



**KOREA's 70 YEARS  
WITH ICAO**

# Review of the Dispute Settlement Mechanism Under ICAO

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## I. How the Dispute Resolution System is regulated

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Issues	Contents
<p><b>ICAO Council</b></p>	<p>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. . . . Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. . . .</p> <ul style="list-style-type: none"> <li>✓ Under Article 84 of the Chicago Convention, upon the application of a contracting State, <b>ICAO Council has jurisdiction to decide any dispute relating to the interpretation or application of the Chicago Convention and its Annexes</b> (i.e. the multilateral agreements) which cannot be settled by negotiation</li> <li>✓ <b>Chapter XVIII (Articles 84–88) of the Convention also prescribes stringent sanctions against any non-complying airlines or contracting States.</b></li> <li>✓ There must have been an assumption among the drafters that the Chicago Convention was a ‘self-contained corpus of public international air law’ and that a Council composed of aviation experts and professionals would be better able to deal with disputes in an effective and expedient manner.</li> <li>✓ In a parallel development, the side agreements adopted at the Chicago Conference, notably the Transit Agreement and the Transport Agreement, reproduced the languages of Chapter VIII of the Convention. As a result, <b>at least in the wording of the Convention, the ICAO Council stands out from other executive bodies of international organizations in assuming a judicial role as well as wider rule-making duties.</b></li> </ul>

# 1. Compulsory jurisdiction of ICAO Council

Issues	Contents
<b>International Court of Justice</b>	<ul style="list-style-type: none"><li>✓ Under article 84 of the Chicago Convention, <b>parties to the dispute may appeal to the ICJ from the decision of the ICAO Council.</b></li><li>✓ Please note that these judicial procedures <b>are not available for the resolution of disputes over bilateral air service agreements, unless the relevant bilateral air services agreement states so.</b></li><li>✓ Although there have been draft proposals for the establishment of an international court for aeronautical disputes so as to bring more uniformity to the interpretation of bilateral agreements, such a court has not yet come into being. Arbitration is still the only adjudicatory procedure available for the resolution of such disputes between States.</li></ul>
<b>Arbitral Tribunal</b>	<ul style="list-style-type: none"><li>✓ Under Article 84 of the Chicago Convention, parties to the dispute may appeal to an arbitral tribunal from the decision of the ICAO Council.</li><li>✓ This is an alternative to the appeal to the ICJ.</li></ul>

## 2. Implied Powers of ICAO Council under the Chicago Convention

Issues	Contents
<b>Article 54 (Mandatory functions of Council)</b>	<p>The Council shall: . . . (j) Report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council; . . .(n) Consider any matter relating to the Convention which any contracting State refers to it.</p> <p>✓ In addition to the said formal judicial mandates, the Chicago Convention obliges the <b>Council to report any infractions of the Chicago Convention</b> to the General Assembly and to consider any matter relating to the Convention referred to it by any contracting State.</p>
<b>Article 55 (Permissive functions of Council)</b>	<p>The Council may . . .(e) Investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable.</p> <p>✓ At the request of any contracting State, the <b>Council may investigate any situation which may pose an obstacle to the development of international air navigation.</b></p>

### 3. Other Optional Dispute Resolution Systems

Issues	Contents
<b>Arbitration based on bilateral or multilateral agreements</b>	✓ Provision for arbitration is made in both multilateral agreements and in most bilateral agreements.
<b>Optional Jurisdiction of the ICAO Council</b>	✓ The ICAO Council has optional jurisdiction to act as an arbitral body on any differences arising among Member States relating to civil aviation matters <b>when expressly requested to do so by all the parties concerned.</b> ✓ <b>A number of bilateral aviation treaties also designate the ICAO Council as their adjudicative or advisory body to deal with such potential disputes as those concerning routes, rates, capacity and frequency.</b>
<b>Arbitration by a Chamber of the ICJ</b>	✓ Under Article 26 of its Statute the ICJ has jurisdiction to institute a Chamber of at least three judges to act as an arbitral tribunal to decide matters which could include aviation disputes, although this jurisdiction has not yet been used for this purpose.
<b>Advisory proceedings</b>	✓ Under Article 96(2) of the UN Charter, ICAO, as a specialized agency of the United Nations may request advisory opinions of the ICJ on legal questions arising within the scope of its activities.



## II. High Expectations and Following Skepticism of ICAO's Dispute Resolution Mechanism

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# 1. High Expectations and Following Skepticism

Issues	Contents
<b>High Expectations</b>	✓ At its inception, the ICAO's dispute settlement mechanism was hailed as the first major incorporation of arbitration into the field of international conventions and a landmark in the history of international arbitration.
<b>Negative Reviews</b>	✓ While defenders of the Council's role in conflict resolution still exist, the majority opinion seems to be that the ICAO Council has been ineffective in carrying out its quasi-judicial functions.
<b>A new approach is needed</b>	✓ Mindful of such apparently contrasting evaluations, there needs to be a more balanced critique of the ICAO Council's performance. On the one hand, when focused on the 'narrower' aspect of its arbitral mandate under Chapter XVIII of the Chicago Convention, the Council has largely failed to live up to the early expectations. ✓ <b>On the other hand, when looking at the 'broader' objective of resolving inter-State conflicts, the Council has performed quite satisfactorily.</b>

## 2. Critique of ICAO's Dispute Resolution Mechanisms

Issues	Contents
<b>Lack of Judicial Independence</b>	<ul style="list-style-type: none"><li>✓ As a political body comprised of representatives of governments, the members of the Council “do <b>not possess that measure of independence and autonomy</b> of an unbiased, neutral decision-maker that one normally expects of a judge.”</li><li>✓ For example, the WTO’s dispute settlement rules specifically forbid member States to instruct or influence panelists on pending matters.</li><li>✓ In the context of the Chicago Convention, this could have been translated into imposing a duty on Council members to deliberate in their personal capacity and thus not to be susceptible to external pressure, even from their home governments. Professor Bin Cheng maintains in a similar vein that Council representatives should sit as neutral and unbiased judges when fulfilling their mission under Chapter VIII.</li><li>✓ However, there is no explicit provision to that effect in the Convention. Article 50 merely stipulates that no Council member may be actively associated with, or financially interested in, any air service operation.</li><li>✓ More fundamentally, the ICAO Council is composed of contracting States, as opposed to individuals in their personal capacity, elected by the General Assembly.</li><li>✓ Bound by the instructions of their home governments, those representatives essentially speak on behalf of their States and thus cannot claim to have full independence.</li></ul>

## 2. Critique of ICAO's Dispute Resolution Mechanisms

Issues	Contents
<b>Lack of Judicial Independence</b>	<ul style="list-style-type: none"><li>✓ In practice, however, the <b>Council has not undergone any serious criticism of its impartiality caused by the absence of judicial independence.</b> This is partly due to the fact that most of the disputes before the Council have been of such a localized or bilateral nature that the Council could be seen as neutral to an acceptable degree.</li><li>✓ Furthermore, the governments on the Council and their representatives may not behave in complete disregard of legal and political constraints. Any decisions must be buttressed by sound arguments, not only in the Council chamber but also eventually in terms of public justification. The procedures enshrined in the rules and subsequent deliberations ensure some degree of legitimacy.</li><li>✓ <b>It is also the Council as a whole, as opposed to its individual representatives, that takes a decision. As such, the Council has tried its utmost to look impartial even in potentially polarizing conflicts in the past. Ultimately, any manifestly wrong decision on the part of the Council would clearly invite an appeal to the ICJ or an ad hoc arbitral tribunal, which would likely overrule the Council's decision, thus de-legitimizing it.</b></li></ul>

## 2. Critique of ICAO's Dispute Resolution Mechanisms

Issues	Contents
<b>Lack of Judicial Competency</b>	<ul style="list-style-type: none"><li>✓ Equally absent in the ICAO Council is judicial competency, specifically the ability on the part of Council representatives, individually and collectively, to deliver a judgment through legally sound reasoning and deliberation.</li><li>✓ International tribunals such as the ICJ, the International Tribunal for the Law of the Sea, and the International Center for Settlement of Investment Disputes (ICSID) require judges or arbitrators to be well-qualified with recognized competence in the relevant field of law.</li><li>✓ In contrast, the <b>Chicago Convention does not prescribe any qualifications, not to mention judicial competency, for Council representatives.</b> A credential signed on behalf of a contracting State constitutes the sole requirement for an individual to be a representative. In other words, the selection and tenure of the representatives is entirely subject to the whim of their own governments. Given its primary responsibility of setting the policy objectives of the ICAO, <b>the Council is mainly composed of aviation bureaucrats and diplomats, rather than jurists capable of delivering coherent judicial decisions.</b></li><li>✓ As a corollary, they are not so much influenced by legal discourse as by politics. Moreover, with its current size of 36 members as well as the absence of any working procedures, the Council cannot be expected to carry out its judicial function and render decisions which the contracting States would perceive to be entirely rule-based and judicially meaningful, let alone build a consistent body of jurisprudence on the interpretation and application of international aviation law.</li></ul>

## 2. Critique of ICAO's Dispute Resolution Mechanisms

Issues	Contents
<b>Lack of Judicial Competency</b>	<ul style="list-style-type: none"><li>✓ In terms of orientation, the ICAO Council may be best characterized as an <b>'administrative' and 'political' organ of sovereign States working in a parliamentary setting</b>.</li><li>✓ As the Council's day-to-day deliberations are conducted in an assembly setting, ambiguous and general language is often preferred.</li><li>✓ Admittedly, the <b>ICAO proved its usefulness by addressing with exemplary diplomatic dexterity</b> several contentious issues such as the 2001 Gaza international airport destruction, the 1983 shooting down of a Korean airline, and the 1973 Libyan airline intervention.</li><li>✓ Its records nonetheless indicate that the Council has been generally reluctant to be judgmental, namely, to positively determine that there has been a violation of the Convention and to expressly identify the contracting State in breach.</li><li>✓ Furthermore, although the Council is obliged under Article 54(j) to report to contracting States any infraction of the Convention and, failing any appropriate action, report it to the ICAO General Assembly, the Assembly has not received such report so far.</li></ul>

## 2. Critique of ICAO's Dispute Resolution Mechanisms

Issues	Contents
<b>Cost and Delay</b>	✓ With thirty-three members comprising the ICAO Council, its adjudicatory proceedings are always likely to be long and expensive
<b>Council Reluctance to Adjudicate</b>	✓ Under the 1957 Rules the Council prefers negotiation, “mediation, conciliation and the prudent use of good offices” in the settlement of disputes, rather than adjudication and sanctions.
<b>Restricted Use of Powers</b>	✓ Some commentators have argued in favor of wider use of ICAO's dispute resolution mechanisms to achieve a more rational system of international aviation. “By precedent-setting decision-making, the ICAO Council could achieve more significant progress towards an orderly flow of international air commerce than is possible in isolated bilateral contexts through unilateral national protective measures.”



- The usage rate of the Council as a dispute resolution forum has been fairly low, especially under its judicial mandates: None under any bilateral aviation agreements, and more than a dozen under Article 54 or implied authorities, and No merits of the disputes under Article 84 of the Convention,



## III. Expectations and Suggestions

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# 1. What to Expect?

Issues	Contents
<b>Assisting to Settle</b>	<ul style="list-style-type: none"> <li>✓ The early anticipation that the Council would serve as a proper arbitral body has gradually faded away. The <b>ICAO Council considers itself tasked with assisting to settle</b>, rather than adjudicating, disputes.</li> <li>✓ Member States no longer expect the Council to render legally valid decisions.</li> </ul>
<b>Encourage the parties to Negotiate</b>	<ul style="list-style-type: none"> <li>✓ The Council is less likely to undertake an adjudicative role; it will instead <b>encourage the parties to engage in further negotiation</b>. The President will be appointed as a Conciliator with fixed but extendable time limits.</li> <li>✓ Finally, the sanctions under Articles 86 and 87, drastic as they may look, will rarely be imposed.</li> </ul>
<b>Viable Avenue for a Contracting State in Dispute</b>	<ul style="list-style-type: none"> <li>✓ The dispute settlement regime of the Chicago Convention <b>nevertheless offers a viable avenue for a contracting State in dispute</b>. With the submission of an application under Article 84, the State <b>can bring an international dimension to an otherwise bilateral dispute; moving from the bilateral negotiating table to the Council chamber</b>. Its strength and usefulness also come from the virtual universality of the Chicago Convention.</li> <li>✓ Chapter XVIII can therefore be seen as deterrence for potential violators or leverage for a party injured by a breach. The contracting State with a stronger legal argument could put more pressure on the other State with the assistance of Article 84. The set time-limit and the conciliation of the Council President will certainly have a catalyzing impact on an otherwise reluctant party. The Council's involvement would constitute another external factor, which could be used to persuade the domestic audience. Non-compliance with such a decision could entail the penalties prescribed under Articles 87 and 88.</li> </ul>

# 1. What to Expect?

Issues	Contents
<b>All Parties Accepted</b>	<ul style="list-style-type: none"><li>✓ It is interesting to note in this regard that <b>any of the parties could have declined the offer and sought a legally binding decision. However, it appears that all the parties thought it worth attempting diplomacy once more under the auspices of the Council and with a set time limit.</b></li><li>✓ An alternative view is that, from the Council's past handling of disputes and its inherent reluctance to articulate legal positions, they might have predicted that a decision of the Council would be an unlikely outcome.</li></ul>

Issues	Contents
<p><b>Concentrate on what it has done best so far</b></p>	<ul style="list-style-type: none"> <li>✓ The Council can concentrate on what it has done best so far: conflict resolution by means of ‘good offices’, mediation, and conciliation. Different kinds of disputes may well require different and more effective settlement options.</li> <li>✓ The ICAO has encountered many sorts of disputes and adopted corresponding methods such as fact-finding, conciliation or even outright condemnation. <b>The Council should retain and even expand such procedural flexibility as it deems most effective for any pending case.</b> For instance, a fact-finding mission may be appropriate in case of an air incident, whereas conciliation would be more appropriate for politically charged disputes.</li> <li>✓ This ADR-type strategy will be particularly effective when the real purpose of the parties to the dispute is to settle rather than to seek legal guidance.</li> </ul>
<p><b>Resort to Article 6(2) of the Rules for the Settlement of Differences</b></p>	<ul style="list-style-type: none"> <li>✓ When a dispute is of a legal nature and thus requires judicial resolution by the application of international law, the <b>ICAO Council could resort to Article 6(2) of the Rules for the Settlement of Differences. Instead of undertaking adjudication of the dispute on its own as a whole, the Council may appoint a committee composed of five Council representatives of ‘member States not concerned in the disagreement’ who also have legal competence.</b></li> <li>✓ The selection of qualified and impartial representatives of the Council will enhance its legitimacy and competency.</li> </ul>

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