



McGill

Centre for Research in Air and Space Law
Centre de recherche en droit aérien et spatial

Occasional Paper Series

No. IV

June 2016

Settlement of Disputes at ICAO and Sustainable Development

by

Mathieu Vaugeois

Occasional Paper Series: *Sustainable International Civil Aviation*

The attached Occasional Papers have been prepared by a group of scholars associated with the Institute of Air and Space Law (IASL) at McGill University. They are the result of a collaborative effort between the IASL and the Centre for International Sustainable Development Law and are designed to be part of a book prepared by authors from both groups which will eventually be published by the Cambridge University Press under the title *Sustainable International Civil Aviation*.

As the title of the book suggests, bringing together these various scholars and papers is the central theme of the sustainable development of international aviation. In particular, the work of the International Civil Aviation Organization (ICAO), the primary United Nations body tasked with regulating the environmental aspects of international aviation, and the provisions of the Chicago Convention which lays down powers of the Organization and the fundamental rules of international air law, form the primary focus of this collection. At the next ICAO Assembly in September-October of 2016, ICAO has the ambitious mandate to finalise a global scheme to limit CO2 emissions from international aviation. As many of the articles contained in the book are of immediate relevance to the discussions due to take place at ICAO, publishing and disseminating these draft chapters will contribute to the growing interest and debates on the issue of the environmental impact of aviation. It is hoped that these papers will contribute to the work of the Assembly and that informed readers and delegates participating at the ICAO Assembly will have constructive comments to share with the authors.

Readers are invited to send their comments to the authors whose e-mail addresses are set out on the title page of each paper as well as a copy to the following address: edannals.law@mcgill.ca

The authors and the Editors of this collection of papers thank all readers for their attention and their comments.

Professor Armand de Mestral, Emeritus Professor, *McGill University, Canada*
Dr. Paul Fitzgerald, *McGill University, Canada*
Dr. Tanveer Ahmad, *North South University, Bangladesh*

SUMMARY

Settling a dispute involving an issue on Sustainable Development before the ICAO: How will the ICAO resolve the dispute?

The issue:

- Whether the mechanism and procedure for the settlement of disputes within the *Chicago Convention* could be adapted to address a potential dispute dealing with issues of sustainable development and environmental protection, should there be a failure to implement a global Market-Based Measure further to the 39th ICAO Assembly.
- If yes, how will the ICAO resolve the dispute?

Its importance:

- Any measure comparable to the EU's unilateral implementation of an Emissions Trading Scheme would most likely be challenged by States in all fora, possibly including a dispute before the ICAO.
- ICAO has jurisdiction to settle legal disputes pertaining to the interpretation and the application of the *Chicago Convention*.
- Any dispute has to be cast as an alleged violation of the *Chicago Convention* or other binding treaty.
- Environmental protection is one of the five strategic objectives of ICAO.

The treaty law:

- Article 84 of the *Chicago Convention*:

Settlement of disputes

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 [...]

The analysis:

- ICAO has jurisdiction over a potential dispute with respect to the implementation of a renewed EU ETS were such a measure to be reintroduced as it arguably involves interpretation and application of the *Chicago Convention*.
- ICAO will most likely consider the principles of Sustainable Development as environmental protection is one of its strategic objectives.
- The dispute will have to be filed individually against the Member States of the EU as the Union as a whole is not a party to the *Chicago Convention*. This was illustrated in the Hushkit dispute between the US and the EU.
- Similar to the Hushkit case, the ICAO will most likely seek conciliation and mediation rather than adjudication.
- Serious procedural difficulties can be envisaged. The EU States will have to withdraw from Council deliberations and may well claim that all non EU Member States members of Council flying to and from EU are indirectly party to the dispute and are not entitled to vote. Nonetheless, since there is no provisions exist in the Chicago Convention with respect to the impartiality of States, this will not be a successful claim.

Options for decision-makers:

- 1) ICAO to settle the potential dispute through mediation and conciliation, which has been a success for all the disputes brought before it.
- 2) ICAO to settle the potential dispute through adjudication. However, the decision will be based on political grounds.
- 3) ICAO to dismiss the dispute on jurisdictional grounds.

Draft for comments

SETTLEMENT OF DISPUTES AT ICAO AND SUSTAINABLE DEVELOPMENT

by

Mathieu Vaugeois¹ under the direction of Armand de Mestral²

ABSTRACT

This article aims to present the dispute settlement mechanism established in Chapter XVIII of the Chicago Convention. To this end, the article will analyze how the Council could resolve a potential dispute in the field of sustainable development. For this exercise, a hypothetical case will be analysed, in which the European Union (EU) decides to unilaterally implement its emissions trading scheme in the field of aviation. This case will serve as a potential scenario to consider if the dispute settlement mechanism set out at Article 84 of the Chicago Convention could be efficient in order to resolve such a dispute. The said dispute settlement mechanism has been criticized many times in ICAO's history due *inter alia* to the incapacity of the Council to provide for a merit-based decision. In fact, the five disputes brought under the present article have always been resolved through diplomatic channels, involving the good offices of the President of the ICAO Council. Therefore, despite the peculiarity of the EU representation at ICAO, the article will demonstrate that a potential dispute with respect to sustainable development will most likely be resolved the same way that it has been done previously in ICAO's history.

I. INTRODUCTION

This chapter seeks to determine whether the mechanism and the procedure for the settlement of disputes within the *Chicago Convention*³ could be adapted to address a potential dispute dealing with issues of sustainable development and environmental protection, if ICAO's Member States are not able to implement a global Market Based Measures (MBM) further to the 39th Session of the Assembly. For this purpose, we consider a potential scenario under which the European Union (EU) decides to establish unilaterally its

¹ Member of the Quebec Bar and holds a Master in Air & Space Law LL.M. from McGill University.

² Emeritus Professor, Jean Monnet Professor of Law at McGill University.

³ *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, 61 Stat 1180.

Emission Trading Scheme (ETS) as of 1 January 2017 following the failure by the ICAO Assembly to reach an agreement. Such scenario is at present hypothetical. Nevertheless, it may serve as a framework in order to demonstrate how the Chicago Convention might potentially allow for the resolution of such a dispute.

Therefore, this article examines the provisions of the Chicago Convention with respect to the settlement of disputes, the procedures currently in force regarding the presentation of an application before the Council, the scope of the jurisdiction of the ICAO Council for the settlement of disputes, as well as the previous cases brought before the Council. Also, this chapter considers the type of legal proceedings certain States could initiate against the EU in relation with the scenario mentioned above. Moreover, the ambiguous status of the EU at ICAO may well lead to uncertainty with respect to the parties involved in a potential application.

II. CHICAGO CONVENTION PROVISIONS FOR THE SETTLEMENT OF DISPUTES

The dispute settlement provisions are set out in Chapter XVIII (Articles 84 to 88) of the Chicago Convention.⁴ Article 84 provides that if any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes it shall, on the application of any State concerned in the disagreement, be decided by the Council. This provision also stipulates that no member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. A party to a dispute can appeal to the International Court of Justice (ICJ) a decision taken by the ICAO Council. Article 85 provides for the situation that a State party to a dispute which wishes to appeal a decision of the Council is not a party to the ICJ Statute.⁵ Currently, this provision seems to be no longer relevant since all 191 ICAO Member States are also members of the United Nations and therefore parties to the UN Charter and have accepted *de facto* the Statute of the ICJ.⁶ Moreover, Article 86 stipulates that any decision of the Council on whether an international airline is operating in conformity with the provisions of the Chicago Convention shall remain in

⁴ On the subject of dispute settlement under Chapter XVIII of the Chicago Convention *see* : Bin Cheng, *The Law of International Air Transport* (London: Stevens, 1962) at 101 ff; Thomas Buergenthal, *Law Making in the International Civil Aviation Organization* (New York: Syracuse University Press, 1969) at 123 ff; Michael Milde, *International Air Law and ICAO*, 2e ed (The Hague: eleven international publishing, 2012) at 194 ff; Paul Stephen Dempsey, *Public International Air Law* (Montreal: Institute and Center for Research in Air & Space Law McGill University, 2008) at 700 ff; René H Mankiewicz, "Pouvoir judiciaire du Conseil et règlement pour la solution des différends" (1957) 3 AFDI 383 and R C Hingorani, "Dispute Settlement in International Civil Aviation" (1959) 14 Arb J 14.

⁵ Nicolas Mateesco-Matte, *Traité de droit aérien-aéronautique*, 2nd ed (Paris : A Pedone, 1964) at 221-22.

⁶ Milde, *supra* note 4 at 194.

effect unless reversed on appeal and that the decisions of the Council, if appealed, shall be suspended until the appeal is decided. The decisions of the ICJ or an arbitral tribunal shall be final and binding.

In order to ensure compliance with decisions under Chapter XVIII, the Chicago Convention sets out two distinct types of sanctions: one for individual airlines and the other for States. The first is set out by Article 87 which provides that each contracting State undertakes not to allow the operation of an airline of a contracting State through the airspace if the Council has decided that the airline concerned is not conforming to a final decision rendered in accordance with Article 86. With respect to the sanction for States, Article 88 stipulates that the ICAO Assembly shall suspend the voting rights in the Assembly and in the Council of any contracting State that is found in default under the provision of this chapter. These sanctions have encountered a certain number of critics over the years. For example, Professor Milde has pointed out that in order to enforce the sanction of Article 88, a majority of States of the Assembly have to be in favor of such measure and would be “undoubtedly motivated by many policy considerations”.⁷

III. THE RULES OF PROCEDURES FOR THE SETTLEMENT OF DIFFERENCES

The provisions of the Chicago Convention with respect to disputes are supplemented by the *Rules of Procedure for the Settlement of Differences*⁸ (the Rules) adopted by the Council. These Rules set out the procedures for a State to introduce an application to the Council. Under these Rules, the Council functions as a judicial body. The Council takes its decisions on the basis of the submission of written documents by the parties (memorials and counter memorials) as well as on the basis of oral hearings. Another important aspect of the Rules is the importance given to mediation and conciliation either before or during the proceedings.⁹ For instance, it is provided at Article 14 of the Rules that any contracting State submitting a disagreement to the Council for settlement shall demonstrate that negotiations to settle the disagreement have taken place between the parties but were not successful.¹⁰ Also, at any stage of the proceedings, the Council may invite the parties in dispute to engage in direct negotiations in order to settle the dispute or to narrow the issues.¹¹ Moreover, in order to facilitate the negotiations, the Council may designate an individual or a

⁷ *Ibid* at 199.

⁸ ICAO, *Rules for the Settlement of Differences*, ICAO Doc 7782/2. These Rules of Procedures were adopted in 1957, and revised in 1975.

⁹ Hingorani, *supra* note 4 at 24.

¹⁰ Article 2 g), Rules.

¹¹ Article 14 (1), Rules.

group of individuals to act as conciliators between the parties.¹² According to Professor Milde, this clearly departs from judicial functions because it promotes mediation and conciliation by the Council as well as allowing for the good offices of the President.¹³ Therefore, as argued by Professor Buergenthal, the main task of the Council under article 84 of the Chicago Convention is “to assist in settling rather than in adjudicating disputes”.¹⁴

Another interesting aspect of the Rules is the fact that they are closely aligned with the *Rules of the Court of International Justice*. This similarity may to some extent create certain problems,¹⁵ as the ICJ is a judicial body and operates strictly as a tribunal. Therefore, the Rules adopted by the Council may not be adapted for a political body that does not operate according to the traditions of a court of justice.¹⁶ The Rules were first adopted in 1957 and subsequently amended in 1975, but have not been modified since then. To this end, some have recently argued in favor of a review of these Rules by the Council, which could potentially be a good opportunity to take into account the political specificity of this organ.¹⁷

IV. JURISDICTION OF THE ICAO COUNCIL OVER THE SETTLEMENT OF DISPUTES

The Council can adjudicate legal disputes concerning the interpretation and the application of the Chicago Convention. Since the entry into force of the Chicago Convention, they have been five disputes under Article 84. Apart from its mandate for the settlement of disputes, the Council, by virtue of Article 66 of the Chicago Convention, has also jurisdiction over the settlement of disputes under the *International Air Services Transit Agreement*¹⁸ and the *International Air Transport Agreement*.¹⁹ Moreover, the Council has been entrusted by the Assembly, during its First Session in 1947, to act as an arbitral body for disputes arising among contracting States relating to international civil aviation matters, when expressly requested to do so by all parties to such dispute.²⁰ A number of

¹² Article 14 (3), Rules.

¹³ Michael Milde, "Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO)" in Karl-Heinz Böckstiegel, ed, *Settlement of Space Law Disputes: the Present State of the Law and Perspectives of further Development: Proceedings of an International Colloquium, Munich, 13 & 14 September 1979* (Cologne: Heymann, 1980) 87 at 89.

¹⁴ Buergenthal, *supra* note 4 at 136.

¹⁵ Milde, *supra* note 4 at 197.

¹⁶ *Ibid.*

¹⁷ See for example Jon Bae, "Review of the ICAO Dispute Settlement Mechanism" (2013) 4:1 JIDS 65 at 81.

¹⁸ *International Air Services Transit Agreement*, 7 December 1944, 84 UNTS 389, 59 Stat 1693, TIAS No 487.

¹⁹ *International Air Transport Agreement*, 7 December 1944, 171 UNTS 387, 59 Stat 1701, TIAS No 488.

²⁰ ICAO Assembly Resolution A1-23. Nevertheless, we should note that since the entry into force

early bilateral agreements designated the ICAO Council as their dispute settlement body in case of any infringement by a party to such agreement.²¹ Today, bilateral air agreements have largely abandoned any reference to the ICAO Council in its capacity of adjudicatory forum;²² Most disputes under bilateral agreements are now resolved through arbitration.²³ The Council also has the duty to report to the Assembly any violation of the Chicago Convention as well as to consider any matter relating to the Convention which any contracting State refers to it.²⁴ Finally, at the request of any contracting State, the Council may investigate any situation which may appear to present avoidable obstacles to the development of international air navigation.²⁵

V. CASES REFERRED TO THE ICAO COUNCIL

Five cases have been brought to the attention of the Council under Article 84 of the Chicago Convention.²⁶ The first dispute occurred in 1952 and was between Indian and Pakistan with respect to the interpretation and application of the Chicago Convention.²⁷ India made an application before the Council but the dispute was eventually settled by negotiation between the parties. The second dispute between the United Kingdom and Spain took place in 1967 and dealt with the Spanish ban on overflight of the approaches to Gibraltar.²⁸ The case was brought to the Council but the parties subsequently requested the Council in 1969 to defer the dispute *sine die*.²⁹ The third case arose in 1971 and involved again Pakistan and India following the suspension by India of all overflight of Indian territory by Pakistani aircraft.³⁰ India submitted preliminary objections to

of the Chicago Convention, no dispute was ever referred to the Council for arbitration under the terms of such resolution. See Milde, *supra* note 4 at 197.

²¹ Dempsey, *supra* note 4 at 702-03.

²² *Ibid* at 702. Also, we should mention that certain States even proposed at the 6th Air Transport Conference an electronic arbitration as a means of dispute settlement mechanism for bilateral agreements (see ATConf/6-WP/42).

²³ To this end, certain agreements could designate the President of the ICAO Council to assist for the designation of arbitrator.

²⁴ Article 54 j), Chicago Convention.

²⁵ Article 55 e), Chicago Convention.

²⁶ For a summary of each of the cases see Milde, *supra* note 4 at 200 ff and Dempsey, *supra* note 4 at 703 ff. For the list of the Council documents with respect to each cases see Ludwig Weber, *International Civil Aviation Organization* (The Netherlands: Kluwer, 2012) at 53-54.

²⁷ Cheng, *supra* note 4 at 101ff; Buergenthal, *supra* note 4 at 137; Frederick Tymms, "Le différend Inde-Pakistan" (1953) 16 Rev Gen Air 207.

²⁸ Milde, *supra* note 4 at 201-02; Weber, *supra* note 26 at 53.

²⁹ ICAO, *Annual Report of the Council to the Assembly for 1969* (Doc 8869 A18-P/2 June 1970).

³⁰ Gerald F Fitzgerald, "The Judgement of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council" (1974) 12 Can YB Int'l L 153; Terry L Albertson, "Appellate Jurisdiction of the International Court of Justice - Jurisdiction of the Council of the International Civil Aviation Organization" (1973) 14 Harv Int'l LJ 612; Kay Hailbronner, "Jurisdiction of the ICAO Council Case" in Rudolf Bernhardt, ed, *Encyclopedia of International Law*, vol 2 (Amsterdam: North Holland, 1981) at 161; Pierre-Michel Eisemann, "L'arrêt du 18 août 1972 en l'affaire de l'appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan)" (1972) 18 AFDI 284; Aleth Manin, "Appel concernant la compétence du Conseil de l'OACI" (1973) 19

the Council denying its jurisdiction. Following their rejection by the Council, India lodged an appeal to the ICJ, which confirmed the Council's decision. This case was finally settled in 1976 following a joint statement by the parties announcing the discontinuance of the proceedings.³¹ The fourth case was brought to the Council in 1998.³² At that time, the United States denied Cuban aircraft the right to fly over its territory towards Canada. After the hearings of the parties, the President of the Council acted as Conciliator and the parties reached an agreement.³³ The most recent dispute brought to the Council occurred in 2000 and was between the United States and fifteen EU member States.³⁴ The issue related to the application of an EU Directive on the noise of aircraft engines, also known as the "hushkit Regulation". The application of this regulation would have had the consequence of denying almost all US carriers to fly their older aircraft into the EU.³⁵ The fifteen EU States submitted a preliminary objection concerning the jurisdiction of the Council.³⁶ This objection was rejected by the Council and the parties proceeded with the hearing on the substance.³⁷ The Council then decided to appoint the President as a Conciliator and the case was finally settled when the EU repealed its initial Regulation and adopted a Directive which satisfied both Parties.³⁸

The Council has never issued a decision on the merits.³⁹ It seems that at every occasion, mediation as well as the use of the good offices of the President of the Council contributed to resolving the dispute.⁴⁰ The fact that the machinery set out in Chapter XVIII of the Chicago Convention has not been able to produce over the years a decision on the merits is certainly one of the main reasons why many authors believe that this mechanism is a "failure".⁴¹ On the contrary, other authors believe that the incapacity of the Council ever to render a final adjudication does not necessarily indicate that the machinery under Chapter

AFDI 290; Jacques Huntzinger, "L'affaire de l'appel concernant la compétence du Conseil de l'OACI devant la Cour internationale de Justice (arrêt du 18 août 1972)" (1974) 78 RGDIP 975.

³¹ Milde, *supra* note 4 at 203.

³² *Ibid* at 203-04; Dempsey, *supra* note 4 at 709-10.

³³ *Ibid*.

³⁴ Milde, *supra* note 4 at 204; Dempsey, *supra* note 4 at 711; Benedicte A Claes, "Aircraft Noise Regulation in the European Union: the Hushkit Problem" (2000) 65 J Air L & Com 329; Kriss E Brown, "The International Civil Aviation Organization is the Appropriate Jurisdiction to Settle Hushkit Dispute Between the United States and the European Union" (2002) 20 Penn St Int'l L Rev 465; Report on Economic Law on *The Admissibility of U.S.-EU 'Hushkits' Dispute Before the ICAO* (2001) 95 Am J Int'l L 410.

³⁵ Milde, *supra* note 4 at 205.

³⁶ *Ibid*.

³⁷ *Ibid*.

³⁸ Weber, *supra* note 26 at 53.

³⁹ Milde, *supra* note 4 at 200.

⁴⁰ Dempsey, *supra* note 4 at 736-37.

⁴¹ Milde, *supra* note 4 at 200. See among others Gabriel S Sanchez, "The Impotence of the Chicago Convention Dispute Settlement Provisions" (2010) 10 Issues Av L & Pol'y 27.

XVIII of the Chicago Convention is inefficient.⁴² According to these authors the inability for the Council to render decisions on the merits demonstrates that States prefer to settle their aviation disputes through the channel of diplomacy rather than adjudication.⁴³ In fact, it is probably more advantageous for States to settle their dispute through negotiation rather than letting the Council decide for them.⁴⁴ Also, except for the “hushkit case”, the disputes brought to the Council under Article 84 of the Chicago Convention were bilateral in nature and concerned rights of overflight in restricted areas. Moreover, as pointed out by Professor Milde, even if those disputes were related to overflight rights, their “centre of gravity” was in fact political in nature and their nature was often external to aviation.⁴⁵ In fact, the “hushkit case” was the only one clearly dealing with environmental protection and is the only one which may provide guidance on how the ICAO Council would deal with a comparable dispute arising in the future.

VI. THE PERFORMANCE OF QUASI-JUDICIAL FUNCTIONS BY THE ICAO COUNCIL

In theory, when the Council is performing the duties set out under Chapter XVIII of the Chicago Convention, it “must consider itself an international judicial organ and act in accordance with rules of international law governing judicial proceedings. Thus, *inter alia*, members of the Council, even though they may be national representatives nominated by Governments must, [...] act in an impartial and judicial capacity.”⁴⁶ However, it seems that in practice, the Council does not act as impartially and judicially as the statement above suggests. Since the signature of the Chicago Convention in 1944, a number of authors have raised concerns with respect to the judicial functions of the ICAO Council.⁴⁷ These concerns are related to the fact that Council Members are neither necessarily independent nor always qualified in order to perform a judicial duty. The Council is composed of thirty-six sovereign States elected by the Assembly.⁴⁸ The Representatives are nominated by their States as diplomatic agents rather than independent experts - unlike the Air Navigation Commissioners.⁴⁹ Therefore, Council Members are not independent *per se*.⁵⁰ In

⁴² Richard N Gariepy and David L Botsford, “The Effectiveness of the International Civil Aviation Organization’s Adjudicatory Machinery” (1976) 42 J Air L & Com 351 at 357-58.

⁴³ *Ibid* at 358.

⁴⁴ Sanchez, *supra* note 41 at 31.

⁴⁵ Milde, *supra* note 4 at 203.

⁴⁶ Cheng, *supra* note 4 at 101.

⁴⁷ See among others Daniel Goedhuis, “Question of Public International Air Law” (1952) 81 Rec des Cours 201 at 223-24;

⁴⁸ Article 50 a), Chicago Convention.

⁴⁹ The Air Navigation Commission is the technical organ of ICAO. Its principal function under article 57 of the Chicago Convention is to consider amendments or modifications to the Annexes to the said Convention and to recommend them to the Council. See Weber, *supra* note 26 at 38.

opposition to ICJ judges, who are bound by their oath of office to act independently, the Council Members, when they adjudicate disputes decide on the basis of the interests of their own State and most likely following precise instructions.⁵¹ For example, during the hearing of the second case *Pakistan v. India* (1971) a number of Representatives requested the postponement of a vote, in order to seek instructions from their respective administrations.⁵² Council Members are appointed by their governments based on their expertise in the field of civil aviation.⁵³ The Chicago Convention itself only stipulates that no Representative shall be actively associated with the operation of an international air service or have any financial interest in such service.⁵⁴ Consequently, the academic and professional background of the representatives is diverse and most of them are not necessarily lawyers by trade nor have exercised any judicial functions prior to their appointment. The ability of the Members of the Council to fully assume their judicial functions and render proper decisions based on the applicable law is therefore questionable.⁵⁵

Nevertheless, we should mention that despite its apparent lack of independence, the Council has not faced any serious criticism caused by its absence judicial capacity over the years.⁵⁶ One explanation given by an author is that most cases brought before the Council were very specific, localized and they concerned bilateral disputes.⁵⁷ Consequently, the Council was able to be seen as neutral and, to a certain extent, able to preserve its independence. Finally, considering the appeal mechanism that exists at the ICJ, a decision apparently unreasonably taken by the Council could be reversed on appeal.⁵⁸

Clearly any decision taken by the Council following a demand under Article 84 of the Chicago Convention would most likely be based largely on political grounds. We can certainly question whether such a method of adjudicating disputes is fit for our purpose in the present context. In fact, the first president of the ICAO Council, Dr. Edward Warner was already of the opinion in 1945 that “no international agency composed of representatives of States could be expected to bring judicial detachment to the consideration of particular cases in which large national interests were involved.”⁵⁹

⁵⁰ Milde, *supra* note 4 at 199.

⁵¹ *Ibid.*

⁵² Council Minutes 29 July 1971, (C-Min. 74/6).

⁵³ Milde, *supra* note 4 at 199; Dempsey, *supra* note 4 at 734.

⁵⁴ Article 50 c), Chicago Convention.

⁵⁵ Dempsey, *supra* note 4 at 734.

⁵⁶ Bae, *supra* note 17 at 71.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Edward Warner, “The Chicago Air Conference Accomplishments and Unfinished Business” (1945) 23:3 *Foreign Affairs* 406 at 415.

VII. THE CONSIDERATION OF ENVIRONMENT AND SUSTAINABLE DEVELOPMENT BY THE ICAO COUNCIL

Under Article 2.2 of the *Kyoto Protocol*,⁶⁰ States shall pursue limitation of greenhouse gases emission (GHG) by working through ICAO. Nevertheless, ICAO does not consider that the said provision grants a mandate to the Organization to act specifically on that matter.⁶¹ In fact, as correctly pointed out by Professor Dempsey, a literal reading of the Kyoto Protocol suggests that only certain States are obliged to address the issue of GHG emissions from international aviation.⁶² In fact, ICAO is not bound under the Chicago Convention or the Kyoto Protocol to develop a policy with respect to GHG emissions but is also not precluded from doing so.⁶³ ICAO is viewed as a forum where States can discuss any such issues.⁶⁴ Without any desire of its Member States, ICAO does not have a specific obligation to consider such a matter. Nevertheless, the signature of the Kyoto Protocol seems to have been the starting point for the ICAO Assembly to take actions in order to trigger the issue of aviation and climate change.⁶⁵ To this end, a review of ICAO Assembly Resolutions since 1998 certainly demonstrates the political will of Member States to tackle that subject.⁶⁶

Furthermore, the recent agreement reached at the Conference of the Parties in Paris in December 2015 (COP21) does not make any reference to civil aviation or ICAO. In fact, the preliminary paragraph on aviation was surprisingly removed completely from the final agreement.⁶⁷ However, the absence of aviation in the final agreement will most likely have little impact on the ICAO process. Indeed, according inter alia of the representative of ATAG, the momentum created at Paris will continue to put pressure on States at ICAO to address aviation emissions through the implementation of a distinct MBM

⁶⁰ *Protocol to the United Nations Framework Convention on Climate Change*, signed 11 December 1997, UN Doc FCCC/CP/1997/7/Add.1, entered into force 16 February 2005.

⁶¹ Alejandro Piera, *Greenhouse Gas Emissions from International Aviation* (The Hague: eleven international publishing, 2015) at 44.

⁶² Dempsey, *supra* note 4 at 450.

⁶³ Such opinion has been argued inter alia by the former Director of the ICAO Legal Bureau, Mr. Denys Wibaux. "The text under consideration, if combined with the Chicago Convention, could be interpreted to indicate that there was no legal obligation for ICAO to develop a policy or rules in respect of aviation GHG emissions, nor was there obviously any legal obstacle, either in the UNFCCC, the Kyoto Protocol or the Chicago Convention, to ICAO developing policies or rules aimed at reducing aviation GHG emissions." See C-MIN 181/21 at p 256, para 22.

⁶⁴ Piera, *supra* note 61 at 44

⁶⁵ *Ibid.*

⁶⁶ *Ibid* at 44-45, n 17.

⁶⁷ See UNFCCC, *Proposal by the President, Paris Agreement*, 12 December 2015, online: <<https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>>.

scheme.⁶⁸

Furthermore, according to a preliminary version of the draft agreement which will be discussed at the Conference of the Parties in Paris in December 2015 (COP21), it seems that the Parties are going to adopt a text that is similar to the provisions of the Kyoto Protocol regarding the obligation of ICAO towards GHG emissions from international aviation.⁶⁹

Also, we should mention that the Chicago Convention does not include any provision with respect to environmental protection and sustainable development.⁷⁰ Therefore, a potential dispute with respect to the implementation of the EU-ETS could certainly lead to some questions regarding *inter alia* the jurisdiction of the Council to handle such matters under Article 84 of the said Convention. In fact, the Council has jurisdiction with respect to the “interpretation and application” of the Chicago Convention.⁷¹ To this end, as the issue of the EU-ETS mostly consists of assessing its compatibility with the Chicago Convention and the Kyoto Protocol, the Council would not seem qualified to handle any matters dealing with the second instrument.⁷² Therefore, the questions covered by the Memorial of the plaintiffs would dictate the Council’s jurisdiction or non-jurisdiction to hear the case.

Nevertheless, it would be highly unlikely for the Council would not to take into consideration the principles of environment and sustainable development while examining a potential application with respect to the unilateral implementation of the EU-ETS. In fact, environmental protection is one of the five strategic objectives of the Organisation and to refuse such consideration would be against certain ICAO Assembly Resolutions adopted within the past decades.⁷³ Also, as a great number of States elected on the Council are also Parties to the Kyoto Protocol, it will be to a certain extent

⁶⁸ Green Air Online, “COP21 President says growing emissions from aviation and shipping sectors must be tackled this year”, 22 January 2016, online: <<http://greenaironline.com/news.php?viewStory=2188>>.

⁶⁹ Draft agreement and draft decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Ad Hoc Working Group on the Durban Platform for Enhanced Action, Second session, part eleven 19-23 October 2015 Bonn, Germany, version of 23 October 2015 @ 23h30, online: UNFCCC <<http://unfccc.int/files/bodies/application/pdf/ws1and2%402330.pdf>>.

⁷⁰ See Brian F Havel & Gabriel S Sanchez, *The Principles and Practice of International Aviation Law* (New York: Cambridge University Press, 2014) at 228.

⁷¹ Bae, *supra* note 17 at 79.

⁷² *Ibid.*

⁷³ See ICAO Assembly Resolutions, A32-8; A33-7; A35-5; A36-22; A37-19 and A38-18. See also Piera, *supra* note 61 at 44-45, note 17. Moreover, taking urgent actions to combat climate change and its impact is one of the United Nations Sustainable Development Goals. To this end, as a UN agency, ICAO is already involved in a number of activities in order to contribute to tackle the established targets. See ICAO, “ICAO and the United Nations Sustainable Development Goals”, online: ICAO <<http://www.icao.int/about-icao/aviation-development/Pages/SDG.aspx>>.

contradictory for States to adopt a position in one *fora* and to do the opposite in another

VIII. EXAMPLES OF LEGAL PROCEEDINGS WHICH COULD BE INITIATED AGAINST THE EU

In the event that a dispute occurs in the coming years in the field of sustainable development and environmental protection, it is most likely that certain States will challenge EU measures in all appropriate *fora*. For example, prior to the 38th session of the Assembly, several States expressed their objections to the EU Directive on ETS through various statements, actions or even lawsuits.⁷⁴ One of the most important one being the *Joint Declaration of the Moscow Meeting on Inclusion of Civil Aviation in the EU-ETS* adopted in Moscow in February 2012.⁷⁵ This declaration gives an idea of the range of actions which could possibly be taken by States wishing to avoid the EU measures.⁷⁶ This declaration was affirmed prior to the 38th session of the ICAO Assembly. Since the Assembly adopted a resolution on the eventual establishment of global market based measures, the declaration is now obsolete. However a range of measures were threatened to stop the EU from moving forward with its EU-ETS. The first suggested measure was to file an application to the ICAO Council under Article 84 of the Chicago Convention.⁷⁷

IX. THE AMBIGUOUS STATUS OF THE EU AT ICAO

⁷⁴ For a list of the principal reactions to the EU-ETS see Pablo Mendes de Leon, "Enforcement of the EU ETS: The EU's Convulsive Efforts to Export its Environmental Values" (2012) 37 286 at 292 ff; Piera, *supra* note 61 at 135 ff.

⁷⁵ *Joint Declaration of the Moscow Meeting on Inclusion of Civil Aviation in the EU-ETS*, 22 February 2012, online: Green Air Online <http://www.greenaironline.com/photos/Moscow_Declaration.pdf > [Moscow Declaration]. The Moscow Declaration has been supported by Armenia, Argentina, Republic of Belarus, Brazil, Cameroon, Chile, China, Cuba, Guatemala, India, Japan, Republic of Korea, Mexico, Nigeria, Paraguay, Russian Federation, Saudi Arabia, Seychelles, Singapore, South Africa, Thailand, Uganda and the United States.

⁷⁶ *Ibid* at Attachment A.

⁷⁷ 1) Filing an application under Article 84 of the Chicago Convention for resolution of the dispute according to the ICAO Rules for the Settlement of Differences (Doc 7782/2); 2) Using existing or new State legislation, regulations, or other legal mechanism to prohibit airlines/aircraft operators of that State from participating in the EU ETS; 3) Holding meetings with the EU carriers and/or aviation-related enterprises in their respective States and apprise them about the concerns arising out of the EU-ETS and the possibility of reciprocal measures that could be adopted by the State, which may adversely affect those airlines and/or entities. 4) Mandating EU carriers to submit flight details and other data; 5) Assessing whether the EU ETS is consistent with the WTO Agreements and taking appropriate action; 6) Reviewing Bilateral Air Services Agreements, including Open Skies with individual EU Member States, and reconsidering the implementation or negotiation of the 'Horizontal Agreement' with the EU; 7) Suspending current and future discussions and/or negotiations to enhance operating rights for EU airlines/ aircraft operators; 8) Imposing additional levies/charges on EU carriers/ aircraft operators as a form of countermeasure; and 9) Any other actions/ measures.

Currently, the EU has only an *ad hoc* observer status at ICAO. In law, the EU could not accede to the Organization due to the provisions of the Chicago Convention with respect to membership,⁷⁸ which only allow sovereign States to become members.⁷⁹ To complicate matters, a recent judgment of the European Court of Justice (ECJ) affirmed that the EU is not bound by the Chicago Convention since it is not a party.⁸⁰ A potential application under article 84 of the Chicago Convention opposing an EU measure would have to be taken against all EU Member States as was done in 2000 for the “hushkit case”.⁸¹ Therefore, even if the status of the EU remains an exception at ICAO, it seems that EU Member States will have to answer for their actions pursuant to EU decisions.

X. MEANS OF RESOLVING A POTENTIAL DISPUTE WITH RESPECT TO THE EU-ETS BEFORE THE COUNCIL

If dispute arises involving an EU ETS scheme it is most likely that the Council will handle the matter similar to the Hushkit case.⁸² The Council would certainly first seek mediation and conciliation rather than adjudication,⁸³ and would encourage negotiations at different stages of the proceedings.⁸⁴ It is also foreseeable that the President of the Council might at some point during the potential proceeding be designated as a Conciliator among the parties.⁸⁵

If the EU were to proceed again with unilateral enforcement of its ETS, the ensuing dispute would have worldwide implications. Consequently, it is questionable how any State Member of Council would be able to act impartially in such case. To this end, EU States would possibly be tempted to submit a counter claim intended to deprive non EU States not party to the dispute of their

⁷⁸ See Armand de Mestral and Mathieu Vaugeois, “La reconnaissance de l’Union européenne à l’Organisation de l’aviation civile internationale: une perspective canadienne”, Policy Brief Series, Canada-Europe Transatlantic Dialogue, Carleton University, Ottawa, May 2015, online : <<http://labs.carleton.ca/canadaeurope/wp-content/uploads/sites/9/Vaugeois-policy-paper-20152.pdf>>

⁷⁹ Article 92, Chicago Convention.

⁸⁰ CJEU Case 366/10 Air Transport Association of America (ATA) and US airlines v. the UK Secretary of State for Energy and Climate Change, 21 December 2011. See Brian F Havel, and John Q Mulligan, “The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme” (2012) 37:1 Air & Space L 3; Pablo Mendes de Leon, “Enforcement of the EU ETS: The EU’s Convulsive Efforts to Export its Environmental Values” (2012) 37:4-5 Air & Space L 287.

⁸¹ Pietro Manzini & Anna Masutti, “The Application of the EU ETS System to the Aviation Sector: From Legal Disputes to International Retaliations” (2012) 37 Air & Space L 307 at 313, note 13.

⁸² Bae, *supra* note 17 at 78.

⁸³ Dimitri Maniatis, “Conflict In the Skies: The Settlement of International Aviation Disputes” (1995) 20 Ann of Air & Sp L 167 at 192-93.

⁸⁴ Article 14 (1), Rules.

⁸⁵ Maniatis, *supra* note 83 at 191.

voting rights, due to their indirect implication in the dispute.⁸⁶ If such claim succeeded, it would affect the quorum needed to allow the Council to take a decision.⁸⁷ It would also be argued that other States members of Council would be at the same time judge and indirectly party to the dispute. Moreover, certain States could be viewed in the judicial process as already bias due *inter alia* to their signature in 2012 of the Moscow Declaration. One could even argue that all non EU States flying to and from the EU are equally situated, and therefore “Parties” to the dispute. Unfortunately no provisions exist in the Chicago Convention with respect to the appearance of impartiality of States while performing their duties under Article 84.⁸⁸ Therefore, as pointed out by Dr. Jon Bae, a preliminary objection of the EU with respect to the lack of impartiality of the Council might well be not successful.⁸⁹

XI. CONCLUSION

Despite all the obstacles, it appears that the dispute settlement mechanism which is set out at Article 84 of the Chicago Convention could still certainly be invoked in a potential dispute in the field of sustainable development and environmental protection. As demonstrated, it seems that a dispute involving a large number of States would be somewhat different from previous cases, which were regional and bilateral in nature. Nevertheless, this dispute settlement mechanism remains relevant and appropriate for a highly political dispute such as the one of the EU-ETS, where conciliation and mediation will be prioritized. The procedural hurdles are considerable. Equally uncertain is the willingness of members of the ICAO Council to base their decision on principles of sustainable development. The Chicago Convention does not require this result but equally it need not frustrate the recourse to evolving standards of environmental protection.

⁸⁶ Bae, *supra* note 17 at 79.

⁸⁷ Article 52 of the Chicago Convention stipulates that “Decisions by the Council shall require approval by a majority of its members”. See Bae, *supra* note 17 at 79.

⁸⁸ Bae, *supra* note 17 at 78.

⁸⁹ *Ibid.*

All rights reserved 2016 ©.

Any reproduction, publication and reprint, whether printed or produced electronically, in whole or in part, is permitted only with the explicit written authorisation of the Centre or the author. The author is exclusively responsible for the contents of this paper as well as propriety of any material used therein.

About Centre for Research in Air and Space Law

The McGill University Centre for Research in Air and Space Law is the principal research and educational outreach arm of McGill's Institute of Air & Space Law, established in 1951. The Institute provides the core degree-granting educational programme, while the Centre produces research, publishes books and other literature, and offers educational products around the world.

Since its inception in 1976, the Centre has published a number of monographic studies, proceedings of symposia, reports and books, and held numerous workshops, seminars and conferences in Montreal and various other international venues.



Centre for Research in Air and Space Law
Centre de recherche en droit aérien et spatial
McGill University
3690 Peel
H3A 1W9
Quebec, Canada
514 398 5095

For more information, please visit:

Institute of Air and Space Law

<https://www.mcgill.ca/iasl/>

Centre for Research in Air and Space Law

<https://www.mcgill.ca/iasl/centre>