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 ICAO  Ministry of Land,  
Infrastructure and Transport

# **Review of the ICAO *Rules for the Settlement of Differences***

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**ICAO Legal Seminar**  
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# Overview of presentation

1. Dispute settlement functions of the Council
2. Cases
3. The Rules for the Settlement of Differences
4. Establishment and Mandate of the WG-RRSD
5. Methodology followed by the WG-RRSD
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# 1. Dispute Settlement Functions of the Council

- Set out in Chapter XVIII of the Chicago Convention
- 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 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 decision of the Council is appealable to an ad-hoc arbitral tribunal or to the International Court of Justice
- Similar functions conferred upon the Council under the Transit Agreement and Transport Agreement – Art. 66



# 2. Cases

## India and Pakistan (1952)

- Related to the establishment by Pakistan of a prohibited zone along its western border
- Articles 5 (right of non-scheduled flight) and 9 (prohibited areas) of the Chicago Convention and the Transit Agreement

## United Kingdom and Spain (1967)

- Related to the establishment of a prohibited area by Spain near Gibraltar airport
- Article 9 (prohibited areas) of the Chicago Convention

## Pakistan and India (1971) – Case (1) and Case (2)

- Related to overflight rights by Pakistani aircraft over Indian territory. Article 5 (right of non-scheduled flight) of the Chicago Convention as well as the Transit Agreement
- The Decision of the Council on the preliminary objection was appealed to the ICJ

## Cuba and United States (1996)

- Related to the right of Cuban-registered aircraft to overfly United States territory during their flights to and from Canada. Article 5 (right of non-scheduled flight) of the Chicago Convention as well as the Transit Agreement

## United States and 15 European Union States (2000)

- Related to EU Regulation 925/99 on the EU's non-addition, or "hushkit" rule. The United States alleged that the EU Regulation violated Articles 11 (applicability of air regulations), 15 (airport and similar charges), 38 (departures from international standards and procedures) and 82 (abrogation of inconsistent arrangements) of the Chicago Convention as well as Annex 16, in that it limited the registration and operation within the EU of aircraft that were modified in order to comply with ICAO noise standards



# 2. Cases

## Brazil and United States (2016)

- Relates to the “the interpretation and application of the Convention and its Annexes following the collision, on September 29th 2006, of the air carrier Boeing 737-8EH operating a regular flight GLO 1907, and air jet Legacy EMB-135BJ operating a flight by ExcelAire Services Inc.”

## Qatar and Egypt, Bahrain, Saudi Arabia and the UAE (2017) Application (A) Qatar and Egypt, Bahrain and the UAE (2017) Application (B)

- Relate to the interpretation and application of the Chicago Convention and its Annexes (Application (A)) and the Transit Agreement (Application (B)) following an alleged closure of the Respondents’ airspace to Qatar-registered aircraft. The Decisions of the Council on preliminary objections were appealed to the ICJ.

## Australia and the Netherlands and the Russian Federation (2022)

- Relates to the interpretation and application of the Chicago Convention following “the downing of Flight MH17” which the Applicants claim was caused “by a Buk-TELAR surface-to-air missile over the east of Ukraine on 17 July 2014”, and which is attributable to the Respondent.

## Russian Federation and 37 Member States (2023)

- Relates to the interpretation and application of Articles 4, 9 b), 11, 15, 22, 28, 37, 38, 44 (paragraphs a, d, f, g, h), 82 and 87 of the Chicago Convention, as well as the Annexes to the Chicago Convention following the alleged imposition by the Respondents of unilateral restrictive measures of a discriminatory nature against the Applicant since 24 February 2022.

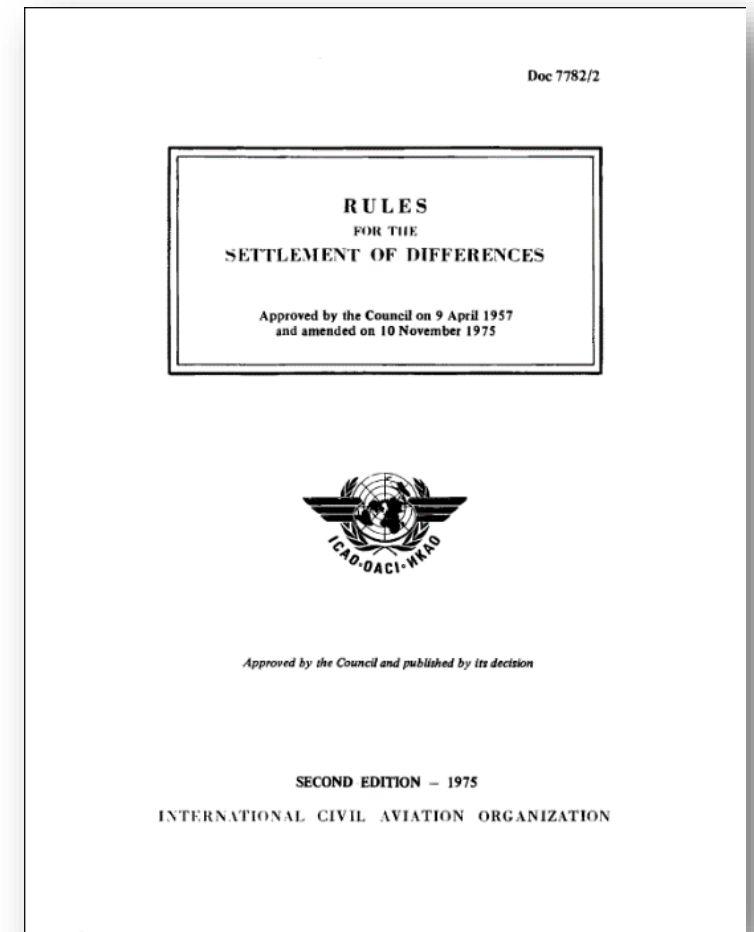
## Canada, Sweden, Ukraine and the United Kingdom and Iran (2024)

- Relates to the interpretation and application of Article 3 *bis* of the Chicago Convention following the destruction of flight PS752 on 8 January 2020, which the Applicants claim, was caused by two surface-to-air missiles fired by the Respondent.

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# 3. The Rules for the Settlement of Differences

- Adopted in 1957; amended once in 1975 to include Russian as an ICAO working language
- Apply to disputes submitted to the Council by Member States under Chapter XVIII of the Chicago Convention, the Transit Agreement and the Transport Agreement
- Define the procedure to be followed by the Council in the settlement of differences
- Council process involves submission of written documents by the parties and oral hearings
- The Rules encourage and facilitate the conduct of negotiations during the proceedings
- Ongoing review of the Rules under the auspices of the Legal Committee - any revised Rules would not apply to disputes currently pending before the Council unless the parties so agree



# 4. Establishment and Mandate of the WG-RRSD

- On 23 June 2017 (C-DEC 211/10), the Council requested the Secretariat to review the Rules, taking into account comparable documentation that is in use for similar purposes elsewhere in the UN system and in IGOs and, in particular, the ICJ Rules of Court.
- LC/37 (September 2018) decided to include the item “Review of the ICAO Rules for the Settlement of Differences” in its Work Programme and to establish a Working Group to carry out the review (Members to be nominated by the LC Chairperson in consultation with the President of the Council).
- The *Working Group for the Review of the ICAO Rules for the Settlement of Differences* (WG-RRSD) was established in May 2019.





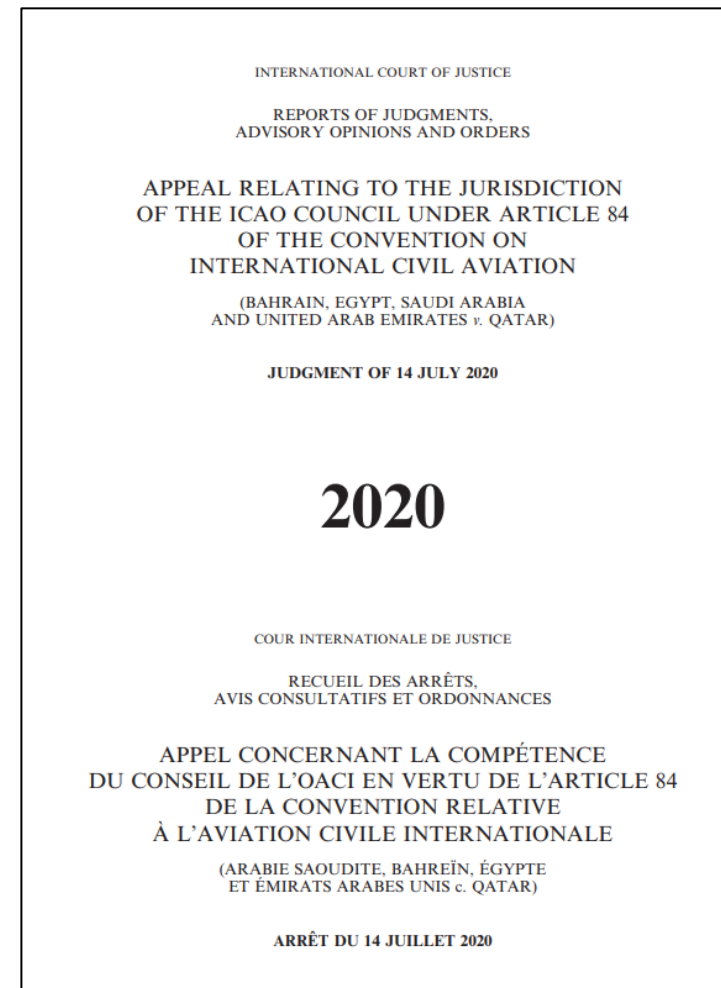


## 4. Establishment and Mandate of the WG-RRSD

- **Membership:** Experts from 23 Member States (Argentina, Australia, Brazil, Cameroon, Canada, China, Finland, France, The Gambia, Greece, Indonesia, Japan, Kenya, Kuwait, The Netherlands, Nigeria, Qatar, Russian Federation, Saudi Arabia, Singapore, United Arab Emirates, United Kingdom and United States) and one IO (AFCAC) participated in one or more of the meetings of the WG-RRSD
- **Chairperson:** Mr. Terry Olson (France); **Vice-Chairperson:** Ambassador Abdul Kadir Jailani (Indonesia), replaced by Mr. John Thachet (Canada) at the Fifth Meeting; **Rapporteur:** Mr. David Low (Singapore)
- The WG-RRSD met eight times (in-person and virtually) between May 2019 and September 2023
- At its 8th Meeting, the WG-RRSD adopted a Report containing proposed draft revisions to the Rules to be presented at LC/39 (June 2024)

## 5. Methodology followed by the WG-RRSD

- WG-RRSD had for consideration benchmarking studies and research conducted by the Secretariat to identify relevant practices of other international dispute settlement bodies, e.g. ICJ, ICSID, ITLOS, PCA, UNCITRAL and the WTO
- WG-RRSD took note of the ICJ Judgments of 14 July 2020 in the *Appeals relating to the Jurisdiction of the ICAO Council under Article 84 of the Chicago Convention and Article II, Section 2 of the Transit Agreement*
- Consideration of drafting proposals by the Rapporteur and Secretariat.



# 6. Proposed Revisions – Key Provisions

## Scope of the Rules – Article 1

- Currently the Rules only apply to disagreements pertaining to the Chicago Convention, the Transit Agreement and the Transport Agreement
- The WG-RRSD considered whether the scope of the Rules should be expanded so that the Rules would also apply to disagreements between Contracting States relating to international air law instruments that have already or may in the future entrust the Council with dispute settlement functions
- Drafting proposal states that the Rules may also apply to any disagreement between two or more Contracting States relating to the interpretation or application of any treaty concerning international civil aviation other than the Chicago Convention, the Transit Agreement, or the Transport Agreement which, pursuant to that treaty, has been referred to the Council (subject to the Council giving its express consent to undertake such functions)
- Placed in square brackets due to divergence of opinion within the WG-RRSD.

## 6. Proposed Revisions – Key Provisions

### **Electronic address of Agent for the Applicant and the Respondent – (New) Article 2(1)(b) (formerly Article 2(b)) and Article 4 (1) (a)**

- Maintains the requirement for the Agents to have an address at the seat of the Organization
- Drafting proposals expressly require the Agents for each of the respective parties to also provide an email address

### **Gender Neutrality – Articles 2 (1) (b), 4 (1) (a), 6 (2), 13 (1) and 27 (2)**

- To reflect the principle of gender neutrality throughout the text of the Rules in all the linguistic versions (e.g. Chairman → Chairperson)

# 6. Proposed Revisions – Key Provisions

## **Submission of pleadings, supporting documents and correspondence in paper and electronic formats – (New) Articles 2 (2), 3 (3), 4 (3) and 7 (5)**

- In addition to the paper-based submissions already provided for in the existing Rules, the drafting proposal would permit the parties to a dispute to submit their written pleadings, supporting documents and correspondence to the Organization in electronic format

## **Precondition of Negotiation – Article 2 (1) (g)**

- Drafting proposal attempts to better align the wording of Article 2 (1) (g) of the Rules with Article 84 of the Chicago Convention without placing any limits on the possibility for the parties to continue negotiations to resolve their dispute while the dispute is pending before the Council. Also aims to provide clarity in situations where negotiations between the parties have not yielded satisfactory results or where one or more of the parties is not open to negotiations



# 6. Proposed Revisions – Key Provisions

## **Grounds for Preliminary Objection – Article 5 (1)**

- In line with the ICJ Judgments of 14 July 2020, the drafting proposal explicitly includes admissibility as a ground for a PO (i.e. in addition to jurisdiction)

## **Pleadings and further proceedings with regard to Preliminary Objection – Article 5 (3)**

- Drafting proposal to clarify i) that the applicant may file a written statement in response to the respondent's PO and ii) that no further written pleadings would be permitted in connection with the PO unless the Council decides otherwise

## **Negotiations during the Preliminary Objection stage – Articles 5 (4) and 14 (1)**

- Drafting proposal to clarify that the Council's obligation to decide the question presented in a PO before any further steps are taken under the Rules neither precludes the parties from engaging in direct negotiations to resolve their dispute nor the Council from inviting them to do so pursuant to Article 14 of the Rules

# 6. Proposed Revisions – Key Provisions

## Notification of Appeals – Article 18 (2)

- Drafting proposal clarifies that it is the actual submission of an appeal which must be notified to the Council within 60 days

## Languages – Article 29

- Introduction of non-numeric language that addresses all of the working languages of the Organization at any point in time
- Drafting proposal to clarify that the Organization will only be required to translate the pleadings submitted by the parties in one ICAO working language into the remaining ICAO working languages, but not the supporting documents appended to the said pleadings, unless otherwise decided by the Secretary General

# 6. Proposed Revisions – Key Provisions

## Confidentiality – Article 30 read together with Rule 37 and Appendix F of the *Rules of Procedure for the Council*

- Apparent inconsistency between Article 30 of the Rules and Rule 37 and Appendix F of the *Rules of Procedure for the Council*
- Drafting proposal aims to reconcile the need for transparency of the proceedings with the need to preserve confidentiality while the proceedings are ongoing.
- The drafting proposal endows the Council with discretion to open different parts of the record to the public at different stages of the proceedings, bearing in the mind the importance of preserving the possibility for negotiated settlements, which is an important feature of the Article 84 process.

# 6. Proposed Revisions – Key Provisions

## Provisional Measures – (New) Article 34

- Introduction of a provision clarifying the Council's power to indicate PM acting on its own initiative or pursuant to an application by one of the parties before the resolution of the case on its merits
- Objective: to limit the potential damage to, and preserve, the rights and interests of the parties, and/or the safety or security of international civil aviation
- The parties in a case should be given the opportunity to be heard in the Council's consideration of PM

# 6. Proposed Revisions – Key Provisions

## Practice Directions – (New) Article 35

- Clarify the Council's power to issue PDs
- PDs could clarify how the Rules are to be applied on a practical level and provide guidance to the parties as well as the Council itself on procedural matters
- PDs would be of general and default application to all cases, with the Council retaining the power and the flexibility to depart from any of the practice directions on a case-by-case basis
- Council would always have the power to adopt or amend its own practice directions, if it so wished, without the need to convene any formal group for that purpose



# 6. Proposed Revisions – Key Provisions

## Potential subjects to be covered by Practice Directions

1. Designation of agent, counsel or advocate in a case before the Council (e.g. with respect to previous professional activities).
2. Guidance to States that do not have resident delegations at ICAO (e.g. how to ensure that their agents have an address at the seat of the Organization).
3. The format of the documents (including electronic formats).
4. The page limits of the documents.
5. Guidance to States on how to make the pleadings and other relevant documents concise.
6. The time-limits for the filing of pleadings and supporting documents.
7. Use of citations and source references in documents.
8. Reference to publicly available information, materials or sources in documents (e.g. Treaties available in the UN Treaty Database).
9. Translation of supporting documents.
10. The order and time-limits for the presentation of oral arguments before the Council.
11. Presentation of audio-visual or photographic material at the hearing.
12. Guidelines on the conduct of virtual proceedings.

# 6. Proposed Revisions – Key Provisions

## Virtual Proceedings – (New) Article 36

- Drafting proposal to clarify that the Council may use virtual means in the performance of its Article 84 dispute settlement functions when exceptional circumstances so require
- VP to be held exceptionally for public health, security or other compelling reasons, and that in deciding whether to hold virtual proceedings, the Council should have due regard to the availability to the parties of technological means for any such virtual proceedings.
- Council to consult the Parties before making a decision on VP

## 6. Proposed Revisions – Key Provisions

**The WG-RRSD considered that no revisions were necessary for the following provisions of the Rules:**

- Enquiry or Expert Opinion – Article 8 (1)
- Evidence – Article 9
- Reasons for the Council’s Decision – Article 15 (2) (v)
- Intervention – Article 19
- Agents – Article 27
- Time-limits – Article 28

# 7. Other Substantive Issues considered by the WG-RRSD

## Interpretation of the term “majority” – Article 52 of the Chicago Convention

- Under Article 52 of the Chicago Convention, decisions by the Council shall require approval by a majority of its Members.
- There was a divergence of opinion during the Working Group’s extensive deliberations on this issue. Some Delegations preferred an “absolute majority” interpretation while others supported a “qualified majority” interpretation.
- The WG-RRSD concluded that this was not a matter on which it could definitively pronounce itself, as any conclusions in this regard could have broader implications for the application of Article 52 of the Chicago Convention in other areas which could affect the efficiency and legitimacy of the Council

## 8. Next Steps

- LC/39 (June 2024) to consider the Final Report of the WG-RRSD, including the Appendix containing draft revisions to the Rules
- Council will subsequently consider the recommendations of LC/39 with respect to the review of the Rules
- Any revised Rules would not apply to disputes currently pending before the Council unless the parties so agree



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# Thank You

