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THE ICAO COUNCIL AS A DISPUTE SETTLEMENT BODY: THEORETICAL AND PRACTICAL ISSUES

INTRODUCTION. *Achieving the goals of international legal regulation of a particular area of inter-State relations depends mainly on the existence of an effective dispute settlement mechanism. In the field of international air law, such powers are attributed to the Council of the International Civil Aviation Organization (hereinafter - ICAO), established under the Convention on International Civil Aviation of 1944 (hereinafter – the Chicago Convention).*
The Council's activities in this area cannot be called fruitful. Since the establishment of ICAO in 1947, the Council has not issued a single decision on disputes that have been brought before it. States have proved to be reluctant to use the dispute settlement mechanism established under the Chicago system. This is mainly due to the imperfection of the relevant provisions of the Chicago Convention, which for many years have been the object of criticism in international legal doctrine. Moreover, the provisions of the Chicago Convention do not answer the question regarding the legal nature of the Council as a dispute settlement body and the limits of its competence. The issue of the Council's competence has been considered twice by the International Court of Justice of the United Nations (hereinafter - ICJ). The judgments issued by the ICJ have not, in our view, resolved the existing legal problems but instead have contributed to further ambiguity. Furthermore, this topic has become especially relevant in light of the fact that in March 2022 the Netherlands and Austria initiated a dispute settlement procedure in the Council under Article 84 of the Chicago Convention against Russia for the downing of Malaysian civil aircraft in 2014. In these circumstances, the Council's de facto role in resolving international civil aviation disputes needs to be clarified
MATERIALS AND METHODS. *This paper examines the provisions of the Chicago international legal regime governing dispute settlement in the Council. The authors also analyse the established State practice in the application of Chapter XVIII of the Chicago Convention. Particular attention is given to legal doctrine, where several international legal concepts emerge to resolve existing legal problems. The methodological basis consists of general scientific and special research methods, including analysis, synthesis, systematisation, as well as formal-legal, formal-logical and critical-legal methods.*

RESEARCH RESULTS. *The Council as a dispute settlement body has a dual legal nature. This is reflected in the fact that in procedural terms the Council is similar to international judicial bodies in many aspects, but a number of features concerning the composition of the Council and the opportunity to appeal the decision issued prevent it from qualifying as a judicial body. This calls into question the power of the Council to issue legally binding decisions and the existence of its jurisdiction per se. State and Council practice also confirms that the Council under Chapter XVIII of the Chicago Convention acts as a mediator, which contrasts with the recent decision of the ICJ on the Qatar Air Blockade case, under which the Council has jurisdiction. Moreover, the Chicago Convention provides sanctions for non-compliance with Council decisions, which does not allow the Council to be considered as a mediator. Equally controversial was the ICJ finding that the Council, in settling disputes arising from the Chicago Convention (the Transit Agreement or other treaties), could examine issues outside their scope.*

DISCUSSION AND CONCLUSIONS. The unclear legal status of the Council as a dispute settlement body, which was promoted by the controversial decision of the ICJ on the Qatar Air Blockade case, makes the mechanism under Chapter XVIII of the Chicago Convention highly ineffective. It is doubtful that states, consistently seeking legal certainty, would initiate proceedings in the Council under the existing international legal framework. As a result of the analysis of international legal concepts that propose the modernisation of the Chicago Convention dispute settlement mechanism, the authors conclude that either the establishment of a permanent arbitral institution within the structure of ICAO or the modification of the text of Chapter XVIII of the Chicago Convention so that the ICAO Council would act only as a mediator would be the preferable options. The authors share the position of lawyers who point to the need to negotiate new universal international law norms in the field of air law.

KEYWORDS: *ICAO, Chicago Convention, dispute settlement in international air law, International Court of Justice, ICAO Council competence, Qatar Air Blockade, progressive development of international air law*

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СОВЕТ ИКАО КАК ОРГАН ПО РАЗРЕШЕНИЮ СПОРОВ: ТЕОРЕТИЧЕСКИЕ И ПРАКТИЧЕСКИЕ ПРОБЛЕМЫ

ВВЕДЕНИЕ. *Достижение целей международно-правового регулирования определенной сферы межгосударственных отношений во многом зависит от наличия эффективного механизма урегулирования споров. В отрасли международного воздушного права подобные полномочия отнесены к компетенции Совета Международной организации гражданской авиации (далее – ИКАО), учреждённой в соответствии с Конвенцией о международной гражданской авиации 1944 г. (далее — Чикагская конвенция).*

Деятельность Совета в этой области нельзя назвать плодотворной. С момента учреждения ИКАО в 1947 г. Совет не вынес ни одного решения по спорам, переданным на его рассмотрение. Государства, как показывает практика, неохотно прибегают к установленному в рамках Чикагской системы механизму разрешения споров. Во многом это объясняется несовершенством соответствующих положений Чикагской конвенции, которые уже на протяжении многих лет являются объектом критики в международно-правовой доктрине. Более того, положения Чикагской конвенции не дают однозначного ответа на вопрос о правовой природе Совета ИКАО как органа по разрешению споров и пределах его компетенции. Вопрос компетенции Совета дважды рассматривался в Международном суде ООН. Вынесенные им решения, на наш взгляд, не разрешили существующие правовые проблемы, а, напротив, внесли еще большую неясность. Более того, особую актуальность данная тема приобрела в свете того, что в марте 2022 г. Нидерланды и Австрия инициировали в Совете процедуру разрешения споров по ст. 84 Чикагской конвенции в отношении России в связи с крушением малазийского гражданского воздушного судна в 2014 г. В данных обстоятельствах возникает необходимость уточнения сложившегося de facto порядка деятельности Совета ИКАО в сфере разрешения международных споров в области гражданской авиации.

МАТЕРИАЛЫ И МЕТОДЫ. *В данной работе исследуются положения Чикагской конвенции, акты органов ИКАО и решения Международного суда ООН, которые в своей совокупности формируют существующий международно-правовой режим разрешения споров в Совете. Авторы также рассматривают сложившуюся практику государств по применяю главы XVIII Чикагской конвенции. Отдельное внимание уделено доктринальным источникам, в рамках которых возникают международно-правовые концепции, призванные разрешить существующие правовые проблемы. Методологическую основу составляют общенаучные и специальные методы исследования, которые включают в себя анализ, синтез, систематизацию, а также формально-юридический, формально-логический и критико-правовой методы.*

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Совет как орган по разрешению споров имеет двойственную правовую природу. Выражается это в том, что с точки зрения процессуальных аспектов Совет во многом схож с международными судебными органами, однако ряд особенностей, касающихся состава Совета и возможности обжалования вынесенного решения, не позволяют его квалифицировать в таком качестве. В этой связи возникает вопрос о возможности вынесения Советом юридически обязывающих решений и наличии у него юрисдикции per se. Практика государств и Совета также подтверждает, что Совет в рамках главы XVIII Чикагской конвенции фактически выполняет функции посредника, что контрастирует с недавним решением Международного суда ООН по делу о воздушной блокаде Катара, из которого следует, что Совет обладает юрисдикцией. Более того, Чикагская конвенция предусматривает наложение санкций за невыполнение решений Совета, что не позволяет рассматривать Совет как посредника. Не менее спорным является и вывод Международного суда ООН о том, что Совет, при разрешении споров, вытекающих из Чикагской конвенции (Соглашения о транзите или иных договоров), может рассматривать вопросы, находящиеся за пределами их сферы регулирования.*

ОБСУЖДЕНИЯ И ВЫВОДЫ. *Неясный правовой статус Совета как органа по разрешению споров, установлению которого способствовало неоднозначное решение Международного суда ООН по делу о воздушной блокаде Катара, делает установленный в главе XVIII Чикагской конвенции механизм крайне неэффективным. Маловероятно, что государства, последовательно стремясь к правовой определенности, будут инициировать разбирательства в Совете при существующем международно-правовом регулировании. В результате анализа международно-правовых концепций, в рамках которых предлагается модернизировать механизм разрешения споров по Чикагской конвенции, авторы пришли к выводу, что наиболее предпочтительным вариантом будет либо учреждение постоянно действующего арбитражного учреждения в рамках структуры ИКАО, либо изменение текста главы XVIII Чикагской конвенции таким образом, чтобы Совет ИКАО выполнял исключительно посреднические функции в качестве органа по разрешению споров. Авторы разделяют позицию юристов-международников, которые отмечают необходимость согласования новых универсальных международно-правовых норм в области международного права.*

КЛЮЧЕВЫЕ СЛОВА: *ИКАО, Чикагская конвенция, разрешение споров в международном воздушном праве, Международный суд ООН, компетенция Совета ИКАО, воздушная блокада Катара, прогрессивное развитие международного воздушного права*

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1. ICAO Council as a dispute settlement body: general characteristics

1.1. Dispute Resolution under the Chicago System

Provisions concerning the dispute settlement procedure are contained in Chapter XVIII of the Chicago Convention. As laid down in Article 84, "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 negotiations, it shall, on the application of any State concerned in the disagreement, be decided by the Council". A State which is the disputing party cannot take part in its settlement in the Council. It is also possible to appeal a decision of the Council to the ICJ or an ad hoc arbitral tribunal. If one party does not recognize the competence of the ICJ or the parties are unable to agree on an arbitral tribunal, the dispute shall be settled by an arbitral tribunal constituted pursuant to Article 85 of the Chicago Convention.

Chapter XVIII also provides rules to ensure the implementation of Council decisions. So, the States, based on Article 87, committed themselves not to make their airspace available to airlines that do not comply with the final decisions of the Council. Moreover, if States do not fulfil this obligation, then the Assembly has the right to suspend the voting rights of such a State in the Council and the Assembly.

The above mechanism is used not only to resolve disputes arising from the provisions of the Chicago Convention. The provisions of the International Air Services Transit Agreement of 1944 and the International Air Transport Agreement of 1944 attribute to the competence of the ICAO Council the power to settle disputes arising from the application and interpretation of these treaties. Subsequently, some international treaties also include a reference to Chapter XVIII of the Chicago Convention as the rules establishing the procedure for dispute settlement under these treaties. As a result, the ICAO Council transformed itself into a body tasked with resolving various disputes in the field of civil aviation, not just those arising under the Chicago Convention[1]. The expanded powers of the ICAO Coun-

[1] Tovmasyan M.D. Aktual'nye problemy peresmotra konventsii o mezhdunarodnoi grazhdanskoi aviatsii: Chikagskoi konventsii 1944 goda. Diss...kand. yurid. Nauk [Relevant issues for the revision of the 1944 Convention on International Civil Aviation. Thesis for the degree of Candidate of Juridical Sciences]. Moscow. 2001. P. 112.

cil were confirmed at the first session of the ICAO Assembly in 1947[2].

Legal doctrine identifies several technical and legal drawbacks in Chapter XVIII of the Chicago Convention [Balakhovskii 1986:162-163]. Firstly, Article 84 enshrines that the dispute settlement procedure of the Council may be initiated at the request of "any State concerned in the disagreement" and that an appeal may be lodged by "any contracting State". Based on this, some lawyers point to a conflict: a dispute can be referred to the Council by any State, but only a State party to the Chicago Convention has the right to appeal the final decision of the Council. Secondly, Article 84 provides for an option to appeal the Council's decision to the ICJ or an ad hoc arbitral tribunal. Still, it is argued that the wording of Article 85 implies[3] that recourse to an arbitral tribunal is only possible if one of the parties to the dispute does not recognize the competence of the ICJ.

In our opinion, the above critical assessment of the provisions of the Chicago Convention is not justified. According to Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of the treaty should be interpreted in their context. Consequently, the phrase "any State concerned in the disagreement" should be considered synonymous with "any contracting State" that is a party to the dispute. Otherwise, based on a restrictive interpretation of these provisions, a situation may emerge where a dispute arises between two or more States parties to the Chicago Convention over its interpretation and application; still, the Council will proceed to resolve it at the request of a third state. Moreover, this State, not being a party to the Chicago Convention, should be "involved in this dispute", but it is not entirely clear on what legal grounds because it does not have the rights and does not bear obligations under this agreement. In our opinion, such an interpretation leads to clearly absurd results. From this, we can conclude that only a State party to the Chicago Convention can initiate the consideration of disputes in the ICAO Council.

The problem of the possibility of appealing the Council's decision to an ad hoc tribunal also seems far-fetched. Article 84 unambiguously establishes a dispositive norm allowing States to appeal the Council's decision either to the ICJ or to an ad hoc arbitral tribunal. In the light of this provision, it would not be entirely correct, in our view, to assert any hierarchy between these avenues of appeal based solely on the wording of Article 85.

Moreover, given that all States Parties to the Chicago Convention are members of the UN and, therefore, ipso facto parties to the ICJ Statute, it is implausible that specific problems with the practical application of the provisions discussed above will arise [Vaugeois 2016:2]. The wording of Article 84 is a clear example of how irrelevant the norms of the Chicago Convention are to the regulation of contemporary international relations in the use of airspace.

1.2. ICAO Rules for the Settlement of Differences

In 1957, the ICAO Council approved the Rules for the Settlement of Differences (hereinafter - Rules)[4]. Some ICAO documents explicitly state that they were developed in strict accordance with the Rules of Court of the International Court of Justice (hereinafter – ICJ Rules)[5]. The Rules provide for the memorials, counter-memorials. The respondent has the opportunity to submit a preliminary objection to the competence of the ICAO Council to consider the issue presented by the applicant. The parties may submit additional written proceedings followed by an oral hearing stage in the case.

A number of the Rules provisions can be used by the Council in order to avoid making a final decision on a case [Bae 2013:74]. So, based on Article 6 of the Rules, the Council, after presenting a counter-memorial, may call the parties to direct negotiations. According to Article 14 of the Rules, the Council may resort to this method of dispute settlement at any stage of the proceedings. In any case, the Council can set a time frame for the completion of negotiations. As will be shown below, this mechanism is the primary method of dispute settlement within ICAO.

Among the controversial aspects of this document it should be noted that there are no provisions that

[2] ICAO: Resolutions Adopted by the First Assembly . P. 20-21. URL: https://www.icao.int/Meetings/AMC/MA/Assembly%201st%20Session/A1_p45.djvu (accessed 28.01.2022).

[3] Under Article 85 of the Chicago Convention, "If any contracting State party to a dispute in which the decision of the Council is under appeal has not accepted the Statute of the Permanent Court of International Justice and the contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the contracting States parties to the dispute shall name a single arbitrator who shall name an umpire".

[4] ICAO: Rules for the Settlement of Differences. URL: https://standart.aero/en/icao/book/doc-7782-rules-for-the-settlement-of-differences-en-cons (accessed 28.01.2022).

[5] ICAO: Review of the Rules for the Settlement of Differences. URL: https://www.icao.int/Meetings/LC37/Documents/LC37%203-2%20EN%20Rules%20Settlement%20Differences.pdf (accessed 28.01.2022).

would establish special requirements for voting in the Council when it rules on disputes. According to the general rule set in Article 52 of the Chicago Convention, the Council decides by a simple majority vote of its members. However, a situation may arise where a majority of the Council is parties to a dispute; consequently, the Council will not be able to make a final decision, as the parties to the dispute will be deprived of their right to vote. This circumstance, reflected in Article 84 of the Chicago Convention, has also been criticized because the Sates involved in the dispute do not have the opportunity to express their legal position in a decision. This provision seems particularly controversial given that the ICJ Statute enshrines the right of parties to elect judges of their nationality [Sanchez 2010:35].

In the foreseeable future, it is likely that the text of the Rules will be amended [Zhang 2021:139-141]. Thus, in 2017 the Council requested the Secretariat to review the Rules to determine whether there is a need to review and update them[6]. The Secretariat concluded that the matter should be referred to the ICAO Legal Committee, and it was included in the work program of the Legal Committee at its 37th session[7]. The Secretariat pointed out the need to bring the Rules into line with the provisions of the ICJ Rules, which have been amended several times since 1957.

The Legal Committee at its 38th session had before it a Progress report on The Working Group for the Review of the ICAO Rules for the Settlement of Differences[8] (hereinafter - WG-RRSD). According to this document, proposed amendments to the Rules can be divided into two groups: changes for which the WG-RRSD has reached a high level of agreement, and changes that require further consideration by the WG-RRSD.

The first group includes aspects that do not affect the essence of the ICAO Council as a dispute settlement body. Thus, in the Draft Revision to the Rules appeared provisions on the use of electronic documents and virtual proceedings. In addition, many points related to the procedural aspects of preliminary objections have been clarified. So, for example, it is proposed to introduce into the text of the Rules "admissibility" as ground for a preliminary objection.

The second group of proposed amendments to the Rules includes provisions, some of which are also, in our opinion, of a purely technical nature. Among them: the clarification of Article 2 of the Rules on the need for a preliminary attempt to resolve a dispute through negotiation and the clarification of Article 3 of the Rules regarding the possibility of the Council to involve experts in the dispute settlement process. The other amendments from the second group have a more significant nature. It is proposed to extend the provisions of the Rules application to all disputes submitted to the Council, to limit public access to the proceedings records (fully or until the moment of rendering a decision); to stipulate an obligation for the Council to reflect legal and factual reasons in the decision; to review the interpretation of the term "majority" in Article 54 of the Chicago Convention in order to ensure that the Council can render a decision if a majority of its members are parties to the dispute; as well as to establish the right of the Council to impose provisional measures.

In general, we can see that the Draft Revision to the Rules is more inclined towards the judicial procedure.

1.3. Dispute settlement practice within the ICAO Council

Since the ICAO foundation, the dispute settlement mechanism under Chapter XVIII of the Chicago Convention has been used to resolve seven disputes. The authors believe it is necessary and appropriate to consider them [Milde 2016:204-209; Dempsey 1987:562-564].

India v Pakistan (1952) Pakistan's restricted zone along the border with Afghanistan effectively prevented direct air traffic between Delhi and Kabul. India argued that this violated Articles 5 and 6 of the Chicago Convention and the Transit Agreement. The Council did not issue a final decision. The parties resolved the conflict through negotiation, as recommended by the Council.

Great Britain v. Spain (1967) The dispute concerned the legality of the establishment by Spain of exclusion zones in the Gibraltar airspace. The consideration of the dispute was postponed indefinitely at the request of both parties.

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[6] Ibidem.

[7] ICAO: Work programme of the organization in the legal field. URL: https://www.icao.int/Meetings/a40/Documents/WP/wp_078_en.pdf (accessed 28.01.2022).

[8] ICAO: Progress report on the work of the Working group for the review of the ICAO rules for the settlement of differences (WG-RRSD). URL: https://www.icao.int/Meetings/LC38/Documents/WP/LC38%20WP%202-1%20PROGRESS%20REPORT%20ON%20THE%20WORK%20OF%20THE%20WG-RRSD_EN.pdf (accessed 28.01.2022).

Pakistan v. India (1971) The reason for the dispute was the suspension of Pakistan aircraft overflights over India. India appealed the Council's competence in this dispute to the ICJ, but the decision was in favour of Pakistan. The dispute was resolved by the parties on their own after the formation of East Bangladesh as an independent State. This dispute, as some lawyers write, was settled entirely within the dispute settlement mechanism of the Council [Gariepy, Botsford 1976:357]. Technically speaking, such a position is very controversial since the Council did not formally make a final decision under Article 84 of the Chicago Convention.

Cuba v. the USA (1998) In 1996, two aircraft operated by Brothers to the Rescue (a non-profit organization, which had repeatedly dropped propaganda leaflets) were shot down on the high seas by the Cuban Air Force. The incident resulted in the deaths of three citizens and one US resident. In response, US authorities closed their airspace to Cuban aircraft. The dispute was resolved by agreement between the parties, and the Council did not issue a final decision

US v. EU (2000) The dispute concerned EU Regulation No. 925/1999[9], which established aircraft engine noise requirements that were not met by US aircraft and therefore they could not operate within the EU. The dispute was resolved through negotiations, and the Council did not make a final decision.

Brazil v USA (2016) The dispute arose out of a disagreement over "the interpretation and application of the Convention and its Annexes" in connection with the 2006 collision between a Brazilian Boeing and an American private jet. The dispute has not been finally settled, but it is unlikely that the Council will take a final decision on the matter. The parties suspended the process of the Applicant's response to the respondent's counter-memorial and now parties are engaged in negotiations[10]. At the 40th session of the ICAO Assembly, Brazil and the United States submitted a paper on State cooperation under Article 12 of the Chicago Convention[11].

Qatar v. Bahrain, Egypt, United Arab Emirates and Saudi Arabia (2017) The dispute arose due to the acts of the respondent States, which prohibited the use of national airspace and flight information areas for Qatari aircraft. The defendants attempted to challenge the competence of the ICAO Council to adjudicate the dispute in ICJ, but the judgment was rendered in favour of Qatar. The blockade was lifted due to agreements reached at the 41st Gulf Cooperation Council summit in January 2021.

It appears from the disputes that in the entire period of ICAO's activities no dispute has been finally resolved in accordance with the provisions of Chapter XVIII of the Chicago Convention. This may indicate the inefficiency of the Chicago Convention mechanism, which is due to several objective factors that will be discussed below.

2. The competence of the ICAO Council to settle disputes: ICJ approach

2.1. Formulation of the problem

The wording of Article 84 of the Chicago Convention raises problems in determining the applicability of the dispute settlement mechanism under Chapter XVIII to a particular situation. It establishes that the ICAO Council has the competence to settle disputes "concerning the interpretation or application" of the Chicago Convention and its Annexes. However, practice shows that deviation from the norms of the Chicago Convention is not always directly related to the interpretation and application of the provisions contained therein. Their breach may result from a dispute for which the application of the Chicago Convention alone would not be sufficient. This raises the question of whether the ICAO Council has the competence to consider such disputes.

This legal issue has twice been the subject of a dispute in the ICJ. It is worth noting that "each new ICJ decision offers not only the lawful elimination of this dispute as such but also the enrichment of the legal arsenal for the prevention or fair settlement of future disputes" [Vylegzhanin, Kalamkaryan 2012:26]. Also, the ICJ in its practice consistently adheres to earlier decisions. Among other things, the ICJ is the competent body for appealing the decisions of the Council. Based on the above-mentioned circumstances, it can be concluded that the decisions of the ICJ on this issue should

[9] EU: Council Regulation (EC) No. 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31999R0925&from=EN (accessed 28.01.2022).

[10] See ICAO Annual Report 2019. URL: <https://www.icao.int/annual-report-2019/Pages/supporting-strategies-legal-and-external-relations-settlement-of-differences.aspx (accessed 28.01.2022).

[11] ICAO: Article 12 of the Chicago convention: communication mechanism and guidelines to support its implementation. URL: https://www.icao.int/Meetings/a40/Documents/WP/wp_101_en.pdf (accessed 28.01.2022).

be considered as a modern interpretation of the provisions of Article 84 of the Chicago Convention.

2.2. India vs Pakistan (1972)[12]

In August 1965, military clashes broke out between India and Pakistan. It led to the interruption of air traffic between these two countries. In February 1966, the countries agreed to resume air services on "the same basis as before August 1, 1965". In 1971 an Indian aircraft was hijacked in Pakistani territory. As a result, India closed its airspace to Pakistani aircraft. This resulted in Pakistan's complaint to the ICAO Council against India for violating Article 5 of the Chicago Convention and Article 1 of Section I of the Transit Agreement. The ICAO Council acknowledged that it had jurisdiction over the dispute, but India decided to challenge the validity of the decision before the ICJ.

India's position in this dispute was based on two main arguments:

1) From August 1965, the Chicago Convention and the Transit Agreement ceased to govern relations between India and Pakistan. After February 1966, India and Pakistan established a "special regime" that provided exclusively permissive use of Indian airspace.

2) The hijacking of an Indian plane on Pakistani territory in 1971 should be qualified as a material violation of the Chicago Convention and the Transit Agreement. Proceeding from this, India, in any case, had the right to suspend the treaties on the basis of the norms of general international law; therefore, the consideration of this issue is outside the powers of the Council.

These arguments were aimed primarily at proving that, for some reason, the Chicago Convention and the Transit Agreement are not in force for the States. Pakistan argued that the agreement reached in February 1966 implied the resumption of flights based on the provisions of the Chicago Convention and the Transit Agreement, rather than a "special regime". The ICJ found that Pakistan had not received an unequivocal statement on the suspension of the treaties, and all notifications from India were related to aircraft flights rather than international treaties. India's objection that its actions were outside the scope of the Chicago Convention and were regulated by norms of general international law and the law of international treaties were not accepted by the court. The ICJ relied on the fact that such objections, emanating from one of the disputing parties, were not enough to deny the jurisdiction of the Council. The ICJ also indicated that the question of the status of the Chicago Convention and the Transit Agreement, as well as the question of the legality of India's response to the hijacking of an aircraft in Pakistan, were to be brought before the ICAO Council and these questions could not ipso facto and a priori exclude the competence of ICAO. The decision also reflected that this dispute prima facie affects the aforementioned international treaties. Therefore, the dispute fell within the framework of the jurisdictional clauses established in these treaties, for the denial of which the statement of one party was not enough. The final decision was in favour of Pakistan.

In our opinion, this decision is controversial. As was rightly noted in the decision, India's position was based on the fact that the Chicago Convention and the Pakistan-India Transit Agreement were terminated or suspended, so India could not violate the provisions of these treaties. It follows from this that India did not deny the facts of derogation of the norms contained in them but did not consider them as violations of international law since they were conditioned by Pakistan's unlawful (in India's opinion) actions. The court did not directly address this aspect in its decision. At the same time, the decision correctly emphasized that India's objections to the jurisdiction of the ICAO Council undoubtedly affected the essence of the dispute, which the ICJ was not authorized to settle. In other words, the issue of jurisdiction in this dispute largely predetermines the final decision.

At the same time, it implicitly follows from the ICJ judgment that the relationship between India and Pakistan was still governed by the Chicago Convention and the Transit Agreement. This was evidenced by the court's finding that India had not expressly declared the suspension of these treaties. Also, the final decision that the Council had jurisdiction over the case based on Article 84 of the Chicago Convention could have been taken by the Council as the ICJ's conclusion that the Chicago Convention and the Transit Agreement applied to the dispute. However, the ICJ did not consider the validity of India's actions on the merits, did not analyze all the circumstances of the case and only concluded that the ICAO Council had jurisdiction over the dispute

If the dispute had been nevertheless resolved by the Council, rather than by agreement between the parties, the Council would have two options: to settle the case on the basis of the Chicago Convention and the Transit Agreement, or by taking into account all the circum-

[12] International Court of Justice: Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan). Judgment of 18 August 1972. URL: https://www.icj-cij.org/public/files/case-related/54/054-19720818-JUD-01-00-EN.pdf (accessed 28.01.2022).

stances of the case and other norms of international law. Both options are unacceptable. In the first case, the decision would not meet the principle of fairness because, as stated earlier, India did not deny derogation from the provisions of the Chicago Convention, and legal qualification of the antecedents is necessary for an objective decision. In the second case, the ICAO Council would have been forced to raise issues that would go far beyond international air law, but States most likely did not seek to give it such authority at the time of signing the Chicago Convention. Based on the previous paragraph, the first option seems the most likely.

The authors of this paper believe that to settle this dispute effectively, the ICAO Council had to declare a lack of competence, as its complex nature involves recourse to various sources of international law and not just the provisions of the Chicago Convention and the Transit Agreement.

2.3. Bahrain, Egypt, Saudi Arabia and United Arab Emirates[13] v Qatar and Bahrain, Egypt, United Arab Emirates and Qatar[14] (2020)

From a formal legal point of view, this dispute should be divided into two separate disputes: a dispute over a violation of the provisions of the Chicago Convention and a breach of the provisions of the Transit Agreement. Saudi Arabia is not a party to the Transit Agreement and therefore is not a party to the dispute. ICJ's decisions on these disputes are identical.

In 2017, Bahrain, Egypt, the United Arab Emirates and Saudi Arabia closed their airspace to aircraft registered in Qatar. The reason for this was the alleged violation by Qatar of its obligations under the so-called Riyadh agreements concluded in 2013-2014. Under them, Qatar agreed upon no support to any "organizations, groups, or individuals that threaten the security and stability of the Council states". In response to this, Qatar, according to Article 84 of the Chicago Convention and Section 2 of Article II of the Transit Agreement, initiated a dispute settlement procedure in the ICAO Council. The respondent Governments raised two preliminary objections. The first stated that the dispute concerned obligations beyond the mentioned treaties, and their actions could be qualified as legitimate countermeasures following international law. In the second objection, it was stated that Qatar did not fulfil the conditions of Article 84 of the Chicago Convention and Section 2 of Article II of the Transit Agreement to refer the dispute to the Council, namely, did not attempt to settle the dispute through negotiations. The ICAO Council did not accept the preliminary objections and in 2018 confirmed its competence to resolve this dispute. Subsequently, Bahrain, Egypt, the United Arab Emirates and Saudi Arabia decided to appeal this decision to the ICJ.

The applicants invoked three grounds of appeal against the decision: violations by the Council of the fundamental principles of due process and the right to be heard, which resulted in an erroneous decision; and factual and legal errors by the Council in rejecting their preliminary objections (each cited as a separate ground).

In its decision, the ICJ chose to start by analyzing the second ground of appeal against the Council's decision. The dispute in question was found to involve provisions of the Chicago Convention and the Transit Agreement and, therefore, be subject to jurisdictional clauses. According to the ICJ's position, the mere fact that this dispute had arisen in the broader context did not deprive the ICAO Council of its jurisdiction under the Chicago Convention and the Transit Agreement. Moreover, the ICJ referred to the 1972 judgment in the India v Pakistan dispute, in which the court found that the position of a party to the dispute (that the provisions of the convention did not apply to the merits of the dispute) could not be a basis for excluding the jurisdiction of the Council[15].

[13] International Court of Justice: Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation. Judgment of 14 July 2020. URL: https://www.icj-cij.org/public/files/case-related/173/173-20200714-JUD-01-00-EN.pdf (accessed 28.01.2022).

[14] International Court of Justice: Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar). Judgment of 14 July 2020. URL: https://www.icj-cij.org/public/files/case-related/174/174-20200714-JUD-01-00-EN.pdf (accessed 28.01.2022).

[15] "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. As has already been seen in the case of the competence of the Court, so with that of the Council, its competence must depend on the character of the dispute submitted to it and on the issues thus raised — not on those defenses on the merits, or other considerations, which would become relevant only after the jurisdictional issues had been settled." See: International Court of Justice: Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan). Judgment of 18 August 1972. Para 27. URL: https://www.icj-cij.org/public/files/case-related/54/054-19720818-JUD-01-00-EN.pdf (accessed 28.01.2022).

The ICJ further disagreed with the applicants' position that Qatar had failed to comply with the requirements of Article 84 concerning the pre-trial settlement of the dispute. This article stipulates that the Council is authorized to consider only those differences that cannot be resolved through negotiations. Qatar pointed to attempts to settle the dispute within the ICAO, WTO and UN, and through other means of dispute settlement. In addition, the ICJ concluded that there was no reasonable basis to believe that the dispute in question could have been settled through negotiation.

Regarding the first ground for appeal against the Council's decision, the ICJ stated that there is no need to consider the issue of cancelling the legally of the correct decision of the Council in the light of procedural violations. The Court also found that the Council's decision-making process did not violate the fundamental requirements of due process.

In this decision, the ICJ confirmed its position on an expanded approach to the interpretation of the provisions of Article 84 of the Chicago Convention on the competence of the Council. In the 2020 decision, the ICJ explicitly indicated the Council had powers to consider issues outside the scope of these international treaties. The controversial nature of this approach was noted in the declaration of Judge K.G. Gevorgyan. According to him, it was sufficient to confine to the position indicated in the 1972 decision to substantiate the applicants' argument about the lack of jurisdiction of the Council[16]. Let us remind that it was about the inadmissibility of denying the competence of the Council on the grounds that one party refers to the inapplicability of the Chicago Convention and the Transit Agreement to a particular dispute. K.G. Gevorgyan quite rightly noted that the States, concluding these treaties, did not agree to vest the ICAO Council with powers to settle disputes that do not affect civil aviation issues. In addition, given that Council members act as representatives of States and are not necessarily experts in international law, the resolution of such disputes will not be effective.

It seems that the position of K.G. Gevorgyan has an indisputable legal basis. At the same time, from our point of view, the intentional or unintentional expansion of the Council's competence, of which K.G. Gevorgyan wrote in his declaration, happened already in 1972 in the ICJ judgment on the India v. Pakistan case. This was not directly reflected in the text of the judgment, but it indirectly followed from it. After all, the ICJ, recognizing the Council's competence to resolve the dispute between India and Pakistan, confirmed its right to decide on the validity of the legal position of India, for the qualification of which, as we indicated earlier, it would be necessary to turn to various sources of international law that do not affect aviation.

The authors of this paper agree with the main argument of the ICJ that the position of a party on the inapplicability of the provisions of the Chicago Convention cannot be an unconditional basis for denying the competence of the Council. However, this approach is not always justified in the light of all the circumstances of a particular dispute. In our opinion, the dispute between India and Pakistan of 1972 and the dispute over the air blockade of Qatar of 2020 fall into this category.

2.4 The ICJ decisions in the context of l legal proceedings on downing of Malaysia Airlines Flight MH 17 in 2014.

On July 17, 2014, a Malaysian Boeing "777-200" was shot down in the airspace over the territory of the Donetsk People's Republic, the territory which was engaged in an armed conflict. In March 2022 official sources announced that the Netherlands and Austria initiated legal proceedings against Russia in Council regarding the downing of the Boeing "777-200"[17]. Leaving aside the merits of the dispute and the validity of the legal position of the Netherlands and Austria, it is important to focus on the issue of the competence of the Council to resolve the dispute.

It is not apparent at this time which provisions of the Chicago Convention the applicants will serve as base for applicants' legal position. We suppose that they will refer to Article 3bis, under which contracting States have undertaken to refrain from resorting to the use of weapons against civil aircraft in flight. If we follow the approach taken by the ICJ in its 2020 decision, we can assume that the Council is highly likely to confirm its competence to resolve this dispute, as it is *prima facie* related to the Chicago Convention and civil aviation in general. However, resolution of this dispute requires the establishment of many factual circumstances, which implies an in-depth analysis of the military and technical details of the accident. Moreover, it will be necessary to make an adequate international

[16] International Court of Justice: Declarations of Judge Gevorgian to the Judgments of 14 July 2020. Paras 2. URL: https://www.icj-cij.org/public/files/case-related/174/174-20200714-JUD-01-02-EN.pdf (accessed 28. 01.2022).

[17] The Netherlands and Australia submit complaint against Russia to the International Civil Aviation Organization. URL: https://www.government.nl/latest/news/2022/03/14/netherlands-and-australia-submit-complaint-against-russia-to-icao (accessed 10.04.2022).

legal qualification of these circumstances. Thus, for example, the Council may be faced the entities' conduct attribution to the State problem, which is outside the scope not only of the Chicago Convention, but also of international air law in general.

Had the Netherlands and Austria had filed an application before 2020, there would be hope that the Council, after examining all the circumstances of the case, would decide not to consider the dispute due to lack of competence. Unfortunately, in today's realities such a scenario is extremely unlikely. As stated earlier, the ICJ has expressly established that the Council, in settling disputes under Article 84 of the Chicago Convention, may consider aspects outside the scope of that treaty. Consequently, we may be witnessing an unprecedented and unwarranted expansion of the Council's competence, which will make the Council an ineffective mode of dispute resolution, and its decisions will inevitably be appealed to the ICJ.

3. The place of the ICAO Council in the system of means for the peaceful settlement of disputes in the light of the ICJ judgments and current practice

3.1. ICAO Council as a judicial body. Does it have jurisdiction in the legal sense of the word?

Currently, there is no unified approach to understanding the legal nature of the Council as a body for the settlement of international disputes in the field of civil aviation. On the one hand, the dispute settlement procedure established by the Rules and the possibility of imposing sanctions for non-compliance with Council decisions, enshrined in Articles 86 and 87 of the Chicago Convention, indicate that the Council can act as a judicial organ. On the other hand, the Council is more of a political body, as it consists of 36 ICAO Member States, which are likely to be guided by national interests in the framework aviation disputes. As a result, the Council cannot be expected to make the kind of fair and impartial decision that is characteristic of a judicial body [Dempsey 1987:568].

In this regard, the position of the outstanding lawyer M. Milde seems to be the most correct, who writes that "the 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 law". As such, Council decisions are more political considerations than normative prescriptions [Milde 2016:204]. At the same time, no less well-known international lawyer R. Abeyratne adheres to the point of view according to which the Council undoubtedly has judicial powers. In support of his position, he argues that Council members may be more competent in settlement aviation disputes than ICJ judges. But, more importantly, he explains that the Council has judicial powers through the concept of "inherent powers", the application of which, in his opinion, is necessary, since otherwise the UN and its specialized agencies "were to be bogged down in a quagmire of interpretation and judicial determination in the exercise of their duties" [Abeyratne 2014:666].

This argument cannot be called indisputable because, as Professor G.I. Tunkin wrote, the concept of "inherent powers" separates the international organization from its basis (i.e. the constituent agreement), contradicts the principles of interpretation of international treaties and the legal nature of international organizations as interstate formations of peaceful coexistence [Tunkin 1974:329].

This aspect was also raised by the ICJ in the recent decision on the competence of the Council. The Court, considering the issue of the applicability of the concept of "judicial ethics" to the activities of the Council, concluded that, despite the provisions of Article 84 of the Chicago Convention, according to which the Council is entrusted with the function of settlement disputes, it is not a judicial body in the literal sense of the word. Moreover, the ICJ actually relied on the same circumstance as M. Milde. At the same time, the document submitted by the ICAO Secretariat on the revision of the Rules stipulates that Article 84 enshrines the judicial function of the Council.

Considering all the above facts and the fact that the Chicago Convention provides for a procedure of appeal of final decisions of the Council to the ICJ, it seems possible to conclude that this body cannot be put on a par with other international judicial bodies. This raises a theoretical question: is it legally correct to speak of the jurisdiction of the Council, given that it is not a judicial body?

S. Amerasinghe in his fundamental work on the jurisdiction in international law analyzed all possible meanings of the term "jurisdiction", and, as follows from the definitions given by him, "jurisdiction" is always associated with various aspects of the activities of the judicial authorities [Amerasinghe 2002:58-64]. However, the international legal doctrine lacks a unified approach to the use of this term. For example, ICJ Judge H. Turlway pointed out that not only judicial and arbitration bodies but also political ones have jurisdiction. Moreover, the jurisdiction of political bodies cannot include the adoption of generally binding decisions [Thirlway 2016:38]. At the same time, the ICAO Council, as noted by K.G. Gevoryan, is a body of a predominantly technical and administrative nature. Consequently, within the framework of H. Turlway's

concept, it should be qualified as a political body with its own jurisdiction.

The approach demonstrated above is rightly criticized by Russian scientists A.N. Vylegzhanin and O.I. Zinchenko. In their view, when referring to the terms of reference of political authorities, the term "competence" rather than "jurisdiction" is preferred". They also give the meaning of the term "jurisdiction", which is given in the most popular English-language legal dictionary (Black's Law Dictionary), where it is stated that jurisdiction is "a term of comprehensive import embracing every kind of judicial action" [Vylegzhanin, Zinchenko 2018:10] At the same time, the Council is not a judicial body for some reasons we have mentioned earlier. As a result, we cannot speak of its "judicial action".

The problematic issue of the Council's "jurisdiction" was reflected in the separate opinion of Judge ad hoc F. Berman[18] to the judgment on the Qatar air blockade case. In his view, the use of the term "jurisdiction" by the ICJ concerning the powers of the Council under Article 84 of the Chicago Convention has complicated the existing ambiguity. F. Berman gives weighty arguments in support of his position. First of all, he notes that only judicial settlement of a dispute is associated with "jurisdiction", i.e. with a legally binding decision. Then he proceeds to review the ICAO Rules, the analysis of which leads him to conclude that the Council powers enshrined in them are more consistent with those of the supreme executive body of a technical institution or "amiable compositeur" than that of a judicial body. He doubts that the contracting States sought to make the decisions of the Council legally binding, given that the Chicago Convention does not contain provisions on the legal nature of the decisions of the Council, but at the same time, according to Article 86, ICJ and arbitral decisions are final and binding. As a result, he offers a different interpretation of Article 84 of the Chicago Convention, according to which the Council does not have "jurisdiction", but exercises "the high administrative function, drawing on its unique knowledge and expertise in the field of civil aviation, of giving authoritative rulings as to what the Convention means and requires, whether or not such issues form part of specific disputes between member States". According to

F. Berman, such an interpretation will make it possible to give authoritative decisions of the Council equal force for all member States of the Chicago Convention, and not only for the parties to the dispute, which will have a positive effect on international civil aviation as a whole. Among other things, this would allow for a clear delineation of the ICJ's appeal function, which would result in a review of the Council's proposed interpretation of the provisions of the Chicago Convention, without addressing the issue of aviation policy, for which the Court may be as incompetent as Council in the sphere of international law.

Given all of the above, it seems legally incorrect to treat the Council's powers under Article 84 of the Chicago Convention as "jurisdiction" because, firstly, the Council cannot be regarded as a judicial body and, secondly, decisions on disputes brought before it is rather of an intermediate nature

3.2. ICAO Council as a mediator

As noted earlier, the Council, in the entire history of its activities, has never fully settled a dispute in accordance with Chapter XVIII of the Chicago Convention. The parties settled all disputes referred to the Council through negotiations. This was not an exclusive achievement of the parties, as the Council contributed significantly to the peaceful settlement of them. For example, in the dispute between the United States and the EU in 2000, the President of the Council provided "good offices" to the parties. A similar situation was observed in the dispute between India and Pakistan in 1952 [Milde 2016:209]. International legal doctrine notes that the Council always seeks to resolve all conflicts "diplomatically" without the need for a final solution [Luongo 2018:52].

This practice is mainly due to factual circumstances. For example, the Council's consideration of disputes is characterized by persistent delays and lengthy proceedings. At the same time, as a

P.S. Dempsey noted in 1987, such delays enabled the parties to settle their differences peacefully and on the basis of consensus [Dempsey 1987:569]. As practice shows, there has been no significant change since the publication of the cited work. It follows that the legal basis for the activity of the Council in the sphere of dispute settlement is not reflected in Chapter XVIII of the Chicago Convention, but rather in the aforementioned Article 6 and 14 of the Rules, under which the Council may at any time call upon the disputing parties to negotiate, during which the proceedings before the Council will be suspended.

All this allows us to speak of the Council as a body that actually acts as a mediator [Gariepy, Botsford

[18] International Court of Justice: Separate opinion of Judge ad hoc Berman to the Judgments of 14 July 2020. Para. 2.URL: https://www.icj-cij.org/public/files/case-related/173/173-20200714-JUD-01-03-EN.pdf (accessed 01.02.2022).

1976:358-459]. in resolving disagreements between the State's parties to the Chicago Convention or, as indicated by M. Milde, as a quasi-mediator [Milde 2016:209].

In this regard, it should be noted that, under the generally accepted approach, a mediator should be understood as an unofficial participant in the process, whose recommendations and decisions are not binding on the parties to the conflict [Khudoykina 1998:5]. Mediation does not imply the use of any legal mechanisms to settle the dispute and monitor the implementation of the decision reached by the mediator. However, according to Articles 86 and 87 of the Chicago Convention, airlines and States that do not comply with the decisions of the Council may be sanctioned. Mediation in international law does not imply such measures.

At the same time, there is a view that the sanctions enshrined in Articles 87 and 88 are not so significant that States are keen to avoid them. For example, Article 87 stipulates that States are obliged to close their airspace to airlines that do not comply with the Council's decisions. However, as

G.C. Sanchez rightly points out, it is virtually impossible to monitor compliance with this obligation because of the large number of States Parties to the Chicago Convention. Moreover, not every State is prepared to aggravate relations with the State of registration of such an airline. In addition, Article 88 states that the "Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions" of Chapter XVIII. According to the position of G.C. Sanchez, essential powers of these bodies consist in the adoption of Annexes to the Chicago Convention, which could be adopted without regard to the position of the delinquent State. Further, G.C. Sanchez writes that in order for an annex to be legally binding, such a State must ratify it and, consequently, States should not be afraid of incurring new international legal obligations without their consent [Sanchez 2010:36-37]. The authors of this article agree with this conclusion, but consider it useful to clarify that the Annexes to the Chicago Convention constitute a set of standards and recommended practices that are referred to as annexes for convenience. It follows that the Annexes to the Chicago Convention are acts of an international organization that are not sources of international law and are not subject to ratification by States [Maleev, Vasil'ev 1979:185; Abashidze, Travnikov 2019:185]. However, in international legal doctrine, this issue is debatable.

Leaving aside the question of the effectiveness of sanctions enshrined in Article 86 and Article 87 of the Chicago Convention, it seems possible to state the discrepancy between the actual and formal legal status of the ICAO Council as a body for the peaceful settlement of disputes. On the one hand, the practice has shown that, despite the inability of the ICAO Council to exercise the functions of a judicial body, it plays an essential role in the settlement of disputes in the field of civil aviation as a mediator [Bae 2013:74]. On the other hand, under Chapter XVIII of the Chicago Convention, the powers of the Council go far beyond the functions of a mediator. The fact that the Council never resorted to them when considering disputes on the basis of Article 84 of the Chicago Convention cannot serve as a basis for qualifying the Council as a mediator.

3.3. Reform of the dispute settlement mechanism enshrined in Chapter XVIII of the Chicago Convention

It is noteworthy that some lawyers consider the ICAO Council as a fairly effective means for the peaceful settlement of disputes. They attribute this to the fact that the Council, rather than performing the quasi-judicial function assigned to it by the Chicago Convention, encourages the parties to reach a consensus [Luongo 2018:52]. Notably, R. Gariepy and D. L. Botsford argue that the fact that only one dispute has been resolved under ICAO[19] does not indicate that the judicial mechanism under the Chicago Convention is ineffective [Gariepy, Botsford 1976:357-359]. They note the significant role of the Council as a mediator but point out that in the absence of the mechanism provided for by Chapter XVIII of the Chicago Convention the effectiveness of the ICAO Council in this area would be highly questionable. In our view, this statement is doubtful, given that the authors of the cited work in support of their position, mention, inter alia, a dispute between Jordan and the UAE, which was settled through Council mediation but without initiating proceedings under Article 84 of the Chicago Convention.

In our view, it is necessary to distinguish between the efficacy of the Council as a mediator and as a dispute settlement body under Chapter XVIII of the Chicago Convention. There is no doubt that, in the first case, the Council has proven to be a highly effective means

[19] As such, the authors consider the 1971 India-Pakistan dispute. However, as has been noted in this paper, the ICAO Council has not made a final decision on it.

for settling disputes in the field of international civil aviation. Such mediation has often arisen precisely in proceedings under Article 84 of the Chicago Convention, but this does not indicate the effectiveness of the Chapter XVIII mechanism as a whole. The absence of disputes in which the Council rendered a final decision is not evidence of the Council's phenomenal success in its role as a mediator but rather of the imperfection of the dispute settlement mechanism established by the Chicago Convention. Consequently, various ideas for reforming this mechanism have been expressed in international legal doctrine.

According to R. Sankovych, the current dispute settlement procedure can be improved without changing the provisions of the Chicago Convention [Sankovych 2017:335-337]. Under his proposal, the Council, based on Article 55, may establish a Panel of Arbitrators, composed of three categories of persons: representatives of the public authorities of the parties to the Chicago Convention, who is responsible for aviation matters; highly qualified staff members of the ICAO Secretariat or other international or regional organizations whose professional activities involve participation in dispute settlement procedures; as well as experienced lawyers specializing in dispute settlement. Within the framework of this concept, it is assumed that persons not involved in the case (airlines and their clients) will be able to provide expert opinions on the subject of the dispute. According to R. Sankovych, all this will help to ensure that the Panel of Arbitrators issues reasoned decisions. The decision made by such a Panel of Arbitrators must be approved by the Council, since this mechanism is not established in the Chicago Convention. Therefore, the legal status of the decisions of the Panel of Arbitrators is not clear. R. Sankovych also considers the possibility of assigning to the proposed Panel of Arbitrators the obligation to provide the Council with two decisions, each in favour of one of the disputing parties. The Council will determine the outcome of the dispute by voting. It is proposed to leave the procedure for appealing decisions unchanged.

The above-mentioned procedure will eliminate one of the main shortcomings of the current order, namely, the lack of the necessary professional competence among the members of the Council. At the same time, R. Sankovych's proposal to assign to the Panel of Arbitrators the obligation to submit to the Council two conflicting decisions seems hugely controversial. In such circumstances, the arbitrators will not be able to objectively consider the dispute and make a single decision based on an independent assessment; one of the decisions will always contradict the position of the majority of the arbitrators, which minimizes the utility of the proposed Panel of Arbitrators as a whole. In the same case, if the Panel of Arbitrators presents one decision to the Council, then the Council will not be obliged to approve it in any case. Under the existing provisions of the Chicago Convention, the Council, when resolving disputes, can only take into account the verdict of such a Panel of Arbitrators. Still, the last word will always be with the members of the Council. Consequently, the actual role of the proposed Panel of Arbitrators, as rightly pointed out by Norberto E. Luongo, will be reduced exclusively to the performance of the advisory function, which the Secretary of ICAO currently performs [Luongo 2018:52].

If R. Sankovych primarily based his concept on the experience of the World Trade Organization (hereinafter - the WTO), then S. Sanetti proposes to completely transfer the WTO dispute settlement mechanism to the Chicago system. S. Sanetti notes that before the adoption of The Understanding on Rules and Procedures Governing the Settlement of Disputes of 1994, the WTO dispute settlement mechanism was criticized on the same grounds as the mechanism of Chapter XVIII of the Chicago Convention [Canetti 1995:515-521]. Such a reform would not affect the structure of ICAO since the ICAO Assembly corresponds in many respects to the WTO Ministerial Conference and the ICAO Council to the WTO General Council. At the same time, the proposed mechanism has the potential to significantly rehabilitate ICAO's role as a means of adequate dispute settlement. For example, the parties would have a guarantee that a final decision will be rendered after a certain period of time, as the 1994 Dispute Settlement Understanding on Rules and Procedures clearly regulates and sets time limits for each stage of a dispute. Moreover, the WTO rules on the appointment of arbitrators address the problem of possible politicization of the final award.

Of particular note is E.A. Samorodova's approach[20], according to which the international community should amend the text of the Chicago Convention or resort to the conclusion of a new universal international treaty on air law. This progressive development of international law, among other aspects, should result

[20] Samorodova E.A. Mezhdunarodno-pravovye problemy razrabotki i prinyatiya universal'noi (vseobshchei) konventsii po vozdushnomu pravu. Diss.... kand. yurid. nauk [International legal issues relating to the drafting and adoption of a universal (general) convention on air law. Thesis for the degree of Candidate of Juridical Sciences].Moscow. 2008. P. 105.

in establishing International Air Arbitration, a permanent judicial body under the ICAO Council or under a new international organization. A distinctive feature of such a judicial body should be "complexity", i.e. International air arbitration must be competent to consider and settle any dispute related to the use of airspace. E.A. Samorodova also proposes the option of concluding a special convention on the settlement of disputes related to the use of airspace.

Another Russian researcher M. D. Tovmasyan[21] adheres to a similar position. He is also considering the option of creating a judicial body - the Permanent Aviation Arbitration, which will include the most authoritative experts in the field of air law nominated by States. At the same time, M.D. Tovmasyan, like E.A. Samorodova, notes the negative attitude of States to referring disputes to arbitration, the decisions of which are binding. In this regard, M.D. Tovmasyan doubts that such a mechanism will be widely used as a stand-alone means of dispute settlement. In his view, it would be most appropriate to develop and regulate consultation and mediation procedures which could be provided by the ICAO Secretary, the President of the Council and other ICAO bodies.

The idea of establishing a permanent arbitral institution as an ICAO organ is also supported by contemporary foreign legal doctrine. As L. Zhang notes, changing the ICAO Settlement Rules will not solve all existing problems. Therefore, the most desirable and practical option would be to establish a new arbitral institution by amending the text of the Chicago Convention [Zheng 2022:181-183].

Any of the above approaches to reforming the dispute settlement mechanism of the Chicago system is possible. Nevertheless, it seems likely that the Chicago Convention XVIII mechanism would not be improved, but rather abolished entirely. It must be stressed that it is solely a question of abolishing the authority of ICAO to issue legally binding rulings on disputes between States Parties. An approach that would exclude ICAO from the current system of peaceful settlement of civil aviation disputes seems to be highly irrational. After all, as we have noted, the Council has been effective in its role as a mediator. Consequently, the Chicago Convention could be amended in order to impose an obligation on contracting States to comply with the pre-trial dispute settlement procedure. It would require States to have recourse to the mediation of the Council. In the same case, if the dispute cannot be settled within ICAO within the prescribed time limit, the parties should go to an ICJ or ad hoc tribunal to resolve the merits of the dispute.

4. Conclusion

Since the establishment of ICAO, the dispute settlement mechanism provided for by the Chicago Convention has not functioned as efficiently as expected in 1944. The analysis of the provisions of the Chicago Convention, international legal doctrine, the practice of the Council and decisions of the ICJ allows us to draw a number of conclusions that reveal the reasons for the current situation.

Firstly, the provisions of Chapter XVIII of the Chicago Convention are not detailed enough, as a result, a number of legal problems arise that do not have a straightforward solution. Second, the Council is the highest administrative body of ICAO, but not a judicial one. Empowering the Council to settle disputes through a legally binding decision violates the internal logic of the entire Chicago Convention. Moreover, it contradicts the conventional approach to the creation of judicial bodies in international law. Third, the ICJ's practice on this issue is extremely ambiguous. Based on the judgements of the ICJ, the Council acquired "jurisdiction" and was recognized as the competent authority to deal with matters outside the scope of international air law. Under these conditions, it is implausible that states will choose the Council to resolve a dispute.

Solving existing problems without changing the provisions of the Chicago Convention will be extremely problematic. The creation of new legal norms will undoubtedly be a time-consuming and labour-intensive activity, but it is necessary to streamline international relations arising from the use of airspace.

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