

INTERNATIONAL COURT OF JUSTICE

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PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

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APPEAL RELATING TO THE  
JURISDICTION  
OF THE ICAO COUNCIL

(INDIA *v.* PAKISTAN)

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*COUR INTERNATIONALE DE JUSTICE*

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MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

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APPEL CONCERNANT LA  
COMPÉTENCE  
DU CONSEIL DE L'OACI

(INDE *c.* PAKISTAN)



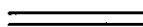
Abbreviated reference:  
*I.C.J. Pleadings,*  
*Appeal Relating to the Jurisdiction of the ICAO*  
*Council*

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Référence abrégée:  
*C.I.J. Mémoires,*  
*Appel concernant la compétence du Conseil*  
*de l'OACI*

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APPEL CONCERNANT LA  
COMPÉTENCE  
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(INDE c. PAKISTAN)



The present volume contains the record filed in the *Appeal Relating to the Jurisdiction of the ICAO Council*.

This case, entered on the Court's General List on 30 August 1971 under number 54, was the subject of a Judgment delivered on 18 August 1972 (*Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 46*).

The Hague, 1973.

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Le présent volume reproduit le dossier de l'affaire de l'*Appel concernant la compétence du Conseil de l'OACI*.

Cette affaire, inscrite au rôle général de la Cour sous le n° 54 le 30 août 1971, a fait l'objet d'un arrêt rendu le 18 août 1972 (*Appel concernant la Compétence de l'OACI, C.I.J. Recueil 1972, p. 46*).

La Haye, 1973.

**APPLICATION INSTITUTING  
PROCEEDINGS**

THE AGENT OF THE GOVERNMENT OF INDIA TO THE  
REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

The Hague, 30 August 1971.

I have the honour to submit herewith to the International Court of Justice an *Application on behalf of the Government of India* appealing from the decision rendered on 29 July 1971 by the Council of the International Civil Aviation Organization. I would be grateful if you could inform me in case there are any technical or formal defects in the Application which you would desire to be rectified.

*(Signed)* J. N. DHAMIJA,  
Ambassador of India at The Hague,  
Agent of the Government of India.

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## APPLICATION INSTITUTING PROCEEDINGS

The undersigned, being duly authorized by the Government of India ("the Applicant") hereby submits to the International Court of Justice an Application on behalf of the Applicant appealing from the decision rendered on 29 July 1971 by the Council of the International Civil Aviation Organization ("the Council") on the Preliminary Objections dated 28 May 1971 raised by the Applicant in the Application of the Government of Pakistan ("the Respondent") dated 3 March 1971 filed under Article 2 of the Rules of the Council for the Settlement of Differences ("the Council's Rules"), and in the Complaint of the Respondent dated 3 March 1971 filed under Article 21 of the said Rules.

*Subject of the dispute*

1. In the Application and the Complaint the Respondent claimed that under the Convention on International Civil Aviation, 1944 ("the Convention"), and the International Air Services Transit Agreement, 1944 ("the Transit Agreement"), Pakistan aircraft had the right to overfly India and to make stops in India for non-traffic purposes. The same substantial reliefs were claimed in both the Application and the Complaint. The subject of the dispute in this appeal relates to the jurisdiction of the Council to handle the matters presented by the Respondent's Application and Complaint, and raises the principal question whether a dispute relating to the termination or suspension of a treaty can be regarded as a dispute relating to its "interpretation" or "application".

*Jurisdiction*

2. The Applicant founds the jurisdiction of the Court on Article 84 of the Convention, Article II of the Transit Agreement, and Articles 36 and 37 of the Statute of the International Court of Justice.

*Brief statement of facts*

3. India and Pakistan are parties to the Convention. The right of a State's aircraft, not engaged in scheduled international air services, to overfly or make non-traffic stops in the territories of other States without the necessity of obtaining prior permission, is conferred by Article 5 of the Convention in the following words:

"Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing."



4. India and Pakistan are parties to the Transit Agreement. Article I of the Transit Agreement confers similar privileges, in respect of scheduled international air services, to overfly or make non-traffic stops in the territories of other States, and its material portion runs as follows:

“Section 1

Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:

- (1) The privilege to fly across its territory without landing;
- (2) The privilege to land for non-traffic purposes.

Section 2

The exercise of the foregoing privileges shall be in accordance with the provisions of the Interim Agreement on International Civil Aviation and, when it comes into force, with the provisions of the Convention on International Civil Aviation, both drawn up at Chicago on December 7, 1944.”

5. The Air Services Agreement dated 23 June 1948 was a bilateral treaty between the Applicant and the Respondent; and it dealt with the right to overfly each other's territory and to make stops in each other's territory for traffic as well as non-traffic purposes.

6. Military hostilities broke out between India and Pakistan in August/September 1965. As a result of the armed conflict, the Air Services Agreement of 1948 was suspended and was never revived. The traffic between the two countries continues to be handled by third country airlines since 1965. The Convention and the Transit Agreement as between the two States were also suspended, in relation to overflights and landings for non-traffic purposes. Consequently, no Pakistan aircraft, whether engaged or not engaged in scheduled international air services, was permitted to overfly India or make any stop for traffic or non-traffic purposes within India. The Applicant issued a Notification dated 6 September 1965 under the appropriate law of India, whereby it directed that “no aircraft registered in Pakistan, or belonging to or operated by the Government of Pakistan or persons who are nationals of Pakistan, shall be flown over any portion of India”.

7. The crucial point is that neither the Convention nor the Transit Agreement was revived at any time after September 1965 as between India and Pakistan in relation to overflights or landings for non-traffic purposes.

8. The armed hostilities ceased on 22 September 1965. On 10 January 1966 the Tashkent Declaration was signed by India and Pakistan. The two countries “agreed to consider measures towards the restoration of economic and trade relations, communications, as well as cultural ex-

changes between India and Pakistan". However, the hope of normalization of relations between India and Pakistan and the restoration of the *status quo ante* the armed conflict, unfortunately did not materialize. The central features of the Convention and the Transit Agreement are the two rights—(i) to overfly and (ii) to land for non-traffic purposes, both without the necessity of obtaining prior permission. These two rights were not restored as between India and Pakistan at any time after September 1965. The right to land in each other's territory for traffic or non-traffic purposes was not revived at all in any form; and Pakistan had to seek India's special *ad hoc* permission in case of any Pakistan aircraft seeking to land in India for non-traffic purposes. In February 1966 a new concession to overfly each other's territory was granted (a) on a provisional basis, (b) on the basis of reciprocity, and (c) subject to the permission of the Government concerned. Under the statutory law of India the Applicant issued a Notification dated 10 February 1966 amending the aforesaid earlier Notification dated 6 September 1965, so that the amended order of the Applicant now was that—

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“no aircraft registered in Pakistan, or belonging to or operated by the Government of Pakistan or persons who are nationals of Pakistan, shall be flown over any portion of India except with the permission of the Central Government and in accordance with the terms and conditions of such permission”.

The aforesaid understanding between the two countries relating to the newly conferred concession as regards overflying each other's territory, is hereinafter referred to as “the Special Agreement of 1966”.

9. The Special Agreement of 1966 continued in operation, both in law as well as in practice. On 4 February 1971 the Applicant withdrew the permission to Pakistan aircraft to overfly India, as it had the right to do under the Special Agreement of 1966. The permission was withdrawn in the following circumstances.

10. An Indian Airlines Fokker Friendship aircraft on a scheduled flight from Srinagar to Jammu with 28 passengers and 4 crew on board was hijacked by two persons among the passengers, and diverted at gun point and under the threat of a hand grenade to Lahore in Pakistan shortly after noon on 30 January 1971. The Applicant requested the Respondent the same afternoon for the immediate release of the passengers, crew, cargo, baggage and mail as well as the aircraft. Far from responding to the Applicant's request, the Respondent behaved in a most reprehensible manner and its conduct amounted to the very negation of all the aims and objectives, the scheme and provisions, of the Convention and the Transit Agreement and violated all international conventions and obligations bearing on the subject. The conduct of the Respondent left no doubt that the Respondent was an accomplice or accessory after the crime, if not before the crime. At about 20.30 hours (I.S.T.) on 2 February 1971 the two criminals were allowed to blow up the hijacked Indian

aircraft. The aircraft was totally destroyed in full view of the airport authorities, troops and police at Lahore airport which is a protected area, and at a time when Martial Law was (as it still is) in force in Pakistan.

11. The Applicant strongly protested against the conduct of the Respondent in relation to the hijacking incident and claimed damages for the destroyed aircraft, cargo, baggage and mail. When no positive and satisfactory response was made by the Respondent, on 4 February 1971 the Applicant ordered withdrawal, with immediate effect, of the permission (which had been granted under the Special Agreement of 1966) for the overflying of Pakistan aircraft over the territory of India. The Respondent had shown no regard for the most elementary notions of safety in civil aviation, and made it impossible for Indian aircraft to overfly Pakistan. The Applicant forthwith suspended overflights of its own aircraft over the Pakistan territory in view of the present and imminent danger to civil aviation created by the conduct of the Respondent.

12. On 3 March 1971 the Respondent submitted as aforesaid the Application and the Complaint to the Council. In the Application the Respondent alleged that the refusal of the Applicant to let Pakistan aircraft overfly India amounted to a disagreement between the Applicant and the Respondent relating to the "application" of the Convention and the Transit Agreement; and in the Complaint the Respondent alleged that the Applicant's conduct amounted to "action under the Transit Agreement".

13. The Secretary-General of the International Civil Aviation Organization, vide his letter No. LE 6/1 dated 8 April 1971 and his letter No. LE 6/2 dated 8 April 1971, invited the Applicant to present its Counter-Memorials to the Respondent's Application and Complaint.

14. Since the Applicant was advised that the Council had no jurisdiction to handle the matters presented by the Respondent's Application and Complaint, the Applicant filed on 28 May 1971 a single set of Preliminary Objections to the jurisdiction of the Council, under Article 5 of the Council's Rules, to both the Application and the Complaint.

15. The Council's jurisdiction is limited to disagreement relating to the interpretation or application of the Convention or the Transit Agreement, and does not extend to any dispute or disagreement relating to the termination or suspension of the Convention or the Transit Agreement by one State *vis-à-vis* another State. This is clear from Article 84 of the Convention, Section 2 of Article II of the Transit Agreement, and paragraph (1) of Article 1 of the Council's Rules.

16. Article 84 of the Convention runs as follows:

"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."

17. Section 2 of Article II of the Transit Agreement runs as follows:

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

18. Paragraph (1) of Article I of the Council's Rules runs as follows:

"(1) The Rules of Parts I and III shall govern the settlement of the following disagreements between Contracting States which may be referred to the Council:

- (a) any disagreement between two or more Contracting States relating to the interpretation or application of the Convention on International Civil Aviation (hereinafter called 'the Convention') and its Annexes (Articles 84 to 88 of the Convention);
- (b) any disagreement between two or more Contracting States relating to the interpretation or application of the International Air Services Transit Agreement and of the International Air Transport Agreement (hereinafter respectively called 'Transit Agreement' and 'Transport Agreement') (Article II, Section 2 of the Transit Agreement; Article IV, Section 3 of the Transport Agreement)."

19. The Council's jurisdiction to deal with a complaint is limited to cases where action is taken by a State under the Transit Agreement. This is clear from Section 1 of Article II of the Transit Agreement and paragraph (2) of Article I of the Council's Rules.

20. Section 1 of Article II of the Transit Agreement runs as follows:

"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. If 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 of the above-mentioned Organi-

zation that such contracting State be suspended from its rights and privileges under this Agreement until such action has been taken. The Assembly by a two-thirds vote may so suspend such contracting State for such period of time as it may deem proper or until the Council shall find that corrective action has been taken by such State."

21. Paragraph (2) of Article 1 of the Council's Rules runs as follows:

"The Rules of Parts II and III shall govern the consideration of any complaint regarding an action taken by a State party to the Transit Agreement and under that Agreement, which another State party to the same Agreement deems to cause injustice or hardship to it (Article II, Section 1), or regarding a similar action under the Transport Agreement (Article IV, Section 2)."

22. In the Preliminary Objections the Applicant submitted that the Council should dismiss both the Application and the Complaint on the grounds that they were incompetent and not maintainable, and that the Council had no jurisdiction to hear them or handle the matters contained therein, because—

- (a) there was no disagreement between the Applicant and the Respondent relating to the interpretation or application of the Convention or the Transit Agreement;
- (b) no action had been taken by the Applicant under the Transit Agreement;
- (c) the question of Indian aircraft overflying Pakistan and Pakistan aircraft overflying India was governed by a Special Régime and not by the Convention or the Transit Agreement; and
- (d) the Council had no jurisdiction to handle any dispute under a Special Régime or a Bilateral Agreement.

23. The Respondent's reply to the Applicant's Preliminary Objections, —both the written reply as well as the reply at the oral hearing on the Preliminary Objections before the Council—was that any dispute between two States relating to the termination or suspension of the Convention or the Transit Agreement should be regarded as a disagreement relating to the interpretation or application of the Convention or the Transit Agreement and was consequently within the jurisdiction of the Council. As regards the Complaint, the Respondent further submitted that termination or suspension of the Transit Agreement amounted to action under that Agreement.

24. The Council heard both the Applicant and the Respondent on 27 and 28 July 1971. After the conclusion of the hearing of the case, at a meeting of the Council on 29 July 1971 the President of the Council expressed his intention of putting to vote the following propositions based on the Applicant's Preliminary Objections:

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

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

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

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

25. The Indian delegation immediately pointed out that the formulation of the questions in the manner indicated above was improper, prejudicial to India and contrary to the Council’s Rules. The propositions before the Council should have been formulated in a positive way, viz., that the Council had jurisdiction to deal with the Respondent’s Application and Complaint. Despite this valid objection by the Indian Delegation, the President of the Council took votes on the propositions as he had formulated them earlier, though he did not put to vote the third proposition under Case 1 in view of the Respondent’s statement, made after the hearing and at the time of voting, that it did not seek relief from the Council under the Bilateral Agreement. While the majority of the members of the Council voted against propositions (i) and (ii), only 13 out of 27 members voted against proposition (iv). The draft Minutes of the 6th Meeting of the Council maintained that the Council’s decision as the result of the votes was the rejection of the propositions (i), (ii), and (iv) and hence the affirmation of the Council’s competence to consider the Respondent’s Application and Complaint.

26. The Government of India has the honour, by the present Application, to exercise, within the time-limit permitted under Article 84 of the Convention (which also applies under the Transit Agreement) the right of appeal from the above-mentioned decision of the Council. A certified copy of the decision, as recorded in the draft Minutes of the Council, is attached to this Application.

*Grounds of objections to Council’s decision*

27. The Applicant submits that the decision of the Council is erroneous and the Council should have upheld the Preliminary Objections filed by the Applicant against the Respondent’s Application and Complaint. The

Council should have held that the Application and the Complaint were incompetent and not maintainable and that the Council had no jurisdiction to hear them or to handle the matters contained therein, and should have upheld the following submissions of the Applicant:

- (a) There is no disagreement between the Applicant and the Respondent relating to the interpretation or application of the Convention or the Transit Agreement. The words "interpretation" and "application" postulate and presuppose the continued existence and operation of the treaty as between two States. When the treaty is terminated, or suspended in whole or in part, as between two States, any dispute relating to such termination or suspension cannot be referred to the Council, since in such a case no question of "interpretation" or "application" can possibly arise, there being no treaty in operation as between the two States. The termination or suspension of an international treaty represents the exercise by a State of its right under international law and that right is *de hors* the treaty, as was held by this Hon'ble Court in the Advisory Opinion of 21 June 1971 (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*). The legal concept of termination or suspension of a treaty is wholly distinct and different from the concept of interpretation or application of the treaty; and the Council's jurisdiction does not embrace the former but is strictly limited to the latter. Therefore, it is irrelevant to decide on the facts (i) whether the case is one of termination or of suspension, and (ii) whether the termination or suspension took place in September 1965 or in February 1971. However, the correct view of the matter according to the Applicant is that the Convention and the Transit Agreement were suspended as between the Applicant and the Respondent by both the States in September 1965 in relation to overflights and landings for non-traffic purposes, and they have never been revived as between the two countries; and the Applicant and the Respondent have accepted and acted on the basis of this position since September 1965; and that if the material parts of the two treaties are at all to be regarded as being in operation between the two countries at the beginning of 1971, they were suspended by the Applicant on 4 February 1971 since there were material breaches of the two treaties by the Respondent, which specially affected the Applicant. A dispute relating to such suspension could not fall within the jurisdiction of the Council.
- (b) As regards the Complaint, it is clearly incompetent and not maintainable, since no action has been taken by the Applicant under the Transit Agreement. The Applicant had suspended the Transit Agreement *vis-à-vis* the Respondent. Such suspension was *de hors* the treaty and represented the exercise of a right under a well-settled rule of international law, and could not possibly be regarded as action under the Transit Agreement.
- (c) The question of Indian aircraft overflying Pakistan and Pakistan

aircraft overflying India is governed, not by the Convention or the Transit Agreement, but by the Special Régime of 1966. This Special Régime was accepted by both the Applicant and the Respondent from February 1966 onwards as constituting a Bilateral Agreement after the suspension or termination (as between the two States) of the Convention and the Transit Agreement in September 1965. At the time of voting by the Council members, the Respondent apparently accepted the position that the Council had no jurisdiction to handle any dispute under a Special Régime or a Bilateral Agreement. But the Council overlooked that where such a Special Régime exists, as it does in the present case, no question of interpretation or application of the Convention or the Transit Agreement can possibly arise.

28. The decision of the Council was further vitiated by the fact that the questions were framed in the wrong manner as indicated above. Further, the decision of the Council as regards the Complaint is directly contrary to Article 52 of the Convention which provides that "decisions by the Council shall require approval by a majority of its members". The Council's decision that it had jurisdiction to consider the Respondent's Complaint was not supported by a majority of the members of the Council. Assuming the Council's decision as regards the Complaint is held to have been validly arrived at on the votes cast, the Applicant submits that there was gross miscarriage of justice as a result of the question having been wrongly framed. If the question had been rightly framed and if the proposition that the Council had jurisdiction to consider the Respondent's Complaint had been put to vote, the decision of the Council would have been in favour of the Applicant on the same pattern of voting. The decision of the Council was further vitiated by another fact. The Council was acting as a judicial body and each of its members had to discharge his duty as a Judge. Although some of the members asked for time to consider the issues of far-reaching importance which had been raised by the Applicant and asked for verbatim notes of the oral hearing, *their request was turned down, with the result that some of the Judges were unable to participate in the deliberations and in the final decision of the Council.* In the circumstances set out in this paragraph, the decision of the Council cannot stand and must be regarded as having no validity or effect.

29. Having regard to Article 67 read with Article 32 of the Rules of Court, the Applicant has set out here only a succinct statement of the facts and the grounds on which the appeal is preferred. The facts and grounds will be elaborated and developed in the Memorial to which the evidence and the relevant documents will be annexed.

#### *Statement of claim*

30. WHEREFORE, MAY IT PLEASE THE COURT TO ADJUDGE AND DECLARE, after such proceedings and hearing as the Court may see fit to direct, and whether the Respondent is present or absent, that the aforesaid decision of the Council is illegal, null and void, or erroneous, on the following grounds or any others:



- A. The Council has no jurisdiction to handle the matters presented by the Respondent in its Application and Complaint, as the Convention and the Transit Agreement have been terminated or suspended as between the two States.
- B. The Council has no jurisdiction to consider the Respondent's Complaint since no action has been taken by the Applicant under the Transit Agreement; in fact no action could possibly be taken by the Applicant under the Transit Agreement since that Agreement has been terminated or suspended as between the two States.
- C. The question of Indian aircraft overflying Pakistan and Pakistan aircraft overflying India is governed by the Special Régime of 1966 and not by the Convention or the Transit Agreement. Any dispute between the two States can arise only under the Special Régime, and the Council has no jurisdiction to handle any such dispute.

31. The Applicant reserves the right to request the Court to declare and adjudge with respect to such further and other matters as the Applicant may deem appropriate to present to the Court.

The undersigned has been appointed by the Government of India as its Agent for the purpose of the Application and all proceedings thereon.

The address for service at the seat of the Court to which all communications relating to this case should be sent is, c/o the Embassy of India at The Hague.

*(Signed)* J. N. DHAMIJA,

Ambassador of India at The Hague,  
Agent of the Government of India.

I, Swaran Singh, the Minister of External Affairs, Government of India, do certify that H.E. Ambassador J. N. Dhamija, has been duly appointed as the Agent for the Government of India in proceedings instituted by this Application.

*[Seal]*

*(Signed)* Swaran SINGH.

## ANNEX

## COUNCIL—SEVENTY-FOURTH SESSION

*Minutes of the Sixth Meeting*

(The Council Chamber, Thursday, 29 July 1971, at 10.00 hours)

## CLOSED MEETING

(DRAFT)

President of the Council: Mr. Walter Binaghi  
 Secretary: Dr. Assad Kotaite, Secretary-General

*Present:*

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

*Also Present:*

Dr. J. Machado (Alt.)

Brazil

Mr. L. S. Clark (Alt.)	Canada
Mr. B. S. Gidwani (Alt.)	India
Mr. M. García Benito (Alt.)	Spain
Mr. N. V. Lindemere (Alt.)	UK
Mr. F. K. Willis (Alt.)	US
Mr. A. A. Khan (Obs.)	Pakistan
Mr. H. Rashid (Obs.)	Pakistan
Mr. Magsood Khan (Obs.)	Pakistan

*Secretariat:*

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

## SUBJECTS DISCUSSED AND ACTION TAKEN

*Subject No. 26: Settlement of Disputes between Contracting States**Pakistan versus India—Suspension by India of Flights of Pakistani Aircraft over Indian Territory*

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

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

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

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

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

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

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

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

4. The President noted that only parties to the Transit Agreement<sup>1</sup> (except, of course, India) were eligible to vote on the second proposition,

<sup>1</sup> The following Council members are parties to the Transit Agreement: Argentina, Australia, Belgium, Canada, the Czechoslovak Socialist Republic, the Federal Republic of Germany, France, India, Japan, Mexico, Nicaragua, Nigeria, Norway, Senegal, Spain, Tunisia, the United Arab Republic, the United Kingdom, the United States of America.

but the statutory majority would still be required for a decision. The result of the vote was as follows:

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

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

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

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

7. The result of the foregoing votes was the rejection of propositions (i), (ii) and (iv) and hence the reaffirmation of the Council's competence to consider the Application and Complaint of Pakistan. Explanations of vote were given by the Representatives of the United States, Senegal, Spain, Indonesia, Canada, Argentina, Tunisia and the People's Republic of the Congo, explanations of abstention by the Representatives of the United Kingdom, the Czechoslovak Socialist Republic and the Union of Soviet Socialist Republics; these will be reproduced in full in Part II of these Minutes (Discussion). The Indian Delegation gave notice that India would appeal the decisions just taken to the International Court of Justice because the manner and method of the voting had been wrong and

expressed the view that until judgment had been rendered by the Court no further action was possible.

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

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**Appendix****STATEMENT BY MR. B. S. GIDWANI (INDIA)**

I shall say only a few words, but to my mind these words merit the closest consideration. For the first time in the history of this Council it has been called upon to decide the question of the limits of its jurisdiction. It is a question of the most far-reaching importance involving the consideration of weighty arguments, principles of international law, and judgments and advisory opinions of the International Court of Justice. It must not be forgotten that the Council is meeting today as a judicial Court entrusted with the task of reaching a judicial decision on points of international law and the ambit of its jurisdiction as an international judicial authority. Even highly trained judicial minds would require time and the most anxious consideration before coming to a fair and correct decision on an issue like this. It has been admitted that some of the Members would like to have the assistance of their respective Governments in evaluating the arguments urged at the hearing. Some Members have specifically stated that without an opportunity of discussing the matter with their Governments or Administrations, they would have to come to a decision not on the basis of the arguments urged, but on the basis of the pleadings filed earlier relating to the preliminary objections and the treaties and the rules applicable thereto. This would make the oral hearing an idle ceremony if time is not allowed to the Members to study the verbatim records and take such assistance from their Governments or Administrations as they may require. If the Council were to come to an immediate decision on an issue of this character, without waiting for the verbatim records of the arguments and without waiting for the respective Governments of the Member States to consider those verbatim records of the full arguments, I am constrained to say that the Council would be failing to discharge its duty and to function as a judicial body.

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

If unfortunately the administrative set-up of the Secretariat is unable to produce the verbatim records within 24 hours, as is common with

many other organs of the United Nations, that drawback has necessarily to be accepted as a part of the procedural problems of the Council and the time involved in the production of the necessary verbatim records should not and cannot be construed as delay.

I fail to understand how an international tribunal like this Council, after detailed arguments of such far-reaching importance, can possibly come to a quick decision without full consideration by the respective Governments of, the arguments advanced here of which the Governments so far know nothing.

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

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

It is my suggestion, therefore, that the final decision should be arrived



at after the verbatim records are made available to the Members of the Council and, through them, to their respective Governments.

Montreal, 29 July 1971.

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