1976

The Effectiveness of the International Civil Aviation Organization's Adjudicatory Machinery

Richard N. Gariepy

David L. Botsford

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
https://scholar.smu.edu/jalc/vol42/iss2/3

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
THE EFFECTIVENESS OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION'S ADJUDICATORY MACHINERY

RICHARD N. GARIEPY*
DAVID L. BOTSFORD**

INTRODUCTION

Although some writers¹ are critical of the International Civil Aviation Organization's (ICAO) adjudicative role in the settlement of disputes, the authors believe the ICAO's adjudicatory machinery plays an effective role in the settlement of disputes. To aid in understanding the effectiveness of the ICAO in the settlement of disputes, this article examines the development, organizational structure, and purpose of the ICAO and considers the machinery for the settlement of disputes, including a discussion of the procedural weaknesses, political implications, history of dispute settlements, and the ICAO's mediation role.

I. THE ICAO: DEVELOPMENT, ORGANIZATION AND FUNCTION

The International Civil Aviation Organization (ICAO) came into existence on April 4, 1947, when the Convention on Inter-

* Mr. Gariepy, a member of the California, District of Columbia and New York Bars, is General Counsel to Garnac Grain Co., Inc.
** Mr. Botsford is a Leading Articles Editor of the Journal of Air Law and Commerce.

¹ One author, after emphasizing the inherent weaknesses in the ICAO adjudicative machinery stated: "It is for consideration whether the Council should not be relieved of the burden of judicial functions which, by its very structure, it can carry out only with very great difficulty." Fitzgerald, The Judgment of the International Court of Justice on the Appeal Relating to the Jurisdiction of the ICAO, 1974 CAN. Y.B. 153, 185 [hereinafter cited as Fitzgerald]. Another writer has referred to the ICAO Council as an unsuitable body to exercise its judicial function. B. CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT, 460 (1962) [hereinafter cited as CHENG].
national Civil Aviation (Convention)\textsuperscript{2} became effective. The Convention was a result of the International Civil Aviation Conference (Conference) which met in Chicago, Illinois, in 1944 to adopt international agreements on commercial air traffic rights and both technical and navigational matters of international aviation.

The Conference drafted two agreements: The International Air Services Transit Agreement (Transit Agreement)\textsuperscript{3} and the International Air Transport Agreement (Transport Agreement).\textsuperscript{4} The Transit Agreement provides for the reciprocal exchange of the privilege of flying across each contracting state's territory and the privilege of landing for non-traffic purposes.\textsuperscript{5} The Transport Agreement, on the other hand, provides for the two privileges in the Transit Agreement and recognizes three additional privileges:

1. the privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;
2. the privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses; and
3. the privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.\textsuperscript{6}

In addition to the Transit and Transport Agreements,\textsuperscript{7} the Conference adopted an Interim Agreement on International Civil Aviation that established the Provisional International Civil

\begin{flushright}
\textsuperscript{5}Transport Agreement, Art. I, § 1. See generally, W. Wagner, International Air Transportation as Affected by State Sovereignty 140-42 (1970). Note also that the privileges of this agreement are limited when an airport is used exclusively for military operations, in areas of "active hostilities or of military occupation," and such privileges are subject to the military authorities of any country during periods of war. \textit{Id}.
\textsuperscript{6}Transport Agreement, Art. I, § 1.
\textsuperscript{7}According to Wagner, \textit{ supra} note 5, at 140, 143, over seventy States have accepted the Transit Agreement, while only twelve have accepted the Transport Agreement. For an excellent discussion of membership in the ICAO and problems related thereto, see T. Buergenthal, Law-Making in the International Civil Aviation Organization 13-35 (1969) [hereinafter cited as Buergenthal].
\end{flushright}
Aviation Organization (PICA0). PICA0, in turn, planned the technical program and administrative structure for the permanent ICA0 in the period preceding the entry into force of the Convention.8

The basic functions of the ICA0 are: to develop the principles and techniques of international air navigation; to foster the planning and development of international air transport to insure the safe and orderly growth of international civil aviation throughout the world; to encourage the development of airways, airports, and air navigation facilities for international civil aviation; to promote the development of all aspects of international civil aeronautics; and to provide for safe, efficient and economical air transport.9

The ICA0 discharges its functions through an Assembly, Council, and various subsidiary bodies.10 Each member state is represented in the Assembly which reviews the activities of the ICA0 and establishes its general policy guidelines. The Assembly meets at least once every three years and has the power "to deal with any matter within the sphere of action of the Organization not specifically assigned to the Council."11 Each representative state in the Assembly has a vote,12 and most decisions of the Assembly are adopted by a majority of the votes cast when a quorum, consisting of a majority of the member states,13 is present.

The Council members, composed of representatives from twenty-seven member states, are elected for three-year terms.14 The Council,

---

8 The Convention entered into force on April 4, 1947. For a more detailed discussion of the preparatory work performed by PICA0 see BUERGENTHAL, supra note 7, at 5.

9 See Convention, Art. 44. For a discussion of the ICA0's role, see W. Binaghi, The Role of the ICA0, in THE FREEDOM OF THE AIR 17 (E. McWhinney ed. 1968).

10 For a discussion of the functions of subsidiary ICA0 bodies see CHENG, supra note 1, at 42-56; BUERGENTHAL, supra note 7, at 7, 9-12.

11 Convention, Art. 49(k).

12 Convention, Art. 48.

13 Id.

14 Convention, Art. 50(a). These members are selected by the Assembly to fulfill the objectives of Article 50(b) which requires the Assembly to: give adequate representation to (1) the States of chief importance in air transport; (2) the States not otherwise included which make the largest contribution to the provision for facilities for international civil air navigation; and (3) the States not otherwise included whose designation will insure that all the major geographic areas of the world are represented on the Council.
described as "the governing board of the ICAO" performs legislative, judicial, and administrative functions. The legislative functions include the adoption of various ICAO air navigation and air transport regulations; the judicial functions include the power to adjudicate disputes between the member states relating to the interpretation and application of the Convention; and the administrative functions include the administration of the finances of the Organization, the appointment of the Secretary General, the execution of Assembly directives and the supervision of international agreements for the joint financing of air navigation facilities and services.16

II. PROCEDURE FOR THE SETTLEMENT OF DISPUTES

The Convention and the Transit and Transport Agreements provide for the settlement of disputes between member states. These agreements also provide sanctions and procedural Rules for the Settlement of Disputes (Rules). Under Chapter XVIII, Articles 84-88 of the Convention, the Council is authorized to settle disputes between member states.17 Article 84 provides the framework for resolution of disputes.18

Article 84, however, raises a number of jurisdictional questions despite its compulsory nature.19 Firstly, a distinction between dis-

16 See ICAO Secretariat, Memorandum on ICAO 13 (5th ed. 1966).
17 See generally Convention, Arts. 54 & 55.
18 The proceedings for the settlement and adjudication of disputes are governed by the Rules for the Settlement of Disputes, ICAO Doc. 7782-c/898 (1959) [hereinafter cited as Rules]. The Rules encompass general rules of procedure and include the exchange of pleadings, a counter-memorial, a reply by the applicant state, and the respondent's rejoinder. For a more detailed study of the Rules, see Buergenthal, supra note 7, at 179-94.
19 Article 84 provides 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. 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.
20 Cheng, supra note 1; Buergenthal, supra note 7, at 125. Both note the compulsory nature of the grant of jurisdiction. It stems from the wording of
agreements and complaints must be made. Disagreements can be instigated properly under Article 84 only, while complaints may be filed pursuant to either Article II, section 1 of the Transit Agreement or Article IV, section 2 of the Transport Agreement. Secondly, the disagreement must relate to "the interpretation or application of" the Convention or its Annexes. Thirdly, it must appear that the dispute "cannot be settled by negotiation." Lastly, the dispute must be submitted to the Council by a contracting State "concerned in the disagreement." It has been asserted that a contracting state can be "concerned in the disagreement only if said state is a party to the dispute," which appears to be an appropriate interpretation of the Rules.

Article 84, which states in pertinent part:

> If any disagreement . . . cannot be settled by negotiation, it shall, on the application of any state concerned in the disagreement, be decided by the Council (emphasis added).

Note that both the Transit Agreement and Transport Agreement use identical language, to wit:

> 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. 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. . . . (emphasis added).

See also Hingorani, Dispute Settlement In International Civil Aviation, 14 ARB. J. 15-16 nn.11 & 12 (1959). It should also be noted that Article 2 of the Rules refers to the proper tool for filing a disagreement (as opposed to a complaint) as an Application containing specifically enumerated details (also referred to as a Memorial). The essential difference is that a complaint alleges behavior that is not technically illegal under the Agreements, although the behavior complained of may cause hardship or injury. See also Note, 14 HARV. INT'L L. J. 612, 615 (1973).

21 Convention, Art. 84.

22 Id. In this connection, see Rules, Art. 2(g); BUERGENTHAL, supra note 7, at 130-36.

23 See Convention, Art. 84.

24 BUERGENTHAL, supra note 7, at 128-29 states that this is an implicit requirement of Article 84, since the second requirement "presupposes that the applicant state has previously addressed to the respondent, . . . a legal claim that the latter has refused to honor" (citation omitted). The author goes on to discuss the 1952 India-Pakistan dispute concerning an Article 84 disagreement, as precedent for his point. There, Afghanistan filed charges against Pakistan identical to those India had made against Pakistan pursuant to Article 84. The Council did not consider Afghanistan's charges as an Article 84 disagreement, stating that a more detailed and explicit statement of its disagreement was necessary. Id. at 129. See also, ICAO Doc. 7291-c/845 at 195 (1952).

25 See Rules, Art. 2(a)-(g).
The Council is required to reach a decision in accordance with the *Rules.*\(^{26}\) The decision must be in writing,\(^ {27}\) and dissents are allowed.\(^ {28}\) Of course, no Council member may vote in the decision of any dispute to which it is a party.\(^ {29}\) The Council's decision may be appealed either to the International Court of Justice or to an ad hoc international tribunal.\(^ {30}\) In either case the judgment of the body selected is final and binding.\(^ {31}\)

The Convention also provides for two sanctions. The first sanction applies when the Council renders a final decision that an airline has not complied with a previous decision. Each member of the ICAO then must bar the airline from operating through the airspace above its territory.\(^ {32}\) The second sanction applies when a contracting state is found in default under Chapter XVIII of the Convention. The Assembly must suspend the member's voting power in the Assembly and the Council.\(^ {33}\)

The Transit and Transport Agreements provide the same procedure for the settlement of disputes as does the Convention.\(^ {34}\)

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 ... Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the ... Convention.\(^ {35}\)

With respect to sanctions, the Transit and Transport Agreements both provide that, after the Council has made appropriate findings and recommendations, "[I]f thereafter a contracting State concerned shall in the opinion of the Council unreasonably fail to take suitable corrective action, the Council may recommend to the Assembly ..."

---

26 See *Rules*, Arts. 5-15.
29 *Rules*, Art. 15(5).
30 Convention, Arts. 84, 85.
31 Convention, Art. 86.
32 Convention, Art. 87.
33 Convention, Art. 88.
34 Although the same procedure is available, it should be noted that the adjudicatory machinery provided for under the Transit and Transport Agreements presents certain problem areas. See Buergenthal, supra note 7, at 155-58.
35 Transit Agreement, Art. II, § 2; Transport Agreement, Art. IV, § 3.
that such contracting State be suspended from its rights and privileges under this Agreement until such action has been taken."

III. PAST DISPUTES

The ICAO has seldom been asked to settle international aviation disputes. In fact, the Council has been requested to consider only three disputes under Chapter XVIII of the Convention. The first dispute occurred between India and Pakistan in 1952 and concerned the interpretation and application of the Convention.\textsuperscript{27} India brought the issue before the Council, and the dispute was settled by negotiation between the parties. The resulting settlement was recorded in an agreement filed with the ICAO Secretariat.\textsuperscript{28}

The second dispute arose between the United Kingdom and Spain in 1967 concerning a prohibited area in the vicinity of Gibraltar.\textsuperscript{29} Although the matter was brought before the Council, consideration of the dispute was deferred indefinitely at the request of the parties in 1969.\textsuperscript{30}

The third dispute, again between India and Pakistan came before the ICAO Council on March 3, 1971\textsuperscript{41} and was fully adjudicated there. After an appeal was taken on the issue of the Council’s jurisdiction over the dispute, the International Court of Justice upheld the Council’s determination that it was vested with jurisdiction in the case.\textsuperscript{42}

That only one dispute has been fully adjudicated by the ICAO does not indicate that the adjudicatory machinery is ineffective;

\textsuperscript{27} Transit Agreement, Art. II, \S 1; Transport Agreement, Art. IV, \S 2. \textit{See note 19 supra.}

\textsuperscript{28} The disagreement stemmed from the proper interpretation and application of Articles 5, 6 and 9 of the Convention and Transit Agreement. \textit{See ICAO, Reporteur’s Guide to the Convention on International Civil Aviation, Article 84-2, ICAO Doc. 8900 (1971).}

\textsuperscript{29} For a discussion of this disagreement, see \textit{BUERGENTHAL, supra} note 7, at 123-97. Note also that at the date of this dispute, the \textit{Rules} were not in force.

\textsuperscript{30} This dispute involved the application and interpretation of Article 9 of the Convention [Chapter II, Flight over Territory of Contracting States, Art. 9—military exceptions and qualifications of the general provisions].

\textsuperscript{41} \textit{ACTION OF THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION, 68th Session, ICAO Doc. 8903C/994 at 27 (1969).}

\textsuperscript{42} For a detailed analysis of this dispute, see Fitzgerald, \textit{supra} note 1. \textit{See also Note, 14 HARV. INT’L L.J. 612 (1973).}

\textsuperscript{46} 1972 I.C.J. Rep. 46.
only that states prefer to settle disputes by diplomacy rather than by adjudication. Adjudication clearly has disadvantages not found in the diplomatic settlement of disputes: adjudication may result in protracted and costly litigation; the parties are not in complete control of the dispute; unwanted publicity may result; and an adverse decision may have more unfavorable results than a negotiated settlement.

IV. THE ICAO AS MEDIATOR

Although Article 84 of the Convention explicitly charges the Council with the authority to decide disputes, the language clearly points out that the Council shall do so only when such disputes "cannot be settled by negotiation." Article 6(1) of the Rules also emphasizes the Council's role as a mediator:

[T]he Council may, at any time during the proceedings and prior to the meeting at which the decision is rendered... invite the parties to the dispute to engage in direct negotiations, if the Council deems that the possibilities of settling the dispute or narrowing the issues through negotiations have not been exhausted.

Furthermore, Article 14(3) of the Rules authorizes the Council to "render any assistance likely to further the negotiations, including the designation of an individual or a group of individuals to act as conciliator during the negotiations."

The Jordan v. United Arab Republic (UAR) dispute demonstrates the ICAO's role as mediator. When the dispute arose, the Council was asked to intervene. Although the parties relied on the Convention, they never formally invoked the jurisdiction of the Council under Chapter XVIII. It is remarkable that the Council did not request the parties to adjudicate their dispute under the Convention, but rather asked only for more information on their

---

43 A writer took note of this fact with respect to air transport agreements. He stated that:

Although most of the nine hundred and forty air transport agreements in force between states provide for arbitration as a means for the settlement of disputes, there have only been two arbitration proceedings in relation to those agreements... Bradley, International Air Cargo Services: The Italy-U.S.A. Air Transport Agreement Arbitration, 12 McGill L.J. 312 (1966).

44 Convention, Art. 84. See note 15, supra.

respective positions. The Council induced the parties to enter into extensive discussions, and a settlement was finally reached without invoking the adjudicatory machinery of Chapter XVIII. This resolution was consistent with one commentator's statement that

[the primary role which the Council thus performs in dealing with complaints is to provide a forum where difficulties between Contracting States can be ironed out in an institutional setting that is particularly well suited for compromise solutions.]

Thus, it appears that the most important function the ICAO performs is mediation. Without the adjudicatory machinery, however, it is doubtful that the mediatorial services the ICAO performs would be as effective.

V. PROCEDURAL IRREGULARITIES

Since the second India v. Pakistan matter is the only case fully adjudicated before the ICAO, an examination of its procedural irregularities is helpful in a critical examination of the Council's procedural adjudicative machinery. India requested the International Court of Justice (ICJ) to declare the decision of the Council illegal, alleging that "the manner and method employed by the Council in reaching its decision render the decision improper, unfair and prejudicial to India, and bad in law." The ICJ, however, stated that the alleged procedural irregularities did not materially prejudice the case.

Several procedural irregularities were observed during the ICAO adjudication. Firstly, some Council members were not present for the entire oral hearings, yet they were allowed to join in the Council's decision without having read a transcript of the complete oral testimony. In addition, although neither party to the dispute

---

40 For a general discussion of these negotiations see Buergenthal, supra note 7, at 162-64.
41 See Fitzgerald, supra note 1, at 153.
42 See Buergenthal, supra note 7, at 162.
45 Id., 69-70.
voted in the final decision, both India and Pakistan were permitted to intervene and speak during the deliberations which followed the presentation of oral arguments. While the second irregularity is not as grave as the first, neither is consistent with usual standards of due process and fundamental fairness. Lastly, the decision on the jurisdiction issue consisted merely of voting on propositions without giving supporting reasons. In a separate opinion, Judge Petén noted, "[I]t is a striking fact that the decision is devoid of all statement of grounds and consists solely in the declaration to the effect that the Council did not accept the objection."

Despite the notation by the ICJ that the procedural irregularities were not materially prejudicial to the Council's decision, it is readily apparent that the ICAO needs to revise the Rules to insure adherence to traditional concepts of due process.

VI. THE POLITICAL QUESTION

Although the Council is empowered to act in a judicial capacity, it is obvious that representatives do not act as individuals. Rather, each acts on behalf of his member state. This unquestionably results in settlements based upon political considerations. Mr. Fitzgerald, after pointing out that in the second India v. Pakistan dispute some Council members wanted to defer the decision until they had received instructions from their governments, has stated:

It is a contradiction in terms to say that a state can be 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.

While it has been asserted that the politically oriented Council cannot properly fulfill its adjudicatory role, it is important to recall that the Council's primary role is that of mediator of disputes:

Most Council Representatives are better qualified to assist the

\[\text{53 Id.}\]
\[\text{54 I.C.J. Rep. 84 (1972).}\]
\[\text{55 The Legal Experts Committee of the ICAO has recognized that the structure of the Council is political rather than judicial. Hingorani, Dispute Settlement in International Civil Aviation, 14 Arb. J. 14, 20 (1959).}\]
\[\text{56 Fitzgerald, supra note 1, at 169.}\]
\[\text{57 See note 1 supra.}\]
parties in adjusting their dispute than they are in adjudicating it. They are appointed to the Council by their governments because of their technical, administrative, and diplomatic experience in civil aviation matters. It is often only a coincidence that some of them happen to have legal training as well. And, since the Council has very extensive legislative and administrative functions to perform, it is not surprising that those serving on it, because of their training, temperament, and the pressure of their work, are more interested in having differences resolved than in adjudicating them.  

Finally, should the Council render a political decision, an aggrieved party has the right to appeal the decision before a non-political forum, either the ICJ or an ad hoc international tribunal.  

CONCLUSION

The overall effectiveness of the ICAO adjudicative machinery warrants its continued utilization because, without it, the ICAO's primary function, mediation, might be seriously eroded. Procedural weaknesses as demonstrated by the India v. Pakistan dispute must be recognized and corrected to provide justice without dependence upon appellate bodies. The procedural weaknesses primarily stem from failure to adhere to the Rules, although new rules could be adopted to remedy defects. Due process, in the sense of procedural fairness, after all, is the desired result. The weaknesses, however, do not appear to be material, although they are distressing to the discriminating jurist. Although the ICAO Council is a distinctly political body, allowing political considerations to enter into the adjudicative function is unsatisfactory. It has been noted, however, that the Council's chief role is that of a mediator rather than an adjudicator. The 1952 India-Pakistan dispute, the Jordan-UAR action, and the striking absence of Article 84 actions demonstrates the effective nature of the ICAO's adjudicatory role. Moreover, an aggrieved party may appeal a Council's political decision to a non-political adjudicative body. The Council is actively engaged in mediation and adjudicates disputes only when no other recourse is available. The existence of adjudicative authority vested in the ICAO, however, gives the

58 See Buergenthal, supra note 7, at 195.
59 See note 30 supra.
Council additional leverage in negotiating settlements. Without this leverage disputants would have little inducement from the ICAO to settle disputes by negotiation.  

Although the ICAO's adjudicative machinery has minor flaws, when viewed from a proper perspective, the ICAO adjudicative machinery plays an effective and important role in the settlement of disputes.

---

60 See section IV and note 43, supra.