prior settlement of outstanding issues and consented to resume mutual overflights. Such overflights by scheduled services of civil airlines of one country across the territory of another are, as Government of Pakistan are aware, a matter of privilege."

That principle is well known to you, but the fact to which I invite your attention is that the Government of India has stated here that they agreed, on a specific request made by the then President of Pakistan, in February 1966 to forgo their right to demand prior settlement of outstanding issues and consented to resume mutual overflights. Yesterday it was said that you could not isolate aviation, but India herself has acknowledged that this could be done. We immediately responded to this note and in paragraph 2 of our letter dated 22 March 1971 we have stated:

"The Government of Pakistan notes with regret that the Government of India has so far not agreed to withdraw its unjustified ban on flights of Pakistan aircraft over Indian territory. Instead, the Government of India has suggested that these overflights are in the nature of a privilege extended to Pakistan in 1966 and that India was within its right to withdraw it unilaterally. The Government of Pakistan cannot accept this position and are formally of the opinion that the mutual overflying rights are governed by the 1948 Agreement between Pakistan and India as well as by international conventions on the subject. Even if, for the sake of argument, the Government of India could claim that after the 1965 conflict it was well within their right to disallow the resumption of overflight so long as relations between India and Pakistan had not been fully normalised, the Government of India have, in the note under reference, acknowledged that the Government of India agreed, in February 1966, to forgo their right to demand prior settlement of outstanding issues and consented to resume mutual overflights. So far as outstanding disputes are concerned, it has always been the endeavour of the Government of Pakistan to settle them in a peaceful, just and equitable manner."

So this is my answer to the statement made by the learned Counsel about Clause VI of the Tashkent Declaration.

17. Now this Declaration was followed by a letter from the Prime Minister of India. A reference was made to it and only a portion was read, but I beg of you, honourable members and Mr. President, to read the text of this letter, because it is quite clear and explicit, without any pre-conditions. I shall read it. It is a letter dated 6 February 1966 from the High Commissioner for India in Pakistan, addressed to the President of Pakistan himself.

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"I have the honour to transmit the following message received from Smt. Indira Gandhi, Prime Minister of India:

'Dear Mr. President,

Our Foreign Minister and Defence Minister, on their return from Tashkent, informed us of your desire for the early resumption of overflights of Pakistani and Indian planes across each other's territory. We had thought that this matter would be settled at a meeting between the Ministers of both countries within a few days, along with other problems connected with the restoration of communications. As it appears that such a meeting might take some time, we would be agreeable to an immediate resumption of overflights across each other's territory on the same basis as that prior to 1st August, 1965."

I underline and would like to re-read these words: "As it appears that such a meeting might take some time, we would be agreeable to an immediate resumption of overflights across each other's territory on the same basis as that prior to 1st August 1965." The message continues:

'Instructions are being issued to our civil and military authorities accordingly.

I very much hope that in both our countries emphasis will be placed on the positive aspects of the Tashkent Declaration, such as early normalisation of relations and the initiation of various processes of co-operation between our two countries in mutually beneficial fields.'

18. Now here is India's chief spokesman, her Prime Minister, conveying to the President of Pakistan their decision to resume flights immediately across each other's territory "on the same basis". What is that basis? - no special arrangement, but the same basis as that prior to 1 August 1965. I opened my submission on the second argument by saying that the basis until August 1965 was the Convention, the Transit Agreement and the Bilateral Agreement of 1948, a basis under which India could come and knock at the doors of this body. Today we are knocking, but of course sometimes States and persons can approbate and deprecate. This letter I read out is without pre-conditions and says that instructions are being issued to the civil and military authorities accordingly. It was in the process of implementing these instructions that certain signals were exchanged between the Directors General of Civil Aviation of the two Governments.

19. A particular portion of a particular signal was read out yesterday, but not in its entirety, not in its proper perspective, or within its correct context. I would therefore beg of you now to look at that signal to see whether there was any special arrangement or any provisional arrangement, as was suggested, alleged or asserted yesterday. The signals are in Annexure 2 to the objections filed by India. I will refer to two or three of them to show what really happened and whether an isolated expression in a signal or cable can be relied upon.

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20. The first signal, dated 4 February 1966, is from the Director General of Civil Aviation, India to the Director General of Civil Aviation, Pakistan:

"Our Government has agreed to restoration of overflights of scheduled services between India and Pakistan. We would suggest meeting as soon as possible to determine details, including earliest date of resumption and routes over which overflying could be resumed. We would be grateful for immediate reply regarding date and venue."

The first sentence is a mere reiteration of the decision taken by the two Governments to restore overflights and the second has to do with the implementation of that decision and is a suggestion for a meeting. What is this meeting to do? - to determine the earliest date of resumption and routes. Pakistan responded by a signal on 7 February, which reads:

"We have received instructions from our Government that the Government of India has agreed on a reciprocal basis to the resumption of overflights of each other's territory by our respective airlines in accordance with procedures existing before 1st August 1965."

So it was in accordance with procedures existing and in operation prior to 1st August 1965, which would, of course, certainly cover the Convention, the Transit Agreement and the Bilateral Agreement. Then the DGCA Pakistan went on to propose resumption of flights over Indian territory as per the following schedule and suggested a schedule. There was a reply from DGCA India dated 8 February 1966, in which he gave their schedule. Calcutta - Agartala, Agartala - Calcutta, Karachi - Mandasaur - Jamshedpur - Calcutta and various other schedules were given.

21. It was in reply to this cable about the schedules that the cable of 9 February 1966 was sent by the Director General of Civil Aviation of Pakistan, part of which was referred to and relied upon by the Indian Counsel yesterday. I would like to read this, because I argue that in the context this is not an independent cable; it is a cable dealing with what has preceded it, namely, a schedule received from India, and it points out in paragraph 1 that:

"In accordance with agreement between our Governments all routes and procedures which existed prior to first August were to be restored. It is noted from your signal..... that PDRS 3, 4 and 6 for Karachi-Dacca flights have not been mentioned. Secondly your signal indicates that on Kathmandu-Dacca route our aircraft will be required to fly via Calcutta. Previously the route was Dhanbad-Dacca direct. Suggest necessary amendments are effected to confirm with agreement. Para. two - Your schedules have been noted. All former routes over Pakistan territory as existed prior to 1/8/65 will be available to IAC and AII on a provisional basis. This will be subject to review in case you are unable to restore all former routes and procedures."

Thus we are, on the administrative side, merely conveying to them that as far as we are concerned, they can have on a provisional basis whatever routes they were operating before 1 August 1965; if they want to review these routes, we are prepared to review, but we are merely implementing the decisions of the two Governments.

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22. So overflights were not restored on a provisional basis or under a so-called special regime. They were restored on the basis of what was applicable to the two countries before 1 August 1965, as acknowledged by the Prime Minister of India in her letter. Therefore the whole argument of a special regime falls to the ground because the basis is knocked out by reading the full text of the correspondence and cables, and especially the authoritative letter of the Prime Minister of India. The signals were merely instructions in the process of implementation and, with reference to one particular item, routes, not all of which had been mentioned, we were reminding them that we, for our part, were willing to make available all the routes in existence prior to 1 August 1965, but they could review and reconsider and let us know. It was merely an administrative arrangement; nothing hinges on it.

23. Then reliance was placed on the notification from the Gazette of India, dated 6 September 1965, when the war between India and Pakistan was in progress, issuing a directive under the Aircraft Act, and the so-called amendment to it of 10 February 1966. These notifications are in Annexure 3 to India's preliminary objection. Now these notifications are their own, issued under their own domestic legislation. They certainly cannot affect Pakistan, because so far as Pakistan is concerned, the agreement arrived at between India and Pakistan was to resume overflights on the basis existing on 1st August 1965. It was suggested that the flights were with special permission. There was no such thing as special permission; I contest and repudiate any such suggestion. All that was done in practice was that each country filed flight schedules with the other's aeronautical authorities. Nothing else, nothing else was done.

24. Therefore my submission is that whatever was the position between India and Pakistan after 1948 became the position from February 1966 by the well-considered decision of the Governments of the two countries and there was no special arrangement of a provisional character and no question of any special permission. Therefore the Convention, the Transit Agreement and the Bilateral Agreement were all in operation. That the Convention was in operation is borne out by many other factors. I need not trouble you with them at this stage, because when we go into the merits of the case we shall go into greater detail. There were, in respect even of non-scheduled flights, overflying and landing in Pakistan and in India by each other's aircraft, pilgrimage or what are called Haj flights, the flights of their dignitaries, our dignitaries, etc. These were, of course, overflights, but apart from them various other obligations under the Convention and Transit Agreement were being performed by India and Pakistan. I will refer to that in a moment.

25. One point I must mention here is this. I have shown that in fact there was no such thing as a special arrangement, agreement or regime. In any case the Convention is quite clear, and the combined effect of Articles 82 and 83 is that there cannot be any special arrangement or agreement inconsistent with the Convention. You are well aware of the provisions embodied in these two Articles, but I will refer to them just to make clear the point which I am canvassing before you.

Article 82

"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."

The rest is not material. Then we go to Article 83:

"Subject to the provisions of the preceding Article, any contracting State may make arrangements not inconsistent with the provisions of this Convention. Any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible."

So firstly there is an undertaking not to make or incur any obligations and understandings which are inconsistent with the terms of the Convention. Secondly, arrangements not inconsistent with it may be made, but these are to be forthwith registered with the Council, which shall make them public as soon as possible. Therefore there could not have been any special regime inconsistent with the Convention, the Convention being in operation.

26. Even customary international law is to the same effect. My learned friend yesterday made the statement that the Vienna Convention recognized certain principles of customary international law. I invoke another Article of the same Vienna Convention, Article 30 - "Application of successive treaties relating to the same subject matter". Clause 3 of this Article reads:

"When all the parties to the earlier treaty are parties also to the later treaty, but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

The first two treaties, namely the Convention and the Transit Agreement, were neither terminated nor suspended, and there was nothing in them incompatible with any later agreement. In fact there was no later arrangement except to this extent: that we revive the arrangements in existence on 1st August 1965.

27. Now I come to one or two illustrations. When we go to the merits we shall give a number of others. As to conduct, I will just give an isolated incident to show. I need not burden you with details at this time. In the year 1969 - that means after September 1965 - an Indian aircraft met with an accident in East Pakistan. In accordance with the provisions of the Chicago Convention, Pakistan investigated the accident. Invoking Annex 13 to the Chicago Convention, India nominated a representative on the inquiry and requested Pakistan to grant the necessary facilities to him and his advisers. Pakistan, carrying out its obligations under the Convention and Annex 13, afforded full facilities, which were acknowledged by the Prime Minister of India herself in a letter dated 29 September 1969 to the President of Pakistan, and I quote: "Thank you for your message of sympathy on the loss of lives as the result of the crash of the Indian aircraft. We are grateful to the Pakistan authorities for the assistance rendered by them in this regard." In the course of the investigation, the Pakistan Inspector examined the air traffic controllers on duty at Calcutta Airport in order to ascertain whether the provisions of ICAO Document 4444 had been complied with.

The Government of India confirmed during the investigation that this document was being followed by them. This amply shows that the conduct of India in relation to Pakistan during the investigation of the accident was on the basis that both countries were parties to the Chicago Convention of 1944 and were governed by that Convention, which was in operation.

28. Mr. President and members of the Council, at regular intervals the learned Counsel yesterday expressed the apprehension of the Indian authorities for the safety and security of Indian planes over the territory of Pakistan, just because of the unfortunate happening at Lahore. I need not talk about Lahore; you know what happened in September 1965; you know what the reaction of the people of Lahore could be; and you also know what the Government of Pakistan did in spite of that. It did all it could, but that is a different matter. So far as safety and security of the flights is concerned, we are likewise interested in that and we certainly could not endanger planes, whether they are theirs or ours or belong to the airlines of other countries. Twenty-three international airlines have been flying over the territory of Pakistan and not one of them has even remotely suggested anything to the contrary. And why should I talk only of those 23 international airlines? Why should I not talk of India itself? India has set out in its objections a case of so-called "confrontation" between India and Pakistan - who is responsible is a different matter - and about the two major conflicts between India and Pakistan, namely those of 1948 and 1965. Notwithstanding that atmosphere of tension, conflict and confrontation, Indian airlines have been operating and flying over the territory of Pakistan for 23 years. One isolated incident of hijacking has taken place. So many hijackings have taken place in the last two years, and you have seen what has happened. You have seen how various other States have had to act in various circumstances. You know much better than I the case of Leila Khaled, or whether particular hijackers were given a particular ransom, whether cars were placed at their disposal, or whether they were taken by special plane from one place to another. Many factors have to be taken into consideration, but that does not mean that any State, merely because of an incident of that kind, can say "From tomorrow on this Convention will not apply." If that is how international conventions are to be applied, I need not tell you what will happen.

29. Mr. President and members of the Council, to sum up on both the points, our case is this. Because her case is that the Convention and Transit Agreement have been terminated and are not in operation, India says that disputes can be classified in four categories - (1) disputes in which questions of interpretation are involved, (2) disputes in which questions of application are involved, (3) disputes concerning action taken under an agreement, and (4) disputes concerning the termination or suspension of an agreement. She contends that only cases of interpretation and application can be brought before this Council under the Convention, that only cases of interpretation, application and action under the agreement can be brought under the Transit Agreement, and that under no circumstances can cases of termination or suspension be brought here. Yesterday, I pointed out to you by various precedents that even though Article 36 of the Statute of the International Court of Justice speaks only of legal disputes concerning the interpretation of a treaty - the word "application" does not appear - any question of international law, the existence of any fact which if established would constitute a breach of an international obligation, and the nature or extent of reparation to be made for the breach of an international obligation, in cases brought before it involving treaties or conventions in which reference is made only to disagreements relating to interpretation or application, the Court has held that the body empowered to entertain a disagreement relating to interpretation or

39. application certainly will be entitled to adjudicate a disagreement concerning termination or suspension, because termination and suspension are part of interpretation and application. You have to determine whether the treaty or convention can be terminated or suspended and then you have to decide whether it has been terminated or suspended, as one party alleges, because the other party has not fulfilled its obligations. Therefore, whichever way you look at it, the Convention has not to be construed in a narrow sense. I laid down as a first principle that it has to be construed in a large and liberal sense and that the expression "any disagreement relating to the interpretation and application of this Convention" is very wide, embracing disputes even in respect of alleged termination or suspension, because one party or one State, unilaterally, unjustifiably and without material breach, can say that the other party's action was sufficient to justify its conduct and that it has terminated the agreement. Such unilateral termination on unjustifiable grounds certainly can be investigated, inquired into and adjudicated by this body.

30. I have explained that there was an express provision in the Convention about termination and suspension. If there is an express provision, recourse cannot be had to implied powers either under Article 60 of the Vienna Convention or otherwise. Even when the right of recourse to implied powers can be exercised, it is hedged by various conditions. It is not an unqualified right - the doctrine of material breach and the possibility of acquiescence, by reason of conduct, in the continued validity of the treaty were invoked. I pointed out that India herself, while alleging termination, approached this Council with respect to the hijacking incident and reminded us of our obligations under the Convention. I cited the opinion of the International Court of Justice in the recent case of South West Africa and I said that nothing in it militated against what I have been submitting and discussing before this august Council. On the last point I have explained my position that there was no special regime; we are governed by the arrangements, agreements and conventions which were in existence and in operation between India and Pakistan on the 1st of August 1965.

31. Before I conclude, Mr. President and members of the Council, if conventions are to be construed so narrowly in the manner India has suggested, whereby a Contracting State can unilaterally say "I do not like a particular State and will not allow its aircraft to touch or fly over my territory", then these conventions will become merely paper conventions, liable to be scrapped by one or more of the Contracting States at their whim and caprice and will be torn to pieces.

32. Mr. President and members of the Council, I have sufficiently detained you. I am not asking a poor litigant to come to the Ritz Hotel. I am only requesting India to come to ICAO, whose doors are open to all Contracting States, all parties to the Convention, seeking justice. Thank you, Mr. President.

33. The President: Thank you. We shall now have a recess of 15 minutes and then the Counsel for India may answer, if he wishes to do so.

34. The President: I now give the floor to the Chief Counsel for India.

35. Mr. Palkhivala: Mr. President and honourable members, in replying to the learned Counsel for Pakistan, I shall confine myself to the main highway of the case and not go into any sidepaths or bylanes.

36. My learned friend, and I do call him friend, first referred to the cardinal rule of interpretation. He said that when you construe an international treaty you must give it a liberal interpretation. My answer is: there is all the difference in the world between giving a liberal interpretation and giving a misinterpretation. If the Statute talks of horses you may include wild horses, Argentinian horses, horses of the Rockies, Irish horses, English horses and Arab horses, but you cannot include cows, and if this homely simile can bring home to the honourable members the distinction between a liberal interpretation and a misconstruction, I shall have made good my point.

37. The whole question at issue before the honourable members is "Are you to confuse interpretation and application of a treaty, both of which presuppose and postulate the continued existence of the treaty, with the situation where the treaty has either come to an end by termination or come to an end for the time being by suspension?" This is the real question and before I proceed further, may I request the honourable members to bear in mind the sharp and clear distinction between two questions. The first question is "Has this Council the jurisdiction to deal with cases of suspension or termination?" The second and independent question would be "Did India have justification, did India have good reasons for suspending or terminating?" If on the first question the honourable Council comes to the conclusion that it has no jurisdiction to go into a question of suspension or termination at all, the second question cannot logically arise. To argue the two questions simultaneously would be to confuse the real question before the Council with a question which is not before the Council. I have already made clear in my opening address that I am not fighting shy of the merits, but, as I see it, I would be wasting your time if I went into the justification for the termination or suspension of the treaty as between India and Pakistan, because the real question is "Can you go into this question of termination or suspension at all?"

38. I emphasize this very much because my learned friend referred to three judgements. I do not know if they were again, in his words, "advisory opinions", but to my mind if the International Court of Justice expresses an opinion, it lays down the law and I call it in that sense a judgement. It judges what the international law is. My learned friend referred to three decisions of the International Court of Justice, each of which is miles away from the real issue before you. In none of the three cases was the International Court of Justice called upon to consider whether a tribunal whose jurisdiction is confined to the interpretation or application of a treaty can go into the question of termination or suspension. For the rest of my argument, allow me, to save time, to use only the word "termination". Wherever I use "termination", the honourable members will take it that I mean "termination or suspension". I shall try to economize on words and will only use "termination" hereafter.

39. The real question is "Has my learned friend been able to cite a single case where any court, either a civil court or the International Court of Justice, has held that the words "interpretation or application" embrace the concept of "termination"? This is the real question. To say that the International Court went into the question whether the termination of a treaty on the facts of a given case was justified or not is to prove nothing, because the International Court of Justice undoubtedly had the jurisdiction to go into that question. The fact that the International Court of Justice can go into the question only means that its jurisdiction is much wider than the jurisdiction of the Council. The most surprising part of my learned friend's argument was with reference to Article 36 of the Statute of the International Court of Justice, which, according to him, gave a narrower jurisdiction to the International Court - and yet the International Court went into various questions of termination! That is why, in the compilation which we prepared and submitted last night for circulation among the honourable members, we included Article 36 of the Statute of the Court, so that the honourable members can judge for themselves whether the jurisdiction of this Council is at all co-extensive with the jurisdiction of the International Court of Justice.

40. Since I am on this point, may I request you immediately to turn to Article 36 of the Statute of the International Court and see whether anyone can possibly equate the words "any disagreement as to interpretation or application" with the words in which jurisdiction is conferred upon the International Court of Justice.

41. Clause 1 of Article 36 reads:

"The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

First of all you will notice that all cases which parties refer to it can be decided by the International Court of Justice. There is no limitation by reference to application or interpretation. It does not say "all cases of application or interpretation"; it says "all cases". Suppose the words of Article 84 of the Convention had been "any disagreement between States" and the matter had ended there, there is no doubt that termination or suspension would have been included because you might say that it was a case of disagreement between two nations, one of which said "You have wrongly terminated," while the other said "I have rightly terminated." The point is that a disagreement that can go to this Council is not any disagreement; it is any disagreement relating to interpretation or application. In glaring contrast to Article 84 of the Convention which confers jurisdiction on this Council, the first clause of Article 36 of the Statute of the International Court of Justice places no limitation whatever on its jurisdiction. All cases which the parties refer to the International Court can be decided by the International Court, as well as all matters specially provided for in the Charter of the United Nations or in treaties or conventions. In other words, if, in the Charter of the United Nations, there are any matters enumerated which can go to the International Court, they will go, and under Article 36 of its Statute the International Court will have jurisdiction to deal with them.

42. Look now at Clause 2 of the same Article 36.

"The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation

to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a) the interpretation of a treaty".

Now the word "interpretation" comes in. So the interpretation of a treaty can be referred by parties to the treaty to the World Court and the World Court will give its opinion. Look at b), which is very interesting:

"any question of international law."

The question whether, on the facts of a given case, a particular State has a right to terminate a treaty as against another State is a question of international law. It can go to the International Court of Justice. It is expressly provided that any question of international law can go and, as the honourable members have already seen, in the South West Africa case the question was one of international law - whether a mandate or international treaty can be terminated if it does not provide for termination. The World Court gave its opinion - it can be terminated without a provision for termination in the mandate, in the treaty itself. Now this is a question of international law. It can go to the International Court of Justice. Can it come before this honourable Council? Put Article 84 of the Convention and Article 36 of the Statute of the International Court of Justice in juxtaposition. Can anyone reading them, in any language in which they happen to be available, possibly say that the two limits of jurisdiction are the same? Therefore it is completely beside the point to cite three cases of the International Court of Justice in which the Court went into the question of whether the termination of a treaty was justified or not. I have never disputed that the International Court of Justice can go into the question whether termination of a treaty was rightful or not. The real question is "Can the Council go into it?"

43. Look at Article 36 (2)(c) of the Statute - "the existence of any fact which, if established, would constitute a breach of an international obligation". Now the World Court could decide whether South Africa had committed a breach of an international obligation and whether that fact had been established. This is what the World Court is entitled to go into. Take (d) - "the nature or extent of the reparation to be made for the breach of an international obligation". Then come to this interesting Clause 6 of the same Article 36 of the Statute of the International Court of Justice. Clause 6 of Article 36 says: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." In other words, if I say to the International Court of Justice "You have no jurisdiction.", the decision of the Court that it has jurisdiction is final.

44. I have the highest regard for this Council, but I would be failing in my duty if I did not point out what is so obvious and so elementary: that the greatest respect for the Council cannot possibly make anyone argue logically that your jurisdiction is co-extensive with the jurisdiction of the International Court of Justice. If the Council were to say tomorrow "I have jurisdiction in a matter of termination.", can you possibly imagine that decision becoming final when Article 84 says that an appeal from the decision of the Council shall lie to the International Court of Justice?

45. Therefore my respectful submission is that, beyond the shadow of a doubt, there can be no comparison between what the International Court of Justice can decide and what the Council can decide. In fact your functions are quite different. They are not inferior; they may be as important; I think they are as significant. They may even be more momentous. In fact your powers are such that they have to be exercised much more frequently than the powers of the International Court, and without meaning to flatter you, I think you are doing more continuous good for international relations than the World Court, which meets once in six months and takes up one case a year, whereas you deal with innumerable matters in the course of a year. But your fields are different. This is not to say that this is an inferior body; this is not to say that your functions are less important; but it is to say that the field in which you operate, very important and enormously significant as it is for good international relations, is completely different from the field in which jurisdiction is exercised by the International Court of Justice.

46. I shall not deal with the actual cases cited by my learned friend because, quite frankly, they have no application whatever. As I have already told you, none of them dealt with the real question you have to decide today, namely, whether "interpretation and application" includes "termination", and no case has been cited to support the startling proposition that it does.

47. My learned friend referred to a book by Mr. B.P. Sinha. It, again, says something which has no relevance to the question of whether the Council's jurisdiction, which is limited to questions of application and interpretation, can be extended to the case of termination. In fact, as far as we, with our limited knowledge, are aware, this point is being argued here for the first time. Perhaps this is also the first time it has arisen here, and I am not aware that an opinion contrary to ours has been expressed in any textbook or in any authoritative quarter. In any event, even if a Mr. Sinha or a Mr. Smith does choose to say something, the honourable members can still decide for themselves what the correct view is after hearing all the arguments.

48. Then my learned friend repeated the argument which he had set out in the reply to India's preliminary objections, namely, that as you have an express provision on termination in the Convention, this provision overrides, supersedes, the rule of international law laid down by the World Court regarding the power to terminate a treaty. I had dealt with this point, basing my submissions expressly on the Articles of the Convention - which submissions have not been answered - but since my learned friend has repeated his argument, may I request you once again to look at the Articles and see whether a single one of them deals with the question of termination of the treaty by one State as against another for a breach of contract by that other State. If an Article dealt with this question of the limits upon the right of a State to terminate a treaty when another State commits a breach, I could understand the argument that there was a provision, but you cannot refer to provisions which have nothing to do with this right of termination on the ground of breach by another State, but have a bearing on completely different concepts, totally different situations, that have no connection with this question of breach by one State and resulting termination of the treaty by another State.

49. Look once again at Article 89 - War and Emergency Conditions. In fact it is very interesting why that provision was included, and its effect is exactly the contrary of what Pakistan would have you believe. This is a most interesting provision and after reading it again I would like you to consider the argument I am submitting for your acceptance and see whether there is any flaw in it at all. If you look at Article 89 of the Convention you find the words are these: "In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States..." What is the result of this Article 89? - that if there is a war, you do not drive a State to terminate or suspend the Convention. The Convention itself gives the State freedom of action. In other words, this clause obviates the necessity of terminating or suspending the Convention in time of war, because the Convention, by its own force, by its own vigour, by its own terms, confers the right to freedom of action within the Convention. This has nothing to do with the right to suspend, the right to terminate, which is dehors the treaty, as the International Court said. This Article merely tells States that the Convention itself gives them freedom of action. So if a State is questioned about not allowing its enemies to overfly while war is going on, it can say that it does not have to declare the Convention terminated, because the Convention itself gives it complete freedom of action.

50. I do not see how you can fail to accept this construction, which is really the right one, and regard Article 89 as conferring the right of termination. Article 89 is not concerned with termination. That is my whole point, and if a provision deals with one situation, I find it extremely difficult to understand by what process of reasoning it can be said to deal with another. To say that it deals with that other situation is to ignore the clear wording of 89, which deals with the limited contingencies of war and national emergency, nothing more. If for a reason not connected with war or a national emergency -- for example, breach by another State - a State wants to terminate the treaty, it does not go to Article 89 or any other provision of the Convention, for the simple reason that no provision of the Convention deals with that situation. It goes, in the words of the International Court, to customary international law which gives it the right to terminate, and the International Court has expressly said - and I read the exact sentence - that the silence of a treaty regarding the right to terminate the treaty in the event of breach by another State does not mean that the right does not exist; the right exists outside the treaty which is being construed and applied.

51. Then my learned friend referred to Article 95. On a plain reading I do not think it is capable of the construction that denunciation can be qua one State. Article 95 deals with denunciation of the Convention, the Convention itself. It does not deal with the relations between two States at all. Again, there are two distinct concepts which are not to be confused. The first concept is that of a State which need not have been a party to this treaty but chose to become a party; on second thoughts - perhaps wilder or more foolish thoughts - that State chooses to back out and say "I am not very happy with this treaty." Then it has the right to denounce the treaty, the right to say "I am no longer a party to this treaty." That is what the right to denounce amounts to. It is not a question of the relations between two States only; it is a question of one State on the one hand and all the other States that are parties to the treaty on the other. This is the right interpretation of Article 95, and if a State wants to exercise its right to denounce the treaty under this Article it will have to denounce the treaty as a whole and will therefore cease to be a party to the treaty after a year has elapsed.

52. Let me put the alternative point of view of my learned friend and see whether it makes sense to you. Suppose there are two States, one of which admittedly commits breaches of its obligations. Leave aside the facts of this case which my learned friend puts in issue and take a straightforward case where one State tells another that it is not going to permit overflying its territory. What is the other State to do? - it has to denounce the Convention and then for one whole year permit the wrongdoer to keep on overflying its territory, because only after one year will the denunciation become effective. I hope I am making my point clear. I am assuming for the purpose of this argument that my learned friend's contention is correct and that this right of denunciation is wide enough to embrace the right to denounce the treaty as against one State only, not against all the States who are parties to the treaty. Assume this is the right construction and look at the absurd consequences! Assume that under Article 95 India can denounce the treaty only against one State and be a party to the treaty as regards all the other States. Look at the consequence: that if a State commits a glaring material breach of this very treaty against India, India - the wronged country - must permit the wrongdoer to continue overflying its territory for one year, because the denunciation cannot come into effect for one year under Article 95. It says "Denunciation shall take effect one year from the date of the notification." Can you conceive of an international treaty so irrationally drafted that the wrongdoing State for one year will be entitled to the full benefits of this treaty and the State which has been wronged is powerless to do anything in the matter except make a complaint?

53. Suppose the complaint is made, what would happen? You give a decision. The decision is not obeyed. What happens then? - you suspend the voting rights of that State, but the poor State which is wronged in the meanwhile must permit overflying. The State which is the wrongdoer may be very impudent and may not care about the loss of its voting rights. What is the sanction then? This State which is wronged must permit the wrongdoer to overfly its territory for one whole year. This is the effect of the construction my learned friend is putting on Article 95, and I say it is an untenable proposition. On the other hand, the construction I am respectfully suggesting makes complete sense. As between two States the whole basis of this Convention is reciprocity. If there is no reciprocity, if there is a situation where there is a breach of the treaty by one State, the other State has the right under international law to treat the treaty as being at an end as regards that particular State. That makes sense, that makes for justice, because it is an effective sanction. The sanction the Council can impose is, with great respect, not effective, because if the State, as I said, does not care about the loss of its voting rights, what happens? Surely you will not construe an international treaty in a manner which puts a premium upon international wrongdoing.

54. Let me deal now with the Vienna Convention, to which my learned friend referred. He read Article 60, but he read that portion which has no application to the present case. He read the first clause of Article 60, which deals with a bilateral treaty. We are dealing with a multilateral treaty. The Convention and the Transit Agreement are multilateral treaties, which are dealt with in Clause 2, which I read out. Now Clause 2(b) says that a material breach of a multilateral treaty by one of the parties entitles a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State. Now this is the power which the World Court said is inherent, implicit, in customary international law and this Article merely codifies that power. I am unable to

see, then, what is the flaw in the argument I presented yesterday morning to the honourable members. I have a right under international law to suspend or terminate the treaty. If anyone says I have done it wrongly, he must find the appropriate forum in which he can say it, if there is such a forum.

55. In this connection I cited the submission made by the United States Counsel to the World Court in which he said that if such a forum did not exist, it was a shortcoming of international law, but did not mean that a State has no right to terminate a treaty in the event of a breach of the treaty by another State. The World Court accepted that argument. This is my argument: I have terminated. If, for the sake of argument, the honourable members are satisfied that this is a case of suspension or termination and therefore the Council has no jurisdiction, how can they be called upon to consider the question whether one hijacking was enough or whether twenty of my planes should have been destroyed before I could take action? Who is to decide that? If the Council has no jurisdiction to deal with the case, what is the point of telling it that there was only one hijacking incident, that there should have been at least twelve before India took action? This is a matter of justification of termination, which can be investigated only by a tribunal which can go into the question of whether the termination of the treaty by India was justified or not.

56. My learned friend referred also to Article 45 of the Vienna Convention. Again one is at a loss to understand what bearing this Article has. Kindly look at the Article and see whether it has the remotest bearing on the question before the honourable members. Article 45 says:

"A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Articles 46 to 50 or Articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

Now what has India's conduct been? India has never expressly agreed after 1965 that the Convention or the Transit Agreement is in force between India and Pakistan. Has it by its conduct acquiesced in the position that the Convention and the Transit Agreement are in operation between the two States? What has been the conduct of India? In September 1965 it said "Total suspension of all overflying". In February 1966 it said "Overflying only with the permission of the Government of India and no stops by Pakistan aircraft in India for traffic or non-traffic purposes". This is the direct opposite of the Transit Agreement and the Convention. How can you possibly argue that this conduct means that India has acquiesced in the continuance of the treaty?

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57. My learned friend referred to the Namibia case and said it has no application. I am asking the honourable members to consider whether the case does not directly apply - not only directly apply but conclusively decide the matter which the honourable Council is called upon to consider. What has been my argument and has it been met? My argument has been that interpretation or application of a treaty presupposes that the treaty is in existence and in operation. If I invoke the power or the right to terminate the treaty, it is a right or power founded on international law outside the treaty. The World Court says this is correct; the power to terminate a treaty is outside the treaty; it is founded on a principle of international law, which will prevail even if the treaty is silent as to the right of termination. How can you say this case has no relevance? It directly applies, because it directly establishes my right to terminate the treaty outside the treaty.

58. You are left, then, with only one question. If its statute tells a particular Council that it can deal with questions of interpretation or application of the treaty, can that Council go into the question whether the treaty was terminated for good reasons or bad? Is that a case of application of the treaty? Who is applying the treaty? How can you apply a treaty which, as a result of termination, is no longer in operation? You will kindly note that if I terminate a treaty, I effectively terminate it. I may be wrong in doing so, but I effectively terminate it. If I set fire to a house, I effectively destroy it. I may have no right to do so, but when I have destroyed the house by fire you cannot go on the basis that it still exists, on the ground that my setting fire to it was wrong. My setting fire to a house may be wrong, but if I have destroyed it, the house does not exist, and can a statute be construed, by any logical process of reasoning, as meaning that the house still exists because my setting fire to it was wrong?

59. Now you, the Council, are asked to consider the simple question of how to apply, how to interpret, a treaty in existence and operation. Questions in the realm of international law, questions of whether the termination was right or wrong, are questions which are expressly out of the purview of the Council. You will recall in this connection the resolution of the Assembly to which I referred and to which there has been no reply -- a resolution which expressly says that originally the Council was invested with much wider powers, but its powers were limited when the Convention was finally agreed upon.

I repeat that again, because even if I say I am not going to deal with cases of termination, not whether India was justified in terminating the treaty. Therefore to say that a material branch is necessary is to go into the merits of the

60. My learned friend referred to the fact that after the hijacking incident, India approached the ICAO Council and therefore can be deemed to have acquiesced in the continuance of the treaty. You have only to read the letter he cited to be satisfied that it says nothing of the kind. You will kindly note what are the functions of the Council. They are not merely to deal with disagreements under Article 84. In fact India never approached the Council with an application under Article 84. She approached the Council as the keeper of the conscience of the world so far as safety in international aviation is concerned. If a State was not a party to the Convention, we could still come to ICAO and say "This is the disastrous consequence of this particular State's attitude to hijacking; please see that appropriate steps are taken." In fact it is most important to note that in this very letter, which is addressed to the President of the Council, we refer to the Tokyo Convention of 1963 and the Hague Convention of 1970 regarding hijacking and neither India nor Pakistan is a party to either of these Conventions. Now if my learned friend is right in his argument that if I make application to ICAO it can only be on the basis that the Convention is in operation between the two of us, by the same token it must follow that if I refer to the Tokyo Convention or the Hague Convention I want the Council to hold that both India and Pakistan are parties to those two Conventions. We are not. India and Pakistan never have been parties to either the Tokyo Convention or the Hague Convention, and yet both Conventions are referred to in this letter. Why? -- because under Article 54 (n) and Article 55 (e) of the Convention, the Council of ICAO has power to deal with various matters not connected with a breach of the Convention by a party to it.

61. Article 54 (Mandatory Functions of the Council) says in Clause (n) that the Council shall "consider any matter relating to the Convention which any Contracting State refers to it". Now the Convention deals with safety in international aviation. If a State tomorrow were to give harbour and comfort to a criminal who had hijacked an Indian plane, and if that State were not a party to this Convention, we would still approach ICAO and say "You are the monitor of good relations in international aviation. Will you kindly use your good offices and see that the right thing is done." In other words this has nothing to do with the Convention being in operation between India and Pakistan. What it has to do with are the wider powers of the Council to see to it that the standards of safety in international civil aviation are safeguarded, and the Council would be entitled to say to a State which is not a party to the Tokyo Convention "Why do not you do the right thing? This is the honourable, the moral, thing to do." The Council may

address a letter to a State. In fact you will remember that both Pakistan and India are still parties to the Convention, although it is not in operation between the two of them. Can the President of the Council not tell a State which is a party to the Convention: "You are a member of ICAO; you are a party to the Convention; may I request you to look at the moral side of it; you cannot treat a neighbouring State in this manner." I say that the Council has not only the power but the right and the duty to say so, even though the Convention may not be in operation between the wrongdoing State and the State whose aircraft has been hijacked.

62. Now look at Article 55 (Permissive Functions of the Council). Under 55 (e) the Council may "investigate at the request of any contracting State" -- and India is a contracting State -- "any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable".

63. Consider also the question of overflying and observe that under the Convention and Transit Agreement overflying is a right that cannot be negated. Kindly credit our country with that very limited knowledge. Can you imagine any country with that knowledge first of all treating the whole thing as being at an end and saying "You have no such right at all." and then writing a letter to the President of the Council whose implication is that it still regards India and Pakistan as being bound by the Convention? There must be something psychologically wrong with the individual who on the same day does these two things. The only way to reconcile our termination of the right of overflying with this letter to the President of the Council is to put the very obvious natural interpretation on it, which, as I said, is this: "You are the keeper of the world's conscience in international aviation; kindly use your good offices to see to it that this wrong is not done to me." This is all.

64. To say that from this it follows that we regarded the Convention as in force between India and Pakistan is completely wrong. What is overlooked is that India and Pakistan still continue to be members of ICAO and parties to the Convention and the Transit Agreement. All that has happened is that whereas the Convention and the Transit Agreement are binding on India and Pakistan as against all other parties, they are not binding on India as against Pakistan or on Pakistan as against India. That is all. Our conduct in writing to the President is completely consistent with the stand I am taking now.

65. My learned friend then referred to Article 60 of the Vienna Convention and said that under that Article there must be a material breach by a State before another State can terminate the contract. I completely agree. I am not disputing that, but are we not mixing up two questions which are separate and distinct? May I repeat those two questions again, because if I do so I have answered his point. The question before the Council is whether the Council has jurisdiction to deal with cases of termination, not whether India was justified in terminating the treaty. Therefore to say that a material breach is necessary is to go into the merits of the termination, but if the Council has no jurisdiction to deal with that question, how can it go into the merits?

66. Then my learned friend referred to Pakistan's reply to our charges concerning the hijacking. I am not going to take much time with it, because it, again, deals with the merits of the termination. But it is most interesting when you consider how specific and clear our charges are: that a foreign airline was there but passengers were not permitted to board; we were not permitted to send our own aircraft to relieve the passengers. My learned friend says a crowd collected. Does this not conclusively prove my case that it would be most dangerous for Indian aircraft to overfly Pakistan? Our plane has been hijacked by criminals. A crowd surrounds the airport. The military regime of Pakistan can do nothing for three and a half days. Suppose my plane is flying over Pakistan and has to land because of mechanical trouble; a crowd can collect and the Pakistan Government says it can do nothing. Is this safety in international aviation? If a Government expressly tells you in its own pleadings that once a crowd collects around an Indian aircraft it is helpless, can you reconcile that with its further contention that it is nevertheless safe for Indian aircraft to overfly Pakistan? My learned friend says 23 airlines overfly Pakistan and nothing happens to them. May I say that more than 23 airlines overfly India and nothing happens to them. If there is a posture of hostility between two countries, it is irrelevant to say that each of them is friendly with 25 other countries. The question is not how many friends Pakistan has or how many friends India has. If that were the question I could say, as I have said already, that many airlines overfly India. We permit everyone to overfly. Why should we object only to Pakistan? Are we out of our minds? There must be some reason for our objection, because normally we do not adopt this attitude to other States.

67. My learned friend referred to the judgement of the World Court and to a passage in the dissenting opinion of Judge Fitzmaurice. The use made of the judgement by the two parties is rather curious. I quote paragraphs, whole paragraphs, from the operative part of the judgement of the Court, whose President was no less a person than Sir Muhammad Zafrullah Khan, representing Pakistan. It is the operative part of the Judgement which I quote, the part where the international law is laid down. My learned friend in reply quotes from the dissenting opinion of Judge Fitzmaurice and a footnote to that dissenting opinion. What he read is the footnote to the dissenting opinion of one Judge. Now what is the law laid down by the International Court? The law is the law laid down by the majority. You cannot possibly say that a footnote to a minority opinion is the law laid down by the World Court. Even in this footnote the Judge merely says "I make a distinction between terminating a contract and putting an end to it." The words are "Note the intentional use of the phrase 'treating it as terminated' and not 'putting an end to it'. There is an important conceptual difference." But I am not on the conceptual difference between terminating and putting an end. I am on the simple, massive, clear-cut point laid down in the majority judgement of the World Court, namely, that every State has a right to terminate an international treaty if there is a breach by another State and this right is in international law outside the treaty.

68. Then my learned friend referred to the judgement of Mr. Justice Dillard on pages 167 and 168. Frankly I am unable to see anything in that judgement which has any bearing on what you have to consider. You will get these paragraphs in the verbatim notes and I think I would be wasting your time if I read them again. There is no sentence, no proposition, no principle, laid down in these passages on pages 167 and 168 which throws any light on the question you have to consider, namely, whether India has the right under international law to terminate the treaty and if there is such a right, is termination and a case of termination covered at all by the words "interpretation and application".

69. My learned friend referred to paragraph 103 on page 49. To do no injustice to the argument of Pakistan, we ourselves, in the compilation we have produced, have deliberately included this paragraph, which my learned friend referred to in his opening remarks yesterday. It does not say anything contrary to what I have already said. I will not read any of the other passages, but, if I may, I will read it to show how the real point is not faced and grappled with. You are referred to some paragraphs here and there which do not deal with the real question before the Council today.

70. What is this paragraph 103 which my learned friend wanted to read?
It is this:

"The Court is unable to appreciate the view that the General Assembly acted unilaterally as party and judge in its own cause. In the 1966 Judgement in the South West Africa cases referred to above, it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League, "in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the 'sacred trust'" was specifically recognized. Having regard to this finding, the United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international obligations, and competent to act accordingly."

All it says is that the United Nations has a right to say whether a nation which is given the power of mandatory has abused that power. I am unable to see what bearing this paragraph has on this case, whereas you will recall that the paragraph I cited had an immediate and significant bearing on what you have to decide.

71. I have finished with my learned friend's argument on the first ground, the first preliminary objection. May I come to his argument on the second ground, the special regime. At the beginning my learned friend said that in the pleading I made I talked of the existence of a special regime right from 1948. Again, I am sorry that your time should be wasted on reading something which is obvious beyond

the shadow of a doubt, but since the point is raised I have to answer it. What we said was that the agreement reached in 1966, after the war, is the special regime by reference to which we say that today the Convention and the Transit Agreement are not in operation. It is true that there are two cases made in the preliminary objections. The first was that even in 1948 there was a special agreement between the two States -- the bilateral agreement. Therefore only the special one prevailed, not the general one like the Convention or the Transit Agreement. The second case is that, in any event, after 1966 there was a special regime, and where we have referred to "Special Regime" we have expressly said that the words mean the agreement reached in 1966. You will find that set out in para. 34 of the Preliminary Objections of India. If I may read that paragraph: "On the basis of the aforesaid understanding" -- that is the understanding reached in 1966 -- "the overflights of Pakistan and Indian aircraft across each other's territory were resumed with effect from February 10, 1966. The aforesaid understanding is hereafter referred to as 'the Special Agreement of 1966'." Then we go on to say, in para. 38, "The Special Agreement of 1966 has governed the rights and privileges of India and Pakistan regarding air transit and overflying from February 1966 until February 1971."

72. I do not want to waste your time going into things prior to 1966 because 1966 is good enough for my purpose and if I were to take you into the earlier period, I would be doing something which would be a work of supererogation, something unnecessary. If a shorter point is enough to dispose of the matter, I do not propose to go into a larger issue, a more controversial area, which really is not necessary for a decision in the case. Therefore I have advisedly confined myself to the events of 1966 as the starting point of the special regime between the two countries and say nothing one way or the other as regards the period 1948-1966. This is to save your time and I do not see what is the point of the criticism here.

73. Next my learned friend referred to the Tashkent Declaration. Frankly, if anything, it shows the bona fides of India. We said "Please let us implement the Tashkent Declaration in full." What did this Declaration say? It said "Let all the seized goods be restored; let normal trade be restored; let there be communications between the two countries; let trains run from one country to the other; let aircraft go from one country to the other -- Pakistan's airlines and our own." This is the Tashkent Declaration. We said "We are willing," and I have given you examples and dates. In his reply, my learned friend said Pakistan has been always willing, always ready etc. As against his general statement that Pakistan is always willing and always ready, I have given you specific examples with dates; that on such and such a date we said "We release all the goods of Pakistan.", but Pakistan would not release our goods. We agreed to release all the confiscated materials except military contraband but Pakistan would not reciprocate. We said "Let us open the doors to trade between the two countries; let us trade with each other." Pakistan said "No". We said "Let us have cultural exchanges; let newspapers go from one country to another." Pakistan said "No". These specific facts are not disputed, but in reply Pakistan says "I have been acting extremely reasonably, extremely well, etc.". It is for the honourable members to consider whether they are to be guided by general statements of goodwill

or influenced by particular specific examples of what each country has done -- not that this is relevant because it, again, has a bearing on the justification for the termination. Therefore I am not asking you to go into it. I myself referred to it, but I thought I said more than once that I was doing so only to show our bona fides, so that the honourable members may not feel that India has done something wrong and is trying to take refuge behind the plea of preliminary jurisdiction. Just to prove our bona fides, I referred to these facts, after making it clear that they really do not arise for a decision at the hands of the Council.

74. Now what Article VI of the Tashkent Declaration, which my learned friend read, says is this -- and look at the carefully drafted words -- "The Prime Minister of India and the President of Pakistan have agreed to consider measures towards restoration of economic and trade relations." We have agreed "to consider measures" for restoration of trade and normal communications. Of course we agreed and we suggested concrete measures which Pakistan rejected. How can you say that from this it follows that the Convention and the Transit Agreement were restored between the two countries? How can it be? They could have been restored if the two countries had fulfilled the Tashkent Declaration, but they did not. Assume the blame is India's, assume Pakistan is one hundred percent innocent, the fact remains that owing to my cussedness -- let me put it that way -- the Tashkent Declaration was never implemented, but how can you from that conclude that the Transit Agreement and the Convention between the two countries, which existed prior to 1966, had been restored? You do not arrive at the right conclusion by apportioning blame between the two States or saying "This country is more to blame than the other." You reach your correct conclusion on the question of jurisdiction by reference to the simple point that whoever is to blame, the fact remains that for some reason, good or bad, there has been termination of these two treaties as between the two States.

75. Then my learned friend referred to the Indian Note to Pakistan of the 4th of March 1971. He read para 4.: "The Government of India wish to remind Government of Pakistan that after Indo/Pakistan conflict of August/September 1965 they would have been well within their rights to disallow the resumption of overflight so long as relations between India and Pakistan had not been fully normalised. However, on a specific request made by the then President of Pakistan, the Government of India agreed, in February 1966, to forgo their right to demand prior settlement of outstanding issues and consented to resume mutual overflights." Then my learned friend says that India says that the Tashkent Declaration was a package deal and must be carried out on the basis that all normal relations must be restored. This does not go against what I am saying at all. On the contrary, it gives further support to my case. What does India say? India says "After the Tashkent Declaration, which was a package deal, we had to restore all normal relations. You did not do it and so I was entitled to say that even overflying cannot be resumed. Yet, as a gesture of goodwill towards you, I permitted overflying." Pakistan is much more worried about overflying than we are. That is why it, not India, is the Plaintiff and the Applicant. Lack of overflying hurt Pakistan; it did not hurt India. Although the Tashkent Declaration was a package deal, we said "All right, as a gesture of goodwill to you, we will permit you to overfly even though you do not restore normal relations as you have agreed to do under the Tashkent Declaration." Does this prove my bona fides or is it a point against me?

76. The second document my learned friend has referred to -- the letter dated 5 February 1966 from the Prime Minister of India to the President of Pakistan -- says: "Our Foreign Minister and Defence Minister, on their return from Tashkent," -- this was after the Tashkent Declaration had been signed on the 10th of January 1966 -- "informed us of your desire for the early resumption of overflights of Pakistani and Indian planes across each other's territory. We had thought that this matter would be settled at a meeting between the Ministers of both countries within a few days, along with other problems connected with the restoration of communications." -- "along with other problems connected with the restoration of communications" because formerly trains went from one country to the other, ships went, etc. but all that had been stopped, so we said "Restore all communications and have your overflying also" -- "As it appears that such a meeting might take some time, we would be agreeable to an immediate resumption of overflights across each other's territory on the same basis as that prior to 1965."

77. Now you will recall that prior to 1965 Pakistani aircraft could land in India and take on passengers -- I myself went as a passenger from Bombay to Karachi on a Pakistani aircraft -- and Indian aircraft could do the same in Pakistan. We wanted the restoration and said we were keen on it, but Pakistan for some reason that we say amounted to a fault on their part -- they say there was no fault -- would not have it. What does it prove? How do you conclude from such a letter that normal relations, and therefore the Transit Agreement and the Convention, have been restored between the two countries? They have not been, because the fact remains that even for non-traffic purposes Pakistani aircraft cannot stop in India, whereas under the Convention and the Transit Agreement they have a clear right to stop for non-traffic purposes. They could not and did not stop after 1965. So what was the good of referring to a letter? What is the real question before you? The real question before you is "Was the Convention, was the Transit Agreement, brought into operation between the two countries?" If it was not -- and the practice shows conclusively that it was not -- the overflying had to be with our Government's permission. That is what our notification said and it is the law of India. Even for non-traffic purposes -- leave aside traffic purposes -- Pakistan aircraft could not land in India.

78. Then what is the good of saying that the Convention and the Transit Agreement have been restored? They cannot be restored by this letter. This letter is only a token of India's goodwill -- a gesture to show her willingness to co-operate with Pakistan in the restoration of normal relations. Can anyone argue that an expression of a desire to restore normal relations between two countries means that in practice and in law the Convention and the Transit Agreement have come back into operation? This desire was never fulfilled; that is the real point. The hope expressed by the Prime Minister of India, which bears eloquent testimony to the goodwill of India and its genuine desire to restore normal relations, was never realized. Therefore this letter is no evidence whatever of the submission made by Pakistan that the Convention and the Transit Agreement came back into effect between the two countries. You find Madame Indira Gandhi saying in the second paragraph "I very much hope that in both our countries emphasis will be placed on the positive aspects of the Tashkent Declaration, such as early normalisation of

relations and the initiation of various processes of co-operation between our two countries in mutually beneficial fields." Therefore, Mr. President and honourable members, although this letter has no bearing on the real issue you have to decide, it is lucky for me that it has been produced here. It is evidence of India's genuine desire, bona fide genuine desire, to restore normal relations, which desire remains unfulfilled to this day.

79. Then my learned friend read the signals starting on page 27. I will not read them again, but I am unable to see what point he was trying to make against my argument. What was my argument? - that the signals expressly say that the aircraft are to fly over each other's territory on a provisional basis. "Provisional" is the word used by Pakistan; "provisional" is the word used by India. The signals expressly say that overflights are on the basis of reciprocity and they are followed by the notification of the Indian Government saying "With the permission of the Government of India you can overfly, not otherwise." These signals, saying that overflights are provisional, are on the basis of reciprocity, and require the Government's permission, conclusively prove that the Convention and the Transit Agreement have not come back into operation, because every one of these conditions is inconsistent with the Convention and the Transit Agreement. If the Convention and the Transit Agreement are in operation, overflights cannot be provisional. If they are in operation you do not need an express provision for reciprocity. If they are in operation you do not need the Government of India's permission for overflying and you have a right to make non-traffic stops in India, which you cannot do and have not done since 1965. How can the signals therefore be read to mean that the Convention and the Transit Agreement were restored as between the two countries?

80. My learned friend read Articles 82 and 83 of the Convention and said that under Article 82 no two States which are signatories to the Convention can have an agreement inconsistent with the Convention. I completely agree. I accept his argument and say - this is my whole point - that if we have a special regime which is inconsistent with the Convention because under it overflights require the Government of India's permission, are provisional and on a basis of reciprocity, it is precisely because the Convention is not in operation. If it was in operation we could never have such a special regime. Articles 82 and 83 I should have quoted, not my learned friend, because they conclusively establish that no nation can have an agreement inconsistent with the Convention, and if you do have such an agreement it can only be because you do not regard the Convention as in operation between yourself and the other party. Therefore these Articles, far from supporting my learned friend, give great support and weight to the point I have made - that the Convention has not been in operation between the two countries since 1965/1966, and that is precisely why an agreement inconsistent with it could be entered into, as was done in 1966.

81. My learned friend then referred to Article 30, clause 3, of the Vienna Convention. This says that "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." I should have thought that this, again, is an Article I should have read. What does it say? If there is one treaty between two States and then a subsequent one, the subsequent treaty prevails over the earlier treaty. To put it briefly it means this: if you have got two treaties, one earlier in point of time than the other, and the two cannot be reconciled, the later treaty prevails over the earlier one. The Convention and the Transit Agreement are of 1948. The special regime is of 1966. Now apply Article 30, Clause 3, of the Vienna Convention and see what result you get. It does not really apply, but my learned friend has relied on it, so I take

it that what he means is that if both countries were parties to the Convention and the Transit Agreement and are parties to the special regime of 1966, then the principle which will apply is that the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. So in the case of a conflict between the earlier treaty and the later treaty, it is the later treaty which prevails and the earlier treaty is superseded. Whom does this Article help? Where you have a special treaty of 1966 and the Convention and Transit Agreement of 1948, the special treaty must prevail because it is the later one, and it says "You shall not overfly without the Government of India's permission." That prevails, because under the earlier treaties you had the right to overfly without the Government's permission.

82. My learned friend finally made two points and that is the end of my reply. He said conventions are not to be narrowly construed. I am all for construing them reasonably, construing them, I would also say, within reason liberally. The only point is whether you can put such a construction upon a treaty as will serve to completely displace the very basis of the Council's jurisdiction. When the question is one of the concept itself, you cannot solve it merely by using the words "liberal" and "narrow". If two concepts are different, and termination and application are two different concepts, you have solved no problem by saying "Put a liberal construction on 'application'", because, however liberal the construction may be, the concepts are different and you cannot mix up two concepts on the principle of putting a liberal interpretation on one of them. Now just consider, therefore, whether it is right to say that I am putting a narrow construction on the Convention. I am putting a reasonable construction on the Convention. I am putting on it a construction which harmonizes with the known functions of this Council, with the excellent work it has done for the promotion of civil aviation.

83. My learned friend finally said that he has come to this Council for justice; it is like the doors of the courts of justice, which are open to rich and poor alike. Here anyone can come for justice. This is a very important point which my learned friend has made and I would like to say a word about it. On which construction are you going to fulfil and promote the purposes of the Convention and the Transit Agreement, on my learned friend's construction or mine? Look at my construction, work out the consequences. Accept my learned friend's construction, work out the consequences and see where you stand as the Council.

84. What is my construction? This Council must be permitted to carry on the excellent work it is doing above the dust and filth of political confrontation and military hostilities, not in a partisan spirit. It is above internal politics or politics between two countries. It has nothing to do with military hostilities or their aftermath. After military hostilities, human memories being what they are, unfortunately countries which ought to be very friendly happen not to be friendly. There may be a thawing of the ice some time later. Enemies become friends, friends become enemies, but whatever the changes in the international picture may be, this Council will not take up its brush and try to paint a part of this picture; it leaves it severely alone. This Council is above the arena of political and military conflict and I want it to remain so. On my construction, this Council will not soil its hands by siding with one State against another, saying "You hijacked; you, Pakistan, gave harbour to two hijackers; if you had given it to twelve, India would have been right", or tell India "Well, this was sufficient for you to terminate." No. This Council is above all that. What I have called the filth and the squalor

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- "squalor" is the right word - of military hostilities and their aftermath, the political confrontations, all these are to be avoided by the Council, and on my respectful construction of the Convention, the honourable members will continue doing their excellent work without being involved in issues which, with the greatest respect, they are not called upon to decide, and, if I may say so, again with the greatest respect, which they are perhaps not qualified to decide in the sense that you have to take evidence as the World Court does, consider questions of international law, etc. To ask it to decide such issues would be putting an undue burden, an undue strain, on the Council. This is what I want the Council to adopt as the right construction.

85. What is my learned friend's construction? His construction comes to this: two nations quarrel; there may be a tremendous political confrontation; there may be border incidents; there may be firing across the border; one State tells the other "No overflying", and then this Council has to decide who is right and who is wrong. How can it do it? All my learned friend says is "Give one year's notice." So while the firing goes on across the border the weak nation, the submissive, quiet nation, must permit the wrongdoer to keep on overflying because it has to give one year's notice of denunciation. After one year, its denunciation will come into effect. The Council in the meantime will decide. What will it decide? How will it decide, on what basis will it decide, how will it be qualified to decide and under which Article will it decide whether the termination of the agreement was wrongful or not?

86. I leave it to you, Mr. President and honourable members, to consider which of the two constructions appeals to you as the one best calculated to promote the interests of international civil aviation. Will you be promoting the objectives of the Convention by getting into this political arena and trying to decide between two sides which are enemies or threaten to be enemies? Or will you be above all that and say "This is not a matter that is within my jurisdiction. I have nothing to do with your dirty quarrels. I am above all that. My objective is only to see that international civil aviation is promoted. If you two quarrel, it is your affair; sort it out as you like." I say that my construction will give the greatest possible fillip and the greatest possible incentive to the promotion of the cause which underlies the Convention and the Transit Agreement, and therefore, far from putting a narrow construction on them, I am trying to put a construction which will redound to the credit of the Council and keep it the respected, non-partisan body, above politics and military hostilities, that it has been so far. Thank you very much, Mr. President.

87. The President: We shall now have the lunch break and return at 2.30.

Mr. P. K. Williams (Afr.) - U.S.

Mr. N. A. Palkhiwala - India

(Chief Counsel)

Mr. Y. S. Chaudhary (Counsel) - India

Mr. I. R. Maron (Assistant - India

Counsel)

Annex 7

ICAO Council, 74th Session, *Minutes of the Fifth Meeting*, ICAO Doc. 8956-C/1001
(28 July 1971)

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31/8/71

SUBJECTS DISCUSSED AND ACTION TAKEN

COUNCIL - SEVENTY-FOURTH SESSION

Minutes of the Fifth Meeting

(The Council Chamber, Wednesday, 28 July 1971, at 1500 hours)

CLOSED MEETING

President of the Council: Mr. Walter Binaghi

Secretary: Dr. Assad Kotaite, Secretary General

PRESENT:

Argentina	- Com. R. Temporini	Japan	- Mr. H. Yamaguchi
Australia	- Dr. K. N. E. Bradfield	Mexico	- Mr. S. Alvear López
Belgium	- Mr. A. X. Pirson		(Alt.)
Brazil	- Col. C. Pavan	Nigeria	- Mr. E. A. Olaniyan
Canada	- Mr. J. E. Cole (Alt.)	Norway	- Mr. B. Grinde
Colombia	- Major R. Charry	Senegal	- Mr. Y. Diallo
Congo (People's Republic of)	- Mr. F. X. Ollassa	Spain	- Lt. Col. J. Izquierdo
Czechoslovak Socialist Republic	- Mr. Z. Svoboda	Tunisia	- Mr. A. El Hicheri
Federal Republic of Germany	- Mr. H. S. Marzusch (Alt.)	Uganda	- Mr. M. H. Mugizi (Alt.)
France	- Mr. M. Agésilas	Union of Soviet Socialist Republics	- Mr. A. F. Borisov
India	- Mr. Y. R. Malhotra	United Arab Republic	- Mr. H. K. El Meleigy
Indonesia	- Mr. Karno Barkah	United Kingdom	- A/V/M J. B. Russell
Italy	- Dr. A. Cucci	United States	- Mr. C. F. Butler

ALSO PRESENT:

Dr. J. Machado (Alt.) - Brazil
Mr. L. S. Clark (Alt.) - Canada
Mr. B. S. Gidwani (Alt.) - India
Mr. M. García Benito (Alt.) - Spain
Mr. N. V. Lindemere (Alt.) - U. K.
Mr. F. K. Willis (Alt.) - U. S.

SECRETARIAT:

Dr. G. F. Fitzgerald - Sr. Legal Officer
Mr. D. S. Bhatti - Legal Officer
Miss M. Bridge - CSO

Mr. N. A. Palkhivala - India
(Chief Counsel)
Mr. Y. S. Chitale (Counsel) - India
Mr. I. R. Menon (Assistant - India
Counsel)
Mr. S. S. Pirzada (Chief - Pakistan
Counsel)
Mr. K. M. H. Darabu - Pakistan
(Assistant Counsel)
Mr. A. A. Khan (Obs.) - Pakistan
Mr. H. Rashid (Obs.) - Pakistan
Mr. Magsood Khan (Obs.) - Pakistan

H. E. A. B. Bhadkamkar - India
(Agent)
H. E. M. S. Shaikh - Pakistan
(Agent)

SUBJECTS DISCUSSED AND ACTION TAKENSubject No. 26: Settlement of Disputes between Contracting StatesPakistan versus India - Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. The meeting opened with the reply of the Chief Counsel for Pakistan, Mr. Pirzada, to the comments made by the Chief Counsel for India at the previous meeting. Denying the imputation that he was guilty of misinterpretation in maintaining that "disagreements relating to the interpretation or application of this Convention" included disagreements relating to termination or suspension, he cited the 1927 judgement of the Permanent Court of International Justice in the Chorzów Factory Case, the summing up of Mr. Justice Lord Wright in the Heyman vs. Darwin case considered by the House of Lords in 1942, and the judgement of the International Court of Justice in December 1962 on the revocation of the South African mandate over South West Africa. In the first case the Court had held that differences relating to reparations which might be due by reason of failure to comply with a convention were differences relating to application, which was a wide and elastic term; in the second the Chief Justice had declared that a dispute as to whether a breach of contract by one party had operated to discharge the other or whether the contract had been frustrated was a dispute arising out of the contract; in the third the Court had ruled that the dispute came within the expression "dispute relating to the interpretation or application of the provisions of the mandate" in Article 7 of the Mandate.

2. He answered the objection that his reference to paragraph 1 of Article 60 of the Vienna Convention on the Law of Treaties was irrelevant by pointing out that under paragraph 2 there was the same limitation of the right of termination or suspension - the breach must be a material breach and it could be invoked only as a ground for suspending the operation of the treaty. He expressed surprise that the letter from the Prime Minister of India to the President of Pakistan was not considered by the Chief Counsel for India to support Pakistan's case that there was no special regime governing overflights, that they had been restored on the same basis as before 1 August 1965. He pointed out that the provisions of Article 95 of the Convention, whose application in the present case the Indian Counsel found ridiculous, were repeated in the bilateral agreement of 1948 between India and Pakistan and suggested that obligations entered into with eyes open must be honoured. He emphasized that it was not unusual for bodies like the Council to be entrusted with judicial or quasi-judicial functions and that there were rules laying down procedures for the discharge of these functions. He also assured the Council that Pakistan certainly had no intention of raising any political questions; its concern was only with its legal rights. Finally, Mr. Pirzada stressed the importance of the issue before the Council and the far-reaching consequences of the decision to be taken on India's challenge to its jurisdiction. This was not just an Indo-Pakistan affair. India's arbitrary, illegal and discriminatory action in banning overflights was a threat to the safe and orderly development of international civil aviation.

3. Mr. Palkhivala rejoined that the 1962 judgement of the International Court had no bearing on the question whether "interpretation or application" covered termination. In this case the Court had been asked to consider four South African objections to the complaint brought by Ethiopia and Liberia: that the mandate had ceased to be a treaty or convention in force when the League of Nations ceased to exist, that Ethiopia and Liberia had no right to interfere, that a dispute could not be said to exist because Ethiopia and Liberia had nothing to lose or gain by fighting the mandate, and that the International Court had no jurisdiction because this was not an issue that could be settled by negotiation. All of these objections had been rejected.

Case No. 2

4. As there were no questions from Council Representatives on Case 1, the President invited the Chief Counsel for India to present the preliminary objection in Case No. 2 - the complaint filed by Pakistan under Article II, Section 1 of the Transit Agreement. Mr. Palkhivala indicated that the grounds of objection in Case 1 applied in Case 2 and there was an additional one: that a complaint filed under Article II, Section 1 of the Transit Agreement had to relate to action taken by another Contracting State under the Agreement, and India had taken no such action; the complaint was therefore not maintainable and the Council had no jurisdiction to handle the matter. If India, for example, had required Pakistani aircraft to fly around the coastline instead of allowing them to take the most direct route across its territory, or if it had taken some other action to make the exercise of the rights granted by the Transit Agreement commercially unprofitable, it would have taken action under the Agreement causing injustice or hardship. It was a contradiction in terms to say that action which was the very antithesis of the Agreement - the banning of overflights and non-traffic stops - was "action under this Agreement".

5. Mr. Pirzada replied that according to Article II, Section 1 of the Transit Agreement, a Contracting State which deemed that action by another Contracting State under the Agreement was causing injustice or hardship to it might request the Council to examine the situation. The use of the verb "deem" indicated that it was for the complainant to determine whether the action of the other State was causing it injustice or hardships, and Pakistan so deemed. As for the contention that action could not be taken under the Agreement because it had been terminated, he had already shown that a case of alleged termination was a case of application. Furthermore, "action" had to be interpreted as including omission, and the failure of India to fulfil its obligations under the Transit Agreement was an omission. Sections 1 and 2 of Article II were not mutually exclusive, and a State considering itself an injured party had the choice of filing a complaint under Section 1 or instituting formal action under Article 84 of the Convention. In dealing with complaints the Council had not in the past taken a technical approach, and in support of this argument he cited the 1958 case of the United Arab Republic vs. Jordan (cf. "Action of the Council", 35th Session, Doc 7958-C/914, page 20).

6. Mr. Palkhivala submitted that the verb "deems" in Article II, Section 1 of the Transit Agreement applied to "injustice or hardship", not to "action". Whether action had been taken under the Agreement had to be formally established - it was not for subjective determination by the complainant. India's whole case was that the Transit Agreement was not in operation between itself and Pakistan and therefore there could be no action under it. The Chief Counsel of Pakistan was construing Article II as giving the Council jurisdiction over any dispute between two contracting parties; if that had been the intention, the text would have said so instead of speaking of "action under this Agreement" and "any disagreement relating to the interpretation or application of this Agreement".

7. As there were no questions from members of the Council on Case 2, the President invited discussion on the suggestion of the Chief Counsel for India that India should be permitted to submit a written memorandum, setting out the arguments he had advanced more concisely than had been possible in an oral presentation, for the use of Council Representatives who wished to seek instructions before the Council took a decision in view of the importance of the point at issue for the future of ICAO and by reason of the fact that the expression "disagreement relating to interpretation or application" was used in a number of treaties. The Chief Counsel for Pakistan objected, arguing that the suggested action was unjustifiable because of the circumstances and the continuing injury being suffered by Pakistan as long as overflights were suspended, and several Representatives questioned whether it would be in conformity with Article 5, paragraph 4 of the Rules for the Settlement of Differences, which said that "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." The Secretariat advised that it was not unusual for a judicial tribunal, after a long and difficult argument, to request counsel to submit a written brief, which would be simply a systematic presentation of arguments already adduced, or for a court to agree to a request by counsel to file such a document. The Chief Counsel for India did not, however, press the suggestion.

8. The Chief Counsels and the Agents for India and Pakistan then withdrew - though the two countries continued to be represented by other members of their delegations - while the Council considered the preliminary objection in Case 1.

9. As reference had been made by the Chief Counsel for India to opinions expressed by the United States counsel before the International Court in the Namibia case, the Representative of the United States explained that the United States position was that Article 84 of the Chicago Convention, as well as Article 7 of the Mandate which was the subject of the Namibia case, covered questions relating to any provisions of those instruments; it did not seem possible for one party to a convention or treaty to negate procedures for the settlement of disputes by stating that the convention or treaty was no longer in force and thereby depriving of jurisdiction the tribunal named in it to settle disputes. The Alternate Representative of India submitted that the United States position was tantamount to saying that under Article 84 the Council had jurisdiction over any dispute or difference relating to the Convention, and repeated India's contention that the expression "any disagreement relating to the interpretation or application of this Convention" had a much narrower meaning and did not include disagreements relating to termination or suspension.

10. Indications at this point by the Representatives of the United Kingdom and the Czechoslovak Socialist Republic that, not being lawyers, they must obtain legal advice on the arguments that had been presented before they could participate in any decision on the substance of the preliminary objection gave rise to considerable discussion. The Representatives of France, Tunisia, Senegal, the People's Republic of the Congo, Italy, Belgium, Uganda, Spain and Colombia said that they were ready to take a decision - the oral presentations by the parties had been essentially elaborations of positions taken in the preliminary objection and the reply to it; though the argumentation had been lengthy, the question (whether the Council was competent to consider Pakistan's application and complaint) was basically simple and administrations had had time to form an opinion on it since the preliminary objection was filed; deferment was therefore unnecessary. The Representatives of France, the People's Republic of the Congo and Belgium said that they would not be opposed to deferment for a week or ten days, but the Representatives of Italy and Uganda expressed the view that this would not be long enough for Representatives who wished to consult their administrations, because for that they would need the verbatim record, which would not be available for at least a month. The Alternate Representative of India maintained that a decision taken now would be vitiated, as it would have been taken before a proper record was available and without proper notice, the Council having decided on 12 June to meet on 27 July only "to hear the parties on the preliminary objection filed by India".

11. As the normal hour of adjournment had arrived, the discussion was suspended at this point, with the understanding that the Council would meet again at 1000 hours on the following day.

DISCUSSION

Subject No. 26: Settlement of Disputes between Contracting States

Pakistan versus India - Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. The President: The Council is again in session and the Chief Counsel of Pakistan would like the floor.

2. Mr. Pirzada: Mr. President and honourable members of the Council, I shall try to be as brief as I can, because in his reply my learned friend was somewhat wide of the mark. He repeated what he had already said, to which I had replied, and his main argument in reply was that this is essentially a case of termination of a treaty by India *qua* Pakistan and that this Council has no jurisdiction to hear or determine any application in respect thereof.

We brought our case within the purview of Article 84 and I will just refer to the language of it again. It is "If any disagreement between two or more Contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council." The words are "any disagreement relating to the interpretation or application of this Convention" and I had submitted that the first principle of interpretation is that the text should be construed liberally. My learned friend did not disagree with that proposition, but he imputed to me something in the nature of misinterpretation, and again reaffirming what he thought was the judgement of the International Court of Justice in the recent case of South West Africa, he stuck to the word "judgement", even though I had pointed out that there is a vast difference between a judgement and an advisory opinion. There are two separate articles in the Statute of the International Court of Justice - Article 65 dealing with advisory opinions and Article 36 dealing with judgements. I have great respect for the opinion expressed in the recent Advisory Opinion, but I submit it is an opinion, not a Judgement. Though my learned friend was so particular, or trying to be so particular, yesterday about the meaning of the expressions "interpretation" and "application", when it came to well defined and well known expressions like "judgement" and "advisory opinion", he stuck to his own way of using expressions and then imputed to me misinterpretation. In fact, he insinuated that what I was doing was tantamount to referring to a horse as a cow. Now I do not wish to use any veterinary language before this august body, but I would submit respectfully that any imputation of misinterpretation to me is highly unjustified.

3. He then tried to show that when I read a footnote from the judgement of Justice Fitzmaurice, I was reading from the dissenting opinion. You will recall that I sought your indulgence to refer to that footnote, which shows that we were so careful and meticulous in making our submissions here that we went even to a footnote.

4. I mentioned that the answer on which he places reliance, made by the Counsel for the United States of America before the International Court of Justice, was to a question put by Justice Fitzmaurice in giving his own interpretation of an expression. That is why I referred to it. I knew that it was a dissenting opinion and said so. Secondly, when I went to the observations made by the learned American judge I pointed out that he had correctly interpreted the answer given by the American Counsel. Lastly, I relied on paragraph 103 on page 49 of the Advisory Opinion to show that the International Court, while considering the question of implied power in connection with the revocation of the mandate, took into consideration the fact that in that case the mandate was being terminated by the General Assembly, which has supervisory powers and can therefore go into the question of material breach and determine it. Here are two States of equal status. India does not hold any supervisory powers over Pakistan permitting it to determine the question of material breach. That question will be, and has to be, determined by some other forum or body. This forum or body has been determined in the Convention in Article 84, in the Transit Agreement in Article III, and also in the Bilateral Agreement to which I will make reference.

5. Having clarified that there was no question or occasion for me to misinterpret, I shall now try to clarify what he tried to say yesterday. Coming back to Article 84, I had respectfully submitted that the expression "disagreement relating to interpretation or application" clearly includes a case of alleged termination by any State, because the moment one State says that another State's conduct or misconduct, act of omission, or non-fulfilment of some obligation under the Convention amounts to repudiation, that it has accepted the repudiation and that it therefore considers the Convention terminated, but the other State asserts that the Convention still applies, it is a disagreement pertaining to the application of the Convention. The mere denial does not take the case out of the purview of Article 84. I cited three decisions yesterday, and if the point was not clear to my learned friend from those decisions, I will not trouble you with them again. To bring the point out more clearly I have selected one case in which the language of the Convention was identical and an interpretation was given by the Permanent Court of International Justice. In this case it was a judgement. I am referring to a case I had mentioned yesterday - the Chorzów Factory Case. The judgement was Judgement No. 9, given in 1927 by the Permanent Court, and is reproduced in Judgement Series A, Advisory Opinions Series B, as well as in Series C.

6. Now this was a dispute between the German and Polish Governments and it arose under Article 23 of the Geneva Convention, not under Article 36 of the Statute of the International Court of Justice. Article 23 reads like this: "Should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and the Polish Governments, they shall be submitted to the Permanent Court of International Justice." Now these Articles were not complied with and the case of the Polish Government was that they were not in existence at all. As there had been a breach of obligations, the German Government claimed reparation. When the matter came before the Permanent Court, the Polish Government demurred to the Court's jurisdiction and in fact disputed it, arguing that, having regard to the language of the Article I read out just now, the Court was not competent to entertain the claim of the German Government. Dealing with this, the Court observed: "In regard to the first of these contentions the judgement of the Court states that it is a principle of international law that the breach of an agreement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."

Differences relating to reparation which may be due by reason of failure to apply a convention are consequently differences relating to its application." Various other reasons were given and I need not trouble you with them. I will come to the last part. "The classification of disputes in Article 13 of the Covenant" - which I read out earlier - "and Article 36 of the Court's Statute would lead to the same conclusion. It is true that the Covenant and the Statute mention separately disputes as to the interpretation of a treaty....." Then the Court observes: "If Article 23, paragraph 1 covers the disputes mentioned in the first and third categories by the two provisions above mentioned, it would be difficult to understand why - failing an express provision to that effect - it should not cover the less important disputes mentioned in the fourth category. From the above considerations the Court concludes that Article 23, paragraph 1 of the Convention contemplates all differences of opinion resulting from the interpretation and application of the Articles referred to, inclusu of differences relating to reparation. "Application" is a wide and elastic term." This is what I have been submitting. I have been submitting that this is a wide and elastic term and would include questions of termination. Consequently, if there has been a failure to fulfil obligations, there can be a claim for compensation, which we have made in the Application we have filed.

7. I had also cited a case of 1942 from the House of Lords coming under municipal jurisdiction and I will read out only a paragraph from Russell's well known book on arbitration. I am reading from Russell "On Arbitration", page 47, on which this case is referred to. The case was Heyman versus Darwin, 1942, Appeal Cases, and this is the summing up in the words of Lord Wright: "A dispute as to whether a breach of contract by one party has operated to discharge the other, or whether a contract has been frustrated, is a dispute arising out of the contract, whether the contract is purely executory or partly executed. In the course of an opinion so holding, Lord Wright said 'I see no objection to the submission of the question whether there ever was a contract at all or whether, if there was, it had been voided or ended. In general, however, the submission is limited to questions arising upon or under or out of a contract, which would prima facie include questions whether it has been ended, and, if so, whether damages are recoverable and if recoverable, what is the amount.' " I think this is sufficient to show that such disputes do fall within the purview of the clause which we have before us and which empowers this Council to entertain such applications.

8. I am deeply obliged to a distinguished Delegate for furnishing me with a photostat copy of a judgement - again I am saying a "judgement" because this was a judgement - in the case of South Africa. South Africa has figured before the International Court of Justice on a number of occasions and this is the judgement handed down in December 1962 - South West Africa, Preliminary Objection, Judgement, ICJ Reports 1962, page 319. It is said here, in respect of that very mandate we have been discussing for the last two days, that Article 7 provided that: "The mandatory agrees that if any dispute whatever should arise between the mandatory and another member of the League of Nations relating to the interpretation or application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations." Note the expression "dispute relating to the interpretation or application of the provisions of the Mandate". Now the Court, when objection was raised by South Africa, answered like this: "The question which rules for the Court's consideration is whether the dispute is a dispute as envisaged in Article 7 of the

Mandate and within the meaning of Article 36 of the Statute of the Court. The respondent's contention runs counter to the natural and ordinary meaning of the provisions of Article 7 of the Mandate, which mentions any dispute whatsoever arising between the mandatory and another member of the League of Nations relating to the interpretation or application of the provisions of the Mandate. The language used is broad, clear and precise. It gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever, relating not to any particular provision or provisions but to the provisions of the Mandate, obviously meaning all or any of the provisions, whether they relate to substantive obligations of the mandatory towards the inhabitants of the territory or towards the other members of the League, or to its obligation to submit to supervision by the League under Article 6, or to protection under Article 7 itself, for the manifest scope and purport of the provisions of this Article indicate that the members of the League were understood to have a legal right or an interest in the observance, by the mandatory, of its obligations both towards the inhabitants of the mandated territory and towards the League of Nations and its members." That was essentially a dispute regarding the revocation of the Mandate and it was held to come within the compass of the expression "application and interpretation of the mandate". I will not trouble you further on this point.

9. Regarding Article 60 of the Vienna Convention about the implied power to invoke material breach as a ground for terminating a treaty, my learned friend said that I referred only to Clause 1 which dealt with bilateral treaties. For the sake of brevity I referred to Clause 1 because Clauses 1 and 2 use identical expressions and whether a treaty is multilateral or bilateral, a ground for revocation could only arise if there is material breach, not otherwise.

10. Then, referring to Article 45 when I pointed out their conduct and showed acquiescence, my learned friend asked whether I suggested that they were in such a frame of mind that on the one hand they were withdrawing the overflight rights and on the other hand approaching the ICAO Council for appropriate reliefs against Pakistan under the Convention. It is not for me to answer. All I can say is that both things happened on the same day, and I am entitled to rely on them to show acquiescence. Mind you, they with great ease say that whether the Convention applied or did not apply, so far as hijacking was concerned they certainly could use the good offices of the President and the ICAO Council. For other things, however, when it comes to taking any action against India, those good offices cannot be used; then the doors of ICAO are to be closed. Well, consistency is a very difficult proposition even for individuals, to say nothing of States, and I will not deal with this any more.

11. On the last point, namely the second ground of the so-called "special regime", I am surprised that my learned friend is suggesting that this letter of the Prime Minister of India of 6 February 1966, which is really the basis, the crux, and the starting point of the revival of all the agreements, doesn't help the case of Pakistan. If it doesn't, I cannot say anything further because I clearly pointed out that there has been no special regime since September 1965. According to this letter of 6 February 1966 - and, I repeat, this is what was agreed to - "As it appears that such a meeting might take some time, we would be agreeable to an immediate resumption of overflights across each other's territory on the same basis as that prior to 1st August 1965. Instructions are being issued to our civil and military authorities accordingly." So overflights were restored on the same basis as prior to 1st August 1965, and I had explained the position very clearly in the morning. I reaffirm it.

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and reiterate that in all those signals there is no question of any provisional arrangement on a reciprocal basis; they related to implementation of routes. This was the decision and it referred back to 1st August 1965; therefore the Convention, to the Bilateral Agreement of 1948 and the Transit Agreement all became applicable again.

12. A kind of hardship was pleaded. When I referred to Article 95 and said that under it a period of one year is required for denunciation - because that is the mode for termination - he asked "What happens in the meantime? Do we wait?" and, anticipating that my answer would be "You could certainly come to the Council.", he said that the remedy which is available from the Council is not a substantial remedy. But you agree to conventions with your eyes open; this is the mode of termination and sanctity has to be attached to it; it is a matter of honour. This sort of thing happens every day, even in the life of individuals. He made fun of the language of the Convention and my interpretation of it, saying that "denunciation" in Article 95 meant denunciation with reference to all other Contracting States. However, very similar wording is used in Article X(E) of the Bilateral Agreement of 1948 between India and Pakistan. In fact, it is even clearer: "This Agreement shall terminate" - the word "denunciation" is not used - "one year after the date of receipt by the other Contracting Party of the notice to terminate, unless the notice is withdrawn by agreement before the expiration of this period." It is a stipulation and States have to honour and abide by stipulations which they have entered into consciously and with their eyes open.

13. Finally, he tried to create an atmosphere of some political situation and said it was not the function of the Council to get involved in situations like that. I think the Convention took good care of such situations; it even incorporated provisions relating to war. This Council is the head of an international organization, a body of experts and guardian of the Convention. Rules have been framed with an elaborate machinery for taking evidence, for hearing declarations by witnesses and experts, for questions and arguments, and eventually for decisions and procedures for implementation. This is not unprecedented. After all, such bodies can be entrusted with the task of performing judicial or quasi-judicial functions, and they have to discharge their responsibilities.

14. Mr. President and members of the Council, on behalf of Pakistan I assure you that we have no intention, at any stage, of raising any extraneous element or political matter, and that is what I had said in Vienna. We are only concerned with legal rights. If we have any, please say so. If we have none and if such sacred conventions can be discarded at the whim and caprice of one State on any ground whatsoever, you may say so. I would end by saying that it is needless to emphasize the importance of the issues involved in the proceedings before the Council. It is not merely an Indo-Pakistan affair. India has challenged the jurisdiction of the Council to hear the Application and the Complaint presented by Pakistan. The Council is well aware of the circumstances under which Pakistan had to approach the Council. The arbitrary, illegal, and discriminatory action by India of banning Pakistan's aircraft overflights across Indian territory is a positive threat to the safe and orderly growth of international civil aviation. Under Article 44 of the Convention the aims and objectives of this Organization are to ensure the development of international air transportation and to see that the rights of the Contracting States are fully respected. It is in this respect I submit, Mr. President and members of the Council, that the Council is seized of a very important issue and its decision will have far-reaching consequences.

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15. Before I conclude, I would only say, in a lighthearted manner, that my learned friend says I am complaining about a house which is no longer in existence because he burned it down. I say that he tried to burn it, but before it could be burned down I approached the fire brigade and asked it to quench the fire. Thank you, Mr. President.

16. The President: Thank you. The Chief Counsel of India.

17. Mr. Palkhivala: Mr. President, in his last reply my learned friend referred to one point, the 1962 Judgement of the International Court of Justice, for the first time. That is why you will give me liberty to deal with it, because, as my learned friend said, one distinguished Delegate had drawn his attention to the Judgement and when I have gone, I would not like the members to think that there is something in this Judgement against me which remains unanswered. I would therefore like to deal with this one Judgement only. I will not deal with any of the other points made by my learned friend.

18. This Judgement, given by the International Court of Justice in 1962, I have gone through during the luncheon interval, because the distinguished Delegate was kind enough to draw my attention to it also. There is nothing in the Judgement, not a sentence anywhere, which has any bearing on the question the learned members of the Council have to decide upon today, namely, whether the words "interpretation and application" cover "termination". In this case the International Court was asked to consider four preliminary objections, none of which was the objection I have raised.

19. The first preliminary objection is on page 330 of the Reports of Judgements, Advisory Opinions and Orders, 1962 - Judgement of 21 December 1962. It is - if I may quote the exact words - "the Mandate for South West Africa has never been, or at any rate is since the dissolution of the League of Nations no longer, a 'treaty or convention in force'." In other words, what South Africa argued was not that they had terminated the Mandate, but that the wording of the Mandate is such that once the League of Nations ceased to exist, the Mandate ceased to be a treaty or convention in force. What the International Court was asked to consider was therefore this: On a proper construction of the Mandate, does the Mandate come to an end when the League of Nations ceases to exist and the United Nations takes over, or is the successor to the League of Nations, namely, the United Nations, entitled to continue to be in the place of the League of Nations? This was a matter of interpretation of the Mandate - and the International Court ruled in favour of the view that on a proper construction the Mandate did not cease to be in force merely because the League of Nations had ceased to exist. The International Court rightly pointed out that it was a surprising statement for South Africa to make that the Mandate was not in force, when South Africa continued to exercise the powers and rights of the mandatory. How could it keep on exercising rights and powers under the Mandate if its case was that on a proper construction the Mandate had come to an end? So the question of interpretation was directly put in issue and it was said that the Mandate was not a convention in force. The World Court said "No." Whether "interpretation and application" cover "termination" was not dealt with at all.

20. The second preliminary objection made by South Africa was that the two parties who had complained to the International Court were Ethiopia and Liberia and the Mandate had nothing to do with them. Who were they to complain? South Africa had no mandate over them and if it oppressed the people of the mandated territory, this was no concern of theirs. That point was negated by the International Court, which said that because Ethiopia and Liberia happened to be members of the League of Nations and subsequently of the United Nations they had a right to raise this dispute.

21. The third point which was urged before the International Court is to be found in the last two lines on page 342 and at the top of page 343: The third preliminary objection was that the dispute brought before the Court by Ethiopia and Liberia could not be said to be a dispute because they had nothing to lose and nothing to gain by the South African Mandate being modified, altered, etc. What did Ethiopia and Liberia gain by fighting this battle? South Africa therefore had no dispute with Ethiopia and Liberia. This was the third preliminary objection raised and the World Court rejected it, saying that "any dispute" meant any dispute raised by a member of the League of Nations, this was a dispute raised by the member of the League of Nations, and the Court would therefore deal with it. Thus what was argued was the meaning of the word "dispute" - can a "dispute" be raised by a State that is not affected by the action of the two parties to the Mandate?

22. The fourth and last preliminary objection made by South Africa is on page 344 and was that this was not a dispute which could be settled by negotiation, and unless the dispute was such that it could be settled by negotiation, the International Court had no jurisdiction. The International Court rejected that contention too and said "No, you cannot say that this is a dispute which could not be settled by negotiation; it could be settled by negotiation and therefore the words "dispute if not settled by negotiation" are wide enough to cover it.

23. The questions raised were therefore not the questions which arise before the Council today. They are a completely different set of questions, which were represented by the four preliminary objections. Not one of them touched the question of what is the right meaning of the expression "interpretation or application of the treaty". These words were not brought to the International Court for consideration and the Court did not deal with them at all. Therefore to say that this Judgement deals with the meaning of the expression "interpretation or application" would be completely incorrect.

24. Finally, Mr. President, this brings to mind something I have been wanting to say ever since the beginning of the argument. It is this: I dare say this is a matter of such far-reaching importance because the words "interpretation or application" are, as we all know, used in a number of treaties. I can well imagine that some, if not many, of the Delegates here might like to seek instructions from their respective Governments or Administrations on what their attitude should be to a question like this. This is understandable, natural and, if I may say so, inevitable. In view of the tremendous significance and importance of the issues involved, it is my humble submission to the learned President and honourable members that, as your verbatim notes will not be ready for many days, if not some weeks, and as they

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are not, to my mind, very satisfactory because when a man speaks without notes he is often inclined to use more words than he would in a precise, clear-cut statement of his case - I know I do - we should be permitted to put in a written memorandum which would set out the entire argument on this issue. This memorandum would contain nothing new; it would contain only the arguments I have presented, but in an orderly and concise form, with repetition eliminated and things in a more coherent and connected form than they would be in a verbatim transcript. The verbatim transcript in any event would take several days to produce, whereas we could prepare this memorandum and have it posted in about a fortnight. I suggest that if we are permitted to do that it would perhaps enable the different Governments and Administrations and Delegates themselves to come not to a quick or hasty conclusion, but to a well considered decision on a matter that is of the greatest importance for the future of ICAO, not only on the important question of the limits of this Council's jurisdiction, but on the very far-reaching question of what is the meaning of the expression "interpretation or application" which you find in many treaties. I do submit that the matter is of such tremendous importance that this request of mine may be granted.

25. I am most grateful to the President and to the honourable members for the very patient hearing they have been kind enough to give me.

26. The President: Thank you. The Counsel for Pakistan.

27. Mr. Pirzada: Mr. President, all I can say is that I am really surprised at the suggestion which has been made by the learned Counsel. This is a matter which has been sufficiently delayed because of the Objections filed by India, and with great respect I must say that this is a delaying device. We are suffering injury every day. It is a very serious matter and already at Vienna time was sought and the matter was brought here. Article 28 of the Rules for the Settlement of Differences says: "The Council shall determine the time-limits to be applied, and other procedural questions related to the proceedings. Any time-limit fixed pursuant to these Rules shall be so fixed as to avoid any possible delays and to ensure fair treatment of the party or parties concerned." The Government of India, a very resourceful Government and the government of a country much bigger than Pakistan, had ample time to prepare their Preliminary Objections, which they prepared exhaustively, which were circulated and which were certainly considered by the members. The Council has heard arguments for two days and now, at the close of them, this suggestion is being made. Certainly the members will deliberate, consider and apply their minds, and I am entirely in their hands, but I must say, with great respect, that the suggestion of putting in a memorandum and taking another fortnight is not justifiable in the circumstances and in view of the recurring injury Pakistan is suffering. I repeat what I said in Vienna, justice delayed is justice denied.

28. The President: The Representative of India.

29. Mr. Palkhivala: The 20th of July is the date on which we received Pakistan's reply and we had to be in Montreal on the 26th.

30. The President: Thank you. Well, we are in the Hearing; we have heard the two parties; and I think we have now reached the point at which Representatives on Council may wish to put questions. I will in due time also ask the Council whether there is any discussion on the suggestion of India that it be permitted to file what I suppose would be a brief, limited to elucidating arguments that have already been put forward. For that, of course, I would have to have a proposal that we do so and perhaps establish a time-limit, etc., and the Council will have to take a decision, if there is such a proposal. We are still on Case No. 1 and I ask the Council Representatives if they have any questions regarding it. Apparently not. Would the question of the brief just raised by the Counsel for India, which I understand was not a proposal or it would have come from the Representative of India, apply equally to Case No. 2?

31. Mr. Palkhivala: You mean, Sir, the written memorandum.

32. The President: Yes, the question of India's submitting a written memorandum applies also to Case No. 2?

33. Mr. Palkhivala: Yes, Sir, but 99% would be common.

34. The President: As it was just a question, I would prefer to go to Case No. 2. Apparently the hearing on Case No. 1 has been completed and there have been no questions by any Representatives. After the hearing on Case No. 2 we will go to this question of having time to submit something additional in writing. I repeat my question: Does any Representative wish to put any questions concerning Case No. 1? No. Then we go to Case No. 2. Needless to say, anything that would be applicable to Case No. 2 which has already been said in connection with Case No. 1 should please be omitted from the statements, by just making a reference to the fact that it is applicable, so that we do not need to spend as much time on Case No. 2 as we have spent on Case No. 1. Will the Counsel for India please start.

35. Mr. Palkhivala: Mr. President and honourable members of the Council, Case No. 2 is the Complaint which has been filed by Pakistan against India, and there our Preliminary Objections are common to our Preliminary Objections in the first case. To the extent to which they are common, I adopt my arguments and submissions in the first case, including the request for a written argument, because my whole object in talking of a written argument was to enable the respective Governments and Administrations of the honourable Delegates to consider the whole argument before they come to a final decision.

36. Now the new point, or the additional point which is peculiar to Case No. 2 and not common with Case No. 1, is the only point which I shall deal with now. All the other points are common and I have already said I shall adopt my own arguments and submissions in the first case for the purposes of the second case.

37. The additional point is this. If you would be kind enough to turn to the Transit Agreement, you will find that Article II, Section 1 reads as follows:

"A contracting State which deems that action by another Contracting State under this Agreement" - I am emphasizing the words "action under this Agreement" - "is causing injustice or hardship to it may request the Council to examine the situation. The Council shall thereupon inquire into the matter, and shall call the States concerned into consultation. Should such consultation fail to resolve the difficulty, the Council may make appropriate findings and recommendations to the contracting

States concerned. If thereafter a contracting State shall in the opinion of the Council unreasonably fail to take corrective action, the Council may recommend to the Assembly of the above-mentioned Organization that such contracting State be suspended from its rights and privileges under this Agreement until such action has been taken. The Assembly by a two-thirds vote may so suspend such contracting State for such period of time as it may deem proper or until the Council shall find that corrective action has been taken by such State."

Pakistan's complaint is based on, and has been lodged under, this Article II, Section 1, and the key to the Article is that the subject matter of the complaint can be nothing else than action by another Contracting State under the Agreement.

38. Now under the Transit Agreement India has taken no action at all. The whole case of Pakistan is that India should take action under the Agreement and try to implement its terms fairly and reasonably, etc. I have taken no action and that is the whole complaint of Pakistan. In fact I ignored this Agreement as not existing, not being in force between India and Pakistan. Even if I do this completely wrongly, I find it impossible to understand how it can be said that I have taken action "under this Agreement". Again I will be told there must be a liberal interpretation, but I find it extremely difficult to reconcile myself to the view that under the notion of a liberal interpretation flags must include electric lights, floors must include ceilings, and the rest. The words "action taken under this Agreement" must surely have some meaning. Whatever large connotation you may put on the word "action", however you construe the word "under", it has to be action under the Agreement and the whole complaint of Pakistan is that I am not taking any action under this Agreement. Therefore the question of causing injustice or hardship does not arise, because even if there is injustice or hardship, it is not caused by action under the Agreement.

39. If you look at the Rules for the Settlement of Differences, Article 1, Clause (2) says "The Rules of Parts II and III shall govern the consideration of any complaint regarding an action taken by a State party to the Transit Agreement and under that Agreement....." Two conditions have to be satisfied: first, there must be action taken by a State party to the Transit Agreement, and, second, the action must be under that Agreement. Unless these two cumulative conditions are satisfied, the question of filing a complaint under Article 21 of these Rules does not arise. Under Article 21 of the Rules, read with Article II, Section 1 of the Transit Agreement, you have the right to file a complaint only in the case of action under the Agreement.

40. Now what is this Transit Agreement and what would be action under the Agreement? The Transit Agreement says that to the scheduled airlines of another State I must give the right of overflight and also the right of non-traffic stops. Now what would be action under the Agreement which may cause injustice or hardship? It would be like this: if I were to tell Pakistan "Yes, you have the right to overfly, but when you overfly you must make sure that you fly along the coast of India, not make a beeline from one point to another on the basis that a straight line is the shortest distance between two fixed points. Trace the whole coastline every time you

go from West to East or East to West." This is permitting overflying, but it is action taken under the Agreement which causes injustice or injury to Pakistan. Or I tell them "You are entitled to make non-traffic stops if you come here, but you will have to take my Government servants free of charge." or I attach some other conditions which are unreasonable. Then I would be taking action under the Agreement which causes injustice or hardship.

41. In other words, what is contemplated is positive action under the Agreement, and if that action causes injustice or hardship to another State, a complaint may be filed. Then, as you see from Article II, Section 1 of the Transit Agreement, I must take reasonable steps to see that the Council's suggestions are implemented. Reasonable compliance is what is needed, and it is all in the field of positive action which may cause injustice or hardship, as I said, by my imposing onerous terms, difficult terms, that make life unnecessarily difficult for another State's scheduled airlines. Scheduled airlines have to operate on a commercial basis, and I may make it commercially unprofitable for them by attaching all kinds of pinpricks, difficulties, to the right to overfly or the right to make non-traffic stops. If I choose to take no action at all and say "I repudiate this Agreement; I terminate it, suspend it qua you.", it is a contradiction in terms to say that I have taken action under the Agreement. In other words, action under the Agreement is the direct antithesis, the direct converse, of total suspension or termination of the Agreement, because when you totally suspend or terminate it, you take no action at all. That is what I have done and I submit, with respect, that it is impossible to reconcile the concept of action under the Agreement with a case where the whole argument of the party is, as India's is here, that I treat the Agreement as not in operation at all; from 1965 to date I have taken no action under this Agreement at all, no action whatsoever. I submit it is therefore impossible for the Council to assume jurisdiction in the second Case and I request it to throw out the Complaint on the grounds that there is no action under the Agreement. This is in addition to various other grounds that apply in the first Case and apply equally here, which I am not repeating. That is all, Sir.

42. The President: The Counsel for Pakistan on Case No. 2.

43. Mr. Pirzada: Mr. President and members of the Council, first of all, let us go back to the language, because no word in any Article is superfluous and meaning is to be assigned to each and every word as far as possible. The language is "A contracting State which deems that action by another contracting State under this Agreement is causing injustice or hardship to it may request the Council to examine the situation." Now first and foremost I invite your attention to the word "deems". Who deems? - the Contracting State, in this case Pakistan. So it is a matter of the subjective satisfaction of Pakistan. The words are not that "a measure concerning action taken by". No, it is an enabling provision, enabling a Contracting State, when it deems that action by another Contracting State under this Agreement is causing injustice or hardship to it, to request the Council to examine the situation. This is what Pakistan deems and that is why it has approached the Council.

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44. Second, we are again in the same circle, because it is being suggested that because the Transit Agreement has been unilaterally denounced or terminated by India, the action taken cannot be deemed to be action under the Agreement. A little while ago, in dealing with Case No. 1, I referred to a number of cases, including one considered by the House of Lords having to do with questions arising under a contract. There it was held that a dispute over whether the contract had been ended or terminated would be a case under the contract and would be covered by the submission in the arbitration clauses. Now applying the same principle here, I submit, with respect, that a case even of suggested termination, or purported termination, or supposed termination will be covered.

45. The last point is that whichever way you interpret it, the word "action" has to be taken as including omission. It does not mean only positive action, although we can even suggest that prohibiting the aircraft of Pakistan from overflying Indian territory is a positive act. Even an omission is covered by "action" and the failure of India to fulfil its obligations under the Transit Agreement would certainly be an omission and would be covered by the expression "action". In fact our respectful submission in due course would be that Sections 1 and 2 of Article II are not mutually exclusive. They are concurrent. I am not dealing with this point at this stage because it may arise a little later; I am only indicating. It has been dealt with in a book to which I am now referring, "Lawmaking in the International Civil Aviation Organization" by Thomas Buergenthal, page 159: "A state which 'deems that action by another Contracting State under this (Transit or Transport) Agreement is causing injustice or hardship to it may request the Council to examine the situation.' That is to say, it may file a complaint. The facts justifying the submission of a complaint could include questions relating to the interpretation or application of the Agreements." - They go back to the same Article II. - "The states involved thus have a choice between filing a complaint or instituting a formal action under Chapter XVIII of the Convention."

46. In fact I have been looking into past precedents of this august Council. A plethora of things have happened and they are under scrutiny and examination, but there is one incident and one precedent to which I would like to invite your attention. I find that this august body has not been hypertechnical, and very rightly its approach has not been very technical. It likes to do justice as far as it can. In 1958, in equally serious circumstances, a situation arose between the United Arab Republic and Jordan. Because of certain differences arising between the two States the United Arab Republic prohibited Jordanian planes from flying over or landing in the UAR. Jordan immediately retaliated by issuing a decree excluding UAR carriers from its territory and shortly afterwards requested the ICAO Council to intervene. The UAR followed suit; certain procedural steps were taken; and even before it could be determined whether it was a complaint or an application or what was the nature of the proceedings - because you have ample power under the various Articles of the Convention, and even in a court of law or before any tribunal, one proceeding could be converted into another or could be deemed to be for other purposes because the question is to give relief as long as the jurisdiction is there - this is what the Council did. I am reading from the book I just referred to, page 163: "After discussing the

matter again at some length the Council concluded that it was still not clear what specific action it was being requested to take" - even in such matters they had no idea what action was sought but the Council necessarily took into consideration the situation - "and instructed the Secretary General to ascertain whether the parties wished the Council to decide the dispute under Chapter XVIII of the Convention or under the arbitral clause of their bilateral agreement. At the same time the Council invited Jordan and the UAR to permit air services between their countries to be resumed, and authorized its President to offer his good offices or those of the Secretary General towards finding a settlement of the difference. The President of the Council entered into consultation with the two parties and shortly thereafter informed the Council that both had agreed to permit the temporary resumption of air services between their respective countries." (Action of the Council - 35th Session, ICAO Document 7958 -C/914, page 20, 1958). Thank you, Mr. President.

47. The President: Thank you. The Counsel for India.

48. Mr. Palkhivala: Mr. President, my answer to my learned friend is briefly this. Article II, Section 1 provides that a Contracting State which deems that action by another Contracting State under the Agreement is causing injustice or hardship may request the Council to examine the situation, but the word "deems" does not mean in the subjective determination of the complaining State. If no action is taken, that State may still deem that action has been taken. The word "deem" refers to the injustice or hardship aspect. In other words, action under the Agreement has to be established objectively as a positive fact; there is no "deeming" there, no subjective decision there. The question is not whether Pakistan deems, thinks, imagines that action has been taken. The word "deems" does not go to the action part of it. That action has been taken under the Agreement has to be objectively established. After that has been done comes the subjective determination of whether such action is causing injustice or hardship. Before you reach the stage of deeming subjectively that India's action is causing injustice or hardship, you have first to establish that India has taken action under this Agreement.

49. If you look at the various Articles, it is clear what is meant by "action under this Agreement". For example, Article I, Section 3, talks of granting airlines the privilege to stop for non-traffic purposes if they offer reasonable commercial service. What is "reasonable commercial service"? Well, India may say "You must render these commercial services."; they may cause injustice or hardship to Pakistan; and, if so, Pakistan can complain. Section 4 of the same Article says that a State may designate the route to be followed within its territory and impose just and reasonable charges for the use of its airports and other facilities. As I was saying, India may designate a route that is unjust or causes hardship to Pakistan. Or it may impose charges that may cause injustice or hardship. But before Pakistan can complain, it has to be objectively established that the action deemed to cause injustice or hardship has been taken. So the word "deem" does not meet the point at all, because "deem" goes with "injustice or hardship"; it does not mean that in the imagination or in the view of Pakistan action is taken when in reality no action is taken. What Article II, Section 1 says is that if objectively, in reality, action has been taken, it is for Pakistan to deem or consider whether it is causing injustice or not.

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50. Secondly, Sir, the book referred to by my learned friend deals, on page 159, with a completely different question, which I shall illustrate in a moment rather than argue in the abstract. What the textbook says is, and rightly, that there may be a case where, as the result of misinterpretation or misapplication of the Agreement to the existing facts, you may cause injustice or hardship. In such a case you, the aggrieved party, have two courses open to you. You may either file an application on the ground that the right interpretation, the right application, has not been adopted or you may make a complaint. If there is misinterpretation or misapplication resulting in action which causes hardship, you may file a complaint about the action under the Agreement or you may file an application on the grounds of interpretation or application. This is not the case we are dealing with here at all. We are dealing with a case where there is no action whatsoever, no interpretation, no application, and the whole case of India is that this Agreement is not in operation.

51. Therefore, Sir, I do submit that the point I have made has not been met. Neither the textbook nor the oral argument meets the real question: what does "action under this Agreement" mean? If it means "any dispute between the parties", why say "action under this Agreement"? Surely the words have some meaning. As my learned friend reads Article II, Section 1, he is virtually rewriting it to say "any dispute between the parties". Well, if that is what the charter of the Council was intended to be, nothing would have been easier than to say "any dispute between the parties". Why talk of interpretation and application? Why talk of action under the Agreement? - simply say "any dispute between the parties". But the limits of the Council's jurisdiction are very severe on the complaint part. It can deal only with a complaint about action under the Agreement, and I would be surprised if in the entire history of the Council a single case has arisen where, without any action under the Agreement, the Council has still entered into the complaint. To say that the Council is liberal, that it wants to do justice, is a tribute to the Council in which I would like to join, but it is a far cry from that to say that because the Council has been liberal, let it now entertain my complaint although there is no action taken by India at all. As far as we are aware, this type of complaint is unprecedented in the history of ICAO, and I respectfully submit, Sir, that the Council would have no jurisdiction at all.

52. The President: I will now put the same question regarding Case 2. Are there any questions that Representatives would like to put to either of the parties? Apparently not. Then we have a request from India that they be permitted to file a brief, which would be limited to arguments that have been presented during the present hearing. It is a request from a party and I will now invite discussion and eventually a vote on it. Is there discussion on that question? The Representative of the United Kingdom.

53. Air Vice Marshal Russell: Just a question for clarification. This would not obviate the previous understanding to make a verbatim record available?

54. The President: No, the verbatim record will be made available; that was clear. May I then put the question to the Council? The Representative of Uganda.

55. Mr. Mugizi: Will this memorandum be submitted by each of the parties? I thought it was suggested that the parties be permitted to submit their arguments in writing without introducing any new ideas. Is that the case?

56. The President: So far I have only had a request from India. If Pakistan would make a similar request, I would consider it in the same way, but the Representative of Pakistan has already indicated the difficulties he would have with that request. The Representative of Pakistan.

57. Mr. Pirzada: Mr. President, the full arguments have been advanced here. They have been recorded and I am sure the Secretariat will make the verbatim record available as soon as they can. Therefore the honourable members will have access to the arguments. They already have the written objections filed by India and time is of the essence in these proceedings in view of the urgency. I therefore have already opposed this request.

58. The President: Thank you. The Representative of Tunisia.

59. Mr. El Hicheri: I should like some clarification on this request made by the Delegate of India. Does it, as I understood, mean that we shall have to wait until we have a short memorandum, explaining perhaps more concisely and precisely the preliminary objection, before the Council takes a decision on the validity of this objection? Is my understanding correct? I shall continue after I have an answer.

60. The President: Yes, undoubtedly that would be the case. The Council would not go into the deliberations until it had received this additional brief. If I was going to put a question it was going to be in two parts unless India modifies the request to include a time-limit, because I think there will be two things to decide: first whether the Council agrees that there may be such a written presentation and if it does - which would be determined by a vote - what time would be given to India to make that presentation. The Representative of Tunisia.

61. Mr. El Hicheri: Mr. President, in your opinion is such a procedure normal? In other words, is it compatible with the Rules for the Settlement of Differences? I have Article 5 of the Rules before me and it says this:

- "(1) If the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant, he shall file a preliminary objection setting out the basis of the objection.
- (2) Such preliminary objection shall be filed in a special pleading at the latest before the expiry of the time-limit set for delivery of the counter-memorial."

Unless I am mistaken, this operation has been completed.

- "(3) Upon a preliminary objection being filed, the proceedings on the merits shall be suspended and, with respect to the time-limit fixed under Article 3(1)(c), time shall cease to run from the moment the preliminary objection is filed until the objection is decided by the Council.

73. (4) 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."

Now if my understanding is correct, the Council has heard the two parties. This is an oral procedure. I do not wish to embarrass you, but I would seek your advice, Mr. President, because in that capacity you certainly have more experience in these matters than anyone else here, on whether the filing of another brief is part of such a procedure. My own opinion is quite clearly that it is not, but I would like an opinion from you, perhaps with the assistance of our Legal Bureau, which may be more impartial than I. I may be biased in this regard, but I must say I am a little surprised at the request.

62. The President: I don't feel embarrassed. I am always ready to give an opinion and to be corrected. As I understand it, although it is not foreseen in the Rules that this be done, it is not forbidden by the Rules either, and there is a general provision - Article 28, paragraph 1, to which the Representative of Pakistan already referred - which says that the Council shall determine the time-limits to be applied and other procedural questions relating to the proceedings. The second sentence is also important: "Any time-limit fixed pursuant to these Rules shall be so fixed as to avoid any possible delays and to ensure fair treatment of the party or parties concerned." The Representative of France.

63. Mr. Agésilas: I must say that I have the same fears as the Representative of Tunisia. If we follow the procedure suggested - that is to say, if we agree to the submission of a new document - I think we risk deviating from the procedure. Suppose that when this document is compared with the verbatim which the Secretariat will establish, differences appear, or at least certain members of the Council find differences, between the way in which the Representative of India, in all good faith I am sure, summarizes in the document what he has said and the way in which the Secretariat reports it in the minutes - we shall, I think, be creating a source of very difficult discussions. I am afraid, therefore, that the adoption of this procedure would mean that we would not be strictly respecting the provisions of our Rules for the Settlement of Differences. That is my opinion, Mr. President.

64. The President: Any other views on this question? The Representative of Senegal.

65. Mr. Diallo: I see this as a sort of debate on procedure. You, Mr. President, gave an affirmative reply to the question of the Representative of Tunisia, but I do not think India has yet given a reply to this question - because they are lawyers we have with us. Do they think it is necessary to wait for this document before deciding? I do not think so, or else I have not understood very well. Could I be enlightened on this question?

66. The President: No, the Chief Counsel for India has requested the Council's permission to file a brief ("mémoire" in French), in writing of course, within a certain time-limit and this brief will be related to arguments that have been adduced in this hearing today. That is as far as it goes. The Representative of Senegal.

67. Mr. Diallo: Yes, that is what I understood. Obviously everyone is free to write his own book afterwards, because really it has been a very instructive meeting for me - I have heard some rather extraordinary things. But the problem is this: after hearing the two parties on the question, are we fully informed or are we not? I think when you asked "Has anyone any questions?", no one raised his hand. Everyone is quite clear. Therefore we now have a decision to take. If tomorrow we receive a fine document which deals with everything that has been said here, and if it is in conflict with the minutes, what is governing for us is the minutes, which will be distributed and which we shall send to our administrations. I have not really understood very well what relation it is desired to establish between this new document India proposes to present to us later and the decision we have to take today.

68. The President: Well, as I understand it, if the Council would agree to the request of India, there would be no decision now. The decision of the Council on the Preliminary Objection of India would be taken only after this other document has been received. The Representative of the Congo.

69. Mr. Ollassa: I take the floor prudently and simply to ask a question, because I did not understand the last interventions very well. My understanding was that you had replied in the negative to the question put by the Representative of Tunisia - in other words, you said that the Indian request was receivable at any time, having regard to the actual procedure. That was not implied in the question put by the Representative of Tunisia. I should therefore like to have clarification.

70. The President: Well, I understood the question of the Representative of Tunisia to be whether it was in order, under the Rules for Settlement of Differences, to agree to the request of India. My answer was that it was really up to the Council to decide whether it was permissible or not because the Council has Article 28 and can decide as it wishes. The Representative of Tunisia.

71. Mr. El Hicheri: I apologize for developing my thought a little further, but I am going to let this point drop, because really it is procedure piled on procedure. We are meeting now on a question of form and I do not want to get into a whirlpool that risks carrying us far on the subject of procedure. My doubt, Mr. President, is only about whether the hearing is an oral hearing or whether, once it has been settled, it is possible to make further written submissions. Article 28 says nothing of the kind. It speaks of time-limits. The Council may now decide to extend the time-limit, but it is not said in Article 28 that it can authorize the publication of other documents. That was the specific question I put.

72. The President: I read the whole Article, but the words that would apply to your question are 'and other procedural questions relating to the proceedings' - 'other procedural questions'. So it is for the Council to decide whether it has enough with this oral hearing or whether it wishes to wait and have more. It is, I think, up to each Council Member. I shall have to put the question to see whether the Council wishes to accede to the Indian request and I am going to do so now unless there is more discussion. The Representative of Belgium.

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73. Mr. Pirson: I am a little concerned about the procedure. The French text of Article 28 is preceded by four words, "Mesures intéressant la procédure" ("Procedural Measures"). In other words, the three paragraphs of Article 28 have to do with procedural measures. Article 5, paragraph (4) says "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." I have made the greatest efforts to be absolutely neutral on this question of procedure, but should we not reflect before putting this question to a vote? In the suggestion that has been made to us is there not something that is not completely in conformity with Article 5, paragraph (4)? - because Article 28 is entitled "Procedural Measures". I would like to have the advice of our Legal Bureau on this point. I am quite ready to take a decision, but I should like to be absolutely sure that we are not starting down a path that was not the one envisaged when these Rules were established.

74. The President: The Secretary General agrees that the Legal Bureau may reply. Dr. FitzGerald.

75. Dr. FitzGerald: Thank you, Mr. President. I will be relatively brief on this question because I think it is quite clear. It is not unusual for a judicial tribunal - and the Council is now so acting under the various constitutional provisions that we have in the Convention, the Transit Agreement, and the Rules for the Settlement of Differences - to request counsel, after a long and difficult argument, to present written briefs. Now this does not mean that new issues are to be raised or that new arguments are to be brought forward; what it really means is that the court would expect a systematic presentation of what has been adduced by each of the parties and within the framework of the arguments adduced by those parties. It would not expect to have new issues raised and new rebuttals brought forward and so on. I say it is not unusual, as a matter of practice, for a court to request this or for the court to agree, should it so desire, reserving all of its rights as a court, to the request of one of the counsels or counsel on both sides to file such a document. An entirely separate question is whether or not in this particular instance the Council would wish to take a particular action. That is of no concern to the person who is now speaking to you. Thank you, Sir.

76. The President: The Representative of Australia.

77. Dr. Bradfield: Like the Representative of Belgium, I am trying to be completely impartial in this matter and also under Article 28 to look to a procedure which ensures fair treatment for both parties. I understand that you proposed to put this question in two parts - first whether or not the Council would permit India to submit another document on this subject, and, second, what time should be allowed. I am afraid that I could not give any decision on the one without the other, because to me the time involved is more important than the written arguments put forward - or as important.

From the statement of the Counsel for India I understood that he would expect, if this was agreed to, that the new document would leave for ICAO in about two weeks' time. That would mean that it would reach us in about three weeks' time. It would then have to be translated and it would therefore be another month before the Council would see it. If that is correct, I have great worries about it because I think it is getting to be a rather long time. On the other hand, if the Counsel for India could produce the document in two days instead of in two weeks, I would feel more inclined to accept such a situation. Again, I am trying to be completely impartial and to follow the principles of Article 28 and I would ask that the two matters be considered together - whether or not we should accept it and the time by which it is to be presented to us.

78. The President: When I referred to the possibility of taking this in two steps, I said I would do so unless the Representative of India would like to include a time-limit in his request. Perhaps you could speak on this, Mr. Palkhivala.

79. Mr. Palkhivala: Frankly, the idea was not to inflict upon the Council any further piece of written work; the idea was merely to assist the Council. In fact, speaking for myself, I would be quite content if, instead of a separate memorandum, which I thought could be drafted with some care and attention, the verbatim notes are made available. My only desire - I shall be very frank - is this. As I see it, there is much more to this matter than may appear to some people at first sight. My only desire is that in a matter of such far-reaching importance every State represented here should have the opportunity of considering the full arguments before coming to a conclusion. Now, I am going to speak very frankly again, because there is no use keeping back anything in my mind. If the normal practice of a particular State is to allow its Representative here to make up his own mind after hearing all the arguments, that is all right because the delegates have been kind enough to hear us very patiently. If, on the other hand, since the matter is one of the most far-reaching importance, there are Representatives who would like to have instructions from their Government or Administration - and that is not for me to ask; I am only stating a possibility - then I would say that even if you dispense with the memorandum, I would appreciate having at least the verbatim notes made available to every member before a decision is taken. As I said, my desire here is not to gain time. I am not interested in that at all. I am only interested in seeing that a just, fair decision is reached after full consideration. For that purpose I suggested a memorandum. The alternative, if you don't want a memorandum, is to have the verbatim notes made available to every member before a decision is reached. This, again, is a request; I cannot insist upon it. It is for this learned, honourable tribunal of Council Members to consider whether this request is fair. If they think it is fair, I would appreciate their saying "All right, no memorandum, but let all the verbatim notes be made available." That is all. Thank you.

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80. The President: Well, supposing that there would be no agreement to decision right away or will wait for the verbatim minutes to be available is something we shall only know when we go to the deliberation stage, which is the next step. Perhaps we should have a coffee-break now and return in fifteen minutes.

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81. The President: The Council is again in session. We still have to decide on this question and I am not sure whether at this moment we have a request from India for permission to present a written brief on the arguments already adduced. You indicated that it was perhaps either that or having the verbatim available, but, as I said, whether the Council is ready to take a decision now or will wait for the verbatim is something we shall know only when we go to the deliberations. So I would not like you now to sign a blank cheque, because you might not get it afterwards, but I leave it to you.

82. Mr. Palkhivala: Mr. President. My request to the honourable Members is either to have a memorandum from India setting out the arguments or, alternatively, the verbatim notes, and to consider and take them into account before coming to a decision. If the honourable Members want neither and are prepared to take a decision without the memorandum, without the verbatim notes, on a matter of such far-reaching importance, it is their decision.

83. The President: I take it, then, that there is no request at the moment. Perhaps when we come to the deliberation, the question of whether the Council should wait for the verbatim will have to be subject to discussion also. Is there anything more on the hearing itself before we enter into the so-called deliberation? Apparently not. Then we are going to go into the deliberation. I had indicated at the beginning of the meeting that according to the advice I had received, when the Council starts its deliberation, the usual court practice will be followed of having the Agents withdraw from the room. India and Pakistan will, of course, still be represented by other representatives whose names I read at the opening. I will ask the Chief Counsels of India and Pakistan whether they have anything to say before we begin the deliberation.

84. Mr. Palkhivala: Nothing further, Mr. President. Thank you.

85. Mr. Pirzada: Mr. President and honourable Members of the Council. I would just like to take this opportunity of expressing my deep gratitude for the indulgence shown to us. Thank you.

(The Agents and Chief Counsels for India and Pakistan withdraw.)

86. The President: Before we enter into the discussion I would like to know whether the request for a verbatim record applies also to this part of the discussion. The Representative of the Congo.

87. Mr. Ollassa: Does Article 30 of the Rules not apply in any case?

88. The President: Yes, but you were not here yesterday when I gave the following explanation. The Secretary General has been keeping verbatim transcripts of all the proceedings pertaining to this case since the very beginning, but, so far, they have just been included in the files of the Organization and will be made available if any party or even the public would like to have access to them. To save work we have not been distributing them in the three languages. However, yesterday, when we started the hearing on the Preliminary Objection, it was agreed that we were going to have verbatim in the three languages of everything that would be said yesterday and today. My question now is whether this applies also to the deliberation. Do you still want the verbatim? The Representative of the Congo.

89. Mr. Ollassa: On what would any difference be based? I ask you this, Mr. President, because you have asked us whether we want the verbatim or not. Why would there be a difference in procedure?

90. The President: For the hearing, the Council wanted to have all the arguments in writing, particularly because both parties have made important presentations. We are now going into a discussion which is closer to the usual type of discussion the Council has or which is similar, let us say, to the discussions we had in Vienna when we set the date, etc. But I was just asking a question; I am not suggesting that there should not be verbatim. I just want to know so that the necessary steps are taken. The Representative of the Congo.

91. Mr. Ollassa: In view of the importance of the question, Mr. President, we should follow the same procedure.

92. The President: Then we shall continue with the verbatim. We now enter into the deliberation on Case 1 and the basic proposition before the Council is the one presented by India, namely, that the Council has no jurisdiction in this Case. The Representative of the United States.

93. Mr. Butler: The remarks I have to make now are necessitated by the references on many occasions to the position stated by the United States in response to a question in the court on the Namibia case which has just recently been decided by the International Court of Justice.

I would like to make the position of the United States clear during this discussion phase, because the response of the United States has been submitted as part of the record and it will be noted that the reply of the Counsel for the

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United States in that case was addressed to the question of the suspension or termination of a treaty by one party or brought about by the material breach of that treaty by the other party. There have been extensive references to Article 60 of the Vienna Convention on the Law of Treaties and the question of material breach as far as that Convention is concerned. I should like to refer for a moment, if I may, to Article 65 of that Convention. Now, while the Vienna Convention may not be in force, as has been pointed out, many of its Articles are codifications of existing international law. While paragraph 4 of Article 65 may not have the force of a treaty among States around this table it should be kept in mind as a provision thought necessary by the drafters of the Vienna Convention concerning the rights and obligations of parties to any treaty which has a provision regarding the settlement of disputes. Article 65 deals with the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty. Now, obviously, the establishment of a procedure such as this is not based merely on codification of existing international law, but it is important that paragraph 4 provides that the procedure for notification of other parties to the same treaty does not affect the rights and obligations of parties to the treaty or any provisions in force which bind the parties with regard to the settlement of disputes.

It is the United States position - and our response to the Court in the Namibia case should be read in this context - that Article 84 of the Chicago Convention, as well as Article 7 of the Mandate which was the subject of the Namibia case and refers to questions of interpretation and application of the terms of the Convention, includes questions related to any provision, all provisions, of the Convention. It does not seem possible to us that one party to a convention or a treaty may negate procedures for the settlement of disputes by stating that the treaty is no longer in force and thereby depriving of its jurisdiction to settle the dispute the tribunal that has been given jurisdiction in the settlement of disputes. Thank you.

94. The President: Is there further discussion? The Representative of India.

95. Mr. Gidwani: Mr. Chairman, I am in some difficulties. I do wish that the legal point that is being raised at this stage had been raised when the lawyers were present here. However, I will try my best to answer my friend from the United States.

Briefly, the position taken by him is simply this: that the words in Article 84 of the Convention, when they refer to interpretation and application, would seem to cover each and every grievance, each and every dispute, each and every difference, but as the Chief Counsel for India explained this morning, if that were so Article 84 would simply say that if any disagreement whatsoever between two Contracting States should arise, the Council has jurisdiction. Our contention, Mr. President, is simply this, that the words "interpretation" and "application" have a narrow, restricted meaning and cannot be deemed to include termination. Thank you.

96. The President: If no one else wishes the floor, I will have to put the next question. That is whether the Council is ready to go now to a decision on the basic questions raised by India. Do I take the silence as meaning that we can proceed with the discussion and eventually reach a decision? The Representative of the United Kingdom.

97. Air Vice Marshal Russell: On this question of going now to a decision, Mr. President, we have heard lengthy discussions and expositions, although they may be brief in legal terms, and not being a lawyer, I could not regard it as reasonable for me, myself, to participate in a decision here and now on the merits of the Preliminary Objection, which for me turns entirely on questions of law. To that extent I shall therefore not be able to support any positive action on the substance of the matter. For me it is essential to obtain legal advice on the arguments which have been presented before so participating.

98. The President: Further discussion or views? The Representative of Czechoslovakia.

99. Mr. Svoboda: I should like to express almost the same view as the Representative of the United Kingdom has expressed, because I too am not a lawyer. During these two days we have heard many things linked very closely to international law and I too would like to have the possibility of consulting my Administration.

100. The President: Since there are two Representatives, at least, who have some difficulties, I think the first thing we have to settle is whether we proceed with the discussion and the decision now or whether there should be some interval. The Representative of Belgium.

101. Mr. Pirson: We have just heard the Representatives of the United Kingdom and Czechoslovakia request deferment to permit them to receive instructions. Could we know how long a delay they have in mind? Is it, for example, a week?

102. Air Vice Marshal Russell: What I said, Mr. President, was that I could not participate in a substantive decision at this time, unfortunately being without legal training myself and not having had the opportunity to seek legal advice. I was not asking for time. I was simply saying that I was, unhappily, not in a position to evaluate from a strictly legal point of view the presentations which have been made to us.

103. The President: That clarifies your position very well, I think. I don't know whether the Representative of Czechoslovakia wishes to say more.

104. Mr. Svoboda: I would need a minimum of eight or ten days, if possible, to consult my Administration.

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105. The President: The Representative of the Congo.

106. Mr. Ollassa: Mr. President, through you I would like to put a question to the Representative of the United Kingdom. Does he mean that he will never participate in a decision? - because he said he could not evaluate the question but made no mention of any delay. What does that mean, Mr. President? Is he going to consult to obtain advice so that he can participate or does he mean simply that he will never participate because he cannot make the evaluation himself? I did not grasp very well the nuance there was in the reply he gave us. I admit it must be very difficult for him to state his position very clearly, but I did not understand it very well. We must know if deferment will permit the entire Council to participate in the decision or not, because if there is deferment and we arrive at the same result - some saying that they cannot evaluate the correctness of the legal presentation - it would be very bad, Mr. President.

107. The President: I understood the second intervention of the Representative of the United Kingdom as meaning that if the Council decides now he will not take part. Perhaps he doesn't want to say what he plans to do in the future; so it is completely up to him to answer or not. The Representative of the United Kingdom.

108. Air Vice Marshal Russell: Of course, Mr. President, I was not saying I wouldn't participate. If the distinguished Representative of the Congo had been present yesterday, perhaps even with his eminent legal training, he would have as much legal indigestion as I have. I don't wish to treat this matter in a spirit of levity; I am endeavouring to treat it seriously. The essential point to me is that this is a legal question and for me - and I am not trying to extend my position to any other Representative on this Council - the expression of a view on the substance of the Preliminary Objection turns entirely on matters of law. Now I am not a lawyer and at this particular moment I am perhaps a little bit sorry and a little bit glad that I am not a lawyer, but it is a fact that I am not and it would be unreasonable - I think that is the right word - for me here and now to express, on behalf of my country, a substantive view on matters of quite complex law. All I am saying is that, for better or worse, I am not in a position to do so.

109. The President: The Representative of France.

110. Mr. Agésilas: Like the Representative of Belgium, I think that as it is evident that several of our colleagues need advice or instructions before a decision is taken, we must, in fact, consider deferment. I personally would be ready to participate in the taking of a decision immediately, but I must admit that what we have heard during the last forty-eight hours needs some digesting. We are, however, faced with a procedure in the Rules for the Settlement of Differences that is precise and indicates that after hearing the parties the Council must decide. The Convention, like the Rules, specifies that it is the Council which must decide; it does not say that the members of the Council must be lawyers. I therefore believe that, as the Representative of Belgium said, a deferment of eight days would help a certain number of our colleagues to obtain advice or instructions and it would certainly be desirable that the largest possible number of Council members be in a position to participate in the taking of a decision. I, for one, would have no objection to an interval of the order I have indicated before we have another meeting at which we can take a decision.

111. The President: The Representative of Tunisia.

112. Mr. El Hicheri: I believe the question is basically very simple. There has been a long discussion, but essentially it was on the question of whether the Council was or was not competent in this affair, and I think that since the preliminary objection was filed, chancelleries and national administrations have had time to study it and form an opinion on this question. Some of us think that the Council is competent; others are of the opinion that it is not. In any event, what I want to emphasize is that the question is simple enough. The argumentation has been rather long in my opinion, but that is another matter. The question is simple and I think national administrations and legal services have had sufficient time to make up their minds on the validity of the preliminary objection, just as India and Pakistan have been able to make written submissions.

I am a little embarrassed because I do not see exactly under what Article of the Rules for the Settlement of Differences deferment could be envisaged. The Rules are obviously quite flexible. In principle, we should take a decision immediately after hearing the parties. There can be objection, but it should be couched in the form of a proposal and could then be voted on. That is what I wish to emphasize, Mr. President. To be very frank, I do not think eight days would be long enough for those who are not sufficiently informed on the question even though it is almost two months since the preliminary objection was filed and the legal services and administrations of the countries represented on the Council have had time to consider it. I think that if some of us wish to request deferment for one reason or another, they should, in these conditions, make a firm proposal specifying a time-limit. I have the impression that it may be covered by Article 28 or some other provision of the Rules, which seem fairly flexible. In principle, however, we should pass immediately to a decision after hearing the parties. Now it appears that some of us are not ready to do so and there should therefore be a proposal for deferment in due and proper form.

113. The President: The Representative of Senegal.

114. Mr. Diallo: My delegation is a little embarrassed by this situation. We are in fact, moving along a procedural trail that is rather delicate. I understand the attitude of the delegations who would like a deferment because they need instructions to be able to take a position, but I reject the argument that the twenty-seven of us here must be lawyers to decide questions of this nature. My personal opinion is that not every science may be characterized by logic and good sense, but any one worthy of the name is. In any event, we have heard the arguments of the two parties, we have evaluated them, and the question before us seems to me much simpler than all we have heard. Perhaps I am going to be a little brutal, but the question is as simple as this: Is the Council going to survive or die? Is it going to take on its responsibilities or refuse them? For me the problem is no more complicated than that.

Now there may be a problem of digesting all we have heard during the last forty-eight hours, but the decision does not bear on the merits of the dispute between India and Pakistan. The question before us is whether the Council is competent to deal with the problem and I think that in the two months, if not more, that we have had, everyone has made up his mind - to borrow the words of our colleague from Tunisia - not as to the substance, but as to the procedure. I say this to explain that I am ready to vote today on this question, but I do not want to press those who wish to have advice. If we must defer the vote, we must know whether or not the debate is closed, because if it is not closed, if we have to set aside another forty-eight hours in the month of August - well, it is very fine to have marathon sessions like this, but we must know exactly what is wanted and what we are going to do. If the debate is closed, we are going to have a meeting from 10 o'clock until noon, we know that we are here to vote, and those who do not have instructions can stay away if they wish, but we shall have fixed a time-limit for coming to a vote. We must think of the Delegations of India and Pakistan, who come from the other end of the world. Are they to be forced to wait around here for eight or fourteen days so that they can answer questions that are going to be put to them? I am not very well informed on the procedure it is desired to follow. In any event, if the debate is closed and if we must give time to the Representatives who want precise instructions from their administrations, I do not think it would be wise to oppose deferment, although I really do not see of what use it will be.

115. The President: Before we proceed I would like to make clear that the fact that we are now in the deliberation stage means that the hearing stage has been closed, so there is no question of going back to it. It is only a question of deliberations so that the Council can decide whether or not it has jurisdiction. The Representative of the Congo.

116. Mr. Ollassa: I would like to say that although I have not had the benefit of the brilliant argumentation here yesterday, I am ready to take the decision that has to be taken, because, as many speakers have said, the problem has been with us since Vienna and we have had time to think about it. Obviously it can be said that to take a decision without having heard the parties is perhaps unjust, but in a certain way the problem is objective. It is a matter of knowing whether the Council is competent or not. It is a legal problem that does not depend on the arguments of one party or the other and in my opinion it is a problem that presents itself in a rather simple way. It is claimed that we need to have in writing all the argumentation presented here. Well, I heard a good part of it and without being a great lawyer I can say immediately that many of the arguments were foreseeable and imaginable and therefore we have already taken them into account in our reasoning.

In a question as important as this, Mr. President, what is important is that the Council, as a body, should be ready to take a decision. It happens that this is not the case and because of that I fully agree that we should have a delay. I think, too, that this would be equitable to the two parties, because one wanted no delay, the other asked for fourteen days, and a week's deferment would split the difference - to use a rather vulgar expression. I shall therefore vote - if there is a vote - with those who want a deferment of eight days, which I think was one of the figures mentioned. Eight days would be much better than ten, because ten is too close to fourteen.

117. The President: Before we continue, I would like to give some information regarding documentation. You recall that yesterday there was a request for verbatim minutes and they, of course, will take time, because they have to be translated. I think the Secretary General reckons that for these four meetings, which have been rather long, full minutes in the three languages will require between three and four weeks. On the other hand, I understand that part of the Summaries of Decisions has already gone to the Language Branch, more will be going, and just to be on the safe side, the last one, in other words this afternoon's, should be distributed in the three languages, of course, by noon next Friday. The Representative of Italy is next.

118. Dr. Cucci: I had not intended to speak at this stage, but I would like to say, first, that if the Council's decision is to have a deferment, I shall vote for it. If the Council wishes to take a decision immediately, I can do the same, but in my opinion we are faced today with an alternative. Is deferment necessary to enable certain Representatives on the Council to digest what they have heard and then - and this is the essential - inform their respective administrations? For me "inform administrations" means to inform them fully. As has been said, yesterday and today we have heard a whole series of very interesting things. We therefore need the minutes. The Summaries will be of no use whatever, especially for people who have no knowledge of law. That is why I say that it is absolutely meaningless to speak of a deferment of eight days. It does not give Representatives on Council the possibility of informing their administrations. The alternatives, in my view, are to take an immediate decision - and I am ready to do so - or to have a reasonable deferment, that is to say, a deferment that will enable all of us to inform our administrations fully. The subject is either difficult or not difficult. If it is difficult, we must have the documentation from the Secretariat. Therefore - and I repeat that I am advocating neither one thing nor the other - if I am obliged to take a stand on deferment, it must be on a deferment that gives everyone the possibility of informing his administration completely. You obviously cannot inform administrations on the basis of Summaries or personal ideas that may be in conflict with the Secretariat's record when that appears. That is why, for me, eight days is not a reasonable deferment. If an eight-day deferment is the alternative, it would be better to take an immediate decision.

119. The President: The Representative of Belgium.

120. Mr. Pirson: We are ready to participate in a decision today. We have studied with a great deal of interest the preliminary objection filed by India, which was first distributed in English on 3 June. We have also been able to study Pakistan's reply, in English, to India's preliminary objection. Because I was in Europe at the time, this study could be made in consultation with the competent services of the Belgian Government. I personally consider the very brilliant presentations we have heard yesterday and today only an explanation of the position that had been given to us very clearly in the two documents, and consequently it does not appear indispensable to defer the decision of the Council. However, as certain Representatives wish to have deferment, I think we should give it to them, but in the meantime do nothing that could be considered contrary to Article 5 of the Rules for the Settlement of Differences. In other words, the Council must take a decision, but it can take that decision in eight days, ten days or fifteen days. The only problem we have at the moment is this. If

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those Representatives wish to be informed of the views of their governments, it means that they consider that the two documents that have been presented - the preliminary objection of India, distributed on 3 June, and Pakistan's reply to it, distributed in English on 9 July - were not sufficient to permit them to come to a conclusion. In that case it is essential for these Representatives to have at least the Summary of Decisions. I am not speaking of the minutes, because I believe that to ask for them means deferring any decision for at least a month, and it seems to me that in the circumstances that would not be reasonable or in conformity with Article 28 of the Rules for the Settlement of Differences.

It seems to me, however, that we should be able to have the Summary and, when we have it, those Representatives who have just expressed a desire to be able to consult their governments can do so. If you tell us that the Summary will not be available until next Friday, that is to say, in nine days, I believe it would be difficult for us to take a decision on the subject that same day. If we really wish to give the Representatives who wish it time to consult their administrations, we must give them a few more days - the shortest time possible compatible with Article 28 of the Rules for the Settlement of Differences. It seems to me, then, that we must give twelve, thirteen, fourteen days to permit speedy consultation with governments.

I shall therefore not oppose any request for deferment of a decision for fourteen days, unless the Summaries are available sooner. If we could have the Summaries - and I realize that it is an exorbitant request I am making of the Secretariat - next Monday, we could, I think, decide the question on Monday, August 9. We would be allowing a week after the distribution of the Summaries. If the Summaries can be distributed only next Friday, I think it would be really difficult not to defer the decision on the subject for five or six days. That would mean that the decision would have to be taken by the Council about a week after the distribution of the Summaries, and when that is will depend very much on the work of the Secretariat. We know that the particular person concerned always works with zeal, enthusiasm and intelligence, and in this case we hope she will continue to do so, but we must also be reasonable. We must not demand of others what we do not always demand of ourselves, Mr. President, that is to say, to work day and night so that we can have this material.

In sum, therefore, I would like to say that I shall not oppose any formula that consists in asking the Council to take a decision a week after the distribution of the Summaries of the debates in which we have just participated.

121. The President: Thank you. The Representative of Uganda.

122. Mr. Mugizi: Like the Representative of Italy, I would prefer, if we have a delay, that it be a meaningful one. I myself would be prepared to take a decision now and it would then be understood that my decision would be limited to my knowledge of the Convention, the Transit Agreement and the Rules for the Settlement of Differences. The Namibia case and all the other cases that have been cited and the Vienna Convention are the things which put us off. These are the things

about which we need to consult lawyers whose business is much wider than our business here. If we are to make consultations, to make sure that our advisers are going to look into all these matters that have been discussed yesterday and today, we need enough time. This is not something you can do after getting a summary of our deliberations yesterday and today, sending it to your Government and saying "Will you give me a reply within five days?" It would take time. Either we delay the decision for three or four weeks and get advice on the implications of the Vienna Convention and all the cases which have been mentioned, or we take a decision now, basing it on the documents we have here. It all depends on what we consider to be the function of this Council. If the function of this Council is to deal with all aspects of international law, if our decisions must take due account of all the international decisions which have been made, of all the cases which have been cited here, then we have got to have time to examine these things and get proper advice, but if we are expected to deal only with the matters dealt with in the Chicago Convention, in the Transit Agreement and in the Rules for the Settlement of Differences, we can take a decision today. Things which put us off are matters which are not defined here. For instance, it was being argued that a convention could be suspended by one State in respect of another State or terminated by one State in respect of another State. This is the sort of thing about which I am in doubt. I myself didn't know this could be done and I was prepared to deal with the matter recognizing that I am ignorant of anything outside the Convention. I would prefer to take a decision today, Mr. President, but if we are to defer it, the period of deferment should be long enough to permit sufficient investigation of the matters which have been cited.

123. The President: Thank you. The Representative of Spain.

124. Lt.Col. Izquierdo: In general I agree with what the Representatives of Italy and Uganda have said. Basically, I am prepared to take a decision today. We actually have in our hands the documents we need. We have the Convention, the Transit Agreement and the Rules for the Settlement of Differences. We also have India's preliminary objection and Pakistan's reply. Thus the only new elements that have entered into the discussion are the masterly presentations made by the Counsels for India and Pakistan. The Summary of Decisions really would not help us, because what we have to think about seriously is in these masterly presentations. Therefore, to consult my Government on these presentations, I must first have the verbatim from the Secretariat. Then I must send it to my Government. Then, of course, there will have to be a meeting of lawyers specialized in international law, which will take five or six weeks. I therefore am in favour of taking a decision today, Mr. President, or, in the extreme, six weeks from now, so that our administrations can study the new elements, and only the new elements, introduced in the masterly presentations of the Counsels for Pakistan and India.

125. The President: The Representative of Colombia.

126. Major Charry: I was going to say practically the same as the Representative of Spain. Eight or ten days would be of no use to me. I shall have to wait three or four weeks for the detailed minutes. I would then have to send them to my country, the lawyers would meet - usually there are four of them, each with a different point of view. This would take two or three months, and I do not think that would be fair to the parties to the dispute. On the other hand, I am not a

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lawyer, but I understand that law is the natural order of things and I do not think it is necessary to go into further details. As other Representatives have said, the Council either is or is not competent to deal with this question. I have formed an opinion, and I am ready to vote immediately.

127. The President: The Representative of Tunisia.

128. Mr. El Hicheri: Just a few words on this question, Mr. President, because, really, between deferment and no deferment, memorials and counter-memorials, time-limits, etc., I am beginning to get lost. We are advancing, but always running away, and I ask myself when this is going to end. Besides, this seems to me more and more like a Kafka novel; I will say no more than that.

I wish only to ask you a small question, Mr. President. When we met in Vienna and decided to meet in Montreal at this time - since it was your humble servant who proposed the date that had a chance of being acceptable to the two parties - and to interfere with the holidays, the private life, the professional life, of many of our colleagues, was it simply to hear the parties and then go away, or was it to hear the parties and take a decision? That is the question I wish to ask you, Mr. President, because this affair is beginning to become rather ludicrous. Come, listen, leave, return - this must end some day.

129. The President: I don't know what the Representatives on the Council had in mind when they took the decision. That point was not specifically discussed. It was simply agreed that the Council would meet on the 27th of July to hear the parties on the Preliminary Objection. We didn't say more than that. So perhaps some people thought that we were going to take a decision and others did not. The Representative of Senegal.

130. Mr. Diallo: Just to express my opinion, Mr. President, and to say that if you ask us to decide whether we should vote today, I shall vote in favour of doing so. If you ask us whether we wish to defer, I shall abstain and the decision will be taken by the majority of my colleagues. As for having meetings in August, I would hope that after the final meeting on this question we decide to have a month's vacation in January or February, because we are in danger of not having any this year.

131. The President: I am hesitant to put any questions because you will recall that any decision the Council takes, even for a delay, requires a statutory majority; it requires 14 votes. I therefore don't want to put anyone in difficulty. That is why I don't want to put questions until I really have to, but of course I shall have to do so eventually. The Representative of France.

132. Mr. Agésilas: I have already indicated that I was ready to take a decision immediately, and a little while ago I expressed an opinion favourable to a deferment that appeared reasonable to me. But I am not in favour of a deferment of the length now being envisaged and I think, therefore, that a decision should be taken immediately, that is to say, tomorrow morning, because it will be necessary in some cases to give explanations of vote. In conclusion, then, I am in favour of a quick decision tomorrow morning.

133. The President: I have had no proposal for a delay. There have been only suggestions so far. May I take it that the Council will meet tomorrow morning and proceed to take a decision? The Representative of India.

134. Mr. Gidwani: Mr. President, the decision is naturally for the Council to take, but I would just like to draw attention to one factor: that in Vienna you took a certain decision and that decision was that you would have this meeting here to hear the parties. I am rather surprised that after hearing the parties you should immediately try to reach a deliberative judgement without making available to the Members of the Council either a summary or a verbatim record.

Mr. President, I also want to point out that the Government of Pakistan was good enough to furnish a reply to the Preliminary Objection filed by India, but there is no mention in the Rules of the submission of a reply. You were good enough to circulate that reply. It reached us on the 20th of July. It was sent on the 22nd to our Chief Counsel, who was to leave on the 24th. We therefore did submit to you this afternoon that we would like to send a detailed memorandum on this subject to clarify the pleadings we have taken. You have also heard today that there are certain Council Representatives who would like to report to their Governments on the legal issues involved and obtain their advice, but it seems to me that the Council perhaps wishes to consider taking a decision now. I would submit to you, Mr. President, that any decision you try to take today will be a vitiated decision if you do so without proper record, without proper minutes, without proper notice, when at the meeting in Vienna you decided that you would merely hear the parties in Montreal on July 27th.

135. The President: Regarding what we decided in Vienna, I read the record and I think we have no more than that. Perhaps without now deciding to take a decision tomorrow, we could say that we shall continue this discussion tomorrow morning. For the time being I have no proposal for deferment; so unless there is such a proposal tomorrow, on which we will have to vote, the Council will eventually reach the point of having to decide. We shall therefore meet tomorrow morning at 10 o'clock. The order of business for tomorrow has already been prepared. After the end of the discussion on this question, we shall go into the other question of Resolution 39/1. The Council is adjourned.

Annex 8

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31/8/71

COUNCIL - SEVENTY-FOURTH SESSION

Minutes of the Sixth Meeting

(The Council Chamber, Thursday, 29 July 1971, at 1000 hours)

CLOSED MEETING

President of the Council: Mr. Walter Binaghi

Secretary: Dr. Assad Kotaite, Secretary General

PRESENT:

Argentina	- Com. R. Temporini	Japan	- Mr. H. Yamaguchi
Australia	- Dr. K. N. E. Bradfield	Mexico	- Mr. S. Alvear López
Belgium	- Mr. A. X. Pirson		(Alt.)
Brazil	- Col. C. Pavan	Nigeria	- Mr. E. A. Olaniyan
Canada	- Mr. J. E. Cole (Alt.)	Norway	- Mr. B. Grinde
Colombia	- Major R. Charry	Senegal	- Mr. Y. Diallo
Congo (People's Republic of)	- Mr. F. X. Ollassa	Spain	- Lt. Col. J. Izquierdo
Czechoslovak Socialist Republic	- Mr. Z. Svoboda	Tunisia	- Mr. A. El Hicheri
Federal Republic of Germany	- Mr. H. S. Marzusch (Alt.)	Uganda	- Mr. M. H. Mugizi (Alt.)
France	- Mr. M. Agésilas	Union of Soviet Republics	- Mr. A. F. Borisov
India	- Mr. Y. R. Malhotra	United Arab Republic	- Mr. H. K. El Meleigy
Indonesia	- Mr. Karno Barkah	United Kingdom	- A/V/M J. B. Russell
Italy	- Dr. A. Cucci	United States	- Mr. C. F. Butler

ALSO PRESENT:

Dr. J. Machado (Alt.) - Brazil
Mr. L. S. Clark (Alt.) - Canada
Mr. B. S. Gidwani (Alt.) - India
Mr. M. García Benito (Alt.) - Spain
Mr. N. V. Lindemere (Alt.) - U. K.
Mr. F. K. Willis (Alt.) - U. S.
Mr. A. A. Khan (Obs.) - Pakistan
Mr. H. Rashid (Obs.) - Pakistan
Mr. Magsood Khan (Obs.) - Pakistan

SECRETARIAT:

Dr. G. F. FitzGerald - Sr. Legal Officer
Mr. D. S. Bhatti - Legal Officer
Miss M. Bridge - CSO

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SUBJECTS DISCUSSED AND ACTION TAKENSubject No. 26: Settlement of Disputes between Contracting StatesPakistan versus India - Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. The meeting opened with the statement by the Alternate Representative of India reproduced in Part II, paragraph 2 of these Minutes. A request for a legal opinion from the Secretariat on the validity of an immediate decision was denied on the ground that the Council was at this time sitting as a court and according to legal practice would have to pronounce on that question itself. The Representatives of the People's Republic of the Congo and Australia, however, disagreed explicitly with the Indian position and the Representatives of Norway, Canada and France disagreed with it implicitly in declaring their readiness to proceed to a decision forthwith. The Representative of the Czechoslovak Socialist Republic, supported by the Representative of the Union of Soviet Socialist Republics, proposed deferment of a decision until August 10th, but when put to the vote this proposal failed to receive the statutory majority which it had been understood from the start of the proceedings on the Pakistan application and complaint would be required for any decision, the result of the vote being 8 for, none against, and 10 recorded abstentions (the Representatives of Argentina, Brazil, Canada, the People's Republic of the Congo, Indonesia, Mexico, Norway, Senegal, Spain and Uganda).

2. The President then expressed his intention of putting to a vote the following propositions based on the preliminary objection:

Case 1 (Application of Pakistan under Article 84 of the Convention and Article II, Section 2 of the International Air Services Transit Agreement)

(i) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the Convention on International Civil Aviation.

(ii) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the International Air Services Transit Agreement.

(iii) The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the bilateral agreement between India and Pakistan.

Case 2 (Complaint of Pakistan under Article II, Section 1 of the International Air Services Transit Agreement)

(iv) The Council has no jurisdiction to consider the complaint of Pakistan.

The Indian Delegation asserted that this was an improper formulation. According to Article 5 of the Rules for the Settlement of Differences, if the respondent questioned its jurisdiction, the Council had to decide the question - in other words, the question of jurisdiction - as a preliminary issue before any further steps were taken under the Rules. The proper formulation therefore was "Has the Council jurisdiction to consider the disagreement in Pakistan's Application. . . . ?", etc.; any other would be prejudicial to India and contrary to the Rules. The President explained that the Council so far had been proceeding on the assumption that it did have jurisdiction; India had challenged its jurisdiction; the Council accordingly had now to decide on the challenge. The Representatives of Canada, the United States, Tunisia and the People's Republic of the Congo supported the President's formulation, maintaining that the purpose of the vote was to determine whether the challenge was upheld, not whether the Council had jurisdiction. The manner of formulation would not affect the results of the vote, but was important because of the precedent-making nature of the decisions to be taken.

3. The result of the vote on the first proposition was none in favour, 20 opposed and 4 abstentions (the Czechoslovak Socialist Republic, Japan, the Union of Soviet Socialist Republics and the United Kingdom). The Indian Delegation protested that the manner in which the vote had been taken was incorrect and inadmissible under the Rules for the Settlement of Differences, and requested a roll-call on the remaining propositions.

4. The President noted that only parties to the Transit Agreement* (except, of course, India) were eligible to vote on the second proposition, but the statutory majority would still be required for a decision. The result of the vote was as follows:

For	None
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Against:	Argentina, Australia, Belgium, Canada, the Federal Republic of Germany, France, Mexico, Nigeria, Norway, Senegal, Spain, Tunisia, the United Arab Republic and the United States (14)
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Abstained:	the Czechoslovak Socialist Republic, Japan, and the United Kingdom (3)
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5. After several Representatives had questioned both the necessity and the desirability of putting the third proposition to the Council - and, indeed, whether Pakistan had really sought relief from the Council under the bilateral agreement - the Representative of Pakistan, after consulting his country's Chief Counsel, stated that it had not; the bilateral agreement had been mentioned simply to reinforce the case being made for Council action under the Convention and Transit Agreement. The Indian Delegation protested, calling attention to the frequent references to the bilateral agreement in Pakistan's Application and to the fact that

* The following Council members are parties to the Transit Agreement: Argentina, Australia, Belgium, Canada, the Czechoslovak Socialist Republic, the Federal Republic of Germany, France, India, Japan, Mexico, Nicaragua, Nigeria, Norway, Senegal, Spain, Tunisia, the United Arab Republic, the United Kingdom, the United States of America.

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in the Preliminary Objection India had denied the Council's jurisdiction to handle any dispute under a bilateral agreement; they did not, however, insist upon the third question being put, having already gone on record as considering any decision taken at this meeting improper.

6. A roll-call vote was then taken on the fourth proposition, only parties to the Transit Agreement (except India) again being eligible to participate. The result was:

For: the United States of America

Against: Argentina, Australia, Belgium, Canada, the Federal Republic of Germany, France, Mexico, Nigeria, Norway, Senegal, Spain, Tunisia and the United Arab Republic

Abstained: the Czechoslovak Socialist Republic, Japan and the United Kingdom.

7. The result of the foregoing votes was the rejection of propositions (i), (ii) and (iv) and hence the reaffirmation of the Council's competence to consider the Application and Complaint of Pakistan. Explanations of vote were given by the Representatives of the United States, Senegal, Spain, Indonesia, Canada, Argentina, Tunisia and the People's Republic of the Congo, explanations of abstention by the Representatives of the United Kingdom, the Czechoslovak Socialist Republic and the Union of Soviet Socialist Republics; these are reproduced in full in Part II of these Minutes (Discussion). The Indian Delegation gave notice that India would appeal the decisions just taken to the International Court of Justice because the manner and method of the voting had been wrong and expressed the view that until judgement had been rendered by the Court no further action was possible.

8. In reply to questions, the President indicated that the period given to India for the filing of its counter-memorial, interrupted by the filing of the preliminary objection, would start to run again immediately and would expire in ten days; if the counter-memorial was not filed by the deadline, the Council would be informed by the Secretary General in a memorandum examining the consequences.

9. The Representative of Australia suggested that in communicating the Council's decision to India and Pakistan, the invitation to negotiate contained in its Resolution of 8 April 1971 should be reiterated.

DISCUSSIONSubject No. 26: Settlement of Disputes between Contracting StatesPakistan versus India - Suspension by India of Flights of Pakistani Aircraft over Indian Territory

1. The President: The Council is in session. This is the 6th Meeting of the 74th Session, and we shall continue with the deliberations concerning the Preliminary Objection of India in Cases No. 1 and No. 2. I understand that the Representative of India wishes to speak.

2. Mr. Gidwani: Thank you, Mr. President. Having regard to the trend of discussion yesterday, I think it is necessary for me to make a statement. I shall say only a few words but to my mind these words merit the closest consideration.

For the first time in the history of this Council it has been called upon to decide the question of the limits of its jurisdiction. It is a question of the most far-reaching importance involving the consideration of weighty arguments, principles of international law, and judgements and advisory opinions of the International Court of Justice. It must not be forgotten, Mr. President, that the Council is meeting today as a judicial court entrusted with the task of reaching a judicial decision on points of international law and the ambit of its own jurisdiction as an international judicial authority.

Now, Mr. President, even highly trained judicial minds would require time and the most anxious consideration before coming to a fair and a correct decision on an issue like this. It has been admitted very clearly that some of the members would like to have the assistance of their respective Governments in evaluating the arguments urged at the hearing. Some members have specifically stated that without an opportunity of discussing the matter with their Governments or Administrations, they would have to come to a decision not on the basis of the arguments urged, but on the basis of the pleadings filed earlier relating to the preliminary objections and the treaties and the rules applicable thereto. It would make the oral hearing an idle ceremony if time was not allowed to the members to study the verbatim records and take such assistance from their Governments or Administrations as they may require. If the Council were to come to an immediate decision on an issue of this character, without waiting for the verbatim records of the arguments and without waiting for the respective Governments of the Member States to consider those verbatim records of the full arguments, I am constrained to say that the Council would be failing to discharge its duty and to function as a judicial body.

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It is true that there should not be any delay in the Council arriving at fair decisions, but what is the meaning of delay? Delay means taking more time than is necessary for the judicial process. Delay does not mean denying the time necessary to apply the judicial process fairly after full and adequate consideration.

If unfortunately the administrative set-up of the Secretariat is unable to produce the verbatim records within 24 hours, as is common with many other organs of the United Nations, that drawback has necessarily to be accepted as a part of the procedural problems of the Council, and the time involved in the production of the necessary verbatim records should not and cannot be construed as delay.

Mr. President, I really fail to understand how an international tribunal like this Council, after detailed arguments of such far-reaching importance, can possibly come to a quick decision without full consideration by the respective Governments of the arguments advanced here of which the Governments so far know nothing or have not been able to evaluate or assess.

It is most significant, Mr. President, to note that some Members of the Council have already stated that they are not in a position to evaluate and decide upon the respective submissions made by India and Pakistan on the preliminary points of jurisdiction without further consideration. Other members have expressly stated that if the decision is to be made later, the time-lag must be meaningful and it must be after the verbatim records are made available for full consideration by them and their Governments or Administrations. This shows very clearly that if the Council were to make a decision now, the decision would have no validity or propriety in law because the Members of the Council, that is some of the judges, are admittedly not in a position to evaluate and decide upon the arguments and submissions without further consideration. I repeat, Mr. President, if the Council were to make a decision now, the decision would have no validity or propriety in law. It is for the Council to consider whether it would like to come to a decision in such circumstances where time is not given to every judge to give full and adequate consideration to the issues involved.

Another ground on which the decision of the Council would be vitiated, if it is arrived at without waiting for the verbatim records, is that the Council, as already stated above, is here acting as a judicial court, and some of the judges, i.e. Members of the Council, were not present throughout the oral hearing from the beginning to the end. They can join in the decision only after reading the verbatim records; and if they join in the decision without considering the verbatim records, then, Mr. President, the whole decision of the Council would stand vitiated on the ground that some of the judges had not applied their minds to the entire case of both sides. It is needless to add that what India and Pakistan had filed before the Council are only pleadings on preliminary objections and not arguments or Statements of the Case or full Briefs on the preliminary objections. If a judge decides a case merely on pleadings, without considering fully the oral or written presentation of the case, the decision would not be proper in law.

It is therefore my suggestion that the final decision should be, it has to be, arrived at after the verbatim records are made available to the Members of the Council and, through them, to their respective Governments.

I will furnish a copy of my statement to the Secretariat and if they would be so kind, I would like to have it distributed to the Members. I was reading from a prepared speech. Thank you.

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3. The President: The Representative of the Soviet Union.
4. Mr. Borisov: Mr. President, the Soviet Union was not a Member of the Council when the Council previously discussed this question, first in Montreal and then in Vienna. It is quite clear that being present for the first time at a Council meeting on this question I met with some nuances on which I, like Representatives of some other countries, have to consult with my competent organs. I request time for such consultation after receiving the complete records from the Secretariat. I believe that a week or ten days would be necessary for this. Failing this, I shall not be able to make a decision on this question. Thank you.
5. The President: Representative of Colombia.
6. Major Charry: I would like to have the Legal Bureau explain to us whether a decision taken today would not be valid, as the Representative of India says. May I hear what the legal secretariat has to say on this point?
7. The President: The Secretary General.
8. The Secretary General: I understand the question put by the Representative of Colombia, but it must not be forgotten that the Council is now sitting as a court, as a tribunal. It is for the court to pronounce on this question, not for the Secretariat to give a legal opinion on it. In my view, for the Secretariat to give a legal opinion would be contrary to judicial practice and ethics, because a court does not need a legal opinion. It is for it to give that opinion.
9. The President: Thank you. Is there further discussion? The Representative of Norway.
10. Mr. Grinde: I should like to state my position briefly. I can say that I am ready to take a vote today, but I do understand and respect the difficulties some Representatives have and their consequent desire to consult with their authorities at home. If the Council should find it necessary to delay action, I shall not object to this provided the time given will be meaningful. After hearing the discussion yesterday, I do not believe that a few weeks will suffice. I understand it will take quite some time to get the verbatim records and if these are to be given a real legal study by my authorities, I am quite sure that they will need several months. So may I reiterate - I am ready to take a vote today but I shall not object to a delay if the time given is meaningful. Thank you.
11. The President: Is there further discussion? I am not sure whether the Representative of the Soviet Union was making a proposal to defer a decision or just a statement indicating that he had difficulty in taking a decision now. The Representative of the Soviet Union.
12. Mr. Borisov: It was a statement.
13. The President: Is there further discussion? The Representative of Canada.

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14. Mr. Clark: I find myself supporting the views so ably expressed yesterday by my distinguished friend from the People's Republic of the Congo. The question before this body appears to be fairly straightforward: does the Council have jurisdiction to hear the case brought before it or not? The preliminary objection lodged was, at least in my view - and I believe this view would be shared by most Representatives on the Council - clear, concise and well-documented and, professionally speaking, I think it was as well drafted a document as I have ever had occasion to study. The reply by the other Party that was distributed and circulated was also concise, clear and well drafted. The Rules for the Settlement of Differences, Article 5(4), seem to contemplate that once the written documentation has been submitted, there would be a hearing of the parties. We have listened here, during the past two days, to the distinguished advocates for both parties, whose contribution was surely a clarification and explanation of the written cases, but the main issue remained the same and we have had the benefit of carefully studying the documentation that was distributed in advance over a reasonably lengthy period of time. Accordingly, I would be prepared to proceed to a decision on the issue of the preliminary objection at this time. On the other hand, I can also understand the preoccupation of the other delegations who seem to feel that they would rather have time to consult with their authorities. At the same time, however, the comment made by the distinguished Representative of Italy would appear to be very sound, and that was that a mere summary of the debate would not be of any particular benefit to us and therefore a short delay to allow the circulation of such a document might not, in fact, achieve its purpose. On the other hand, a delay of several months to allow translation, correlation and distribution of a complete verbatim record of the discussion of the past two days would, in our view, not really be compatible with what is contemplated in Article 28 of the Rules, and may not ensure fair treatment of both parties concerned.

So, to reiterate, the Canadian position would be that we are certainly prepared to proceed to a decision today, and would not think that a lengthy delay of several months to allow correlation and distribution of a complete verbatim record would be upholding the responsibility of this body to ensure fair treatment of both parties. Thank you.

15. The President: The Representative of the United States.

16. Mr. Butler: There is just one point I would like to make here and that is a reminder that we sit here as representatives of governments. We are not individual members of the Council. Our Governments are members of the Council and even though the Council may be sitting in a judicial capacity at this time, we sit as 27 governments, not as individuals. If 26 governments are prepared to go to a decision today, it is the decision of those Governments, not of the individuals who sit at this Council table, and I think it is important for us to remember this. We are unlike the members of the World Court, for example, which sits in a judicial capacity; they sit in personal capacity as judges not responsible to national administrations. Here we represent governments, and it is important for all of us to remember this.

It is therefore suggested that the decision should be arrived at after the verbatim records are made available to the Members of the Council and, through them, to their respective Governments.

17. The President: Is there further discussion on this question? The Representative of the United Kingdom.

18. Air Vice-Marshal Russell: I would just like to express a little disappointment at the reply given to the Representative of Colombia by the Secretary General, although I understand his point of view. It is not unique for a body of persons other than professional judges to sit in a judicial capacity, at any rate not in the United Kingdom. It is usual in such circumstances for the body to have recourse to legal advice on points of strict law and if I am correct in supposing that the Representative of India was saying that for reasons which he gave a decision taken now would not be taken legally, is it possible for me to be advised on how this point should be determined as a point of law?

19. The President: I think the Representative of India said that the decision would be vitiated; those were the words that he used. I think the Secretary General feels that he cannot say that he agrees or disagrees with that position. This Council has to take a decision itself. If Representatives cannot decide by themselves, I suppose they will have to check with their own administrations. As the Representative of the United States just said, Council members are sitting as representatives of governments. I imagine also that if the decision of the Council on this question was contested, there is always a superior body to which India could apply.

20. Mr. Gidwani: Thank you, Mr. President, I just wanted to state that you quoted me correctly; that the decision if taken now would be vitiated. And I want to be very clear - it is not that India is seeking any time; India is seeking fair treatment. What we wish is that these verbatim records should be available, as indeed is provided for in the Rules for the Settlement of Differences. Quite apart from that, if it was a question of merely seeking time, it would be very easy for me to say that this particular meeting has been held here, as per the decision of the Council in Vienna, for the purpose of hearing the parties. No indication whatsoever was given to the Government of India that the Council would discuss the matter and take a decision at this meeting. Otherwise, I could have claimed my right under the Convention and sought time so that the Government of India might have an opportunity to appoint a special representative, if it wanted, for the purpose of this meeting, because every Government has the right to be represented in regard to a matter affecting its interests. Therefore the indication should be given. I did not take that pleading because the Government of India is not interested in seeking time, but it is very much interested that there should be fair treatment of the parties, that the verbatim reports should be available. If the Council is to take a vote now, its action will be improper, illegal, entirely invalid and certainly vitiated, Mr. President.

21. The President: That, of course, is a matter of opinion. I think that one point Council members are now considering is this: was something brought forward in the hearing itself that was different from the written presentations and required them to seek further instructions? I think each Council member is the judge of that. Some apparently believe there was, others that they had enough material before the hearing or that there was nothing new - or not enough new - brought forward in the hearing to make it necessary for them to consult. That is how I interpret the position of some Representatives. The Representative of the Congo.

22. Mr. Ollassa: I consider what the Representative of India said an assertion. The Government of India, like any other government, can make all the assertions it likes. In any event, after having read and re-read the documents, and though I did not hear all that has been said here, I find that the arguments brought forward were, as the Representative of Belgium said, just an illustration of the preliminary objections we have received. Besides, we know that when there is a disagreement, the proceedings are generally in writing. Therefore in principle what has been given to us in writing is the essential; the rest is only an explanation of the documents we have. Because of that, Mr. President, I am in complete agreement with the Secretary General that it is not for him to give a legal opinion. We had these documents in Vienna; administrations have had time to read them. The explanations given here perhaps are considered by certain members of the Council to supplement what was said in the preliminary objections, but they may equally be considered simply as illustrating what was submitted in writing. At all events, that is what the People's Republic of the Congo thinks; what has been said merely illustrates the preliminary objections.

For that reason, Mr. President, I think the Secretary General really has nothing to do now. It is for us to decide, and I would leave the Representative of India the responsibility for everything he has said. He has said that the decision would be vitiated. That is not my opinion at all, because we have had the documents for a long time. There have been brilliant arguments, some of which, as I have already said, were foreseeable and imaginable. The arguments were magnificent, brilliant, and to me it was an extremely interesting legal game. I would have liked to be able to participate in it from the beginning, but it has changed absolutely nothing, Mr. President. The question remains the same as it was in Vienna. The arguments have not changed it and they cannot change the solution. That any decision taken at this time would be vitiated is an assertion by a government and must be left to that government, but to me the decision would not be vitiated. I am ready to take one and if there is no proposal for deferment we must take a decision today and make an end, because the question is clear to everybody, at any rate to governments who have had the preliminary objections to read.

23. The President: Is there further discussion? Apparently not, so I shall have to put the questions. There are several, because you realize that there are two cases and that different instruments are involved. In the Application of Pakistan there is the Chicago Convention, the Transit Agreement and the bilateral Air Services Agreement between India and Pakistan; that covers Case 1. Then we have Case No. 2, the Complaint. So I shall have to put those questions separately and it will be realized that all Council Members, except India, of course, can vote on the question relating to the Chicago Convention and on the question relating to the bilateral agreement, but only Council-member States parties to the Transit Agreement - again, except India - can vote on what concerns that Agreement. Therefore when the votes are taken we shall have to proceed on that basis. I shall just read the list of Council-member States that are parties to the Transit Agreement. You have had that list for the old Council, but I had better read it again now for this new Council. The States that are at present parties to the Transit Agreement are Argentina, Australia, Belgium, Canada, Czechoslovakia, France, Germany, India - I made a reservation about India already - Japan, Mexico, Nicaragua, Nigeria, Norway, Senegal, Spain, Tunisia, United Arab Republic, United Kingdom, United States. There are 19, of which only 18 are eligible to vote. The Representative of France.

24. Mr. Agesilas: Mr. President, if you intend now to ask us to vote, I should like an opportunity, before the vote, to explain how I am going to vote. The French authorities have studied the preliminary objection filed by India with the utmost objectivity and with concern that the delicate question of the disagreement submitted to the Council should be treated in a way fair to both parties. I myself have listened attentively and with keen interest to the very complete statement by the Representative of India and the reply made by the Representative of Pakistan. I wish to summarize briefly, Mr. President, the conclusions on which the position I am going to take is based.

Three international agreements have been mentioned by the two parties:

- 1) the bilateral agreement concluded between India and Pakistan in 1948;
- 2) the Chicago Convention, to which the two States are parties;
- 3) the International Air Services Transit Agreement.

As far as the bilateral agreement is concerned, we have noted that in 1952 India recognized the competence of the Council in applying to it to settle the first difference it had with Pakistan at that time and the Council itself recognized its competence in agreeing to consider the Indian request. Naturally we are not forgetting the events that took place in 1965, but it remains that, to the extent it is admitted that after the Tashkent arrangements had put an end to the hostilities the 1948 Agreement had at least partially to be brought back into force, the right of one of the parties concerned to address itself to the same court - in this case the Council of ICAO - must be recognized. This is the rule of estoppel, well known to jurists.

As far as the Chicago Convention is concerned, Article 89 has been cited and commented on at some length. This Article, as we know, provides that in case of war or national emergency Contracting States regain their full freedom as regards their obligations under the Convention. If this Article could be invoked in 1965 at the time of the armed conflict, it is difficult to concede that after the Tashkent agreement and six years later - in 1971 - a state of war in the legal sense could be considered to exist between the two States. As for the state of emergency, which might better correspond to the actual situation between Pakistan and India, for it to be invoked it must have been notified to the Council, which is not the case.

Since the particular conditions envisaged in Article 89 of the Convention cannot be maintained, we come back, as regards the multilateral agreements (Chicago Convention and Transit Agreement), to the general rules of international law. The two speakers have cited Article 60 of the Convention on the Law of Treaties, the Vienna Convention of 1969. We know that this Convention has not come into force, but as Article 60 does no more than codify customary international law, it can, in fact, be validly referred to.

This Article 60 recognizes the right of a State to suspend or terminate an agreement if there has been material breach by the other party. Has there been a material breach by Pakistan in the case before us? I shall not reply to this question, which touches on the very substance of the case submitted to the Council, but we must at least record that there is a dispute on this point of the existence of material breach. We are, then, faced with a disagreement in the sense of Article 84 of the Chicago Convention.

For all these reasons that I have just evoked, we cannot acknowledge that the Council is incompetent and are ready to participate in the taking of a Council decision on this point.

We could also admit another formula. Since, in the final analysis, it is a question of judging whether India's decision to suspend or terminate the agreements is validly based on a previous and material breach by Pakistan, one could admit that it would only be possible to pass final judgement on this point after an examination in substance of Pakistan's application and India's defence. If this formula were adopted, examination of the Indian preliminary objection could be associated with examination of the substance. The procedure which was interrupted would therefore be set in motion again. The Indian counter-memorial should be filed, and the Council would pursue its examination of the case, but it would be in the course of this examination that a definitive decision would be taken on the objection presented by India.

In short, Mr. President, our position consists either in voting in favour of the last formula I have just described, if it is supported, or of expressing an opinion in the sense that the Council is competent, if the general tendency is in favour of taking an immediate decision.

25. The President: The Representative of India has asked for the floor.
26. Mr. Gidwani: I have only one submission to make. I heard the distinguished Representative of the USSR say that he would make a proposal after the coffee break, unless I am very much mistaken. I would also like to consult my advisers about what the French Delegation has said and therefore wonder, Mr. President, if you would be kind enough to let us have a coffee break.
27. The President: I had not understood the Representative of the USSR to say that he wanted to have a break, but if there is no objection, we can have a short one, until 11 o'clock.
- RECESS -
28. The President: The discussion continues and, as I said, I hope we can come to a vote as soon as possible if the Council is ready to vote. I understand the Representative of Czechoslovakia wanted the floor.
29. Mr. Svoboda: After the consultation, permit me to propose deferment of the Council's decision until 10 August 1971. Thank you.
30. The President: Is that proposal supported? Supported by the Soviet Union. Is there discussion now on the proposal that the Council's decision on this question be deferred until the 10th of August? The Representative of Tunisia.
31. Mr. El Hicheri: Mr. President, I suppose the statutory majority rule will be applied?
32. The President: All decisions of the Council on this case require 14 votes to pass. The Representative of the United Arab Republic.
33. Mr. El Meleigy: Before we vote on the proposal, could I know how many Council members will benefit from deferment until the 10th of August?
34. The President: Perhaps when they vote they will indicate that.
35. Mr. El Meleigy: If some Council members were in a position to give an opinion on the point it might be helpful.
36. The President: I have some speakers on my list. The Representative of Nigeria.

37. Mr. Olaniyan: Just a small question. Could I be told whether the deferment refers only to the voting, not that on August 10th we are again going to embark on this question?

38. The President: I understood that the intention of the Representative of Czechoslovakia is that the taking of the decision be postponed. As I explained yesterday, in any case the hearing has been closed, so we cannot return to it. The Representative of the Congo.

39. Mr. Ollassa: I wish to explain what I said yesterday, now that we have a formal proposal. I said yesterday that what we are aiming at is fair treatment for the two States, and deferment for more than a week could be something that favours one State more than the other. I think, however, that our calculation was not good because it seems that one of the States asked for four weeks, whereas according to my calculations it was two. In any event, Mr. President, I believe I must say this now: for me to support deferment there would have to be many members of the Council who would have difficulty in deciding today, because more and more I have the impression that what the Representative of Tunisia said yesterday is true - these are evasive tactics. Yesterday we could have decided on deferment; the conditions were present; everyone was almost ready to agree to deferment, when suddenly we became aware that no one was making a proposal and at that moment I changed my mind and took up again my initial position, which was that we should decide. I came here this morning with the same feeling. Now we have this new proposal, I believe there must be extraordinary or exceptional reasons, or in any case wide support, before my delegation could agree to it. This time I shall not join with the majority, because I find that this deferment has not been requested for good reasons; for those we must have the verbatim and have it for a fairly long time. What other reason could there be for deferment? To obtain instructions? - we have had this problem before us for two months, Mr. President, and in my opinion our instructions are not going to be influenced by some example or other that has been given now by way of illustration.

I shall therefore abstain in this vote, in full knowledge of the fact that an abstention is very important in a vote on which the statutory majority applies. Thank you.

40. The President: The Representative of Tunisia.

41. Mr. El Hicheri: I have the same concern as the Representative of the People's Republic of the Congo. In all honesty - especially as the proposal comes from my friend, the Representative of the Czechoslovak Socialist Republic - I do not believe a deferment of ten days can be of any use at all. I do not think it can serve either of the parties or the interests of the Council. I do not think it can serve even those who have asked for it, because either administrations are not informed, in which case they must have all the documents and that will certainly take more than ten days - perhaps a minimum of two months - or else administrations have had time to come to a conclusion on the problem before us - the competence of the Council. I said yesterday that I thought it would have been possible for them in two months to form an opinion on the subject.

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For these reasons, Mr. President, I cannot support the proposal made by the Representative of the Czechoslovak Socialist Republic and supported by the Representative of the Union of Soviet Socialist Republics. I believe it was made in good faith, but I do not think that in practice it can serve the interests of the Council. That is my opinion. Perhaps there will be a proposal for a longer deferment, but that is another problem. Thank you.

42. The President: Is there further discussion before we go to the vote? Then I will take a vote on the Czechoslovak proposal that the decision of the Council on this question be deferred until the 10th of August. Those in favour please raise their hands. Opposed. Eight in favour, no opposition, but of course 14 votes have not been obtained, and so the proposal has failed. Any recorded abstentions? Congo, Brazil, Spain, Mexico, Uganda, Senegal, Norway, Indonesia, Canada, Argentina.

We continue, then, with the discussion with a view to taking a decision now. Is there any discussion before I proceed with the questions? By the way I will read the questions - all of them - before we start to vote. The Representative of Australia.

43. Dr. Bradfield: Mr. President, before the vote is taken I would like to make a statement explaining the Australian vote.

The Australian Delegation appreciates the difficult circumstances existing at the present time and the background against which this dispute between Pakistan and India must inevitably be considered. For this reason we have been more than ever concerned to approach the matter before us now as one dealing solely with the Preliminary Objection, and particularly with the legality of it.

We are in a position to state our opinion in a vote taken on this matter today. We wish to reiterate the point made by the Representative of the United States that this Council is a Council of States, not of individuals, and the opinion of Australia that the Council has competence to consider the dispute is an opinion of Australia as a State after consideration of the papers submitted by India by appropriate legal authorities in Australia. I, as Representative here in the Council, may not have the qualifications to express a legal opinion, as may be required in a matter of this nature, but I do consider that I have the ability to determine whether or not the statements made, and made so ably, by the Counsel for India have contained any significant new arguments in addition to those which are contained in the original statement and to advise the appropriate organs of my Government accordingly. In consequence of this, the vote to be cast by me today is a vote of Australia based on legal opinion. I am afraid that I could not agree with the opinion of India that a decision taken by Council today would be vitiated. If I did so I would not cast a vote.

44. The President: Is there further discussion? I referred to several questions. Really there are four and I will read all of them so that you see why I am making the distinction. It has to do with the fact that three instruments are involved and the voting on different cases is different. Some Council Members can vote in certain cases but not in others.

Concerning Case No. 1 there will be three questions and therefore three votes. The basic propositions are the following; they are the ones that India has brought forward:

The first is that the Council has no jurisdiction to consider that disagreement in Pakistan's Application insofar as concerns the Convention on International Civil Aviation. In other words, the Council has no jurisdiction in what regards the Convention.

The second is that the Council has no jurisdiction insofar as concerns the Transit Agreement; there only States parties to the Transit Agreement can vote, except India.

The third question is that the Council has no jurisdiction insofar as concerns the Bilateral Agreement between India and Pakistan.

I hope it is clear. It is always the same question, in one case for the Chicago Convention, in the second case for the Transit Agreement, in the third case for the Bilateral Agreement, and that would complete the decision regarding Case 1.

Regarding Case 2, the proposition is that the Council has no jurisdiction to consider Pakistan's Complaint, the word 'Complaint' being taken from Articles 1 and 2 of the Rules for the Settlement of Differences. So these are the questions which I shall put in due course. I will ask if there is any more discussion. I am a Representative of the United States.

45. Mr. Butler: A question for clarification, Mr. President. If I understand correctly, the jurisdiction of the Council has been invoked by Pakistan as far as the Chicago Convention and the Transit Agreement are concerned under the Application and then under the Complaint. Could you clarify for me whether Pakistan invoked the terms of the Bilateral Agreement in their Application and Complaint and has the jurisdiction of the Council been requested by Pakistan on that issue?

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46. The President: That is the way the Legal Bureau read the Application of Pakistan: the Bilateral Agreement was mentioned in the Application but since a representative of Pakistan is here I will ask him.

47. Mr. A.A. Khan: Mr. Chairman, I must confess my own ignorance and shortcoming, but so far as I recall - and perhaps the documents would show - we sought relief under the Convention and the Transit Agreement and we quoted the Bilateral Agreement in order to strengthen our case. This is perhaps the position.

48. The President: Dr. FitzGerald.

49. Dr. FitzGerald: Mr. President, we in the Secretariat had examined the relevant documentation as best we could in order to find out how the questions could be framed as simply as possible and when we came to page 8 of Pakistan's Application we found a paragraph 8 which said that the decision of the Government of India is arbitrary, unilateral and illegal and is in violation of the Conventions (plural) and Agreements (plural). Then further down, when we get to Section F (Reliefs Desired), we find - and I quote: "The Government of Pakistan seeks, among others, the following reliefs by action of the ICAO Council: (1) To decide and declare that the decision of the Government of India suspending the overflights of Pakistan aircraft over the territory of India is illegal and in violation of India's international obligations under the Convention and Agreements" (plural) "aforesaid.", and we took it that the Bilateral Agreement of 1948 was included. Similar material is also found in the Complaint. This does not mean that the Secretariat holds any brief for inclusion or exclusion; it is just a question of trying to ascertain what were the issues to be put to vote. Thank you, Sir.

50. The President: Is there further discussion before I proceed with the vote on the first point? The Representative of India.

51. Mr. Gidwani: Merely to clarify, in the spirit of helping, sub-paragraph 8 of Pakistan's Memorial also mentions that a disagreement has arisen between the Government of Pakistan and the Government of India relating to the application of the provisions of the Convention, the International Air Services Transit Agreement, and the Bilateral Air Services Transit Agreement of 1948, and throughout they have referred to all three documents, the Bilateral Agreement along with the other two. Thank you.

52. The President: Thank you. The Representative of Pakistan.

53. Mr. A.A. Khan: Sir, the documents are quite clear.

54. The President: All right, then I will proceed with these four questions. The first proposition is..... The Representative of the Congo.

55. Mr. Ollassa: For a clarification, Mr. President. In Case No. 2 only the Transit Agreement is involved? - because I cannot participate on what concerns the Transit Agreement.
56. The President: Yes, in Case No. 2 it is only the Transit Agreement. The Representative of India.
57. Mr. Gidwani: Mr. President, I thought that even in Case No. 1 the second issue which you raised relates to the Transit Agreement, does it not?
58. The President: The Representative of the Congo was asking about Case No. 2. I hope I will be clear each time. So, the first question, on which all Council Members except India are entitled to vote, is the following proposition of India: that the Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the Convention on International Civil Aviation. Those who agree with that please raise their hands. The Representative of India.
59. Mr. Gidwani: Mr. President, surely that will not be the way the vote will be taken. The Council has to decide it as the preliminary issue and in either case the statutory majority will be necessary. It is not that India is proposing something and if it does not receive 14 votes, India loses. Any proposal you make here has to receive 14 votes. That is my understanding.
60. The President: Yes, but the question is this: India has come with a basic contention to the Council; the contention is that the Council has no jurisdiction. Now I have to ask those who agree with this contention and, as you say, 14 votes are necessary. If there are not 14 votes in agreement with that contention, the Council is rejecting the contention.
61. Mr. Gidwani: That is not the way a vote can be taken. After all, you have to settle it as a preliminary issue and we have raised a preliminary objection. You have to say "Has the Council jurisdiction?" or "Has the Council not jurisdiction?" and each proposal must receive a statutory majority. It is not that India is proposing something and you have rejected it. It is Pakistan saying that the Council has jurisdiction and that also will be subjected to a vote.
62. The President: No, I am sorry, Pakistan has not said anything. Pakistan has, of course, replied to India but the Council was working on the basis that it had jurisdiction. India comes with the Preliminary Objection: you have no jurisdiction. The Council has to decide on this position of India. If the Council does not accept it, we continue as we were.
63. Mr. Gidwani: You have to settle it as a preliminary issue and you have to determine by 14 votes, a statutory majority, that you have jurisdiction. You cannot do it otherwise.
64. The President: The Representative of the Congo.

65. Mr. Ollassa: Mr. President, the result would be exactly the same, but I believe it would be well, nevertheless, to admit the justice of what the Representative of India has said. It would be better for the Council to take the decision and that this decision should be taken not by saying, if you will, "India is wrong." or "India is right", but by saying "Has the Council competence or not?" I believe it would be much better like that, Mr. President. The result is exactly the same, but if this formulation pleases India, I believe it may please everyone here. The result is exactly the same.

66. The President: Well, I don't know whether the result is the same or not. Really I personally only want a result. Which one it is is not for the Chair to prefer, but I would not like to put questions in a way that will set a precedent for future cases. That is the problem I see. As I see it, each time something is brought to the Council, unless the Council agrees with that something, we continue as we are. This applies to this case and would apply, of course, to the substance of the case in the future, because otherwise I shall be asking the Council to take simultaneously a positive decision and a negative decision, which I believe is rather difficult. The Representative of Canada.

67. Mr. Clark: Before making a comment I would like to ask a question of the Secretariat through you, Mr. President. Could I have the date and the text, because it is extremely short, of the resolution of the Council setting a date for the filing of the Indian Counter-memorial to the Pakistan Memorial?

68. The President: The text and the date? The date was the 8th of April. The Secretary General will read the text.

69. The Secretary General: The text is the following:

"The Council:

- (1) invites the two parties immediately to negotiate directly for the purpose of settling the dispute or narrowing the issues;
- (2) decides, subject to the consent of the parties concerned, to render any assistance likely to further the negotiations;
- (3) fixes at eight weeks the period within which India is invited to present its counter-memorial."

70. Mr. Clark: It would seem clear, at least to my Delegation, that by adopting this resolution the Council was acting as if it had jurisdiction in this case. If we now have a challenge to that jurisdiction, it would be, we would submit, a question which would have to be upheld by the Council by a statutory majority, because the Council has already, in adopting this resolution, acted as if it had jurisdiction and now we have a challenge to the jurisdiction. So in my view there is no question that the statutory majority required is to uphold the challenge to the jurisdiction rather than to affirm the fact that the Council does have jurisdiction. Thank you, Mr. President.

71. The President: That is how I saw the issue and in non-juridical language I said that we would continue as we were before the preliminary objection was filed, unless by 14 votes the Council decided otherwise. The Representative of Tunisia is next.
72. Mr. El Hicheri: Very briefly, I share your concern a little, Mr. President. I agree with the Representative of the People's Republic of the Congo when he says the result will be the same. That is my opinion too, but as this is the first case of its kind, there is a risk of creating a precedent, as you have underlined, and perhaps that should determine our action. It is really the only important point here. Aside from that, I do not think there will be a great difference if the question is taken one way or the other. Thank you.
73. The President: Thank you. The Representative of the United States.
74. Mr. Butler: Merely to say that we support the view of the Delegation of Canada. We think it would have important implications for all of the work of this Council if the proposition put forward by the Representative of India were to stand. It would be impossible to try to take many decisions of the Council in both directions, particularly because of the abstention problem. Thank you.
75. The President: The Representative of India.
76. Mr. Gidwani: Mr. President, I do hope that on grounds of expediency you would not take a vote that I would really consider would result in a decision which is entirely invalid. Article 5 of the Rules for the Settlement of Differences is very clear. Clause (1) says: "If the respondent questions the jurisdiction of the Council" - we certainly have questioned the jurisdiction of the Council in this matter and we shall continue to do so for valid reasons already given - and Clause (4) clearly says: "If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question.....", the question of your jurisdiction. You have to decide the question of your jurisdiction, not my preliminary objection. You do not work on my preliminary objection; you decide the question of your jurisdiction and to come to the conclusion that you have the jurisdiction you need the statutory majority. Any other decision, Mr. President, would be really trying to use the statutory majority rule in order to place us in an entirely unfavourable position, for no rhyme or reason. The Rules are very clear, Mr. President.
77. The President: I am not asking the Council to agree or disagree with India. The question I am putting to the Council is that the Council has no jurisdiction to consider the disagreement. That is all I want the Council to vote on: that the Council has no jurisdiction. I want to find out how many agree that the Council has no

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jurisdiction and for the reasons the Representative of Canada has just mentioned, unless the Council decides now that it has no jurisdiction, we carry on as we were before the preliminary objection of India. The Representative of India.

78. Mr. Gidwani: Has the Council jurisdiction or has it not? Both must receive a statutory majority in any case. It cannot be that by mere abstentions on the one proposition, the other does not stand.

79. The President: The Representative of the Congo.

80. Mr. Ollassa: Just to say, Mr. President, that I support the opinion expressed a moment ago by the Representative of Canada and by the Representative of Tunisia after what you have said, because, in the final analysis, one could also say that India herself, in coming here the first time, agreed that the Council was competent. At that time she could have said "No, I am not going there, because it is a court that is not competent." So there really is, as they say in English, a "challenge".

81. The President: Is there more discussion? I regret - and I am addressing myself to the Representative of India - that I will proceed on that basis, but I am glad that the discussion has taken place. That was the way I saw the question and I see that Council Members as they have spoken now seem to agree that that is the way it should be considered. So, I repeat, the first proposition is: "The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the Convention on International Civil Aviation." Those who agree with that please raise their hands. Those opposed, please raise their hands. No votes in favour, 20 votes against. Any recorded abstentions? The United Kingdom, Japan, Soviet Union, Czechoslovakia. Well, I think that since there have been 20 contrary votes, the question of a positive or negative decision has now been superseded. There are 20 votes against, which means that there are 20 members who consider that the Council is competent. The Representative of India.

82. Mr. Gidwani: Mr. Chairman, just to ask you to record my statement that the manner in which the vote has been taken is not correct and is not permitted by the Rules. Thank you.

83. The President: Thank you. Now we go to the second question. The Representative of India.

84. Mr. Malhotra: Mr. President, I don't want to raise any matter of substance, but just to request a roll-call vote. The first vote has already taken place and nothing can be done about it now, but may I have a roll-call on the other questions?

85. The President: For the information of new Council members, I am drawing a name to determine who is going to vote first. On the second question only those States that are parties to the Transit Agreement, except India, can vote. The question is: The Council has no jurisdiction to consider the disagreement in Pakistan's Application in so far as concerns the Transit Agreement.

86. Mr. Agesilas: Mr. President, so that it will be very clear, as a roll-call vote is involved, in replying "Yes" one endorses the negative position taken by India. Is that it? Then, to oppose it you must say "No".

87. The President: Yes, those who agree that the Council has no jurisdiction have to say "Yes", those who consider that the Council has jurisdiction have to say "No". The first name is Lebanon, which is not here and is not a party to the Transit Agreement. Spain. Spain is a party to the Transit Agreement.

88. Lt. Col. Izquierdo: As you put it, it was not very clear.

89. The President: Those who agree that the Council has no jurisdiction say "Yes". Those who think that the Council has jurisdiction say "No". The Representative of the Congo.

90. Mr. Ollassa: Mr. President, I don't wish to complicate matters for you, but in French it is difficult. Those who think the Council is not competent should say "Yes" and those who think it is should say "No".

91. The President: I could make it longer. Those who agree with the proposition that the Council has no jurisdiction to consider the Application under the Transit Agreement - I think this is good in the three languages - say "Yes"; those who consider that the Council has jurisdiction say "No". Spain was first and says "No". Will you continue reading, please.

92. Dr. FitzGerald: Mr. President, Spain has said No.

Tunisia - No	Czechoslovakia - Abstention
United Arab Republic - no	France - No
United Kingdom - Abstention	Federal Republic of Germany - No
United States of America - No	Japan - Abstention
Argentina - No	Mexico - No
Australia - No	Nicaragua - not here
Belgium - No	Nigeria - No
Canada - No	Norway - No
	Senegal - No

That is all, Mr. President.

93. The President: Thank you. There are no votes "Yes", 14 votes "No", 3 abstentions. The Council has therefore not agreed with the contention that the Council has no jurisdiction regarding the Transit Agreement as there were 14 votes against. The Representative of Belgium.

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94. Mr. Pirson: When you have put your third question, Mr. President, may I speak before the vote?

95. The President: Yes, I will put it so as to be clear and then I certainly will allow statements. The third question is the same question except that it has to do with the Bilateral Agreement. I will put it this way: Those who agree that the Council has no jurisdiction to consider Pakistan's Application in so far as concerns the Bilateral Air Services Agreement of 1948 between India and Pakistan should vote "Yes". Those who are against that should vote "No". The Representative of Belgium.

96. Mr. Pirson: I wish only to say that I am not convinced that this question should be put to the Council and in these circumstances, if you proceed to a vote, I shall abstain. I do not want to go further, but really I have very serious doubts about the necessity of putting this question to the Council.

97. The President: I asked the Representative of Pakistan and he made a statement to the effect that the documents were clear. I don't know whether he wishes to speak again on this question. As Pakistan made the Application, it tells us how it considers the issue. I have, however, other speakers and while the Delegation of Pakistan is consulting, I will give the floor to the Representative of Tunisia.

98. Mr. El Hicheri: I am of the same opinion as the Representative of Belgium; I have very strong doubts about this. It is my impression that Pakistan has based its case on the Transit Agreement. On reading the documents, I did not have the impression that the interested party, Pakistan, came here to ask the Council to pronounce on its competence in regard to the Bilateral Agreement. I did not have that impression at all, Mr. President. I therefore wish to associate myself very strongly with the doubts expressed by the Representative of Belgium. Perhaps the Pakistan Delegation should be allowed a few minutes to consult their Chief Counsel. He might be able to give us a clear answer in this regard.

99. The President: Yes, I agree that we are in the hands of Pakistan. It is the Applicant and if it now says that it is not seeking relief under the Bilateral Agreement, India's point is no longer of interest as far as the Council is concerned. The Representative of the Congo.

100. Mr. Ollassa: I too am very reluctant to deal with this question; in fact I shall not deal with it at all, because I do not think the Council has to pronounce upon a bilateral agreement. I think our field has to do with multilateral agreements and if we start entering into bilaterals it is going to be very difficult. In any case, I for one do not have authority to pronounce on a bilateral agreement.

101. The President: Thank you. The Representative of Nigeria.
102. Mr. Olaniyan: Just to say that I share the view expressed by the Representative of Belgium.
103. The President: Thank you. The Representative of France.
104. Mr. Agesilas: A few minutes ago I expressed our opinion on this subject, but I think, nevertheless, that it would probably be better for the Council not to pronounce on this point.
105. The President: Is the Representative of Pakistan ready to speak now?
106. Mr. A. A. Khan: Mr. Chairman, I am grateful for the suggestion that I should seek your indulgence to consult our Chief Counsel on this point and I would appreciate it if a short time could be given to us for that purpose. Thank you very much.
107. The President: I still have four speakers, but if the Council agrees that we give the Delegation of Pakistan time to consult on this particular point, it may not be necessary for them to intervene. However, I will call them in the order I had them. The Representative of Spain.
108. Lt. Col. Izquierdo: Very briefly, just to say that I share the views expressed by the previous speakers on this particular point and that I shall, of course, be obliged to abstain on it.
109. The President: The Representative of the United States.
110. Mr. Butler: I still have the question I raised before, whether we have been asked to come to any decision, and I also question whether India addressed itself to the question of violation of the Bilateral Agreement in its preliminary objection. In reading the summary of Ground 1, it says there is no disagreement between India and Pakistan relating to the interpretation or application of the Convention or the Transit Agreement and no action by India under the Transit Agreement. In other words, there are three questions, not four. So even assuming that Pakistan had invoked it, if I am correct, the fact that India has not questioned the jurisdiction of the Council to deal with the bilateral issue is, I think, an added element.
111. The President: Thank you. The Representative of Senegal.

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112. Mr. Diallo: I know that in bilateral agreements the two parties usually explicitly agree to submit any difference to ICAO, and when they have one to submit, they must do it together - in other words, by common consent. I also know that bilateral agreements are registered with ICAO so that it can follow their application and perhaps be aware of the differences that can arise, but I believe that in the present case I can say that it is not that the Council has not to express an opinion on this particular point, but that it is preferable for the Council not to do so.

113. The President: Thank you. The Representative of Uganda.

114. Mr. Mugizi: Mr. President, I would like to ask if this dispute regarding the Bilateral Agreement has been submitted in accordance with Article XI of the Agreement.

115. The President: The Delegation of Pakistan is seeking advice and I think I will be informed in a few minutes about this. The Representative of Uganda.

116. Mr. Mugizi: Mr. President, is it something to be explained by Pakistan or by the Secretary General?

117. The President: I think we have to know first whether Pakistan in its Application has covered also the question of the Bilateral Agreement. The Representative of Belgium.

118. Mr. Pirson: I do not think so, Mr. President. On your third proposition I did not wish, a few moments ago, to say what the Representative of the United States has said, but it is my opinion also. No doubt the Representative of India could enlighten us: has India challenged the competence of the Council in regard to the Bilateral Agreement? If India has done so, does this mean that Pakistan requested the Council's intervention in the framework of the Bilateral Agreement? I do not remember exactly all the provisions of India's preliminary objection. If we find a contestation on this point by India, can we ask Pakistan if it wishes, still on this point, the Council's intervention? After that the Council will have to express an opinion. Does India wish the third proposition to be submitted to the Council?

119. The President: I think the Secretary General will explain.

120. The Secretary General: I refer to paragraph 39(d), page 25, of the preliminary objection submitted by India and wish to read the original text, in English, presented by India: "The Council has no jurisdiction to handle any dispute under a Special Regime or a bilateral agreement."

121. The President: Thank you. The Representative of Tunisia.

122. Mr. El Hicheri: Really, Mr. President, I do not see how we can extend the affair. The Government of Pakistan brought two cases before the Council; this is very clear and, besides, was presented in that way. Case No. 1 relates to disagreements between the two States in the sense of Clauses (a) and (b) of Rule (1) of Article 1 of the Rules for the Settlement of Differences. Case No. 2 is a complaint relating to the International Air Services Transit Agreement in the sense of Rule (2) of Article 1 of the Rules. Now, Mr. President, the case is being extended. It is very clear that at no point did the Government of Pakistan bring before the Council a question concerning the interpretation, or misinterpretation, of the Bilateral Agreement. It came before the Council on the basis of the Chicago Convention and the Transit Agreement, and from the beginning the question has been presented in this way: Case No. 1, Case No. 2. There has never been a Case No. 3 and a fortiori a Case No. 4.

123. The President: The question is not as simple as that. According to the Secretariat, Case No. 1 has three parts, but it could have only two and we are going to learn which from Pakistan. Case No. 1 covers the Convention and the Transit Agreement; the question now is whether or not it covers the Bilateral Agreement. The Representative of Tunisia.

124. Mr. El Hicheri: I have not finished, Mr. President. What I said is in a Council document that has been distributed, C-WP/5372. I was not speaking from memory; I was reading something before me. Now in Case No. 1 it is a question of the Chicago Convention and the Transit Agreement, in Case No. 2 a question of the Transit Agreement. That is how the question has been presented to us from the beginning. It is another matter if Pakistan now wishes to add something else, but I am basing myself on what the plaintiff has presented so far.

125. The President: We have the delegation of Pakistan here and they will explain.

126. Mr. A.A. Khan: Thank you very much, Mr. President. I apologize for this slight confusion, which is entirely due to my own shortcomings. I have sought and received clarification and I fully confirm the understanding which has been explained by the distinguished Representative of Tunisia. We did not seek relief under the Bilateral Agreement and we did not argue on that point either. As I stated earlier, this Agreement was mentioned to reinforce our case.

127. The President: Thank you. That is clear now and will, of course, be entered in the record. The Representative of India.

128. Mr. Gidwani: I really find it rather strange that at this late stage we are being told what Pakistan intended or did not intend. Your first memorandum on this very subject, Mr. President, said that Pakistan has aired, in regard to Case No. 1, a disagreement under the Chicago Convention, under the Transit Agreement and under the Bilateral Agreement. Pakistan has said so throughout in its Application. We took the trouble, therefore, of refuting that and saying that the Council has no jurisdiction. Now we are told that Pakistan does not wish to raise this after all the pleadings and after all the arguments. I seek no remedy from you for this. I merely wish to point out the manner and the method in which Council has been functioning. Thank you and I do consider it entirely improper, as I said.

129. The President: Well, as I explained before, the Secretary General after reading the text was also of the opinion that the Bilateral Agreement was included. Now it has been explained in a different way. The Representative of India.

130. Mr. Gidwani: We were told that the first Case represents this, this and this and everyone had the documentation. Now people are getting surprised as to what was before them. This comes from not having the verbatim; this comes from not having the records; this comes from giving a snap decision in the offhand manner in which the Council is giving it. Thank you.

131. The President: Thank you. The Representative of Belgium.

132. Mr. Pirson: I understand that India is objecting to the procedure. In these circumstances, does India insist that the question be put? - because if India insists that the question be put, it can be put.

133. The President: I think we should not complicate matters. The Representative of India was referring to the manner in which this matter was being handled. That is how I understood his intervention. The Representative of India.

134. Mr. Gidwani: Yes, Mr. President, you are quite right. I am not suggesting that any matter be put or not put because, as I said, all matters being put to a vote and all decisions being taken are vitiated. So it would not help very much if I put to a vote another matter, the decision in respect of which would also be vitiated.

135. The President: We go now to the next question, concerning Case No. 2: that the Council has no jurisdiction to consider Pakistan's Complaint. The Complaint has to do with the Transit Agreement; therefore only those States that are parties to that Agreement, except India, are entitled to vote. I will ask those who think that the Council has no jurisdiction to consider Pakistan's Complaint to so indicate by saying "Yes" and those who disagree with that to say "No", as in the vote we took before. I will now have to draw the name for the first to vote. Canada is the one and is a party to the Transit Agreement. Dr. FitzGerald, will you start calling the roll, please?

136. Dr. FitzGerald:

Canada	- No	Spain	- No
Czechoslovakia	- Abstention	Tunisia	- No
France	- No	United Arab Republic	- No
Federal Republic of Germany	- No	United Kingdom	- Abstention
Japan	- Abstention	United States of America	- Yes
Mexico	- No		
Nicaragua	- not here		
Nigeria	- No	Argentina	- No
Norway	- No	Australia	- No
Senegal	- No	Belgium	- No

That is all, Mr. President.

137. The President: Thank you. There was one vote in favour, 13 votes against and 3 abstentions. The Representative of the United States.

138. Mr. Butler: Mr. President, I should like to explain why I voted against the jurisdiction of the Council in Case 2. Case 2 involves a complaint brought pursuant to Article II, Section 1 of the International Air Services Transit Agreement. Article II, Section 1 provides the jurisdiction of the Council in cases in which a Contracting State deems that action by another Contracting State, under the Transit Agreement, is causing injustice or hardship to it - that is, it invokes the so-called equity jurisdiction of the Council, when a Contracting State is acting pursuant to the Agreement, that such action causes injustice or hardship. On the basis of the pleadings and oral arguments, the issue before us does not appear to us to be a question of action by a State pursuant to the Transit Agreement, but of whether the action is in conformity or fails to conform to its provisions. This is a case under Article II, Section 2 involving interpretation and application of the Agreement and thus we supported the view that the Council had jurisdiction in Case 1. It is, in our mind, improperly brought under Article II, Section 1. Article II, Section 1 is not applicable here and therefore in this Case could not confer jurisdiction on the Council.

139. The President: I was going to say, before the intervention of the Representative of the United States, that with this decision, of course, the contention that the Council has no jurisdiction has not passed and therefore we are where we were, in other words, we shall continue considering that the Council has jurisdiction and will continue with the Case. The Representative of the Congo.

140. Mr. Ollassa: Mr. President, I do not understand. Is the majority of the Council always the same, even when there are States that are not parties to an agreement? That surprises me, because they cannot vote. How can the majority be the same? I really do not understand. There are nineteen States that are parties to an agreement; the statutory majority should therefore be based on 19. We cannot base the majority on States which are not parties to an agreement and by virtue of Article 66 of the Convention cannot participate in a vote. That is incredible.

141. The President: I said nothing about the statutory majority, although I said at the beginning of these proceedings, as early as February or March, that according to the legal opinion 14 votes were necessary in any vote taken on this subject. In this case it does not matter because there was only one vote in favour of the contention. So the contention has not been approved by the Council and we continue to have jurisdiction. That is all I am going to say and I suggest that we do not need to discuss at this moment what the statutory majority is. The result is the same. Any other explanations of vote? The Representative of the United Kingdom.

142. Air Vice Marshal Russell: I should like to record that I abstained from voting as being unable to participate at this time in a decision which turns entirely on points of law. I would have been in the same position on any proposal for a decision on a question of substance today. I am not, myself, sufficiently advised on the merits of the legal arguments which have been presented, although of course I accept that other Representatives are so prepared. Thank you, Mr. President.

143. The President: The Representative of Nigeria.

144. Mr. Olaniyan: This is not to explain my vote. I think the question that has been raised by the Representative of the Congo is an important one....

145. The President: I am going to interrupt you because you are out of order; we have not documented the subject. If the Council wants documentation we will provide it. I would not like now to engage in an hour's discussion on a question on which I said something some time ago. The Representative of Senegal.

146. Mr. Diallo: Mr. President, my delegation voted for the competence of the Council to deal with the three questions put to us. This in no way prejudices the position we shall take on the substance of the disagreement. I did not believe I had to abstain to make clear my Government's neutrality towards the two countries that have this disagreement, because we think it is more than a question of being on one side or the other. It is a question of saving the truth, of respecting the law and jurisprudence already established by the Council. If the Council declared itself incompetent on this question of overflight which two Contracting States are contesting, we think that in future it would no longer be sure on what it was competent and on what it was not. Therefore, Mr. President, unilateral cancellation in the circumstances explained to us in the statements of the two parties to the disagreement does not appear to us to be outside the framework of the Convention, because a certain number of Articles in the Convention explicitly reject the idea of discrimination. That is why, Mr. President, my delegation voted to support the competence of the Council on the three questions put to us.

147. The President: Thank you. The Representative of Spain.

148. Lt.Col.Izquierdo: Mr. President, I should like to explain briefly the position of my Government on the question we have been dealing with these past few days. We have always considered that problems of this nature, which directly involve the interests of States, deserve special attention and very careful consideration from the Council. We are satisfied that these aspects have been taken care of in the course of our debate. We have considered with the greatest care the preliminary objections submitted by the Government of India, as well as the reply of the Government of Pakistan, and have had the opportunity to hear, during these meetings, the thoughtful presentations made by the distinguished Legal Counsels of the two Governments. For a variety of reasons which have emerged in the course of our debate, we consider that the ICAO Council does have jurisdiction in this case and have voted accordingly, without this action in any way prejudging the attitude we may take on the substance of the problem.

149. The President: The Representative of Indonesia.

150. Mr. Karno Barkah: We have voted positively for the competence of the Council, but this does not prejudice our position regarding the substance of the matter, Mr. President. Indonesia has always had good relations with both India and Pakistan and will continue to have and we are doing our best to maintain strict neutrality and fairness in our decision between the two parties.

151. The President: Any other explanations of vote? On the question on which I interrupted the Representative of Nigeria, the Secretary General will circulate a memorandum giving all the reasons why this is so and if the Council, at a later stage, wishes to question that, it will have an opportunity to do so. I remember, however, having explained the situation when we started on this question and the Secretary General will be able to provide background information on why it is so. The Representative of India for an explanation of vote, I understand, or rather an explanation of the situation.
152. Mr. Gidwani: Mr. President, I have no explanation of vote; in fact I didn't vote. There is only one point I wanted to mention to you: that one should take these decisions sportingly. Unfortunately I at the moment am not taking them sportingly, because I felt there was something wrong with the method and the manner. Quite apart from that, I just wanted to thank you for all the courtesy, all the patience and all the hearing that you have given me. I also wanted to inform you that having regard to the manner and method in which the decision has been taken, both on procedure and substance, it is the intention of the Government of India to move the World Court. Thank you.
153. The President: Thank you. The Representative of Belgium.
154. Mr. Pirson: Mr. President, I would like you to distribute the exact text of the three questions that were put to the Council and to repeat for us the votes on them. I think I have them precisely, but in the first case we voted without a roll-call. Could you in each case repeat the result of the vote? The President: When you say "distribute", would you like to see them in writing or do you want me to read them now? Mr. Pirson: In writing, Mr. President. The President: Do you want the votes now? Mr. Pirson: If you can combine them with the questions it would perhaps be simpler. We all would then have an official text. The President: Yes, that can be done, and if you will accept the English text, it can be done this afternoon. The Representative of Czechoslovakia.
155. Mr. Svoboda: Permit me, Mr. President, to make a statement on my vote. I abstained solely because I was unable to consult my administration during the debate which developed during the last few meetings on matters of legal importance.
156. The President: The Representative of Tunisia.
157. Mr. El Hicheri: I should like to have a clarification from the Representative of India. I think he said something very important and perhaps certain States here can be informed. If I understood correctly, the Government of India intends to appeal to the International Court of Justice. Is it on the decision taken by the Council today concerning its competence or on the substance? I should like to have a clarification on this point because I may have to inform my Government, as it is a rather important development. I do not know whether he said exactly whether the appeal would be on today's decision by the Council or on the substance, but I understood that India would appeal - or at least intended to appeal - to the International Court of Justice on the manner in which the Council interpreted its own competence.

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158. The President: It is up to the Representative of India to reply if he so wishes.

159. Mr. Gidwani: Mr. President, the question of substance does not arise because the substance has not been discussed here. As I mentioned, we shall go to the International Court of Justice on the decision taken here today. Thank you.

160. The President: The Representative of Canada.

161. Mr. Clark: Only an explanation of vote. Canada, like many other countries represented here, has excellent relations with both India and Pakistan. However, we were concerned here today strictly with a point of international law and on that issue, and that issue alone, Canada was of the view that the Council of this Organization has jurisdiction. We found that for this reason, on a strict point of international law, we could not support the preliminary objection.

162. The President: Thank you. The Representative of Argentina.

163. Com. Temporini: As other delegations have said, our country has very amicable relations with the parties in this case we are considering, but in international relations Argentina has great respect for law and for the provisions of international agreements. When the pertinent documentation was received from India, we immediately sent it to our Government, which has considered it and sent us instructions. The position we took in the vote does not prejudice in any way the substance of the question.

164. The President: The Representative of Tunisia.

165. Mr. El Hicheri: As there have been several explanations of vote, all having to do with the relations members of the Council have with the two parties, I should not like to lose this opportunity to do the same. Of course, it is unnecessary to say, Mr. President, that we have very good relations with the two parties, and, addressing myself particularly to India, I may say that these are not platonic words. At a time when India was very gravely threatened and many countries failed in their obligations, Tunisia was one of the few to speak up for what it considered just. But, Mr. President, this question should not be considered from the standpoint of our friendship for one country or the other. It must be considered from the standpoint of law and of the interpretation of existing texts. In any case, the vote today, as several members of the Council have emphasized, bears only on a point of law, a question of form on the competence of the Council, and I believe it is inadmissible to interpret it as an indication of friendship or hostility towards one party or the other. This vote must be interpreted as a legal decision by the Council on a question of form. At any rate, that was the intent of our vote.

166. The President: The Representative of the Congo.

167. Mr. Ollassa: We too have excellent relations with the two parties. We came here only to decide a question of law and I wish to say immediately that the decision we took on this question has nothing to do with any solution that may be given to the substance of the problem. We think, and I believe we shall continue to think, that it is in bilateral negotiations that the two States in question will find a solution for all their problems.

168. The President: The Representative of Pakistan.

169. Mr. A.A. Khan: Mr. President, I wish to take this opportunity to thank you, Sir, the Secretariat and particularly the delegates who have been so generous in extending and reiterating their friendship for my country. We came to this august body in a spirit of humility, in a spirit of accommodation, in a spirit of goodwill. My Government does not consider the decision of this august body as a victory or a defeat for any State. It is our conviction that it is a victory for the Council, for this august body, for the responsibilities which this august body has accepted and reaffirmed. As Representative of Pakistan, I do wish to assure you, Mr. President, and distinguished delegates, that it is our intention to continue appearing before this Council in the same spirit, adhering to the Convention, adhering to the internationally established procedures, laws and conventions. With these remarks on behalf of my delegation I do wish to reiterate, once again, our thanks and our gratitude for the courtesy, for the kindness and for the consideration that all the Representatives, the Chairman, and the members of the Secretariat have extended to us. Thank you very much, Sir.

170. The President: Any other statements? The Representative of the Soviet Union.

171. Mr. Borisov: I abstained from voting on the first case because I was not given time for consultation with the competent organs of my Government. I request that this be recorded in the minutes. Thank you very much.

172. The President: Thank you. That will be done.

173. Dr. Bradfield: I presume that the decisions of the Council in this matter will be formally communicated to the representatives of the Governments of India and Pakistan and I suggest, Mr. Chairman, that when that is done, the point recently made by the Representative of the Congo be followed and that we reiterate our invitation to the two parties to make progress towards a solution by negotiation.

174. The President: Thank you. Any further points? I would like to remind the Council that, because of this decision, the time-limit which ceased to run when India deposited its Preliminary Objection, begins to run again as of today. Is there anything else on this question? The Representative of Senegal.

175. Mr. Diallo: Just to clarify our ideas, Mr. President. When will this period which begins to run again today come to an end?

176. The President: The original deadline was the 11th of June and we received the Preliminary Objection on the first of that month. India knows the dates. The Representative of India.

177. Mr. Gidwani: Mr. President, as I mentioned to you, we propose to go to the International Court of Justice and we will see legally whether or not a counter-memorial has to be filed. Personally I am of the view that no further proceedings of the Council on this matter are possible. As I said, we will go to the International Court of Justice. However, this is a matter which the Council separately, and the Government of India separately, will certainly examine.

178. The President: Thank you. I repeat that the deadline was the 11th of June and we received the Indian Preliminary Objection on the 1st of June, in other words there were ten days more. So the deadline will be ten days from today. Today is the 29th, so I think it will be something like the 8th of August. The Secretary General will have to determine it. The Representative of Senegal.

179. Mr. Diallo: Then it is in ten days that the period will expire. I have asked the question because my ideas are a little confused. Does the explanation the Delegate of India has just given mean that we shall not have the counter-memorial? - because I cannot place the problem. Are we still in the framework of Article 84 of the Convention which says that an appeal shall be notified to the Council within sixty days? The Representative of India has notified us at this meeting, but what are we to understand? I confess that I am a little lost, because we have not gone into the substance of the question and one Government has already expressed its intention of appealing to the International Court of Justice. How are things going to develop? I should like to have your reply summarized in the note on the decisions which was asked for a few minutes ago. That is not, of course, the "Summary of Decisions", but I should like to have this point clarified at this meeting. Thank you, Mr. President.

180. The President: I think that this is a very serious business and that it would not be desirable to ask India now exactly what it intends to do. I think all the Council has to note now - it is only noting - is that because of the decisions taken today, the time-limit has started to run again and that ten days from now India has to present the counter-memorial, and we stop there. What happens next, what India wants to do, is something we shall learn in time. The Representative of the Congo.

181. Mr. Ollassa: I think that after what the Representative of India has said, it is useless to adopt an ostrich policy. What India has said it has said officially and it will appear in the minutes. As it will appear in the minutes, one has a right to ask what the situation is going to be. It therefore would be desirable, at the very least, for members of the Council to have in a few days a memorandum on the main possibilities there will be if India does, in fact, do what it has just said it will do. To do what you have just said, Mr. President, is really following an ostrich policy.

182. The President: I don't think it is an ostrich policy. What will happen is this. We have to wait until, I think, the 8th or 9th of August, when the deadline comes. The Secretary General will keep the Council informed of what happens. If there is a counter-memorial from India he will circulate it; if there is no counter-memorial he will tell the Council so and will give further explanations if he can. The Representative of the Congo.

183. Mr. Ollassa: Mr. President, I venture to tell you that your reply is not a good one, and it is really a pity, because there are times when even a President of the Council cannot know everything. A reply that would interest me would be that of the Director of the Legal Bureau. I should like to know, for example, whether an appeal by India to the International Court of Justice would take the case out of the Council's hands. That is one of the questions that arise. If the reply is "Yes", how can you still tell us "Well, the period starts to run again.....I shall call a meeting if India does not file its counter-memorial....."? It is not worthwhile. We want replies to all these little questions, eventual questions, which are less eventual than you think, Mr. President, in the sense that we have an official declaration by India which will appear in the minutes. I believe there are times when one can be right, but also times when it is necessary to open the door to suggestions that are made. Could we not, as you said just a moment ago in a manner I found at one and the same time elegant and inelegant, have a memorandum on the question?

184. The President: At least a memorandum, yes. I think it is impossible for the Secretary General to start making an analysis now of the different possibilities and what the situation is. It is a very serious question; it has to be seriously considered. As I have said, in ten days time we shall know what the situation is, perhaps even sooner, because we may receive something from India today or tomorrow; I don't know. So we will inform you at the latest in ten days' time. If there is no reply from India the Secretary General will have to present the analysis you asked for in announcing that there has been no reply from India. So you will have satisfaction. What I wanted to avoid at this moment was putting the Secretary General in the position of having to improvise answers on the different hypothetical possibilities. The Representative of Senegal.

185. Mr. Diallo: In am really sorry to insist, Mr. President, but I would like to have clarification. In the note requested by the Delegate of Belgium a few minutes ago would it be possible at least to make reference to this official declaration by India that it is going to refer the Council's decision to the International Court of Justice? Where is that going to appear - only in the minutes we shall eventually receive or in the Summary of Decisions? Mr. President, it is proper that our Administrations know what is likely to happen, or most likely to happen, because we have heard in conversations - and it is well known - that the International Court of Justice meets twice a year. If this question was placed on its calendar and taken out of the Council's hands, we should be left on the sidelines for a considerable length of time without knowing exactly what was going to be done. If this question, however important it may be, was placed on the calendar of the International Court of Justice, it might be considered before the end of the century, but we should not know what we were going to do in the meantime. Our Administrations have only us to rely on for an exact idea of the situation, and if we have not understood it, we cannot very well explain it.

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186. The President: I think this is what will take place. It will be many days before we have the verbatim minutes, but I am going to ask the Secretary General to give first priority to the distribution of the Summary of Discussion for today's meeting, because it is the meeting in which we have had the discussion, voting, and decisions, and we shall have in that the points made by the Representative of India today. So you will have that first and then the Summary of Discussion for Tuesday and Wednesday will be coming out next week, at the latest on Friday, but this one you are going to have earlier and you will have in it the information you want. I understand, however, that in addition to that the wording of the questions and the results of the voting will be distributed separately today in a flimsy. The Representative of France.

187. Mr. Agésilas: I am going to take the liberty of asking another question, which, though a hypothetical one, the Secretariat may be able to answer more easily. Supposing India's counter-memorial is received in about ten days, could the Secretariat give us an indication, even a rough one, of how long it would take to translate and distribute it and when, eventually, the Council would have to meet to deal with the substance of the question? It is an eventuality on which it would perhaps be interesting to have an indication and the Secretariat may be able to give one.

188. The President: Yes, that is something the Secretary General can answer, I am sure.

189. The Secretary General: The Council realizes that we shall have a verbatim record of these last five meetings and we shall make every effort to publish it in the three languages. We shall need at least three or four weeks for that. To answer the question of the Representative of France, obviously we shall do our best to distribute the counter-memorial in the three languages as soon as possible, but when we shall be able to do so will depend on its length - how many pages, if there are attachments, if there are such detailed arguments that it will take quite a time to translate them. I can, however, assure the Council that this question will be given high priority by the Language and Production Services, so that the material will be made available to Council members.

190. The President: As far as a Council meeting to consider the matter, I believe it is out of question to think in terms of the month of August. It will not be in August and will probably be even after Labour Day. Unless India makes a very short presentation, late September is the earliest we would be able to do anything. The Representative of India.

191. Mr. Gidwani: Mr. President, talking of short presentations, I should be very grateful if in the Summary Record which you are going to give today or tomorrow, as you said, the statement made by me this morning, copies of which I handed to the Secretariat, could be inserted in full. Thank you.

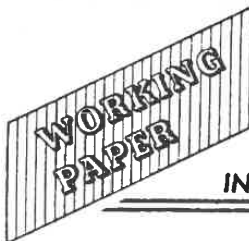
192. The President: We will attach it, because it is not normal to include statements in extenso in the Summary. The Representative of Belgium.

193. Mr. Pirson: I am aware of the difficulties, but I wish the Secretary General would give absolute priority to the distribution of the Summaries. I realize that the minutes proper will take some time. I am thinking particularly of the translation of the Summaries and I hope that we can have them at the beginning of next week at the latest, rather than at the end of next week.

194. The President: Well, as far as today's is concerned, yes, it will be available early next week. The other four will be within the week and, as I said before, the last of them will be out by Friday, noon at the latest. Is there anything else on this question? Apparently not, so the Council has completed discussion of this issue and at 2.30 this afternoon we shall meet for consideration of Resolution 39/1.

Annex 9

ICAO Council, 74th Session, *Working Paper: Voting in the Council on Disagreements and Complaints brought under the Rules on Settlement*, ICAO Doc. C-WP/5465 (21 Oct. 1971)



INTERNATIONAL CIVIL AVIATION ORGANIZATION

C-WP/5465
21/10/71

COUNCIL - SEVENTY-FOURTH SESSION

Subject No. 27: Convention on International Civil Aviation
[Chicago Convention]

VOTING IN THE COUNCIL ON DISAGREEMENTS AND COMPLAINTS BROUGHT UNDER THE RULES FOR THE SETTLEMENT OF DIFFERENCES

(Presented by the Secretary General)

- References:
1. S.G. Memorandum SG 609/71, 10 August 1971
 2. Chicago Convention, Doc 7300/4
 3. International Air Services Transit Agreement
 4. Draft C-Min. LXXII/20 (Closed) Part II

Introduction

1. Following the issue of the Secretary General's Memorandum of the above-mentioned subject to Council Representatives, No. SG 609/71 dated 10 August 1971, a Council Representative requested the President of the Council that the subject of that Memorandum be included in the Work Programme of the Council. The present paper provides an analysis of the question of the majority required under the Chicago Convention for a decision of the Council in cases of disagreements and complaints brought under the Rules for the Settlement of Differences. The opinion of the Legal Bureau in the matter is stated in paragraph 5, while paragraph 6 recalls the ruling given by the President in two cases recently.

Majority required for decisions of the Council

2.
 - (a) The Council is a body of which the number of members is fixed: Article 50 of the Chicago Convention states: "It shall be composed of twenty-seven Contracting States elected by the Assembly".
 - (b) Article 52 provides that: "Decisions by the Council shall require approval by a majority of its members".
 - (c) Consequently, at present the requisite number of members is fourteen.
 - (d) It is to be specifically noted that the requirement of Article 52 is that a decision of the Council as a body is dependent on the number of its members, and not, for example, as in the case of the Assembly, on the number of "the votes cast" (Article 48, paragraph (c) of the Chicago Convention).

DISTR26/10/71

Cases where some members do not vote

3. The number of votes cast on a given occasion would be less than the number of members of the Council (namely, 27) in the following cases:

A - Where the Convention states that a member shall not vote:

- (i) Under Article 53 which provides:
"No member of the Council shall vote in the consideration by the Council of a dispute to which it is a party".

Note: Article 84 of the Convention contains an identical provision.

- (ii) Under Article 66(b):
"Members of the ... Council who have not accepted the International Air Services Transit Agreement ... or the International Air Transport Agreement ... shall not have the right to vote on any questions referred to the ... Council under the provisions of the relevant Agreement".

- (iii) Under Article 62 of the Convention:
"The Assembly may suspend the voting power ... in the Council of any Contracting State that fails to discharge within a reasonable period its financial obligations to the Organization".

B - Where it is impracticable for a member to vote because its Representative is not present, or unable to be present, for any reason, at the time of the voting in the Council.

C - Where a member voluntarily decides not to vote: for example, a Representative may declare that his State is not participating in the vote; or he, without any such declaration, simply abstains in the voting.

Effect of not voting

4. The provisions of Articles 53, 84, 66 and 62 mentioned above contain no reference, expressly or by implication, to Article 52. Consequently, they do not produce any effect on the requirement specified in Article 52 that: "Decisions by the Council shall require approval by a majority of its members". Therefore that Article is not subordinated to, and operates independently of, the other four Articles mentioned.

Conclusion

5. In the opinion of the Legal Bureau -

- A - Nothing in Articles 53, 84, 66 or 62 of the Convention amends the figure of twenty-seven which is the membership of the Council specified in Article 50(a). In other words,

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a member of the Council does not cease to be a member of that body solely because its voting power is taken away for some particular occasion by a provision of the Convention. (A State which is not entitled to vote at a particular session of the Assembly by reason of the application of Article 62 or Article 88 does not cease to be a Contracting State).

- B - Nothing in the four Articles mentioned affects the majority required by Article 52, such majority being related to the number of members of the Council and not to the members voting.
- C - The foregoing conclusions would only be fortified by the following provision of Article II, Section 2, of the International Air Services Transit Agreement⁽¹⁾ which depends on the Chicago Convention:

"Section 2

If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement cannot be settled by negotiation, the provisions of Chapter XVIII of the above-mentioned Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the above-mentioned Convention."⁽²⁾

Ruling of the President

6. The only precedent relating to voting in the Council on 1) disagreements and 2) complaints, brought under the Rules for the Settlement of Differences, is that the President of the Council, in the meeting of the Council held on 7 April 1971, gave the ruling that in the two cases before the Council, Case No. 1 and Case No. 2, Pakistan versus India, "the statutory majority requirement in Article 52 for any decision taken" would be necessary. Replying to two questions he confirmed that the statutory majority would be required in Case No. 2 also, (besides Case No. 1), and explained that the Rules could not be amended to permit decisions to be taken on Case No. 2 by a majority of the Member parties to the Transit Agreement because "the majority was governed by the Chicago Convention, not by the Rules for the Settlement of Differences": see Draft C-Min. LXXII/20 (Closed), Part II - DISCUSSION, paragraphs 6, 7, 8 and 9. There were no further questions raised relating to procedure.

Action

- 7. This paper is presented for information.

⁽¹⁾ Doc 7500

⁽²⁾ underlining supplied for this paper.

Annex 10

ICAO Council, *Règlement pour la Solution des Différends* (1957, amended 10 Nov. 1971)

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RÈGLEMENT

POUR LA SOLUTION DES DIFFÉRENDS

Approuvé par le Conseil le 9 avril 1957
et amendé le 10 novembre 1975*

CHAPITRE I

CHAMP D'APPLICATION DU RÈGLEMENT

Article premier

1) Les règles énoncées aux Titres I et III s'appliquent au règlement des désaccords suivants survenus entre États contractants qui peuvent être soumis au Conseil:

a) tout désaccord survenu entre deux ou plusieurs États contractants à propos de l'interprétation ou de l'application de la Convention relative à l'aviation civile internationale (appelée ci-après "la Convention") et de ses Annexes (articles 84 à 88 de la Convention);

b) tout désaccord survenu entre deux ou plusieurs États contractants à propos de l'interprétation ou de l'application de l'Accord relatif au transit des services aériens internationaux (appelé ci-après "Accord de transit") ou de l'Accord relatif au transport aérien international (appelé ci-après "Accord de transport") (Accord de transit, article II, section 2; Accord de transport, article IV, section 3).

2) Les règles énoncées aux Titres II et III s'appliquent à l'examen de toute plainte relative, soit à une mesure prise aux termes de l'Accord de transit par un État partie à cet Accord et qu'un autre État partie audit Accord estime injuste ou préjudiciable à son égard (Accord de transit, article 2, section 1), soit à une mesure analogue aux termes de l'Accord de transport (article IV, section 2).

Titre I

CHAPITRE II

DÉSACCORDS

Article 2

Tout État contractant (appelé ci-après "le demandeur") qui soumet un désaccord au Conseil aux fins de règlement, doit introduire une requête, à laquelle est joint un mémoire contenant:

* Amendement de l'article 29 approuvé par le Conseil le 10 novembre 1975.

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a) le nom du demandeur et le nom de tout État contractant (appelé ci-après "le défendeur") avec lequel le désaccord existe;

b) le nom d'un agent autorisé à agir pour le demandeur au cours de l'instance, avec l'indication de son adresse, au siège de l'Organisation, à laquelle seront envoyées toutes les communications relatives à l'affaire, y compris la notification de la date des séances;

c) un exposé des faits sur lesquels la requête est fondée;

d) les pièces à l'appui;

e) un exposé de droit;

f) le remède sollicité par décision du Conseil en ce qui concerne les divers points soumis;

g) une déclaration attestant que des négociations ont eu lieu entre les parties pour régler le désaccord, mais qu'elles n'ont pas abouti.

CHAPITRE III

SUITE QUE COMPORTENT LES REQUÊTES

Article 3

Rôle du Secrétaire général

1) Dès réception d'une requête, le Secrétaire général doit:

a) vérifier si la requête est présentée dans la forme prescrite à l'article 2 ci-dessus et, au besoin, inviter le demandeur à suppléer à toute omission constatée dans la requête;

b) après vérification, notifier sans délai la réception de la requête à toutes les parties à l'instrument dont l'application ou l'interprétation est en cause, ainsi qu'à tous les membres du Conseil;

c) communiquer au défendeur copie de la requête et des pièces à l'appui, en l'invitant à déposer un contre-mémoire dans le délai fixé par le Conseil.

2) Copie de toutes les pièces de procédure ou autres documents soumis ultérieurement par une partie au Conseil sera transmise également par le Secrétaire général à l'autre ou aux autres parties en cause.

Annex 11

ICAO Council, *Cuba v. United States*, Memorial of Cuba (11 July 1996)



INTERNATIONAL CIVIL AVIATION ORGANIZATION
 ORGANISATION DE L'AVIATION CIVILE INTERNATIONALE
 ORGANIZACIÓN DE AVIACIÓN CIVIL INTERNACIONAL
 МЕЖДУНАРОДНАЯ ОРГАНИЗАЦИЯ ГРАЖДАНСКОЙ АВИАЦИИ
 منظمة الطيران المدني الدولي

INTERNATIONAL AVIATION SQUARE, 1000 SHERBROOKE STREET WEST, MONTREAL, QUEBEC, CANADA H3A 2R2
 FACSIMILE TEL.: (514) 288-4772 CABLES: ICAO MONTREAL TELEX: 05-24513 SITA: YULCAYA

OFFICE TEL.:

SG 1490/96
 LE 6/3

30 September 1996

To: Representatives on the Council
 From: Secretary General
 Subject: Settlement of Differences: Cuba and United States (1996)

By memorandum SG 1484/96, LE 6/3 dated 29 August 1996, I notified Representatives on the Council that the Government of Cuba had submitted an application to the Council for settlement of a difference with another Contracting State. The application, dated 11 July 1996, delivered to the Office of the President of the Council on 16 July 1996, was submitted with respect to the right of overflight of Cuban-registered aircraft over United States territory during their flight to and from Canada and named the United States of America as the Respondent.

In accordance with Article 3, paragraph (1) (b) of the ICAO Rules for the Settlement of Differences (Doc. 7782/2), I have notified all parties to the *International Air Services Transit Agreement* and to the *Convention on International Civil Aviation* by State letter LE 6/3 - 96/82 dated 30 August 1996 that the above application has been received.

The application of the Government of the Republic of Cuba is set out in the Attachment. (It should be noted that pages A-7, A-10 through A-13, and A-17 through A-20 of the attachments to the application have been intentionally left blank, since legible copies of these pages have yet to be provided by Cuba. These will be distributed as soon as received.)

A handwritten signature in dark ink, appearing to read 'P. Rochat'.

Philippe Rochat

Attachment

A-1

D. Gill, D. Wilson

FRES

JOB NO 2793

16 JUL 1996

Havana, 11 July 1996

CUBA

CIVIL AVIATION INSTITUTE OF CUBA
PRESIDENT

Sir,

I am sending you herewith the document "Complaint by the Republic of Cuba to the Council of the International Civil Aviation Organization" with the aim of having it included as one of the items for the next 149th Session of the Council.

Accept, Sir, the assurances of my highest consideration.

(sgd) Rogelio Acevedo González
Major-General

President

Dr Assad Kotaite
President of the Council of ICAO
Montreal

A-2

Complaint by the Republic of Cuba to the Council of the International Civil Aviation Organization

In accordance with the International Air Services Transit Agreement and particularly Section 1 of its Article II and Article 5 of the Convention on International Civil Aviation, the Republic of Cuba deems that the actions taken by the Government of the United States in relation to the right to overfly its territory (First Freedom) for Cuban-registered aircraft in their flights to and from Canada are causing injustice and hardship to it. It therefore requests that the Council of the International Civil Aviation Organization examine this discriminatory situation and consequently that the Government of the United States correct such actions.

In keeping with the provisions of Article 1 (2) and Article 21 of the Rules for the Settlement of Differences, it is referring the present complaint to the Council owing to the restrictive and discriminatory unjust and detrimental actions being applied against it by the Government of the United States of America, as referred to in the preceding paragraph, which violate the provisions of the Convention on International Civil Aviation Organization and the International Air Services Transit Agreement, to which both States are parties.

The Republic of Cuba considers that these actions which have been applied against it for over 15 years are unjust and illegal and are causing great hardship to Cuban airlines, since the route that we are obliged to take is not the shortest and most expedient, which significantly increases fuel consumption, raises operating costs in general and represents a major inconvenience for the passengers.

In view of the fact that more than eight months have passed since the holding of the 31st Session of the Assembly and no result has been achieved in resolving this situation, we are referring the present complaint to the Council of the International Civil Aviation Organization in keeping with the provisions of the Rules for the Settlement of Differences since the complainant Party cannot go on waiting, *sine die*, for a reaction from the respondent Party.

This pleading submitted to the Secretariat of the International Civil Aviation Organization on 16 July 1996.

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- 2 -

MEMORIAL

1. The Republic of Cuba is the applicant and the United States of America is the respondent.

2. The Republic of Cuba authorizes Mr Gabriel Tiel Capote as its legal representative; he will be assisted by counsel and advocates whose names will be communicated to the Council in accordance with what is established in Article 27 of the Rules for the Settlement of Differences. All communications related to the case will be sent to the Consulate of the Republic of Cuba in the city of Montreal located at 1415 Pine Ave.; they will have to be sent with sufficient prior notice to allow its representative, counsel and advocates to travel to the city of Montreal in time.

3. The Republic of Cuba has complied strictly with what is established in the International Air Services Transit Agreement and it has acted in accordance with what is stated in Article 5 and Article 44 of the Convention on International Civil Aviation and, in particular, with what is stated in subparagraph (g): "Avoid discrimination between contracting States".

4. Cuban airlines, in their flights bound for Canada, have repeatedly requested from the competent authorities of the United States of America the corresponding permission to overfly their territory on the published international routes which are more convenient for these commercial flights; this has been refused, obliging those airlines to overfly an area of routes which are neither competitive nor economically acceptable to their frank disadvantage as compared to other airlines operating similar services (Attachment 1, telexes of requests and refusals).

5. The detour which Cuban airlines are obliged to make leads to a significant increase in operating costs and inconvenience for users (see Attachment 2, Economic Hardship); this is in direct contradiction with one of the objectives of the Convention which is to provide "international air transport services [which] may be . . . operated soundly and economically".

6. The aeronautical authorities of the Republic of Cuba have authorized all the commercial airlines and general aviation coming from the United States of America to overfly its territory on their flights through the air corridors which cross the FIR of the Republic of Cuba, respecting the principles and objectives established in the Convention on International Civil Aviation and the International Air Services Transit Agreement (Attachment 3, Main airlines of the United States of America which fly through the airspace of the Republic of Cuba).

7. This discriminatory practice on the part of the United States of America has been the subject of complaints to the competent authorities of that State, taking into account the purely technical nature of the matter and the provisions of the above-mentioned Agreement, in addition to the fact that both States are signatories to that Agreement; this grants them the right to exercise the first and second freedoms of the air. The responses have been in the negative.

8. Independent of the steps take by the competent authority of the Republic of Cuba within the bilateral framework, in order to find a solution to this flagrant violation of the above-mentioned Agreement and the principles and objectives established in the Convention on International Civil Aviation directed towards ensuring "that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity", we have insistently denounced this discriminatory policy at various Sessions of the Assembly of ICAO, as described below:

A-4

- 3 -

a) At the 27th Session of the Assembly in Montreal from 19 September to 6 October 1989, in a Plenary Meeting the Republic of Cuba denounced the discriminatory practices which adversely affected the flights of Cubana de Aviación bound for Canada when it came to overflying the territory of the United States of America. It was stated that this involved considerable consumption of fuel and that this was in violation of the Chicago Convention and also in contradiction with Recommendation 7 of the Third Air Transport Conference. The cessation of such discriminatory practices was demanded.

b) At the 29th Session of the Assembly in Montreal from 22 September to 8 October 1992, the Republic of Cuba raised the question of the non-discriminatory treatment accorded to overflights by foreign aircraft, regardless of all political considerations, which was aligned with the requirements of the Chicago Convention and international law. It was indicated that Cuba was not treated reciprocally and equitably by the United States of America.

c) At the 31st Session of the Assembly in Montreal from 19 September to 4 October 1995, the Republic of Cuba again repeated its statement with regard to the discriminatory treatment to which it was subjected on its flights to Canada when it came to overflying the territory of the United States of America. Cuba presented to that forum Working Paper A31-WP/94 (Attachment 4) which was considered by the Assembly which directed the Secretary General and the President of the Council to continue and intensify their efforts to find a satisfactory solution to these problems.

9. In view of the fact that more than eight months have passed since the holding of the 31st Session of the Assembly, taking into account the actions and insistence of the Republic of Cuba to find a solution to this matter through the good offices of the President of the Council and the Secretary General of ICAO (Attachment 5) and since no result has been achieved in resolving this disagreement, we turn to the Council of ICAO in keeping with the provisions of the Rules for the Settlement of Differences since the applicant Party cannot go on waiting, *sine die*, for a reaction from the respondent Party.

A-5

- 4 -

Statement of Law

1. Convention on International Civil Aviation

- Preamble, second and third paragraphs
- Article 5
- Article 44 (a), (d), (f), (g) and (i)
- Article 54 (b), (j) and (n)

2. International Air Services Transit Agreement

Article I, Section I

Article II, Section I

3. Rules for the Settlement of Differences

Article 1 (2)

Article 2

In accordance with the International Air Services Transit Agreement and particularly Section I of its Article II and Article 5 of the Convention on International Civil Aviation, the Republic of Cuba deems that the actions taken by the Government of the United States of America in relation to the right to overfly its territory (First Freedom) for Cuban-registered aircraft in their flights to and from Canada are causing injustice and hardship to it. It therefore requests that the Council of the International Civil Aviation Organization examine this discriminatory situation and consequently that the Government of the United States correct such actions.

A-6

- 5 -

ATTACHMENT I

Compendium of telexes of requests and refusals by seasons

- (a) Winter 1993
- (b) Summer 1993
- (c) Summer 1994
- (d) Winter 1994
- (e) Summer 1995
- (f) Winter 1995
- (g) Summer 1996

NOTE:

S - Cuban request

R - Negative response from the United States

A - 7

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A - 8

emitir : 018
 FF KDCAYAYX KRWAYAYX
 271900 MUHACUBI
 RMT 261800 REF REQUEST OVERFLIGHT PERMISSION FOR CUBANA FLIGHTS
 AGGREGATE CUB484/485 FROM DEC/19 TO MAR/20 OPERATING AS FOLLOWS STP
 CUB484/485 FROM DEC/19 TO MAR/20 OPERATING AS FOLLOW STP
 ALL TIME UTC STP
 CUB484 19DEC20MAR 0000007 IL6 C4Y156 HAV1230 VRA1300
 VRA1515 YMX1915
 CUB485 19DEC20MAR 0000007 IL6 C4Y156 YMX2115 VRA0115+1
 CUB485 20DEC21MAR 1000000 IL6 C4Y156 VRA0245 HAV0315
 REST MI MSG WITHOUT CHANGE STP
 TKS IN ADVANCE FOR YOUR COOP RGDS
 CUBANA OPS STP

NNNN

OI HAV

emitir : 052
 FF KDCAYAYX KRWAYAYX
 281340 MUHACUBI
 WINTER 1993/1994 OPRTING CUBANA FLIGHT CUB9040/9041
 HAV/VRA/YQB/VRA/HAU
 A/C IL-62 CONF C4Y156 STS ALL STS FOR PAXS STP A/C REG CU-T1202/
 1209/1215/1216/1217/1218/1225/1226/1252/1259/1260/1282/1283/1284
 STP ALT A/C TU-154 CONFY156 STS 153 STS FOR PAXS STP A/C REG CU-T1202
 //1224/1253/1256/1264/1265/1275 AS FOLLOWS STP ALL TIME UTC STP
 CUB9040 05NOV25MAR 0000500 IL6 C4Y156 HAV1600 VRA1630
 VRA1730 YRB2130+1
 CUB9041 05NOV25MAR 0000500 IL6 C4Y156 YRB2300 VRA0300+1
 CUB9041 06NOV26MAR 0000060 IL6 C4Y156 VRA0345 HAV0415
 TKS IN ADVANCE FOR YOUR COOP RGDS
 CUBANA/OPS

CZC TCA033 300028
DD MUHACUBT

A - 9

291926 KRWAYAYX

////PART 1 OF 2////

SUBJECT CUBANA WINTER 1993 SCHEDULE.
REFERENCE YOUR 261800, 262020, 271055, 271235, 271900 AND 281340

MESSAGES.
1. FAA APPRECIATES NOTIFICATION AND HAS NO OBJECTIONS.
PREVIOUSLY APPROVED ROUTES AS LISTED BELOW WILL CONTINUE TO BE
FLOWN.

A. TO HAVANA

(1) FROM MONTREAL
V282 BUGSY J570 ALB J37 JFK A300 CHAMP

G437 ZQA R628 UVR
(2) FROM QUEBEC

V447 YSC J563 ALB J37 JFK A300 CHAMP G437

ZQA R628 UVR

(3) FROM TRONTO

KLOPS J522 HNK HUO J63 JFK A300 CHAMP

G437 ZQA R628 UVR

////END PART 1////

NNNN

ZCZC TCA034 300030

DD MUHACUBT

291926 KRWAYAYX

////PART 2 OF 2////

B. TO MONTREAL

(1) UVR R628 ZQA G437 CHAMP A300 JFK J63 SYR
ART ART040 J594 MSS V203 FRANX CYMX

C. TO QUEBEC

(1) UVR R628 ZQA G437 CHAMP A300 JFK J37 AIR
J563 YSC V447 CYQB

D. TO TORONTO

(1) UVR R628 ZQA G437 CHAMP A300 JFK J63 HUO
CFB J95 BUF V36 CYYZ

2. UNTIL A FORMAL REQUEST IS MADE TO THE DEPARTMENT OF STATE NO
CHANGES IN ROUTING WILL BE MADE.

BEST REGARDS.

DRAIN/AIA-101

////END PART 2////

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ZCZC TCA319 070034

A-14

DD MUHACUBI

041814 KRWAYAYX

//PART 1 OF 2//

ATTN. ZMA-502.1/ MUHACUBI

SUBJECT CUBANA AIRLINES SUMMER 1994 SCHEDULE.

REF: FAA/AIA-101 MESSAGE 232120 MAR 94

REFERENCE MESSAGE IS APPROVAL OF SUMMER FLIGHT SCHEDULE ONLY.
REQUESTED ROUTINGS ARE UNDERGOING REVIEW AND ARE NOT REPEAT
NOT APPROVED. APPROVAL FOR NEW ROUTINGS WILL BE DONE VIA
DIPLOMATIC CHANNELS. UNTIL THEN THE PREVIOUSLY APPROVED
ROUTES AS LISTED BELOW REMAIN IN EFFECT:

A. TO HAVANA

(1) FROM MONTREAL

V282 BUGSY J570 ALB J37 JFK A300 CHAMP

6437 ZQA R628 UVR

(2) FROM TORONTO

KLOPS J522 HNK HUO J63 JFK A300 CHAMP

6437 ZQA R628 UVR

//END PART 1//

NNNN

ZCZC TCA321 071006

DD MUHACUBI

041814 KRWAYAYX

//PART 2 OF 2//

B. TO MONTREAL

(1) UVR R628 ZQA 6437 CHAMP A300 JOK J63

SYR ART ART040 J594 MSS V203 FRANX CYMX

C. TO TORONTO

(1) UVR R628 ZQA 6437 CHAMP A300 JFK J63

HUO CFB J95 BUF V36 CYYZ

BEST REGARDS, AIA-101

//END PART 2//

NNNN

D. Wilson

A — 15

JOB NO 2793/3

CUBANA DE AVIACION

Havana, 18 October 1994

Routing Unit

We are hereby providing Cubana's international routing for the Winter 1994 season so that the overflights of the United States for the **Canada-bound flights** using IL-62M aircraft and the AOM-leased back-up DC-10 aircraft can be processed:

Registration:

Aircraft:
IL/62 ... CUT1209/1215/1217/1218/1225/1259/1280/1282/1283/1284

Aircraft:

DC-10 ...
FGNEM/FODLX/FODLZ/FODLY/FBTDD/FGNDC/FBTDE/FGLMX/FGKMY/FG
GMZ/FGHOI

Routes:

VRA/YMX
MUVR-SID-G448-MTH-DCT MIA-DCT-ADDOR-AR7-DIW-J74-ORF-J209-SBY-J79-
JFK-J37-IGN-ALB-J6-PLB-J567-YUL-STAR-CYMX

YMX/VRA
CYMX-SID-J570-ALB-J37-IGN-JFK-J79-SBY-J209-ORF-J174-DIW-AR7-PANAL-
MILOE-OZENA-ADDOR-DCT MIA-MTH-G448-TADPO-UVR-STAR-MUVR

VRA/YYZ
MUVR-SID-G448-TADPO-MTH-DCT-MIA-ORL-J53-CRG-J55-SAV-J51-CAE-DCT-
PSK-J53-EWC-DCT-DKK-ABCID-LINNG-YOUTH-STAR-CYYZ

A — 16

YYZ/VRA

CYYZ-SID-DCT-TOBIC-THORL-EWC-J53-PSK-DCT-CAE-J51-SAV-J103-OMN-J79.

VRB-PBI-MIA-DCT-MTH-G448-TADPO-UVR-STAR-MUVR

(sgd) Rosa María Suarez Ferrás

Head, Routing Unit

Ms Lourdes Pérez Rocca
Head, Legal Department
ECA

Ms Mayda Molina
Head, Internal Relations Department
IACC

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DD MULHCUBI

271844 KRWAYAYX

////PART 1 OF 3////

1. REFERENCE YOUR WINTER 95/96 SCHEDULE FOR CUBANA AIRLINES.
FAA APPRECIATES NOTIFICATION AND HAS NO OBJECTION ON THE
FOLLOWING SCHEDULE:

A. TO/FROM MONTREAL

/1/ SUN IL62 CUB484/485// MUHA1345 MUMR1415/1515
CYMX1915/204 /MON/ MUVR0045/0145 MUHA0215

/2/ ?/29 OCT - 18 DEC/ SUN IL62 CUB9024/9025//

MUHA1000 MUVR1030/1130 MUCA1215/1315 71845

MUCA2245/2345 /MON/ MUVR0030/01

? .7~0205

/3/ ?/23 DEC - 24 MAR/ SAT IL62 CUB9024/9025//

MUHA1215 MUVR1245/1345 CYMX1745/1915 MUVR2315/0245 /SUN/

MUHA0315

/4/ ?/23 DEC - 24 MAR/ SAT IL62 CUB9036/9037//

MUHA1445 MUVR1515/1615 CYMX2015/2145 /SUN/ MUVR0145/0245

MUHA0315

B. TO/FROM TORONTO

/1/ ?/23 DEC - 23 MAR/ SAT IL62 CUB9000/9001//

MUHA1230 MUVR1300/1400 CYYZ1755/1930 MUVR2330/0030 /SUN/

////END 1 OF 3////

CIA13128.001

DD MULHCUBI

271844 KRWAYAYX

////PART 2 OF 3////

MUHA0100

/2/ ?/29 OCT - 18 DEC/ SUN IL62 CUB9006/9007//

MUHA1300 MUVR1330/1430 CYYZ1830/2000 MUVR2359/0100 /MON/

MUHA0130

/3/ ?/24 DEC - 24 MAR/ 2 CUB9006/9007//

MUHA1415 CYYZ1830/2000 /MON/ MUHA0015

C. TO/FROM QUEBEC

/1/ ?/24 DEC - 24 MAR/ SUN I 62 CUB9040/9041//

MUHA1230 MUCA1315/1415 CYQB1815/1945 MUCA2345/0045 /MON/

UHA0130

2. ROUTES REQUESTED IN YOUR 151913 MESSAGE HAVE NOT BEEN
APPROVED. PLEASE CONTINUE TO FILE AND FLY THE APPROVED ROUTES
AS FOLLOWS:

A. TO HAVANA

/1/ FROM MONTREAL

BUGSY J570 ALB J37 JFK A300 CHAMP G437
ZQA R628 UVR

/2/ FROM QUEBEC

////END PART 2 OF 3////

CIA70030.001

DD MULHCUBI

271844 KRWAYAYX

////PART 3 OF 3////

J563 ALB J37 JFK A300 CHAMP G437 ZQA

R628 UVR

/3/ FROM TORONTO

KLOPS J522 HNK HUO J63 JFK A300 CHAMP

G437 ZQA R628 UVR

B. TO MONTREAL

/1/ UVR R628 ZQA G437 CHAMP A300 JFK J63 6YR

ART ART040 J594 MSS V203 FRANX

C. TO QUEBEC

/1/ UVR R628 ZQA G437 CHAMP A300 JFK J37 ALB

J563

D. TO TORONTO

/1/ UVR R628 ZQA G437 CHAMP A300 JFK J63 HUO

CFB J95 BUF V36

BEST REGARDS.

17:24

A - 22

NO. 446

622

LAW OFFICES

ZUCKERT, SCOTT & RASENBERGER, L.L.P.

888 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20006-3939
TELEPHONE: (202) 298-8660
FACSIMILES: (202) 342-0663
(202) 342-1316

October 27, 1995

BY FACSIMILE

Sra. Lourdes Pérez-Roca Tort
Legal Department
Empresa Consolidada Cubana de
Aviación
Calle 23 No. 64
La Rampa, Vedado, Habana 4, CUBA

Dear Lourdes:

Shortly before we received your letter today, we received a letter from the Federal Aviation Administration ("FAA") denying the routing that Cubana submitted for the 1995/1996 winter season. We have enclosed the FAA's letter for your review. Cubana must continue to use the routes that it has previously operated.

When you get a chance, please send us the revised routing, so that we may file it with the FAA.

Thank you for your assistance. If you have any questions concerning these matters, please do not hesitate to contact us.

Best regards.

Sincerely,

James L. Devall
James L. Devall
Lorrie Anne Jones

Enclosure

CORRESPONDENT OFFICES: LONDON, PARIS AND BRUSSELS

10:00AM 7 AIA

A - 23



U.S. Department
of Transportation

Federal Aviation
Administration

Office of International Aviation
Washington, D.C. 20591

FACSIMILE TRANSMISSION
FAX NUMBER (202) 267-5306
TELEPHONE (202) 267-8115

October 27, 1995
1 Page(s)

TO: Lonnie Jones

Lonnie,

The FAA appreciates notification of Cubana's 95-96 Winter schedule. There is no objection to the schedule, however the airway routings requested by Cubana have not been approved. We request that they continue to fly the approved routings.

If you have any questions please give me a call.

Best regards.

VH Sharp

Lt Col Vincent Sharp
AIA-101

R

A- 24

FF0SPX00.027

FF MULHCUBI KRWAYAYX KDCAYAYX

141943 MULHCUBI

PART ONE CONTINUED.....

CUBANA DE AVIACION GREETES YOU AND REQUEST OVERFLIGHT PERMISSIONS OVER
UNITED STATES FOR CUBANA IATA SUMMER 96 SEASON TO CANADA USING ACFTS* IL6 CONFIG/D12Y150 STS ACFT REG CUT1209/1215/1217/1218/1225/1259/1280
1282/1283/1284 AS FOLLOW STP ALL TIMES UTC STP

CUR484 31MAR31MAR 0000007 D12Y150 IL6 HAV1345 VRA1415/1515 YMX1915

CUB485 31MAR31MAR 0000007 D12Y150 IL6 YMX2045 VRA0045/0145 HAV0215+1

CUB484 07APR20OCT 0000007 D12Y150 IL6 HAV1245 VRA1315/1415 YMX1815

CUB485 07APR20OCT 0000007 D12Y150 IL6 YMX1945 VRA2345/0045 HAV0115+1

CUB9006 31MAR20OCT 0000007 D12Y150 IL6 HAV1205 VRA1230/1330 YYZ1730

CUB9007 31MAR20OCT 0000007 D12Y150 IL6 YYZ1900 VRA2300/2359 HAV0030+1

CUB9024 31MAR31MAR 0000007 D12Y150 IL6 HAV1005 VRA1030/1130 AVI1215

AVI1315 YMX1715

CUB9025 31MAR31MAR 0000007 D12Y150 IL6 YMX1845 AVI2245/2345 VRA0030+1

CUB9025 01APR01APR 1000000 D12Y150 IL6 VRA0130 HAV0200

CUB9024 07APR20OCT 0000007 D12Y150 IL6 HAV0905 VRA0930/1030 AVI1115

AVI1215 YMX1615

CUB9025 07APR20OCT 0000007 D12Y150 IL6 YMX1745 AVI2145/2245 VRA2330

CUB9025 07APR21OCT 1000000 D12Y150 IL6 VRA0030 HAV0100

@

FF0SPX00.028

FF MULHCUBI KRWAYAYX KDCAYAYX

141949 MULHCUBI

PART TWO END.....

HAV/YMX/HAV ROUTE

GO

MUVR-DCT-UVR-G448-MTH-DCT-MIA-ADOOR-AR7-DIW-J174-DRF-J209-SBY-J79-JFK
-J37-IGN-ALB-J6-PLB-DCT-NAPEE-YMX

BACK

YMX-DCT-EUSTA-V282-BUGSY-J570-ALB-J37-IGN-JFK-J79-SBY-J209-DRF-J174-
DIW-AR7-PANAL-MILDE-OZENA-DCT-MIA-MTH-G448-TADPO-UVR-DCT-VRA

HAV/YYZ/HAV ROUTE

GO

VRA-DCT-UVR-G448-MTH-DCT-MIA-DCT-ORL-J53-CRG-J55-SAV-J51-CAF-DCT-
PSK-J53-EWC-DCT-DKK-DCT-4242N07917W-DCT-ABCID-DCT-LINNG-DCT-YOUTH-
DCT-YYZ

BACK

YYZ-SID-TOBIC-THORL-DCT-EWC-J53-EKN-PSK-DCT-CAE-J51-SAV-OMN-J103-
VRA-J79-PBI-BSY-MIA-DCT-MTH-G448-UVR-DCT-VRACUBANA DE AVIACION MUCH APPRECIATE YOUR ATTENTION AND PROMPTLY REPLY
STP WE WOULD WANT YOU TO TAKE IN ACCOUNT ROUTES WE REQUEST BECAUSE
THEY MEAN LESSER FLYING TIME TO OUR POINTS IN CANADA AND IT IS
DIRECTLY RELATED WITH AIR NAVIGATION SECURITY STPWE ALSO WOULD WANT TO WISH YOU MERRY CHRISTMAS AND HAPPY NEW YEAR
IF YOU NEED ANY INFORMATION ELSE FOR GIVING PERMIT DO NOT HESITATE IN
CONTACTING US TO AFTN ADDRESS MULHCUBI OR TO FAX NR (537)334719 STP
REMAIN YOU

BEST REGARDS

ENG. LEONARDO HAZA

CUBANA SCHED PLANNING

@

A- 25

CIA02630.001

ED MULHCUBI

291617 KRWAYAYX

PART 01 OF 02

.. REFERENCE YOUR CUBANA SUMMER 1996 SCHEDULE. FAA
APPRECIATES NOTIFICATION AND HAS NO OBJECTION ON THE
FOLLOWING SCHEDULE

A. TO/FROM MONTREAL /CYMX/

/1/ SUN IL62 CUB484/485// MUHA1245 MUVR1315/1415
CYMX1815/1945 MUVR2345/0045 /MON/ MUHA0115

/ONE HOUR LATER ON 31 MAR/

/2/ SUN IL62 CUB9024/9025// MUHA0905
MUVR0930/1030 MUCA1115/1215 CYMX1615/1745 MUCA2145/2245
MUVR2330/0030 /MON/ JUHA0100

/ONE HOUR LATER ON 31 MAR/

B. TO/FROM TRONTO /CYYZ/

/1/SUN IL62 CUB9006/9007// MUHA1205
MUVR1230/1330 CYYZ1730/1900 MUVR2300/2359 /MON/ MUHA0030
END PART 01

R

A - 26

ZUCKERT, SCOUTT & RASENBERGER, LLP

(FRI) 03. 29 '96 14:40/ST. 14:39/NO. 3500205973 P 2

LAW OFFICES

ZUCKERT, SCOUTT & RASENBERGER, L.L.P.

646 SEVENTEENTH STREET, N.W.

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TELEPHONE: (202) 298-8660

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(202) 342-1318

March 29, 1996

BY FACSIMILE

Sr. Francisco Marqués
Legal Department
Empresa Consolidada Cubana de
Aviación
Calle 23 No. 64
La Rampa, Vedado, Habana 4, CUBA

Dear Francisco:

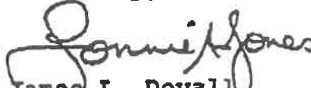
The Federal Aviation Administration ("FAA") denied today the routing that Cubana submitted for the 1996 summer season. We have enclosed the FAA's letter for your review. Cubana must continue to use the routes that it has previously operated.

We would appreciate it if you would send us the revised routing, so that we may file it with the FAA.

If you have any questions concerning this matter, please do not hesitate to contact us.

Best regards.

Sincerely,


James L. Devall
Lonnie Anne Jones

Enclosure

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U.S. Department
of Transportation

Federal Aviation
Administration

Office of International Aviation
Washington, D.C. 20591

FACSIMILE TRANSMISSION
FAX NUMBER (202) 267-5306
TELEPHONE (202) 267-8115

March 29, 1996
1 Page(s)

TO: Lonnie Jones

Lonnie,

The FAA appreciates notification of Cubana's 96 Summer schedule. There is no objection to the schedule, however the airway routings requested by Cubana have not been approved. We request that they continue to fly the currently approved routings.

If you have any questions please give me a call.

Best regards.

Lt Col Vincent Sharp
AIA-101

R

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ATTACHMENT 2**Economic hardship**

Indicators	UM	1988-1994	1995	1996 (first half)	
Flights performed	number	2 745	398	103	
Additional flight time	hours	3 054	565	145	
Additional fuel	t	18 528	3 014	780	
Additional cost for fuel	US \$	5 130 453	636 280	193 200	
Additional cost for flight time	US \$	27 023 952	810 439	209 700	
Total cost	US \$	32 154 405	1 446 719	402 900	34 004 024

Total losses from 1988 to the first half of 1996: US \$34 004 024

ATTACHMENT 3

**Main airlines of the United States of America which fly through
the airspace of the Republic of Cuba (Table 1)**

No.	Code	Three-letter designator	Airline name
1	0001	AAL	American Airlines Inc.
2	0810	AJT	Amerijet International
3	1660	AMT	American Trans Air
4	0404	APW	Arrow Airways Inc.
5	1539	CKS	American International Airways Inc.
6	0005	COA	Continental Airlines Inc.
7	0307	CWC	Challenge Air Cargo Inc.
8	1623	FAE	Merlin Express Inc.
9	0340	FBF	Fine Airlines Inc.
10	1780	FWL	Florida West Airlines
11	0012	NWA	Northwest Orient Airlines Inc.
12	1571	OXO	Killon Air Inc.
13	2091	PAC	Polar Air Cargo Inc.
14	1661	RIA	Rich International Airways Inc.
15	1556	SCX	Sun Country Airlines Inc.
16	2088	TCN	Trans Continental Airlines
17	0729	TPA	Transportes Aereos Mercantiles Panamericanos S.A.
18	0015	TWA	Trans World Airlines Inc.
19	0016	UAL	United Airlines Inc.
20	0037	USA	U.S. Air
21	0857	USS	USAir Shuttle
22	1670	WOA	World Airways Inc.

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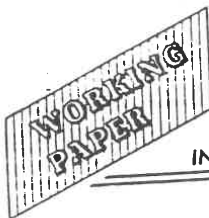
**Number of overflights per year in the
Havana FIR (Table 2)**

	Total	Daily
1987	63 372	174
1988	65 462	179
1989	69 694	191
1990	82 531	227
1991	87 531	240
1992	102 476	281
1993	106 476	292
1994	116 867	320
1995	118 533	325
1996 (first half)	61 824	340

The table above shows that the annual increase of overflights in the Havana FIR is significant. The daily average has risen from 174 overflights in 1987 to 340 overflights in the first half of 1996.

Of the total number of overflights per year, 58% are by aircraft registered in the United States of America. The main airlines appear in Table 1 of this Attachment.

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

A31-WP/94
EC/14
11/9/95

ASSEMBLY — 31ST SESSION
ECONOMIC COMMISSION

Agenda Item 36.1: Regulation of international air transport services

INTERNATIONAL AIR SERVICES TRANSIT AGREEMENT
(TWO FREEDOMS AGREEMENT) — NEED FOR IMPLEMENTATION BY
ALL ICAO CONTRACTING STATES

(Presented by Cuba)

SUMMARY

The purpose of this working paper is to reiterate the need for the countries which have signed the Chicago Convention and the International Air Services Transit Agreement to comply with the latter in accordance with one of the objectives of the Convention: to provide international air transport services which may be "operated soundly and economically".

REFERENCES

Doc 9644, AT Conf/4
Doc 9602, Assembly Resolutions in Force (Resolution A21-28)
Doc 9587, Policy and Guidance Material on the Regulation of International Air Transport
Doc 9470, AT Conf/3, Recommendation 7
Doc 7300, Convention on International Civil Aviation

1. Introduction

1.1 The Final Act of the International Civil Aviation Conference (Chicago, 1944), includes, *inter alia*, the International Air Services Transit Agreement by which non-traffic rights for scheduled services are exchanged multilaterally. Section 1 of Article I of this Agreement categorically states that: "Each Contracting State grants to the other Contracting States the following freedoms of the air in respect of scheduled international air services:

- 1) the privilege to fly across its territory without landing;
- 2) the privilege to land for non-traffic purposes."



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A31-WP/94
EC/14

- 2 -

When this paper was drafted, the Agreement had been ratified by 104 Contracting States. The United States of America (depository) and the Republic of Cuba are among the States which signed this Agreement, also known as the "Two Freedoms Agreement".

1.2 In Article 5 of the Convention on International Civil Aviation, the same rights, among others, are granted to aircraft registered in one of the parties when such aircraft are engaged in non-scheduled air services.

1.3 Article VI of the Agreement clearly states that: "Any State a member of the International Civil Aviation Organization may accept the present Agreement as an obligation binding upon it by notification of its acceptance to the Government of the United States, and such acceptance shall become effective upon the date of the receipt of such notification by that Government."

1.4 Through Resolution A21-28, the Assembly has urged States to ratify the Agreement. The Third Air Transport Conference adopted two recommendations concerning overflight, one of which (AT Conf/3-Recommendation 7) recommends that: "Contracting States ensure that overflight of their territories be permitted on a non-discriminatory basis consistent with obligations assumed by adherence to the Chicago Convention and the International Air Services Transit Agreement."

1.5 The Final Act of the Fourth Air Transport Conference once again states the following in its conclusions: "States which have not yet done so should again be urged to become parties to the International Air Services Transit Agreement, which is called for in Assembly Resolution A21-8, so that the international air transport system might benefit fully from universal adherence to and implementation of this fundamental multilateral regulatory accord."

In its recommendation (Doc 9644, AT Conf/4), that Conference recommended:

"a) that States pursue, and ICAO promote, universal adherence to and implementation of the International Air Services Transit Agreement."

2. Analysis

2.1 For several years, Cuban civil aviation has been requesting permission for Cubana de Aviación aircraft to overfly the territory of the United States on the route from Cuba to Montreal and Toronto and back. These requests for permission have been duly submitted to the aeronautical authorities of the United States without any official response to them having been received. These requests were made on the basis of the precedent that both Cuba and the United States signed the International Air Services Transit Agreement which, as stated in the introductory part of this working paper, grants commercial aircraft of signatory countries the right of overflight on published international routes. The Cuban aeronautical authorities have strictly respected this right since aircraft of North American airlines have not been denied overflight of Cuban territory.

2.2 In contrast to the international rights established by the international community and in violation of the Chicago Convention and the Two Freedoms Agreement, mentioned in paragraphs 1.2 to 1.4 of this paper, Cuba is discriminated against and the Department of Transportation of the United States does not allow Cuban civil aircraft to use the most appropriate public international routes in their flights to Canada, thus causing an excessive waste of time and fuel which affects flight safety and passenger services, contrary to what is stated in the Convention: that air services may be "operated soundly and economically".

3. Conclusion

3.1 In view of what is stated in parts 1 and 2 of this working paper, we consider that the international aeronautical community should not only urge ICAO Contracting States to adhere to international agreements and conventions, but also ensure that signatory States comply, with due seriousness, with the obligations assumed.

3.2 In this new stage of ICAO's work and of its regulations aimed at strengthening the international aeronautical community, it is necessary to be more demanding with regard to compliance with what has already been agreed on and in this way face the challenge to aviation in today's world.

4. Action by the Assembly

4.1 The Assembly is invited to:

- a) request that signatory States comply with what is stipulated in the International Air Services Transit Agreement;
- b) recognize the discrimination to which Cuba is being subjected and the waste of resources caused to Cuba by being prevented from overflying the territory of the United States; and
- c) declare non-compliance by States with multilateral agreements signed within the framework of the Organization to be harmful to the proper conduct of ICAO's work.

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ATTACHMENT 5**Exchange of correspondence between Cuba's aeronautical authority
and the President of the Council of ICAO**

1. Letter from the President of the IACC to the FAA Administrator of the United States of America.
2. Letter of 20 October 1995 from the President of the IACC to the President of the Council of ICAO.
3. Letter from the President of the Council of ICAO to the President of the IACC in reply to the letter of 20 October 1995.
4. Letter of 11 January 1996 from the President of the IACC to the President of the Council of ICAO.
5. Letter from the President of the Council of ICAO to the President of the IACC in reply to the letter of 11 January 1996.
6. Letters of 1 April 1996 and 6 June 1996 from the President of the IACC to the President of the Council of ICAO.

PRESIDENTE

A — 35

Havana,
March 27, 1995

Mr. Gen. Thomas C. Richards
Administrator
Federal Aviation Administration
U.S.A.

Mr. Richards:

For many years we have been applying for the permission to overfly the territory of the United States on behalf of Cubana de Aviación aircraft following the route from Cuba to Montreal and Toronto and back. These applications have been presented through the Cuban Ministry of Foreign Affairs before the U.S. Interest Section in Havana, without having ever received any official answer.

These applications have been presented taking into account the fact that Cuba as well the United States are signatories of the Air Transit Agreement which gives the right for commercial aircraft of these countries to overfly their territories using published international routes. This right has been strictly respected by Cuban aeronautics authority never denying the overflight of our national territory to aircraft of U.S. airlines.

On the base of the arguments above, I express to you the interest of this civil aeronautics authority for you to analyze the routes annex to this letter in order that the FAA gives Cubana de Aviación the corresponding overflight permit.

Awaiting your reply, we remain,

Sincerely,

GENERAL DE DIVISION



Rogelio Acevedo González
President



D. Wilson

A — 36

0 8 NOV 1995

JOB NO 4940

CUBA

Havana, 20 October 1995

IACC

Sir,

As you will recall, we had a conversation during the 31st Session of the Assembly of ICAO on the subject of the discrimination suffered by our civil airlines with regard to overflights of the territory of the United States on their routes to and from Canada.

At that time, the Assembly reached the following conclusions:

"the wish for the continuation and intensification of diplomatic efforts by the Secretary General and the President of the Council to find a satisfactory solution. The Commission considered that the international aviation community had a general interest in the resolution of this matter."

(Report of the Economic Commission, Agenda Item 36.1, paragraph 36.1:11, A31-WP/224, P/57, approved by the Plenary.)

In view of the above, I am writing to you to reiterate our interest in you intensifying your efforts with the authorities of the United States to achieve a satisfactory solution to the situation of our overflights of the territory of the United States.

Accept, Sir, etc. ...

(sgd) Rogelio Acevedo González

President, IACC
Major-General

Dr. Assad Kotaite
President of the Council of ICAO
Montreal

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REPORT ON ACTIVITY

TRANSMISSION OK

# TX/RX	2494
Tel. connection	514 288 4772
ID connection	
Time of start	02/11 09:39
Time used	00'29
Number of pages	1
Result	OK

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TO BE TRANSLATED INTO SPANISH

14 December 1995

Ref.: EC 10/1
AN 13/4.6

Dear Major-General González,

I wish to acknowledge receipt of your letter dated 20 October 1995 concerning difficulties experienced by Cuba with regard to overflights of the territory of the United States as well as receipt of your letter dated 3 November 1995 concerning participation of Cuba in the Second GREPECAS Meeting on automatization, operation of foreign airlines in Cuba and the repair of Fokker engines in Canada.

Following my previous contacts with the authorities of the United States of America, I would like to inform you that I have written to them regarding the above-mentioned difficulties to overflights of their territory. I take this opportunity to assure you that I will do my utmost to assist in resolving this problem.

I will keep you informed of any developments.

Yours sincerely,

Assad Kotaite

Major-General Rogelio Acevedo González
President *el*
Instituto de Aeronáutica
Civil de Cuba (IACC)
Calle 23 No. 64
Municipio Plaza
Apartado Postal 6215
Ciudad de la Habana
Cuba

A — 39

Havana, 11 January 1996

IACC

Sir,

Further to the information which we have provided on the subject of the discrimination to which our civil airlines are subjected to on their overflights of the territory of the United States on their routes to and from Canada, I must inform you that during the months of November and December 1995, of the 48 overflights requested of the United States, only two were authorized.

I therefore wish to repeat our interest in your intensifying your efforts with the authorities of the United States to achieve a satisfactory solution to the situation of our overflying the territory of the United States.

Accept, Sir, the assurances of my highest consideration.

(sgd) Rogelio Acevedo González
Major-General

President, IACC

Dr. Assad Kotaite
President of the Council of ICAO
Montreal

A — 40

FOR TRANSLATION INTO SPANISH

31 January 1996

Ref.: EC 10/1
AN 13/4.10

Dear General de División Acevedo González,

With reference to your letter dated 11 January 1996 and to my letter of 18 December 1995 concerning the difficulties experienced by Cuba with regard to overflights of the territory of the United States, I have the honour to inform you that on Monday, 22 January 1996 I had talks with high-level Officials of the Government of the United States of America in Washington, D.C. regarding this matter. The Officials at the State Department dealing with this subject indicated to me that they will give serious consideration to my request and will let me know.

Please be assured that I am giving full attention to this matter and will keep you informed of any developments.

Yours sincerely,

Assad Kotaite

General de División Rogelio Acevedo González
Presidente
Instituto de Aeronáutica Civil de Cuba (IACC)
Calle 23 No. 64
Municipio Plaza
Apartado Postal 6215
Ciudad de la Habana
Cuba

Fax no.: 334577

G:\LETTERS\CUBA\IACCPRES

A — 41

IACC

Havana, 1 April 1996

Sir,

Further to the information which we have provided on the subject of the discrimination which our civil airlines are subjected to on their overflights of the territory of the United States on their routes to and from Canada, I must inform you that during the months of February and March, none of the 70 overflights requested of the United States were authorized.

Accept, Sir, the assurances of my highest consideration.

(sgd) Rogelio Acevedo González
Major-General

President, IACC

Dr. Assad Kotaite
President of the Council of ICAO
Montreal

A — 42

IACC

Havana, 6 June 1996

Sir,

Further to the information which we have provided on the subject of the discrimination which our civil airlines are subjected to on their overflights of the territory of the United States on their routes to and from Canada, I must inform you that during the months from January to May, none of the 142 overflights requested of the United States were authorized.

Accept, Sir, the assurances of my highest consideration.

(sgd) Rogelio Acevedo González
Major-General

President, IACC

Dr. Assad Kotaite
President of the Council of ICAO
Montreal

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REPORT ON ACTIVITY

# TX/RX	2405
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Annex 12

ICAO Council, *United States v. 15 EU Member State*, Memorial of the United States
(14 March 2000)



INTERNATIONAL CIVIL AVIATION ORGANIZATION
 ORGANISATION DE L'AVIATION CIVILE INTERNATIONALE
 ORGANIZACIÓN DE AVIACIÓN CIVIL INTERNACIONAL
 МЕЖДУНАРОДНАЯ ОРГАНИЗАЦИЯ ГРАЖДАНСКОЙ АВИАЦИИ
 منظمة الطيران المدني الدولي
 国际民用航空组织

999 UNIVERSITY STREET, MONTREAL, QUEBEC, CANADA H3C 5H7

Tel.: (514) 954-8219
 Fax: (514) 954-6077

Internet: icao@icao.org
 Sitatex: YULCAYA

Telex: 05-24513
 Cables: ICAO MONTREAL

SG 1658/00
 LE 6/5


3 April 2000

To: Representatives on the Council
 From: Secretary General
 Subject: Settlement of Differences: United States and 15 European States (2000)

By memorandum SG 1655/00 dated 15 March 2000, I notified Representatives on the Council that the United States had submitted an Application and Memorial to the Council for settlement of a disagreement with 15 other Contracting States. The application, dated and forwarded to my Office on 14 March 2000, was submitted with respect to the European Council Regulation (EC) No. 925/1999 ("Hushkits") and the provisions of the *Convention on International Civil Aviation* (Doc 7300/7) and its Annex 16 (*Environmental Protection*). It names as respondents Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

In accordance with Article 3, paragraph (1) (a) of the *ICAO Rules for the Settlement of Differences* (Doc 7782/2), I have verified that the Application complies in form with the requirements of Article 2 of the Rules. In line with Article 3, paragraph (1) (b) of the Rules, I have notified all parties to the *Convention on International Civil Aviation* by State letter LE 6/5 - 00/38 dated 31 March 2000 that the above application has been received.

I am enclosing a copy of the Application and Memorial. A copy of the Attachments is also enclosed in the original language submitted. Other language versions of the Attachments will be forwarded as soon as translated.


 R.C. Costa Pereira

Attachments



REPRESENTATIVE OF THE UNITED STATES OF AMERICA
TO THE
INTERNATIONAL CIVIL AVIATION ORGANIZATION

OSG

14 MAR 2000

TELEPHONE
(514) 954-8304

SUITE 14.10
999 UNIVERSITY AVENUE
MONTREAL, QUEBEC, CANADA
H3C 5J9

March 14, 2000

Mr. Renato Costa Pereira
Secretary General
International Civil Aviation Organization
Montreal

Dear Mr. Costa Pereira:

I am today forwarding to you as Secretary General of ICAO, the Application and Memorial submitted by the United States pursuant to Article 84 of the Chicago Convention and the Council's Rules for the Settlement of Differences. The Application and Memorial seek a decision of the Council on a disagreement with fifteen European countries relating to European Council Regulation (EC) No. 925/1999. Copies of the Application and Memorial are included in the submission.

You will note that David S. Newman is the Agent for the United States of America and he can be reached through the U.S. Mission.

Sincerely,

A handwritten signature in dark ink, appearing to read "Edward W. Stimpson".
Edward W. Stimpson

Enc: 16 copies complete with exhibits
2 copies without exhibits

cc: Dr. Assad Kotaite
President of the Council



OSG

14 MAR 2000

United States Department of State

Washington, D.C. 20520

March 14, 2000

Mr. Renato Costa Pereira
 Secretary General
 International Civil Aviation Organization
 Montreal, Quebec, Canada

Re: U.S. Disagreement under Article 84 of the Convention on International Civil Aviation with Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom relating to European Council Regulation (EC) No. 925/1999.

Dear Secretary General:

The United States of America submits herewith its Application and Memorial, pursuant to Article 84 of the Convention on International Civil Aviation and the Council's Rules for the Settlement of Differences, seeking a decision of the Council on a disagreement with Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom ("Respondents") relating to European Council Regulation (EC) No. 925/1999.

If you have any questions, please contact me through the U.S. Mission to ICAO, 999 University Street, Montreal, PQ, Canada H3C 5J9. The telephone number of the U.S. Mission is (514) 954-8304. Thank you for your assistance in this matter.

Respectfully submitted,

David S. Newman
 Agent for the United States of America

Enclosures: Application and Memorial of the United States of America
 (16 copies complete with exhibits; 2 copies without exhibits)

APPLICATION OF THE UNITED STATES OF AMERICA

The United States of America ("Applicant") hereby submits its Application, pursuant to Article 84 of the Convention on International Civil Aviation (the "Chicago Convention") and Article 2 of the Rules for the Settlement of Differences (the "Rules"), for the Council of the International Civil Aviation Organization (ICAO) to decide the below-described disagreement relating to the interpretation and application of the Chicago Convention and its Annexes. The Memorial of the United States of America is attached hereto, in accordance with Article 2 of the Rules. The Applicant requests that the Secretary General act upon this Application in accordance with Article 3 of the Rules.

The present disagreement exists with Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom ("Respondents"). As grounds for its disagreement, the Applicant asserts that the Respondents, member States of the European Union, in adopting and undertaking to apply in their territories European Council Regulation (EC) No. 925/1999 (the "regulation") have violated their international obligations under the Chicago Convention, ICAO guidelines, and international practice for non-discriminatory performance based noise certification standards, including Chicago Convention Articles 11, 15, 38, and 82 and Standard 1.5 in Annex 16, Volume I (aircraft noise). Respondents' actions raise questions of interpretation and application of the Chicago Convention and its Annexes.

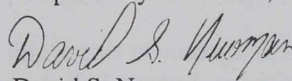
The regulation limits the registration and operation in Respondents' territories of aircraft that are in full compliance with the most stringent international noise standards. The targeted aircraft include aircraft modified to meet Chapter 3 noise standards by adding "hushkits" (equipment that acts like a muffler on aircraft engines) to quiet their engines and aircraft on which old noisy engines have been replaced with newer quieter engines designed with a by-pass ratio of less than 3:1 (the "targeted aircraft"). The regulation conditions imposition of its restrictions on the basis of the nationality of the aircraft.

The Applicant asserts that the regulation discriminates among aircraft on the basis of their nationality with respect to registration and access to airports in Respondents' territories, in violation of Articles 11 and 15 of the Chicago Convention. Furthermore, the regulation's reliance on design standards and whether an aircraft has been modified and recertificated constitute deviations from ICAO standards set forth in Annex 16. The Respondents failed to give ICAO the notice required under Article 38 of the Chicago Convention relative to those differences. Finally, under Annex 16, Volume I, Standard 1.5, Respondents are obligated to accept noise certifications granted by the United States to aircraft on its registry. However, contrary to that obligation, the regulation obligates the Respondents to reject aircraft so certificated.

For these reasons, the United States requests that the ICAO Council determine that the Respondents have violated the Chicago Convention; order Respondents to comply with all provisions of the Convention; and order Respondents to take immediate steps to procure their release from their obligations under the EC regulation.

This Application and the attached Memorial are being submitted to the Secretary General on March 14 2000.

Respectfully submitted,



David S. Newman

Agent for the United States of America
U.S. Department of State

OSG

14 MAR 2000

Before the Council of the International Civil
Aviation Organization (ICAO) Under the ICAO
Rules for the Settlement of Differences (Doc. 7782/2)

**MEMORIAL
OF
THE UNITED STATES OF AMERICA**

Disagreement Arising under the
Convention on International Civil Aviation
done at Chicago on December 7, 1944

David S. Newman
Agent for the United States of America
United States Department of State

March/4, 2000

MEMORIAL OF THE UNITED STATES OF AMERICA

The United States of America hereby submits for settlement by the Council a disagreement relating to the interpretation and application of the Convention and its Annexes, pursuant to Article 84 of the Convention on International Civil Aviation (the "Chicago Convention") and the Rules of Parts I and III of the Rules for the Settlement of Differences approved by the Council on 9 April 1957 and amended on 10 November 1975 (the "Rules").

As grounds for its disagreement, the United States of America submits that the below named respondents, member States of the European Union, in adopting and undertaking to apply in their territories European Council Regulation (EC) No. 925/1999 (the "regulation"), have acted in a manner inconsistent with Chicago Convention Articles 11, 15, 38, and 82 and Standard 1.5 in Annex 16, Volume I (aircraft noise) (3d ed. July 1993) ("Annex 16"), thereby raising questions of interpretation and application of the Convention and its Annexes.

(a) Identification of the Parties

The United States of America ("Applicant") pursues the present disagreement against Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom ("Respondents").

(b) Authorized Agent

David S. Newman, U.S. Department of State, is authorized to represent and act for the Applicant in these proceedings. All communications relating to this case, including notice of the dates of any meetings, should be sent to the attention of Mr. Newman to the U.S. Mission to ICAO, 999 University Street, Montreal, PQ, Canada H3C 5H7. The telephone number of the U.S. Mission is (514) 954-8304.

Introduction

The International Civil Aviation Organization ("ICAO") has promulgated, in Annex 16 to the Chicago Convention, uniform aircraft noise certification standards for the entire international aviation community. The European Council, acting unilaterally and with discriminatory intent, adopted European Council Regulation (EC) No. 925/1999 on April 29, 1999. That regulation is inconsistent with ICAO's noise standards in Annex 16 to the Chicago Convention, Volume I (Aircraft Noise) and with Articles 11, 15, and 38 of the Chicago Convention. The United States and other nations injured by the European Union's actions have attempted unsuccessfully to resolve this dispute with the European Union without resort to formal intervention of the ICAO Council under Article 84 of the

Chicago Convention. The EC regulation, if it is not abrogated, will have a profoundly disruptive and discriminatory effect on the orderly development and operation of international civil aviation. It is therefore incumbent upon the ICAO Council to act swiftly and decisively to find the Respondents in violation of the Chicago Convention; order Respondents to comply with all provisions of the Convention; and order Respondents to take immediate steps to procure their release from their obligations under the EC regulation.

The international aviation community requires
uniform international noise certification standards.

International noise certification standards developed at ICAO "are important for the undistorted and balanced development of both the aviation and aeronautical industries."¹ ICAO has been the recognized and exclusive source of international aircraft noise certification standards since its initial adoption on April 2, 1971, of Annex 16, pursuant to Article 37 of the Chicago Convention. Currently, the issue of aircraft noise is a principal focus of the Committee on Aviation Environmental Protection (CAEP). Consistently with the Chicago Convention, including its annexes, and international practice, the CAEP is working toward stricter aircraft noise certification standards that are non-discriminatory, considerate of the needs of all contracting States, and phased in to permit reasonable opportunity for the airlines of the world to plan accordingly.

Pursuant to Article 37, States are bound "to collaborate in securing the highest practicable degree of uniformity" in regulations and standards relating to aircraft, where "uniformity will facilitate and improve air navigation." Article 37. The Respondents' actions, resulting in adoption of the EC regulation, represent a failure of collaboration and are inconsistent with the on-going efforts to develop and implement new international

¹ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Air Transport and the Environment Toward Meeting the Challenges of Sustainable Development, Brussels, 30 November 1999, COM (1999) at paragraph 11. (See Attachment 1). In this Communication, the Commission suggested the following guidelines for when an individual EU airport might be permitted to adopt more stringent rules:

With a view to safeguarding internal market requirements and undistorted competition, it is important, however, that entitlement for introduction of more stringent rules must be based on fulfilment of clear and objective criteria constituting an exceptional situation and on use of common benchmarks for the determination of the noise impact on the environment of the airport. Such benchmarking will be greatly facilitated by the introduction of common indicators and assessment methods as discussed above.

Attachment 1 at para. 62. Under the EU's own guidelines, the EC regulation would be characterized as one that disrupts the market and distorts competition, because, contrary to these guidelines, the EC regulation lacks a clear objective, relies on design standards, and disregards the need for common benchmarks for determining noise impact.

noise certification standards. As noted by the President of the Council, "[i]f States believe that changes to the content or level of implementation of the Standards in Annex 16 are necessary or desirable, they should use the multilateral mechanism of ICAO." Letter dated 22 March 1999 from the President of the ICAO Council to the President of the Council of the European Union (E/4/150) (*See Attachment 2*).

The EC regulation is inconsistent with the
spirit and letter of the Chicago Convention.

The Respondents, through European Council Regulation (EC) No. 925/1999, adopted by the European Council on April 29, 1999, violate their international obligations under the Chicago Convention and its Annexes which require that noise certification standards be non-discriminatory and performance-based. The regulation limits registration and operation in Respondents' territories of aircraft that are in full compliance with the most stringent international noise standards. The targeted aircraft include aircraft modified to meet Chapter 3 noise standards by adding "hushkits" (equipment that acts like a muffler on aircraft engines) to quiet their engines and aircraft on which old noisy engines have been replaced with newer, quieter engines designed with a by-pass ratio of less than three to meet Chapter 3 standards (the "targeted aircraft"). European Council Regulation (EC) No. 925/1999 at Article 2, section 2 (*See Attachment 3*). The implementing provisions of the regulation condition imposition of these restrictions on the nationality of the aircraft.

The history of the regulation establishes that it was designed to target U.S. aircraft. Notably, the regulation was adopted without a full evaluation of its impact, in terms of both environmental benefits and costs to air carriers and their users. So long as the EC regulation remains law, its provisions have an immediate and adverse impact on non-EU registered targeted aircraft, the airlines that operate them, the airlines of other countries that wish to buy them, and the manufacturers of the targeted technology. Airlines have no choice but to take account of the regulation in making long-term decisions concerning the acquisition, modification, positioning, operation, maintenance, and disposition of aircraft.

The regulation is focused more on targeting
U.S. interests than on reducing airport noise.

Although the preamble to the regulation asserts a purpose to reduce noise emissions at European airports, the regulation is not reasonably tailored to meet that objective:

- The substantive provisions of the regulation are not based upon, and make no reference to, aircraft noise levels. Even if a hushkit could be developed that would make old aircraft the quietest aircraft in the sky, those hushkitted aircraft would be restricted.

- Instead of targeting noise levels, consistently with ICAO objectives and guidelines set forth in Annex 16, Volume I (Aircraft Noise) and related ICAO resolutions, the regulation relies on a design standard, intentionally targeting U.S. aircraft. The very purpose of the regulation was described by its advocates as follows:

It is to be feared that after 31 December 1999 hushkitted Chapter 2 aeroplanes will be transferred from the USA to the European community's aeroplane registers. It is the danger of this that should be precluded with the directive/regulation here under discussion.

"Report on the Proposal for a Council Directive on the registration and use within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of Volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation," (3d ed. July 1993), Committee on the Environment, Public Health and Consumer Protection European Parliament session documents A4-0279/98 (21 July 1998), (hereinafter referred to as the "Report on the Proposal"), Explanatory Statement at p.8. (See Attachment 4).

By targeting U.S. aircraft, and their transfer to airlines of other countries, the regulation minimizes or avoids adverse impact on owners and operators of aircraft of Respondents' registries. However, the regulation does harm manufacturers of the targeted technology, the current owners of aircraft relying on that technology, and the airlines of other countries that are potential purchasers of the targeted aircraft. As a result, the regulation impairs the ability of non-EU airlines, particularly smaller airlines, to economically achieve a fully Chapter 3-compliant fleet.

The regulation distorts the resale market for targeted aircraft.

The regulation causes further distortion of the international aviation system by enhancing the value of older aircraft on Respondents' registries, at the expense of comparable aircraft on other registries, and by coercing purchasers of these aircraft to register them on one of Respondents' registries. This occurs because a purchaser of aircraft employing the targeted technology generally may not operate the aircraft into Europe after April 1, 2002, unless he purchases an aircraft that was on one of Respondents' registries and causes the aircraft to remain on one of those registries.

As a result, any purchaser that might desire to operate into Respondents' territories aircraft that it purchases employing the targeted technology into Europe:

- (1) is improperly encouraged to purchase aircraft already on one of Respondents' registries, rather than aircraft of any other nationality, and would be forced to pay a premium price for such an aircraft; and
- (2) if purchasing aircraft on one of Respondents' registries, is encouraged to keep the aircraft on that registry, regardless of the nationality of the purchaser.

This market distortion highlights the discriminatory and protectionist nature of the regulation.

(c) Statement of Facts

1. The Applicant and the Respondents are parties to the Chicago Convention.
2. On April 29, 1999, the Council adopted Council Regulation (EC) No. 925/1999. The regulation limits access to European airports by aircraft that "have been modified to meet Chapter 3 standards either directly through technical measures or indirectly through operational restrictions," excluding aircraft "completely re-engined with engines having a by-pass ratio of three or more." Regulation, Article 2 section 2, at Attachment 3.
3. These restrictions will preclude certain targeted aircraft from being registered on Respondents' registries or from operating at Respondents' airports, based on their State of registration and place of operation prior to application of the regulation. Also, the regulation discriminates in favor of targeted aircraft of European ownership that transfer between Respondents' registries, or between Respondents' registries and other registries, in conjunction with a lease. Specifically, pursuant to the regulation:
 - a. As from May 4, 2000, Respondents must refuse registration in their States of targeted aircraft, unless the aircraft continuously has been registered in any Respondent State since May 4, 2000. Regulation, Article 3 sections (1) and (2);
 - b. As from April 1, 2002, Respondents must deny access to their airports to targeted aircraft not on a Respondent's registry, unless the aircraft continuously has been on the same State registry since May 4, 2000, and was operated into the EU between April 1, 1995 and May 4, 2000. Regulation, Article 3, section (3).
 - c. Targeted aircraft registered in any Respondent State may continue to operate into any of Respondents' airports, regardless of a transfer of state of registration, provided the transfer is between Respondent States. Regulation, Article 3, section (2); and
 - d. Respondents may grant exemptions from the regulation's restrictions for leased aircraft removed from one of Respondents' registries on which it was registered during the six months prior to the date of application of the regulation, provided ownership of the aircraft remains in a Respondent State. Regulation, Article 4, section (3).

4. The regulation was designed specifically to restrict U.S. aircraft using hushkits, an apparatus that acts like a muffler on aircraft engines, to quiet their engines² and aircraft whose old noisy engines have been replaced with new quieter engines designed with a by-pass ratio of less than three. Regulation at Article 2, section 2.

5. The regulation imposes these restrictions in spite of the fact that the targeted aircraft have been certificated by Respondents and accepted by other governments as being in full compliance with the most stringent international noise standards. Targeted aircraft, including re-engined aircraft and aircraft fitted with hushkits, have been certificated by the United States Federal Aviation Administration ("FAA") as compliant with Chapter 3 noise standards.³

6. The regulation discriminates among targeted aircraft on the basis of the aircraft's nationality, past and present. For example, a targeted aircraft transferred to or from a non-Respondent registry after May 4, 2000 loses its ability to operate into Respondents' territories; whereas, the same aircraft transferred between any of Respondents' registries would not be restricted.

7. The FAA has granted Chapter 3 noise certifications to U.S. registered aircraft that have been re-engined with Pratt & Whitney JT8D-200 series engines that have a by-pass ratio of less than three, as well as to European manufactured Rolls Royce TAY 651-54 engines and engines manufactured by CFM International (a U.S./French joint venture), which have by-pass ratios greater than three. *See* Attachment 5. The EC regulation's standard for by-pass ratio would cause the regulations restrictions to hit only the U.S. manufactured Pratt & Whitney engines. *See* Regulation, Article 2.

8. The Regulation targets recertificated aircraft re-engined with engines having a by-pass ratio of less than three, but does not affect other aircraft built with engines having a by-pass ratio of less than three, such as the MD-80. *See* Regulation, Article 2.

² While the regulation on its face would appear to cover any aircraft modified to meet Chapter 3 standards, it is clear from the history of the regulation that its target was hushkitted aircraft. *See* Report on the Proposal, Attachment 4, at p. 8 ("The proposal is thus intended to prevent the re-registration of noisy aeroplanes (i.e. hushkitted Chapter 2 aeroplanes.") and at 9 ("it is to be feared that, by the time the directive/regulation enters into force, i.e. 1 April 1999, recertificated subsonic jet aeroplanes (=hushkitted aeroplanes) may be registered in the EU or third countries in increased numbers."); "The aim of the proposed directive/regulation is to prevent an increase in noise pollution due to recertificated civil subsonic jet aeroplanes (=hushkitted Chapter 2 aeroplanes).")

³ FAA's noise compliance findings are made in accordance with 14 CFR part 36, pursuant to U.S. law. The FAA's test and analysis procedures used to measure noise levels and to grant Stage 3 noise certification under 14 CFR Part 36 are essentially equivalent to the Chapter 3 standards in Annex 16

9. Engine by-pass ratio is not a test criterion for noise certification under Annex 16.

10. Respondents have recognized FAA aircraft noise certifications on U.S. registered aircraft, thereby acknowledging that the FAA certifications standards, including its noise certification of hushkitted and re-engined aircraft, are at least equal to the applicable Standards in Annex 16, Volume I, Chapter 3. *See* Attachments 6, 7. In fact, the EU has acknowledged expressly that hushkitted aircraft meet the standards for Chapter 3. *See* Report on the Proposal, Attachment 4, Explanatory Statement at p.7 ("hushkitted aeroplanes only just satisfy the standards for Chapter 3....").

(d) Supporting Data

1. A copy of European Council Regulation (EC) No. 925/1999 is Attachment 3.

2. An affidavit of Thomas L. Connor, Manager of the Noise Division of Environment and Energy at the FAA, is Attachment 5. The affidavit discusses the noise certification process, identifies the equipment and manufacturers of equipment targeted by the Regulation, and, through copies of portions of supplemental type certificates (STC), establishes that FAA has granted noise certifications to targeted aircraft.

3. Attachment 6 hereto includes portions of STCs for FAA approved hushkits and an FAA Approved Airplane Flight Manual Supplement to Boeing 727-200 Airplane Flight Manual relating to installation of Pratt & Whitney Internal Exhaust Gas Mixer Noise Reduction Kit. The attached official documentation reflects that aeronautical authorities in the United Kingdom and France have accepted aircraft so modified for operation in the territories of the U.K. and France.

4. An affidavit of Kenneth R. McGuire, President of Burbank Aeronautical Corporation II ("BAC II"), is Attachment 7. BAC II is a holder of STCs issued by the FAA for certain Stage 3 hushkit modifications. The affidavit discusses the FAA noise certification process and establishes that hushkitted aircraft that are targeted by the Regulation already have been permitted by Respondents to operate in their territories.

(e) Statement of Law

A principal objective of the Chicago Convention is to allow international air transport services to be "established on the basis of equality of opportunity and operated soundly and economically." Chicago Convention, preamble paragraph 3. This objective may be achieved only if States do not discriminate on the basis of nationality and they do not deviate from international standards. The prohibition against discriminating on the basis of the nationality of aircraft is most clearly set out in Articles 11 and 15 of the Convention. Those Articles prohibit States from relying upon the State of registration of aircraft as a basis for discriminating, either in the context of promulgating laws affecting

international civil aviation or in permitting access to their public airports. *See* Chicago Convention Articles 11 and 15.⁴

Under the Convention, States also undertake "to collaborate in securing the highest practicable degree of uniformity in regulations ... in all matters in which such uniformity will facilitate and improve air navigation." Chicago Convention Article 37. Unquestionably, noise regulations fall within the category of matters requiring such collaboration. Nevertheless, the Convention anticipates that there will be times when it is necessary for a contracting State to adopt regulations or practices differing from the international standards. Accordingly, Article 38 of the Convention sets out guidelines for States deviating from the international standard, including the obligation to notify ICAO immediately.

In adopting a discriminatory, design-based standard, Respondents have disregarded this framework and have violated the Convention. The Convention provides no defense to the Respondents' violation of the prohibition on discriminating on the basis of aircraft nationality. However, if a contracting State meets the standards of Article 38 and must adopt noise certification requirements stricter than, or in addition to, the international standard, there is a procedure for it to do so. It must, however, give notice to ICAO of that difference, in accordance with Article 38 of the Chicago Convention. Respondents have failed to give such notice.⁵

A. The Regulation Violates Articles 11 and 15 of the Convention by Discriminating on the Basis of Aircraft Nationality.

Articles 11 and 15 of the Chicago Convention prohibit States from discriminating among aircraft on the basis of nationality in allowing access to their airports and airspace or in applying their laws relating to operation and navigation of aircraft. Article 11 provides:

Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with

⁴ Article 17 of the Convention provides that "aircraft have the nationality of the State in which they are registered." Accordingly, "nationality" and "state of registration" are used interchangeably in this Memorial.

⁵ The procedure for notifying differences under Article 38 is expressly limited to departures from international standards and procedures. *See* Article 38 (Departures from international standards and procedures). Clearly, States cannot violate the provisions of the Convention, such as the non-discrimination provisions of Articles 11 and 15, and invoke an Article 38 notice as a defense.

by such aircraft upon entering or departing from or while within the territory of that State.

Article 15 provides, in pertinent part:

Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States.

The regulation is inconsistent with Article 11 of the Convention, because it distinguishes among aircraft, granting or denying the ability to operate within Respondents' territory, based upon the nationality of the aircraft. *See* Regulation, Article 3. For example, under the regulation, a targeted aircraft that transfers registries after May 4, 2000, will be excluded from Respondents' airports, but not if both the old and new registries were in Respondents' states. Thus, the Respondents will inquire into the past and present nationalities of aircraft and will discriminate against aircraft with similar noise levels, depending upon their nationalities at specified times.

Under the regulation, a targeted aircraft's transfer of registries between the United States and Canada would result in an aircraft losing its right to operate into Respondents' airports, whereas, a similar aircraft transferred between two Respondent States could continue to operate into any of Respondents' airports. *See* Regulation, Article 3. Consequently, a U.S. registered targeted aircraft sold to, and re-registered in, a third country after May 4, 2000, would not be permitted to operate into Respondents' airports after April 1, 2002.

Moreover, pursuant to Article 15, contracting States may not invoke a condition to deny access to its airports by aircraft of foreign registry, unless those conditions are applicable on a uniform basis to national aircraft. The regulation violates that provision, because it constitutes a condition on access to Respondents' airports that is not applied on a uniform basis to aircraft of all nationalities. The regulation targets certain design standards and denies access to its airports by targeted aircraft not on a Respondent's registry, in situations where access would be permitted for aircraft that were on any of Respondents' registries. For example, targeted aircraft of Respondents' registries may be transferred freely among those registries and continue to operate into any of Respondents' airports. However, if a U.S. airline purchased a targeted aircraft from an airline of any Respondent after May 4, 2000, the aircraft could not operate into any of Respondents' airports after April 1, 2002.

The Discriminatory Nature of the Regulation is
Demonstrated by its Disparate Impact on U.S. Interests

As established above, the regulation discriminates explicitly on the basis of aircraft nationality, in violation of Articles 11 and 15 of the Convention. However, impermissible discrimination also has been interpreted, in the context of civil aviation, to

include disparate impact, in addition to direct discrimination. *See* Award on the First Question, U.S./U.K. Arbitration Concerning Heathrow Airport User Charges (November 1992), at pages 324-26. Unpublished (on file in the Office of the Legal Adviser, U.S. Department of State) (hereinafter "Award") (*See* Attachment 8).⁶

In the U.S./U.K. Arbitration, the arbitral tribunal rejected the argument that the disputed pricing structure was non-discriminatory, because, objectively, airlines of each side were subject to the same rate schedule. Rather, the Tribunal found "nothing in Article 10(2) [user charges provision of the bilateral agreement] or, indeed, in Article 15 of the Chicago Convention on which it is based, to support the proposition that discrimination need be assessed only by reference to "overt" behavior, "which may, in fact, mask actual discrimination, when other operational factors are taken into account...."⁷ Award, ch. 8, at 324-25, para 7. *See* Attachment 9. The Tribunal further concluded that "an examination of potentially discriminatory practices requires more than a superficial comparison of the schedule of charges on a flight by flight basis; rather, it mandates a closer inquiry into the overall effect of charges and related rules...." *Id.* at 326.

Given the clear evidence in the legislative history of the regulation of the EU intent to target U.S. hushkitted aircraft, and the effect of the regulation on U.S. interests, Respondents' violation of the non-discrimination provisions of the Chicago Convention is established by the disparate impact the regulation has on U.S. interests.

B. Respondents Have Failed to Comply
with Article 38 of the Chicago Convention.

The Respondents have failed to comply with the requirements of Article 38 of the Convention, because they have adopted a regulation inconsistent with international standards, without immediately notifying ICAO of the differences between their own practice and that established by the international standard. Pursuant to Article 37 of the Convention, States undertake:

⁶ Award on the First Question, U.S./U.K. Arbitration Concerning Heathrow Airport User Charges. Unpublished (on file in the Office of the Legal Adviser, U.S. Department of State) (hereinafter "Award"). Relevant portions appended at Attachment 8. Discussed in S.M. Witten, "The U.S.-U.K. Arbitration Concerning Heathrow Airport User Charges," 89(1) *Am. Jnl. Intl. Law* 174-192 (1995) and J. Skilbeck, "The U.S./U.K. Arbitration Concerning Heathrow Airport Charges," 44(1) *The International and Comparative Law Quarterly*, pp. 171-179 (1995).

⁷ In the Heathrow Arbitration, the arbitral tribunal also considered whether the U.K.'s failure to monitor "whether the operation of the sharply differentiated peak/off-peak charging system [for landing fees] was in practice working inequitably, to the detriment of the U.S. airlines, by reason of British Airways having some advantage, that was denied to Pan Am/TWA, in relation to re-scheduling flights out of terminal peak hours." Award, ch. 6, at 207, para 11.2.37 (*See* Attachment 8).

to collaborate in securing the highest practicable degree of uniformity in regulations ... in relation to aircraft ... in all matters in which such uniformity will facilitate and improve air navigation.

Pursuant to Article 38:

Any State which finds it impracticable to comply in all respects with any such international standard or procedure ... or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard.

ICAO's global standards for aircraft noise certification appear in Volume I of Annex 16 to the Chicago Convention. Those standards dictate that the noise evaluation measure for subsonic jet aeroplanes "shall be the effective perceived noise level." Annex 16, Volume I, Standard 3.2.1.1. (*See* Attachment 9). This measurement is to be in EPNdB (Effective Perceived Noise level in decibels) as described in Appendix 2 to Annex 16, Volume I. Thus, ICAO's Chapter 3 standards are based on the acoustic performance of the aircraft. The standards include procedures and guidelines for noise measurement, testing, and certification. *See* Annex 16, Volume I, Chapter 3 (Attachment 9).

The EC regulation sets out noise standards based upon whether the aircraft has been modified to meet Chapter 3 standards and whether it has been recertificated. In conjunction with these tests, the regulation references specific design standards. Annex 16 does not establish noise standards based on whether aircraft have been modified or based upon any aircraft design specifications.⁸ Thus, the standards that the Respondents are bound to implement constitute differences from the international standards set out in Annex 16.

There can be no question but that the promulgation of noise standards constitutes a matter in which uniformity would facilitate and improve air navigation, within the meaning of Article 37. ICAO has, in fact, long been the recognized forum for setting international noise certification standards for aircraft. Whereas, the Respondents, through the EU, have acknowledged their regulation as a new

⁸ Annex 16, Chapter 3 relies exclusively on aircraft performance levels. Similarly, Chapter 2 of Annex 16, volume I, adopted in 1977, also relied on aircraft performance for purposes of determining which aircraft might be restricted under that standard. However, Chapter 2 also made reference to aircraft engine by-pass ratio, but solely in the context of exempting such aircraft from the noise standards. (*See* Attachment 9) The provision did not establish a precedent for restricting aircraft that meet the international noise standard.

environmental standard for aircraft;⁹ nevertheless, they have failed to comply with the requirement of Article 38 to notify their difference to ICAO.

The regulation already has been challenged in Europe as an unjustified departure from international standards - and the High Court of Justice in the United Kingdom supported that challenge. In the case of *Regina v. Secretary of State for the Environment, Transport and Regions, ex parte Omega Air Limited* (UK High Court of Justice November 25, 1999) (hereinafter referred to as the "*Omega*" case at Attachment 11), the High Court of Justice noted serious questions as to the validity of the regulation. The applicant in that case, an Irish company engaged in trading in aircraft and engine refurbishment, re-engined a number of Boeing 707 aircraft with engines having a by-pass ratio (BPR) of less than three. The applicant sought the court's referral to the European Court of Justice (ECJ) for annulment of Council Regulation EC No. 925/1999, with respect to its restrictions linked to engine by-pass ratio. The Court noted that the regulation would prevent Omega's re-engined aircraft from being operated in the EU, thus making them commercially nonviable for potential customers. *Omega* at 4.

The *Omega* Court generally found in favor of the Applicant, referring to the ECJ questions relating to the validity of the regulation. *Omega* at 33. In reaching that conclusion, the Judge made a preliminary finding that the international standard for aircraft noise is based on decibel levels and the regulation fails adequately to explain its reliance on by-pass ratio. *Id.* at 17. Reviewing both ICAO standards and Article 2 of the WTO Agreement on Technical Barriers to Trade, which establishes rules against technical barriers to trade, the Judge determined that the regulation requires explanation for moving from a decibel level related test to a by-pass ratio method. *Id.* at 13-17. Further, the Judge noted the need for some rationale in support of the specific by-pass ratio chosen. *Id.* at 17. The Judge noted "his own view" that the regulation seems wholly defective for these reasons. *Id.* at 17.

In accordance with ICAO procedures, the State of Registry of an aircraft relies upon Annex 16 noise evaluation standards in granting or validating noise certification of an aircraft. An aircraft that complies with requirements that are at least equal to the Annex 16 standards must be certificated. Annex 16, Volume I, Standard 1.2

C. Respondents Violated Annex 16, Volume I, Standard 1.5

The EC regulation also violates the Respondents' obligation, set forth in Annex 16, to recognize the noise certifications of other States, so long as the other State's certification standards at least meet the standards in Annex 16. The obligation of

⁹ The European Union published in its web page, at www.eurunion.org/news/press/1999, under "The European Union Press Releases, on March 29, 1999, as EU PR 14/99, a press release advising that "This legislation places the EU at the forefront of elaborating the most stringent environmental standards for aircraft which is the normal responsibility of ICAO." See Attachment 10 ("Press Release").

contracting States to recognize the noise certification of other contracting States is set out in Annex 16:

Contracting States shall recognize as valid a noise certification granted by another Contracting State provided that the requirements under which such certification was granted are at least equal to the applicable Standards specified in this Annex.

Annex 16, Volume I, Standard 1.5. (See Attachment 9). The EC regulation compels Respondents to prohibit operation into their territories by some U.S. registered aircraft that have been granted noise certification in accordance with ICAO Standards; whereas, Annex 16, Volume I, Standard 1.5 obligates Respondents to open their airports to all aircraft so certificated. Thus, the EC regulation's imposition of additional tests (including whether the aircraft has been recertificated, modified, or transferred between registries) in the context of regulating noise, for purposes granting access into Respondents' airports, violates Annex 16, Volume I, Standard 1.5.

The obligation of a State to recognize a noise certification means that the State into which the certificated aircraft seeks to operate cannot deny access to its airspace or airports on the basis of some additional noise based requirement. Except to the extent that a State has, in accordance with the requirements of the Convention, notified a difference to ICAO, the obligation States incur under Annex 16, Volume I, Standard 1.5 may not be qualified or modified through legislation or administrative regulations enacted by the individual State. See *British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153, 1161 (D.C. Cir 1981) (interpreting Article 33 of the Convention, which employs language equivalent to that in Standard 1.5 recognizing certification granted by other States party to the Chicago Convention) (See Attachment 12).

In the *British Caledonian* case, the British airline was joined by Swissair, Balair AG, Lufthansa, and Alitalia in challenging an order issued by the FAA prohibiting the operation of all Model DC-10 airplanes within the airspace of the United States, including aircraft registered in other countries. The order, which addressed an apparent safety hazard, was issued following a DC-10 crash that killed 271 people and following findings by the U.S. National Transportation Safety Board (NTSB) to justify grounding the aircraft.

The matter came before U.S. courts on the argument that FAA violated U.S. law, the predecessor to 49 U.S.C. § 40105(b)(A), which obligated the FAA Administrator to comply with U.S. international obligations. The airlines argued, and the court found, that absent the Administrator raising the question of whether the foreign governments that had certificated the DC-10s had failed to observe the minimum safety standards referred to in Article 33 and set forth in Annex 8, the FAA could not, consistently with Article 33, question the airworthiness judgment of the country of registry. 665 F.2d at 1162.¹⁰

¹⁰ The *British Caledonian* case involved a violation of Article 33 of the Convention; whereas, the present disagreement concerns a violation of Standard 1.5 of Annex 16 to the Convention.

Notably, the EU rule is not predicated on any finding that the targeted aircraft, whether modified in the United States or elsewhere, fail to meet the standards of Chapter 3 of Annex 16, Volume I. Neither has any Respondent challenged the targeted aircraft's compliance with international standards. To the contrary, the regulation implicitly recognizes the targeted aircraft's compliance with Chapter 3 standards, by permitting some of the targeted aircraft to continue operating in the Respondents' territories without restriction. Furthermore, Respondents have consistently recognized U.S. aircraft noise certification, including Chapter 3 noise certification of U.S. hushkitted and re-engined aircraft, in accordance with their obligation to do so under Standard 1.5 of Annex 16, Volume I. (*See* Attachment 9).

The EC regulation creates two classes of aircraft within Annex 16, Volume I, Chapter 3. While the aircraft in both classes comply with the noise requirements in that Chapter, one class could be registered and operated in Respondents' territories after April 2002, whereas the other class could not. These classifications are based upon criteria that have no relevance to the standards in Annex 16, including: whether the aircraft has been recertificated, whether the aircraft has been operated in Respondents' territories, and where the aircraft has been registered. These classifications are incompatible with the requirements of Annex 16.¹¹

For these reasons, the EC regulation differs in particular respects from international standards and, therefore, Respondents were obligated, under Article 38 of the Convention, to give immediate notice to ICAO of the differences between their practice and the international performance-based standard, once the EC regulation became law on May 4, 1999.

Furthermore, by assuming an obligation to exclude from their airports, on the basis of noise, aircraft certificated by the United States as compliant with applicable international noise standards, Respondents violate their obligation under Annex 16, Volume I, Standard 1.5 to recognize the noise certifications of other States.

While the Convention provides no justification for non-compliance with provisions of the Convention itself, the Convention does provide justification and procedures for non-compliance with standards and the Annexes in Articles 37 and 38. Accordingly, if the Respondents had appropriate justification and followed Article 38 procedures for notifying differences, their non-compliance with Standard 1.5 of Annex 16 would not constitute a breach.

¹¹ *See generally* ICAO Document C-Min 156/16 19/3/99 Council - 156th Session, Summary Minutes of the Sixteenth Meeting (The Council Chamber, Friday 19 March 1999, at 1000 hours) at p.8, para 23 (comments of D/LEB) (Attachment 13).

D. Suspension of the Regulation Neither Excuses Respondents' Breach nor Justifies Delay of a Review

The regulation, although not yet applied, has been incorporated into law and represents a binding undertaking of the Respondents. In that regard, the Respondents stand in violation of Article 82 of the Convention, which provides, in pertinent part:

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.

The regulation constitutes a set of obligations and understandings undertaken by Respondents that are inconsistent with Articles 11, 15, and 38 and Annex 16 of the Convention. Therefore, the Respondents presently are in breach of the Convention.

Even before its application, the regulation has caused significant harm to operators of U.S. aircraft as well as to U.S. manufacturers of hushkits and targeted engines. This harm is suffered because the regulation forces U.S. airlines and U.S. aircraft to anticipate, in all decisions relating to acquisition, modification, positioning, operation, maintenance, and disposition of aircraft, the discriminatory limitations on their access to Respondents' airports. U.S. airlines are being prevented from making the decisions most appropriate for their purposes, even among options that would comply with all applicable international standards.

Furthermore, there is no just reason for delaying a legal review of the regulation. Just as was found in the *Omega* decision, the parties to this dispute and all States affected by the regulation "should be able to act with certainty in regard to the legal efficacy of the Regulation." *Omega* at 6. (Attachment 11). The judge in *Omega* discussed, in this context, the case of *The Queen v. Secretary of State for Health, ex parte Imperial Tobacco Limited* [ECJ 1991], where the European Court of Justice held, in light of existing uncertainty as to whether a particular directive could be made legally effective, that the Court "should be prepared to grant declaratory relief in respect of the intention and obligation of the Government of the United Kingdom to implement the requirements of the directive..." *Imperial Tobacco*, EuLR page 582, *quoted in Omega* at 4-5. Likewise here, Respondents are obligated to implement the Regulation, which is now law, and thus, this matter is ripe for review.

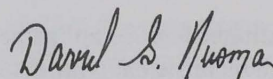
(f) Requested Relief

The Applicant respectfully requests that the Council: (1) determine that Respondents are in violation of Articles 11, 15, 38, and 82 of the Convention and Annex 16, Volume I, Standard 1.5; (2) order Respondents to comply with all provisions of the Convention; (3) order Respondents to take immediate steps to procure their release from

their obligations under the EC regulation; and (3) grant the Applicant such other and further relief as the Council deems proper and just.

(g) Report of Negotiations

Negotiations to settle the present disagreement have taken place between the parties but have not been successful. Protracted negotiations have failed to bring the parties near to agreement, despite engagement at the highest political levels.

A handwritten signature in dark ink, appearing to read "David S. Newman". The signature is fluid and cursive, with the first name "David" and last name "Newman" clearly distinguishable.

David S. Newman

Agent for the United States of America

Annex 13

ICAO Council, 161st Session, *Summary Minutes of the Fourth Meeting*, ICAO Doc. C-MIN
161/4 (15 Nov. 2000)

COUNCIL — 161ST SESSION**SUMMARY MINUTES OF THE FOURTH MEETING****(THE COUNCIL CHAMBER, WEDNESDAY, 15 NOVEMBER 2000, AT 1000 HOURS)****OPEN MEETING**

President of the Council: Dr. Assad Kotaite

Secretary: Mr. R.C. Costa Pereira, Secretary General

PRESENT:

Algeria	— Mr. T. Chérif	Kenya	— Mr. S.W. Githaiga
Argentina	— Mr. J.L. Bacarezza	Lebanon	— Mr. R. Abdallah
Australia	— Dr. J. Aleck	Mexico	— Mr. R. Kobeh González
Botswana	— Mr. K. J. Mosupukwa	Netherlands	— Mr. M.A. Kraan
Brazil	— Mr. A.M. Cunha	Norway	— Mr. O.M. Rambech
Cameroon	— Mr. T. Tekou	Pakistan	— Mr. S.N. Ahmad
Canada	— Mrs. G. Richard	Panama	— Mr. R.E. García de Paredes
China	— Mr. Y. Zhang	Russian Federation	— Mr. V.P. Kuranov
Colombia	— Mr. J. Hernández López	Saudi Arabia	— Mr. S. Al-Ghamdi
Cuba	— Dr. M. Molina Martínez	Senegal	— Mr. M. Ndiaye (Alt.)
Egypt	— Mr. A.Y. El Karimy	Slovakia	— Mr. O. Fabrici
France	— Mr. M.-Y. Peissik	Spain	— Mr. L. Adrover
Germany	— Dr. H. Mürl	United Kingdom	— Mr. D.S. Evans
India	— Mr. A.P. Singh	United States	— Mr. E.W. Stimpson
Indonesia	— Mr. J. Sjoen	Uruguay	— Mr. C.A. Borucki
Italy	— Mrs. L. Aghilarre (Alt.)		
Japan	— Mr. K. Okada		

ALSO PRESENT:

Mr. F. Robledo (Alt.)	— Argentina
Mr. E.M. Salin (Alt.)	— Brazil
Mr. J.F. Murphy (Alt.)	— Canada
Mr. J. Yuan (Alt.)	— China
Mr. E.E. Falcón (Alt.)	— Colombia
Mrs. M.C. Saucedo (Alt.)	— Colombia
Mr. D. Wibaux (Adv.)	— France
Mr. A. Veillard (Alt.)	— France
Mr. T. Mickler (Alt.)	— Germany
Mr. E.K. Karayannis (Obs.)	— Greece
Mr. K. Ohashi (Alt.)	— Japan
Mr. S. Takano (Alt.)	— Japan
Mr. K. Keldusild (Alt.)	— Norway
Mr. E.N. Lobachev (Alt.)	— Russian Federation
Mr. D.S. Newman	
(Authorized Agent)	— United States
Mr. A.I. Mendelsohn (Adv.)	— United States
Mr. F.W. Price (Alt.)	— United States
Mr. D.M. Shapiro (Alt.)	— United States
Mrs. M. Camposano (Alt.)	— Uruguay
Mr. J.-L. Dewost	
(Authorized Agent)	— 15 European States
Mr. E. White (Adv.)	— 15 European States
Ms. M. Tousseyn (Adv.)	— 15 European States
Mr. P. van den Heuvel (Adv.)	— 15 European States

SECRETARIAT:

Dr. L.J. Weber	— D/LEB
Mr. G. Griffiths	— C/EPO
Mrs. D. Cooper	— EPO
Mrs. C. Rideout	— CSO

1. The President of the Council extended a welcome to Mr. Jean-Louis Dewost, the Authorized Agent of the 15 Member States of the European Union; the Delegation accompanying him; Mr. David S. Newman, the Authorized Agent of the United States of America; Mr. Denys Wibaux, Advisor to the French Delegation; and Mr. Allan I. Mendelsohn, Advisor to the United States Delegation.

Subject Number 26: Settlement of disputes between Contracting States

Subject Number 16: Legal work of the Organization

Settlement of Differences: United States and 15 European States (2000)
(Note on Procedure: Preliminary Objections)

2. The above subject was documented for the Council's consideration in C-WP/11380, in which the President of the Council provided an overview of the procedure applicable to the case during the preliminary objections stage; memorandum SG 1670/00 dated 17 August 2000, in which the Secretary General transmitted the preliminary objections presented by Mr. Dewost, Authorized Agent on behalf of the 15 respondent European States in accordance with Article 5 of the *Rules for the Settlement of Differences* (Doc 7782); and memorandum SG 1674/00 dated 27 September 2000, in which the Secretary General transmitted the statement of response to the preliminary objections, filed on behalf of the United States.

3. The President of the Council clarified that the Council's consideration of this subject was of a procedural nature, limited to the preliminary objections of the European States and to the response of the United States, and would not address the merits of the case. The President also clarified that for this case the above-mentioned *Rules for the Settlement of Differences* and the *Rules of Procedure for the Council* (Doc 7559) would be used. The previous proceedings related to the *Pakistan vs. India* case (1971) and the decision of the International Court of Justice in the case *Appeal Relating to the Jurisdiction of the ICAO Council, India vs. Pakistan* (1972) would also be taken into account. The President reminded the Council that for the case before it, the Council was sitting as a judiciary body.

4. The Council heard a presentation by Mr. Jean-Louis Dewost, the Authorized Agent of the 15 Member States of the European Union, who observed that the case before the ICAO Council today, in which the Council was being invited by one of the ICAO Contracting States—i.e. the United States of America—to decide, according to Article 84 of the Chicago Convention, a dispute between it and the fifteen Member States of the European Union, was only the fifth to be brought since 1944. He also pointed out that in only one of those five cases had the Council taken a decision in favour of one Contracting State and against the other. Mr. Dewost indicated that he would first present the preliminary objections of the 15 Member States of the European Union, then reply in detail to the response of the United States, and at the end make some concluding remarks.

Part I—Presentation of the Preliminary Objections

5. Mr. Dewost recalled that the subject of this dispute was a European Community (EC) Council Regulation No. 925/1999 adopted on 29 April 1999, designed to “freeze” the number of the noisiest aircraft which could be registered in, or operated into, the European Union (the so-called “hushkit” regulations). For those who were not familiar with EU law, Mr. Dewost clarified that the European Union was a political entity with a separate legal personality from those of its constituent Member States (“the fifteen”), vested with law-making power as well as treaty-making power and enjoying the capacity to be a party to legal proceedings. Regulation 925/1999 was therefore a legal act binding States as well as economic operators. Although the fifteen EU Member States were bound to implement this Regulation, they had no capacity to alter it or to

withdraw it, since it belonged to the Community legal order and was a result of the Community legislative procedure. For the sake of completeness, Mr. Dewost also explained that he had been appointed as Counsel of the fifteen Member States in this dispute because the European Union as such was not a member of ICAO.

6. As regards the claims of the two parties, Mr. Dewost observed that on one hand, the United States was claiming that the Regulation enacted by the Council of the European Union was causing severe damage to the industries making hushkits and certain low bypass ratio engines, and that it had diminished the resale value of the fleets operated by some US airlines. This, he contended, had nothing to do whatever with the interpretation or application of the Chicago Convention.

7. On the other hand, to put it in a nutshell, the fifteen Member States which Mr. Dewost had the honour to represent claimed, in response to the US claim, that Regulation 925/1999 aimed to reconcile a sustainable growth of air traffic and the protection of environment, these two objectives being in full agreement with ICAO policy reflected in Resolution A32-8 (*Consolidated statement of continuing ICAO policies and practices related to environmental protection*). In no way did the Regulation violate ICAO noise standards, as the United States claimed, for the good reason that the Chapter 3 standard applied only for the certification of prototype aircraft and did not deal with aircraft already in operation. The Regulation addressed, in the least disruptive manner for civil aviation, the very serious problem of noise around European airports, a problem with which populations were more and more deeply concerned, as had been demonstrated by the European Parliament in the debate it had held on hushkits. By freezing noise damage from recertificated aircraft, Regulation 925/1999 in fact preserved the possibilities for air traffic growth in European airports, which would benefit the whole civil aviation community.

8. The subject under discussion therefore concerned, on one hand, the private interests of US industry and, on the other, the growing public concern in Europe for environmental protection of the populations living in the vicinity of airports as well as the general interest of all carriers landing in Europe. In these circumstances, the United States was asking the Council to take four decisions:

- 1) to determine that the fifteen EU Member States were in violation of Articles 11 (*Applicability of air regulations*), 15 (*Airport and similar charges*), 38 (*Departures from international standards and procedures*) and 82 (*Abrogation of inconsistent arrangements*) of the Convention and Annex 16, Volume I, Standard 1.5;
- 2) to order them to comply with all provisions of the Convention;
- 3) to further order them to take immediate steps to procure their release from their obligations under the EU Regulation; and
- 4) to grant the United States such other and further relief as the Council deems proper and just.

9. The fifteen EU Member States were of the opinion that these requests were inadmissible:

- 1) because the subject of the dispute fell outside the scope of Article 84, since it was not a dispute about the interpretation or application of the Chicago Convention;
- 2) because in any case, negotiations on points of law that the United States raised for the first time in its Application had not taken place before it had been filed;

- 3) because the general rule governing public international law disputes between sovereign States (that is, the necessity to exhaust local remedies before having recourse to international procedure) had not been respected; and
- 4) because in any case, the aim of Article 84 procedure was not to issue injunctions or orders to Contracting States but to give a legal appreciation of the respective claims, leaving to them the choice of the measures they wished to take in order to implement the Council's decision.

10. Focussing on the main points, Mr. Dewost argued that although there had of course been prior negotiations, these had been political negotiations, the constant request of the United States being that the EU should repeal the Regulation. The United States had never engaged in a legal debate on why the Regulation could be considered contrary to the Convention or on how it could be amended. The text of Article 84 was clear. The prior negotiations must relate to the disagreement about interpretation or application of the Convention. Negotiations to find a political solution—however laudable and desirable—did not serve the same function, which was to define and narrow the legal issues before they were made the subject of a litigation.

11. The United States' response to the EU argument concerning the "local remedies rule" was even weaker. To pretend that the US claim was a claim of direct injury to the United States thus rendering access to European courts useless, after having developed at length in the Application that there was a huge damage to US companies, and having based its request for the repeal or setting aside of the Regulation on that damage, was not very credible. Mr. Dewost wished to inform the Council in this connection that industry had found its way to the courts and that there were three court cases pending at present in the United Kingdom, Ireland and the European Union.

12. Last but not least, having not succeeded in their pressures on the European Union to get Regulation 925/1999 purely and simply repealed because they considered it hurt some industrial interests, the United States now turned to this Council, asking it to order the Member States of the EU to procure their release from their obligations under the Regulation, which had been enacted according to the competencies and rules of procedure of the European Union Institutions.

13. This was a brand new approach. The fifteen Member States which Mr. Dewost was representing today were active Members of this Organisation; they supported ICAO's work and trusted that this work was essential for an orderly and sustainable development of world civil aviation. They had the utmost respect for the Council and for President Kotaite's competence and skills in this respect. But the way this Organisation had been successful was a classical way of progressive consensus-building among its Members. Those Members were sovereign States which had accepted well-defined limitations of competencies whilst ratifying the Chicago Convention. They could not be deemed to have surrendered globally their competencies in the whole field of civil aviation and, all the more, in the field of environmental protection.

Part II—Detailed Reply to the United States' Response

Introduction—the nature of the preliminary objections

14. Turning to his detailed, point-by-point reply to the US Response of 15 September 2000, Mr. Dewost, by way of introduction, wished to offer some comments about the nature of the fifteen EU Member States' Preliminary Objections, which had been taken as a denial of the Council's competence to deal with the questions posed by the Application. This was a misunderstanding. The Preliminary Objections

concluded with the statement that “the ICAO Council has no jurisdiction to handle the matter presented by the Applicant”. This formulation had been textually drawn from Rule 5 of the Council’s *Rules for the Settlement of Differences* and in fact referred, as the content of the preliminary objections made clear, only to the admissibility of the Application in its present form and at the present time—not of course to the competence of the Council to decide a dispute of this kind. If there had been any misunderstanding about the fifteen States’ attitude arising out of this formulation, Mr. Dewost asked that the Council accept their apologies for not being sufficiently clear from the outset.

15. The Preliminary Objections were indeed not challenges to the Council's competence; they were challenges to the United States’ right to bring this case before the Council at this time and to its right to demand the issuing of orders to Contracting States of ICAO.

16. As was made clear in their Preliminary Objections, the fifteen EU Member States fully recognised—and wholeheartedly supported—the role of ICAO in establishing global standards for all matters affecting the safety, regularity, and efficiency of air navigation, and also the role of the Council in resolving disputes on the interpretation and application of the Convention and its Annexes. Mr. Dewost wished to reassert formally the unambiguous will of the fifteen EU Member States to co-operate fully in the development of ICAO policies in the field of noise standards and other environmental policies and to promote their respect through efficient methods such as the audit method that ICAO was successfully developing in the field of safety.

The Negotiations

Introduction

17. Highlighting the importance of prior negotiations, Mr. Dewost clarified that the preliminary objection relating to the absence of negotiations was not a formal and technical legal nicety; it was of real and fundamental importance.

18. The Council, as the key decision-making body of ICAO, had an essential role to play in developing, formulating, and especially building consensus around the rules, policies, standards and recommended practices that would allow international civil aviation to develop into the 21st Century. The Council had also been given a judicial role, to adjudicate disagreements between Contracting States. This role, if extended beyond reason, had the potential to distract the Council from, and destroy the necessary climate for, its main role of consensus building. That was why the Convention so clearly and so wisely provided that adjudication of disagreements by the Council should be a last resort, that is, it should only be available after negotiations had failed. That was also why the Convention provided that the disagreements which could be adjudicated in this way must relate to clearly defined legal questions “relating to the interpretation or application of the Convention”, and not to disguised disputes on policy. Policy questions must absolutely be resolved by the Council acting in its consensus-building mode, not in a conflictive, dispute settlement mode.

19. It was, of course, possible for the legal issues about which there was disagreement to be defined during the litigation, but there was a significant difference between defining the legal issues before bringing of a case to an adjudicatory body and doing so during the proceedings. For one thing, it was much more difficult to come to a settlement in the heat of a dispute than before it had started. But perhaps more importantly, the fact of defining the exact scope of the legal disagreement helped to find a way of reconciling the conflicting positions. Once the meaning of “non-discrimination” provisions of the agreement or the relevant provisions relating to ICAO standards and recommended practices had been debated between the parties and

some measure of agreement reached as to their meaning, it would be much easier to identify and possibly agree on the various options available to the parties. Such a debate might well have led the parties to this dispute to consider changes to the Regulation that would have satisfied any legitimate legal concerns of the United States. However, as was demonstrated by the documents annexed to the Preliminary Objections, the United States, instead of engaging in this exercise, had simply reiterated its demand for the total repeal of the Regulation.

20. The respondent States were ready to enter into proper negotiations with the United States. But for this to happen, it was necessary for the ICAO Council to tell the United States that this was what was required by Article 84 as a precondition for asking the Council to become involved in the disagreement.

The historical record of the negotiations

21. Mr. Dewost next answered the United States' detailed arguments on the historical record of the negotiations, on what it termed "the legal standard" contained in Article 84, and on the question of whether the negotiations needed to relate to specific legal claims. He noted that the United States alleged in Sections 1.1 and 1.2 of its Response that the history of the dispute contained in Annex 1 to the Preliminary Objections was "incomplete and inaccurate".

22. On the question of completeness, there was no claim of course to have presented a complete account of the contacts between the parties--merely the most recent and relevant documents. As the United States recognised itself, these contacts had occurred at various levels and in various forms and "it would be virtually impossible to set out a complete history" (page 2 of the US response). The documents were, to a large extent, repetitious, but what mattered for the Council was whether any of the documents demonstrated, as required by Article 84 of the Convention, the holding of negotiations to resolve a disagreement relating to the interpretation or application of the Convention.

23. The further documents submitted by the United States—who, it must be remembered, had the burden of proof—did not help prove that the negotiations required by Article 84 of the Convention had taken place.

24. Before explaining why the contacts that had taken place did not satisfy the legal requirements of Article 84, Mr. Dewost wished to highlight the following points:

- It was clear from the documents submitted both by the United States and in the Preliminary Objections that the United States' concerns related to merchandise matters (the effect of Regulation 925/1999 on hushkits, engines and used aircraft) rather than aviation matters;

- Although the correspondence referred a number of times to Annex 16, nowhere did it mention the provisions on which the United States was relying in this case, i.e. Articles 11 (*Applicability of air regulations*), 15 (*Airport and similar charges*), 37 (*Adoption of international standards and procedures*), 38 (*Departures from international standards and procedures*) and 82 (*Abrogation of inconsistent arrangements*) of the Convention and paragraph 1.5 of Chapter 1 to Annex 16;

- On the occasions where there had been an exchange of views as opposed to the sending of *démarches*, this had related to policy issues, not legal issues of interpretation or application of the Convention; and

- The United States' allegation that a letter of Mme de Palacio of 3 February 2000 "reflects the common view of the parties that it had not been possible to resolve the dispute despite extensive negotiations" was false. What Mme de Palacio had actually said in that letter was that consultations had been undertaken to find a "mutually acceptable way forward" on the question of hushkitted aircraft and that "unfortunately it has not so far been possible to find a way to resolve this problem." Clearly Mme de Palacio was referring to attempts to find a policy agreement ("mutually acceptable way forward") and also considered that it was still possible to find a solution (she had said "so far").

25. An effort had been made to settle the political dispute with the United States. The correspondence showed an agreement *ad referendum* to an Action Plan and Joint Declaration on 23 February 2000 establishing common objectives for the 33rd Session of the ICAO Assembly in 2001 on the definition of a new standard on aircraft noise and rules for transition towards this new standard. On page 5 of its Response, the United States sought to dismiss this as "irrelevant" and "unsubstantiated."

26. Mr. Dewost was confident that the Council would come to its own view of the relevance of this agreement in establishing the fifteen EU Member States' good faith. On the issue of its substantiation, Mr. Dewost wished to submit to the Council a letter dated 1 March 2000, in which the United States industry rejected the Action Plan and Joint Declaration and demanded that legal proceedings be pursued. However, the essential point on the inadequacy of the negotiations was that the United States had never engaged in a legal debate on why or how the Regulation could be considered to be contrary to the Convention. This was despite the initiative which had been taken, in a letter dated 26 February 1999 from the responsible Member of the EU Commission to the United States Secretary of State for Transportation, to explain why it was considered that the Regulation could not be considered as a new noise standard, had no effect on noise certification, and could not be considered inconsistent with Annex 16 or discriminatory or unjustified. No response had been forthcoming from the United States to the arguments contained in that letter.

27. It was noteworthy that when the effective date of the Regulation had been suspended, United States Secretary of State Daley had welcomed the opportunity that this gave to work bilaterally and multilaterally on a solution to the underlying problem of airport noise. Secretary of State Daley had made at that time in his statement no mention of any legal objections to Regulation 925/1999 and had indicated that the United States considered the concerns about aircraft noise to be legitimate. The United States did not in fact contest that it had not set out the legal basis of its complaint before referring the disagreement to the Council. Its real arguments were that a failure of settlement by negotiation was a precondition for the Council to decide, rather than for an application to be made, and that negotiations did not have to cover legal claims.

The legal standard

28. Addressing these arguments in order, Mr. Dewost stated firstly that the United States sought to escape the consequences of its failure to seek to settle the dispute by negotiation by arguing that the "legal standard" in Article 84 applied as a condition for the Council to take a decision, not as a condition for a Contracting State to refer a disagreement to the Council. This argument was based on a fundamental misinterpretation of Article 84 of the Convention, which stated that "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council." The Council decided on the application of "any State concerned", and the application could only be made if the disagreement "cannot be settled by negotiation." It was clear from the text that the application, as well as the decision, must come after the failure of negotiations.

29. The United States was arguing that the failure of negotiations could occur after the application, at any time during the proceedings prior to the taking of the decision by the Council. This was a contorted reading of the text that made no sense. If the parties to a dispute settled their disagreement before the Council decided, there would be nothing left for the Council to decide. The purpose of including in Article 84 a requirement that the "disagreement cannot be settled by negotiation" was to ensure that the parties first try to settle their disagreements themselves before referring them to the Council for decision. If this had not been the intent of the drafters of the Chicago Convention, they would surely have simply omitted any reference to a requirement that the disagreement "cannot be settled by negotiation."

30. The United States sought to argue that the standard for initiating a proceeding under Article 84 was that specified in Article 2(g) of the *Rules for the Settlement of Differences*—"that negotiations to settle the disagreement had taken place between the parties but were not successful." There was no conflict between the Rules and the Convention; the phrases meant exactly the same. Indeed, by specifying that an application must explain that negotiations had taken place but had not been successful, the Rules confirmed the view that negotiations to settle the dispute were a pre-condition for the making of an application.

31. The above view of the meaning of the obligation to negotiate, i.e. that it was a pre-condition for the making of an application under Article 84, had also been shared by the judges of the International Court of Justice ("ICJ") when considering the appeal by India against the Council's decision on its jurisdiction to hear the disagreement referred to it by Pakistan. For example, Judge Onyeama had had the following to say in his separate opinion: "It seems to me that the first requirement of Article 84 is that a disagreement between contracting States should first be negotiated. This requirement fully accords with the expressed desire to avoid friction." (In *Appeal Relating to the Jurisdiction of the ICAO Council*, Separate Opinion of Judge Onyeama of 19 January 1972, ICJ Reports 1972, page 87).

32. The separate opinion of Judge Onyeama dissented from the view of the rest of the majority on the question of the jurisdiction of the ICJ to hear the appeal, but agreed with the majority on the competence of the Council to decide the disagreement. However, the above quoted section did not contradict any statement by the majority or by itself lead to the conclusion that the majority was wrong. The majority had considered that the ICJ was competent to hear the appeal essentially because a decision on jurisdiction could determine the outcome of a case. The real question—whether the "dispute" that must be the subject of the negotiations may be a dispute about policy, or must rather be an articulated disagreement about the interpretation or application of the Convention—would be addressed in a moment.

33. In conclusion of the issue of the "legal standard" Mr. Dewost added that even if the United States were correct, it would mean that the proceeding should be suspended so as to allow negotiations to take place before the Council could decide. The respondents had, he believed, made abundantly clear their willingness to engage in such negotiations.

Negotiations must cover legal claims

34. The US finally admitted itself that, for a complaint under Article 84 of the Convention to be admissible, "an applicant may be asked to prove that negotiations were held but were unsuccessful." (Statement of Response of the United States attached to Memorandum SG 1674/00 of 27 September 2000, page 7). The United States avoided specifying, however, on what subject negotiations must be held. The more important issue in respect of this preliminary objection was not whether contacts had taken place, but whether they needed to, and did, cover articulated legal claims.

35. Article 84 was clear; it provided that the "disagreement" which could not be settled by negotiation and was to be referred to the Council must relate to the "interpretation or application of this Convention". As already explained, the United States had never articulated issues of interpretation or application of the Convention. The rationale for requiring negotiations to define the legal issues in dispute was precisely to distinguish legal from political disputes.

36. As was indicated in the Preliminary Objections, the Council should not, in Article 84 proceedings, be asked to adjudicate political disputes between individual Contracting States. This was not only an abuse of the procedure, it would also undermine its very function.

37. The respondents' view of the requirements of Article 84 was borne out by the international law cases cited in the Preliminary Objections.

38. The United States singularly failed to comment on the explanation of the meaning of the term "dispute" or "disagreement", referred to in the Preliminary Objections, that had been given in a judgment of the International Court of Justice in the case *Nicaragua vs Honduras*. The United States sought to confine its comments to the *Continental shelf case*, which the respondents had only mentioned in connection with the meaning of "negotiations". The real question here was the "dispute" or "disagreement" that must be the subject of the negotiations. Article 84 of the Convention clearly stated that it must relate to the "interpretation or application of this Convention and its Annexes". That this was also the generally applicable rule in international law was demonstrated by the following extract from the *Nicaragua vs Honduras* case just referred to: "The Court, as a judicial organ, is ... only concerned to establish, first, that the dispute before it is a legal dispute ...".

39. In its Response, the United States failed to deal with this issue. Section 1.4 of its Response was entitled "Negotiations need not cover specific legal claims," but the text that followed did not deal with this question. It discussed instead the entirely separate issue of the degree of probability that was required that further negotiations would not resolve the dispute. This question however did not arise until the legal claims were identified. As demonstrated above, the contacts that had preceded the Application had not identified legal claims.

40. The section of the opinion of Judge Onyeama in the case between Pakistan and India quoted above further confirmed the fifteen EU Member States' point of view. It stated that:

"What is to be negotiated is a disagreement relating to the interpretation or application of the Convention; that is to say, a difference of opinion as to the meaning of some provision of the Convention, or as to how such a provision should be applied between contracting States in the field of aviation." (In *Appeal Relating to the Jurisdiction of the ICAO Council*, Separate Opinion of Judge Onyeama of 19 January 1972, ICJ Reports 1972, page 87)

Conclusion

41. For the above reasons, the respondent States asked the Council to declare the Application inadmissible at the present time, since the necessary preliminary negotiation on the legal subject matter of the disagreement had not yet taken place, and to reserve its adjudicatory function for a time when this pre-condition had been complied with.

The Local Remedies Rules

42. Mr. Dewost was pleased to note that the United States accepted that the local remedies rule existed and that it was correctly stated in the *Ambatielos* case, in the passage that the United States itself quoted, as meaning that:

“the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State.”
(Response of the United States, page 10)

The point made in the Preliminary Objections was that the injury about which the United States complained was all damage to companies. It was true that the United States was not asking for damages, but it was relying on injury to its companies, and its goal was to eliminate the Regulation for the benefit of its companies.

43. The United States could not deny, and had not indeed denied, that the Regulation was presently subject to challenge before the national courts of EU Member States and before the European Court of Justice. Although the grounds of challenge to the Regulation in the cases presently with the European Court of Justice for consideration were to a large extent, but not entirely, different to those sought to be presented to the ICAO Council, the plain fact was that if those cases were successful, both the Applicant in those cases and the United States would have achieved the remedy desired - the Regulation being rendered unenforceable in the European Union. That was an additional reason why it would be wise to await the outcome of the litigation before engaging in complex legal adjudication before the Council.

*The Requested Relief**Introduction--the arguments of the United States*

44. The third preliminary objection against the Application, i.e. concerning the excessive remedies demanded by the United States, had, as mentioned above, been misrepresented as an attack on the competence of the Council.

45. As the key decision-making body of ICAO, the Council had been given very considerable powers and duties. Amongst these were specific powers for the resolving of disagreements between Contracting States. These powers, defined in the Convention, were to decide any disagreement between two or more Contracting States relating to the interpretation or application of the Convention and its Annexes which could not be settled by negotiation. These powers were not challenged. All that the responding States challenged was the pretension of the United States that it could require the Council to impose new obligations on a Contracting State, i.e., to order a Contracting State to take certain specific action.

46. Accordingly, what was at issue was not so much the powers of the Council, but whether an individual Contracting State was entitled to demand that the Council issue orders to another Contracting State concerning the way in which this State had to implement its obligations. The judicial role of the Council must

be interpreted so as not to interfere with, and destroy the necessary climate for, its main role of formulating and building consensus around the rules according to which civil aviation could develop.

47. The United States was asking the Council to go beyond declaring the correct interpretation of the Convention, and to take this further step of ordering precise measures that were to be taken by a Member to implement its obligations. This went further than allowed by the Convention and would constitute a restriction of the sovereignty of Contracting States, which it was a purpose of the consensus-building approach to protect.

48. The obligations which Contracting States had under the Convention were those that had been accepted by them in concluding the Convention and those created under the Convention according to the procedures set out therein. Article 84 of the Convention existed because there may be disagreements as to what the obligations under the Convention were. The Council then was called upon to decide, subject to review by the International Court of Justice, what these obligations were, but not to create new obligations or to decide how the obligations which existed were to be fulfilled. Either an obligation existed or it did not. A decision by the Council under Article 84 could not create it. Therefore, the Council could indeed declare the existence of an obligation to cease the violation, but could not dictate to the party concerned how precisely to bring itself into conformity with its obligations under the Convention.

49. Regulation 925/1999 had not been adopted in application of the Convention or its Annexes. The United States' case was that various provisions of the Convention and its Annex 16 prohibited measures such as the Regulation. The disagreement between the parties was therefore about the interpretation of these provisions, and the task of the Council was to decide the disagreement by declaring the correct interpretation of those provisions. The obligation to respect those provisions as so interpreted, i.e. to implement a Contracting State's obligations, derived directly from the Convention without any need for the Council to set it out.

50. The United States seemed to be making a number of arguments to the effect that such a power to make orders must be implicit in the Convention. These were:

- that the pleadings in the Article 84 case brought by Pakistan against India contained requests for the Council to issue orders to India;
- that "International tribunals" grant relief of the kind requested by the United States;
- that the Respondent's position would deprive the Council of powers essential to perform its duties;
- that Article 87 of the Convention referred to airlines "failing to conform" to decisions of the Council and Article 88 spoke of Contracting States being "found in default";
- that Article 2(g) (sic) and Article 13(2) of the Rules implied that the requested relief was available; and

- that International law required a State that was found in breach of international obligations to cease the illegal conduct and make reparation, and the Council must have the power to determine the existence of such obligations.

ICAO precedents

51. There was no precedent of the Council ordering a Contracting State to take certain action, as the previous cases had never reached that stage. It was true that Pakistan had asked the Council to award damages on the occasion of its dispute with India. There had, however, been no debate on the admissibility of such a request, and the merits of the dispute had never been adjudicated.

52. The request for the Council to make orders had not, however, escaped comment from the ICJ. Judge Dillard, who was in "fundamental agreement with all the conclusions of the ICJ and the reasons supporting them", had commented as follows in his separate opinion, rendered "especially as the thrust of India's main contention has implications reaching beyond this particular case."

The Council has no general power to adjudicate disagreements among contracting States. Its powers are strictly derivative and thus depend on the terms of the Convention and Transit Agreement.

Article 84 of the Convention and Article II, Section 2, of the Transit Agreement (by reference to Article 84) confer the power to decide '... any disagreement between two or more contracting States relating to the interpretation or application' of the Convention and its Annexes".

53. It was clear to the fifteen respondent States, at any rate, that there was no power for the Council to award damages or otherwise to impose on a contracting State obligations which were not in the Convention itself.

The powers of "international tribunals"

54. The United States claimed that "international tribunals" automatically had the powers that it was asking the Council to assume. In fact, the only "international tribunal" it referred to was the ICJ. It was clear that the ICJ was vested with wider powers under its statute than was the ICAO Council in the settlement of disputes under Article 84 of the Convention. Article 36 of the Statute of the ICJ gave the ICJ power to decide all claims referred to it and specifically jurisdiction in disputes over the interpretation of treaties, any question of international law, breaches of international obligations and the nature and extent of the required reparations.

55. The fifteen EU Member States agreed, of course, that international law created an obligation for a State responsible for a violation of international law to cease its illegal conduct and make reparation. The American Law Institute and the International Law Commission of the United Nations ("ILC"), referred to by the United States, correctly stated the principle. However, the point was that the ICJ had jurisdiction to entertain claims relating to these obligations. According to Article 36 of its Statute, it had jurisdiction over

"all cases which the parties refer to it" and Article 38 provided that it was to apply international law and gave a complete definition of the sources of international law.

56. The ICAO Council was of course a very different body from the ICJ. It was not a court and should not be transformed into a permanent court. It was principally a policy-making and management body. The settlement of legal disagreements was only an ancillary and, one would hope, very occasional function. The Convention wisely limited the role of the Council in this regard to deciding a disagreement on the interpretation or application of the Convention by making a declaration as to who was right and who was wrong, and did not go on to ask the Council to make orders as to how a contracting State should behave in the future.

57. The Council had recognised the different nature of its powers compared with those of the ICJ when it had drawn up its *Rules for the Settlement of Differences*. Article 15, which set out the required content of the Council decision on a disagreement, merely provided that it should state "the conclusions of the Council and its reasons for reaching them". This was in sharp contrast to the Rules of the ICJ, which provided that a judgment shall state its "operative provisions." The terms of the Council's Rules were otherwise quite close to those of the ICJ on which they were based. But the deliberate change in terminology on that point was a reflection of the fact that the Council had purely declaratory powers in dispute settlement under the Convention.

58. The United States sought to find support for its "inherent powers" theory in the Third Report on State Responsibility of ILC. It misquoted the ILC, however, and the actual words of the ILC in fact supported the opposite position. What the ILC had actually said was that :

The Commission is of the view that all that international law - and international bodies - are normally fit or enabled to do with regard to internal legal acts, provisions or situations is to declare them to be in violation of international obligations and as such sources of international responsibility and further to declare the duty of reparation, such reparation requiring, as the case may be, invalidation or annulment of internal legal acts on the part of the author State itself. (*Paragraph 9 of the Commentary to Article 7 (now Article 43) of the draft Articles on State Responsibility. Draft Articles provisionally adopted on second reading by the Drafting Committee (1998) Source: United Nations Doc. A/CN.4/L.569, 4 August 1998. The United States referred in its Response to the Third Report which was quoting from the commentary.*)

59. It was clear from the terms used ("all that international law - and international bodies - are normally fit or enabled to") that the ILC had been describing the maximum powers that may be given to international bodies. It was not affirming that they automatically or implicitly had such powers.

60. The other point to make about this statement of the ILC was that it made clear that the powers of international tribunals with respect to internal acts is to make declarations. There was no power to grant orders or injunctions in respect of internal acts of States. That the Chicago Convention was no exception to

this general rule was clear from the fact that the power to decide legal disputes was limited to the “interpretation and application” of the Convention..

61. In other international organisations with dispute settlement powers, it was a generally recognised fact that there were normally a number of ways to “bring a measure into compliance”, including modification as well as the removal of the measure, and the taking of separate action to solve the dispute.

62. Where States intended to give the organs of the international organisations that they created the power to impose on Members the means by which certain obligations were to be implemented, they specifically provided for this. This fact was illustrated by the provisions of the Constitution of the International Labour Organisation (ILO) which provided in its Article 26 that the ILO Governing Body could establish a Commission of Inquiry which may issue a report containing "recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken" (Article 28). In case of non-acceptance of the recommendations, the matter could be referred to the ICJ, and in this respect Article 33 specified that:

In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the ICJ, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

The Chicago Convention did not, of course, provide for the Council to adopt recommendations of this kind.

63. The United States was asking the Council to assume powers to restrict a Contracting State's options for compliance by requiring repeal of the Regulation. This would not only interfere with that choice, in the absence of any legal basis, it would also be a disproportionate and inappropriate interference in the sovereignty of Contracting States, who alone were in the position to know how they could best implement their international obligations.

The Council is able to perform its duties within its existing powers (Articles 82 and 83 of the Convention)

64. The United States was also claiming that "the authority to ‘create new duties’ applicable to States found in violation of the Convention ... is essential for the Council to fulfil its mandate to resolve disputes, as anticipated by the Convention." (*Page 20 of the United States’ Response*). The Convention contained the dispute resolution mechanism that the Contracting States wanted to create - not the one that the United States would like to apply to other countries in order to secure an effective solution to its perceived problems. The general rule in international law was that States were their own judge of what their obligations were and how they would implement them. The system was based on the presumption that States would fulfil their obligations, once it was clear what they were, in good faith. It was also based on the principle of State sovereignty. Most international agreements did not have any dispute resolution mechanism.

65. The power of the ICAO Council to make declarations of the correct interpretation or application of the Convention was essential in order to carry its function, which was to decide disputes. The

15 EU Member States had never disputed this power. They failed to see how the United States could consider that the supplementary powers that it was asking the Council to assume derived from Articles 82 and 83 of the Convention.

66. Footnote 14 of the Response attempted to import some reasoning into the United States' undeveloped argument by quoting Article 82 of the Convention out of context and suggesting that Article 82 required the abrogation of inconsistent agreements. The EU Regulation was not of course an agreement but, quite apart from this, Article 82 simply did not say this. The full text of the sentence of Article 82 from which the United States quoted in its footnote 14 was:

A contracting State which, before becoming a member of the Organization has undertaken any obligations toward a non-contracting State or a national of a contracting State or of a non-contracting State inconsistent with the terms of this Convention, shall take immediate steps to procure its release from the obligations.

67. It was clear that this provision was not providing for an obligation consequent upon a decision rendered under Article 84 of the Convention, but merely an obligation consequent upon accession to the Convention.

68. The United States' reference to Article 83 of the Convention was perplexing. The United States was suddenly claiming that the Regulation was "inconsistent with" Article 83 of the Convention, which it claimed "permits States party to the Convention to enter only into those arrangements that are not inconsistent with the provisions of the Convention". Article 83 had not been invoked in the Application and could not now be used to allege an inconsistency with the Convention.

69. But more importantly, beyond this procedural point, Article 83, which was entitled "Registration of new arrangements" was not prohibiting any kind of arrangement; it was providing a right to enter into certain arrangements and creating an obligation of registration. It stated that:

Subject to the provisions of the preceding Article, any contracting State may make arrangements not inconsistent with the provisions of this Convention. Any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible.

70. Article 83 therefore related to the registration with ICAO of bilateral air services agreements. It did not require the registration with the Council of every measure that Contracting States may adopt in the field of civil aviation.

The other dispute settlement provisions of the Convention--Articles 87 and 88

71. The United States also argued that the claimed powers were implicit in Article 87 of the Convention, which referred to airlines "failing to conform" to decisions of the Council and Article 88 which spoke of Contracting States being "found in default".

72. How could the existence of sanction provisions necessarily require that the Council had to impose specific duties on a Contracting State at the end of an Article 84 proceeding? The sanctions could be imposed once it was established that a Contracting State had taken no action to comply with its obligations or had taken inappropriate action. There was no need for the means of implementation to be defined in advance. Indeed, the existence of sanctions provisions demonstrated that the Contracting States intended to provide in the Convention for all the necessary powers of the Council. The fact that they did not provide for Council to order a Contracting State to take specific action demonstrated that they did not consider that this was necessary.

73. Also, Article 87 only applied in the special case of a dispute concerning international airlines and provided for a decision by the Council on whether an airline was conforming to a final decision under Article 86, i.e. following an appeal. The fact that no equivalent decision by the Council was envisaged in the case of compliance measures which needed to be taken by States by opposition to airlines, even following an appeal, confirmed the view that no such power existed with respect to States, *a fortiori* prior to appeal.

74. Article 88 provided for the case of States found in default, but such a decision was reserved for the Assembly. Again, this confirmed that the role of the Council in dispute settlement was to declare the correct interpretation and application of the Convention as provided in Article 84. This role was essential and Mr. Dewost wished to stress again that the fifteen States which he represented fully supported it.

Articles 2(f) and 13(2) of the Rules

75. The United States also argued that the existence of the claimed supplementary powers was evidenced by the requirement in Article 2(g) of the Rules for an applicant to specify the relief that it requested. Mr. Dewost assumed that the reference to Article 2(g) was a textual mistake and that Article 2(f) was intended to be invoked.

76. Article 2(f) of the Rules was perfectly consistent with the view of the fifteen EU Member States of the powers contained in Article 84. The fact that the Rules invited a complainant to state the requested relief was simply designed to encourage applicants to specify clearly the issue of interpretation or application on which they were requesting a ruling. The form of the relief would still be however a declaration of which party was right, not an order for a Contracting State to take specific measures.

77. The United States also argued that a power to "grant the requested relief" must exist because Article 13(2) of the Rules provided that when the Council appointed a Committee, this Committee prepared a report including "findings of facts and the recommendations of the Committee". The United States assumed that the reference to "recommendations" could only refer to a recommendation to take appropriate corrective measures.

78. For the fifteen EU Member States, it was clear from Article 13(1) of the Rules that the Committee made its report and therefore its recommendations to the Council, not a Contracting State. These were recommendations for Council decisions on the disagreement relating to the interpretation or application of the Convention.

79. Where the Rules envisaged recommendations to Contracting States, they made this clear. This was done, for example, in Articles 25(2) and 26(3) contained in Chapter VI of Part III, which was not of course applicable to these proceedings. In any event, recommendations were not orders.

The US requests for the Council to go beyond declaring the correct interpretation of the Convention seeks to establish a precedent drastically changing the role of the Council

80. The United States argued that since international law required a State that was found in breach of international obligations to cease its illegal conduct and make reparation, the Council must have the power to declare or "to determine the existence" of such obligations and therefore order the taking of remedial measures. Mr. Dewost reminded the Council that the United States requested it order the fifteen EU Member States to "procure their release from their obligations under the Regulation."

81. As had already been explained, the fifteen EU Member States did not contest that the Council, acting under Article 84 of the Convention, may declare the existence of a violation; they did however object to the United States' assertion that the Council must go further and specify how a Contracting State should carry out its obligations once their existence had been established. A Contracting State was not entitled to require the Council to dictate to another Contracting State which measures should be employed. This would create a precedent drastically changing the role of the Council.

82. There are presently - this was an open secret - several bilateral disputes between Members of this Organisation which involved the respect of Article 15 of the Chicago Convention, insofar as some of the contested practices were not in conformity with the principle of "like uniform conditions ... to the use, by aircraft of every contracting State, of all air navigation facilities..." (Article 15 of the Convention).

83. Would one imagine, in the same vein as the present request of the United States, that this Council would rule on all these bilateral cases and order that those national laws or regulations be repealed or set aside? Obviously not. The United States themselves would certainly not accept that an order of the Council would repeal or set aside an Act of the United States Congress. Therefore, for that third reason, Mr. Dewost urged the Council to consider the United States' complaint as not being admissible under Article 84 procedure.

Conclusion

84. For the reasons given, only the first point of relief requested in the United States Memorial was justified or indeed necessary. Once the obligations under the Convention had been fully determined and if violations of those obligations established, there was automatically an obligation to remove the violations. An addition of a request to bring the Regulation into conformity with those obligations was the maximum supplementary relief that could be justified.

Time Limits

85. Before making some general concluding remarks, there was one final matter that Mr. Dewost wished to deal with. It arose because the United States had ended its Response with a request that the Council,

in the event that it rejected the Preliminary Objections, deny any further requests that the respondent States might make for additional time to file the Counter-Memorial.

86. For the record, Mr. Dewost had to say that the fifteen States which he represented objected to this pre-emptive and premature request. He would be happy to explain why this request was inadmissible at the present time, if the need arose.

Part III--Concluding Remarks

General conclusion

87. For all the above reasons the fifteen EU Member States asked the Council to decide the questions raised by the Preliminary Objections as follows:

- The Application is inadmissible at the present time since the United States has failed to demonstrate that there is a disagreement with the Respondent relating to the interpretation or application of the Convention and its Annexes that cannot be settled by negotiation;
- The Application is inadmissible at the present time since the United States has failed to exhaust the remedies that are available in the legal systems of the Respondent;
- The second to fourth items of requested relief are inadmissible since the first item fully describes the form of decision which a Contracting State is entitled to request the Council to take under Article 84 of the Convention.

88. The fifteen respondent States also asked the Council to dismiss the United States' request to preclude in advance the granting of more time for the filing of a possible Counter-Memorial.

89. Mr. Dewost wished to end these pleadings on a note of hope. There had been recently, in Seattle, promising working within the Committee for Aviation Environmental Protection (CAEP). Experts were developing models, which might lead to a global agreement on noise standards including flexible regional solutions. The fifteen EU Member States were very keen to contribute to the progress of this work and Mr. Dewost was authorised to say that the European Union, as such, was very much open to envisage specific exemptions or timetable derogations for certain nations which might encounter difficulties in implementing the new standards.

90. Mr. Dewost reminded the Council that the contested Regulation would only start to apply to third country operators on 1 April 2002. There was therefore a time space up to 2002 allowing the parties concerned to make progress together within ICAO bodies with the aim of finding, by consensus, an acceptable solution to all Contracting States. The fifteen Member States of the EU did trust that ICAO was the competent and appropriate forum to deal with environmental problems linked to the development of civil aviation.

91. The legal route chosen by the United States was therefore not only improper in legal terms, but led them nowhere except to the risk of endangering the results of ongoing work within ICAO to which EU was very much dedicated.

92. The latest United States position, as Mr. Dewost understood it from the *demarches* that it had undertaken in the fifteen capitals of the EU Member States concerned, was that both parties should negotiate with the personal assistance of the President of the ICAO Council. Mr. Dewost's legal position was that the negotiations referred to in Article 84 of the Chicago Convention, as a precondition for filing an application, had never taken place. Defining the exact scope of the legal disagreement might moreover help to find a way of reconciling the two parties' positions. If the United States Administration was now ready to negotiate on this basis, the fifteen Member States which Mr. Dewost represented had always been ready to do so and would willingly proceed at this time. They were convinced that the future of ICAO did not reside in the development of bilateral litigation based on a distorted reading of Article 84 of the Convention. The future of ICAO lay in its technical and legal competence and its ability to develop rules through consensus building and to see to it that they were respected through appropriate controls.

93. The Council next heard a presentation by Mr. D.S. Newman, the Authorized Agent of the United States, who recalled the 1996 dispute concerning Cuba and United States, the difficult issues raised in that proceeding, and the skilful manner in which the Council had overseen negotiations which had led to a conclusion and the very skilful hand of its President in guiding the parties to an appropriate resolution. Whereas very complex issues had been brought in that claim, the issues that arose in this proceeding - speaking now of the Preliminary Objections - were not, in his view, particularly complex. Mr. Newman hoped that his words in this opening statement would assist the Members of the Council in framing the issues that needed to be resolved today, and in understanding and appreciating the importance of these issues.

94. The United States had filed its Application Memorial in this case in March of the current year, the Preliminary Objections had been filed in July, the United States had responded in September. The EU Member States claimed that the United States' claims brought in the Memorial were outside the jurisdiction of the Council. The purpose of the hearing was to determine the scope of the Council's jurisdiction. It was not to review the merits of the United States' Memorial or to consider whether additional negotiations might be a means of resolving this dispute. It was not to condemn the EU Member States for their unilateral action but to decide the Preliminary Objections. The Council would have to act, in deciding this matter, in a fashion to preserve its existing authority and therefore each of the Preliminary Objections would have to be rejected. The Rules required that the Council decide the Preliminary Objections before any further steps were taken.

95. There were themes that ran through the Preliminary Objections. They suggested that ICAO should not interfere with States acting to address their political, economic or other concerns regardless of whether those actions violated the Chicago Convention. In negotiations, the EU Member States had focussed on their regional concerns; the United States had focussed on global concerns. In their first exhibit to the Preliminary Objections, a document entitled "Common Conclusions", the EU Member States noted "the European concern regarding short-term deterioration of the noise situation at community airports" and referred to the United States' concern regarding the need to maintain uniform global aviation standards developed under the umbrella of ICAO. As the EU Member States acknowledged, those were the positions throughout the negotiations; they were the positions today. They prevented successful negotiation of this dispute and

required the United States' filing its Article 84 Memorial because of United States' concerns over unilateral action that violated the Chicago Convention. The United States did not condemn all unilateral actions, but the Convention had rules. There were limitations, such as the prohibition on discrimination, that limited a State's rights when it was acting unilaterally.

96. Setting out his three objectives for this opening statement, Mr. Newman indicated that he would first review briefly Regulation No. 925/1999 and the claims of the United States, providing only that information that was necessary to resolve the objections. Second, he would review the Preliminary Objections and explain why each of them must be denied to preserve the Council's authority. Finally, he would discuss the implications of the Preliminary Objections for ICAO and why they were of such concern.

97. Regulation No. 925/1999 could be described very briefly as a restriction on the registration and operation in the European Union of certain types of aircraft, including hushkitted aircraft and aircraft that had been re-engined with certain types of engines. The affected aircraft were largely United States-registered, although there were a number that were registered in other States. The EU "hushkits" Regulation excluded certain aircraft from its restrictions. The exclusions discriminated, based upon the nationality of the aircraft. The discrimination preferred aircraft registered in the EU Member States.

98. Mr. Newman summarized the United States' claims set out in its Memorial, which very clearly were issues regarding the interpretation and application of the Convention.

99. First, the United States argued that the Regulation violated Articles 11 and 15, which prohibited discrimination based on nationality. When a State promulgated laws affecting international civil aviation or permitted access to their public airports - as noted in describing the Regulation - it did discriminate against aircraft registered outside the European Union.

100. The second United States claim was that the Regulation targeted specific aircraft types, most of which were registered in the United States. This was a discrimination again under Articles 11 and 15, based on the disparate impact. The European Union may have had environmental concerns and may continue to have those concerns; those concerns must however be addressed in a non-discriminatory manner, and not by excluding non-EU aircraft.

101. The third of the United States' claims argued that the Regulation constituted a deviation from ICAO noise standards, and that the EU Member States failed to comply with the procedures in Article 38 for such deviations. If the EU Member States wished to promulgate their own standards, the Convention allowed them to do so, but it set out rules, and those rules had not been followed.

102. Finally, the United States claimed, and now asserted, that the Regulation caused the EU Member States to reject United States noise certifications by restricting - on the basis of noise - aircraft that had been certified by United States authorities as complying with the most stringent international noise standards.

103. Turning to the objections raised by the EU Member States and the reasons why they must be denied, Mr. Newman observed firstly that the EU States argued that negotiations had not been adequate. Before filing its Memorial and Application, the United States had engaged in three years of diplomatic efforts,

including written correspondence, technical level meetings, and high level meetings on both sides of the Atlantic Ocean involving the Secretary of Transportation, the Secretary of Commerce and senior legislators. How possibly could all of these efforts fail to satisfy any reasonable requirement for adequate negotiations? The respondents - i.e. the EU Member States - appeared to admit the adequacy of the negotiations in a quotation referenced by the Agent for the EU States: "Mme de Palacio acknowledged extensive consultations that had been undertaken in order to reach a common understanding on a mutually acceptable way forward on the question of so-called hushkitted aircraft". That letter, which was Exhibit 7 to the Preliminary Objections, specifically noted that it had not been possible to find a way to resolve the problem. These were clear words of an authorized person and a direct viewpoint; what then could be inadequate about the negotiations?

104. The EU States asserted in their Preliminary Objections that none of the questions of interpretation and application of the Convention raised by the United States in its memorial had been discussed. This was not correct. The United States had attached to its written response - Exhibit 2 for example - written exchanges specifically on these points. At Attachment 2 was a letter from an authorized United States representative to authorized representatives of the EU Member States, noting that the Regulation deviated from ICAO noise standards; that it was based on a design, not a performance requirement; and that it discriminated in favour of aircraft registered in the EU over identical aircraft registered in third countries in provisions concerning transfers, leases and changes of registration. The letter also specifically noted that the Regulation restricted hushkitted and re-engined United States aircraft certified by the United States as fully compliant with ICAO noise standards. There were similar written exchanges but they would be redundant.

105. Noting the reference to Article numbers made by the Authorized Agent for the fifteen EU Member States, Mr. Newman suggested that this was not a basis for determining negotiations inadequate. As regards the real question, i.e. "what is the source of the requirement that a State set out its legal claims?" Mr. Newman asserted that the only applicable requirement for filing an application memorial under Article 84 was set out in Article 2 of the *Rules for the Settlement of Differences*, the rules primarily applicable to this proceeding. The requirement was that negotiations to settle the agreement had taken place between the parties and had not been successful. There was no issue for debate; this was a simple matter. There was no basis for requiring that all legal arguments and Article numbers be set out in negotiations. There was no legal requirement that all avenues for negotiation be exhausted. The requirement was that negotiations had been held and not have been successful. The EU Member States apparently would like to change the 1977 Rules; they may pursue that, but this was not an appropriate place.

106. Mr. Newman further noted that the United States had indeed exhausted all avenues even though that had not been required, because the United States understood that the Council's time was precious and it did not lightly take to impose additional burdens on the Council unless it was unavoidable. Negotiations had continued over a period of three years, including negotiations among high level officials, until a point at which there had been an impasse. The two sides had had demands that were not compatible.

107. Mr. Newman noted that the Agent for the fifteen EU Member States had suggested that the United States had failed to negotiate a proper amendment to the Regulation. He understood this to mean that the United States had failed to settle on the terms demanded by the European States. That did not, under international law, constitute a failure of adequate negotiations, it constituted a failure of concession and there was certainly no requirement for one side to concede its position before filing an Article 84 Memorial.

108. Turning to the second Preliminary Objection, Mr. Newman noted that the European States argued that before the United States could pursue its rights under an international agreement, first companies' nationals of that State must litigate their claims - whatever they may be, and whatever relevance they may have to the claims of the State - in the local court. Mr. Newman suggested that this was a very dangerous precedent, a precedent that no Member of the Council would like to see imposed upon its State, whereby a State was held hostage to decisions of its nationals regarding private litigation before that State could attempt to vindicate its rights in an appropriate international tribunal. Article 84 specifically stated that disagreements between Contracting States relating to the interpretation or application of the Convention and its Annexes shall be decided by the Council.

109. The argument of the European States was based upon the doctrine in international law referred to as the "local remedies" rule. It did not apply where a State was pursuing a direct injury to that State - its own claims - it applied where a State had only an indirect injury which derived from the claims of its nationals, where the State was espousing claims of its nationals to recover damages where one of its nationals had suffered a violation of its property rights or personal rights. The cases relied upon by the European States in their brief all fell into that category. The *Interhandel case* cited in the Preliminary Objections involved Switzerland defending the interests of particular nationals seeking restitution for their property that had been seized. The case involving *Electronica Cequila* (ELSIE), also referred to in the Preliminary Objections, had involved United States claims for damages suffered by an Italian company that was wholly owned by United States companies. The *Ambatielos case*, also cited, had involved Greece espousing a claim of a Greek national against the Government of the United Kingdom for damages suffered due to non-compliance with a contract for the purchase of steamships. Certainly there were cases where a State suffered injury and its nationals suffered as well; in fact, in most international agreements the agreements were negotiated for the benefit of the nationals of the respective countries.

110. Mr. Newman observed that the European States would argue, if there were nationals injured by an act of a foreign State, it was not possible to consider the claims of the State for violation of that agreement. That argument was not correct, and was not supported by international law. Very similar issues had been addressed in 1978, in arbitration involving the United States and France, and in 1992, in arbitration involving the United States and the United Kingdom (the Heathrow arbitration). Both of these disputes had arisen under bilateral air services agreements. The bilateral agreements - as everyone knew - shared a common base with the Chicago Convention. Not only did they derive from the foundation of the Chicago Convention, but they defined the rights of States, which rights benefitted the airlines of those States. In both of the arbitrations just described, the arbitration tribunals had recognized that specific United States airlines had been harmed by the actions of the foreign States; however, the arbitration tribunals had recognized that the United States was pursuing its own rights, that under the relevant agreements no rights accrued directly to the airlines and that the issues at stake certainly affected the particular airlines at that time but were much wider than that because they affected airlines in the future. Decision of the cases had required an interpretation of agreements that would guide the countries and their airlines in future relations. In all respects, those decisions were pertinent to the present dispute.

111. Turning to the third of the Preliminary Objections, where the Council, it was argued, lacked the power to grant the United States' requested relief beyond determining that there were violations of the Convention, Mr. Newman, while noting that the argument was incorrect with respect to its interpretation of the Chicago Convention, more importantly noted that it was not a "Preliminary Objection". In fact, it

assumed that the Council would decide the dispute in favour of the United States, that there had been violations of the Chicago Convention and its Annexes, and the question raised by this objection was “what is the extent of the relief the Council may grant to the United States?”. The ICAO Council addressed many difficult issues and it should be in its interest to avoid issues that were premature, and that need not be decided at this point. Mr. Newman suggested that this Preliminary Objection may be dismissed at this point as premature, but dismissed “with prejudice”, meaning that the European States could raise it at such future time as the Council had decided the merits in favour of the United States.

112. In the interest of correcting misrepresentations of the United States argument, Mr. Newman would rely on the Council Members to read the United States’ written submission for themselves, and asked that they not rely on various representations by the Authorized Agent for the fifteen EU Member States as to positions taken by the United States. It was not worthy of the Council’s time to now review any misstatements to the effect that the United States had asserted that all international tribunals had the power to grant any type of relief. The United States’ submission discussed the Chicago Convention and the Rules for the Settlement of Differences and explained why they gave the Council the powers to grant the relief requested by the United States. Reference was made to principles of international law which acknowledged that as a matter of general principles a finding that there had been a violation of international law was typically associated with an obligation to cease the unlawful behaviour and to comply with the international obligations. The EU States suggested it was unreasonable and beyond the Council’s power to grant even that relief. When the United States’ submission referred to the memorial of Pakistan in the 1971 dispute, it was responding to an argument raised by the European States that the United States’ request for relief conflicted with Council precedent. The United States responded by saying “there is no Council precedent, the only relevant precedent that might be considered is the prior request for relief”. Today the Council had heard the Agent for the fifteen EU Member States agree that there was no Council precedent, and therefore the United States’ request could not be inconsistent with any such precedent.

113. In its written submission the United States reviewed the several provisions of the Chicago Convention and the roles in which it believed the power of the Council was implicit. The Authorized Agent for the fifteen EU Member States had reviewed those Articles, and Mr. Newman would therefore refrain from reviewing them again since Representatives on the Council could determine for themselves whether there was intended the power for the Council to grant appropriate relief to resolve the dispute. He would refer only to Article 54 of the Convention, para graph (j) indicating that the Council shall “report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council”. It seemed this language was clear: the Council did not just find infractions but in addition it made determinations that the State was obligated to carry out. When the time would come for the Council to decide this issue, the United States anticipated the Council would determine that it had the appropriate authority, but the time for decision on that authority need not be at the close of this hearing, as this objection could be dismissed as premature.

114. Addressing his third objective for this opening statement, which was to discuss the implications of the Preliminary Objections for ICAO and why they were of such concern, Mr. Newman indicated that the United States had initiated this proceeding to address a unilateral action of the European States that violated the Chicago Convention and its Annex 16. The Preliminary Objections would attempt to diminish the Council’s power to address such disputes. The clear result was that it would be that much easier for Contracting States to violate the Convention in the future through unilateral action. The first of the

Preliminary Objections required the exhaustion of negotiations, a substantial new and perhaps impossible burden on States seeking to exercise Article 84 rights. Why impossible? Because after reviewing the diplomatic efforts engaged in by the United States, over three years at the level of senior government officials, if the sum total of all those efforts did not constitute adequate negotiations, how would any State meet the burden that the European States would seek to impose? If the Council rejected these objections, it would have the opportunity to oversee future negotiations. Future negotiations would be facilitated by the European States setting out their position by filing a counter-memorial. Absent that, the United States would be in the same position as before filing the Article 84 case. No further negotiations could take place until the European position was seen.

115. Mr. Newman had been quite surprised to hear the Agent for the fifteen EU Member States relate a *démarche* delivered to capitals of the EU Member States that the United States was now prepared to negotiate, and would be very interested in seeing it, since it came as a great surprise to him.

116. The second Preliminary Objection, concerning exhaustion of local remedies, first and foremost was problematic because it would subordinate States' rights under international agreements to the rights of their nationals which could be pursued, as the European States suggested, in local courts. The rights of any State could not be held hostage to decisions of a foreign court. They were to be resolved in international tribunals, such as ICAO. The United States recognized that Article 84 was a time-consuming process. The United States had filed its Memorial and Application eight months earlier, and had still not seen the European defence to its claims. Further delay for years while the matter proceeded in State courts would render Article 84 useless, although perhaps that was the goal of the European States.

117. The third Preliminary Objection, as the United States noted it, was premature. It was not a challenge to jurisdiction and could be dismissed on that basis alone. But of greater concern, it conflicted and would render meaningless provisions of the Chicago Convention and the Rules, and it would diminish the Council's power to resolve disputes. In paragraph 44 of their Preliminary Objection, the European States argued that the Council lacked power to do what was proper and just; the United States certainly could not believe that the drafters of the Chicago Convention had intended that. If the Council did not have the power under the Convention and the Rules to grant appropriate relief - and certainly the cessation of unlawful behaviour and compliance with the Chicago Convention was minimal appropriate relief - then States engaged in disagreements would be forced to turn to other fora to resolve their disputes or perhaps adopt unilateral counter-measures. Certainly that was not the intention of the Chicago Convention.

118. In conclusion, the United States would ask that the Council reject the Preliminary Objections which would deprive the Council and the Contracting States of reasonable access to an important tool for dealing with violations of the Chicago Convention. Article 84 was a tool of last resort, and it was unfortunate when States needed to rely upon it. Certainly ICAO and the Council exercised the greatest skill and were most productive through consensual efforts to develop new standards, but there were times, when a Contracting State refused to abide by its obligations under the Chicago Convention and sought to undermine the work of ICAO, that Article 84 was an essential tool and had to be preserved. The denial of each of the Preliminary Objections preserved the Council's authority and its discretion in this case and in the future to oversee negotiations, to settle disagreements or, if all else failed, to resolve them by decision.

119. It was noted that at the next (161/5) meeting, the Authorized Agents would each be given an opportunity to respond, after which the Council would proceed with the question period provided for under Article 11 of the *Rules for the Settlement of Differences*, open to Members of the Council not parties to the dispute.

120. The meeting adjourned at 1320 hours.

Annex 14

ICAO Assembly, *Resolution 38-12: Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation*, ICAO Doc. 10022 (entered into force as of 4 Oct. 2013)

Doc 10022



Assembly Resolutions in Force (as of 4 October 2013)

Published by authority of the Secretary General

International Civil Aviation Organization

Published in separate English, Arabic, Chinese, French, Russian
and Spanish editions by the
INTERNATIONAL CIVIL AVIATION ORGANIZATION
999 University Street, Montréal, Quebec, Canada H3C 5H7

For ordering information and for a complete listing of sales agents
and booksellers, please go to the ICAO website at www.icao.int

Doc 10022, *Assembly Resolutions in Force (as of 4 October 2013)*

Order Number: 10022

ISBN 978-92-9249-419-3

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3. Member States should be allowed a full three months for notifying disapproval of adopted SARPs amendments; in establishing a date for notifying disapproval the Council should take into account the time needed for transmission of the adopted amendments and for receipt of notifications from States.
4. The Council should ensure that, whenever practicable, the interval between successive common applicability dates of amendments to Annexes and PANS is at least six months.
5. The Council, prior to the adoption and approval of amendments to SARPs and PANS, should take into account feasibility of the implementation of SARPs and PANS by the intended applicability dates.
6. The Council, taking into account the definitions of terms “Standard” and “Recommended Practice”, should ensure that new Annex provisions, uniform application of which is recognized as necessary, are adopted as Standards, and that those new provisions, uniform application of which is recognized as desirable, are adopted as Recommended Practices.
7. The Council should urge Member States to notify the Organization of any differences that exist between their national regulations and practices and the provisions of SARPs as well as the date or dates by which they will comply with the SARPs. If a Member State finds itself unable to comply with any SARPs, it should inform ICAO of the reason for non-implementation, including any applicable national regulations and practices which are different in character or in principle.
8. Differences from SARPs received should be promptly made available to Member States.
9. In encouraging and assisting Member States in the implementation of SARPs and PANS, the Council should make use of all existing means of ICAO and strengthen partnerships with entities which provide resources and assistance towards development of international civil aviation.
10. Member States should establish internal processes and procedures by which they give effect to the implementation of provisions of SARPs and PANS.
11. ICAO should update and develop guidance material in accordance with the established priorities to adequately cover all technical fields.

A38-12: Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation

Whereas in Resolution A15-9 the Assembly resolved to adopt in each session for which a Technical Commission is established a consolidated statement of continuing policies related specifically to air navigation up to date as at the end of that session;

Whereas a statement of continuing policies and associated practices related specifically to air navigation as they existed at the end of the 37th Session of the Assembly was adopted by the Assembly in Resolution A37-15, Appendices A to W inclusive;

Whereas the Assembly has reviewed proposals by the Council for the amendment of the statement of continuing policies and associated practices in Resolution A37-15, Appendices A to W inclusive, and has amended the statement to reflect the decisions taken during the 38th Session;

Whereas a policy or associated practice that requires continued application for a period of more than three years should be regarded as a continuing policy or associated practice;

Whereas material which is contained in regulatory or readily available authoritative ICAO documents, such as Annexes, rules of procedures and directives to air navigation meetings should normally be excluded from the consolidated statements. This pertains, in particular, to the associated practices; and

Whereas the Assembly agreed to develop a new Resolution A38-11 based on Resolution A37-15 Appendices A, D and E, as a continuing policy in respect to formulation and implementation of Standards and Recommended Practices (SARPs), Procedures for Air Navigation Services (PANS) and notification of differences that would apply to all Annexes to the Convention and technical guidance material;

The Assembly:

1. *Resolves that:*

- a) the Appendices attached to this resolution constitute the consolidated statement of continuing air navigation policies and associated practices of ICAO as they exist at the close of the 38th Session of the Assembly; and
- b) the practices associated with the individual policies in the appendices constitute guidance intended to facilitate and ensure implementation of the respective policies; and

2. *Declares* that this resolution supersedes Resolution A37-15 with its Appendices, except for Appendices A, D and E which are superseded by the new Resolution A38-11.

APPENDIX A

Air navigation meetings of worldwide scope

Whereas the holding of worldwide air navigation meetings is an important function of ICAO and entails substantial expenditures of effort and money by the Member States and ICAO; and

Whereas it is necessary to ensure that maximum benefit is obtained from these meetings without imposing any undue burden upon the Member States or ICAO;

The Assembly resolves that:

1. meetings, convened by the Council, in which all Member States may participate on an equal basis shall be the principal means of progressing the resolution of problems of worldwide import, including the development of amendments to the Annexes and other basic documents in the air navigation field;
2. such meetings shall be convened only when justified by the number and importance of the problems to be dealt with and when there is the likelihood of constructive action on them; meetings convened on this basis may also be requested to conduct exploratory discussions on matters not mature for definite action;
3. the organization of such meetings shall be arranged so that they are best suited to carry out the assigned task and to provide proper coordination among the technical specialities involved; and
4. unless necessitated by extraordinary circumstances, not more than two such meetings shall be convened in a calendar year, and successive meetings dealing extensively with the same technical specialty shall be separated by at least twelve months.

Associated practices

1. Before deciding to refer a matter to a worldwide meeting, the Council should consider whether correspondence with States or use of machinery such as panels or air navigation study groups could dispose of it or facilitate subsequent action on it by a future meeting.
2. The agenda should be sufficiently explicit to define the task to be performed and to indicate the types of specialized expertise that will be needed at the meeting. In an agenda including more than one technical specialty the types of expertise called for should be kept to the minimum compatible with efficiency.
3. To facilitate the participation of all Member States, the Council should so plan the meeting programme as to keep to the minimum, consistent with efficiency, the demands upon the time of States' technical officials.
4. The planned duration of a meeting should allow adequate time for completion of the agenda, study of the report as drafted in the working languages of the meeting and approval of the report. Following the meeting, the Secretariat should make any necessary minor editorial amendments and typographical corrections to the meeting report.
5. The approved agenda and the main supporting documentation should be dispatched, normally by air, not less than ten months in advance of the convening date in the case of the agenda and not less than three months in the case of the main supporting documentation; other documentation should be dispatched as soon as possible.

APPENDIX B

Panels of the Air Navigation Commission (ANC)

Whereas panels of the Air Navigation Commission have proved a valuable medium for advancing the solution of specialized technical problems; and

Whereas it is necessary to ensure that maximum benefit is obtained from Air Navigation Commission panels without imposing any undue burden upon the Member States or ICAO;

The Assembly resolves that:

1. the Air Navigation Commission shall establish panels if necessary to advance the solution of specialized technical problems which cannot be solved adequately or expeditiously by the Air Navigation Commission through other established facilities;
2. the Air Navigation Commission shall ensure that the terms of reference and the work programmes of panels shall support the ICAO Strategic Objectives, be clear and concise with timelines and shall be adhered to;
3. the Air Navigation Commission shall review periodically the progress of panels and shall terminate panels as soon as the activities assigned to them have been accomplished. A panel shall be allowed to continue in existence only if its continuation is considered justified by the Air Navigation Commission; and
4. panel activity shall support a performance-based approach to SARPs development to the extent possible.

Associated practice

Reports should be clearly presented as the advice of a group of experts to the Air Navigation Commission so that they cannot be construed as representing the views of Member States.

APPENDIX C**Certificates of airworthiness, certificates of competency and licences of flight crews**

Whereas Article 33 of the Convention does not explicitly define the purposes for which recognition is to be accorded to certificates and licences;

Whereas several interpretations exist as to whether or not there is any obligation on Member States to recognize certificates and licences issued or rendered valid by other Member States pending the coming into force of SARPs applicable to the aircraft or flight crew involved; and

Whereas with respect to certain categories of aircraft or flight crew licences, it may be many years before SARPs come into force or it may be found most practicable not to adopt SARPs for some categories or flight crew licences;

The Assembly resolves that:

1. certificates of airworthiness and certificates of competency and licences of the flight crew of an aircraft issued or rendered valid by the Member State in which the aircraft is registered shall be recognized as valid by other Member States for the purpose of flight over their territories, including landings and take-offs, subject to the provisions of Articles 32 (b) and 33 of the Convention; and
2. pending the coming into force of international Standards respecting particular categories of aircraft or flight crew, and certificates issued or rendered valid, under national regulations, by the Member State in which the aircraft is registered shall be recognized by other Member States for the purpose of flight over their territories, including landings and take-offs.

APPENDIX D**Qualified and Competent Aviation Personnel**

Whereas the satisfactory implementation of SARPs and PANS is contingent upon having qualified and competent personnel;

Whereas difficulties are being experienced by Member States in these matters due to a lack of qualified personnel to support the existing and future air transportation system;

Whereas special effort is required to support Member States in meeting their human resource needs; and

Whereas learning activities conducted by ICAO are an effective means of promoting a common understanding and the uniform application of SARPs and PANS;

The Assembly resolves that:

1. ICAO shall assist Member States in achieving and maintaining competency of aviation personnel through the ICAO Aviation Training Programme;
2. the ICAO Aviation Training Programme shall be governed by the following principles:
 - a) qualification of aviation professionals is the responsibility of Member States;
 - b) the highest priority is placed on learning activities that support the implementation of SARPs;

- c) cooperation with Member States and industry is essential to develop and implement learning activities to support the implementation of SARPs; and
 - d) priority shall be placed on cultivating the next generation of aviation professionals.
3. ICAO advises operators of training facilities but does not participate in the operation of such facilities; and
 4. Member States assist each other to optimize access to learning activities for their aviation professionals.

Associated practices

1. The Council should assist Member States to harmonize aviation professionals' levels of competency. These efforts should be based on:
 - a) data analysis to determine priorities and needs;
 - b) identified training needs for the implementation of ICAO provisions; and
 - c) a competency-based approach.

APPENDIX E

Formulation and Implementation of Regional Plans including Regional Supplementary Procedures

Whereas the Council establishes Regional Plans setting forth the facilities, services and Regional Supplementary Procedures to be provided or employed by Member States pursuant to Article 28 of the Convention;

Whereas the Regional Plans require amendment from time to time to reflect the changing needs of international civil aviation;

Whereas ICAO has established an approach to planning of facilities and services that centres on the Global ATM Operational Concept and the Global Air Navigation Plan; and

Whereas any serious deficiencies in the implementation of Regional Plans may affect the safety, regularity and efficiency of international air operations and, therefore, should be eliminated as quickly as practicable;

The Assembly resolves that:

1. Regional Plans shall be revised when it becomes apparent that they are no longer consistent with current and foreseen requirements of international civil aviation;
2. when the nature of a required change permits, the associated amendment of the Regional Plan shall be undertaken by correspondence between ICAO and Member States and International Organizations concerned; and
3. when amendment proposals are associated with the services and facilities provided by States and such amendment proposals:
 - a) do not represent changes to the requirements set by the Council in the Regional Plans;
 - b) do not conflict with established ICAO policy; and

- c) do not involve issues which cannot be resolved at the regional level;

the Council may delegate authority for processing and promulgating such amendments to the regional level.

4. Regional Air Navigation (RAN) meetings, although important instruments in the determination of the facilities and services, shall be convened only to address issues which cannot be adequately addressed through the Planning and Implementation Regional Groups (PIRGs);

5. priority shall be given in the implementation programmes of Member States to the provision, and continuing operation of those facilities and services, the lack of which would likely have an adverse effect on international air operations;

6. the identification and investigation of and action by ICAO on significant deficiencies in the implementation of Regional Plans shall be carried out in the minimum practicable time; and

7. Planning and Implementation Regional Groups (PIRGs), using a project management approach, shall identify problems and shortcomings in Regional Plans and in the implementation thereof, along with suggested remedial measures.

Associated practices

1. The Council should ensure that the structure and format of regional plans is aligned with the Global Air Navigation Plan and is in support of a performance-based approach to planning.

2. In assessing the urgency of any revision of the Regional Plans the Council should take into account the time needed by Member States to arrange for the provision of any necessary additional facilities and services.

3. The Council should ensure that implementation dates in Regional Plans involving the procurement of new types of equipment are realistically related to the ready availability of suitable equipment.

4. The Council should ensure that web based regional plans are developed, with supporting planning tools, in order to improve efficiency and expedite the amendment cycle.

5. The Council should use the Planning and Implementation Regional Groups (PIRGs) it has established throughout the regions to assist in keeping up to date the Regional Plans and any complementary documents.

APPENDIX F

Regional air navigation (RAN) meetings

Whereas RAN meetings are important instruments in the determination of the facilities and services the Member States are expected to provide pursuant to Article 28 of the Convention;

Whereas these meetings entail substantial expenditures of effort and money by Member States and ICAO;

Whereas it is necessary to ensure that maximum benefit is obtained from these meetings without imposing any undue burden on Member States or ICAO; and

Considering that regional air navigation planning is normally accomplished by Planning and Implementation Regional Groups (PIRGs);

The Assembly resolves that:

1. RAN meetings shall be convened only to address issues which cannot be adequately addressed through PIRGs;
2. the convening of such meetings and their agenda shall be based on the existence or expectation of specific shortcomings in the Regional Plans of the respective areas;
3. the geographical area to be considered, account being taken of the existing and planned international air transport and international general aviation operations, the technical fields to be dealt with and the languages to be used shall be decided for each such meeting;
4. the organization best suited to deal with the agenda and to ensure effective coordination among the components of the meeting shall be used for each such meeting; and
5. meetings of limited technical and/or geographical scope shall be convened when specific problems, particularly those requiring urgent solution, need to be dealt with or when convening them will reduce the frequency with which full scale RAN meetings must be held.

Associated practices

1. The Council should endeavour to hold RAN meetings at sites within the areas concerned and should encourage the Member States within those areas to serve as host, either individually or jointly.
2. The approved agenda and the main supporting documentation should be made available, by electronic means, not less than ten months in advance of the convening date in the case of the agenda and not less than three months in the case of the main supporting documentation.
3. The Council should ensure that adequate guidance is made available to RAN meetings on operational and technical matters relevant to their agenda.
4. Each participating Member State should inform itself, in advance of a meeting, on the plans of its air transport operators and its international general aviation for future operations and, similarly, on the expected traffic by other aircraft on its registry and on the overall requirements of these various categories of aviation for facilities and services.
5. The Council, taking into account the requirement to improve still further existing safety levels, should foster the establishment, for and by RAN meetings, of up-to-date planning criteria which would aim to ensure that Regional Plans satisfy the operational requirements and are economically justified.
6. The Council should develop and maintain specific and detailed directives for consideration of implementation matters at RAN meetings.

APPENDIX G

Delimitation of air traffic services (ATS) airspaces

Whereas Annex 11 to the Convention requires a Member State to determine those portions of airspace over its territory within which air traffic services will be provided and, thereafter, to arrange for such services to be established and provided;

Whereas Annex 11 to the Convention also makes provision for a Member State to delegate its responsibility for providing air traffic services over its territory to another State by mutual agreement;

Whereas cooperative efforts between Member States could lead to more efficient air traffic management;

Whereas both the delegating and the providing State can reserve the right to terminate any such agreement at any time; and

Whereas Annex 11 to the Convention prescribes that those portions of the airspace over the high seas where air traffic services will be provided shall be determined on the basis of regional air navigation agreements, which are agreements approved by the Council usually on the advice of regional air navigation meetings;

The Assembly resolves, with reference to regional air navigation plans, that:

1. the limits of ATS airspaces, whether over States' territories or over the high seas, shall be established on the basis of technical and operational considerations with the aim of ensuring safety and optimizing efficiency and economy for both providers and users of the services;
2. established ATS airspaces should not be segmented for reasons other than technical, operational, safety and efficiency considerations;
3. if any ATS airspaces need to extend over the territories of two or more States, or parts thereof, agreement thereon should be negotiated between the States concerned, taking into account the need for cost-effective introduction and operation of CNS/ATM systems, and more efficient airspace management, in particular, in the upper airspace;
4. the providing State in implementing air traffic services within airspace over the territory of the delegating State shall do so in accordance with the requirements of the delegating State, which shall establish and maintain in operation such facilities and services for the use of the providing State as are mutually agreed to be necessary;
5. any delegation of responsibility by one State to another or any assignment of responsibility over the high seas shall be limited to technical and operational functions pertaining to the safety and regularity of the air traffic operating in the airspace concerned;

and, furthermore, *declares* that:

6. any Member State which delegates to another State the responsibility for providing air traffic services within airspace over its territory does so without derogation of its sovereignty; and
7. the approval by the Council of regional air navigation agreements relating to the provision by a State of air traffic services within airspace over the high seas does not imply recognition of sovereignty of that State over the airspace concerned.

Associated practices

1. Member States should seek the most efficient and economic delineation of ATS airspaces, the optimum location of points for transfer of responsibility and the most efficient coordination procedures in cooperation with the other States concerned and with ICAO.
2. Member States should consider, as necessary, establishing jointly a single air traffic services provider to be responsible for the provision of air traffic services within ATS airspace extending over the territories of two or more States or over the high seas.
3. The Council should encourage States providing air traffic services over the high seas to enter, as far as is practicable, into agreements with appropriate States providing air traffic services in adjacent airspaces, so that, in the event the required air traffic services over the high seas cannot be provided, contingency plans, which may require temporary modifications of ATS airspace limits, will be available to be put into effect with the approval of the ICAO Council until the original services are restored.

Annex 15

ICAO Council, *Rules of Procedure for the Council*, ICAO Doc. 7559/10 (2014)

Doc 7559/10



Rules of Procedure for the Council

Approved by the Council and
published by its decision

Tenth Edition — 2014

International Civil Aviation Organization

Doc 7559/10



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Tenth Edition — 2014

Note.— Throughout these Rules of Procedure, the use of the male gender should be understood to include male and female persons.

International Civil Aviation Organization

Published in separate English, Arabic, Chinese, French, Russian
and Spanish editions by the
INTERNATIONAL CIVIL AVIATION ORGANIZATION
999 University Street, Montréal, Quebec, Canada H3C 5H7

For ordering information and for a complete listing of sales agents
and booksellers, please go to the ICAO website at www.icao.int

Eighth Edition, 2007
Ninth Edition, 2013
Tenth Edition, 2014

Doc 7559, *Rules of Procedure for the Council*
Order Number: 7559
ISBN 978-92-9249-579-4

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RULES OF PROCEDURE FOR THE COUNCIL*

PRELIMINARY SECTION

DEFINITIONS

For the purpose of these Rules, the expression:

Alternate — means a person designated and authorized by a Member of the Council to act on its behalf in the absence** of the Representative, and holding credentials as evidence thereof.

Convention — means the Convention on International Civil Aviation.

Majority of the Members of the Council — means more than half of the total membership of the Council.

Meeting — means a single sitting of the Council from the time the Council comes to order until it adjourns.

Member of the Council — means a Contracting State elected by the Assembly to form part of the Council in accordance with Article 50 of the Convention.

Observer — means a person representing a Contracting State not represented on the Council, a non-Contracting State, an inter-

* Revised on 28 November 1969, entered into force on 27 April 1970; amended by the Council on 12 May 1971 (Rule 50), 17 March 1976 (Rules 56 and 57), 13 April 1976 (Rule 16 a)), 12 September 1980 (Rule 56), 9 June 1999 (Rule 56), 9 June 2006 (entered into force on 1 August 2006), 16 March 2007 and 20 June 2013 (Rule 12).

** This does not require the Representative to leave the room in the case of a Council meeting.

national organization or other body, designated and authorized by his State or organization to participate in one or more of the meetings of the Council without the right to vote or to move or second motions or amendments, under such further conditions as the Council may determine and holding credentials as evidence of his appointment.

Order of business — means a list of items of business for consideration at one meeting.

President — means the President of the Council.

Representative — means a person designated and authorized by a Member of the Council to act on the Council, and holding credentials as evidence thereof.

Secret Ballot — means a ballot where the marking of the ballot paper by a Representative takes place in private and cannot be overseen by any person other than the Representative's Alternate. All ballot papers distributed should be exactly alike so that it cannot be determined how any one Representative voted.

Work Programme — means the list of items to be considered during a session of the Council.

Working Day — means a weekday on which the Organization conducts business at Headquarters and does not observe a public holiday.

Working paper — means a paper proposing Action by the Council.

SECTION I

REPRESENTATIVES, ALTERNATES AND OBSERVERS, AND THEIR CREDENTIALS

Rule 1

Each Member of the Council shall have one Representative, whose place may be taken by an Alternate. No person may represent more than one State.

Rule 2

Credentials of Representatives, of their Alternates and of Observers shall be signed on behalf of the State, organization or body concerned and indicate the capacity in which the individual is to serve, and shall be deposited with the Secretary General.

Rule 3

The credentials shall be examined by the President, one of the Vice-Presidents and the Secretary General, who shall report to the Council.

Rule 4

Any Representative, Alternate or Observer shall be entitled, pending the presentation of the report on his credentials and Council action thereon, to attend meetings and to participate in them subject, however, to the limits set forth in these Rules. The Council may bar from any further part in the activities of the Council, Commissions, Committees and Working Groups any Representative, Alternate or Observer whose credentials it finds to be insufficient.

SECTION II

**OFFICERS OF THE COUNCIL
AND THE SECRETARY GENERAL**

Rule 5

The Council shall elect its President for a term of three years, the exact dates of commencement and termination of which will be determined by the Council. Candidates shall be nominated by Contracting States. The rules and procedures governing the election of the President are set out in Appendix A.

Rule 6

The President of the Council may be removed from office at any time by a decision of the Council taken by a majority of its Members, provided that the motion for that purpose is introduced in writing and is moved jointly by not less than one third of the Members of the Council. Upon the introduction of such a motion, the meeting shall be adjourned. As soon as practicable thereafter, a meeting to consider the motion shall be called by the Vice-President entitled to act under Rule 10. Pending the decision of the Council, the President shall refrain from carrying out the normal functions of the President.

Rule 7

In the event of the President's death, removal from office, or resignation, or if the President is otherwise unable to complete his term of office, a new President shall be elected by the Council as soon as possible thereafter and the latter shall hold office for the remainder of the term of his predecessor. If the President gives prior notice of resignation, the election shall be held on a date to be decided by the Council, if possible before the resignation takes effect.

Rule 8

The Council shall elect from among Representatives a First, a Second and a Third Vice-President. Candidates shall be nominated by one or more Council Members. The rules set out in Appendix B shall govern the election of each Vice-President.

Rule 9

The term of office of a Vice-President shall extend for one year from the date of his election, but he may continue to hold office thereafter until his successor is elected, provided that his term of office shall not extend beyond the end of the term of the Council unless the State which he represents continues to be a Member of the Council.

Rule 10

In the absence of the President, the First Vice-President, the Second Vice-President or the Third Vice-President in that order shall exercise the functions vested in the President by these Rules of Procedure.

Rule 11

A Vice-President when acting in the absence of the President shall retain his right to vote.

Rule 12

The Council shall appoint the Secretary General for a term of three years. Candidates shall be nominated by Contracting States. A Secretary General who has served for two terms shall not be appointed for a third term. The rules and procedures governing the appointment of the Secretary General are set out in Appendix C.

Rule 13

The Secretary General of the Organization shall be the Secretary of the Council.

Rule 14

The Secretary General may be removed from office by a decision of the Council taken by a majority of its Members, provided that the motion for that purpose is introduced in writing and is moved jointly by not less than one third of the Members of the Council. As soon as practicable thereafter, a meeting to consider the motion shall be called by the President. Pending the decision of the Council, the Secretary General shall refrain from carrying out the normal functions of the Secretary General.

Rule 15

In the event of the Secretary General's death, removal from office, or resignation, or if the Secretary General is otherwise unable to complete his term of office, the Council shall, notwithstanding the procedure in Appendix C, draw up an appropriate timetable for appointing a successor. If the Secretary General gives prior notice of resignation, the appointment shall be held on a date to be decided by the Council, if possible before the resignation takes effect.

SECTION III**COMMISSIONS, COMMITTEES AND
WORKING GROUPS OF THE COUNCIL***Rule 16*

- a) The Council shall appoint the Members of the Air Navigation Commission from candidates nominated by Contracting States. Such appointment shall be for a term of three years, or for the remainder of the term of a predecessor.
- b) The Council may appoint Alternates to act in the absence of a member of the Air Navigation Commission.
- c) The Council shall appoint the President of the Air Navigation Commission in accordance with the Guidelines set out in paragraph 4 of Appendix D.
- d) The rules and procedures governing the appointment of the Members, Alternates and President of the Air Navigation Commission are set out in Appendix D.

Rule 17

- a) In addition to the Air Navigation Commission, the Air Transport Committee and the Finance Committee, the Council may establish

other Commissions, Committees or Working Groups, either Standing or Temporary. The Council shall elect the Members and Alternates of standing bodies and shall specify at the time of establishing such bodies whether the body shall also elect its own Chairman. Standing bodies shall elect their own vice-Chairmen.

- b) The Council may elect an Alternate who may act and vote on behalf of a Member of the Standing Commission, Committee or Working Group who is absent or who is discharging the functions of Chairman.
- c) The rules and procedures governing the election of the Members, Alternates and Chairmen of Commissions (other than the Air Navigation Commission), Committees and Working Groups are set out in Appendix E.
- d) The temporary bodies mentioned in paragraph a) shall elect their own officers, unless the Council decides otherwise.
- e) The method of selection, terms of reference and working methods of Temporary Commissions, Committees or Working Groups shall be determined by the Council in each case.

SECTION IV

SESSIONS OF THE COUNCIL

Rule 18

The Council shall meet at such times and for such periods as it deems necessary for the proper discharge of its responsibilities. The Council shall determine the dates of the opening and termination of each session.

Rule 19

- a) Between two consecutive sessions of the Council, the President, on his own initiative or at the request of a Contracting State, after consulting the Members of the Council and with the approval of the majority of the Members of the Council, shall call an extraordinary session or change the date which the Council has set for the opening of the next session. No such action shall result in a Council Meeting being held on less than seven days' notice.
- b) When the President considers that the urgency of a situation so warrants, he may, after consultation with the most senior Vice-President available, convene a special session of the Council provided that no less than 48 hours' notice is given.

Rule 20

If a part of a Council session is devoted primarily to Committee meetings, the President may call such Council meetings as he considers necessary. No such meetings shall be called on less than 48 hours' notice without the approval of the majority of the Council.

Rule 21

The Council shall meet at the seat of the Organization unless the Council decides that a particular session or meeting shall take place elsewhere.

SECTION V**WORK PROGRAMME AND ORDER OF BUSINESS***Rule 22*

A Provisional Work Programme of each session of the Council shall be prepared by the Secretary General after consultation with the President,

and presented to the Council for approval. The presentation to the Council should normally, and wherever practicable, be made during the preceding session. The Council should indicate the priority which it attaches to the consideration of the various items in the Provisional Work Programme.

Rule 23

In preparing the Provisional Work Programme, the Secretary General shall include therein:

- a) subjects which require consideration by the Council by virtue of provisions of the Convention or other international agreement;
- b) subjects to be considered by virtue of decisions of the Assembly or decisions taken by the Council at a previous session;
- c) reports presented or references made to the Council by bodies of the Organization or other international bodies;
- d) any subject proposed by a Member of the Council and transmitted directly to the President or the Secretary General;
- e) any subject referred by a Contracting State for consideration by the Council;
- f) any subject which the President or the Secretary General desires to bring before the Council;
- g) a report on action carried out to implement the decisions of the Council taken at its previous session;
- h) a report on the financial situation of the Organization; and
- i) a report on the progress made by the Organization towards its strategic objectives and the objectives of the Business Plan.

Rule 24

- a) Supplementary items may be placed on the Work Programme during a session at the request of any Member of the Council, or of the President or the Secretary General, subject to the approval of the Council.
- b) Any additional subject which fulfils the conditions specified in Rule 26, paragraph d), shall be deemed to be included in the Work Programme of the session concerned.
- c) Supplements to the Work Programme should be issued by the Secretary General showing results of the application of paragraphs a) and b) of this Rule.

Rule 25

The Order of Business for each meeting shall be prepared by the Secretary General and approved by the President.

Rule 26

- a) The Order of Business shall be distributed to all Representatives at least 24 hours before the meeting of the Council.
- b) All documents listed in the Order of Business shall be distributed to all Representatives in advance of the meeting of the Council to which the Order of Business relates as follows:
 - i) for working papers containing proposals for adopting or amending the Annexes under Article 90 of the Convention — at least 10 working days before the meeting;
 - ii) for other working papers — at least 5 working days before the meeting;

- iii) for reports from Standing Commissions or Committees of the Council or reports of other bodies established under Rule 17 — at least 48 hours before the meeting; and
 - iv) for all other documents — at least 24 hours before the meeting.
- c) A revised Order of Business may be distributed less than 24 hours before the meeting of the Council to include, without substantial change, items of business included in the Order of Business already distributed for that meeting or an item carried over from the immediately preceding meeting provided that the revised Order of Business shall not list any documents not distributed in accordance with paragraph b) of this Rule.
 - d) If the Secretary General, or the President, or a Contracting State requests that a new subject, whether or not included in the Work Programme, be considered at a meeting of the Council, such subject shall be listed in an Addendum to the Order of Business to be issued by the Secretary General. Any such additional item shall be considered only if the Council so decides by a majority of its Members.
 - e) Notwithstanding paragraphs a) and b), for special sessions of the Council convened pursuant to Rule 19 b), the Order of Business and other documents shall be distributed as soon as practicable in advance of the meeting.

Rule 27

Any subject on the Work Programme of the Council and any document presented in connection therewith may be referred by the Council to an appropriate existing Committee, Commission or Working Group for consideration and report before its consideration by the Council.

Rule 28

Any Member of the Council may have placed on the Order of Business any item of the Work Programme which it wishes to be considered

forthwith by the Council. This right is subject to the provisions of the second sentence of paragraph d) of Rule 26, and subject also to the proviso contained in clause b) of Rule 30.

Rule 29

- a) Any Member of the Council, the President or the Secretary General may introduce for the consideration of the Council documents bearing upon any item on the Council Work Programme, or present any recommendations with respect thereto.
- b) The Council shall, as necessary, issue guidelines on the structure and presentation of working papers and other documents.

Rule 30

The Council may at any time:

- a) amend the Work Programme of a session; or
- b) decide, by a majority of its Members, to amend the Order of Business of a meeting, provided that no item or other matter which was not included in the Order of Business as distributed in accordance with the provisions of Rule 26, shall be brought to final action at that meeting except by the unanimous consent of all the Members of the Council represented at the meeting.

SECTION VI

CONDUCT OF BUSINESS

Rule 31

Any Contracting State may participate, without a vote, in the consideration by the Council and by its Committees and Commissions of any question which especially affects its interests (Article 53 of the

Convention). Subject to the approval of the Council, the President may invite such participation where he considers that the condition of special interest is fulfilled. If a Contracting State requests permission to participate on the grounds of special interest, the President shall refer the request to the Council for decision.

Rule 32

- a) The Council may invite non-Contracting States and international organizations or other bodies to be represented at any of its meetings by one or more Observers.
- b) The President shall invite the United Nations to be represented by Observers at meetings of the Council.
- c) Subject to the approval of the Council, the President may invite Specialized Agencies in relationship with the United Nations to be represented by Observers at meetings of the Council in which matters of special interest to them are to be discussed.

Rule 33

A majority of the Members of the Council shall constitute a quorum for the conduct of the business of the Council.

Rule 34

- a) The President shall convene meetings of the Council (Article 51 a) of the Convention); he shall preside at, and declare the opening and closing of each meeting, direct the discussion in a structured and focused way, accord the right to speak, put questions and announce the decisions.
- b) He shall ensure the observance of these Rules.
- c) During the discussion of any matter, a Representative may raise a point of order or any other matter related to the interpretation or

application of these Rules. The point of order or matter related to the interpretation or application of these Rules shall be decided immediately by the President, in accordance with these Rules. A Representative raising a point of order may only speak in relation to that point of order.

Rule 35

- a) The President shall call upon speakers in the order in which, in his opinion, they have expressed their desire to speak, taking into account the desirability of maintaining a structured and focused discussion; he may call a speaker to order if he considers that the speaker's observations are not relevant to the subject under discussion, or for any other appropriate reason.
- b) Generally, no speaker shall be called to intervene a second time on any question, except for clarification, until all others desiring to intervene have had the opportunity to do so.
- c) The President of the Air Navigation Commission and the Chairman of a Commission, Committee or Working Group may be accorded precedence for the purpose of explaining the conclusions arrived at by the body concerned.

Rule 36

Rulings given by the President during a meeting of the Council on the interpretation or application of these Rules of Procedure may be appealed by any Member of the Council and the appeal shall be put to vote immediately. The ruling of the President shall stand unless overruled by a majority of the votes cast.

Rule 37

Meetings of the Council shall be open to the public unless the Council rules by a majority of votes cast that any particular meeting or part

thereof be closed. Guidelines on when Council meetings should be held in closed session and when Council documents should be marked “Restricted” are found in Appendix F.

Rule 38

Closed meetings of the Council shall be open to the Alternates and Advisers accompanying the Representatives; to Observers from any other Contracting State, unless the Council decides otherwise; to the members of the Secretariat whose attendance is necessary to the conduct of the meeting or is desired by the Secretary General; and to any other persons invited by the Council. Closed meetings shall not be broadcast by the Organization’s monitoring exchange.

Rule 39

Subject to the approval of the Council, the President may invite the President of the Air Navigation Commission and the Chairmen of Commissions, Committees or Working Groups who are not Representatives to attend any open or closed meeting of the Council and participate in its discussion without the right to vote when business relating to the work of their Commission, Committee or Working Group, or to any documentation connected therewith, is before the Council.

Rule 40

Any Member of the Council may introduce a motion or amendment thereto, subject to the following rules:

- a) with the exception of motions and amendments relative to nominations, no motion or amendment shall be discussed unless it has been seconded;
- b) no motion or amendment may be withdrawn by its author if an amendment to it is under discussion or has been adopted;

- c) if a motion has been moved, no motion other than one for an amendment to the original motion shall be considered until the original motion has been disposed of. The President shall determine whether such additional motion is so related to the motion already before the Council as to constitute a proper amendment thereto, or whether it is to be regarded as an alternative motion, consideration of which shall be postponed as stipulated above;
- d) if an amendment to a motion has been moved, no amendment other than an amendment to the original one shall be moved until the original amendment has been disposed of. The President shall determine whether such additional amendment is so related to the original one as to constitute an amendment thereto, or whether it is to be regarded as an alternative amendment, consideration of which shall be postponed as stipulated above.

Rule 41

- a) The following motions shall have priority over all other motions and shall be taken in the following order:
 - 1) a motion to reverse a ruling by the President;
 - 2) a motion to adjourn the meeting;
 - 3) a motion to fix the time to adjourn the meeting;
 - 4) a motion to suspend the meeting for a limited time;
 - 5) a motion to defer further debate on a particular question, either indefinitely or for a limited period greater than that covered by Rule 42;
 - 6) a motion to refer the matter to a Commission, Committee or Working Group;
 - 7) a motion to invite the opinions of Contracting States on a matter, and to postpone final action thereon until reasonable time for the receipt of such opinions has been allowed;

- 8) a motion to terminate the debate on a particular motion and to take at once a decision thereon.
- b) Action on these matters will be determined by a majority of the votes cast.

Rule 42

Upon the request of any Member of the Council, and unless objection is raised by the majority of the Members of the Council, further debate on any item of business shall be deferred for a period of not over two working days, or until the next Council meeting following the second day; but no such action under this paragraph shall be admissible when it would have the effect, due to the anticipated adjournment of a Council session, of making it impossible to resume consideration of the deferred item by the seventh day following the action of deferment. Any such request shall be privileged, and shall be considered immediately on its presentation.

Rule 43

The Council may decide, by a majority of its Members, to reopen the discussion of an item already disposed of by the Council in the same session. In that event, and unless the Council by a majority of its Members decides that the item be dealt with forthwith, the item concerned shall be placed on the Order of Business of the next meeting.

SECTION VII

VOTING

Rule 44

Each Member of the Council has one vote.

Rule 45

With the exception of motions and amendments relative to nominations, no motion or amendment shall be voted on, unless it has been seconded.

Rule 46

Upon the request of any Member of the Council, and unless a majority of its Members decide otherwise:

- a) final action on any motion or amendment thereto shall be delayed until the proposed text of the motion or amendment thereto has been available to Representatives for at least 24 hours;
- b) a vote or final action on any item which has been considered shall, after any initial discussion of the item, be postponed for a period not exceeding that indicated in Rule 42.

Rule 47

Any amendment shall be voted on before the motion or amendment to which it refers.

Rule 48

On the request of any Member of the Council, and unless opposed by a majority of the votes cast, parts of a motion shall be voted on separately. The resulting motion shall then be put to a final vote in its entirety.

Rule 49

Except in the case of a secret ballot, the vote or the abstention from voting of any Member of the Council shall be recorded upon his request. Subject to the same exception, upon the request of any Member of the Council, the individual votes of all the Members of the Council shall be recorded. In the latter case, the roll-call shall be taken

in the English alphabetical order of the names of the Members, beginning with the Member whose name is drawn by lot by the President.

Rule 50

Unless opposed by a majority of the Members of the Council, the vote shall be taken by secret ballot if a request to that effect is supported, if made by a Member of the Council, by one other Member, and, if made by the President, by two Members.

Rule 51

A vote received by correspondence or electronically shall not be counted unless, in a particular case, the Council has previously decided otherwise. In the latter event, a communication approved by the Council or under its authority shall be sent to the Member of the Council concerned for the purpose of ensuring that due consideration is given to the major points of view expressed on the question before the vote is sent, and reasonable time shall be allowed for a reply.

Rule 52

In the event of a tie vote, a second vote on the motion concerned shall be taken at the next meeting of the Council, unless by a majority of the votes cast the Council decides that such second vote be taken during the meeting at which the tie vote took place. Unless there is a majority in favour of the motion on the second vote, it shall be considered lost.

Rule 53

The President may take a preliminary informal vote or poll of the Members of the Council on any issue, in terms to be phrased by him, for the purpose of facilitating the subsequent framing of a motion. Such

informal procedure shall not commit the Council or any Member thereof. The results of such informal procedure may be recorded in the Minutes, but no mention of the vote of any Member of the Council shall be made.

SECTION VIII

APPROVAL OF PROPOSALS WITH RESPECT TO ADMINISTRATIVE MATTERS

Rule 54

Notwithstanding the other provisions of these Rules of Procedure, proposals of the Secretary General with respect to such administrative matters including amendments to administrative regulations as require approval of the Council may be approved in accordance with the following procedure:

- 1) the Secretary General shall distribute to the Representatives of the Members of the Council a paper explaining his proposals, and the existence of this paper shall be noted on the Orders of Business of two Council meetings, the first of which shall be held at least one week after the date of the distribution of the paper;
- 2) upon the request of any Member of the Council, filed with the President at least 24 hours before either of these two meetings, the paper shall be brought before the Council for consideration under the normal procedure;
- 3) in the absence of a request for discussion under the provisions of paragraph 2) of this Rule, the proposal of the Secretary General shall be deemed to have been approved on the date of the second of the two Council meetings in the Orders of Business of which the existence of the paper has been noted.

SECTION IX

LANGUAGES OF THE COUNCIL

Rule 55

The discussions of the Council shall be conducted in the English, Arabic, Chinese, French, Russian and Spanish languages, and interpretation shall take place accordingly. By unanimous agreement, the Council may decide that interpretation into one or more of such languages shall be waived.

Rule 56

The Council shall decide from time to time in which language or languages, specified in Rule 55, the documentation for the Council shall be drawn up.

SECTION X

RECORDS OF PROCEEDINGS

Rule 57

- a) The Secretary General shall prepare Draft Decisions taken at each meeting within five working days of the meeting to which they relate. These shall be submitted to the President for agreement and shall be distributed to Representatives who shall have three working days to comment thereon. If there are no objections raised by Representatives to the content of the Draft Decisions, the President shall declare them approved. If any objections are raised, the President shall attempt to resolve them with the Representative concerned. If the objections are not so resolved, the matter shall be considered by the Council, without reopening the substance of the debate, if at least two Representatives ask for it to be so.

- b) The Secretary General shall prepare Draft Minutes of each meeting within six weeks of the session of the Council to which they relate. These shall be submitted to the President for agreement, distributed to Representatives who shall have ten working days to comment thereon and adopted by the Council either through written procedure or at a subsequent meeting.
- c) After adoption, the text of Decisions and Minutes shall be made available to Representatives and to Contracting States.

Rule 58

Council documents other than the Minutes of closed meetings may be provided to non-Contracting States, to international organizations and to the public, unless otherwise directed by the Council or, between sessions of the Council, by the President.

Rule 59

The final texts of all resolutions and decisions of the Council, together with Council working and other papers, shall be made available by the Secretary General to all Contracting States as soon as possible.

Rule 60

Press releases concerning the proceedings of the Council shall be prepared by the Secretary General and shall be approved by the President after consulting with the most senior Vice-President available, before being made public.

SECTION XI

INTERPRETATION, REVOCATION, SUSPENSION AND AMENDMENT OF THE RULES OF PROCEDURE

Rule 61

Any Member of the Council may request that any application or interpretation of these Rules by the President otherwise than during a meeting of the Council, be reviewed by the Council. Such request shall be considered by the Council at its next regular meeting, unless the President considers it advisable to call a special meeting for that purpose under Rule 20 of these Rules of Procedure. The action taken by the President shall stand confirmed unless decided otherwise by a majority of the votes cast.

Rule 62

In the case of any provision herein which does not specify the majority by which a decision shall be taken, it is understood that a majority of the votes cast will be sufficient, provided that if a Member of the Council has requested that the decision be taken by a majority of Members of the Council, the latter majority shall apply.

Rule 63

- a) These Rules of Procedure or any portion thereof may be revoked, temporarily suspended or amended by Council decision taken by a majority of its Members, provided that no such action is in conflict with the Convention or with any direction given or decision taken by the Assembly. The Secretary General shall maintain and make available to Council Members a central record of all such temporary suspensions.
- b) Notwithstanding Rule 26, proposals to amend or revoke these Rules of Procedure shall be circulated to Representatives at least ten working days in advance of the meeting of the Council in which they will be considered.

Appendix A

Rules and Procedures for the election of the President of the Council

1. The Council shall, not less than three months before the opening of the ordinary session of the Assembly which will elect a new Council, inform Contracting States that the Council to be elected at that Session of the Assembly will elect the President of the Council. The communication should also:

- a) invite attention to the provisions of Article 51 of the Convention;
- b) set out the qualifications, experience and abilities which candidates are expected to demonstrate; and
- c) indicate the date by which the names of candidates for the Presidency should be in the hands of the Secretary General.

2. The names of the candidates shall be circulated by the Secretary General to all Contracting States as soon as they are received.

3. The Council shall invite candidates, at an appropriate date before the election, to present their views and ideas to a meeting of Representatives, and to answer any questions which may be posed.

4. The election of the President shall require a majority of the Members of the Council.

5. If no candidate receives the majority on the first ballot, a second and, if necessary, subsequent ballots shall be held on the two candidates who received the largest number of votes in the preceding ballot. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.

6. The election shall take place by secret ballot, unless waived by unanimous decision of the Members represented at the meeting.

Appendix B

Rules and Procedures for the election of the Vice-Presidents of the Council

1. The election of each Vice-President shall require a majority of the Members of the Council.
2. If no candidate receives the majority on the first ballot, a second and, if necessary, subsequent ballots shall be held on the two candidates who received the largest number of votes in the preceding ballot. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.
3. The election shall take place by secret ballot, unless waived by unanimous decision of the Members represented at the meeting.

Appendix C

Rules and Procedures for the appointment of the Secretary General

1. The appointment of the Secretary General will take place approximately five months before the termination of the period for which the incumbent was appointed.

2. Ten months before the termination of that period, the Council shall inform Contracting States that it will proceed to the appointment of the Secretary General. The communication should also:

- a) invite attention to the provisions of Articles 54 (h), 58 and 59 of the Convention;
- b) set out the qualifications, experience and abilities which candidates are expected to demonstrate; and
- c) indicate the date by which the names of candidates for the Secretary General should be in the hands of the President; that date to provide Contracting States three full months for reply.

3. The names of the candidates shall be circulated by the President to all Contracting States as soon as they are received.

4. The Council shall invite candidates, at an appropriate date before the election, to present their views and ideas to a meeting of Representatives, and to answer any questions which may be posed.

5. The appointment of the Secretary General shall require a majority of the Members of the Council.

6. If no candidate receives the majority on the first ballot, a second and, if necessary, subsequent ballots shall be held on the two candidates who received the largest number of votes in the preceding ballot. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.

7. The election shall take place by secret ballot, unless waived by unanimous decision of the Members represented at the meeting.

Appendix D

Rules and Procedures governing the appointment of the Members, Alternates and President of the Air Navigation Commission

1. The appointment of the Members, Alternates and President of the Air Navigation Commission shall require a majority of the Members of the Council and, unless waived by unanimous agreement of the Members represented at the meeting, shall be by secret ballot.

Appointment of Members and Alternates

2. If the number of candidates receiving the required majority on the first ballot is in excess of the number of places to be filled, those receiving the highest number of votes shall be appointed. If the number of candidates appointed on the first ballot is less than the number of places to be filled, additional ballots shall be held as necessary. In each ballot subsequent to the first one, the names considered shall be those having received the highest number of votes in the previous ballot, up to a total number of candidates equal to twice the total number of places to be filled. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.

Appointment of President

3. If no candidate receives the majority on the first ballot, a second and, if necessary, subsequent ballots shall be held on the two candidates who received the largest number of votes in the preceding ballot. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.

4. Pursuant to Rule 16 c), the following constitutes the Guidelines relating to the appointment of the President of the Air Navigation Commission:

- a) the candidacies to the post of the President of the Commission should be declared to the President of the Council;
- b) the Commission should indicate to the Council what is expected of its future President, the major tasks to be performed during its mandate, and the main qualities needed by its future President in this context;
- c) the Commission should refrain from voting on this issue.

Appendix E

Rules and Procedures governing the appointment of the Members, Alternates and Chairmen of Commissions (other than the Air Navigation Commission), Committees and Working Groups

1. In cases where the Council has to elect Members, Alternates or a Chairman of a Standing Commission (other than the Air Navigation Commission), Committee or Working Group, each Member of the Council may present names from among the Representatives or Alternates, with their consent, for inclusion in a list to be presented to the Council by the President. Not more than one Representative or Alternate of any State may be elected.

2. The election of Members, Alternates and Chairmen of such Commissions, Committees and Working Groups shall require a majority of the Members of the Council and, unless waived by unanimous agreement of the Members represented at the meeting, shall be by secret ballot.

Election of Members, Alternates and Chairmen

3. If the number of candidates receiving the required majority on the first ballot is in excess of the number of places to be filled, those receiving the highest number of votes shall be elected. If the number of candidates elected on the first ballot is less than the number of places to be filled, additional ballots shall be held as necessary. In each ballot subsequent to the first one, the names considered shall be those having received the highest number of votes in the previous ballot, up to a total number of candidates equal to twice the total number of places to be filled. Candidates tying for the last qualifying place in a ballot shall all be included in the next ballot.

Appendix F

Guidelines on when Council meetings should be held in closed session (Rule 37) and when Council documents should be marked “Restricted”

1. Meetings of the Council should normally be open to the public. In general, meetings should only be held in closed session if discussion involves the following:

- a) the level of aviation security in specified States or in general;
- b) current or future provisions concerning aviation security;
- c) salaries or allowances of an individual member of staff or of a category of staff;
- d) disputes between Contracting States; and
- e) issues where Representatives’ personal security could be endangered if their statements were made public.

2. Normally, only documents relating to meetings considering the subjects listed under a) to e) above should be marked “Restricted”.

— END —



Annex 16

Convention on International Civil Aviation, *Annex 15: Aeronautical Information Services*
(15th ed., July 2016)



ICAO

International Standards
and Recommended Practices

Annex 15 to the Convention on International Civil Aviation

Aeronautical Information Services

Fifteenth Edition, July 2016



This edition supersedes, on 10 November 2016, all previous editions of Annex 15.

For information regarding the applicability of the Standards and Recommended Practices, see Foreword.

INTERNATIONAL CIVIL AVIATION ORGANIZATION



| ICAO

International Standards
and Recommended Practices

Annex 15 to the Convention on International Civil Aviation

Aeronautical Information Services

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

Published in separate English, Arabic, Chinese, French, Russian
and Spanish editions by the
INTERNATIONAL CIVIL AVIATION ORGANIZATION
999 Robert-Bourassa Boulevard, Montréal, Quebec, Canada H3C 5H7

For ordering information and for a complete listing of sales agents
and booksellers, please go to the ICAO website at www.icao.int.

First edition 1953
Thirteenth edition 2010
Fourteenth edition 2013
Fifteenth edition 2016

Annex 15 — Aeronautical Information Services

Order Number: AN15
ISBN 978-92-9258-033-9

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retrieval system or transmitted in any form or by any means, without prior
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AMENDMENTS

Amendments are announced in the supplements to the *Products and Services Catalogue*; the Catalogue and its supplements are available on the ICAO website at www.icao.int. The space below is provided to keep a record of such amendments.

RECORD OF AMENDMENTS AND CORRIGENDA

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CHAPTER 5. NOTAM

5.1 Origination

5.1.1 A NOTAM shall be originated and issued promptly whenever the information to be distributed is of a temporary nature and of short duration or when operationally significant permanent changes, or temporary changes of long duration are made at short notice, except for extensive text and/or graphics.

Note 1.— Operationally significant changes concerning circumstances listed in Appendix 4, Part 1, are issued under the Aeronautical Information Regulation and Control (AIRAC) system specified in Chapter 6.

Note 2.— Information of short duration containing extensive text and/or graphics is published as an AIP Supplement (see Chapter 4, 4.4).

5.1.1.1 A NOTAM shall be originated and issued concerning the following information:

- a) establishment, closure or significant changes in operation of aerodrome(s)/heliport(s) or runways;
- b) establishment, withdrawal and significant changes in operation of aeronautical services (AGA, AIS, ATS, CNS, MET, SAR, etc.);
- c) establishment, withdrawal and significant changes in operational capability of radio navigation and air-ground communication services. This includes: interruption or return to operation, change of frequencies, change in notified hours of service, change of identification, change of orientation (directional aids), change of location, power increase or decrease amounting to 50 per cent or more, change in broadcast schedules or contents, or irregularity or unreliability of operation of any radio navigation and air-ground communication services;
- d) establishment, withdrawal or significant changes made to visual aids;
- e) interruption of or return to operation of major components of aerodrome lighting systems;
- f) establishment, withdrawal or significant changes made to procedures for air navigation services;
- g) occurrence or correction of major defects or impediments in the manoeuvring area;
- h) changes to and limitations on availability of fuel, oil and oxygen;
- i) major changes to search and rescue facilities and services available;
- j) establishment, withdrawal or return to operation of hazard beacons marking obstacles to air navigation;
- k) changes in regulations requiring immediate action, e.g. prohibited areas for SAR action;
- l) presence of hazards which affect air navigation (including obstacles, military exercises, displays, races and major parachuting events outside promulgated sites);
- m) erecting or removal of, or changes to, obstacles to air navigation in the take-off/climb, missed approach, approach areas and runway strip;

- n) establishment or discontinuance (including activation or deactivation) as applicable, or changes in the status of prohibited, restricted or danger areas;
- o) establishment or discontinuance of areas or routes or portions thereof where the possibility of interception exists and where the maintenance of guard on the VHF emergency frequency 121.5 MHz is required;
- p) allocation, cancellation or change of location indicators;
- q) significant changes in the level of protection normally available at an aerodrome/heliport for rescue and fire fighting purposes. NOTAM shall be originated only when a change of category is involved and such change of category shall be clearly stated (see Annex 14, Volume I, Chapter 9, and Attachment A, Section 18);
- r) presence or removal of, or significant changes in, hazardous conditions due to snow, slush, ice, radioactive material, toxic chemicals, volcanic ash deposition or water on the movement area;
- s) outbreaks of epidemics necessitating changes in notified requirements for inoculations and quarantine measures;
- t) forecasts of solar cosmic radiation, where provided;
- u) an operationally significant change in volcanic activity, the location, date and time of volcanic eruptions and/or horizontal and vertical extent of volcanic ash cloud, including direction of movement, flight levels and routes or portions of routes which could be affected;
- v) release into the atmosphere of radioactive materials or toxic chemicals following a nuclear or chemical incident, the location, date and time of the incident, the flight levels and routes or portions thereof which could be affected and the direction of movement;
- w) establishment of operations of humanitarian relief missions, such as those undertaken under the auspices of the United Nations, together with procedures and/or limitations which affect air navigation; and
- x) implementation of short-term contingency measures in cases of disruption, or partial disruption, of air traffic services and related supporting services.

Note.— See Annex 11, 2.31 and Attachment C to that Annex.

5.1.1.2 Recommendation.— *The need for origination of a NOTAM should be considered in any other circumstance which may affect the operation of aircraft.*

5.1.1.3 The following information shall not be notified by NOTAM:

- a) routine maintenance work on aprons and taxiways which does not affect the safe movement of aircraft;
- b) runway marking work, when aircraft operations can safely be conducted on other available runways, or the equipment used can be removed when necessary;
- c) temporary obstructions in the vicinity of aerodromes/heliports that do not affect the safe operation of aircraft;
- d) partial failure of aerodrome/heliport lighting facilities where such failure does not directly affect aircraft operations;
- e) partial temporary failure of air-ground communications when suitable alternative frequencies are known to be available and are operative;
- f) the lack of apron marshalling services and road traffic control;

- g) the unserviceability of location, destination or other instruction signs on the aerodrome movement area;
- h) parachuting when in uncontrolled airspace under VFR (see 5.1.1.1 I)), when controlled, at promulgated sites or within danger or prohibited areas;
- i) other information of a similar temporary nature.

5.1.1.4 At least seven days' advance notice shall be given of the activation of established danger, restricted or prohibited areas and of activities requiring temporary airspace restrictions other than for emergency operations.

5.1.1.4.1 **Recommendation.**— *Notice of any subsequent cancellation of the activities or any reduction of the hours of activity or the dimensions of the airspace should be given as soon as possible.*

Note.— *Whenever possible, at least 24 hours' advance notice is desirable, to permit timely completion of the notification process and to facilitate airspace utilization planning.*

5.1.1.5 NOTAM notifying unserviceability of aids to air navigation, facilities or communication services shall give an estimate of the period of unserviceability or the time at which restoration of service is expected.

5.1.1.6 When an AIP Amendment or an AIP Supplement is published in accordance with AIRAC procedures, a NOTAM shall be originated giving a brief description of the contents, the effective date and time, and the reference number of the amendment or supplement. This NOTAM shall come into force on the same effective date and time as the amendment or supplement and shall remain valid in the pre-flight information bulletin for a period of fourteen days.

Note.— *Guidance material for the origination of NOTAM announcing the existence of AIRAC AIP Amendments or AIP Supplements ("Trigger NOTAM") is contained in the Aeronautical Information Services Manual (Doc 8126).*

5.2 General specifications

5.2.1 Except as otherwise provided in 5.2.3 and 5.2.4, each NOTAM shall contain the information in the order shown in the NOTAM Format in Appendix 6.

5.2.2 Text of NOTAM shall be composed of the significations/uniform abbreviated phraseology assigned to the ICAO NOTAM Code complemented by ICAO abbreviations, indicators, identifiers, designators, call signs, frequencies, figures and plain language.

Note.— *Detailed guidance material covering NOTAM, SNOWTAM, ASHTAM and pre-flight information bulletin (PIB) production is contained in Doc 8126.*

5.2.2.1 When NOTAM are selected for international distribution, English text shall be included for those parts expressed in plain language.

Note.— *The ICAO NOTAM Code together with significations/uniform abbreviated phraseology, and ICAO Abbreviations are those contained in the Procedures for Air Navigation Services — ICAO Abbreviations and Codes (PANS-ABC, Doc 8400).*

5.2.3 Information concerning snow, slush, ice and standing water on aerodrome/heliport pavements shall, when reported by means of a SNOWTAM, contain the information in the order shown in the SNOWTAM Format in Appendix 2.

5.2.4 Information concerning an operationally significant change in volcanic activity, a volcanic eruption and/or volcanic ash cloud shall, when reported by means of an ASHTAM, contain the information in the order shown in the ASHTAM Format in Appendix 3.

5.2.5 The NOTAM originator shall allocate to each NOTAM a series identified by a letter and a four-digit number followed by a stroke and a two-digit number for the year. The four-digit number shall be consecutive and based on the calendar year.

Note.— Letters A to Z, with the exception of S and T, may be used to identify a NOTAM series.

5.2.6 When errors occur in a NOTAM, a NOTAM with a new number to replace the erroneous NOTAM shall be issued or the erroneous NOTAM shall be cancelled and a new NOTAM issued.

5.2.7 When a NOTAM is issued which cancels or replaces a previous NOTAM, the series and number of the previous NOTAM shall be indicated. The series, location indicator and subject of both NOTAM shall be the same. Only one NOTAM shall be cancelled or replaced by a NOTAM.

5.2.8 Each NOTAM shall deal with only one subject and one condition of the subject.

Note.— Guidance material concerning the combination of a subject and a condition of the subject in accordance with the NOTAM Selection Criteria is contained in Doc 8126.

5.2.9 Each NOTAM shall be as brief as possible and so compiled that its meaning is clear without the need to refer to another document.

5.2.10 Each NOTAM shall be transmitted as a single telecommunication message.

5.2.11 A NOTAM containing permanent or temporary information of long duration shall carry appropriate AIP or AIP Supplement references.

5.2.12 Location indicators included in the text of a NOTAM shall be those contained in *Location Indicators* (Doc 7910).

5.2.12.1 In no case shall a curtailed form of such indicators be used.

5.2.12.2 Where no ICAO location indicator is assigned to the location, its place name spelt in accordance with 1.3.2 shall be entered in plain language.

5.2.13 A checklist of valid NOTAM shall be issued as a NOTAM over the aeronautical fixed service (AFS) at intervals of not more than one month using the NOTAM Format specified in Appendix 6. One NOTAM shall be issued for each series.

Note.— Omitting a NOTAM from the checklist does not serve to cancel a NOTAM.

5.2.13.1 A checklist of NOTAM shall refer to the latest AIP Amendments, AIP Supplements and at least the internationally distributed AIC.

5.2.13.2 A checklist of NOTAM shall have the same distribution as the actual message series to which they refer and shall be clearly identified as a checklist.

5.2.13.3 A monthly plain-language list of valid NOTAM, including indications of the latest AIP Amendments, AIC issued and a checklist of AIP Supplements, shall be prepared with a minimum of delay and forwarded by the most expeditious means to recipients of the Integrated Aeronautical Information Package.

5.3 Distribution

5.3.1 NOTAM shall be distributed on the basis of a request.

5.3.2 NOTAM shall be prepared in conformity with the relevant provisions of the ICAO communication procedures.

5.3.2.1 The AFS shall, whenever practicable, be employed for NOTAM distribution.

5.3.2.2 When a NOTAM exchanged as specified in 5.3.4 is sent by means other than the AFS, a six-digit date-time group indicating the date and time of NOTAM origination, and the identification of the originator shall be used, preceding the text.

5.3.3 The originating State shall select the NOTAM that are to be given international distribution.

5.3.3.1 **Recommendation.**— *Selective distribution lists should be used when practicable.*

Note.— *These lists are intended to obviate superfluous distribution of information. Guidance material relating to this is contained in Doc 8126.*

5.3.4 International exchange of NOTAM shall take place only as mutually agreed between the international NOTAM offices concerned. The international exchange of ASHTAM (see 5.2.4), and NOTAM where States continue to use NOTAM for distribution of information on volcanic activity, shall include volcanic ash advisory centres and the centres designated by regional air navigation agreement for the operation of AFS satellite distribution systems (satellite distribution system for information relating to air navigation (SADIS) and international satellite communications system (ISCS)), and shall take account of the requirements of long-range operations.

Note.— *Arrangements may be made for direct exchange of SNOWTAM (see Appendix 2) between aerodromes/heliports.*

5.3.4.1 These exchanges of NOTAM between international NOTAM offices shall, as far as practicable, be limited to the requirements of the receiving States concerned by means of separate series providing for at least international and domestic flights.

5.3.4.2 A predetermined distribution system for NOTAM transmitted on the AFS in accordance with Appendix 5 shall be used whenever possible, subject to the requirements of 5.3.4.

Annex 17

Convention on International Civil Aviation, *Annex 11: Air Traffic Services* (14th ed., July 2016)



ICAO

International Standards
and Recommended Practices

Annex 11 to the Convention on International Civil Aviation

Air Traffic Services

Air Traffic Control Service
Flight Information Service
Alerting Service

Fourteenth Edition, July 2016



This edition supersedes, on 10 November 2016, all previous editions of Annex 11.

For information regarding the applicability of the Standards and Recommended Practices, see Foreword.

INTERNATIONAL CIVIL AVIATION ORGANIZATION

2.29 Common reference systems

2.29.1 Horizontal reference system

World Geodetic System — 1984 (WGS-84) shall be used as the horizontal (geodetic) reference system for air navigation. Reported aeronautical geographical coordinates (indicating latitude and longitude) shall be expressed in terms of the WGS-84 geodetic reference datum.

Note.— Comprehensive guidance material concerning WGS-84 is contained in the World Geodetic System — 1984 (WGS-84) Manual (Doc 9674).

2.29.2 Vertical reference system

Mean sea level (MSL) datum, which gives the relationship of gravity-related height (elevation) to a surface known as the geoid, shall be used as the vertical reference system for air navigation.

Note.— The geoid globally most closely approximates MSL. It is defined as the equipotential surface in the gravity field of the Earth which coincides with the undisturbed MSL extended continuously through the continents.

2.29.3 Temporal reference system

2.29.3.1 The Gregorian calendar and Coordinated Universal Time (UTC) shall be used as the temporal reference system for air navigation.

2.29.3.2 When a different temporal reference system is used, this shall be indicated in GEN 2.1.2 of the Aeronautical Information Publication (AIP).

2.30 Language proficiency

2.30.1 An air traffic services provider shall ensure that air traffic controllers speak and understand the language(s) used for radiotelephony communications as specified in Annex 1.

2.30.2 Except when communications between air traffic control units are conducted in a mutually agreed language, the English language shall be used for such communications.

2.31 Contingency arrangements

Air traffic services authorities shall develop and promulgate contingency plans for implementation in the event of disruption, or potential disruption, of air traffic services and related supporting services in the airspace for which they are responsible for the provision of such services. Such contingency plans shall be developed with the assistance of ICAO as necessary, in close coordination with the air traffic services authorities responsible for the provision of services in adjacent portions of airspace and with airspace users concerned.

Note 1.— Guidance material relating to the development, promulgation and implementation of contingency plans is contained in Attachment C.

ATTACHMENT C. MATERIAL RELATING TO CONTINGENCY PLANNING

(Chapter 2, 2.31 refers)

1. Introduction

1.1 Guidelines for contingency measures for application in the event of disruptions of air traffic services and related supporting services were first approved by the Council on 27 June 1984 in response to Assembly Resolution A23-12, following a study by the Air Navigation Commission and consultation with States and international organizations concerned, as required by the Resolution. The guidelines were subsequently amended and amplified in the light of experience gained with the application of contingency measures in various parts of the world and in differing circumstances.

1.2 The purpose of the guidelines is to assist in providing for the safe and orderly flow of international air traffic in the event of disruptions of air traffic services and related supporting services and in preserving the availability of major world air routes within the air transportation system in such circumstances.

1.3 The guidelines have been developed in recognition of the fact that circumstances before and during events causing disruptions of services to international civil aviation vary widely and that contingency measures, including access to designated aerodromes for humanitarian reasons, in response to specific events and circumstances must be adapted to these circumstances. They set forth the allocation of responsibility among States and ICAO for the conduct of contingency planning and the measures to be taken into consideration in developing, applying and terminating the application of such plans.

1.4 The guidelines are based on experience which has shown, inter alia, that the effects of disruption of services in particular portions of airspace are likely to affect significantly the services in adjacent airspace, thereby creating a requirement for international coordination, with the assistance of ICAO as appropriate. Hence, the role of ICAO in the field of contingency planning and coordination of such plans is described in the guidelines. They also reflect the experience that ICAO's role in contingency planning must be global and not limited to airspace over the high seas and areas of undetermined sovereignty, if the availability of major world air routes within the air transportation system is to be preserved. Finally, they further reflect the fact that international organizations concerned, such as the International Air Transport Association (IATA) and the International Federation of Airline Pilots' Associations (IFALPA), are valuable advisers on the practicability of overall plans and elements of such plans.

2. Status of contingency plans

Contingency plans are intended to provide alternative facilities and services to those provided for in the regional air navigation plan when those facilities and services are temporarily not available. Contingency arrangements are therefore temporary in nature, remain in effect only until the services and facilities of the regional air navigation plan are reactivated and, accordingly, do not constitute amendments to the regional plan requiring processing in accordance with the "Procedure for the Amendment of Approved Regional Plans". Instead, in cases where the contingency plan would temporarily deviate from the approved regional air navigation plan, such deviations are approved, as necessary, by the President of the ICAO Council on behalf of the Council.

3. Responsibility for developing, promulgating and implementing contingency plans

3.1 The State(s) responsible for providing air traffic services and related supporting services in particular portions of airspace is (are) also responsible, in the event of disruption or potential disruption of these services, for instituting measures to ensure the safety of international civil aviation operations and, where possible, for making provisions for alternative facilities and services. To that end the State(s) should develop, promulgate and implement appropriate contingency plans. Such plans should be developed in consultation with other States and airspace users concerned and with ICAO, as appropriate, whenever the effects of the service disruption(s) are likely to affect the services in adjacent airspace.

3.2 The responsibility for appropriate contingency action in respect of airspace over the high seas continues to rest with the State(s) normally responsible for providing the services until, and unless, that responsibility is temporarily reassigned by ICAO to (an)other State(s).

3.3 Similarly, the responsibility for appropriate contingency action in respect of airspace where the responsibility for providing the services has been delegated by another State continues to rest with the State providing the services until, and unless, the delegating State terminates temporarily the delegation. Upon termination, the delegating State assumes responsibility for appropriate contingency action.

3.4 ICAO will initiate and coordinate appropriate contingency action in the event of disruption of air traffic services and related supporting services affecting international civil aviation operations provided by a State wherein, for some reason, the authorities cannot adequately discharge the responsibility referred to in 3.1. In such circumstances, ICAO will work in coordination with States responsible for airspace adjacent to that affected by the disruption and in close consultation with international organizations concerned. ICAO will also initiate and coordinate appropriate contingency action at the request of States.

4. Preparatory action

4.1 Time is essential in contingency planning if hazards to air navigation are to be reasonably prevented. Timely introduction of contingency arrangements requires decisive initiative and action, which again presupposes that contingency plans have, as far as practicable, been completed and agreed among the parties concerned before the occurrence of the event requiring contingency action, including the manner and timing of promulgating such arrangements.

4.2 For the reasons given in 4.1, States should take preparatory action, as appropriate, for facilitating timely introduction of contingency arrangements. Such preparatory action should include:

- a) preparation of general contingency plans for introduction in respect of generally foreseeable events such as industrial action or labour unrest affecting the provision of air traffic services and/or supporting services. In recognition of the fact that the world aviation community is not party to such disputes, States providing services in airspace over the high seas or of undetermined sovereignty should take appropriate action to ensure that adequate air traffic services will continue to be provided to international civil aviation operations in non-sovereign airspace. For the same reason, States providing air traffic services in their own airspace or, by delegation, in the airspace of (an)other State(s) should take appropriate action to ensure that adequate air traffic services will continue to be provided to international civil aviation operations concerned, which do not involve landing or take-off in the State(s) affected by industrial action;
- b) assessment of risk to civil air traffic due to military conflict or acts of unlawful interference with civil aviation as well as a review of the likelihood and possible consequences of natural disasters or public health emergencies. Preparatory action should include initial development of special contingency plans in respect of natural disasters, public health emergencies, military conflicts or acts of unlawful interference with civil aviation that are likely to affect the availability of airspace for civil aircraft operations and/or the provision of air traffic services and

supporting services. It should be recognized that avoidance of particular portions of airspace on short notice will require special efforts by States responsible for adjacent portions of airspace and by international aircraft operators with regard to planning of alternative routings and services, and the air traffic services authorities of States should therefore, as far as practicable, endeavour to anticipate the need for such alternative actions;

- c) monitoring of any developments that might lead to events requiring contingency arrangements to be developed and applied. States should consider designating persons/administrative units to undertake such monitoring and, when necessary, to initiate effective follow-up action; and
- d) designation/establishment of a central agency which, in the event of disruption of air traffic services and introduction of contingency arrangements, would be able to provide, 24 hours a day, up-to-date information on the situation and associated contingency measures until the system has returned to normal. A coordinating team should be designated within, or in association with, such a central agency for the purpose of coordinating activities during the disruption.

4.3 ICAO will be available for monitoring developments that might lead to events requiring contingency arrangements to be developed and applied and will, as necessary, assist in the development and application of such arrangements. During the emergence of a potential crisis, a coordinating team will be established in the Regional Office(s) concerned and at ICAO Headquarters in Montreal, and arrangements will be made for competent staff to be available or reachable 24 hours a day. The tasks of these teams will be to monitor continuously information from all relevant sources, to arrange for the constant supply of relevant information received by the State aeronautical information service at the location of the Regional Office and Headquarters, to liaise with international organizations concerned and their regional organizations, as appropriate, and to exchange up-to-date information with States directly concerned and States which are potential participants in contingency arrangements. Upon analysis of all available data, authority for initiating the action considered necessary in the circumstances will be obtained from the State(s) concerned.

5. Coordination

5.1 A contingency plan should be acceptable to providers and users of contingency services alike, i.e. in terms of the ability of the providers to discharge the functions assigned to them and in terms of safety of operations and traffic handling capacity provided by the plan in the circumstances.

5.2 Accordingly, States which anticipate or experience disruption of air traffic services and/or related supporting services should advise, as early as practicable, the ICAO Regional Office accredited to them, and other States whose services might be affected. Such advice should include information on associated contingency measures or a request for assistance in formulating contingency plans.

5.3 Detailed coordination requirements should be determined by States and/or ICAO, as appropriate, keeping the above in mind. In the case of contingency arrangements not appreciably affecting airspace users or service provided outside the airspace of the (single) State involved, coordination requirements are naturally few or non-existent. Such cases are believed to be few.

5.4 In the case of multi-State ventures, detailed coordination leading to formal agreement of the emerging contingency plan should be undertaken with each State which is to participate. Such detailed coordination should also be undertaken with those States whose services will be significantly affected, for example by re-routing of traffic, and with international organizations concerned who provide invaluable operational insight and experience.

5.5 Whenever necessary to ensure orderly transition to contingency arrangements, the coordination referred to in this section should include agreement on a detailed, common NOTAM text to be promulgated at a commonly agreed effective date.

6. Development, promulgation and application of contingency plans

6.1 Development of a sound contingency plan is dependent upon circumstances, including the availability, or not, of the airspace affected by the disruptive circumstances for use by international civil aviation operations. Sovereign airspace can be used only on the initiative of, or with the agreement or consent of, the authorities of the State concerned regarding such use. Otherwise, the contingency arrangements must involve bypassing the airspace and should be developed by adjacent States or by ICAO in cooperation with such adjacent States. In the case of airspace over the high seas or of undetermined sovereignty, development of the contingency plan might involve, depending upon circumstances, including the degree of erosion of the alternative services offered, temporary reassignment by ICAO of the responsibility for providing air traffic services in the airspace concerned.

6.2 Development of a contingency plan presupposes as much information as possible on current and alternative routes, navigational capability of aircraft and availability or partial availability of navigational guidance from ground-based aids, surveillance and communications capability of adjacent air traffic services units, volume and types of aircraft to be accommodated and the actual status of the air traffic services, communications, meteorological and aeronautical information services. Following are the main elements to be considered for contingency planning depending upon circumstances:

- a) re-routing of traffic to avoid the whole or part of the airspace concerned, normally involving establishment of additional routes or route segments with associated conditions for their use;
- b) establishment of a simplified route network through the airspace concerned, if it is available, together with a flight level allocation scheme to ensure lateral and vertical separation, and a procedure for adjacent area control centres to establish longitudinal separation at the entry point and to maintain such separation through the airspace;
- c) reassignment of responsibility for providing air traffic services in airspace over the high seas or in delegated airspace;
- d) provision and operation of adequate air-ground communications, AFTN and ATS direct speech links, including reassignment, to adjacent States, of the responsibility for providing meteorological information and information on status of navigation aids;
- e) special arrangements for collecting and disseminating in-flight and post-flight reports from aircraft;
- f) a requirement for aircraft to maintain continuous listening watch on a specified pilot-pilot VHF frequency in specified areas where air-ground communications are uncertain or non-existent and to broadcast on that frequency, preferably in English, position information and estimates, including start and completion of climb and descent;
- g) a requirement for all aircraft in specified areas to display navigation and anti-collision lights at all times;
- h) a requirement and procedures for aircraft to maintain an increased longitudinal separation that may be established between aircraft at the same cruising level;
- i) a requirement for climbing and descending well to the right of the centre line of specifically identified routes;
- j) establishment of arrangements for controlled access to the contingency area to prevent overloading of the contingency system; and
- k) a requirement for all operations in the contingency area to be conducted in accordance with IFR, including allocation of IFR flight levels, from the relevant Table of Cruising Levels in Appendix 3 of Annex 2, to ATS routes in the area.

6.3 Notification, by NOTAM, of anticipated or actual disruption of air traffic services and/or related supporting services should be dispatched to users of air navigation services as early as practicable. The NOTAM should include the associated contingency arrangements. In the case of foreseeable disruption, the advance notice should in any case not be less than 48 hours.

6.4 Notification by NOTAM of discontinuance of contingency measures and reactivation of the services set forth in the regional air navigation plan should be dispatched as early as practicable to ensure an orderly transfer from contingency conditions to normal conditions.

— END —

Annex 18

ICAO Council, *ICAO Annual Report: Settlement of Differences*, available at <https://www.icao.int/annual-report-2017/Pages/supporting-implementation-strategies-legal-and-external-relations-services-settlement-of-differences.aspx> (last accessed: 31 Jan. 2019)

Settlement of Differences

Brazil and the United States (2016)

On 2 December 2016, Brazil (the Applicant) presented to ICAO an Application and Memorial pursuant to Article 84 of the Convention on International Civil Aviation (Chicago Convention), seeking a decision of the Council on a disagreement with the United States (the Respondent) relating “to the interpretation and application of the Convention and its Annexes following a collision, on September 29th 2006, of the air carrier Boeing 737-8EH operating a regular flight GLO 1907, and air jet Legacy EMB-135BJ operating a flight by ExcelAire Services Inc.”

On 27 March 2017, the Respondent submitted a Statement of preliminary objection to the Application. On 19 May 2017, the Applicant submitted Comments on the Statement of preliminary objection. After hearing the Parties, the Council, at the ninth Meeting of its 211th Session, decided with 4 votes in favour, 19 against and 11 abstentions, not to accept the Respondent’s preliminary objection. The Council further decided to invite the Parties to continue their direct negotiations and also requested the President of the Council to be available to provide his good offices as Conciliator during such negotiations. The Respondent subsequently filed its Counter-memorial on 31 August 2017.

At the eighth Meeting of its 212th Session, the Council considered a progress report on negotiations. The Council endorsed an agreement reached between the two parties to suspend the filing of a Reply by the Applicant to the Respondent’s Counter-memorial in order to allow for further consultations among them.

Request submitted under Article 54 n) of the Chicago Convention

At the tenth Meeting of its 211th Session, the Council considered and approved a request, submitted by Qatar pursuant to Article 54 n) of the Chicago Convention, to schedule an extraordinary session for the consideration of the actions of Bahrain, Egypt, Saudi Arabia and the United Arab Emirates to close their airspace to aircraft registered in Qatar. On 31 July 2017, following its consideration of the item, the Council rendered a decision urging all ICAO Member States to continue to collaborate, in particular, to promote the safety, security, efficiency and sustainability of international civil aviation.

Qatar and Bahrain, Egypt, Saudi Arabia and the United Arab Emirates (2017) – Application (A)

On 30 October 2017, Qatar presented Application (A) and its corresponding Memorial under the terms of Article 84 of the Chicago Convention. Bahrain, Egypt, Saudi Arabia and the United Arab Emirates were named as Respondents. The said Application (A) and its corresponding Memorial relate to a disagreement on the “interpretation and application of the Chicago Convention and its Annexes” following the referenced announcement by the Governments of the Respondents on 5 June 2017 “with immediate effect and without any previous negotiation or warning, that Qatar-registered aircraft are not permitted to fly to or from the airports within their territories and would be barred not only from their respective national air spaces, but also from their Flight Information Regions (FIRs) extending beyond their national airspace even over the high seas”. On 15 November 2017, the Council fixed a time-limit of 12 weeks for the filing of Counter-memorials by the Respondents with respect to Application (A).

Qatar and Bahrain, Egypt and the United Arab Emirates (2017) – Application (B)

On 30 October 2017, Qatar also presented Application (B) and its corresponding Memorial under the terms of Article II, Section 2 of the International Air Services Transit Agreement (Transit Agreement) and Chapter XVIII of the Chicago Convention. Bahrain, Egypt and the United Arab Emirates were named as Respondents. Application (B) relates to a disagreement on the “interpretation and application” of the Transit Agreement, following the referenced announcement by the Governments of the Respondents on 5 June 2017 “with immediate effect and without any previous negotiation or warning, that Qatar-registered aircraft are not permitted to fly to or from the airports within their territories and are barred from their respective national air spaces”. On 15 November 2017, the Council fixed a time-limit of 12 weeks for the filing of Counter-memorials by the Respondents with respect to Application (B).

Annex 19

Hernán Longo, “Sharing information in order to fight against terrorism”, ICAO, Hong Kong ICAO TRIP Regional Seminar (2017), *available at* <https://www.icao.int/Meetings/TRIP-HongKong-2017/Documents/1.HERNAN%20LONGO.pdf>



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Sharing information in order to fight against terrorism

Hernán Longo

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Hong Kong ICAO TRIP Regional Seminar





United Nations Office on Drugs and Crime (UNODC)

- Specialized agency of the UN Secretariat
- Mandated to assist UN Member States on the implementation of the conventions against illicit drugs, organized crime, corruption and terrorism conventions

RESEARCH

LEGAL REFORM

CAPACITY BUILDING

INTERNATIONAL COOPERATION





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Foreign Terrorist Fighters (FTF) in SEA



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UNSCR 2178

Foreign Terrorist Fighters (FTFs)

Individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training



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Profiles

All Backgrounds
Male and Female
Criminal Trend
Personal “Vacuum”





Estimated Number of FTFs Globally

27,000 – 31,000 from at least 86 countries have travelled to Syria/Iraq

75% of FTFs are from 12 countries:

- | | |
|--------------|----------------|
| Tunisia | Morocco |
| Saudi Arabia | Lebanon |
| Russia | Germany |
| Jordan | United Kingdom |
| Turkey | Egypt |
| France | Indonesia |

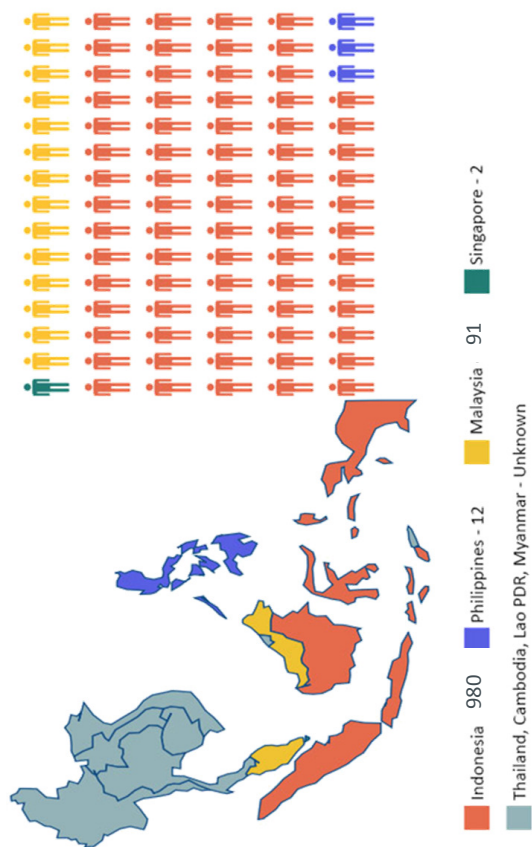


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Estimated Number of FTFs From Southeast Asia





How do they travel?





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“Violent Jihadist Highway”

- Majority of FTFs travel across the border between Turkey and Syria
- Turkey has direct flights to/from at least 107 countries
- FTFs Utilise “broken travel” to hide their final destination by stopping at multiple points on route to Turkey.
- However, many will use various modes of transport
 - Train, boat, cars etc.



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Muhammad Wanndy Bin Mohamed Jedi





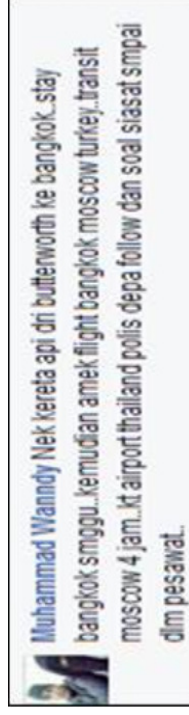
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Left Malaysia in January 2015



I took the train to Butterworth to Bangkok. Stayed in Bangkok for a week. Then I took a flight from Bangkok to Moscow to Turkey... The transit at Moscow lasted 4 hours... At the Thai airport, I was followed and asked questions until I boarded the plane



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Some reported FTF movements in SEA....

- July 2016 : 4 Bangladeshis jailed in Singapore for terrorist financing
- January 2017 : 1 Indonesian killed by airstrike in Philippines
- February 2017: 1 Filipino charged in Malaysia for recruitment
- March 2017: 3 Russians and 1 Tajikistani Deported from Malaysia
- April 2017 : Kuwaiti and Syrian arrested in Philippines
- April 2017: 3 Indonesians and 1 Malaysian JI Members killed in Philippines
- Intel reports of at least 28 Indonesians, 26 Pakistanis, 21 Malaysians, 3 Bangladeshis, 1 Singaporean among FTF in Southern Philippines (Marawi)



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Returnees

- 62 FTFs have returned to Indonesia, 8 to Malaysia
- Conflict experience
- global networks
- Deeply embedded ideology
- Southeast Asia Wilayat
- Many FTFs are required to burn their passports upon joining ranks



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“Wilayat” in Southern Philippines?

- Several terrorist groups pledged allegiance to Daesh
- June 2016 – Propaganda video “If you can’t travel to Syria/Iraq, join Mujahideen in Philippines”
- Reports of 4 Indonesians Travelled to Philippines from Syria (deported back to Indonesia)
- December 2016 - Isnilon Hapilon moved to Central Mindanao to find a suitable area to establish a “Wilayat”
- May 2017 – Martial Law declared in Marawi





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UN framework against terrorism and FTFs



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Universal legal framework against terrorism

- UN Global Counter-Terrorism Strategy (UNGA)
- Conventions and protocols
- UN Security Council Resolutions (UNSCR)





Global Counter-Terrorism Strategy

- Effort to move beyond traditional law enforcement to a holistic approach
- Provide strategy framework and practical guidance
- First time UN members agreed on a common single strategy on CT
- Adopted unanimously by UNGA in September 2006

UN GLOBAL COUNTER-TERRORISM STRATEGY

Pillar I
Addressing the
Conditions
Conducive to the
Spread of
Terrorism

Pillar II
Preventing and
Combating
Terrorism

Pillar III
Building States' capacity and strengthening the role of the United Nations

Pillar IV
Ensuring Human rights and the rule of law



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19 international conventions and protocols against terrorism



UN



IAEA



ICAO



IMO

Common elements:

- Define terrorist offences
 - Set up rules for jurisdiction
 - Promote international cooperation



Universal CT Legal Instruments concerning Civil Aviation

1. 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft
2. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft
3. 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
4. 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
5. 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation
6. 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft
7. 2014 Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft



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Civil Aviation Treaties: Information Sharing

Beijing Convention (2010)

Article 17

1. **States Parties shall afford one another the greatest measure of assistance** in connection with criminal proceedings brought in respect of the offences set forth in Article 1. The law of the State requested shall apply in all cases.

Article 18

Any State Party having reason to believe that one of the offences set forth in Article 1 will be committed shall, in accordance with its national law, **furnish any relevant information in its possession to those States Parties** which it believes would be the States set forth in paragraphs 1 and 2 of Article 8.



Civil Aviation Treaties: Information Sharing

Montréal Protocol 2014

Article 3 *bis*

If a Contracting State, exercising its jurisdiction under Article 2, has been notified or has otherwise learned that one or more other Contracting States are conducting an investigation, prosecution or judicial proceeding in respect of the same offences or acts, that Contracting State shall, as appropriate, **consult those other Contracting States with a view to coordinating their actions.** [...]



Civil Aviation Treaties: Information Sharing

Montreal Protocol 2014

Article 13

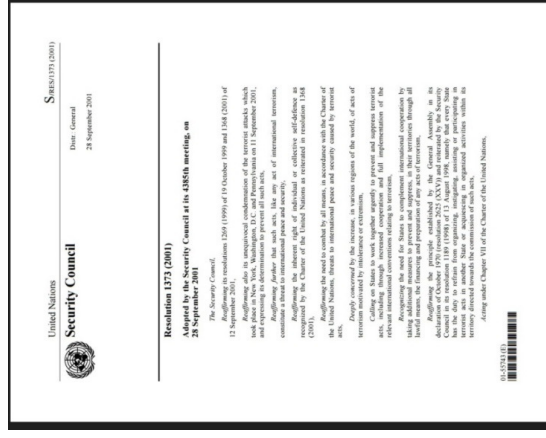
When a State, pursuant to this Article, has taken a person into custody, it **shall immediately notify the State of registration of the aircraft and the State of nationality of the detained person and, if it considers it advisable, any other interested State** of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 4 of this Article **shall promptly report its findings to the said States** and shall indicate whether it intends to exercise jurisdiction.



Key UN Security Council Resolutions on CT & FTFs

Resolution 1373 (2001)

Calls upon all States to find ways of intensifying and accelerating the exchange of operational information, specially regarding the movements of terrorist persons or networks (o.p. 3)





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UNSCR 1267 (1999)

Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council to undertake the following tasks and to report on its work to the Council with its observations and recommendations



SECURITY COUNCIL COMMITTEE PURSUANT TO RESOLUTIONS 1267, 1989, AND 2253

All states are required to prevent the entry into or transit through their territories by designated individuals

- 1(b) of resolution 2161 and renewed in 2 (b) of resolution 2253

Sanctions List

- Al-Qaeda, ISIL, Abu Sayyaf Group, Jemaah Islamiyah



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UNSCR 2178 (2014)

Calls for Member States to:

exchange of operational information regarding actions or movements of terrorists or terrorist networks

cooperate in efforts to address the threat posed by foreign terrorist fighters

require that **airlines** operating in their territories **provide advance passenger information** to the appropriate national authorities Member States shall prevent the entry into or transit through their territories



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UNSCR 2309 (2016)

- Adopted unanimously on September 2016
- First stand-alone UNSCR focusing on civil aviation
- Aims at enhancing the safety of global air services



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UNSCR 2309 (2016)

Calls for Member States to:

- ✓ **Work within ICAO to ensure that international security standards were reviewed, updated, adapted and implemented.**
- ✓ **Strengthen cooperation and collaboration and sharing experiences** in regards to developing security check technologies
- ✓ **Further engage in dialogue** on aviation security and **cooperate by sharing information**
- ✓ Require that **airlines** operating in their territories **provide advance passenger information** to the appropriate national authorities



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UNSCR 2322 (2016)

Reiterating the **obligation of Member States to prevent the movement of terrorists and terrorist groups**, in accordance with applicable international law, by, inter alia, effective border controls, and, in this context, **to exchange information expeditiously, improve cooperation among competent authorities to prevent the movement of terrorists and terrorist groups** to and from their territories, the supply of weapons for terrorists, and financing that would support terrorists



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UNSCR 2322 (2016)

Calls upon States to:

share, where appropriate, **information** about foreign terrorist fighters and other individual terrorists and terrorist organizations, **including biometric and biographic information, as well as information that demonstrates the nature of an individual's association with terrorism**

Consider, where appropriate, **downgrading for official use intelligence threat data on foreign terrorist fighters** and individual terrorists, to appropriately **provide such information to front-line screeners, such as immigration, customs and border security** and to appropriately share such information with **other concerned States** and relevant international organisations



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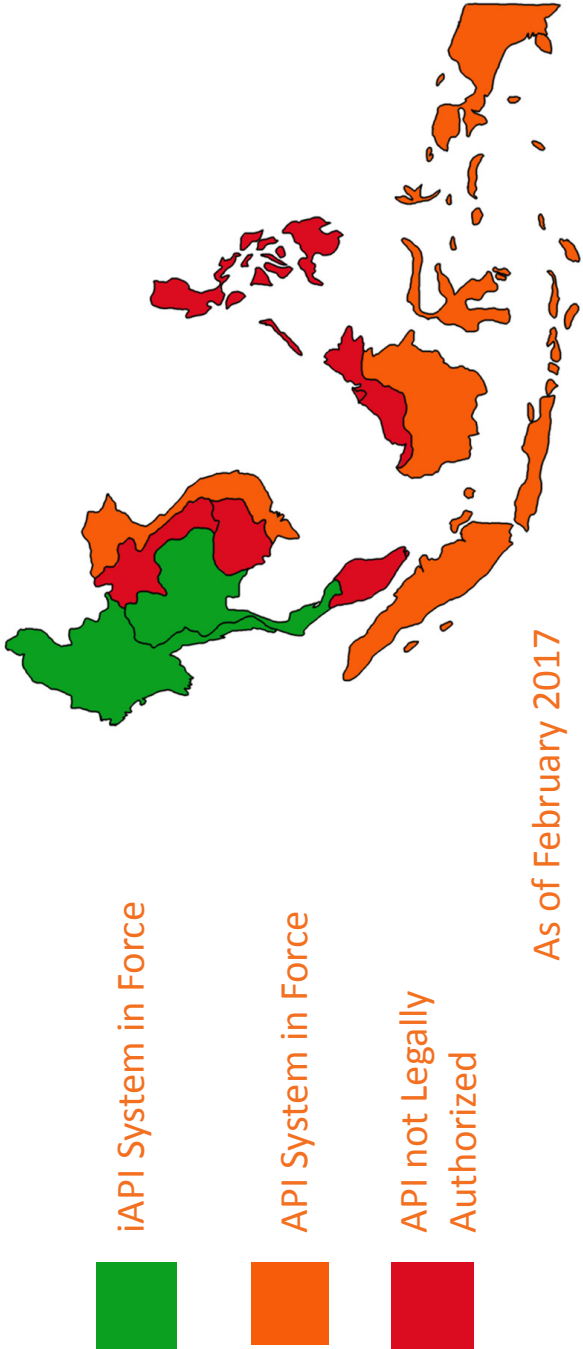
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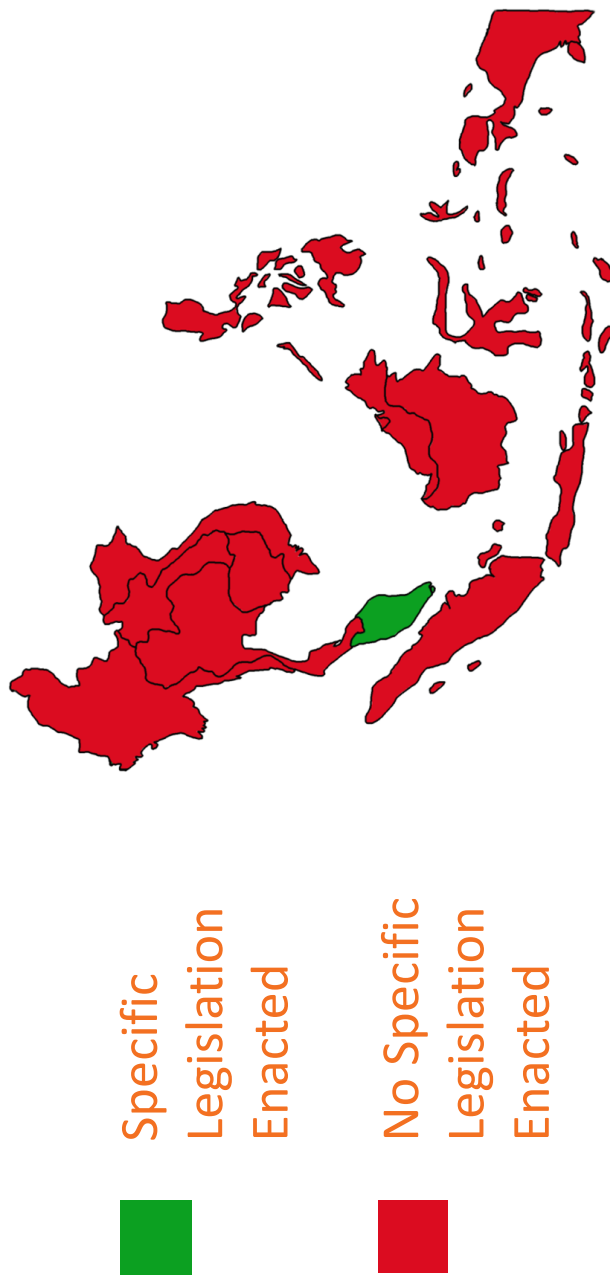
ASEAN Implementation Status

API Implementation Status





Legislation Against the Travel of FTFs





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Information Sharing

Not systematic

- Ad Hoc
- Whatsapp and informal channels

Lack of Integrated databases

- Including with Interpol's databases

❑ THE GAP



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Concluding Thoughts



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Way Forward

- Political engagement
- Institutional and Legal Reform
- Capacity Building
- Regional platforms





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Thank you for your attention

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