

President Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I much regret I am unable to agree that Article 84 of the Convention read with Articles 5 (4), 15 and 18 of the Rules for the Settlement of Differences provides a right of appeal against a decision of the Council of ICAO rejecting a preliminary objection to its competence to handle an application or complaint. It seems to me that the considerations that have impelled the Court to arrive at the opposite conclusion do not carry the matter any further than the desirability of a provision to that effect. However strong that desirability may be it cannot serve as a substitute for the lack of such a provision in the Convention read with the relevant rules. The entire scheme of the Rules excludes the possibility of an appeal against a decision of the Council rejecting a preliminary objection against its competence. The remedy for the correction of this situation, if a correction should be desired, would be by way of amendment of the Convention and the Rules, and not by reading into them a meaning which they are not capable of bearing.

Nor am I able to agree that Section 1 of Article II of the Transit Agreement contemplates only cases of injustice or hardship occasioned by action which is lawful but is prejudicial, and that to the extent to which a complaint under that Section alleges unlawful action as the cause of the injustice or hardship complained of, it becomes assimilable to the case of an application for the purposes of appealability to the Court.

In view, however, of the finding of the Court that the Council of ICAO has jurisdiction to entertain the Application and Complaint laid before it by the Government of Pakistan on 3 March 1971, a finding with which I am in entire agreement, my dissent on the question of the admissibility of India's appeal assumes a purely academic aspect.

A large part of the submission of India's counsel to the Court was devoted to the exposition of irregularities of procedure alleged to have been committed by the Council of ICAO in dealing with India's Preliminary Objection to its assumption of jurisdiction in respect of Pakistan's Application and Complaint. The purpose of this exposition was to persuade the Court to hold that the proceedings before the Council were vitiated by these alleged irregularities and that the decision of the Council on India's Preliminary Objection was thus rendered void and of no effect and should consequently be set aside.

These alleged irregularities fall broadly into two categories; those relating to the "manner and method" of arriving at the decision appealed against, and those resulting from failure to comply with the requirements laid down in Article 15 of the Rules for the Settlement of Differences.

As regards the first category, India's objections and suggestions were thoroughly debated in the Council (Memorial of India, Annex E, (e), Discussion, paras. 50-84) and the rulings of the President were upheld by

the Council. Nothing urged by India's counsel in his submissions to the Court in this context has served to raise any doubt in my mind concerning the correctness and propriety of the President's rulings and of the procedure followed by the Council.

As regards the second category, the brief answer to India's objections is that Article 15 of the Rules for the Settlement of Differences has no relevance to a decision on a preliminary objection. The subject of Preliminary Objection and Action Thereon is dealt with in Article 5 of the Rules. This Article is comprised in Chapter III of the Rules, which deals with Action upon Receipt of Applications. The Article is self-contained and comprehensive. The procedure for dealing with a preliminary objection is prescribed in paragraph (4) of Article 5 which runs as follows: "If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question as a preliminary issue before any further steps are taken under these Rules." This is exactly what the Council did.

Article 15 of the Rules is contained in Chapter IV which prescribes the procedure to be followed in respect of "Proceedings", which start after a preliminary objection has been disposed of and which relate to the merits of the case. Article 15 which is headed "Decision" obviously has reference to a decision on the merits, and does not relate back to a decision on a preliminary objection disposing of the question as a preliminary issue before the commencement of proceedings on the merits.

The record of the discussion before the Council does not show that India urged compliance by the Council with the requirements of Article 15. Even before the Court some of the alleged irregularities were mentioned for the first time in the oral submissions of counsel and the list was expanded in reply. Be that as it may, it is clear that Article 15 of the Rules has no application to a decision on a preliminary objection. The Council rightly proceeded on that assumption and not a single member gave expression to a difference of view.

Judge LACHS makes the following declaration:

*Feeling as I do that there are certain observations which should be made on some aspects of the Judgment, I avail myself of the right conferred by Article 57 of the Statute of the Court and append hereunder the following declaration.*

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While I fully agree with the findings of the Court concerning its competence to entertain the appeal, I wish to comment further on the interpretation of Article 84 of the Chicago Convention on International Civil