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info@demetracentrostudi.it
www.demetracentrostudi.it/

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Recent Developments in the ICAO Settlement of Disputes Mechanism[1]*

Norberto E. Luongo

Lawyer. ICAO Qualified Instructor on Air Law (in Spanish and English). First Vice-Chairman of the ICAO Legal Committee. Arbitrator of the Aviation Court of the Shanghai Arbitration Center. Former Director of Aeronautical Legislation and Air Services Agreements in the Civil Aviation Authority of Argentina (2010-2012). Former Representative of Argentina to the ICAO Council (2012-2017). Former Chairman of the ICAO Facilitation Panel (2016-2018)

Abstract

The Chicago Convention, the founding document of the International Civil Aviation Organization (ICAO), includes a mechanism for the settlement of disputes between the organization's Member States. In the relevant provision of such Convention, the ICAO Council is empowered to exercise a sui generis judicial activity that has rarely been used during the history of ICAO (although there seems to be an incipient renewed interest in its application). This article reviews the history of the application of this procedure, analyzes some controversial aspects of it, and presents some recent developments thereto related, namely: 1) the ongoing process of review of the ICAO Rules for Settlement of Differences, and 2) the recent judgments of the International Court of Justice on the appeals in the ongoing cases between BAHRAIN, EGYPT and UNITED ARAB EMIRATES and QATAR.

Keywords*: ICAO - Settlement of Disputes – ICAO Rules of Procedure – "Qatar v. Bahrain, Egypt Saudi Arabia and United Arab Emirates" and "Qatar v. Bahrain, Egypt and United Arab Emirates." - ICJ Judgments.*

[1] On January 5, 2021, the Kingdom of Saudi Arabia, the United Arab Emirates (UAE), Bahrain and the rest of the Gulf Cooperation Council (GCC) member states, along with Egypt, signed the "Al-Ula Declaration", marking the end of a three-and-a-half-year dispute with the State of Qatar, which was put in place in June 2017. More recently, Saudi Arabia and the UAE have taken steps to reopen all land, sea and air corridors for movement to and from Qatar, and the relevant authorities in both countries have issued directives and circulars to this effect. The International Civil Aviation Organization through its President, the Secretary General, and the members of the Council welcomed the announcement. It is expected that this turn of events will have a significant impact in the dispute presented before the ICAO Council and discussed in this paper.
* Sottoposto a referaggio.

Summary — INTRODUCTION — CHAPTER I. The ICAO mechanism for the settlement of disputes between States — CHAPTER II. Criticism on the ICAO Dispute Settlement System — CHAPTER III. Recent Developments — CHAPTER IV. FINAL EVALUATION and CONCLUSIONS

INTRODUCTION

Since the beginning of human civilization, relationships between individuals and among various groups or social collectives have been structured around the progressive construction of both oral and written covenants, which were used as a cornerstone to regulate and build our "society of coexistence".

Historically, this concept has been developed under the name "Social Contract Theory," that is: the view that persons' moral and/or political obligations are dependent upon a contract or agreement among them in order to form the society in which they live. Since this state includes some sort of figure invested with the authority and power to mete out punishments for breaches of such contract, human beings have good, albeit self-interested reasons to adjust themselves to the artifice of morality in general, and justice in particular. Having created a political society and government through their consent, groups of people living together then gained three things they lacked in the pre-covenant phase (the so-called "State of Nature"), namely: laws, judges to adjudicate laws and the executive power necessary to enforce these laws. Each person therefore gives over the power to protect themselvesand punish transgressors of the Law of Nature to the government that they have created through the compact.

Therefore, the premise that the observance of the stipulations ("terms") of any such covenant under the "social contract state" should be the norm, and its breach, the exception, constitutes a fundamental assumption; otherwise, coexistence would be chaotic, if not impossible. Hence the need to have a sovereign with the capacity for both enforcement of the rules and punishment of their breach.

Mutatis mutandi, the same principles are applicable to the coexistence of sovereign States. The current concept of "world order" was born as a consequence of the signature of the "Peace of Westphalia"[2] and the adoption of its political philosophy. This concept reflected a practical accommodation of the needs of the European states to the reality of that time, but it did not entail the imposition of a single moral vision, since it was founded on the premise of the establishment of a system of independent states that would refrain from interfering in the internal affairs of others and would mutually control their ambitions through a general balance of power. In return, each state was assigned the attribute of sovereign power over its territory.[3]

However, experience shows that both for relationships between individuals and also between states, an overreliance on the willingness of the parties to fulfil their obligations and abide to the law can lead to unpleasant situations and, not infrequently, be regarded as an incentive for abuses. This is why almost every written agreement among those actors explicitly includes remedies to be applied in the event that such a covenant is violated or, at least, when differences between the parties regarding the

[2] The "Peace of Westphalia"is the collective name given to two peace treaties signed in October 1648, ending the Thirty Years' War.
[3] H. Kissinger *"World Order"*, Penguin Books, 2016, p. 15.

interpretation or application of its terms arise. And as it happens with individuals, here also some type of "judges" to adjudicate conflicts are necessary.

This is a characteristic feature of the standard regulation of relationships between states in all areas and, of course, aeronautical activity is no exception to this rule. In 1947, Prof. John Cobb Cooper wrote: *"somewhere an impartial forum must exist in which the legitimacy of these objectives can be challenged by other nations directly concerned. The development of air transport of one nation may injuriously affect another or cause a dangerous dispute. Again, there must be a forum and machinery to remedy such a situation. World organization may well require sufficient international control so that air transport does not become an instrument of unfair nationalistic economic competition or political aggression and thus the source of serious international misunderstanding and dangerous ill feeling."*[4]

As is well known, the most successful multilateral treaty on the regulation of international civil aviation operations is the Convention on International Civil Aviation[5] (commonly known as the "Chicago Convention" from its birthplace in 1944) which — *inter alia* — created the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations whose objective is to promote the safe and orderly development of international civil aviation.[6]

The Chicago Convention constitutes a true *Magna Carta* due to its foundational nature, not only of the aforementioned ICAO,[7] but also of the entire modern system for organization of international civil aviation. Among its numerous provisions of various natures, it includes a special chapter that establishes and regulates the mechanism to be implemented for the solution of differences that may arise between its member states in relation to the interpretation or application of the Convention and its Annexes,[8] consisting of a debate process in which ICAO will assume a judicial role, at the end of which it will issue a verdict for adjudication of the controversy. This peculiar mechanism is presented and described in the following chapter of this article.

CHAPTER I. The ICAO Mechanism for the Settlement of Disputes between States

a) Key features

The mechanism envisaged by the Chicago Convention for the resolution of disputes between Member States that are submitted to ICAO is regulated in Chapter XVIII (arts. 84 to 88) of the said Convention, as follows.

In the event of a disagreement between two or more contracting states on the interpretation or application of the Convention and its Annexes that cannot be settled by

[4] J.C. Cooper, *The Right to Fly*, New York, 1947, p. 192–93.
[5] *Convention on International Civil Aviation*, done in Chicago on December 7, 1944, 15 UNTS 295, 61 Stat 1180; ICAO Doc. 7300 [herein after: Chicago Convention].
[6] *Chicago Convention*, Preamble.
[7] *Chicago Convention*, Second Part (Chapters VIII to XIII).
[8] The ICAO Annexes (a total of 19) are composed of the so-called Standards And Recommended Practices (SARPs), which are technical specifications adopted by the Council of ICAO in accordance with Article 37 of the Chicago Convention in order to achieve *"the highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation"*.

negotiation, any concerned State (the "applicant") may request that the matter be decided by the ICAO Council.[9] Similarly, if any disagreement between two or more contracting states relating to the interpretation or application of the International Air Transport Agreement (IASTA)[10] cannot be settled by negotiation, the provisions of Chapter XVIII of the Chicago 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.[11]To this end, the State will file a formal petition to the Council (the "application"), accompanying a report (the "memorial") detailing all the factual and legal circumstances on which it intends to base its claim. This application will be forwarded to the counterpart (the "respondent"), along with an invitation to file a counter-memorial within the timelimit established by the Council.[12] After substantiation of the process (which will include a production of evidence and a hearings phase, as the case may be), the matter will be decided by the Council through a vote, in which no member of the Council will take part when it comes to a dispute to which the said member is a party.[13]

Once the Council verdict has been delivered, any Contracting State may appeal the decision to an *ad hoc* arbitration tribunal accepted by the other parties to the dispute, or to the International Court of Justice (ICJ),[14] and such appeal shall be notified to the Council within sixty days after receipt of the notification of the decision of the Council.[15]

If a contracting State party to a dispute in which the decision of the Council is under appeal has not accepted the Statute of the International Court of Justice and if the Contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the parties shall appoint a single arbitrator who shall name an umpire. In the event that any State party to the dispute fails to appoint an arbitrator within three months from the date of the appeal, the President of the Council shall appoint an umpire from a list of qualified and available persons maintained by the Council. If within thirty days the arbitrators cannot agree on the name of the umpire, the President of the Council will designate it from the aforementioned list. The arbitrators and the umpire shall then constitute an arbitral tribunal. The tribunal shall adopt its own procedure and its decisions by majority vote, provided that the Council may decide procedural questions in the event of delays that, in its opinion, are excessive.[16]

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[9] *Chicago Convention,* art. 84.
[10] International Air Services Transit Agreement, signed at Chicago on 7 December 1944 [herein after: IASTA].
[11] IASTA, art. II, section 2.
[12] *Chicago Convention,* art. 84.
[13] *Chicago Convention,* art. 84, and art. 15 of the ICAO *Rules for the settlement of Differences*, Doc. 7782/2, Second Ed. (1975).
[14] The text of the Chicago Convention, written and adopted in 1944, refers to the "*Permanent Court of International Justice*". However, following the Second World War, both the League of Nations and the Permanent Court of International Justice were replaced by the United Nations and International Court of Justice, respectively. The San Francisco Conference, meeting from April to June 1945 to draw up the United Nations Charter was also entrusted with preparing a draft statute for a future international court of justice, based on the Statute of the PCIJ, as clearly stated in the same Charter. The Permanent Court of International Justice convened for the last time in October 1945 and resolved to transfer its archives to its successor, the International Court of Justice, while its decisions remained valid.
[15] *Chicago Convention,* art. 84.
[16] *Chicago Convention,* art. 85.

Unless the Council decides otherwise, any decision by the Council as to whether an international airline is operating in accordance with the provisions of the Chicago Convention shall remain in force unless it is reversed on appeal. On any other matter, the decisions of the Council, if appealed, will be suspended until the appeal is decided. The decisions of the International Court of Justice or an arbitration tribunal shall be final and binding.[17]

The Convention also contains very strict sanctions. Every Contracting State undertakes not to allow the operation of an airline of a Contracting State through the airspace above its territory if the Council has decided that the airline concerned is not in compliance with a final decision rendered according to the Convention.[18] Also, the Assembly shall suspend the right to vote in the Assembly and in the Council of any Contracting State found to be in default with respect to the provisions of Chapter XVIII of the Chicago Convention. This provision was never tested in the practice, and it would have to be taken by the majority of the Assembly.[20]

Additional procedural aspects of this mechanism are regulated separately, in a document adopted later and approved by the ICAO Council, named *"Rules for the Settlement of Differences"*("The Rules").[21]

The Rules govern the procedure to be followed by the Council in the settlement of differences between Contracting States pursuant to Article 84 of the Chicago Convention. Under these Rules, the Council functions as a dispute settlement body. The Council takes its decisions on the basis of written documents submitted by the parties (e.g., memorials, counter-memorials, replies and rejoinders) as well as oral hearings. Another important aspect of the Rules is the importance given to mediation and conciliation either before or during the proceedings. The Rules were adopted by the Council in 1957 and have since been amended only once, just to include Russian as a working language.

b) A brief history of the Disputes submitted to the Council for adjudication

The International Civil Aviation became fully operational in 1947[22] and has been performing the functions entrusted to it by the Chicago Convention since then uninterruptedly. However, it is noteworthy that during the long period between the actual entering into functions of ICAO (1947) and 2016, only five cases were brought before the ICAO Council for adjudication, which is quite a low number. In order to provide the historical background necessary for the subsequent analysis of the subject matter of this article, a brief review of such cases is presented below.[23]

[17] *Chicago Convention*, art. 86.
[18] *Chicago Convention*, art. 87. There has not been any instance when this provision would be applied.
[19] *Chicago Convention*, art. 88.
[20] M. Milde, *International Air Law and ICAO*, The Netherlands, 2012, p. 199.
[21] ICAO Doc. 7782/2, Second Ed. (1975).
[22] ICAO succeeded PICAO, the Provisional International Civil Aviation.
[23] For the purposes of this listing, every dispute is considered as one, as is done in most legal textbooks, even when more than a single memorial were submitted, under different grounds. For a more detailed account of these cases, please refer to: P.S. Dempsey, *Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation*, in Ga. *J. Int'l & Comp. L.*, Vol. 32, 2, 2004, p. 267–286.

India v. Pakistan (1952)
The first dispute submitted to the ICAO Council for adjudication was a complaint filed by India against Pakistan in April of 1952. India alleged breach of the Chicago Convention and the Transit Agreement by Pakistan's refusal to permit Indian aircraft to fly over its territory to and from Afghanistan. Because no rules of procedure had then been promulgated, the Council appointed a working group of three Council representatives to assist it in devising appropriate procedures. By June 1953, the parties had reached an amicable resolution of the controversy, and so informed the Council.[24]

United Kingdom v. Spain (1969)
The second complaint was filed by the U.K. against Spain, alleging Chicago Convention violations by Spain's establishment of a prohibited zone near Gibraltar. In 1969, the parties informed they wished the complaint deferred *sine die*,[25] and consideration was thus deferred indefinitely.

Pakistan v. India (1971)
The third complaint (two applications, one under art. 84 of the Chicago Convention and another under Section I, art. 2 of the IASTA) was filed by Pakistan against India in February 1971. It was triggered by India's suspension of Pakistani flights over its territory after Indian nationals hijacked an Indian aircraft, flew it to Pakistan and blew it up, allegedly with the complicity of the Pakistani government. India filed a preliminary set of objections, challenging the jurisdiction of the Council on May 28, 1971. On July 29, 1971, the Council affirmed its jurisdiction over the Pakistani complaint. India appealed that decision to the International Court of Justice pursuant to Article 84 of the Chicago Convention. Proceedings before the Council were held in abeyance pending the outcome of the appeal. The Court voted 14–2 to uphold the jurisdiction of the ICAO Council to hear the case.[26] The ICJ decision, issued August 18, 1972, cleared the way for consideration of the merits of the case by the ICAO Council. However, the conflict was essentially rendered moot when Bangladesh emerged as a new nation, replacing East Pakistan. In July 1976, India and Pakistan issued a joint statement discontinuing the proceedings before the ICAO Council.[27]

Cuba v. United States (1998)
The dispute originated in the denial by the U.S. of rights of overflight for Cuban aircraft engaged in scheduled flights between Cuba and Canada. As a result of the conciliation efforts conducted by the President of the Council, the parties reached an agreement that provided for such overflight rights, subject to certain restrictions.

United States v. Fifteen European Nations (2000)
The dispute was motivated by the adoption of Council Regulation (EC) 925/1999, which established significantly more stringent standards for noise emissions than those demanded by the ICAO standards (promulgated under Annex 16 to the Chicago Convention). The United States filed a formal Article 84 complaint with ICAO against the fifteen EU member states (for the EU itself is not formally an ICAO member) on

[24] ICAO Doc. 7361 C/858 at 15–26 (1953); ICAO Doc. 7367 A7/P/1 74–76 (1953); 166 U.N.T.S. 3 (1953).
[25] ICAO Doc. 9803, c/994 27 (1969).
[26] Appeal Relating to the Jurisdiction of the ICAO Council *(India v. Pakistan),* 1972 I.C.J. 46, 70.
[27] M. Milde, *International*, cit., p. 202.

March 14, 2000.[28] The EU member states responded to the U.S. complaint on July 18th with preliminary objections, as follows: 1) absence of adequate negotiations, 2) failure to exhaust local remedies, and c) scope of the relief requested.
The Council voted 26-0 in favor of the United States. Following the Council's decision, the EU Member States did not exercise their right to appeal it to the International Court of Justice and filed their counter-memorial. The Council invited the parties to resume negotiations to resolve the dispute, which they agreed to do. The dispute was defused with an agreement between the United States and EU concluded at ICAO's Montreal headquarters in October 2001.[29] In April 2002 the EU repealed the noise regulation, and the parties agreed to discontinuation of the proceedings.
As anticipated in this chapter, in 2016 and 2017 two cases (actually involving three claims), were submitted to the ICAO Council for settlement. These cases are presented below.

Brazil v. United States
On December 2, 2016, the Delegation of Brazil to the International Civil Aviation Organization presented an application and memorial to the Council of ICAO for the settlement of a disagreement between Brazil and the United States. The Application of Brazil, submitted under Article 84 of the *Convention on International Civil Aviation* and under the ICAO *Rules for the Settlement of Differences*, relates to the interpretation and application of the Convention and its Annexes following the collision of flight GOL 1907, and a private flight operated by ExcelAire Services Inc. (September 29, 2006).

Qatar v. Egypt, Bahrain, Saudi Arabia and United Arab Emirates
On October 30, 2017, the State of Qatar presented an Application to the Council of ICAO for the settlement of a disagreement between the State of Qatar and the Arab Republic of Egypt, the Kingdom of Bahrain and the United Arab Emirates, pursuant to Article II, Section 2, of the International Air Services Transit Agreement (Chicago, 1944). On the same date, the State of Qatar presented another Application to the Council of ICAO for the settlement of a disagreement between the State of Qatar and the Arab Republic of Egypt, the Kingdom of Bahrain, the United Arab Emirates, and the Kingdom of Saudi Arabia, pursuant to Article 84 of the Convention on International Civil Aviation. The presentations followed the announcement made by the governments of the Respondents (June 5, 2017) that Qatar-registered aircraft would not be permitted to fly to or from the airports within their territories and are barred from their respective national air spaces.

c) A preliminary reflection

As a first conclusion on this historical review, it can be reaffirmed that — as mentioned before — it is quite remarkable that before 2016 and duringits more than seventy years

[28] This European "environmental leadership" has often drawn criticism from nations outside the EU, which view the noise limitations as being used to restrict market access by non-EU carriers and to protect European aircraft manufacturers. The issue of protectionism for European manufacturers was also raised by the United States, since U.S.-based corporations are the only suppliers of *hushkits*, and many of the engine models produced by U.S. manufacturer Pratt & Whitney do not meet the bypass ratio requirement. P.S. Dempsey, *Flights of Fancy*, cit.,p. 278–82.
[29] *U.S. Drops Hushkit Complaint, Pursues Case Against Belgium,* AVIATION DAILY, June 14, 2002, at 2.

of history, ICAO had received only five cases of disputes between member states for Council adjudication. This peculiarity has led some scholars to cast doubts onthe ability of the mechanism devised by the drafters of the Chicago Convention to arouse the interest of the international community to turn to it as a means of dispute settlement. Some have gone even further, targeting the main features of the systems as responsible for this phenomenon, arguing such a mechanism proved to be inadequate to fulfil its specific purpose.[30] A discussion of this approach will be presented further in this article.

CHAPTER II. Criticism on the ICAO Dispute Settlement System

Although the ICAO Council has been designed as a potential forum for both arbitration and adjudication, and given the fact that 193 States are parties of the Chicago Convention at present, international aviation disputes have rarely been brought before it. Moreover, in none of them did the Council issue a formal decision on the merits of the case.

This particular situation has created in some authors the perception that the settlement of differences mechanism established in Chapter XVIII of the Chicago Convention has failed as an attempt to provide an effective solution to disputes between States, since it never actually fulfilled the purpose for which it was conceived.[31] Conversely, others believe that such assessment is too hasty, and overlooks some important features of the system and the political forces driving the conduct of States that explains such outcome.[32]

There seems to be several reasons why so few disputes have been submitted for adjudication under Chapter XVIII of the Convention. Collecting the opinion of a number of distinguished scholars, Prof. Paul S. Dempsey lists as many as six reasons why nations are reluctant to resort to legal means for dispute resolution in general.[33]

1. Some nations may be unwilling to tender the question to a third party for fear of an adverse resolution, since, although legal methods offer a means of securing an answer to a controversial legal question, the answer may not be the one that a participant would prefer to hear.[34]
2. Similarly, a nation in a superior bargaining position may have that strength seriously diluted if the dispute is submitted to a neutral third party, and advantage it may not wish to lose.[35]
3. Some other States may be hesitant to resort to this solution because of the dearth of precedents or clear legal norms to govern the decision-makers.[36]
4. In no few cases, this reluctance is explained by the States' interest in avoiding the potential embarrassment of focused media attention.[37]

[30] *See infra*, Chapter II.
[31] G.S. Sanchez, *The Impotence of the Chicago Convention Dispute Settlement Provisions, 10 Issues Av L & Pol'y*, 2010,p. 27 ff. *(passim)*.
[32] P.S. Dempsey, *Public International Air Law*, Institute & Center for Research in Air and Space Law, McGill University, Montreal, Canada, 2008, p. 731–732.
[33] *Idibem*.
[34] R. Bilder, *Some Limitations on Adjudication as an International Dispute Settlement Technique*, *23 VA.J.LNT'l L.*, 1, 1982, p. 4.
[35] M.S. McDougal, H.D. Lasswell, J.C. Miller, *The interpretation of agreements and world public order: principle of content and procedures,* New Haven, 1967, p. 258–60.
[36] R. Bilder, *Some Limitations*, cit., p.1, 3.

5. The actual underlying cause of dispute may differ from the legal issue that is submitted to arbitration or adjudication. Thus, the tribunal may be focusing on an ostensibly important legal question when the real friction between the governments arises from in a political or economic dimension.[38]

6. Finally, other nations may be concerned about the expense, inconvenience and delay involved in arbitral or international procedures or uncertainty regarding the enforceability of any eventual judgment.[39]

Regarding the specific procedure elaborated in Chapter XVIII of the Chicago Convention, some commentators have recently surmised that it is insufficient to provide an adequate solution to all the areas in dispute in modern aviation,[40] which, in turn, would explain the preference for direct negotiations pursuing a consensual resolution, and of arbitration as a means to solve the conflict when consultations and negotiations fail. Arbitration, as an alternative method of resolution of conflicts, not only entails a more expeditious and economic procedure, but also secures the privacy of proceedings and greater input in the selection of the decision-makers.[41]

Moreover, most bilateral air transport agreements include explicit arbitration clauses that require the submission of disputes to an arbitral panel, once consultation and negotiation alternatives have failed to resolve the dispute. This is identified as an advantage over attempting to secure jurisdiction over recalcitrant nations before an international adjudicatory body such as the International Court of Justice.[42]

As noted by an author, "*[t]he primary problem confronting both the Permanent Court of Justice under the League of Nations and the International Court of Justice under the United Nations has been the reluctance of nations to submit themselves to the compulsory jurisdiction of either court."*[43]

However, the Chicago Convention does not contain any constitutional basis for the settlement of differences arising from bilateral agreements, and on the basis of the Convention the Council would not be competent to consider disputes based on bilateral agreements. This matter was addressed by the very first session of the Assembly in 1947 in Resolution A1-23, named *"Authorization to the Council to Act as an Arbitral Body."*[44]

In any case, the majority of the criticism of the ICAO mechanism of settlement of

[37] P.Larsen, *The United States-Italy Air Transport Arbitration: Problems of Treaty Interpretation and Enforcement*, in 61 *A.M.J INT'L.*,1967, p. 496 ff., esp. p. 498–99; G. McGinley, *Ordering a Savage Society: A Study of International Disputes and a Proposal for Achieving Their Peaceful Resolution*, in 25 *HARV INT'L L.J.*, 1984,p. 43 ff., esp. p. 70.
[38] R. Bilder, *Some Limitations*, cit., p. 4,6.
[39] *Ibidem*, p. 3.
[40] R. Sankovych, *ICAO Dispute Resolution Mechanism: Deepening the Current Framework in Lieu of a New One*, in *IALP*, Spring 2017, Vol. 16, No. 2, p. 319–340.
[41] *Vid. supra*, note 32.
[42] P.S. Dempsey, *Public International*, cit., p. 733.
[43] H.J. Owen, *Compulsory Jurisdiction of International Court of Justice: A Study of Its Acceptance by Nations*, in 3 *GA. L. REV.*, 1969,p. 704.
[44] M. Milde, *International*, cit., P.196 –197. That Resolution authorized the Council to act as an arbitral body on any differences arising among contacting States relating to civil aviation matters submitted to it, when expressly requested to do so by all parties to such difference. On such occasions the Council would be authorized to render an advisory report, or a decision binding upon the parties, if the parties expressly decide to obligate themselves in advance to accept the decision of the Council as binding. It is interesting to note that in the existence of ICAO no dispute was ever referred to the Council for arbitration under the terms of Resolution A1-23. M. Milde, *International*, cit., p. 196 –197.

disputes lies in the nature of the Council itself, namely its political composition. Authors pointing out this feature argue that the Council is a body comprised of governmental representatives appointed for their technical, administrative or diplomatic skills rather than their legal abilities,[46] and hence, they do not possess that measure of dispassionate independence and autonomy of an unbiased neutral decision maker that one normally expects of a judge.[47]

The first president of the Council. Dr. Edward Warner, noted that *"No international agency composed of representatives of States could be expected to bring judicial detachment to the consideration of particular cases in which large interests are involved".*[48] *His successor as President of the Council, Walter Binaghi, expressed that he "had always had doubts abouts the role assigned to the council by Chapter XVIII of the Convention."*[49]

Dr. Michael Milde, former Director of the ICAO Legal Affairs and External Relations Bureau, wrote that *"[t]he Council cannot be considered to be a true judicial body composed of judges who would be acting in their personal capacity and deciding strictly and exclusively on the basis of international air law. Since the Council is a policy making body composed of States, the procedure for the settlement of differences under the Chapter XVIII of the Convention cannot be a true international adjudication on the basis of the international law but rather a sort of "qualified international arbitration" — arbitration sui generis — "diplomatic arbitration" conducted by sovereign States. Their decision may be based on policy or political considerations or equity rather than on strict legal rules."* [50]

However, not all authors are of the same opinion. Some have asserted that the Council of ICAO has true judicial power under Chapter XVIII of the Chicago Convention and that *"the Council must consider itself an international judicial organ in accordance with rules of international law governing judicial proceedings. Thus, inter alia, members of the Council, even though they maybe national representatives nominated by Governments must, when functioning under Chapter XVIII of the Chicago Convention, act in an impartial and judicial capacity."* [51]

As will be mentioned in the chapter in this article, the International Court of Justice has expressed an opinion of its own on this matter in a recent judgment. Another problem with Chapter XVIII of the Chicago Convention mechanism is the potential cost of lengthy adjudicatory proceedings in consumption of the time and monetary resources of the parties. *"The sheer size of today's ICAO Council […] would suggest the likelihood of a lengthy evidentiary and discretional process, and the*

[45] Prof. D. Goedhius, Questions of Public International Air Law, in Recueil des Cours, Academie de Droit International (a952–II), p. 205 and p. 222–225.
[46] T. Buerghental, Law-Making in the International Civil Aviation Organization, Syracuse, N.Y., 1969,p. 12–24, 195.
[47] "A convincing illustration that the Representatives on the Council do not act in "an impartial and judicial capacity" may be found, e.g., in the Minutes of the Council meeting held on 29 July 1971, where several Representatives requested a postponement of a vote (re Pakistan v. India) to consult with their respective administrations to obtain instructions (C-Min 74/6, 29 July 1971). It would be unthinkable for a judge to request 'instructions' from a national administration or anybody else." M. Milde, International, cit., p. 200.
[48] Dr. E. Warner, The Chicago Air Conference. Accomplishments and unfinished business, in 23 Foreign Affairs, April 1945, p. 406.
[49] C-Min. 88/5, pp. 40–41.
[50] M. Milde, International, cit., p. 200.
[51] B. Cheng, The Law of International Air Transport, London, New York, 1961, p. 101.

nightmare of a plethora of separate and conflicting opinions," and that compromises its "judicial independence"[53] to the point that an author expressed that to say a state can be a judgeis a contradiction in itself.[54]
All these concerns will be addressed in chapter IV below.

CHAPTER III. Recent Developments

Two recent developments regarding the ICAO Settlement of Disputes mechanism will be presented in this section.

a) Review of the Rules for the Settlement of Differences

The ICAO Council, at the fifth meeting of its 215th Session held on November 7, 2018, endorsed the recommendation of the 37th Session of the Legal Committee (4–7 September 2018) to establish a working group to review the ICAO Rules for the Settlement of Differences (WG-RRSD).
As mentioned before, the Rules (Doc 7782/2) govern the procedure pertaining to the performance of the judicial functions of the Council under Article 84 of the Chicago Convention. The said Rules were adopted by the Council in 1957 and have since been amended only once in 1975, to add Russian as a working language.
At the tenth meeting of its 211th Session held on June 23, 2017, the Council requested the Secretariat to review the ICAO Rules, with the aim of determining whether the said Rules need to be revised and updated taking into account relevant developments that had occurred since the publication of the document. The Council further requested that this review should also take into account comparable documentation that is in use for similar purposes elsewhere in the United Nations system, as well as international governmental organizations, and in particular the Rules of Court of the International Court of Justice (the "ICJ Rules"). Following some preliminary work on the subject, the Secretariat advised the President of the Council that it was necessary for the issue to be referred to the Legal Committee during its 37th Session.[55]
At the 37th Session of the Legal Committee, the Secretariat introduced a Working Paper on the subject,[56] which provided, *inter alia*, a historical background with respect to the adoption of the ICAO Rules and highlighted the need for their modernization.
In particular, the Working Paper recalled that the ICAO Rules, which were approved by the Council in 1957, were drafted in close alignment with the 1946 ICJ Rules and that since then the ICJ has adopted a thoroughly revised set of Rules of Court that came into

[52] P.S. Dempsey, *Public International*, cit., p. 735.
[53] P.S. Dempsey, *Flights of Fancy*, cit.,p. 302.
[54] *"In short, it is a contradiction in terms to say that a state can be a judge. It is also a contradiction to hold that a representative who receives instructions from a state as to how he should act with respect to a particular disagreement could be seen to act judicially".* G. Fitzgerald, *The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council,* in *CAN. Y.B. INT'LL.*, 1974, p. 153 ff., esp. p. 168-69.
[55] Montreal, Canada, 4 –7 September 2018.
[56] LC/37-WP/3-2.

force on July 1, 1978,[57] with subsequent amendments that entered into force in 2001 and 2005.[58]

The Working Paper also highlighted that the ICAO Rules were not aligned with the current ICJ Rules as for example the ICAO Rules provide for the filing of a preliminary objection solely on ground of jurisdiction whereas the ICJ Rules allow for the filing of preliminary objections on several grounds including jurisdiction, admissibility and other grounds. Additionally, the said paper suggested that a modernization of the Rules may include a review of some miscellaneous provisions in order to recognize other ICAO working languages (Arabic and Chinese) as well as electronic communications and submissions such as through emails.

It was the view of several delegations that, because of its political and judicial roles, the Council of ICAO is unique and therefore different from the ICJ, whose role is purely judicial. Therefore, while questioning the appropriateness of aligning the ICAO Rules exclusively to the ICJ Rules, some delegations pointed out that it would also be important to consider aligning the ICAO Rules with best practices.[59]

After consideration of the Working Paper, the Committee decided to add the item *"Review of the ICAO Rules for the Settlement of Differences"* to its Work Program with priority No. 2.[60] The Committee agreed to establish a Working Group to undertake the work on this item whose members would be nominated by the Committee's next Chairperson in consultation with the President of the Council.[61]

The Committee also noted that any revised rules would not apply to any of the disputes currently pending before the Council but to future disputes brought before the Council.[62]

At the fifth meeting of its 215th Session, held on November 7, 2018, the Council endorsed the Legal Committee's decision to establish the Working Group for the Review of the ICAO Rules for the Settlement of Differences (WG-RRSD).

The task of the WG-RRSD is to assist the Legal Committee in revising said Rules, taking into account comparable documentation that is in use for similar purposes elsewhere in the United Nations system, as well as international governmental organizations, and in particular the ICJ Rules. Moreover, the WG-RRSD is also expected to take into account the development of new and innovative mechanisms to facilitate the settlement of differences in a timely, expeditious and transparent fashion.

In addition, a benchmarking study conducted by the Secretariat compared ICAO's Rules with the rules and procedures governing the settlement of differences in other international judicial and dispute settlement bodies, such as: the International Court of Justice (ICJ), the International Centre for Settlement of Investment Disputes (ICSID), the International Tribunal for the Law of the Sea (ITLOS), the Permanent Court of Arbitration (PCA), the United Nations Commission on International Trade Law (UNCITRAL) and the World Trade Organization (WTO).

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[57] Rules of Court (1978), adopted on April 14, 1978, and entered into force on July 1, 1978.
[58] Any amendments to the Rules of Court, following their adoption by the Court, are now posted on the Court's website, with an indication of the date of their entry into force and a note of any temporal reservations relating to their applicability (for example, whether the application of the amended rule is limited to cases instituted after the date of entry into force of the amendment); they are also published in the Court's *Yearbook.*
[59] Legal Committee, 37th Session. Montreal 4 –7 September, 2018. Report, 6:9.
[60] *Ibidem*, 3:8.
[61] *Ibidem*, 6:11.
[62] *Ibidem*.

The WG-RRSD is comprised of several States represented by legal experts having knowledge of judicial settlement of international disputes, with particular emphasis on aviation disputes. Two face-to-face meetings of the WG-RRSD were held in 2019, and decisions on future meetings are subject to the evolution of the current global pandemic situation. Once its work is finished, it will submit its report and conclusions to the 38th Session of the Legal Committee.

b) ICJ judgment on the "Bahrain, Egypt and United Arab Emirates v. Qatar" Appeal

On June 5, 2017, the Governments of Bahrain, Egypt, Saudi Arabia and the United Arab Emirates severed diplomatic relations with the State of Qatar and adopted a series of restrictive measures relating to terrestrial, maritime and aerial lines of communication with Qatar, which included aviation restrictions. Pursuant to these actions, all Qatar-registered aircraft were barred by the Appellants from landing at or departing from their airports and were denied the right to overfly their respective territories, including the territorial seas within the relevant flight information regions. Certain restrictions also applied to non-Qatar-registered aircraft flying to and from Qatar, which were required to obtain prior approval from the civil aviation authorities of the Appellants.[63]
On June 15, 2017, Qatar submitted to the Office of the ICAO Secretary General an application for the purpose of initiating proceedings before the Council, citing Bahrain, Egypt, Saudi Arabia and the United Arab Emirates as respondents, as well as a memorial, in which it claimed that the aviation restrictions adopted by the respondents violated the respondents' obligations under Article 84 of the Chicago Convention. On the same date, another application and memorial were submitted by Qatar against Bahrain, Egypt and the United Arab Emirates, claiming that the aforementioned restrictions violated Article II, Section 2, of the IASTA.[64] Due to certain deficiencies in the applications and the memorials identified by the Secretariat, both documents were resubmitted on October 30, 2017.
On March 19, 2018, Bahrain, Egypt and the United Arab Emirates, as respondents before the ICAO Council, raised two preliminary objections.
In the first preliminary objection, it was argued that the ICAO Council lacked jurisdiction under the IASTA since the real issue in dispute between the parties involved matters extending beyond the scope of that instrument, including whether the aviation restrictions could be characterized as lawful countermeasures under international law.
In the second preliminary objection, it was argued that Qatar had failed to meet the precondition of negotiation set forth in the Chicago Convention and the IASTA, also reflected in Article 2, subparagraph (g), of the ICAO Rules for the Settlement of Differences, and consequently that the Council lacked jurisdiction to resolve the claims raised by Qatar, or alternatively that the application was inadmissible.

[63] According to the Appellants, the restrictive measures were taken in response to Qatar's alleged breach of its obligations under certain international agreements to which the Appellants and Qatar are parties, namely the Riyadh Agreement (with EndorsementAgreement) of November 23 and 24, 2013, the Mechanism Implementing the Riyadh Agreement of April 17, 2014 and the Supplementary Riyadh Agreement of November 16, 2014, and of other obligations under international law.
[64] *"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 [Chicago] 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."*

By a decision dated June 29, 2018, the ICAO Council, rejected the preliminary objections, treating them as one single objection. On July 4, 2018, the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates filed in the Registry of the Court a joint Application constituting an appeal from the decision rendered by the ICAO Council, and on the same day, the Kingdom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates filed in the Registry of the Court another joint Application constituting an appeal from the same ICAO Council decision.

On 14 July 2020, the Court rendered its Judgments. The main elements of such judgments are summarized below.

1) The Court's appellate function and the scope of the right of appeal to the Court

Before addressing the three grounds of appeal against that Decision, the Court described its appellate function and the scope of the right of appeal to the Court under Article 84 of the Chicago Convention (also incorporated by reference in Article II, Section 2, of the IASTA).

The Court noted that Article 84 of the Chicago Convention appears under the title *"Settlement of disputes"*, whereas the text of the article opens with the expression "any disagreement". In this context, the Court recalls that its predecessor, the Permanent Court of International Justice, defined a dispute as *"a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."*[66] The text of Article 84 does not specify whether only final decisions of the ICAO Council on the merits of disputes before it are subject to appeal. The Court settled this issue in the first appeal submitted to it against a decision of the ICAO Council,[67] where the Court concluded that: *"an appeal against a decision of the Council as to its own jurisdiction must therefore be receivable since, from the standpoint of the supervision by the Court of the validity of the Council's acts, there is no ground for distinguishing between supervision as to jurisdiction, and supervision as to merits."* [68]

The Court noted that Qatar expressly recognized the right of the Appellants under Article II, Section 2, of the IASTA to appeal the Council's decision on its jurisdiction and, therefore, the Court was satisfied that it had jurisdiction to entertain the appeal.

2) The second ground of appeal: rejection by the ICAO Council of the first preliminary objection

The Appellants' second ground of appeal related to their first preliminary objection as respondents before the ICAO Council. In this objection, they argued that their actions, including in particular the aviation restrictions, constitute a set of measures *"adopted in reaction to Qatar's multiple, grave, and persistent breaches of its international*

[65] See: https://www.icj-cij.org/en/case/173 (last time accessed: February 8, 2021).
[66] Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.
[67] Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972, p. 46.
[68] *Ibid*., p. 61, para. 26.
[69] The Court noted that there was no requirement to follow the order of grounds of appeal used by the Appellants.

obligations relating to matters essential to [their] security […] and constitute lawful countermeasures authorized by general international law". They expressed the view that under Art. 84 of the Chicago Convention and Article II, Section 2, of the IASTA the jurisdiction of the Council is limited to any disagreement between two or more States relating to the interpretation or application of said documents, and that the Council therefore does not have jurisdiction to adjudicate issues as to whether Qatar has breached its other obligations under international law, including obligations under the Riyadh Agreements, matters falling outside of the scope of the Chicago Convention and the IASTA and, therefore, the ICAO Council lacks jurisdiction. They argued that the narrow dispute relating to airspace closures cannot be separated from the broader issues and that the legality of the airspace closures cannot be judged in isolation.

Before the Council, Qatar expressed the view that the issues of countermeasures and their lawfulness go to the merits of the case and should not be considered by the Council when it takes a decision on its jurisdiction. Qatar relied on the Court's Judgment in the Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan),[70] and there is nothing in the Chicago Convention, the IASTA Agreement or in the ICAO Rules for the Settlement of Differences that sets any other limit on, or otherwise circumscribes, the jurisdiction of the Council.

The Court considered that the mere fact that this disagreement has arisen in a broader context does not deprive the ICAO Council of its jurisdiction under the Chicago Convention and the IASTA. As the Court has observed in the past, *"legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned."*[71]

The Court also considered that the prospect that a respondent would raise a defense based on countermeasures in a proceeding on the merits before the ICAO Council does not, in and of itself, have any effect on the Council's jurisdiction within the limits of the Chicago Convention and the IASTA. As the Court stated when considering an appeal from a decision of the ICAO Council in 1972: *"The fact that a defense on the merits is cast in a particular form, cannot affect the competence of the tribunal or other organ concerned, — otherwise parties would be in a position themselves to control that competence, which would be inadmissible."*[72]

The Court stated that such reasoning applied equally to the present case and, therefore, concluded that the Council did not err when it rejected the first preliminary objection by the Appellants relating to its jurisdiction.

In view of the above, the Court concluded that the second ground of appeal could not be upheld.

[70] Appeal Relating to the Jurisdiction of the ICAO Council *(India v. Pakistan)*, Judgment, I.C.J. Reports 1972.

[71] United States Diplomatic and Consular Staff in Tehran *(United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, p. 20, para. 37; see also Certain Iranian Assets *(Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (I), p. 23, para. 36.

[72] Appeal Relating to the Jurisdiction of the ICAO Council *(India v. Pakistan)*, Judgment, I.C.J. Reports 1972, p. 61, para. 27.

3) The third ground of appeal: rejection by the ICAO Council of the second preliminary objection

As their third ground of appeal, the Appellants asserted that the ICAO Council erred when it rejected the second preliminary objection, which they raised as respondents before the Council, pursuant to which they claimed that the ICAO Council lacked jurisdiction because Qatar had failed to meet the negotiation precondition found in Article 84 of the Chicago Convention and in Article II, Section 2, of the IASTA. The Appellants argued that the ICAO Council erred in rejecting this objection to its jurisdiction, arguing that there must be *"at the very least […] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute"* (I.C.J. Reports 2011 (I), p. 132, para. 157). They maintained that a genuine attempt to negotiate must be more than a general call for dialogue.

Qatar agreed that a negotiation precondition normally requires a potential applicant to make a genuine attempt to negotiate and that a negotiation precondition is not met until negotiations have become futile or deadlocked, but emphasized that no specific format or procedure is required for negotiations, which, it argues, can take place within the context of an international organization. Furthermore, Qatar maintained that it made a genuine attempt to negotiate and, since the Appellants displayed a complete unwillingness to negotiate, any further attempt to negotiate would have been futile.[73]

In its Judgment of both cases, the Court observed that:

- The reference in Article 84 of the Chicago Convention and in Article II, Section 2, of the IASTA to a disagreement that *"cannot be settled by negotiation"* is similar to the wording of the compromissory clauses of a number of other treaties.[74]
- The Court considers that both international instruments impose a precondition of negotiation that must be met in order to establish the ICAO Council's jurisdiction.
- A genuine attempt to negotiate can be made outside of bilateral diplomacy.[75]
- The overtures that Qatar made within the framework of ICAO related directly to the subject-matter of the disagreement that was later the subject of its applications to the ICAO Council.
- The Court concludes that Qatar made a genuine attempt within ICAO to settle by negotiation its disagreement with the Appellants regarding the interpretation and application of Chicago Convention and the IASTA.

Also, the Court stated that a negotiation precondition was satisfied when the parties' *"basic positions ha[d] not subsequently evolved"* after several exchanges of diplomatic correspondence and/or meetings,[76] and pointed out that in advance of the ICAO Council's Extraordinary Session of July 31, 2017, the Appellants submitted a working

[73] Judgments, para. 77–86.
[74] Application of the International Convention on the Elimination of All Forms of Racial Discrimination *(Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 128, para. 140, and Questions relating to the Obligation to Prosecute or Extradite *(Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II), p. 445, para. 56).
[75] Ibidem.
[76] Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment, I.C.J. Reports 2012 (II), p. 446, para. 59; see also Immunities and Criminal Proceedings *(Equatorial Guinea v.France)*, Preliminary Objections, Judgment, I.C.J.Reports 2018 (I), p. 317, para. 76.

paper that urged the Council to limit any discussion to issues related to the safety of international aviation, which supported Qatar's assertion that the Appellants were unwilling to seek a resolution of the disagreement over the aviation restrictions within the ICAO Council.
For the reasons set forth above, the Court considered that the ICAO Council did not err in rejecting the contention advanced by the respondents before the Council that Qatar had failed to fulfil the negotiation precondition.

4) The first ground of appeal: alleged manifest lack of due process in the procedure before the ICAO Council

The Appellants argued that irregularities in the procedures that the ICAO Council followed in reaching the Decision prejudiced in a fundamental way the requirements of a just procedure, and they alleged a series of procedural violations, listed in the appeal.
The Court observed that the alleged procedural irregularities did not prejudice in any fundamental way the requirements of a just procedure. The Court had no need to examine whether a decision of the ICAO Council that was legally correct should nonetheless be annulled because of procedural irregularities.
For the reasons set forth above, the Court concluded that the first ground of appeal cannot be upheld.

5) Conclusion

For all these reasons, THE COURT:
(1) Unanimously,
Rejected the appeal brought by the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates on July 4, 2018 from the Decision of the Council of the International Civil Aviation Organization, dated June 29, 2018.
Rejected the appeal brought by the Kingdom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates on July 4, 2018 from the Decision of the Council of the International Civil Aviation Organization, dated June 29, 2018.
(2) By fifteen votes to one,
Held that the Council of the International Civil Aviation Organization has jurisdiction to entertain the application submitted to it by the Government of the State of Qatar on October 30, 2017 and that said application is admissible.

CHAPTER IV. FINAL EVALUATION and CONCLUSIONS

As explained in this article, criticism of the real value of the adjudication process under Chapter XVIII of the Chicago Convention is not new, and some of those arguments seem to point out valid concerns. However, that does not mean the settlement of differences mechanism should be disregarded as an effective tool to resolve disputes between States and, much less, discarded. In fact, the reality is quite the contrary, as will be demonstrated below by assessing such main objections.

1. Scarcity of cases submitted to ICAO

Since the inception of ICAO and for over seventy years, only five cases[77] of disputes between Member States had been submitted for Council adjudication. However, in recent times the ICAO Council's intervention was requested in two new disputes (involving three different claims) between Member States.
Taking this into account, from a statistical point of view it could be surmised that in a period of less than one year, the number of disputes filed for adjudication increased significantly in a period of just one year.
However, it seems that is still too early to conclude that this can be interpreted as a reaffirmation of faith and trust of the international aeronautical community in the validity and strength of the ICAO system for the resolution of disputes between States. What it certainly can be affirmed is that the issuance of a death certificate for the Chapter XVIII advocated by some authors appears to bea touch hasty.

2. Rules for the Settlement of Differences

While the Rules for the Settlement of Differences appear to be rigid, there is one element of flexibility: the Council, subject to the agreement to the parties, may suspend or amend the Rules if in its opinion such act would lead to a more expeditious or effective disposition of the case.[78]
The current process of revision undertaken by the WG-RRSD addresses multiple issues related to the modernization of the Rules and looks for new and innovative mechanisms to facilitate the settlement of differences in a timely, expeditious and transparent fashion. The alignment with the new Rules of Procedure of the ICJ is a very important example of the initiatives, but just one of them, since the scope of the revision goes beyond that, taking into account the rules and procedures governing the settlement of differences in other international judicial and dispute settlement bodies.
All these reasons, plus the skills of the expert members the group, are sufficient to reassure the confidence of the international aviation community in the success of the work of the WG-RRSD in contributing to modernizing the ICAO Rules and overcoming the current difficulties they face.

3. The peculiar nature of the Council

As explained in this article, the first and foremost criticism of the ICAO mechanism for the settlement of differences between States is grounded on the *"political nature of the Council"*.
It is this author's view that such an assertion cannot be construed as necessarily leading to the conclusion that this function should be transferred to a body of elected arbitrators or judges who would be able to act with *"due judicial detachment"* as suggested by some authors.[79]
First of all, in practice it is quite unlikely that States would be ready to submit their differences to any form of final adjudication on a compulsory basis. As explained by an author: *"However imperfect the current machinery may be, it is available to States and*

[77] See *supra*, note 23.
[78] Art. 32 of the Rules. See: M. Milde, *International*, cit., p.199.
[79] See *supra*, note 40.

its existence can act as a deterrent that it could be used with all the undesirable publicity and further inflame the adversarial attitudes — unless States use their best efforts to find a solution through their direct negotiations".[80]

More importantly, such criticism does not take into account the fact that the Council is, in fact, a rule-setting and a diplomatic and political body, *which has been entrusted by the Chicago Convention with dispute settlement functions.*

Under the Chicago Convention and the Rules of Procedure for the Settlement of Differences, the provisions permitting that the decisions of the Council can be appealed to the ICJ suggest that the Council in performing functions pertaining to the settlement of differences is *de facto* exercising judicial functions. Moreover, during the whole process the Council functions as a traditional judicial body: it may decide on the basis of written submission of the parties (memorials and counter-memorials), and on the basis of oral hearings,[81] and these judicial functions should be distinguished from the quasi-judicial functions under Articles 54 (subparagraphs *n, j* and *k*) of the Chicago Convention.

The ICJ decision (nearly identical, in this regard, to the 1972 decision in *Appeal Relating to the Jurisdiction of the ICAO Council*) has an important effect on the construction of the dispute settlement function of ICAO, affirming that a particular body is entitled to examine ancillary matters that may lie outside its jurisdiction in order to determine whether jurisdiction is properly founded. Although the Court took care to observe that the Council's dispute settlement function does not transform it *"into a judicial institution in the proper sense of that term"*,[83] the decision empowers non-judicial bodies, such as the ICAO Council, to engage in quasi-judicial dispute settlement. In that respect, the Judgment might lead to an increase in such proceedings, particularly if they are regarded by the parties as a more attractive alternative to the stricter jurisdictional requirements of international judicial bodies. What still remains open for discussion is the exact nature of such functions, that could be described as "*a sui generis judicial function"*. Point 2 in the analysis of the International Court of Justice of the second ground of appeal *("Whether Qatar's claims are inadmissible on grounds of 'judicial propriety'")* illustrates such complexity.[84]

As mentioned before in this article, the Court observed that it is difficult to apply the concept of *"judicial propriety"* to the ICAO Council, precisely due to its composition. The Council, said the Court, was given in Article 84 the function of settling disagreements between two or more contracting States relating to the interpretation or application of the Convention and its Annexes. This, however, does not transform the ICAO Council into a judicial institution in the proper sense of that term.

The separate opinions of Judge Gevorian and Judge *ad hoc* Berman elaborate deeper in this matter. Judge Gevorian holds that nothing like a doctrine of *"judicial propriety"* can properly be applied to the ICAO Council, since the Council is a body of a primarily technical and administrative nature, whose members act as representatives of their Governments and need not be well-versed in international law, and whose dispute settlement mandate is narrowly limited to the interpretation and application of the ICAO treaties. The basic principle remains that States should be subjected to the jurisdiction of

[80] M. Milde, *International*, cit., p.205.
[81] L. Weber, *International and EU Aviation Law. Selected Issues,* The Netherlands, 2011, p. 99.
[82] *Ibidem*, p. 101.
[83] *Judgments, para*. 60.
[84] *Ibidem*.

the Council only to the extent they have consented to it, and this is applicable with even greater force to an institution like the ICAO Council, given its narrow mandate.[85]
The aforementioned conclusions do not hinder any initiative that could improve and facilitate the exercise of the Council's judicial functions, such *as, e.g.*, the use of the advice of an independent group of legal experts. Once more, all efforts to revitalized the procedures and making the work of the Council in such capacity more efficient, like the one undertaken by the WG-RRSD, must be enthusiastically welcome, but substantive changes to the text of the Chicago Convention to achieve such goals do not appear to be urgent (or necessary).

4. Lack of results

It is a fact that, so far, in none of the cases submitted to the Council for adjudication did that body issue a formal decision on the merits of the case. To this author's understanding, by no means that can be construed as a failure by the Council in exercising the settlement of disputes functions entrusted to it. That might be asserted should the abovementioned outcome be achieved contrary to the Council's desires or interests. However, it is actually the contrary.
Although ICAO has been given comprehensive adjudicatory powers by virtue of the Chicago Convention, and wide-ranging arbitral powers under a plethora of bilateral air transport agreements, it has exhibited no enthusiasm for exercising either, preferring instead to use its good offices to bring the parties to a resolution of the dispute.[86] In each of the five cases filed between 1952 and 2000, delay in the proceedings and/or ICAO's role in conciliation and mediation has enabled the parties to resolve the controversy. The 1957 Rules suggest a preference for consultations and negotiations rather than adjudication and sanctions. Mediation, conciliation, and the prudent use of good offices are sometimes the more efficient and effective means of conflict resolution, and the ones preferred by ICAO itself.[87]
In every case submitted to its consideration, the Council endeavored— and strove — to put in motion its best offices to make possible for the parties to reach a consensual solution. From this point of view, it can be undoubtedly affirmed that ICAO has achieved an impressive record, facilitating via its own active participation, either an amicable solution via agreement between the concerned States or a per se deactivation of all the conflicts.
Moreover, the existence of the Chapter XVIII dispute settlement machinery may itself encourage nations to resolve their disputes amicably.[88] It undoubtedly gives the Council additional leverage in its efforts at mediation and conciliation.[89] Moreover, some commentators are of the view that the ICAO's dispute resolution mechanism ought to be expended and employed to deal with problems of economic discrimination in international aviation, despite ICAO's shortcomings: *"[…] it is not quite understandable why States have not approached the ICAO concerning some*

[85] Separate Opinion of Judge Gevorian, paragraphs 10–12. Similarly: Separate Opinion of Judge *ad hoc* Berman, *passim*.
[86] B. Cheng, *The Law of International*, cit.,p. 460.
[87] M. Milde, *Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO), in Settlement of Space Law Disputes*, 1979,p. 87 ff., esp. p. 94.
[88] *Ibidem*.
[89] R. Gariepy, D. Botsford, *The Effectiveness of the International Civil Aviation's Adjudication Machinery*, in 42 J. AIR L. & COM., 1976, p. 351 ff., esp. p. 361-62.

discriminatory practices, such as complaints over landing fees, given the clear mandate of Article 15of the Convention. Byprecedent setting decision making, the ICAO Council could achieve more significant progress towards an orderly flow of international air transport commerce than is possible in isolated bilateral contexts through unilateral national protective measures."[90]

It comes as no wonder to this author that ICAO has been characterized as *"among the most quietly effective international organizations"*[91], the Settlement of Differences functions of Chapter XVIII of the Chicago Convention being one of the several ingredients responsible for that success, and nothing indicates that a change should be introduced in this respect.

[90] J. Gertler, *Nationality of Airlines: A Hidden Force in the International Air Regulation Equation*, in 48 J. AIR L. & COM., 1982, p. 51 ff., esp. p. 83-84.
[91] D. Marcella, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, in 40 HARV. *INT'L L.J.*,1999, p. 81 ff., esp. p. 120.

Promossa da:

demetra

CENTRO STUDI